THE ORDERED LIBERTY OF ASSEMBLY: THE COVENANTS AND PRACTICES OF SELF-GOVERNMENT IN THE PLURAL CONSTITUTIONAL COMMUNITY

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INTRODUCTION 1397
I. TEXT: "THE RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE" 1400
A. Defining the Right to Assemble 1400
B. Limits of Assembly 1405
C. Expressive Association 1417
II. THE PLURAL CONSTITUTIONAL COMMUNITY: DEFINING "*OUR* SCHEME OF ORDERED LIBERTY" 1420
III. THE CONSTITUTIONAL COMMUNITY IN ITS PLURALITY: COVENANTS IN TOWNS, COLONIES, AND CIVIL SOCIETY 1425
A. Popular Sovereignty and Plurality in the Covenants of the American Colonies 1426
B. Towns and Civil Society 1435
C. Towns During the Revolution 1437
IV. FROM TOWN COVENANTS TO CIVIL SOCIETY COMPACTS 1440

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V. RESTORING FUNCTIONAL SELF-GOVERNMENT TO THE PEACEABLE ASSEMBLIES OF CIVIL SOCIETY 1452
CONCLUSION 1455

INTRODUCTION

The right of the people peaceably to assemble is a "forgotten" freedom in the First Amendment.[1] The Supreme Court hasn't treated the right in any substantial way in a majority opinion in over four decades.[2] Some scholars over the last decade and a half have uncovered the historical and political importance of the right, linking it to core aspects of American political principles and practices.[3] With the rise of traditionalism on the Supreme Court, it is high time to exhume the right of assembly and explore what the practice of peaceable assembling has meant in American historical practice and what it might mean in terms of American constitutional rights.[4] Traditionalism holds that when a right has not been adequately adjudicated, it is essential to explore the text, history, and tradition of the right to determine the proper scope of its protection. The courts' undertheorizing of the right of assembly increases the need for an historical analysis that appreciates the broad role that peaceable assemblies have played in the American system of self-government and demonstrates how they are "fundamental to *our* scheme of ordered liberty."[5]

This Article examines the text and history of the right peaceably to assemble in the terms of the Court's traditionalism. The first Part examines the *text* of the Assembly Clause, looking at the etymology of the terms in the Clause, constitutional debates, and likely meaning.[6] This analysis indicates that the text of the Assembly Clause can plausibly be read as a right independent of the Petition Clause and intended to protect a broad swath of what today we would call "civil society"

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1 JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012) [hereinafter INAZU, LIBERTY'S REFUGE]; John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 570 (2010) [hereinafter Inazu, *The Forgotten Freedom*]; *see also*, Nicholas S. Brod, Note, *Rethinking a Reinvigorated Right to Assemble*, 63 DUKE L.J. 155, 158 (2013); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 547 n.10 (2009); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 980 (2011).

2 *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907–09 (1982); INAZU, LIBERTY'S REFUGE, *supra* note 1, at 62.

3 *See* Abu El-Haj, *supra* note 1, at 547; Inazu, *The Forgotten Freedom*, *supra* note 1; John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010); Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639 (2002); Ashutosh Bhagwat, *Associations and Forums: Situating* CLS v. Martinez, 38 HASTINGS CONST. L.Q. 543, 549–53 (2011); Luke C. Sheahan, *The First Amendment Dyad and* Christian Legal Society v. Martinez*: Getting Past "State" and "Individual" to Help the Court "See" Associations*, 27 KAN. J.L. & PUB. POL'Y 223 (2018); Nikolas Bowie, *The Constitutional Right of Self-Government* 130 YALE L.J. 1652, 1656 (2021).

4 *See* Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1167 (2020).

5 McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).

6 Reference to the Court's textual analysis in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022) aids the analysis.

institutions, self-formed communities around a variety of purposes. Included here is a discussion of the ratification of the Assembly Clause in light of the English regulation of assembly in the seventeenth century. Where some aspects of the American political and legal tradition are a continuity from England, such as the right to keep and bear arms, others are an explicit innovation, such as protection against general warrants and, I argue, the right peaceably to assemble. Based upon the text alone, the Assembly Clause could be reasonably interpreted to protect a broad swath of civil society groups. This Part concludes with a discussion of the expressive association jurisprudence demonstrating how it fails at a basic textual level to protect the right of assembly.

The rest of the paper takes its cue from Marc Degirolami's description of the traditionalist interpretive method's

> two key elements: (1) concrete practices, rather than principles, ideas, judicial precedents, and so on, as the determinants of constitutional meaning and law; and (2) the endurance of those practices as a composite of their age, longevity, and density, evidence for which includes the practice's use before, during, and after enactment of a constitutional provision.[7]

A number of scholars have argued for an expanded reading of the right of assembly to cover marches, crowds, and protests, local governments, petitioning assemblies, and expressive associations.[8] The intent of this Article is to demonstrate that peaceable assembly is essential to our system of self-government and that the peaceable assemblies protected under the Assembly Clause do for American *civil* society what the compacts of towns and colonies did for American *political* society. This discussion demonstrates that the free action of these civil society associations is essential to the American understanding of self-government, in the Supreme Court's words, "*our* scheme of ordered liberty."[9] My intent is not to limit the reading of the Assembly Clause, which likely does refer to protests, local governments, petitioning assemblies, and expressive associations, but to insist that it also includes civil society associations. These too are essential to self-government in the context of the American constitutional tradition.[10]

The second Part turns to this broader question of how the right peaceably to assemble is situated in the American tradition of ordered

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7 Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9, 14 (2023).

8 *See* Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Speech*, 80 MO. L. REV. 961, 986 (2015); Bowie, *supra* note 3, at 1738; Mazzone, *supra* note 3, at 717; Bhagwat, *supra* note 1, at 1019.

9 *McDonald*, 561 U.S. at 767.

10 GLENN ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 4 (1961).

liberty.[11] Drawing from the work of the American sociologist Robert Nisbet, this Part briefly describes the American constitutional order as the *plural constitutional community*, *our* system of ordered liberty in the broadest sense. This constitutional system is a combination of two essential qualities, popular sovereignty and plurality. Political theorist Vincent Ostrom called this the compound republic, a republic of republics.[12] Popular sovereignty originated and is defined by the covenants and compacts of the American colonial period. American political compacts were further defined by their plurality. There were multiple layers of these compacts at the town, colony, and pancolonial level, providing an interlocking and multifaceted political order. This sort of constitutional community recognizes at the outset the existence of multiple layers of government and social authorities interacting in complex ways.

The third Part outlines the history of the American plural constitutional community, beginning with the town covenants and early colonial documents in the first half of the seventeenth century, demonstrating the prevalence of both popular sovereignty in the compacts and their inherent plurality. It focuses on the practice of self-government in the colonial period as a self-constituting act, especially in the towns, which were largely self-conceived communities governed by a single document. We might describe them as residential voluntary associations, which claimed the right of assembly.[13] Similarly, several colonies were conceived as self-governing communities of towns, some originating in the towns and forming colonies through federal compacts among the local communities. While towns and colonies operated under compacts, very quickly multiple compacts became operative at the same time over the same towns and colonies, with tension, but without contradiction. This Part demonstrates how the American system of ordered liberty has consisted of the practice of self-government that takes place through compacts operating at several levels and each intertwined with and limited by the others. This practice of plural self-government constitutes the core of the American system of ordered liberty.

The fourth Part argues that the history and tradition of peaceably assembling is a continuation of the practice of self-creation of churches and towns in covenants and compacts, but outside the formal channels of political government. Peaceable assemblies in the American context exist early in the eighteenth century but come into their own out of the tumult of the American Revolution as the towns become incapable

11 *McDonald*, 561 U.S. at 767.

12 VINCENT OSTROM, THE POLITICAL THEORY OF A COMPOUND REPUBLIC: DESIGNING THE AMERICAN EXPERIMENT 171 (2d. ed. 1987).

13 *See* Bowie, *supra* note 3, at 1663.

of providing adequate communal cohesion under the strains of the war, population growth, and economic development and individuals turn to peaceable assemblies to meet their communal needs and accomplish communal functions. Civil society groups in the eighteenth century are outgrowths of the town covenants, reflecting the towns' constitutional structure as yet another layer of pluralism in the plural constitutional community. These groups operated as modes of popular sovereignty in line with the compact tradition of the towns and colonies, states and union, and very much conduct themselves in a manner consistent with this constitutional tradition. This practice followed the same pattern of self-government as the towns, a single document outlining the duties and responsibilities of citizens and members. These civil society compacts were differentiated from the towns and states, making more limited claims upon their members than did the political compacts, but nonetheless creating "a people" around the function of the group in the same manner as their political counterparts. Civil society groups, as peaceable assemblies, further pluralized the American polity, but did so in a manner consistent with our constitutional tradition of plural self-government. This practice of self-government through peaceable assembly continued with a plethora of voluntary associations beginning in the middle of the eighteenth century but accelerating in the 1790s into the 1800s and beyond.

The Article concludes by emphasizing the importance of this analysis in giving meaning to constitutional text the courts have ignored and calls for a judicial principle of functional self-government for civil society groups. It provides an account of the right peaceably to assemble as the right to practice self-government in a vast array of social and political affairs, and thus an essential aspect of the American tradition of ordered liberty in our plural constitutional community.

I. TEXT: "THE RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE"

A. Defining the Right to Assemble

The text of the First Amendment's protection for the right of assembly is as follows, "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . . ."[14] When incorporating the right of assembly, the Court wrote, "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."[15] It saw in the right of assembly an essential role

14 U.S. CONST. amend. I.

15 De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (overturning a conviction under the Criminal Syndicalism Law of Oregon for meeting under auspices of an organization that advocated the violent overthrowing of the United States).

of self-government, explaining that "the right [of assembly] is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions."[16] A right of such importance deserves more attention than it has hitherto received. The Court's failure to unpack the meaning of assembly in any meaningful sense requires some initial inquiry into the text of the right. We will consult the Court's methodology in *New York State Rifle & Pistol Ass'n v. Bruen* as well as dictionaries from the time of the founding to get a sense for the meaning of the text. But constitutional texts capture constitutional meanings that go beyond dictionary definitions.[17] While the present inquiry sheds light on the text of the right peaceably to assemble, it does not exhaust its constitutional meaning.

In *Bruen*, the Court offers guidance on how to interpret a textual right. First, the text is decisive in asserting a right, "as informed by history."[18] The Court writes of the question raised in *Bruen* that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[19] In order for the government to regulate that conduct it "must demonstrate that the regulation is consistent with this Nation's historical tradition" of the regulation of that right.[20] The *Bruen* Court carefully examined the meaning of each word in the Second Amendment, finding that the Clause protects both the right to "keep" and the right to "bear" arms as separate actions. To keep arms is to own and to store weapons at home.[21] To bear arms is to carry in public.[22] The Court's decision hung on the Second Amendment protecting both keeping *and* bearing arms because both are protected in the text.

Sometimes a provision in the Bill of Rights "codifie[s] a pre-existing right."[23] The Court writes in *Bruen* that "the Second Amendment 'codified a right "inherited from our English ancestors,"'" the right to keep and to bear arms.[24] Other textual rights assert a liberty that had not been adequately codified in the English common law or constitutional practice. For example, the Fourth Amendment's protection

16 *Id.*

17 *See* Bowie, *supra* note 3, at 1723 ("[T]he historical authors of a text rarely intend one clear meaning.").

18 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127 (2022). However, the *Bruen* Court wrote, "to the extent later history contradicts what the text says, the text controls." *Id.* at 2137.

19 *Id.* at 2126.

20 *Id.*

21 *See id.* at 2134; *see also* District of Columbia v. Heller, 554 U.S. 570, 582 (2008).

22 *Bruen*, 142 S. Ct. at 2134.

23 *Heller*, 554 U.S. at 592 (emphasis omitted).

24 *Bruen*, 142 S. Ct. at 2138–39 (quoting *Heller*, 554 U.S. at 599).

against unreasonable searches and seizures is a reaction to the English practice of issuing general warrants. It follows precedent set in a number of state constitutions which did the same.[25] The right of assembly has less of an English pedigree than the right to keep and bear arms, but no less as stringent protection because it drew a sharp line rejecting the English historical practice of suppressing free assemblies. In the case of the Assembly Clause, we find strengthened protection for a common practice in the American colonial experience that accords with—and grew out of—American conceptions of self-government and ordered liberty. Like the Fourth Amendment, the Assembly Clause is a reaction to a history of inadequate protection in at least some English historical eras.

The Assembly Clause asserts the "right of the people peaceably to assemble."[26] The "'normal and ordinary' meaning"[27] of the First Amendment's language protecting the right "peaceably to assemble" would suggest that people may peaceably assemble for any cause whatsoever, as long as the manner of assembling is peaceable. Using directions the Court gives on textual interpretation in *Bruen*, we can determine the textual extent of this right. On its face, the Assembly Clause "presumptively protects" assemblies for a peaceable purpose in a peaceable manner.[28] We will examine each word of the text in turn.

The term "right" appears six times in the Bill of Rights.[29] The first use is in connection with the Assembly Clause. Each time it connotes a

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25 *See* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 151–54 (1999); Luke C. Sheahan, *"The People" of the Tenth Amendment: A Constitutional Theory of Town and Civil Society*, 13 AM. POL. THOUGHT 309, 330 (2024). Virginia's Declaration of Rights was the first state constitution to do so. *Id.* The wording of Pennsylvania's Constitution was closest to that adopted by Congress in the Fourth Amendment. "That the people have a right to hold themselves, their houses, papers, possession free from search and seizure . . . ." LEVY, supra, at 169, 168–71 (quoting PA. CONST. OF 1776, art. X).

26 U.S. CONST. amend. I.

27 *Bruen*, 142 S. Ct. at 2127 (quoting *Heller*, 554 U.S. at 576).

28 *Id.* at 2130. A similar textual analysis is undertaken in Brod, *supra* note 1, at 163–69.

29 In addition to the First Amendment, it appears in the Second Amendment's "right of the people to keep and bear arms" and the Fourth Amendment's "right of the people to be secure in their persons, houses, papers, and effects," both of which constrain the government's ability to prohibit certain behavior (keeping and bearing firearms) or enter someone's home without meeting high legal standards. U.S. CONST. amends. II, IV. The Sixth Amendment's "right [of a person] to a speedy and public trial" and the Seventh Amendment's "right of trial by jury" both constrain how the government may prosecute individuals. *Id.* amends. VI, VII. Finally, the Ninth Amendment's guarantee that "certain rights, [enumerated in the Constitution] shall not be construed to deny or disparage others retained by the people" constrains the government in general exercise of authority against citizens' rights. *Id.* amend. IX; *see* Kurt T. Lash, *Three Myths of the Ninth Amendment*, 56 DRAKE L. REV. 875, 876, 877 (2008); Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005).

constraint upon political power.[30] The use of the term "right" in the Clause would indicate a constraint upon the government's ability to interfere with peaceable assemblies. The term "right" precedes the genitive "of the people." The term "the people" also appears in the Second, Fourth, Ninth, and Tenth Amendments.[31] As I've argued elsewhere, the people of the Tenth Amendment may indicate a collection of institutions separate from federal and state legislatures.[32] The term appears earlier in the Bill of Rights in the context of nonpolitical institutions, free assemblies in the First Amendment, local communities in the Second, and households in the Fourth. Whatever else it might mean, the term connotes Americans acting through nonstate institutions in political and social ways.[33]

The 1773 edition of Samuel Johnson's Dictionary defines "assemble" as, "[t]o bring together into one place. It is used both of persons and things."[34] It defines "assembly" as "[a] company met together."[35] Noah Webster's 1828 dictionary lists seven definitions of "assembly," four relevant to our purposes.

> A company or collection of individuals, in the same place; usually for the same purpose.
>
> A congregation or religious society convened.
>
> . . . .
>
> A collection of persons for amusement; as a dancing *assembly*.
>
> A convocation, convention or council of ministers and ruling elders delegated from each presbytery; as the General *Assembly* of Scotland or of the United States.[36]

Each of these definitions indicates a self-selected company, self-constituted toward a particular end as presumptively determined or acquiesced to by the group itself. Applying these definitions to the

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30 Samuel Johnson's dictionary defines "right" when made in reference to citizens as "[i]mmunity" or "privilege." *Right*, A DICTIONARY OF THE ENGLISH LANGUAGE (Samuel Johson, ed., London, W. Strahan et al. 1773). This would accord with how the right is used in the Second and Fourth Amendments. In the sixth and seventh, it means constraint on how the government may conduct trials, they must be speedy and public, and they must be by jury.

31 U.S. CONST. amends. II, IV, IX, X.

32 *See generally* Sheahan, *supra* note 25.

33 *See generally id.*

34 *Assemble*, A DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 30.

35 *Assembly*, A DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 30.

