Printed in U.S.A.
Vol. 110, No. 5

THE DEMOCRATIC FIRST AMENDMENT

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ABSTRACT—Over the past several decades, the Supreme Court and most First Amendment scholars have taken the position that the primary reason why the First Amendment protects freedom of speech is to advance democratic self-governance. In this Article, I will argue that this position, while surely correct insofar as it goes, is also radically incomplete. The fundamental problem is that the Court and, until recently, scholars have focused exclusively on the Religion Clauses and the Free Speech Clause. The rest of the First Amendment—the Press, Assembly, and Petition Clauses—might as well not exist. The topic of this Article is the five rights—speech, press, assembly, association, and petition—that I call the Democratic First Amendment.

I will argue that the Democratic First Amendment is best read to adopt a particular vision of citizenship, one associated with the Democratic Republican philosophy of Thomas Jefferson and his allies. Citizens, on this view, are meant to be active in a myriad of ways, to engage with and even challenge their elected representatives, and to develop and communicate their values and opinions jointly, through assemblies and associations. It stands in sharp contrast to the passive form of citizenship, limited to biennial voting, favored by Jefferson's Federalist adversaries. Each of the rights of the Democratic First Amendment, I show, advance this kind of democracy. More importantly, these rights are, to use the Supreme Court's term, "cognate," and must be exercised in combination to enable meaningful and active citizenship. The First Amendment, in short, is not just democratic, it is also kaleidoscopic.

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INTRODUCTION

Over the past several decades, the Supreme Court has repeatedly taken the position that the primary—albeit not necessarily the only—reason why the First Amendment protects freedom of speech is to advance democratic self-governance.[1] Moreover, there is also broad consensus among First Amendment scholars supporting this view.[2] In this Article, I will argue that this position, while surely correct insofar as it goes, is also radically incomplete.

The Court's ruminations about the purpose of the Free Speech Clause fail to answer three overlapping questions. First, what is the relevance of the fact the Free Speech Clause does not stand alone, but rather is accompanied by other equally important provisions? Second, how exactly does the Free Speech Clause, in combination with those other provisions, advance self-governance? And third, what role does the First Amendment as a whole envision for citizens in a representative democracy? These are important questions, requiring careful consideration that they have not yet received.

The problem starts with the Supreme Court. One noteworthy feature of the Supreme Court's modern First Amendment jurisprudence is that it is not truly a First Amendment jurisprudence at all; rather, it is a series of decisions interpreting the Religion Clauses and the Free Speech Clause. The rest of the First Amendment—the Press, Assembly, and Petition

[1] *See* Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 33–35 (2012) (summarizing cases expounding democratic reading of the Free Speech Clause); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2246 (2015) ("[T]he Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government . . . .").

[2] Bhagwat, *supra* note 1, at 32–33 (summarizing scholarship).

Clauses—might as well not exist. The Press Clause has been entirely subsumed by the Free Speech Clause.[3] The Assembly Clause has not been addressed in over thirty years.[4] The relevance of the Petition Clause has been limited to the peripheral issue of access to courts[5]—and even in that sphere, a recent decision limits its independent significance.[6] Even the nontextual right of association, which has not been entirely abandoned, has been made subservient to free speech, even though historically the right clearly derived from the Assembly Clause.[7]

For a long time, First Amendment scholarship was similarly blinkered. Recent years, however, have seen an explosion of scholarship examining the history and meaning of the rest of the First Amendment, especially the Assembly and Petition Clauses.[8] This scholarship is extremely valuable, but it too suffers from a flaw: it fails to take seriously the proposition that democratic rights protected by the First Amendment are not independent points, but rather are deeply interrelated and overlapping.[9] And it is impossible to fully understand how these rights function, as well as the vision of democratic citizenship they advance, without taking into account that interrelationship.

The topic of this Article, then, is those five rights—speech, press, association, assembly, and petition—what I call the Democratic First Amendment. Each of these rights has independent significance, but they also operate in combination with one another. I will also argue that the Democratic First Amendment is best read to adopt a particular vision of citizenship, one associated with the democratic-republican philosophy of Thomas Jefferson and his allies. Citizens, on this view, are meant to be active in a myriad of ways, to engage with and even challenge their elected representatives, and to develop and communicate their values and opinions

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[3] Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 258 n.29 (2004) (citing David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430, 448–50 (2002)); 2 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 22:6, Westlaw (database updated 2014).

[4] JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 62 (2012).

[5] Borough of Duryea v. Guarnieri, 564 U.S. 379, 387 (2011).

[6] *Id.* at 389–90 (treating Petition and Speech Clauses as equivalent in the context of government employment).

[7] *See generally* INAZU, *supra* note 4, ch. 4.

[8] *See, e.g.*, *id.*; RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES (2012); Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1 (2011); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009).

[9] *See* Timothy Zick, *Recovering the Assembly Clause*, 91 TEX. L. REV. 375, 383–84 (2012) (making a similar criticism).

jointly, through assemblies and associations. It stands in sharp contrast to the passive form of citizenship, limited to biennial voting, favored by Jefferson's Federalist adversaries and by some modern scholars. The First Amendment, in short, is both democratic and kaleidoscopic.

I. DEMOCRATIC RIGHTS

In this Part, I will briefly review the origins and purposes of each of the five rights constituting the Democratic First Amendment. Essential antecedents to the American Bill of Rights include medieval English practices, the English Bill of Rights of 1689, and various post-revolutionary state bills of rights, the most important of which is the Virginia Declaration of Rights of 1776. In addition, a full understanding of the drafting history must take account of George Mason's Master Bill of Rights, which provided the template for many of the proposals for amendments that emerged from the state ratifying conventions,[10] and for James Madison's original proposed constitutional amendments, presented to Congress on June 8, 1789.[11] Also relevant, of course, are subsequent revisions in Congress that produced the eventual amendments sent to the states. Obviously, in this short space, a thorough analysis of each of these complex histories is impossible, but even a summary yields important insights.

