Chapter 8

The Right to Freedom of Assembly

In the 1830s, a French visitor named Alexis de Tocqueville toured the United States to learn why the American Revolution had created a functioning democracy whereas the French Revolution had failed. His classic book, Democracy in America, listed a number of reasons for this success, including one still considered a national trait: "Americans of all ages, all stations in life, and all types of dispositions are forever forming associations." They gathered for every sort of civic purpose, and in the process, he concluded, they were fulfilling the promise of self-government.

We remain a nation of joiners. Every day and at all ages, we come together voluntarily in civic groups, religious institutions, benevolence societies, sports leagues, service societies, and school clubs, among thousands of other organizations. In doing so, we exercise the fundamental freedoms of assembly and association, rights protected by the First Amendment, which states that "Congress shall make no law. . . abridging. . . the right of the people peaceably to assemble."

The founding generation understood the value of the freedom of assembly because they had relied on it during their struggle for independence. The colonists used a variety of methods to protest British violations of their liberties; chief among them were assemblies of people, such as the Sons of Liberty, willing to make their grievances known publicly. English law allowed these gatherings unless they endangered public safety, and royal authorities often labeled colonial protests as dangerous to public order. Not all of the assemblies were peaceful, of course; the colonists resisted British attempts to suppress their protests, sometimes with force.

The revolutionary creation of a government based on popular consent carried with it an obligation to provide a way for citizens to express their views and protest against authority collectively as well as individually.This notion seemed so obvious to many people that they thought it was not necessary to list it as a protected right. "If people converse together they must assemble for that purpose," noted one member of the First Congress. "It is a self-evident, inalienable right which the people possess." But the framers of the First Amendment, remembering their recent experience, thought otherwise. If they did not protect it, officials might do as the British had done and try to deny collective protests against the government. They knew the right of peaceful assembly gave meaning to the other rights of expression. Individual citizens had limited ability to influence the government, but people acting together could exercise great power to protect their liberty from abuse.

Throughout U.S. history, demonstrations, marches, and rallies have been common ways to pressure legislators to change laws and provide remedies for intolerable conditions. Striking workers, antiwar protesters, civil rights march-

ers, and woman suffragists are among the hundreds of groups that have filled streets and public squares, challenging what they judged to be unequal treatment or misguided policies. Many of these events still carry great emotional or symbolic significance. Martin Luther King's "I Have a Dream" speech during the civil rights March on Washington in 1963, the large antiwar protests of the late 1960s, and the 1995 Million Man March, organized by Nation of Islam leader Louis Farrakhan, remain vivid memories for many Americans, in large measure because they were among the first televised demonstrations in the nation's history. All these various forms of assembly were protected by the First Amendment. Riots and other violent acts do not have the same guarantee, even if the underlying grievances are the same as protests of peaceful assemblies.

Until the twentieth century, the First Amendment limited only the federal government, not the states. A right of assembly also appeared in many state constitutions, but minority groups often discovered its protections did not apply equally to them. The word peaceable had come to be interpreted as "legal," or whatever the lawmakers or police officers allowed. Courts and legislators, in the name of ensuring public safety, outlawed any gatherings with a "bad tendency" to produce disorder. The right of assembly did not protect these assemblies. Socialists, communists, labor unions, and other so-called radical groups were prosecuted routinely under laws that forbade demonstrations deemed to threaten public safety. A dockworker in Portland, Oregon, named Dirk DeJonge was a communist who sought an end to capitalism by organizing a labor union. He received a seven-year prison sentence for advocating an industrial and political revolution. Significantly, a state law also forbade voluntary assemblies for the purpose of advocating these activities. In 1937, the Supreme Court reversed DeJonge's conviction and gave new force to the right to assemble peacefully. Free speech, free press, and free assembly were necessary "for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein," the justices concluded, "lies the security of the Republic." In *DeJonge v. Oregon*, the U.S. Supreme Court recognized assembly as a right incorporated, or included, in the due process clause of the Fourteenth Amendment as a limit on state power.