36 *Assembly*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Noah Webster ed., New York, S. Converse 1828). The others relate to a legislature, also called an assembly, or to the "beating of the drum before a march." *Id.* Neither are relevant to peaceable assemblies in our context. In the founding period it also referred to state constitutional conventions. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 28 (1998).

Assembly Clause, the right of "the people" means the privilege of individuals to meet together in a peaceable manner for their own purposes. Their purpose may be something as exalted as religious practice or as banal as recreational dancing, as the definitions indicate. The purpose need not be intended to affect the political realm, although it could be so constituted. From basic definitions of the operative terms, the text protects assembly around a vast array of purposes, social as well as political.

These dictionary definitions are only the beginning of our analysis. We would find entirely inadequate a constitutional right to free speech if it only included freedom in "[t]he power of articulate utterance; the power of expressing thoughts by vocal words."[37] Such a definition would exclude symbolic speech or expressive association, both essential to an adequate understanding of free speech.[38] Nonetheless, if the Supreme Court had hitherto done little with the Speech Clause, we might begin with these definitions of the text and then work through additional protections necessary to the concept of free speech in a constitutional democracy.

This discussion of the text of the Assembly Clause indicates at least that assembly is not merely an aggregate of persons gathered, but a *community* convened around some purpose. Protections for spontaneous gatherings certainly ought to be protected by the Assembly Clause, but the term connotes even more.[39] Such a community may be an organization that exists through time. In some Protestant theology, assembling is linked to the gathering of believers, as the church.[40] The German theologian Dietrich Bonhoeffer related assembling to *ekklesia*, the Greek term for community and the root of the word that has been applied to the church as the specifically Christian community.[41] The essential requirement of gathering, assembling in Christian practice is

37 *Speech*, A DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 30.

38 *See* Texas v. Johnson, 491 U.S. 397, 416–17 (1989) (explaining that burning the American flag may symbolize many different views); Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (noting that expressive association protects a group's choice of leaders).

39 *See* Abu El-Haj, *supra* note 1 at 547.

40 *See* John D. Inazu, *The Freedom of the Church (New Revised Standard Version)*, 21 J. CONTEMP. LEGAL ISSUES 335, 354–55 (2013).

41 Inazu notes this important etymological implication of assembly in Protestant theology. *See id.* Dietrich Bonhoeffer translated *ekklesia* into *versammlung*, an assembly. *Id.* at 354 & n.98 (citing DIETRICH BONHOEFFER, SANCTORUM COMMUNIO: A THEOLOGICAL STUDY OF THE SOCIOLOGY OF THE CHURCH (Joachim von Soosten ed., 1930), *in* 1 DIETRICH BONHOEFFER WORKS 1, 208 (Clifford J. Green ed., Reinhard Krauss & Nancy Lukens trans., 2009)). The significance is that it denoted a community of persons rather than a building that houses them. *Id.* at 355 n.100 (citing H.C. Erik Midelfort, *Social History and Biblical Exegesis: Community, Family, and Witchcraft in Sixteenth-Century Germany*, *in* THE BIBLE IN THE SIXTEENTH CENTURY 7, 9–10 (David C. Steinmetz ed., 1990)).

relevant to the understanding of the broad nature of the right of assembly. The right of assembly is the freedom to gather individuals together "for the same purpose,"[42] to direct them toward a shared goal. To exercise the right peaceably to assemble is for individuals to join together in a community around a shared objective.

Peaceably is generally thought to be a limit on assembling, which we will cover shortly. But it also may be a guarantee. Nicholas Brod argues that the peaceable requirement may be an obligation on the government to guarantee peace to those assembling. He writes, "Looked at this way, the Assembly Clause promises those gathered that they may do so without interference from external pressures, that they have a right to assemble in peace, a condition that the government . . . bears the burden of safeguarding."[43]

This definition of assembly as community accords with the practice of self-government that we will see in the colonial period, the creation of a people as a community. Applied in an assembly, it means creation of a people in a very limited sense, a sense limited by the purpose of the assembly. According to this discussion, there is a strong textual presumption that the authority wielded by the collection or congregation is legitimate by the very act that the assembly in question has assembled and agreement between them is taking place. Assemblies in our system are self-forming communities around their own purposes and self-authorizing by virtue of their own act of self-forming.

B. Limits of Assembly

We've established the breadth of the textual ramifications of the right, but all rights have limits.[44] In *Heller*, the Court compares the Second Amendment right to keep and bear arms to the First Amendment right to free speech.[45] "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions"[46] including "showing whether the . . . conduct falls outside of the category of protected speech."[47] The right to free speech is limited by a number of exceptions. In *United States v. Stevens*, the Court ruled that the government must show that the regulated or proscribed speech belongs to a "'historic and traditional category[y]' of constitutionally unprotected speech."[48] The *Bruen* Court reasoned that the

42 *See Assembly*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 36.

43 Brod, *supra* note 1, at 168 (emphasis omitted).

44 *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2123 (2022).

45 *See* District of Columbia v. Heller, 554 U.S. 570, 595, 606, 618, 634–35 (2008).

46 United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 816 (2000).

47 *Bruen*, 142 S. Ct. at 2130.

48 *Id.* at 2130 (alteration in original) (quoting United States v. Stevens, 559 U.S. 460, 468 (2010)).

same burden the government bears regarding the textual right to free speech applies to the textual right of the Second Amendment. [49]

Following the reasoning of *Bruen*, to limit the textual right of assembly, the government regulation of the right of peaceable assemblies must demonstrate that the "regulation is part of the historical tradition that delimits the outer bounds of the right" peaceably to assemble.[50] The burden falls on the government to demonstrate that exception. There are textual reasons to think that the limitations on assembly are severely limited. In the text, the only explicit limitation is that the assembly be "peaceable." The other potential textual limitation is the connection of assembly to the right to petition for a redress of grievances. We will consider each potential textual limitation in turn.

Tabatha Abu El-Haj writes,

> The central interpretive question [of the Assembly Clause], therefore, has always been where to draw the line between a constitutionally protected assembly and a criminally punishable mob. While riots and unlawful assemblies have always been understood to fall outside of constitutional protection, what constitutes a riot or unlawful assembly is much less clear.[51]

The Court's Second Amendment rulings illuminate the meaning of the word "peaceable"[52] and the line between riots and unlawful assemblies on the one hand and peaceable assemblies on the other. Despite no "peaceable" or other exception in the text of the right to "keep and bear arms," the Court identified three exceptions to that right, each of which implicate public order and peaceableness: type restrictions, place restrictions, and purpose restrictions.[53] The state may prohibit the "carrying of 'dangerous and unusual weapons.'"[54] The concern here is that carrying a type of weapon that is particularly dangerous would have the inevitable effect of intimidating fellow citizens at minimum and potentially pose a catastrophic danger to the public.[55] In addition to *particular types* of arms that might be limited, there is also limitations on *where* one could bear arms and for *what purposes*. Bearing firearms could be prohibited in "sensitive places"[56] or

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49 *Id.*

50 *Id.* at 2127.

51 Abu El-Haj, *supra* note 8, at 967.

52 "[L]ike most terms in our Constitution, peaceably is not self-defining." *Id.* (emphasis omitted).

53 *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

54 *Id.* at 627 (first citing 4 WILLIAM BLACKSTONE, COMMENTARIES *148-49; and then citing 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 79 (Bird Wilson, ed., Philadelphia, Bronson & Chauncey 1804)).

55 *See id.* at 626–27.

56 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022).

"for a 'wicked purpose.'"[57] Such sensitive places include "schools and government buildings,"[58] and prohibited purposes include violence.[59] While these constraints are not in the text of the Second Amendment, they do exist in the extant literature at the time which indicates that they were not included in the right to bear arms outside one's home. However, the Court writes, "[T]hose who sought to carry firearms publicly and peaceably in antebellum America were generally free to do so."[60] Essentially, the right to keep and bear arms means the right to do so in a peaceable manner in appropriate places, where one has a right to be, and in an appropriate manner that neither intimidates nor endangers one's fellow citizens.

A similar analysis on the right to assembly yields two categories of exceptions: manner and place. The "peaceable" constraint in the text mirrors the exceptions the Court recognized in the right to bear arms, that of carrying unusually dangerous weapons or of bearing them for a wicked purpose: Assembly may not take place for a violent purpose or in a violent manner. Johnson's dictionary defines "peaceably" as "[w]ithout war; without tumult."[61] Similarly, Websters Dictionary defines "peaceably" as "[w]ithout disturbance; quietly; without agitation; without interruption."[62] The right to peaceably assemble precludes the right to riot or to assemble tumultuously, admittedly sometimes difficult to police when tumult and peaceableness both take place at the same assembly.[63]

The common law doctrine of unlawful assembly arose to account for unpeaceable assemblies, but contains an ambiguity dangerous to the full practice of the right, perhaps permitting restrictions beyond the textual requirement of peaceableness.[64] Unlawful assembly is a separate charge from routs and riots, although treated together by William Blackstone.[65] Blackstone defined unlawful assembly as "when three, or more, do assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren or the game therein;

57 *Id.* at 2145 (quoting State v. Huntley, 25 (3 Ired.) 418, 423 (N.C. 1843)).

58 *Id.* at 2133 (quoting *Heller*, 554 U.S. at 626).

59 *See id.* at 2146.

60 *Id.*

61 *Peaceably*, A DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 30; *see also* Brod, *supra* note 1, at 167.

62 *Peaceably*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 36.

63 *See* Abu El-Haj, *supra* note 8, at 965.

64 *See* Tabatha Abu El-Haj, *A Right of Peaceable Assembly*, 125 COLUM. L. REV. 1049, 1110–17 (2025) (distinguishing between unlawful, nonviolent, and nondisruptive and arguing that peaceable requires more than merely unlawful).

65 4 BLACKSTONE, *supra* note 54, at *146.

and part without doing it, or making any motion towards it."[66] This is different from, although close to, a rout and a riot. Blackstone defines a rout as "where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common, or of way; and make some advances towards it."[67] A riot is defined by Blackstone as an assembly

> where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel: as if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner.[68]

Early American laws addressing unlawful assembly similarly were aimed at maintaining order in the face of insurrections or "combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals."[69] Generally speaking in the nineteenth century, "American law narrowly defined the crimes of riot, rout, and unlawful assembly by requiring an immediate and serious risk of violence."[70]

John Inazu examines a number of legislative acts addressing unlawful assemblies.[71] The Louisiana Territory adopted a law that defined unlawful assembly as when

> three or more persons shall assemble together with an intent to do an unlawful act, with force and violence, against the person or property of another, or to do any other unlawful act, against the peace and to the terror of the people; or being unlawfully assembled, shall agree with each other to do any unlawful act as aforesaid, and shall make any movement or preparation therefor.[72]

The law "conflated unlawful assembly with riot."[73] Despite this ambiguity, Inazu argues that certain elements suggest that this articulation of unlawful assembly is and ought to be quite limited. He writes,

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66 *Id.*, *quoted in* John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 10 (2017).

67 *Id.*

68 *Id.* (footnote omitted). English prosecutions for unlawful assembly were rare when charges of riot were not also brought. *See* Inazu, *supra* note 66, at 10–11.

69 Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. 264, 264 (repealed 1795), *quoted in* Inazu, *supra* note 66, at 11–12.

70 Abu El-Haj, *supra* note 8, at 971; *see also* ABERNATHY, *supra* note 10, at 19.

71 Inazu, *supra* note 66, at 11–14.

72 1 LAWS OF A PUBLIC AND GENERAL NATURE, OF THE DISTRICT OF LOUISIANA 215 (Jefferson City, W. Lusk & Son 1842), *quoted in* Inazu, *supra* note 66, at 12.

73 Inazu, *supra* note 66, at 12 n.43.

> First, the final clause introduces an act requirement of "movement or preparation" when members of an assembly that had initially lawfully gathered entered into an unlawful agreement during their gathering. The requirement of movement toward lawbreaking guards against an entirely peaceful assembly being deemed unlawful based on a mere agreement to violate the law at some later point in time. Think, for example, of an assembled crowd that agrees to return at some future time to engage in lawbreaking but does nothing disruptive in their actual gathering.
>
> The second reason to think that the Louisiana Territory laws contemplated a relatively narrow form of liability is that they required a threat of force or violence directed either "against the person or property of another" or "against the peace and to the terror of the people." The latter reinforced the seriousness of the threat—not simply "against the peace" but also "to the terror of the people."[74]

Other provisions required a proclamation of dispersal before local authorities could make arrests.[75]

Maine outlawed "violent or tumultuous" activities.[76] Even if the purpose was lawful, if the manner was violent the assembly was still unlawful.[77] Common law constraint upon manner is narrowly construed to acting tumultuously or riotously in such a way that it endangers lives and property reflected in nineteenth and early twentieth century legal treatises which tended to recognize unlawful assembly as a breach of the peace.[78]

Inazu identifies three elements in the doctrine of unlawful assembly.[79] First, the assembly had to create "a fear of harm that disturbs the peace."[80] Second, there had to be a "likelihood of severe harm."[81] Third, the persons assembled had to have "contemplated use of force or violence."[82] Inazu notes that modern statutes and interpretations of these principles tend to downplay or even omit them, but each element ought to be treated in a strict manner given that these are limitations upon a textual right.[83]

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74 *Id.* at 12–13 (footnotes omitted) (quoting 1 LAWS OF A PUBLIC AND GENERAL NATURE, *supra* note 72, at 215).

75 *See id.* at 13.

76 ME. STAT. tit. XII, ch. 159, § 2 (1840), *quoted in* Inazu, *supra* note 66, at 13–14.

77 Inazu, *supra* note 66, at 14.

78 See a summary in *id.*, at 14–18.

79 *See id.* at 29.

80 *Id.*

81 *Id.*

82 *Id.*

83 *See id.* at 18–29. Abu El-Haj likens twentieth- and twenty-first-century doctrines regarding assembly to the level of protection for speech in the early twentieth century,

Perception of harm by the general public must be more than mere inconvenience, but fear of violence. "[T]he character of the meeting must be such as to cause alarm to firm men, not merely such as may produce fear in timid persons."[84] Harm must be likely, not merely possible or suggested, as determined by a reasonable person. If an assembly merely assembles, but does not engage in violence, it ought to be protected.[85] Furthermore, not mere harm, but force or violence must be likely to justify disrupting the practice of assembly.[86] Inazu writes, "Like speech, assembly can peacefully express 'unpopular views,' 'invite dispute,' and 'stir[] people to anger' without lapsing into violence."[87]

We already have a helpful doctrine, "imminent lawless action," derived from the free speech jurisprudence that should contribute to a definition of peaceableness.[88] If an assembly is intending to commit violence and the threat is immanent, then the state may intervene. However, the imminence requirement has been interpreted to mean merely imminent non-violent, albeit *lawless*, action, rather than imminent *violent* action.[89] The text of the First Amendment would indicate

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> when the Court routinely upheld the suppression of speech so long as the government could show the speech had a so-called bad tendency to produce lawlessness or violence. This is true despite the fact that states vary in their definitions of unlawful assembly and riot—with some retaining the nineteenth-century approach—and despite the Supreme Court's efforts in the mid-twentieth century to narrowly circumscribe the use of criminal law in the context of activities protected by the First Amendment. These high points are undermined both by the widespread acceptance of municipal permit requirements and the criminal consequences of that acceptance for protestors and by the wide discretion that police officers exercise on the ground.

Abu El-Haj, *supra* note 8, at 972 (footnote omitted).

84 *Riots, Routs, and Unlawful Assemblies*, 3 AM. L. MAG. 350, 355 (1844), *quoted in* Inazu, *supra* note 66, at 31–32.

85 Inazu expresses concern that the inherent inchoate nature of this offense may be used to suppress assembly. *See* Inazu, *supra* note 66, at 33–34. Where in other circumstances, such as attempted murder and the like, the attempted threat of imminent violence is forbidden and punishable by law, punishment of assembling for an illegal purpose, even when the purpose is unlikely and never materializes, is a threat to peaceable assembly. *Id.*

86 *See id.* at 34–37.

87 *Id.* at 40 (alteration in original) (quoting Cox v. Louisiana, 379 U.S. 536, 551–52 (1965)).

88 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

89 Inazu argues that the Court's *Brandenburg* opinion fails to fully recognize the distinction between imminent violence and mere lawless action. Inazu, *supra* note 66, at 36–37; *see also* Maria L. Marcus, *Policing Speech on the Airwaves: Granting Rights, Preventing Wrongs,* 15 YALE L. & POL'Y REV. 447, 463 (1997).

that to constrain assembly, the threat of unpeaceable behavior must be present or immanent. El-Haj notes, "There is little question that setting objects on fire renders an assembly unlawful, but it is less clear that blocking a highway should count as unpeaceable for First Amendment purposes."[90] In other words, an unlawful exception to the Assembly Clause may be a broader exception than peaceable and therefore inappropriate when a textual right is practiced. Assembling to advocate for and even commit non-violent action must receive some protection, even if the non-violent but illegal behavior may be punished. Inazu argues that this is a logical way to understand assembly given the very text of the Clause.[91] The guiding principle should be that when an "assembly is peaceable and the persons gathered together have done nothing and said nothing"[92] it is protected by the right peaceably to assemble.[93]

One final consideration to undergird the broad nature of protection for peaceable assembly is the use of "tumult" in Johnson's definition of peaceable.[94] We've discussed riots and violence already, but The Tumultuous Petitioning Act of 1661,[95] an act of Parliament that restricted those petitioning the king to an assembly of no more than ten persons, is also instructive. The practice of petitioning allowed those with petitions to the crown to approach the throne and lay them at the king's feet. The act intended to protect the king's person when receiving petitions. Restriction on the number of persons petitioning was to ensure the safety of the king's person should the assembly become unruly.[96] The petitioning assembly had to deliver the petition in a peaceable manner and the constraint on assembly in the act of petitioning implicated the bodily safety of the sovereign.

We see in this historical example an appropriate application of manner and place restrictions on assembly as well as the narrowness of that application. The petitioning assembly had to avoid being

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90 Abu El-Haj, *supra* note 8, at 967 (emphasis omitted).

91 *See* Inazu, *supra* note 66, at 40–41. Few courts have recognized this. *Id.*

92 Owens v. Commonwealth, 179 S.E.2d 477, 479 (Va. 1971), *quoted in* Inazu, *supra* note 66, at 41.

93 *See* Inazu, *supra* note 66, at 30–31, 41 (rejecting a mens rea understanding of unlawful assembly when nothing unlawful has actually happened).

94 *See Peaceably*, A DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 30; *see also Peacably*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 36.

95 Tumultuous Petitioning Act 1661, 13 Car. 2 c. 5, § 1 (Eng.).

96 Parliament made it clear that the act "shall not be construed to extend to debar or hinder any person or persons not exceeding the number of Ten aforesaid to present any publique or private Grievance or Complaint to any Member or Members of Parliament . . . or to the Kings Majesty for any remedy to bee thereupon had." *Id.* § 2, *quoted in* RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 171 (2012).

tumultuous, but even if not tumultuous, the number of people assembling could still be limited in certain circumstances, implicating *place*. Assemblies larger than ten could gather, but not in the presence of the king, even if they were not tumultuous. The implication is that by meeting in certain places you are committing violence or a threat of violence by the very act of assembling in that place and some prudent restrictions may apply. Or, in the case of the king, perhaps the potential for violence is too great to permit normal rights of assembly. Note that this restriction only applied in the *presence of the king*. Contemporary examples could include a protest *inside* the Pentagon, or the White House, or the Capitol building, which may by the very act of assembling constitute trespass and be unlawful to an extent that it disrupted core functions of government and perhaps even threatened national security.

This consideration calls into question current place restrictions on assembling, which allow too much discretion in permitting peaceable assemblies to form. El-Haj writes,

> Under an independent Assembly Clause jurisprudence, regulations of gatherings that limit opportunities to build such social capital and social solidarity, bond individuals to their communities, or create bridges between communities would, therefore, be viewed with skepticism. Pro forma acceptance of the constitutional reasonableness of rules requiring substantial advanced notice, like those that limit when and how assemblies can take place, would end. Such rules target the spontaneity, creativity, autonomy, and playfulness that build relationships and undergird social solidarity, and they undermine opportunities to demand civic inclusion or disrupt orthodoxies.[97]

If the property is private, property rights issues and private trespass likewise arise. The assembly may be lawful in itself, but the location of the assembling persons implicates other legal and constitutional questions.[98] Although even here, private property open to the public would suggest a different analysis.[99]

At the congressional debates on the First Amendment, Elbridge Gerry references Shay's Rebellion as an abuse of the right of assembly, "yet that abuse ought not to operate as an argument against the use of it."[100] Shay's Rebellion had gathered with the intent of imminent

97 Abu El-Haj, *supra* note 64, at 1119.

98 *See* Hudgens v. NLRB, 424 U.S. 507, 517–21 (1976); Abu El-Haj, *supra* note 64, at 1082.

99 Abu El-Haj, *supra* note 8, at 985.

100 THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 232 (Neil H. Cogan ed., 2d ed. 2015). The Supreme Court reflects this concern in *De Jonge v. Oregon*.

violence.[101] The right of assembly ought not to be constrained except in its abuses, limited to violence and its imminent threat.[102]

A second potential textual limitation is the textual proximity and possible grammatical connection of the Assembly Clause to the Petition Clause[103] or to political activity more broadly.[104] The arguments tethering the Assembly Clause to the Petition Clause are unpersuasive for reasons of text, history, and the underlying theory of "*our* scheme of ordered liberty."[105] In the debates in Congress over the text of the First Amendment, the rights of assembly and petition are treated as separate.[106] Confusion generally comes from punctuation in the final draft, "the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[107] Some read the comma between the Clauses as conjoining rather than separating the rights.[108] Earlier in the First Amendment, commas separate the Establishment Clause from the Free Exercise Clause and the Speech Clause from the Press Clause, while semicolons separate the Religion Clauses from Speech and Press and from Assembly and Petition, implying three general clusters of rights of religion, expression, and assembly to petition.

However, earlier drafts make clear that these Clauses were not seen as conjoined. At the state ratifying conventions in 1788, Virginia and North Carolina had suggested an Assembly Clause with "*the* common good" appended to it and New York and Rhode Island suggested changing the wording to "*their* common good."[109] Mason's draft for Congress included the latter formulation of the common good clause: "the People have a Right peaceably to assemble together to consult for

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> These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.

De Jonge v. Oregon, 299 U.S. 353, 364–65 (1937).

101 *See* Bowie, *supra* note 3, at 1711.

102 *See supra* note 100.

103 *See, e.g.*, Mazzone, *supra* note 3, at 712–17. The Supreme Court ruled this way in *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

104 *See, e.g.*, AMAR, *supra* note 36, at 28–29; ASHUTOSH BHAGWAT, OUR DEMOCRATIC FIRST AMENDMENT 48 (2020).

105 McDonald v. City of Chicago, 561 U.S. 742, 767 (2010). The distinction in the text is explained in Sheahan, *supra* note 25, at 324–28; *see also* INAZU, LIBERTY'S REFUGE, *supra* note 1, at 21–25.

106 *See* INAZU, LIBERTY'S REFUGE, *supra* note 1, at 23.

107 U.S. CONST. amend. I.

108 *See* INAZU, LIBERTY'S REFUGE, *supra* note 1, at 23.

109 THE COMPLETE BILL OF RIGHTS, *supra* note 100, at 228 (emphasis added).

their common Good, or to instruct their representatives,"[110] only for the phrase to be dropped altogether from the text.[111] The comma in the final draft originally conjoined reasons the people might assemble: They might do so for the common good or they might do so to instruct their representatives. Both clauses are excised from the final wording at least in part because they may be too constricting on the right.[112]

Perhaps most revealingly is the exchange between two representatives in congressional debates over the wording of the First Amendment in the First Congress.[113] Representative Theodore Sedgwick of Massachusetts argued for striking the Assembly Clause from the Amendment, not because he thought it wrong, but because he thought it redundant.[114] He alleged that the right to assemble is an "unalienable right" and "it is certainly a thing that never would be called in question."[115] Assembly was necessary to the exercise of every other right in the First Amendment and therefore the right to assemble could not be abrogated without abrogating the rights already listed.[116] He even goes so far as to claim that "it is derogatory to the dignity of the House to descend to such minutiae."[117]

Virginia's Representative John Page responded with an historical example that likely won the debate for him. He said that the right of assembly is, "no more essential than whether a man has a right to wear his hat or not."[118] It appears at first that he agrees the Clause is redundant, of course everyone can decide whether to wear a hat and of

110 BHAGWAT, *supra* note 104, at 45 (emphasis added) (quoting GEORGE MASON'S MASTER DRAFT OF THE BILL OF RIGHTS (1787), https://constitution.org/1-History/Founders/gmason/amd_gmas.htm [https://perma.cc/M6G5-BNKJ]).

111 INAZU, LIBERTY'S REFUGE, *supra* note 1, at 22. The phrase "*the* common good" appears in connection to assembly in the North Carolina Constitution of 1776, the Massachusetts Constitution of 1780, and the New Hampshire Constitution of 1783. THE COMPLETE BILL OF RIGHTS, *supra* note 100, at 229 (emphasis added). The phrase "*their* common good" appears in the Pennsylvania Constitutions of 1776 and 1790 and the Vermont Constitution of 1777. *Id.* at 229–30 (emphasis added).

112 Elbridge Gerry expressed such a concern in the congressional debates. *See* THE COMPLETE BILL OF RIGHTS, *supra* note 100, at 233; *see also* INAZU, LIBERTY'S REFUGE, *supra* note 1, at 22. I discuss these same grammatical issues in Sheahan, *supra* note 25, at 325–27.

113 IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 55–57 (1965).

114 *See id.* at 54.

115 THE COMPLETE BILL OF RIGHTS, *supra* note 100, at 232, 231–32 (statement of Rep. Theodore Sedgwick).

116 *See* BRANT, *supra* note 113, at 54.

117 THE COMPLETE BILL OF RIGHTS, *supra* note 100, at 232 (statement of Rep. Theodore Sedgwick); *see* AMAR, *supra* note 36, at 27. It's possible he also wanted to weaken protections for assembly as his "excessive zeal against the Shaysites caused the farmers of [his] county to assemble with the intention of destroying [his] house." BRANT, *supra* note 113, at 55.

118 THE COMPLETE BILL OF RIGHTS, *supra* note 100, at 232 (statement of Rep. John Page). I discuss this precise exchange at length in Sheahan, *supra* note 25, at 327.

course everyone will decide whether or not to assemble. Then Page continues,

> [B]ut let me observe to [Mr. Sedgwick] that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, . . . if the people could be deprived of the power of assembling *under any pretext whatsoever*, they might be deprived of every other privilege contained in the clause.[119]

We don't know whether this statement by Representative Page was responsible for Congress voting to retain the Assembly Clause. We do know that preserving the Clause is exactly what Congress did after this exchange.

We can make a few reasonable inferences from this incident. First, Representative Page argues for the text of the Assembly Clause as protecting assembling against restriction "under any pretext whatsoever," indicating protection for assembling for any reason given by those assembling, with the exception of violence precluded by the condition that assemblies be "peaceable." This would accord with the dictionary definitions we saw above.[120] Second, the right extends beyond mere political assemblies. The reference Representative Page makes to "a man . . . obliged to pull off his hat when he appeared before the face of authority" is a reference to William Penn, arrested in 1670 for violating the 1664 Conventicle Act, which forbade religious assemblies of non-Anglicans to more than a few persons.[121] These assemblies were not political, at least not directly. They were religious. Quaker assemblies gathered not in protest nor to instruct representatives nor to petition for a redress of grievance, but to worship.[122] Their act was essentially social, inward-facing, and ingroup oriented. Their intention was to assemble for the unified purpose of Quaker worship, to exercise authority over those who were part of the group, and no one else. In essence, a Quaker assembly existed for religious self-government according to the practices of the Quaker faith.

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119 THE COMPLETE BILL OF RIGHTS, *supra* note 100, at 232 (emphasis added) (statement of Rep. John Page).

120 *See Assembly*, A DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 30; *Assembly*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 36.

121 Irving Brant writes that "[t]he mere reference to [Penn] was equivalent to half an hour of oratory." BRANT, *supra* note 113, at 55. I discuss this incident, especially Representative Page's comment, in similar detail in Sheahan, *supra* note 25, at 327; *see also* INAZU, LIBERTY'S REFUGE, *supra* note 1, at 24; Luke C. Sheahan, *Protecting Freedom of Association*, 52 NAT'L AFFS., Summer 2022, at 41, 45.

122 A point made in INAZU, LIBERTY'S REFUGE, *supra* note 1, at 25.

The above analysis indicates that the right of assembly was simply not thought textually tethered to the Petition Clause. To put the argument in terms the Court uses in *Heller*, the "operative clause" is the right to assemble, just as the operative clause in the Second Amendment is the right to keep and bear arms.[123] Just as the right to keep and bear arms may not be limited by the Militia Clause, so the Assembly Clause may not be limited by the Petition Clause, which has its own history and demonstrated importance in our system of ordered liberty.[124] This discussion "points unmistakably to the answer"[125] that the right of assembly "is a basic right" [126] recognized in the American system. The assembly of Quakers was orderly, although it was claimed at trial to be a "great disturbance of [the king's] [p]eace[;] to the great terror and disturbance of many of his [l]iege people and [s]ubjects."[127] The jury famously acquitted Penn and his associate because it "refused to look upon public worship as riot or tumultuous assembly."[128] Many Americans knew this story and the aftermath of the trial of the twelve jurors for finding the men "not guilty" of tumultuous assembly. Americans were decidedly upon the side of Penn and the various judges and jurors who opposed the corruption of the courts under the Tudor and Stuart kings and the general suppression of peaceable assemblies.[129] The end result of this exchange was for Congress to retain the text of the Assembly Clause with the apparent intent to protect social gatherings that had nothing to do with politics or petitioning.

The rejection of restrictions associated with the Conventicle Act provides a guide toward a plausible reading of the Assembly Clause. This context indicates that the resulting text protects conduct,[130] both individuals meeting in groups for a purpose determined by the group and the authority of the group to determine the terms of its own meeting and membership. In short, each assembly may engage in peaceable self-government toward its own peaceable ends. This understanding indicates just how far afield the Court's current association jurisprudence has strayed from the text.

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123 *See* District of Columbia v. Heller, 554 U.S. 570, 579–81 (2008).

124 *See* KROTOZYNSKI, *supra* note 96.

125 McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).

126 *Id.*

127 BRANT, *supra* note 113, at 56 (first alteration in original) (quoting THE TRIAL OF WILLIAM PENN AND WILLIAM MEAD AT THE OLD BAILEY 14 (London, Headley Bros. 1670)) (quote corrected).

128 *Id.* at 61.

129 *See id.* at 61–62.

130 Abu El-Haj, *supra* note 64, at 1101.

C. Expressive Association

The Court's expressive association jurisprudence justifies peaceable assemblies only insofar as they serve the purpose of speech, ignoring the Assembly Clause altogether. At the outset, this approach is problematic, as the Court writes in *Heller*, "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[131] The entire doctrine of expressive association arose because the Court insisted on justifying the right of association purely in terms of its contribution to democratic processes, ignoring the text of the Assembly Clause. The distinction between what is protected in terms of expressive association and what is not is entirely an act of the judiciary deciding "on a case-by-case basis whether the right [of assembly] is really worth insisting upon"[132] in a given context.

The Court's expressive association jurisprudence begins in the more broadly defined freedom of association jurisprudence. The Court recognized in *NAACP v. Alabama* that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment."[133] In four cases over the next five years, the Court articulated its doctrine of freedom of association, always connecting it to "advancing ideas and airing grievances."[134] The Court originally only located the right in the Fourteenth Amendment, but in 1961, placed freedom of association in the First Amendment as generally enabling the rights listed therein, but never explained textually where it fit.[135]

In *Roberts v. United States Jaycees*, the Court coined the term "expressive association" to describe the right of groups under the First Amendment's Speech Clause to discriminate in membership based upon the expressive views of the group because "[s]uch a regulation [of membership] 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."[136] Despite the strong language on behalf of association, the Court ruled

131 District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

132 *Id.* (emphasis omitted).

133 NAACP v. Alabama, 357 U.S. 449, 460 (1958).

134 Bates v. City of Little Rock, 361 U.S. 516, 523 (1960); *see also* Shelton v. Tucker, 364 U.S. 479, 487 (1960); Louisiana *ex rel.* Gremillion v. NCAAP, 366 U.S. 293, 296 (1961); NAACP v. Button, 371 U.S. 415, 430 (1963).

135 *See Gremillion*, 366 U.S. at 296; Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539, 545 (1963).

136 Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

against the group, finding that the state's goal of eliminating sex discrimination was "unrelated to the suppression of expression [and] plainly serves compelling state interests of the highest order."[137] Only the expression of the group mattered, but not the integrity of the group itself.

Just a few years later in *City of Dallas v. Stanglin*, the Court explicitly addressed the status of a dancehall finding that it lacked constitutional protection because it was a "social association," not an expressive association.[138] The Court wrote, "[W]e do not think the Constitution recognizes a generalized right of 'social association' that includes chance encounters in dance halls."[139] The First Amendment requires that a group "take positions on public questions," essentially tethering the right peaceably to assemble to engagement in public debate.[140] The dance hall did nothing of the sort. The Court writes,

> The Dallas ordinance restricts attendance at Class E dance halls to minors between the ages of 14 and 18 and certain excepted adults. It thus limits the minors' ability to dance with adults who may not attend, and it limits the opportunity of such adults to dance with minors. *These opportunities might be described as "associational" in common parlance, but they simply do not involve the sort of expressive association that the First Amendment has been held to protect.* The hundreds of teenagers who congregate each night at this particular dance hall are not members of any organized association; they are patrons of the same business establishment. Most are strangers to one another, and the dance hall admits all who are willing to pay the admission fee.[141]

The Court refused to protect peaceably assembling outside of expressive association on public matters and it simply ignored the text of the Assembly Clause.