Four decades later, the right of assembly faced another test, but this time the challenge was more difficult. It involved a group who sought to parade its message of hate before an especially vulnerable population. The question at issue was simple: did the Constitution protect neo-Nazis who viciously taunted elderly Holocaust survivors?

Frank Collins was the son of Max Cohen, a Jewish survivor of Dachau, a Nazi concentration camp. He was also the leader of the National Socialist Party of America. Frank Collins, in short, was a neo-Nazi. He led a party of about fifty members who goose-stepped about their Chicago headquarters, dressed in brown-shirted uniforms and black boots. They were a ragtag group of anti-Jew and antiblack hate-mongers who worshiped Adolf Hitler and proclaimed the resurrection of the Third Reich.

Few people gave them much notice. The American Jewish Committee kept tabs on the group but considered it politically impotent and capable only of spewing vicious propaganda. Even a Nazi publication in Europe called its American members "dead-beats, right wing kooks, and religious nuts." But in 1978, it would have been difficult to find anyone in Skokie, Illinois, who shared this view. This Chicago suburb had a substantial Jewish population, includingmore than six hundred survivors of the Holocaust. Many residents were either related

to or knew one or more of these survivors. The World War II death camps of Buchenwald, Bergen-Belsen, and Auschwitz were not names in a history book to the citizens of Skokie. They were painful memories.

When Collins sought a permit to hold a rally in a Skokie city park, government officials told him he would have to get a $350,000 bond; they knew he could not satisfy this requirement. In response, he planned to assemble his followers in front of the village hall, wearing full Nazi uniform, and hand out literature protesting the infringement of his right to speak. The village council wanted to ignore the group, but the Jewish community was adamantly opposed and convinced the council to block the rally, even though many Jewish organizations, such as B'nai B'rith, normally were strong supporters of free expression.

"These weren't ideas being discussed," the village attorney argued in response to newspaper inquiries. "The swastika was not an expression of free speech. It amounted to an assault [on the Holocaust survivors]."

The Skokie council passed three ordinances to put their case on firmer footing, including bans on hate literature and demonstrations by persons wearing military-style uniforms.When the village used these ordinances to stop the Nazi rally, Collins enlisted help from the American Civil Liberties Union (ACLU). It was a difficult moment for the ACLU. It abhorred the Nazis' rants, but it believed even their hate-filled speech and rallies fell under the protection of the First Amendment. If government could stop a Nazi demonstration, it also could stop a Jewish one, the civil liberties organization argued.

By now the case was receiving national attention, and lower state courts tried vainly to find a way through the emotionally charged battlefield. The Illinois Appellate Court, citing a U.S. Supreme Court approval of a criminal conviction for "fighting words" or words likely to provoke a fight, ruled that the Nazis could march but only in clothing stripped of the swastika. But the state supreme court reversed the lower court's decision: the ban on the demonstration violated the First Amendment. The federal district court upheld the ban; the ordinances were invalid. Acknowledging that it was tempting to look for an exception to the guarantee of free speech and assembly in this instance, the court decided that "it was better to allow those who preach racial hate to expend their venom in rhetoric than to be panicked into embarking on a dangerous course of permitting the government to decide what its citizens must say and hear." The Supreme Court refused to hear the case, which meant it left intact the lower court's ruling that "the freedom of thought carries with it the freedom to speak and to publicly assemble to express one's thought." These rights were at the heart of democratic government.

Collins revived his plan to demonstrate, but now he faced a massive counterdemonstration announced by his opponents. Seizing an opportunity to save face, the neo-Nazi leader changed his mind and shifted his rally to an all-white suburb of Chicago to avoid what he called "a mob of howling creatures." He also announced a demonstration in downtown Chicago. Both events proved to be anticlimactic: the downtown rally drew twenty-five Nazi demonstrators, two thousand police, and far more people who screamed their opposition. The suburban demonstration attracted more than two hundred Nazi sympathizers, but they too were outnumbered by police and vocal opponents. With all the noise, few people at either event heard Collins's speeches.Within minutes, the spectacles were over.