Expressive association has protected groups in some cases. In a 5-4 decision, the Court ruled in *Boy Scouts v. Dale*, that the Boy Scouts may exclude a scout leader who is known to take a position contrary to that which the group sought to advance.[142] The Court wrote, "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that

137 *Id.* at 624.

138 City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

139 *Id.*

140 *Id.* (quoting Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U. S. 537, 548 (1987)).

141 *Id.* at 24–25 (emphasis added).

142 Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000).

person affects in a significant way the group's ability to advocate public or private viewpoints."[143]

However, the same doctrine failed to protect the right of a religious student group to discriminate in membership around shared religious beliefs and practices. In *Christian Legal Society v. Martinez*, the Court wrote, "[CLS's] expressive-association and free-speech arguments merge: *Who* speaks on its behalf, CLS reasons, colors *what* concept is conveyed. It therefore makes little sense to treat CLS's speech and association claims as discrete."[144] It then reasoned that since the speech rights of CLS were in no way infringed by the presence of a disagreeing member, their First Amendment rights were not violated.[145] Perhaps worst of all, the *Martinez* Court ruled it constitutional for the government to "permit[] *all* organizations to express what they wish but *no* group to discriminate in membership."[146] The Court concluded that suppressing peaceable assemblies is permissible as long as the government suppresses *all* of them.

The expressive association jurisprudence fails under the text of the Assembly Clause in at least three ways. First, it ignores the text itself and focuses on the Speech Clause.[147] The very presence of the Assembly Clause in the text would indicate, following the logic of *Heller* and *Bruen*, that the courts must turn to the text.[148] What the text of the Assembly Clause states is an "unqualified command" that the government refrain from suppressing peaceable assemblies.[149] According to the standards articulated in *Bruen*, the government must prove why the regulation of conduct is acceptable when that conduct is presumptively constitutionally protected by the text.[150] The same ought to apply to the text of the Assembly Clause. "When the Government restricts [assembly], the Government bears the burden of proving" why it is that that form of assembly is not protected by the plain text of the First Amendment.[151]

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143 *Id.* at 648.

144 Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 680 (2010) (citation omitted).

145 *Id.* at 692–93.

146 *Id.* at 694.

147 *See* LUKE C. SHEAHAN, WHY ASSOCIATIONS MATTER: THE CASE FOR FIRST AMENDMENT PLURALISM 104–06 (2020); INAZU, LIBERTY'S REFUGE, *supra* note 1, at 118–49.

148 District of Columbia v. Heller, 554 U.S. 570 (2008); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

149 *Bruen*, 142 S. Ct. at 2126 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

150 *See id.* "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 816 (2000); *see Heller*, 554 U.S. at 582, 595, 606, 618, 634–35.

151 *Playboy Ent. Grp.*, 529 U.S. at 816.

Second, under the expressive association doctrine, the Court does not require that the government prove the constitutionality of its actions in violating freedom of assembly. The government need merely prove that the assembly is not *expressive*, but it need not prove that the assembly in question is not *peaceable*. Even worse, after *Martinez*, the government need only prove that the speech rights of *individual* members of the assembly are not violated when the association's rights are violated.[152]

Third, under the expressive association standards, the Court permits a means-end scrutiny test.[153] According to *Bruen*, this is "one step too many"[154] for a textual right. Instead, the government must demonstrate that the presumptively protected activity "falls outside of the category of protected"[155] activity as historically determined. The *Bruen* Court insists that this is the standard for rights to free speech and to keep and bear arms.[156] Given its status as a textual right, it follows that this applies to "the right of the people peaceably to assemble."[157] The government cannot simply insist that its own disruption of assembly is acceptable under whatever ends it is attempting to pursue and the only burden it bears is demonstrating that the assembly in question is inadequately expressive. Courts must further interpret the constitutional text in light of our tradition of ordered liberty, which at its core is the right of self-government in matters political as well as social. To that part of the argument, we now turn.

II. THE PLURAL CONSTITUTIONAL COMMUNITY: DEFINING "*OUR* SCHEME OF ORDERED LIBERTY"

In this Part, I contend that the right of assembly is "fundamental to *our* scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition."[158] This scheme in the broadest sense is a plural constitutional community. It is *plural* in that it emphasizes and embodies plurality in its institutional structure, distribution of power, recognition of many centers of authority, and the like. It is *constitutional* in that it both empowers and constrains government according to the American tradition of self-government as defined in a constitutional

152 Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 680 (2010); *see also* SHEAHAN, *supra* note 147, at 103–11.

153 *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

154 *Bruen*, 142 S. Ct. at 2127.

155 *Id.* at 2130.

156 *See id.*

157 U.S. CONST. amend. I.

158 McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (first citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968); and then quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

text.[159] It is a *community* in that in all its plurality, there is still a single political entity with a name, the United States of America, and definable interests. That political entity may engage with other like entities in international affairs. While we can speak of a single political entity with a name tied to a single document, the United States Constitution, it is also true that the very name of the country implies its plurality, it is a union of states and only by implication a state itself.[160] In the broadest sense, the United States is a single polity, but one that at its very foundation recognizes the value of plurality, a variety of authorities operating within their own spheres and according to their own competences in a way that bolsters self-government at many different levels and in many different ways.

The sociologist Robert Nisbet coined the term "plural community" to describe the type of community I am discussing here.[161] Such a community takes as its starting point "the diversity and plurality of things,"[162] not only in descriptive terms, but in finding "freedom and justice and equity to lie in plurality."[163] Plurality is not simply descriptive of this type of community, but a social good. As a concept, plurality means an emphasis upon variety. Nisbet writes, "The good community is not founded upon a single objective or pursuit—whether kinship, religion, or politics—but upon a plurality of communities, each holding its proper and due place in the larger social order. Hence . . . derives the all-important idea of *communitas communitatum*, community of communities."[164] Such a plural community could take a variety of forms. It need not be constitutional, although *our* system is a *constitutional communitas communitatum*.[165] "The plural community is not only characterized socially by plurality of membership in groups, association, and a wide range of communities but also culturally by diversity of belief and idea and style of living. Such diversity is no more indeed than the cultural accompaniment of social plurality."[166]

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159 DONALD S. LUTZ, A PREFACE TO AMERICAN POLITICAL THEORY 31 (1992).

160 SAMUEL GOLDMAN, AFTER NATIONALISM: BEING AMERICAN IN AN AGE OF DIVISION 127 (2021).

161 ROBERT NISBET, THE SOCIAL PHILOSOPHERS: COMMUNITY AND CONFLICT IN WESTERN THOUGHT 385–442 (1973). My concept is narrower than Nisbet's, describing the United States of America and our particular constitutional tradition.

162 *Id.* at 385.

163 *Id.* at 386.

164 *Id.* at 387–88.

165 *See id.* at 388.

166 *Id.* The European medieval world was a plural community as well in that it was rife with various crisscrossing communities including feudal structures, monarchies, churches, monasteries, guilds, towns, and the like. A plurality of social structures, including guilds, manors, free towns, monasteries and the like would necessarily mean variety of lifestyle among merchants, peasants, aristocrats, citizens of free towns, monks, and so on.

Five concepts elucidate the plurality of this sort of community: functional autonomy, decentralization, hierarchy, tradition, and localism.[167] These concepts inform our understanding of the type of constitutional order we have and elucidate our particular form of ordered liberty. *Functional autonomy* is the principle that

> each group or community within the larger community should be endowed with the greatest possible autonomy consistent with performance of its function *and* with performance by other groups and communities of the functions embedded in them by tradition or plan. The family, the church, the labor union, the university: each of these is an association built around a very distinctive function. The success of each will be dependent, therefore, upon the degree of autonomy it possesses in the performance of its distinctive function—and, too, in its sense of freedom from unnecessary encroachments by other associations in society such as the larger, encompassing political government.[168]

This principle ensures that social authorities attached to a variety of institutions retain their ability to pursue their own ends free of interference from each other and from the political state. The concept of functional autonomy is the most important in demonstrating the plurality of self-government encompassed by the plural community.[169]

Decentralization requires a distribution of social authority outward and downward from the central authority.[170] Outward decentralization means that the centralized state does not dominate all functions but permits other institutions to carry them out. [171] Structurally, this encompasses a "delegation of authority to the associations and communities composing the social order."[172] Nisbet writes, "[P]ower wielded by government must be distributed into as many hands as possible—not abstract, desocialized *political* hands but those we actually see in the social order, those of workers, enterprisers, professionals, families, and neighborhoods."[173] Downward decentralization means that the centralized political power permits political functions to be carried out by political entities at a lower or more local level of administration. We call this federalism in the American system. The central state should leave significant power in regional governments. The state should

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167 *Id.* at 387–90.

168 *Id.* at 388. Nisbet uses the term "autonomy" in *The Social Philosophers* and updates the term to "functional autonomy" two years later in *Twilight of Authority. See id.*; ROBERT NISBET, TWILIGHT OF AUTHORITY 236 (1975).

169 This concept of functional autonomy is helpful in delineating the right of associations under the Assembly Clause. *See* SHEAHAN, *supra* note 147, at 147–49.

170 *See* NISBET, *supra* note 161, at 388–89.

171 *See id.*

172 *Id.* at 389.

173 NISBET, *supra* note 168, at 237.

refrain from centralizing power beyond the degree necessary for the purposes of maintaining order in politics and society.

Hierarchy means merely that there is always "some system of stratification of function and responsibility."[174] This is true in the military, in the family, in the university, in the government, and any other institution or community that attempts to accomplish any function. Nisbet writes, "Wherever two or more people associate more or less regularly, there is bound to be some form of stratification or hierarchy, no matter how fleeting [or] minor."[175] Nisbet writes, "Authority, any society, any association, must have. It is simply the structure of the association."[176] Authority in all groups must be vested somewhere. A plural community recognizes this and, with the principle of plurality, encourages plural sources of authority.[177] Rather than a necessary evil, hierarchy of this sort is a positive good.

Consider four examples: the university, civil society groups, the federal courts, and American federalism under the Constitution. University offices distinguish between presidents, vice presidents, provosts, vice provosts, directors, assistant directors, department chairs, full professors, associate professors, assistant professors, adjunct professors, and the like. The university accomplishes the core functions of teaching and research in varied ways through these roles. Every civil society organization is composed of ordinary members, voting members, executive council members, and what-have-you. Through these various roles, organized hierarchically, the functions of the civil society group are carried out. The federal court system has a clear hierarchy of district courts under circuit courts, which in turn, are under the Supreme Court. In such a manner, federal law can be adjudicated throughout the country while attaining a certain level of uniformity under the Supreme Court. The American federal system is such that the United States as a whole is composed of states. This federal system preserved the political communities long in existence while empowering a new and effective government that in turn has effectively preserved the nation as an equal among nations. Nonetheless, there is a hierarchy of authority. The Supremacy Clause dictates that in matters arising under the Constitution, "the Laws of the United States . . . and all Treaties made, or which shall be made" are "the supreme Law of the Land."[178] This diversity of role and function is not a necessary evil in each of these contexts, but a positive good. Nisbet explains,

174 NISBET, *supra* note 161, at 389.

175 *Id.*

176 ROBERT A. NISBET, THE QUEST FOR COMMUNITY: A STUDY IN THE ETHICS OF ORDER AND FREEDOM 270 (1953).

177 *See id.*

178 U.S. CONST. art. VI, cl. 2.

> The plural community is . . . a kind of chain of being, which rises from the smallest possible communal link at the bottom to the most important—in the cultural as well as political sense—at the top. The units of hierarchy in the plural community are like the vertebrae of the backbone. They are as indispensable to structure as are any of the nonhierarchical, "horizontal" segments of society.[179]

Tradition is "the handing down, the transferring, of ideals and practices. There is a strong element of the customary and the habitual."[180] Tradition should be written in the lower case and probably conceived in the plural, as tradition*s*. Nisbet's definition is broad but consists of the practices that emerge from the interaction between group members over time. Informal social interactions play a large role in tradition and renders "law in the formal and prescriptive sense unnecessary."[181] Traditions act as a sort of social glue for social groups, binding them together through shared practices in ways that can be hard to see and understand from outside the group. Nisbet writes,

> [Tradition is] reliance upon, in largest possible measure, not formal law, ordinance, or administrative regulation, but use and wont, the uncalculated but effective mechanisms of the social order, custom, folkway, and all the uncountable means of adaptation by which human beings have proved so often to be masters of their destinies in ways governments cannot even comprehend.[182]

Tradition suffuses a plural society in that a great deal in that society is decided outside prescriptive law. The very method of traditionalism is a reflection of this aspect of American constitutional plurality through its emphasis upon "cultural practices of long age and duration as constituting the presumptive meaning of the text."[183]

Finally, *localism* is an essential element of the plural community. This element of the plural community is the emphasis upon "family, neighborhood, small community, and local association."[184] It is captured in the practice of American federalism, in the role of towns in many of the colonies and states, and in election to the House of Representatives by district. Fundamentally, localism means a recognition of the importance of place and scale to socially healthy and humane living and best captured in the structure of a federal constitutional order. As demonstrated below, local allegiances to covenants and compacts were the very substance of the American conception of self-

179 NISBET, *supra* note 161, at 389.

180 *Id.*

181 *Id.*

182 NISBET, *supra* note 168, at 239.

183 Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1655 (2020).

184 NISBET, *supra* note 161, at 390.

government. This conception continued into civil society groups, formed on a similar covenantal basis as the political communities of American society.

These elements should not be understood as rigidly distinct concepts, but as interlocking features, informing and bolstering the fundamental structure of plurality in our particular constitutional order. Each of these elements is present with the American constitutional regime to a great degree and each lends itself to a plurality of social groups assembling for a variety of purposes, political, religious, and social, according to the principle of functional autonomy. Below, I contend that our system of ordered liberty takes this structure for granted and articulates rights and responsibilities in regard to it, including protection for peaceable assemblies in civil society.

III. THE CONSTITUTIONAL COMMUNITY IN ITS PLURALITY: COVENANTS IN TOWNS, COLONIES, AND CIVIL SOCIETY

Plurality is rife in the American system of ordered liberty. To describe American constitutional structure is to immediately use the language of plurality. Federalism, separation of powers, and bicameralism are essential to the structure of the American constitutional order and each element aims to facilitate plurality in the exercise of government power. As the Court writes in *Dobbs*, "Ordered liberty sets limits and defines the boundary between competing interests."[185] Interests of states and the federal government, of various religious, social, and economic groups, are hedged and balanced through the plural elements of our constitutional system. We see this play out in how our system of ordered liberty arose from the practice of making covenants and compacts in townships and colonies, culminating in state and federal constitutions. Plurality further describes the practice of compacting in civil society, following the same pattern of self-government we see in the town and church compacts of the colonial period, but applied to problems and communities in civil society.

What follows is a sketch of the American system and its origins in colonial government to emphasize popular sovereignty and pluralism in the history of our plural constitutional community. Core to this history is the self-creating and self-legitimizing compacts in towns, colonies, states, and nation. All of our governments are legitimized under the principle of popular sovereignty, but popular sovereignty suffused with elements of plurality including functional autonomy,

185 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2236 (2022). In *Dobbs*, the Court found that our history and tradition permitted state legislatures to come to differing conclusions on how to balance the interests of a pregnant woman and those of potential life. *See id.* at 2257.

decentralization, hierarchy, tradition, and localism. In the next Part, I will connect this understanding of plural popular sovereignty to the widespread practice of peaceable assembling in the eighteenth and nineteenth centuries, as witnessed by Alexis de Tocqueville. Peaceably assembling is the exercise in the social realm of the same principle of popular sovereignty through covenants that govern in the political realm but further pluralized and adapted to the context of civil society. At the core is an image of the self-governing people that is simultaneously a collection of self-governing peoples interacting at the center and the periphery of our constitutional system in complicated ways. This image of the self-governing people in formal and informal contexts would be referred to by the term "assembly."

A. Popular Sovereignty and Plurality in the Covenants of the American Colonies

Constitutional scholar Donald Lutz writes of Americans in the early seventeenth century, "When it came time for these Protestants to order themselves politically as their charters allowed and as circumstances required, they turned to the covenant form."[186] The covenant form was that which many reformed Protestant churches took in England.[187] By taking this form, these churches constituted a "parallel legal and constitutional structure, effectively forging civil societies within the larger kingdom."[188]

The Mayflower Compact is the most famous of these early covenants and we find there the five elements Lutz identifies in a religious covenant. The first line, "In the Name of God, Amen" claims the sacred witness of God.[189] Second, reasons are given for the compact, for the "better Ordering and Preservation" of their settlement toward a particular end, "to plant the first colony in the northern Parts of Virginia."[190] Third, it creates a people, "[w]e, whose names are underwritten."[191] Fourth, it creates not a church, but a "civil Body Politick," a particular political community rather than a religious community

186 DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 25–26 (1988).

187 *See generally* JOHN WITTE, JR., THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM 277–320 (2007); GLENN A. MOOTS, POLITICS REFORMED: THE ANGLO-AMERICAN LEGACY OF COVENANT THEOLOGY (2010); BRUCE P. FROHNEN & TED V. MCALLISTER, CHARACTER IN THE AMERICAN EXPERIENCE: AN UNRULY PEOPLE 24 (2022).

188 FROHNEN & MCALLISTER, *supra* note 187, at 12.

189 AGREEMENT BETWEEN THE SETTLERS AT NEW PLYMOUTH (1620), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 31, 32 (Donald S. Lutz ed., 1998).

190 *Id.*

191 *Id.*

through a political covenant that took the same form as a religious covenant, but one still blessed by God.[192] Finally, it describes the type of people the Pilgrims desired to be, the type who seek "the Glory of God, and Advancement of the Christian Faith, and the Honour of our K[i]ng and Country."[193] The only thing lacking that we find in a modern constitution is the description of the governing institutions. That would come to the Pilgrims in due course.

The text reveals at least two essential points. First, in their circumstances, on the other side of the ocean from their king, the Pilgrims turned to deliberation, coming to a consensus on what they planned to do together in community, or at the very least agreed that whatever they did, they would do so together as a community.[194] That very commitment to covenanting together would form the core of the American political tradition of self-government. Second, they were willing to make this commitment "[i]n the Name of God," as an oath to each other following the covenantal structure used to establish churches.[195] This establishes the political covenant as sacred, sealed by the same vow that sealed one's soul to God.

The Pilgrim Code of Law followed sixteen years after the Mayflower Compact.[196] In the prefatory paragraphs it references reading of the Mayflower Compact and the royal charter—in that order—as preamble to its description of laws.[197] This implies that the legal basis for the Pilgrim Code of Law arose from both the people's own compact as well as authorization under the royal charter. It also includes the Plymouth Agreement, that "no imposition, law, or ordinance be made or imposed upon us by ourselves or others at present or to come but such as shall be made or imposed by consent."[198] Lutz argues that this may be the first constitution made in the modern sense. He writes, "A free, self-governing people used a deliberative process based upon their consent to create a government. The government was centered upon a representative assembly beholden to a virtuous people as measured by God's law."[199] It also sets an important precedent for the creation of the institutions that wield political power. The people were created first in the original compact and this, by necessity, predates the

192 *Id.*

193 *Id.* (alteration in original).

194 *See id.*

195 *Id.*

196 *See* LUTZ, *supra* note 186, at 26.

197 *See id.* at 27.

198 PILGRIM CODE OF LAW (1636), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION, *supra* note 189, at 61, 62.

199 LUTZ, *supra* note 186, at 27.

creation of the government. The Preamble to the Code references these previous compacts and agreements explicitly.[200]

The royal charter permitted the Pilgrims to create their own government.[201] Early in the Code after referencing the legal basis of the Code in the Compact, Charter, and Plymouth Agreement, the Code describes the General Court with instructions on how each town is to elect its representative.[202] The General Court operated as a legislature for the eight towns and it, in turn, elected the Court of Assistants who aided the governor as a sort of a privy council.[203] We might see it as a primitive upper house.

Here we find elements of a complete constitution. There is a definition of a way of life in the Mayflower Compact, a statement of legitimacy in both the Compact and the charter, then the charter's definition of the people as those living in a particular geographical area that includes the towns, although different from "those undersigned."[204] The text further describes processes whereby decisions would be made at the colony level and further describes the primary governing institutions of the colony.[205] None of this abrogates the covenants of the towns but takes their institutional status for granted. All this is done explicitly while leaving each of the towns with the same self-government in local affairs previously possessed. The Massachusetts colony was a community of towns.

The following year, the Providence Agreement of 1637 followed a similar covenantal form but lacked God as a witness.[206] Roger Williams insisted for theological reasons on excising the religious oath from the document, making it a secular compact rather than a religious covenant, but otherwise retaining the other four covenantal elements.[207] First, reasons given for the compact, the compacting people were "desirous to inhabit in the town of Providence;" second, creation of a people, "[w]e whose names are hereunder;" third, creation of a political society limited in its reach to "civil" matters, "incorporated together in a Towne fellowship . . . only in civil things;" and fourth, description of the type of people they desire to be, ones who "subject [themselves] in active and passive obedience . . . for the public good."[208]

200 *See id.*

201 *See id.* at 20–21.

202 *See id.* at 27, 40–41.

203 *See id.* at 39–41.

204 *See id.* at 41–42.

205 *See id.* at 41.

206 *See* PROVIDENCE AGREEMENT (1637), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION, *supra* note 189, at 161, 161–62.

207 *Id.* at 161.

208 *Id.* at 162; *see also* LUTZ, *supra* note 186, at 28.

The text calls upon neither God nor King, which raises the question of enforcement. What higher authority would hold the people compacting together to their word? We find in the Providence Agreement the first clear expression of unadulterated popular sovereignty: the force of the pledge comes not from the witness of God or sovereign, but from the force of will of the people "whose names are hereunder." We find a self-founding and self-enforcing understanding of popular sovereignty rooted in the act of drafting the text and signing it. There is an oath of sorts, they "do promise to subject [themselves] in active and passive obedience."[209] The reason for the legality and enforceability of this agreement is that it was made by those who are to live under it. It still creates a people, explains why the document is necessary, and defines the type of people they hope to be. The result is a compact that innovates on the covenant and establishes the general principle of popular sovereignty. It, along with a number of other covenants forming additional towns as well as federations between them[210] makes possible the later Rhode Island Acts and Orders of 1647 that form a general government among the various towns in the colony.[211] The document takes for granted that those agreeing to the compact will keep it, as a matter of their sacred honor, and abide by the processes described in the Agreement.

What is distinct about the founding of these towns under covenants is their expression of the symbol of popular sovereignty as an act of voluntary association. People choose to create the town, in many cases separating from another town, as Roger Williams did.[212] While Williams' actions are the most famous, the founding of new towns was a common practice.[213] This makes sense given the assumption of popular sovereignty. The people, "We whose Names are under-written," in the words of the Mayflower Compact, form the basis of the compact.[214] If some people wished to form a new town, it follows that they could do so—and they did. Massachusetts Bay Colony started recognizing these new towns in 1636 with few restrictions because they were thought to be legitimately self-governing because they were self-constituted.[215]

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209 PROVIDENCE AGREEMENT, *supra* note 206, at 162.

210 Such as the Organization of the Government of Rhode Island establishing a federal union between Portsmouth and Newport but leaving the different town governments intact. *Id.* at 161.

211 *See* LUTZ, *supra* note 186, at 48–49.

212 *See* PROVIDENCE AGREEMENT, *supra* note 206, at 161.

213 BARRY ALAN SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT 90 (1994).

214 AGREEMENT BETWEEN THE SETTLERS AT NEW PLYMOUTH, *supra* note 189, at 32.

215 The colony didn't charter the town, the town was founded and then the colony issued the charter and invited the town to join the colony. DONALD S. LUTZ, POPULAR

Two years after the Providence Agreement, the towns of Hartford, Windsor, and Wethersfield came together to create a common government under the Fundamental Orders of Connecticut.[216] Where Rhode Island arose haphazardly toward this end, the towns of Connecticut deliberately formed a federal colony nearly a decade earlier of their own accord.[217] This document is an excellent study in this phenomenon of self-government taking the federal form, a plural constitutional community.[218]

The preamble to the Orders has all the elements of a covenant. It appeals to God as witness ("Forasmuch as it hath pleased the Allmighty God") and then it creates a people ("we the Inhabitants and Residents of Windsor, Harteford and Wethersfield").[219] It creates a political entity, "we . . . doe therefore associate and conjoyne our selues to be as one Publike State or Commonwealth; and doe . . . enter into Combination and Confederation togather."[220] However, the "combination" is limited and federal, the towns and their governments remain intact and operative despite the new colonial government.[221] Those inhabiting the three originating towns are constituted as a new people, the people of Connecticut, while maintaining their membership in peoples of the various towns. The document describes what type of people they intend to be, a people who "mayntayne and prsearue the liberty and purity of the gospell of our Lord Jesus."[222] The system is thoroughly federal rather than confederal, a combination or covenant, but one that is constrained to only handling colony-wide affairs. The citizens of each town act as such in governing their town and then act as citizens of the whole colony of Connecticut when electing town delegates to the colonial assembly. Both the towns and the colony reflected popular sovereignty, but a sovereignty pluralized and therefore limited to the functions and processes relevant to the respective level of compact.

Furthermore, the Fundamental Orders lay out the governing institutions at the colonial level in a way that ensures both local control at the town level and the ability of the citizens of the town to work

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CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 156 (1980). Frohnen and McAllister write, "At the core of [early Americans'] ideals was self-rule. To this end New Englanders planted new towns as groups who migrated together." FROHNEN & MCALLISTER, *supra* note 187, at 31.

216 LUTZ, *supra* note 186, at 31.

217 *See id.* at 43.

218 *Id.* at 42.

219 FUNDAMENTAL ORDERS OF CONNECTICUT (1639), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION, *supra* note 189, at 210, 211.

220 *Id.*

221 *Id.*

222 *Id.*

together at the colony level when it was broadly beneficial to all. Concerns for both unity and particularity guide the text. The chief institution created at the colony level is the General Court which consisted of deputies elected by all inhabitants of the towns, four from each.[223] The deputies then selected the governor and six magistrates.[224] The governor and magistrates along with the deputies were responsible for passing laws for the colony as a whole.[225] While the General Court was not in session, the magistrates helped the governor govern and he, in turn, called annual elections.[226]

What the Fundamental Orders of Connecticut established was more than a confederation, although that's what it is called in the text. It was a federal system a century and a half before the term was invented. The root of federal, *foedus*, is the Latin term for covenant and appropriately describes these relationships.[227] The covenants of each town remain intact even as the covenant of the colony of Connecticut has its own legitimacy and authority within its own sphere and according to its own limits, that "wch conserns the good of the Commonwealth."[228] The plural nature of American popular sovereignty is present here. The people of Hartford, Windsor, and Wethersfield remain covenanted in their particularity with requisite functional autonomy for town affairs even as they covenanted as a unified people into the colony of Connecticut. Decentralization and localism are both present in this arrangement. This federal relationship was clarified in October of 1639 in the Structure of Town Governments, a document that further delineated the responsibilities and powers of each of the towns in legal and civil matters such as dispute resolution procedures, legal issues regarding property and wills, and the like.[229]

The Fundamental Orders of Connecticut was ratified by the three founding towns in 1639, just as England was descending into civil war.[230] After the restoration of the monarchy in England, Charles II issued the Connecticut charter, more or less approving the Fundamental Orders of Connecticut, but claiming its legitimacy from the monarch's role as grantor of the charter to the towns as grantees.[231] But by

223 LUTZ, *supra* note 186, at 44.

224 *Id.*

225 *Id.*

226 *See id.* at 44–45; FUNDAMENTAL ORDERS OF CONNECTICUT, *supra* note 219, at 212–14.

227 *See* LUTZ, *supra* note 186, at 43.

228 FUNDAMENTAL ORDERS OF CONNECTICUT, *supra* note 219, at 212.

229 STRUCTURE OF TOWN GOVERNMENT (1639), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION, *supra* note 189, at 217, 217–20.

230 *See* THE NEW ENGLAND CONFEDERATION (1643), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION, *supra* note 189, at 365, 365.

231 LUTZ, *supra* note 186, at 47.

essentially rubberstamping the initial act of popular sovereignty a generation earlier, the king inadvertently obscured the nature of the authority to form the colonial government of Connecticut.[232] Was the Connecticut government legitimate because it was created by the people (who lived under it for nearly a quarter century) or was it legitimate because it was authorized by the monarch some decades later? Was the initial act of self-government the creation of a people or was the people only created when the charter designated the people as grantee? The colonies and the monarch would come to different answers to that question at the end of the following century and the assumption of the former would define the American understanding of our constitutional order.

Several years after the Fundamental Orders, other towns would form the New Haven colony. By 1665, all of the towns in the New Haven colony had joined the Connecticut colony, including the town of New Haven.[233] In 1642, Providence, still living under the Providence Agreement, joined with Pocasset and three other towns under the Organization of the Government of Rhode Island.[234] In turn, four colonies, Massachusetts, Plymouth, Connecticut, and New Haven, each composed of towns, joined the New England Confederation of 1643, which lasted for four decades.[235] "Thus towns, each with its own covenant or compact for local government, then became part of [a] larger colon[y] by one of four compacts, and then joined in a regionwide government by another compact."[236]

We see here the hierarchy of the plural community and the delineation of functional autonomy across four levels of compacts. Even though the New England Confederation didn't last, it demonstrated the political predilections of Americans as early as the 1640s to form a federal system with significant plurality by way of varying levels of intertwining covenantal agreements. Towns were ruled by covenants, so were the colonies, and so was the overall confederation, each limited in its authority by the authority of the others but arranged in a decentralized hierarchy of function, emphasizing the importance of local covenants.

This examination of these documents demonstrates a number of constitutional themes in the practice of American self-government. First, *popular sovereignty* is expressed in covenants and compacts. The towns at issue were the result of acts of self-creation under a covenant or compact and those compacts remained operative regardless of what

232 *See id.*
233 *Id.* at 31.
234 *See id.* at 32.
235 *See id.*
236 *Id.*

happened at the colony level. Second, *plurality* of covenants. What happened at the colony level took for granted the preservation of the popular sovereignty embedded in the covenants of the towns. The nascent federal structure permitted the creation of a new people while simultaneously retaining the constituent peoples. Colonies, at least in New England, were inherently federal. "Towns were the basic political unit, and all New England colonies, and thus states, were built from federations of towns."[237] This was not political sleight of hand, meant to undermine the smaller units over the long term. The intention was never to abolish the smaller compacts, but to create a larger compact that left the constituent compacts entirely intact.

Third, these documents demonstrate how *texts* were the essential medium whereby self-government was established, outlined, and obeyed. Preference for a single document capturing all of the components of the compact and governing apparatus appears in the Fundamental Orders. There is the statement of purpose in the Preamble as well as the outline of the General Court, elections, powers, and procedures of the government. It was recognizably similar to the national constitutions to come at the end of the eighteenth century. They too would take the constituent covenants of the states for granted and outline the processes whereby the peoples of the constituent states would remain such while also working together as a united people.[238]

Fourth, these documents demonstrate the *continuity* of these principles through time. Lutz writes,

> In American constitutionalism, there was more continuity and from an earlier date than is generally credited. The early state constitutions did not suddenly spring into being. Neither did the United States Constitution. The continuity was rooted not only in documents and institutions but also in a way of viewing and approaching politics.[239]

That way of viewing and approaching politics was to recognize the legitimacy of the town covenants. Other covenants to come accomplish something similar, but the Fundamental Orders of Connecticut does it most clearly and voluntarily and before all but one of the others.[240]

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237 *Id.* at 54.

238 *See id.* at 43.

239 *Id.* at 49.

240 *See, e.g.*, GENERAL LAWS AND LIBERTIES OF NEW HAMPSHIRE (1680), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION, *supra* note 189, at 5, 5–31; TOWNS OF WELLS, GORGIANA, AND PISCATAQUA FORM AN INDEPENDENT GOVERNMENT (1649), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION, *supra* note 189, at 139, 139–40; ORGANIZATION OF THE GOVERNMENT OF RHODE ISLAND (1647), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION, *supra* note 189, at 172, 172–75; ACTS AND ORDERS OF 1647 (1647), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION, *supra*

While the Pilgrim Law Code comes two years earlier, its popular legitimacy is ambiguous as it references both the Mayflower Compact and the king's charter as legitimizing its existence. The Fundamental Orders of Connecticut sets the tone and the pattern for constitutional development culminating in the foundational documents of the American constitutional system, the Declaration of Independence and the Constitution of 1787.