Following the rallies, representatives from Skokie's religious bodies held an interfaith memorial service in memory of the Holocaust victims. Soon life in

the village returned to normal, but with one major difference. The opponents of hate realized they were victorious after all. The Holocaust survivors, the village attorney noted, "felt that now they finally had stood up to a symbol and that they had defeated it."True to its promise, freedom of assembly, in the end, had promoted the cause of truth.

The right of assembly appears in the same amendment with other basic rights of democracy—the freedoms of religion, speech, press, and petition.We consider these rights fundamental because they allow citizens to express their views and participate freely in government without subscribing to certain beliefs or belonging to approved parties. The protection of assembly differs from the other rights in its wording, however. It is the only one in the First Amendment that has an adverb attached to it—"peaceably." It also implicitly contains another guarantee, the right to associate freely.

In many ways the right to associate with anyone for legitimate, or noncriminal, purposes has been more controversial—and more at risk—than the right to assemble peacefully. Dirk DeJonge's case in 1937 was as much about his membership in the Communist party as it was about his right to rally his fellow dockworkers to support a labor union. In the late 1940s and early 1950s, widespread fear of communism led Congress to pass laws requiring the Communist party and other so-called radical groups to register with the federal government. Congressional committees, most notably one headed by Senator Joseph McCarthy of Wisconsin, conducted investigations into alleged communist activity in government, the entertainment industry, and elsewhere. Actors, teachers, writers, and others who refused to testify about their associations, even when citing their Fifth Amendment privilege against self-incrimination, soon found their names on "blacklists" that prevented them from working.

The Supreme Court initially ruled that Congress could limit the right of association for communists because of the group's announced desire to overthrow the government. Four justices dissented strongly, however, warning that this action placed the nation in danger of tyranny. Banning people from associating because of their ideas, the minority argued, made the First Amendment's protection of speech and assembly meaningless. Soon the Court began to reconsider its position. In a series of cases in the 1960s, it reversed the earlier ruling, and by 1967 it had decided that the freedom of association, part of the right of assembly, even allowed communists to work in the nation's defense plants.

Other cases during this period made it clear why the right of association was vital to democratic government. During the struggles for civil rights in the 1950s, state governments in Alabama and Arkansas tried to compel antisegregation groups such as the National Association for the Advancement of Colored

"This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

—Justice John Marshall Harlan II, *NAACP v. Alabama* (1958)

People (NAACP) to reveal their membership lists. The organizations refused. Making these names public would subject their members to harassment and violence, they claimed—and their fears were not without reason, as events throughout the South tragically revealed.The Supreme Court unanimously upheld these refusals. The right to associate for peaceful purposes, as well as the right to keep these associations private, were protected by the First Amendment. This right was implicit, or included, in the right of assembly.

Today, the freedoms of assembly and association continue to be contested rights. As a society, we have embraced these freedoms as necessary for a vital democratic government, but we disagree on the balance between these rights and the legitimate protection of public safety or promotion of public order. Free expression generally, including free assembly and association, must follow laws regulating health, safety, and welfare of the general public, such as regulations on traffic, litter, noise abatement, and use of private property. At times, the interests of public safety and the rights of assembly and association may be in conflict—for example, keeping picketers a safe distance away from an abortion clinic or enacting a curfew or anti-loitering laws—and it is in these cases we struggle to find the right balance. The events since the terrorist attacks of September 11, 2001, have also called into question how far the right of association extends. Illegal and criminal associations clearly are not protected, but it is not easy to identify which associations threaten national security and which do not.

Our history provides the best assurance of the worth of free assembly and association to our society. The ability to come together voluntarily has produced changes we now consider essential to a healthy democracy. Associations of powerful voices have called for the inclusion of women and blacks in our political process; groups have pushed successfully for the end to segregation and wars; demonstrations have reminded us to safeguard our natural environment; and organizations have worked tirelessly for improved health, education, working conditions, and public safety in neighborhoods, towns, and cities across the nation. Most important, the rights of assembly and association have given meaning to the right of free expression, which ultimately is a catalyst for change.