Thus far, our discussion has been centered on New England. There were certainly distinctions between the covenantal form we see in New England and the middle and southern states, but points of overlap are important for our understanding of the covenantal basis of the American constitutional system. The South had far fewer towns and focused on English style county government. While there were large landowners, superficially making the south look like aristocratic England, there was no aristocracy in the European sense.[241] A far larger proportion of the populace in all southern states, many times more, owned property and thus had voting rights than in England.[242] Furthermore, the royal governors didn't always reside in the colonies. The royal governor of Virginia, for example, stayed in England and his Privy Council in the colony was composed of large landowners who were generally indistinguishable from the smaller landowners in terms of political interests, a development very different from England.[243] On the whole, large landowners on the privy council tended to side with the House of Burgesses rather than the royal governor.[244]

The middle states were populated by a larger diversity of immigrants and had from early in its history larger religious diversity, everyone from Quakers in Pennsylvania to Catholics in Maryland.[245] This led to stronger protections for religious liberty in these states.[246] Daniel Elazar described the New England states, middle states, and southern states as "moralistic," "individualistic," and "traditionalistic" respectively.[247] Despite these real cultural and institutional differences, what is key is that all had a core of self-government, perhaps less

note 189, at 178, 178–203; FUNDAMENTAL ARTICLES OF NEW HAVEN (1639), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION, *supra* note 189, at 221, 221–26 (establishing the Articles in June, five months after the Fundamental Orders); NEW HAVEN FUNDAMENTALS (1643), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION, *supra* note 189, at 235, 235–38.

241 *See* LUTZ, *supra* note 186, at 50.

242 *See id.* at 51.

243 *See id.* at 50–51.

244 *See id.* at 51.

245 *See id.* at 52.

246 *See id.*

247 DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 119 (3d ed., Harper & Row, Publishers, Inc. 1984) (1966).

pronounced in the middle and especially southern states.[248] Nonetheless, each expressed a variation on the theme of popular sovereignty and local government, even if the government was focused on the county or large landowner rather than town as it was in New England.[249] The context for all of the states was a sense of continuity and self-government under a benevolent monarch.[250] That self-government was thought to be popularly authorized through a plurality of self-instituted compacts.[251]

Through the 1760s and 1770s the Northeastern town meetings became the locus of dissent against English policy.[252] Middle states and southern states adopted the model under what became known as the committees of correspondence.[253] While the plural compact model was most prevalent in New England, it became the governing paradigm throughout all of the colonies.[254] "Even in colonies like Pennsylvania, whose towns had no custom of calling town meetings, various local committees of correspondence organized themselves into meetings like the Boston town meeting or the Middlesex County convention."[255] This happened in southern states like Virginia as well, where county meetings were taking place "issu[ing] resolutions to explain why they had the power to petition and otherwise act without statutory authorization."[256] When states adopted their own constitutions, only four would add an Assembly Clause, but the first two, "Pennsylvania and North Carolina—had no such history of town meetings."[257] Furthermore, these meetings at the level of town, county, and colony would be dubbed "assemblies" and their defense hinged on a claim of the right to assemble for the purposes of self-government.[258]

B. Towns and Civil Society

As the history of American colonial covenants and compacts indicates, self-government at the local level is an overwhelming but

248 *See* LUTZ, *supra* note 186, at 51–52.
249 *See id.* at 46–47, 50.
250 *See id.* at 38.
251 *See id.*
252 *See* Bowie, *supra* note 3, at 1667–71.
253 *Id.* at 1690.
254 *See id.* at 1732.
255 *Id.* at 1690.
256 *Id.* at 1691.
257 *Id.* at 1732.
258 *See id.* at 1660. The dissenting colonists "invoked the right to assemble to defend not only their town and county governments but also their constitutional conventions, provincial congresses, and informal assemblies, which all claimed the right, derived from the people who composed them, to exercise governmental power." *Id.*

underappreciated aspect of the American republic. Bruce Frohnen and Ted McAllister write, "The business of government ('administration') was significant at the local level but much less so at the state and national levels. Consequently, the powers of self-government exercised in the townships—and in families, churches, and voluntary associations" were so substantial that it was generally the only level of administration with which most people interacted.[259] These town covenants are the primary practice in America that established what Tocqueville called "[t]he dogma of the sovereignty of the people."[260] Tocqueville identifies this dogma as the "generative principle of most of the English colonies of America,"[261] referring to the history of these town compacts recounted above. Popular sovereignty did not start with the country under the Declaration of Independence, the Articles of Confederation, or the Constitution of 1787, and then work downward to states, towns, and civil society. Rather, as Tocqueville writes, the "dogma of the sovereignty of the people emerged from the town and took over the government; . . . it became the law of laws,"[262] the fundamental principle that guided the practice of the American scheme of ordered liberty. The principle of popular sovereignty rose from the towns to the colonies, but it also went downward, defining the terms of self-government in the plethora of civil society groups.

Despite the description of the American constitutional order primarily in terms of federalism, division of popular sovereignty between states and the federal government was really a side show. The real authority occurred at the town level, the original context of popular sovereignty. Constitutional scholar Forrest McDonald writes,

> [T]he constitutional order, in the circumstances [of the founding], confirmed that the country was not to be one republic or even thirteen, but a multitude of them. For the United States was a nation composed of several thousand insular communities, each of which exercised virtually absolute powers over its members . . . .[263]

Debates at the Constitutional Convention about division of power between states and the federal government ignored the much larger sphere of power that remained at the local level. Under the

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259 FROHNEN & MCALLISTER, *supra* note 187, at 76. "[T]he real action and substance of life were neither national nor specifically political, but local." *Id.*

260 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 92 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2010) (1835).

261 *Id.*

262 *Id.* at 92–93. These assertions by Tocqueville were not without controversy. *See* LUCIEN JAUME, TOCQUEVILLE: THE ARISTOCRATIC SOURCES OF LIBERTY 57–58 (Arthur Goldhammer trans., Princeton Univ. Press 2013) (2008).

263 FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 289 (1985).

Constitution of 1787, "[t]he gain in national power was only at the expense of state power,"[264] not at the expense of local communities. This Section sketches the importance of the towns in the revolutionary period and how the expansion of civil society groups emerged from towns and local communities during this time.

In the towns, the American people conceived of themselves "as a people by achieving a shared psychological state in which they recognize themselves as engaged in a common enterprise and as bound together by widely held values, interests, and goals."[265] The compacts and covenants described above were a great part of achieving that "psychological state" of "a common enterprise," a community.[266] Each town's equivalent to the Mayflower Compact's statement of "We whose Names are under-written"[267] asserted this "shared psychological state."

Michael Zuckerman describes four features of the towns as the core of popular sovereignty.[268] First, each town is governed by consent, meaning that most decisions of import were decided in town meetings by the citizens of each town.[269] Second, the towns were small enough that people largely interacted face-to-face.[270] Third, towns were intentionally exclusive around their governing compacts, which often had a religious tinge.[271] Since each town was organized around a church, theological disagreement was often the reason for exclusion on the one hand or why someone left to found a new town on the other.[272] Fourth, the towns were the most pervasive level of government for most people.[273] The colonial and later state capitals simply were not present in most people's lives most of the time.[274]

C. Towns During the Revolution

By the time Americans were declaring independence from Britain, ninety-five percent lived in towns with a population from 500 to 1,000.[275] This description of town governance and influence was true for most people most of the time. Even in Tocqueville's own day he

264 LUTZ, *supra* note 215, at 169.

265 LUTZ, *supra* note 186, at 6 (emphasis omitted).

266 *Id.*

267 AGREEMENT BETWEEN THE SETTLERS AT NEW PLYMOUTH, *supra* note 189, at 32.

268 *See generally* MICHAEL ZUCKERMAN, PEACEABLE KINGDOMS: NEW ENGLAND TOWNS IN THE EIGHTEENTH CENTURY (1970).

269 *Id.* at 190–91.

270 *See id.* at 254.

271 *See id.* at 5–8.

272 *See id.* at 141–42.

273 *See id.* at 46.

274 *See id.* at 221.

275 *See* SHAIN, *supra* note 213, at 65.

saw that the towns remained nearly as essential to popular sovereignty and the survival of democracy in America as they had been in the colonial and early republican period. He writes,

> The strength of free peoples resides in the town . . . . Town institutions are to liberty what primary schools are to knowledge; they put it within the grasp of the people; they give them a taste of its peaceful practice and accustom them to its use. Without town institutions, a nation can pretend to have a free government, but it does not possess the spirit of liberty.[276]

Tocqueville goes so far as to describe each town as "an independent nation,"[277] similar language to how he described the states.[278] Each governed itself to the extent that its decisions affected itself alone.[279] Where it affected others living outside the town, the town was required to obey the laws of the state, but the state relied in turn upon the towns to enforce its laws.[280] Even for the collection of taxes states relied on town officials.[281] The nation, the state, and the town are each sovereign in their own way, part of the plural constitutional community.

Colonial capitals mattered to a certain extent, but for most people living in the American colonies and later in the American states, the towns were the real center of authority.[282] Barry Alan Shain writes, "From the moment of settlement, in an almost reactionary stance, the village, township, or county community sought to be the center of Americans' self-directing communal lives."[283] The self-governance of the town drew from the covenantal tradition already articulated, a certain legal tradition of local self-governance for incorporated towns in English law,[284] as well as the joint-stock company model, which encouraged voting by stock-holders.[285] They worked together with other towns and with colonial capitals when convenient, and ignored them when not. There are recorded incidents of towns refusing to send representatives or pay taxes if they disagreed with policies coming down from the colonial capital.[286] Given the geographic proximity of the towns, it

276 TOCQUEVILLE, *supra* note 260, at 102.
277 *Id.* at 109.
278 *See id.* at 98.
279 *See id.* at 109.
280 *See id.*
281 *See id.* at 110.
282 *See* ZUCKERMAN, *supra* note 268, at 8.
283 SHAIN, *supra* note 213, at 63.
284 *Compare* SUSAN REYNOLDS, AN INTRODUCTION TO THE HISTORY OF ENGLISH MEDIEVAL TOWNS 118 (1977), *with* Bruce P. Frohnen, *The One and the Many: Individual Rights, Corporate Rights and the Diversity of Groups*, 107 W. VA. L. REV. 789, 812–13, 816 (2005).
285 *See* LUTZ, *supra* note 186, at 52.
286 *See* ZUCKERMAN, *supra* note 268, at 26–27.

was simply too difficult to effectively enforce the capital's prerogatives.[287]

While there was much to which Americans objected in the Intolerable Acts of 1774, arguably the worst requirement was that town meetings, where many grievances against the British were aired, receive prior approval from the royal governor.[288] Town meetings were regular affairs in some places from the 1620s, certainly by 1630 when Boston began holding town meetings.[289] Outraged, local communities met anyway in what became known as the committees of correspondence.[290] Donald Lutz writes, "Towns and counties established committees of correspondence that became the local government. In this manner, a 'shadow' government was erected, independent of formal institutions and reaching all the way to a national convention."[291] The impetus for the committees was popular sovereignty, the sense that upon their own authority the people organized under founding compacts could meet and decide for themselves what they wanted to do in their committees. Officially, they may have followed instructions to suspend their compacts, but unofficially, they continued to act as if they were composed of a variety of self-forming and self-authorizing communities.[292]

All along the way, the argument for these meetings was the right to assemble.[293] It was these assemblies, organized by locality, that wrote to their state legislatures or their functional equivalent under the Intolerable Acts to argue for independence. Lutz writes,

> Throughout the transition from colonies to states, the revolutionary leaders relied upon the town and county meetings as the constitutional basis for their extralegal state legislatures and their political actions. By this time, town meetings had been activated in the northern states, and county organizations established in the South. State institutions were thus constructed from below quite rapidly, and because state institutions rested upon these mini-republics,

287 *See id.* at 16–17.

288 *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 321 (1969); ZUCKERMAN, *supra* note 268, at 248–49; SHAIN, *supra* note 213, at 79.

289 *See* Bowie, *supra* note 3, at 1664.

290 *See id.* at 1689. "In Boston, the town meeting met and discussed the Massachusetts Government Act's ban on newly called town meetings and proposed electing delegates to a county convention of towns." *Id.* (emphasis omitted). This took place outside of Massachusetts as well. "Massachusetts was far from the only colony in its situation. Towns and counties had appointed provincial congresses around the continent for similar reasons as in Massachusetts, and many also faced hostile, if not violent, opposition to their right to assemble." *Id.* at 1696.

291 LUTZ, *supra* note 215, at 78.

292 *See* Bowie, *supra* note 3, at 1689–90.

293 *See id.* at 1679.

> they naturally embodied the principles that the townsmen took for granted.[294]

The primary principle taken for granted was the right to assemble and decide for themselves what they intended to do, the principle of self-government.[295] As a reflection of the plurality of the American understanding of popular sovereignty, these assemblies in committees of correspondence birthed larger assemblies along the lines of counties, colonies, and finally a pan-colonial assembly in the Continental Congress in 1774.[296]

IV. FROM TOWN COVENANTS TO CIVIL SOCIETY COMPACTS

Towns continued to dominate to a great extent after the Revolution, but they also gave way to voluntary associations, which rose to fill the void left by small towns as they became larger and more heterogenous and less able to operate in a primary association for their citizens.[297] When a new town would be founded around a compact, the colony would recognize the town as legitimate and invite it to send a representative to the colonial assembly.[298] But the practice of starting a new town over theological disagreements led to a plethora of new towns.[299] By the end of the eighteenth century, legislatures increasingly represented counties, larger geographical districts encompassing several towns, which reduced towns' direct influence in the legislatures.[300] Increased size also meant that town meetings could not achieve consensus, face-to-face interactions, homogeneity, and cohesion to the same extent they had for much of the colonial period. Towns may have been dominant in many ways throughout much of the nineteenth century, but the towns' collective success eroded the distinction between direct self-government in the town and representative government at the state and federal level.[301] As the towns grew larger, they were

294 LUTZ, *supra* note 215, at 168–69.

295 *See* Bowie, *supra* note 3, at 1663–95. Bowie discusses at length town meetings and committees of correspondence through the Stamp Act protests and other colonial objections to English imperial policies. Throughout, the colonists made constant appeals to the right to assemble. *See id.*

296 *See id.* at 1690–91.

297 *See* LUTZ, *supra* note 215, at 167–68.

298 *See id.* at 156; *supra* notes 170–73 and accompanying text.

299 *See* SHAIN, *supra* note 213, at 90.

300 *See* Bowie, *supra* note 3, at 1727.

301 John Adams anticipated this development in some of his letters. Bowie explains, "The ideal government, Adams explained, was one in which everyone could participate, like a town meeting . . . . But this sort of ideal wasn't often practical for an entire state," and thus required representation. *Id.* at 1698.

governed more like the states and federal government.[302] However, the urge to self-government didn't disappear. It was transferred to voluntary associations.[303] The form these associations took followed that of the compacts Americans lived under since the early 1600s but adapted to new social circumstances.[304]

The committees of correspondence were an important transition between the towns and the voluntary associations. Gordon Wood writes of this period in American history, "Beginning with the Revolutionary movement (but with roots deep in American history) the American people came to rely more and more on their ability to organize themselves and to act 'out-of-doors,' whether as 'mobs,' as political clubs, or as conventions."[305] Americans continued to govern themselves but through assemblies, some of which turned violent, as Wood admits, but many of which were instrumental to the decision-making process that led first to the colonies declaring independence and then to new versions of the self-government through compacts that they had practiced for nearly 200 years.[306] These "shadow governments" influenced the American way of self-governing in terms of more versatile, voluntary, and adaptable assemblies rather than towns.[307] Towns, while founded in voluntary compacts and versatile in terms of their plural compacts, were geographically fixed. The committees of correspondence arose ad hoc over narrow issues related to opposition to British policy, such as taxes or support for independence, but they gave Americans a taste for voluntary association, adapting the penchant for voluntary self-government to more narrow ends which the established political institutions were unable to achieve in the circumstances of the 1760s and 1770s.

The transition from assemblies as governmental entities to voluntary associations took some working out. Nikolas Bowie writes, "After independence, however, Massachusetts was full of many overlapping and potentially competing assemblies—town meetings, the General Assembly, and informal caucuses and conventions. . . . [The right of assembly] alone could not explain which of these assemblies should be considered supreme when their powers or policies conflicted."[308]

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302 *Cf.* LUTZ, *supra* note 215, at 169–70.

303 I have a less extended discussion of this transition in Sheahan, *supra* note 25, at 319–21.

304 *See id.*

305 WOOD, *supra* note 288, at 319.

306 *See id.* at 320.

307 *See* Sheahan, *supra* note 25, at 320.

308 Bowie, *supra* note 3, at 1703. Tensions between counties, whose officials were appointed by the state, and towns who elected their own officials were an important flash point in this debate. *See id.* at 1703–08.

Shay's rebellion itself sprang from assumptions behind the right of assembly. Farmers in western Massachusetts were unhappy with their political and economic situation and assembled to take action on their own behalf.[309] The contrary claim was that through representation these people were governing themselves through the state assembly and thus their actions were fundamentally unlawful.[310] Bowie writes, Shay's rebellion "inspired Massachusetts's eastern elite to interpret the assembly clause as a protection of constitutionally recognized assemblies, like town meetings and the General Assembly, but not informal county conventions."[311] Over the following decade, debates over the meaning of assembly and its instantiation in the First Amendment would not follow the claims of Massachusetts's elites. Sedgewick's proposal to excise the Clause would be defeated in Congress.[312]

Following the Revolution, there was a veritable explosion of voluntary associations around nearly every conceivable practice. Where the committees of correspondence had focused upon narrow issues related to political governance in the context of the War for Independence, the voluntary associations formed for all sorts of reasons. Kevin Butterfield writes, "After the Revolution, something new appeared: men and women at all levels of social standing, white and black, and in communities large and small, embraced voluntarism and self-created, relatively formal organizations as the very best of means to improve society and their own lives."[313] Not entirely new, but an adaptation of popular sovereignty that bore a resemblance to the earlier instantiation of the towns as described by Zuckerman in being able to instantiate self-government on a direct basis, although around a narrower set of purposes.[314] These associations were governed by consent, entirely voluntary.[315] They were small and thus people could interact face-to-face.[316] They were exclusive around their primary purpose, whatever that was.[317] Each voluntary association was not pervasive in the sense that any particular group dominated any individual's life, but the category of voluntary associations was pervasive.[318] A plethora of voluntary associations pluralized the pervasiveness of town authority and operated as the means to self-government in many individuals' lives in a

309 *See id.* at 1708–11.

310 *See id.* at 1710.

311 *Id.* at 1713.

312 *See supra* notes 113–19 and accompanying text.

313 KEVIN BUTTERFIELD, THE MAKING OF TOCQUEVILLE'S AMERICA: LAW AND ASSOCIATION IN THE EARLY UNITED STATES 3 (2015).

314 *See* ZUCKERMAN, *supra* note 268, at 46.

315 *See* BUTTERFIELD, *supra* note 313, at 9–10.

316 *See id.* at 63.

317 *See id.* at 21.

318 *See id.* at 1.

variety of ways reflecting the primary claim of the right of assembly, which is the right of self-government.[319]

Americans organized these institutions on a compact basis, following the constitutional form of the towns and colonies.[320] Lutz describes these constitutions as determined by three qualities:

> First, [a constitution] defines the range of activities on which the political institutions will bear, in effect providing a definition of the public realm versus the private realm. Second it determines which institutions have how much say in a given area of public concern. Third, it determines who, as full citizens, will share in the operation of those institutions.[321]

Just as the towns, colonies, and the American nation established written documents that accomplished these purposes, voluntary associations did the same. Their founders met together in what can best be described as a mini-constitutional convention, drew up a document that determined the purpose of the group and "the range of activities on which" the group would bear.[322] Then it determined how the group would pursue those activities, "how one became a member, their duties while a member, and (usually) what one had to do to withdraw."[323] The particular form of these constitutions followed that of the national and state constitutions of the 1770s and 1780s, complete with "a preamble describing the purposes of organization, articles laying out precisely who held what power, exact description of the modes of amendment, which almost invariably called for a supermajority, and, most importantly, a clear distinction between it and 'ordinary' rules or law."[324] Butterfield describes the tendency toward legality in group/member interaction, processes that tended to "become increasingly formalized, increasingly law-minded."[325] In short, members of these compacts viewed them precisely in terms of the political compacts out of which they grew and with which their members were familiar.

Two examples from before the War for Independence demonstrate how civil society institutions sought consensus, encouraged face-

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319 *See generally*, Bowie, *supra* note 3.

320 *See* BUTTERFIELD, *supra* note 313, at 26. "The very term *constitution* was introduced to much of the world via the exportation of Freemasonry from England . . . ." *Id.*

321 LUTZ, *supra* note 186, at 14. Butterfield describes these constitutions as "operating as a sort of fundamental law from which all associational power derived." BUTTERFIELD, *supra* note 313, at 115.

322 LUTZ, *supra* note 186, at 14; *see* BUTTERFIELD, *supra* note 313, at 113.

323 BUTTERFIELD, *supra* note 313, at 100. Formalizing the relationship between member and group took some time to develop but followed the pattern of citizenship, even while being less encompassing. Like citizenship, membership required a sense of mutual obligation, of both duties and rights. *See id.* at 37.

324 *Id.* at 110–11.

325 *Id.* at 40.

to-face interactions, and exercised a limited authority over their members' activities early in American history. The young Paul Revere founded a bell-ringing society in 1750 for his fellow boys.[326] The range of the group's activity was narrow, the ringing of bells.[327] The group operated by majority rule but preferred unanimity, much like towns.[328] The group was exclusive, admitting to membership only those who "made a mutual commitment among themselves to ring the bells for two hours once every week."[329] However banal the purpose of the group might be, when the young Revere and the boys desired to carry out their tasks in community, they did so through the constitutional pattern of the town compacts, governing themselves insofar as bell ringing goes. Benjamin Franklin founded "Junto" in 1727 for the purpose of mutual self-improvement.[330] He established rules for meeting times and regularity, rules for essay contributions, and rules governing social engagement and progress in each member's personal development.[331] Each group by necessity exercised authority over its members in requirements it put upon them.[332] The number and purposes of these groups expanded in the 1780s and 1790s and into the nineteenth century, slowly absorbing various aspects of the hitherto pervasive self-government of the towns.[333] Many formed during this time followed written constitutions, even if they didn't yet possess the full features of later founding documents.[334]

Just as the towns had taken seriously their compacts, so the voluntary associations took seriously their mini-constitutions. Butterfield writes, "the societies [in the colonial era] took their organization, their record keeping, and their founding documents seriously, as more effective ways of achieving their collective objectives."[335] At the beginning, they even expected courts to enforce the terms of their governing documents and they would follow official amendment procedures if they wanted to change anything, even something as simple as which night they would meet.[336]

Just as the towns had been the primary way in which Americans governed themselves on a day-to-day basis in the colonial period, so

326 *See id.* at 24.
327 *See id.*
328 *See id.*
329 *Id.*
330 *See id.*
331 *See id.*
332 *See id.*
333 WOOD, *supra* note 288, at 324–26; ROBERT E. WRIGHT, LIBERTY LOST: THE RISE AND DEMISE OF VOLUNTARY ASSOCIATION IN AMERICA SINCE ITS FOUNDING 52–54 (2023).
334 *See* BUTTERFIELD, *supra* note 313, at 110–11.
335 *Id.* at 24.
336 *See id.* at 6, 67.

civil society associations become the primary means whereby Americans governed themselves day-to-day in the early republic. "[T]he ordinary, everyday experiences of American joiners and organizers had begun to contribute to a pervasive culture of constitutional self-government, one that did not begin and end with the political creations of the Revolutionary era."[337] Americans had governed themselves through town and colonial compact long before this and would govern themselves through civil society institutions long after. This "pervasive culture of constitutional self-government" characterized the American plural constitutional community from the top to the bottom, from the republican Congress and Presidency to the local musicians' club.[338] Of the latter, Butterfield writes,

> If it were not for the fact that the penchant for formal association has become so deeply fixed in our collective way of being, we would no doubt ask why they needed committees, a formally ratified constitution (one that they frequently took the time to amend), and bylaws in order to play their horns and violins.[339]

These civil society groups became the main way that Americans decided nearly all matters of importance—and unimportance.[340] Tocqueville writes,

> Americans of all ages, of all conditions, of all minds, constantly unite. Not only do they have commercial and industrial associations in which they all take part, but also they have a thousand other kinds: religious, moral, [intellectual,] serious ones, useless ones, very general and very particular ones, immense and very small ones; Americans associate to celebrate holidays, establish seminaries, build inns, erect churches, distribute books, send missionaries to the Antipodes; in this way they create hospitals, prisons, schools. If,

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337 *Id.* at 25.

338 *See id.* at 1 (discussing "a musical society formed by a handful of men in Wakefield, New Hampshire, in 1815 'for the purpose of practicing on their several and respective instruments'").

339 *Id.*

340 One humorous aspect of the rise of voluntary associations is the formation of groups for satirical purposes, such as the Anti-Bell-Ringing Society, formed to bring attention to the "astonishing ubiquity of collective activism." *Id.* at 3. But Americans also formed societies for more important reasons, as Tocqueville writes,

> There is only one nation on earth where the unlimited liberty of association for political ends is used daily. This same nation is the only one in the world where the citizens have imagined making use continual use of the right of association in civil life and have succeeded in gaining in this way all the good things civilization can offer.

TOCQUEVILLE, *supra* note 260, at 912 (footnote omitted). This freedom was far beyond what was enjoyed in Europe. *See* Donald J. Maletz, *Tocqueville on the Society of Liberties*, 63 REV. POL. 461, 464 (2001).

> finally, it is a matter of bringing a truth to light or of developing a sentiment with the support of a good example, they associate.[341]

These voluntary associations were by definition diffused, pluralizing authority among a variety of institutions, performing the same pluralizing and decentralizing function as federalism. Acts of association were not a social curiosity, but core to American democracy.[342] For Tocqueville, associating was the American way of self-government. Tocqueville writes, "Wherever, at the head of a new undertaking, you see in France the government, and in England, a great lord, count on seeing in the United States, an association."[343] Where aristocracies looked to aristocrats and other political states looked to governments, Americans looked to their own associations, their own social compacts formed voluntarily around particular issues and views to solve problems or advance causes.

So often do Americans look to the associational form of peaceable assembly that, Tocqueville observes, Americans see them "as the only means they have to act."[344] He writes,

> When you allow [Americans] to associate freely in everything, they end up seeing in association the universal and, so to speak, unique means that men can use to attain the various ends that they propose. Each new need immediately awakens the idea of association. The art of association then becomes, as I said above, the mother science; everyone studies it and applies it.[345]

This is true in political associations, political parties and the like, but also in associations in civil society at large. Tocqueville writes,

> The same spirit [of association] is found in all the actions of social life. An obstruction occurs on a public road; the way is interrupted; traffic stops; the neighbors soon get together as a deliberative body; out of this improvised assembly will come an executive power that will remedy the difficulty, before the idea of an authority pre-dating that of those interested has occurred to anyone's imagination. . . . There is nothing that human will despairs of achieving by the free action of the collective power of individuals.[346]

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341 TOCQUEVILLE, *supra* note 260, at 896 (alteration in original) (footnote omitted).

342 It was also the reason that democracy in America, Tocqueville thought, may survive without falling into tyranny of the majority, or some similar democratic pathology. *See id.* at 307.

343 *Id.* at 896. For a longer discussion of Tocqueville's account and defense of associations, see generally Luke C. Sheahan, *Democratic Self-Government and the Freedom of Association: Alexis de Tocqueville on the Quintessential American Freedom*, *in* 2 FREEDOM OF ASSOCIATION 73 (Luke C. Sheahan & Kenneth B. McIntyre eds., 2025).

344 TOCQUEVILLE, *supra* note 260, at 897.

345 *Id.* at 914.

346 *Id.* at 303; *see also* OSTROM, *supra* note 12, at 141.

Tocqueville's observations demonstrate how voluntary associations follow the compact form. He writes, "An association consists only of the public support that a certain number of individuals give to such and such doctrines and of the promise that they make to work in a particular way toward making those doctrines prevail."[347] Associations form with a common goal and then "mak[e men] march freely toward it."[348] This matches what we saw in Webster's description of an assembly, a group that meets for a common purpose.[349] Tocqueville writes, "The association gathers the efforts of divergent minds into a network and vigorously pushes them toward a single, clearly indicated goal."[350] Those associating have the freedom to assemble, to put their minds together, to "see each other; the means of action combine" and to decide a course of action.[351] In political associations, this may lead to voting in caucuses or conventions. In the social realm, it means deciding on a course of action, and then acting to fix the pothole, establish the inn, or build the school.

Tocqueville describes associations as protection against the dangers of democracy because they are, in a concrete sense, self-government; the way in which individuals form small social groups that are legitimate by the fact that they have formed. Just as the states and the towns are their own sovereign nations, so associations "form, so to speak, a separate nation within the nation, a government within the government."[352] Tocqueville sees this as true of political associations, those parties out of power who articulate an alternative vision of American public policy and law, but also of civil society associations, which proffer their own authority, freely followed, to achieve their own vision of the good life. Political associations do this explicitly, but Tocqueville connects the freedom of political associations to the "general theory of associations" demonstrating by analogy that civil society associations do the same in the non-political realm.[353] He writes, "In politics, men unite for great enterprises, and the advantage that they gain from association in important affairs teaches them, in a practical way, the interest that they have in helping each other in the least affairs."[354] Great associations contribute to the formation of smaller associations.

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347 TOCQUEVILLE, *supra* note 260, at 303.

348 *Id.* at 897.

349 Notice the similarity to Webster's definition of assembly. *See Assembly*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 36.

350 TOCQUEVILLE, *supra* note 260, at 304.

351 *Id.*

352 *Id.*

353 *Id.* at 914.

354 *Id.* at 913.

The sorts of social activities described by Tocqueville were assemblies of persons gathered in a peaceable manner for a peaceable purpose. Direct appeals to the right to peaceably assemble generally only arose when such practices were threatened.[355] This happened to the Democratic-Republican Societies shortly after ratification of the First Amendment. First organized in Philadelphia in 1793, dozens more appeared throughout the 1790s.[356] They claimed the right of the people to assemble as undergirding the legitimacy of their activity.[357] Controversy arose from their support for the French Revolution, ardently opposed by the Federalists, especially President Washington, who expressed concern in his 1794 address to Congress that such societies would foment violent rebellion.[358] Congress censured the societies and they fell out of popularity.[359] While their activity was thought explicitly political, they held "feasts, festivals, and parades."[360] These are social gatherings with no explicit message or form of expression. Nonetheless, these groups claimed protection of the right of assembly.[361]

Other groups that formed were not without controversy. Society of the Cincinnati is a prominent example. The group formed to preserve the friendships forged by soldiers during the Revolution, or so it claimed.[362] Opponents worried that it was the seeds of an aristocracy,[363] something like the patrician class of Rome. Given that members were former soldiers who hailed from every state in the union, "[i]t looked all too much like a self-created and parallel government."[364] Only Congress had such scope. Jefferson's correspondence with Washington indicated his opposition on the grounds that the Cincinnati were aristocratic by basing membership upon birth, just like the European aristocracy.[365] Furthermore, Jefferson thought formal organization would

355 Bowie, *supra* note 3, at 1661. This has contributed to some confusion over the right to assemble, that it is a protection for dissent rather than a more fundamental "claim to govern." *Id.*

356 INAZU, LIBERTY'S REFUGE, *supra* note 1, at 26.

357 *See id.*

358 *See id.* at 27–28.

359 *See id.* at 28–29.

360 *Id.* at 27 (quoting SIMON P. NEWMAN, PARADES AND THE POLITICS OF THE STREET: FESTIVE CULTURE IN THE EARLY AMERICAN REPUBLIC 2 (1997)).

361 *See id.* at 29.

362 *See* BUTTERFIELD, *supra* note 313, at 14. Founded by General Henry Knox, the Society of the Cincinnati described itself in its constitution as a "Society of Friends, to endure so long as they shall endure, or any of their eldest male posterity." *Id.* at 13 (quoting Cantonment of the American Army, on Hudson's River (May 10, 1783), *reprinted in* BRYCE METCALF, ORIGINAL MEMBERS AND OTHER OFFICERS ELIGIBLE TO THE SOCIETY OF THE CINCINNATI: 1783–1938, at 1, 1 (1995)).

363 *See id.* at 13.

364 *Id.* at 14.

365 *Id.* at 17.

harm friendship, the ostensible purpose of the Society, rather than help it.[366] Federalist societies, such as the Washington Benevolent Societies, formed in the early nineteenth century as a counterpart to the Democratic-Republican societies of the 1790s, faced similar critiques. Although most criticisms tended to focus more on the accusation that these groups were formed by sinister men for malicious purposes rather than the formal structure itself.[367] Another prominent concern was that such societies constrained the individual, made him unfree in some sense.[368]

Whatever these critiques, the practice of assembly in formal groups continued to grow and become institutionalized throughout the nineteenth century.[369] Concerns over individuals trapped in membership receded as what Butterfield calls a "common law of membership" emerged, where groups could make claims upon their members because individuals could "act within their *own* voluntary associations in ways that emphasized procedural fairness, legalistic formalities, and compliance with their own originating documents, which they usually called constitutions."[370] The right of exit always existed, even in the townships, and certainly in voluntary associations.[371] This rule-based way of self-governance in these associations is first adjudicated by courts "as a way of defending the proliferation of private societies" by protecting them from government suppression.[372] By the end of the 1830s, courts relinquished control and permitted associations internal governance without much legal oversight.[373] Each of these groups by then had adopted an "everyday constitutionalism,"[374] working under the assumption that formal associations were the best way to

366 *Id.* at 18. This argument hinged on the American adoption of Scottish Enlightenment views drawn from Shaftesbury and others about the distinction "between society and government—one natural, the other artificial." *Id.* at 16; *see id.* at 14–15 (referring to Anthony Ashley Cooper, third Earl of Shaftesbury, as well as Adam Smith, Dugald Stewart, and Francis Hutcheson).

367 *Id.* at 58–59.

368 *Id.* at 60–61.