The right to speak as an individual is a prerequisite for self-government, but it is our ability to act together that makes it possible for self-government to improve our lives and extend our freedom.We should not fear the opinion that disagrees with us. If we insist on harmony in our society, we deny human nature and we also deny the potential of liberty to produce greater good. “Conformity,” President John Kennedy reminded us, “is the jailor of freedom.” When we guarantee the right of assembly and association, no matter how unpopular the cause, we are in fact protecting our own liberty and our future as a free people.

The Power of Association

In 1831, Alexis de Tocqueville, an aristocratic Frenchman, visited the United States to study its prison system. His classic work Democracy in America *(1835) described the essential character of Americans and their government. Tocqueville believed the strength of the new nation was its voluntary associations, which the First Amendment right of assembly protected.*

An association consists simply in the public assent which a number of individuals give to certain doctrines and in the engagement which they contract to promote in a certain manner the spread of these doctrines. The right of association in this fashion almost merges with freedom of the press, but societies thus formed possess more authority than the press.When an opinion is represented by a society, it necessarily assumes a more exact and explicit form. It numbers its partisans and engages them in its cause; they, on the other hand, become acquainted with one another. And their zeal is increased by their number. An association unites into one channel the efforts of divergent minds and urges them vigorously towards the one end which it clearly points out.

The second degree in the exercise of the right of association is the power of the meeting. When an association is allowed to establish centers of action at certain important points in the country, its activity is increased and its influence extended. Men have the opportunity of seeing one another; means of execution are combined; and opinions are maintained with a warmth and energy that written language can never attain.

Lastly, in the exercise of the right of political association there is a third degree: the partisans of an opinion may unite in electoral bodies and choose delegates to represent them in a central assembly. This is, properly speaking, the application of the representative system to a party. . . .

The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. This right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty.

"The Opportunity for Free Political Discussion"

In 1937, the U.S. Supreme Court overturned the conviction of Dirk DeJonge, who had been prosecuted under an Oregon statute that outlawed criminal syndicalism, or organizing to bring about a change in the form of government or in industrial ownership or control. DeJonge had helped to conduct a meeting organized by the Communist party to protest police shootings of striking workers. The meeting was peaceful, and the Oregon court had held that a person could be convicted for nothing more than participating in a party meeting. In reversing the conviction, Chief Justice Charles Evans Hughes wrote in DeJonge v. Oregon *(1937), "[P]eaceable assembly for lawful discussion cannot be made a crime." It was a major First Amendment case. The right to assemble peaceably was guaranteed against state interference by the Fourteenth Amendment's due process clause.*

Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. . . . The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right 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—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. . . .

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. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

A Privilege of Citizenship

The Committee for Industrial Organization (CIO) was a coalition of five labor unions that left the American Federation of Labor (AFL) in 1938 in order to boost pay and improve job conditions and security for workers in heavy industries, such as steel manufacturing. Its members included a number of communists who favored more aggressive policies than practiced by the older, more conservative unions of the AFL.

In 1937, the CIO began a campaign to promote its cause and enlist new members. Organizers often used public parks to their rallies, but in Jersey City, New Jersey, the mayor, Frank "Boss" Hague, used a city ordinance regulating the parks to prevent these meetings and the distribution of literature. The CIO sued in federal court, claiming that the ordinance violated the First Amendment right to freedom of assembly. In 1939, the U.S. Supreme Court upheld its claim. Justice Pierce Butler, the most conservative justice on the Court, wrote the opinion in Hague v. Committee for Industrial Organization *(1939), which ruled that the right of assembly was a right of national citizenship and therefore protected under the Fourteenth Amendment from abridgement by the states.*

Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against state abridgment, it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects. . . .

Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom. All of the respondents' proscribed activities had this single end and aim. . . .

What has been said demonstrates that, in the light of the facts found, privileges and immunities of the individual respondents as citizens of the United States, were infringed by the petitioners, by virtue of their official positions, under color of ordinances of Jersey City, unless, as petitioners contend, the city's ownership of streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof, or unless, though the city holds the streets in trust for public use, the absolute denial of their use to the respondents is a valid exercise of the police power. . .

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.