369 *Id.* at 87.

370 *Id.* at 63.

371 Butterfield discusses Albert Hirschman's *Exit, Voice, and Loyalty*, where Hirschman notes that exit was always "accorded an extraordinarily privileged position in the American tradition." *Id.* at 65 (quoting ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 106 (1970)). "Dissenters to the governing ethos of each town were dangerous to the integrity of this self-governing body and so these communities regularly purged (often informally rather than by law) those who didn't fit in." FROHNEN & MCALLISTER, *supra* note 187, at 31.

372 BUTTERFIELD, *supra* note 313, at 64.

373 *Id.* at 90.

374 *Id.* at 93.

accomplish a variety of purposes, including cultivating friendships.[375] Fraternal organizations for men had existed from at least the 1750s.[376] During the nineteenth century, sorority societies emerged for women as well.[377] Both proved to be essential to men and women working together in society for economic and social betterment.[378]

Inazu describes the practice of assembly "apart from the state" in the antebellum period as widespread, taking place through a variety of forms and for an assortment of purposes.[379] Churches achieve special recognition and protection because of their widespread presence throughout American society as well as their role as the primary place where "the relationship between the state and the group life of civil society was first being worked out."[380] Disestablishment of religion meant that churches sought independent recognition, sometimes through incorporation, sometimes not.[381] The argument against incorporation of churches was precisely that it would invite oversight in matters internal to the church.[382] Church membership and attendance grew tremendously between 1780 and 1820, and for decades thereafter.[383] Working out what a religious institution was without state support turned to arguments about voluntarism and the rights and responsibilities of membership. Eventually religious institutions formalized practices around membership and what it required in terms of belief and practice.[384]

A variety of state court opinions recognized the right of religious assembly to include forming a society around particular beliefs and then excluding those not part of the compact. This is true in

375 *See id.* at 98–99.

376 *Id.* at 24.

377 *Id.* at 88.

378 WRIGHT, *supra* note 333, at 242-43.

379 INAZU, LIBERTY'S REFUGE, *supra* note 1, at 29.

380 BUTTERFIELD, *supra* note 313, at 30, 29–30.

381 *Id.* at 70.

382 *Id.*

383 *Id.* at 33. "Americans built about 10,000 new churches between 1780 and 1820, and 40,000 more before the Civil War. In 1776, the number of actively used church buildings in America was already north of 3,200. That figure passed 38,000 in 1850 and 54,000 a decade later." WRIGHT, *supra* note 333, at 153.

384 BUTTERFIELD, *supra* note 313, at 30.

Massachusetts,[385] New Hampshire,[386] Illinois,[387] Missouri,[388] California,[389] Kansas,[390] Michigan,[391] and Wisconsin.[392] Legal treatises, as Inazu points out, argued that the category of assembly applied to a vast array of groups, including officially incorporated associations such as the Masons and the Odd-fellows in addition to churches.[393] The formalizing of voluntarism in churches was followed by the formalization of voluntarism in a plethora of civil society groups. By 1860, most states moved toward general incorporation of civil society groups, legally recognizing most groups that sought such recognition.[394]

Abolitionists began organizing in conventions where alternative systems of government were instated, ones where racial and gender inequality found in state constitutions were inapplicable.[395] Women especially made use of these types of assemblies beginning as early as 1837.[396] These conventions had an expressive purpose, to advance ideas of equal rights, but they also constituted a forum where women could speak publicly, organize and exercise authority, and the like.[397] These women's societies became more frequent and explicitly female-centered in the early twentieth century.[398] The activities of women's assemblies were broadly social as well as political. They included "banner meetings, balls, swimming races, potato sack races, baby shows,

385 *See* Leavitt v. Truair, 30 Mass. (13 Pick.) 111 (1832); Oakes v. Hill, 27 Mass. (10 Pick.) 333 (1830); Inhabitants of First Par. in Sudbury v. Stearns, 38 Mass. (21 Pick.) 148 (1838); INAZU, LIBERTY'S REFUGE, *supra* note 1, at 30.

386 *See* Richardson v. Union Congregational Soc'y of Francestown, 58 N.H. 187, 189 (1877).

387 *See* People *ex rel.* Rice v. Bd. of Trade of Chi., 80 Ill. 134, 136 (1875); Poyer v. Village of Des Plaines, 18 Ill. App. 225 (1886).

388 State *ex rel.* Poulson v. Grand Lodge of Mo., 8 Mo. App. 148, 155–56 (1879).

389 *See* Josich v. Austrian Benevolent Soc'y of S.J., 51 P. 18, 19 (Cal. 1897).

390 *See* Anderson v. City of Wellington, 19 P 719, 720–21 (Kan. 1888).

391 *See In re* Frazee, 30 N.W. 72, 75 (Mich. 1886).

392 *See* Von Rueden v. State, 71 N.W. 1048, 1048 (Wis. 1897).

393 INAZU, LIBERTY'S REFUGE, *supra* note 1, at 41–42; *see* 1 FREDERICK BACON, TREATISE ON THE LAW OF BENEFIT SOCIETIES AND LIFE INSURANCE: VOLUNTARY ASSOCIATIONS, REGULAR LIFE, BENEFICIARY AND ACCIDENT INSURANCE (2d ed., St. Louis, The F.H. Thomas L. Book Co. 1894); JOHN ALEXANDER JAMESON, A TREATISE ON THE PRINCIPLES OF AMERICAN CONSTITUTIONAL LAW AND LEGISLATION 268 (2d ed., Chicago, E.B. Myers & Co. 1869); A.O. WRIGHT, AN EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 266 (13th ed., Madison, Midland Publ'g Co. 1884); THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 268 (Boston, Little, Brown & Co. 1880).

394 WRIGHT, *supra* note 333, at 42–43. Even under a regime of special incorporation, state legislatures tended to be quite liberal in granting them. See *id.* 56–57.

395 INAZU, LIBERTY'S REFUGE, *supra* note 1, at 33.

396 *Id.*

397 *See id.* at 33–35.

398 *See id.* at 45.

meals, pageants, and teatimes."[399] Women's societies in general demonstrate self-governance at an early period. Butterfield writes,

> [I]n the interior lives of their societies, the commonalities with men's societies—the detailed articulation of the rights and duties of individual membership, the voluntary and well-delimited nature of these purely voluntary relationships—are equally significant in our understanding of early American civil society. One consequence of this focus is to emphasize not women's separation from political society, but their close relationship with it, in the ways they organized their own societies by using languages of informed consent, law, and personal rights.[400]

Before receiving the right to vote and participate politically, an end result of the activism protected by the right of assembly, the practice of association in such peaceable assemblies demonstrated self-government in society in a widespread and significant way.

Throughout this period the term assembly is "broadly construed not only as a right to attend a meeting but also as a right to form and participate in groups."[401] Assembling peaceably to accomplish anything is just what Americans do, it is part of our habits.[402] The practice is widespread, reaching every sphere and every part of society. Churches of course, but also fraternal societies, debating societies, charitable societies, recreational societies, and the like.[403] Through these peaceable assemblies Americans not only dissent, they also practice self-government.

V. RESTORING FUNCTIONAL SELF-GOVERNMENT TO THE PEACEABLE ASSEMBLIES OF CIVIL SOCIETY

The American tradition of self-government has always been plural, recognizing the act of compact taking place at different levels, each compact taking account of and balanced against the others. Americans have always struggled to define this system. Michael Zuckerman writes,

> [E]ven after the Revolution, Americans would still grope for terms in which to describe this new fact of the dispersal of effective authority. They would speak of "the people" or "individualism" when they meant merely the people or individuals aggregated on different principles than those of the centralized state, when what they

399 *Id.*

400 BUTTERFIELD, *supra* note 313, at 99.

401 INAZU, LIBERTY'S REFUGE, *supra* note 1, at 49; ABERNATHY, *supra* note 10, at 4.

402 TED V. MCALLISTER & BRUCE P. FROHNEN, COMING HOME: RECLAIMING AMERICA'S CONSERVATIVE SOUL 83 (2019).

403 WRIGHT, *supra* note 333, at 147–233 (describing these types of voluntary associations created in the nineteenth century).

> really meant was sovereignty in severalty, the sovereignty of local groups and localities.[404]

From the beginning, American self-government recognized a variety of self-created and self-legitimized communities. The Assembly Clause secures the freedom of a category of these self-created communities outside of the official political channels, legitimized not for their role in the larger political system, but for their very act of being created by their members and further "defin[ing] the boundar[ies]" between various "competing interests"[405] in state and civil society. Defining those boundaries is done through the very formation of the groups themselves.

This Article began with a study of the text of the Assembly Clause, demonstrating that its plain meaning protects a broad array of associations, persons gathering together around a shared purpose.[406] To further elucidate the text, Marc DeGirolami articulates three aspects of traditionalist interpretation of a practice: endurance, longevity, and density.[407] First, its endurance is "the antiquity of a practice."[408] My discussion above demonstrates that the practice of peaceable assembly around a variety of purposes predates the First Amendment and was widespread at the time of its ratification.[409] During congressional debates over the Clause, non-political assemblies were the go-to example of the sort of activity protected by the right.[410] Second, is its longevity, "the continuity of the practice across time."[411] This practice began before the Revolution, characterized many groups during the Revolution, and continued at an accelerated pace throughout the nineteenth century, predicated upon the practices of self-government in town and colonial compacts beginning early in the seventeenth century.[412] As Glenn Abernathy writes, "The American people are chronic joiners,"[413] from the seventeenth century to today.[414] As Robert Putnam has noted, the increasing practice of association continued into the

404 ZUCKERMAN, *supra* note 268, at 46–47.

405 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2236 (2022).

406 *See supra* Part I.

407 DeGirolami, *supra* note 7, at 15.

408 *Id.*

409 *See supra* Part III.

410 While it is possible to make too much of this exchange, *see* Bowie, *supra* note 3, at 1726, n.501 (warning that it isn't obvious that it was the Quakers Page was referring to), we also should not ignore it. It is one plank of the broad protection implied by the right of assembly.

411 DeGirolami, *supra* note 7, at 15.

412 *See supra* Part IV.

413 ABERNATHY, *supra* note 10, at 171.

414 *Id.* at 171–99.

twentieth century, only declining well after World War II.[415] Third, the density of the practice, "the extent to which the practice was used or adopted across space."[416] The practice of assembling was based in the New England towns, but during the 1770s was practiced all over the continent.[417] Concern over the decline in the widespread practice of peaceable assemblies in the last few decades, most famously expressed in Robert Putnam's *Bowling Alone*,[418] springs from the very fact that the practice of peaceable assembling was so common and so pervasive in American society that to a great extent it defined the practice of American self-government.[419] America is simply a "nation of joiners."[420] The reason this is so is that the practice of joining associations is essential to the constitutional nature of the American republic, drawing its key components from the compact tradition that forms the core of American constitutionalism and popular sovereignty across many social spheres.[421]

As noted already, the judiciary has failed to articulate protections for the right peaceably to assemble.[422] Given the text of the Assembly Clause, the widespread historical practice of peaceably assembling around a variety of purposes, the judiciary must develop constitutional protection for the breadth of peaceable assemblies. Imperative to protecting peaceable assembly in the plural constitutional community is protection for functional autonomy of associations, the self-government of peaceable assemblies, around their constituted purposes.

Historically, groups have been able to assemble peaceably around a variety of functions, pursuing a vast array of purposes both banal and exalted. Constitutional protection must extend to most if not all of these groups in "formation, composition, expression, and

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415 ROBERT D. PUTNAM & SHAYLYN ROMNEY GARRETT, THE UPSWING: HOW AMERICA CAME TOGETHER A CENTURY AGO AND HOW WE CAN DO IT AGAIN 119–20 (2020).

416 DeGirolami, *supra* note 7, at 15.

417 *See supra* note 213.

418 ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 283 (2000).

419 *See supra* notes 337–41 and accompanying text.

420 Arthur M. Schlesinger, *Biography of a Nation of Joiners*, 50 AM. HIST. REV. 1, 1 (1944).

421 Wright categorizes his analysis of civil society associations by for-profit, non-profit, religious enlightenment (churches, religious educational institutions, non-sectarian religious organizations, religious and secular charities, and orphanages), self-improvement (formal educational institutions, library and literary societies, learned and cultural societies and lyceums, and hospitals), cooperative improvement (immigrant aid and ethnic uplift societies, mutual benefit societies, community, economic, and industrial development societies, laborers' associations and unions, and political associations), and social reformation (prison reform, peace societies, anti-removal societies, abolitionist societies, temperance societies, and utopian social development societies). *See* WRIGHT, *supra* note 333, at iii–iv.

422 *See supra* Section I.B.

gathering."[423] Certainly, there will be limits, such as to those groups of a commercial nature,[424] but otherwise the courts must inquire whether the present regulation falls outside the breadth of the historical practice.[425]

I have before suggested a "functional autonomy test" to aid courts in determining whether a regulation of peaceable assembly is constitutionally permissible.[426] The core question the courts can pose to the government is: *Does the policy inhibit the functional self-government of the peaceable assembly*? This question is intended to provide cover for the vast array of peaceable assemblies that have been the means through which Americans have governed themselves in civil society as an essential part of our plural constitutional community and constituted the very core of "*our* system of ordered liberty."[427]

CONCLUSION

When Tocqueville visited America in the 1830s, he was particularly concerned with the rise of the greatest democracy of its time. He believed, rightly as it turned out, that democracy was taking the world by storm, a culmination of a tendency toward equality that had been playing out for centuries. He thought it neither desirable nor possible to return to an aristocratic society, but he worried that certain dangers lurked in the democratic arrangement of power that would lend itself to a stifling political centralization.[428] Monarchies of the past, whatever their claims to absolutism, in actual historical fact struggled against a social plurality that stymied the power of the monarch on all sides. This included the aristocracy, the church, the monasteries, the free towns, and the like. These medieval monarchies were something of a plural community. To a great extent, monarchs relied upon these corporate bodies for administration of the realm.[429] Democracies sterilized these classes and corporate bodies for the sake of equality.[430] Whatever

423 INAZU, LIBERTY'S REFUGE, *supra* note 1, at 167.

424 *See id.*

425 *See* McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).

426 *See* SHEAHAN, *supra* note 147, at 146–49; Sheahan, *supra* note 121, at 47–52.

427 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247 (2022) (emphasis added) (quoting *McDonald*, 561 U.S. at 778).

428 *See* TOCQUEVILLE, *supra* note 260, at 1263–65; Richard Avramenko & Noah Stengl, *Looking Down Tocqueville's Nose: On the Problem of Aristocratic Etiquette in Democratic Times*, *in* ARISTOCRATIC SOULS IN DEMOCRATIC TIMES 275, 275-96 (Richard Avramenko & Ethan Alexander-Davey eds., 2018).

429 *See* TOCQUEVILLE, *supra* note 260, at 1246.

430 *See* NISBET, *supra* note 161, at 422.

benefits this brought, it simultaneously annihilated traditional barriers to centralized power.[431] Tocqueville writes,

> I see the government [in democracies] that alone inherits all the prerogatives wrenched from families, from corporations or from men; so, to the sometimes oppressive but often conservative strength of a small number of citizens, the weakness of all has succeeded.[432]

The structure of what I described here as the plural constitutional community militates against this tendency by institutionalizing a plurality of authority, decentralizing power, and preserving the functional autonomy of a variety of groups. Kevin Butterfield writes that this community of overlapping authorities

> include[s] the layers of federalism that Americans contemplate today—local, county, state, and federal governments—but also organizations that were, generally speaking, nongovernmental and entered voluntarily: clubs, churches, unions, corporations, and the like. There, too, individuals could find themselves required to pay dues or assessments, which they often called 'taxes'; there, too, men and women drafted constitutions, amended them, acted in accordance with them, or found themselves fined, censured, or expelled.[433]

Individuals may have been oppressed in certain ways by the corporate bodies of the past, but those associations were also a source of strength for individuals, a way through which they could exert influence upon the world around them and not only in a political sense.

The "central component"[434] of the Assembly Clause is self-government in civil society. Essential to the plural constitutional community is the preservation of these peaceable assemblies because they are not only the place where views are shaped, but where Americans, from the colonial period to today, have exercised self-government through the practices of compact-making as means to assemble peaceably around a variety of purposes. This practice of peaceably assembling was rife from the early republican period and pervasive in American society. Far from an elite phenomenon, it was utilized by every demographic.[435] It was the way all Americans governed themselves in terms of the American system of ordered liberty as a plural constitutional community.

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431 *See* TOCQUEVILLE, *supra* note 260, at 89–90. This includes the desire to be esteemed as an equal. *Id.*

432 *Id.* at 22.

433 BUTTERFIELD, *supra* note 313, at 5.

434 New York State Rifle & Pistol Association v. Bruen, 142 S. Ct. 2111, 2150 (2022) (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

435 BUTTERFIELD, *supra* note 313, at 3.