As a starting point, it should be noted that the five rights constituting the Democratic First Amendment derive from four clauses in the text of the First Amendment—Speech, Press, Assembly, and Petition[12]—along with one nontextual right, association. This list notably excludes the Religion Clauses.[13] The reason for this is rooted in the distinct historical roots of the Religion Clauses. I have summarized this history in greater detail elsewhere,[14] but briefly, if one looks at the antecedents to our Bill of Rights, it becomes clear that religious rights were seen as quite distinct from speech, press, assembly, and petition. In James Madison's original proposals to Congress, the Religion Clauses were listed separately from

[10] GEORGE MASON'S MASTER DRAFT OF THE BILL OF RIGHTS, CONST. SOC'Y ¶¶ 15, 16, 20, http://www.constitution.org/gmason/amd_gmas.htm [perma.cc/7N9P-MBC5].

[11] *Amendments Offered in Congress by James Madison June 8, 1789*, CONST. SOC'Y, http://www.constitution.org/bor/amd_jmad.htm [perma.cc/P9JG-QRAE].

[12] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[13] *Id.* ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

[14] *See* Ashutosh Bhagwat, *Religious Associations:* Hosanna-Tabor *and the Instrumental Values of Religious Groups*, 92 WASH. U. L. REV. 73, 92–93 (2014).

what became the rest of the First Amendment.[15] More tellingly, in George Mason's Master Draft of the Bill of Rights and in the Virginia Declaration of Rights of 1776, religious rights do not appear contiguously to speech, press, assembly, and petition (indeed, speech, assembly, and petition do not even appear in the Virginia Declaration).[16] Finally, it is noteworthy that in the drafting process in Congress, the Speech, Press, Assembly, and Petition Clauses were combined into one proposed amendment quite early.[17] The Religion Clauses did not get combined with the others, however, until September 9, 1789, just weeks before final adoption, when the Senate did so without explanation.[18]

What the above history demonstrates is that the Religion Clauses are different from the rest of the First Amendment and should be understood to have distinct roots and serve distinct goals. It does not, however, clearly establish that a relationship exists between the remaining provisions of the First Amendment, much less that they serve common, democratic goals. If one examines the roots of each of the democratic rights individually and in a bit of detail, however, such commonalities quickly become obvious.

A. Freedom of Speech

Free speech lies at the center of the modern First Amendment. It seems likely that more ink, both judicial and scholarly, has been spilt discussing free speech than the rest of the First Amendment (including the Religion Clauses) put together—which makes it all the more interesting that the Free Speech Clause has the most shallow and obscure history of any provision of the First Amendment. The English Bill of Rights of 1689 did not provide any protection for free speech (aside from the speech of members of Parliament),[19] nor, as noted earlier, did the Virginia Declaration of Rights of 1776.[20] Indeed, of the thirteen original states, only one—Pennsylvania—protected free speech in its state constitution.[21] More generally, the great debates in the eighteenth century over free expression were entirely focused on the press; speech was at best an afterthought,

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[15] *Amendments Offered in Congress by James Madison*, *supra* note 11.

[16] GEORGE MASON'S MASTER DRAFT OF THE BILL OF RIGHTS, *supra* note 10; THE VIRGINIA DECLARATION OF RIGHTS (1776) §§ 12, 16, http://www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html [perma.cc/665F-8ST7].

[17] THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 130 (Neil H. Cogan ed., 2d ed. 2015).

[18] *Id*. at 133, 139.

[19] ENGLISH BILL OF RIGHTS (1689), http://avalon.law.yale.edu/17th_century/england.asp [perma.cc/U4NH-2KBS].

[20] *See* VIRGINIA DECLARATION OF RIGHTS, *supra* note 16 and accompanying text.

[21] LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 5 (1985).

linked to freedom of the press but not terribly important.[22] It is precisely this lack of history that has permitted such broad debates in recent years about the underlying functions of free speech.

Despite this lack of history, however, as this Article began by noting, a broad consensus has emerged over the past half-century regarding the fundamental reason why the Constitution protects free speech: to advance democratic self-governance.[23] This position has been defended ably by a vast array of First Amendment scholars including Robert Post,[24] Jim Weinstein,[25] Cass Sunstein,[26] Robert Bork,[27] and Alexander Meiklejohn.[28] The Supreme Court has reiterated the same thought repeatedly, both in majority opinions[29] and in separate opinions by individual justices,[30] including most famously and originally in Justice Brandeis's seminal concurring opinion in *Whitney v. California*.[31]

Not only is the consensus about the fundamental purpose of the Free Speech Clause broad, it is entirely supported by history. As discussed earlier, during the Framing period, free speech principles were largely seen as linked to, and derivative of, press freedoms. As we shall soon see, however, there can be no serious doubt that the institutional function of freedom of the press has *always* been understood to be to preserve democracy and check government tyranny. Aside from its link to the press, moreover, there is good historical evidence that prior to the American

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[22] Philip B. Kurland, *The Original Understanding of the Freedom of the Press Provision of the First Amendment*, 55 MISS. L.J. 225, 237 (1985).

[23] *See supra* notes 1–2 and accompanying text.

[24] Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 670 (1990).

[25] James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 493–97 (2011).

[26] CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 121–24 (1993).

[27] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–21 (1971).

[28] Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

[29] *See, e.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, 135 S. Ct. 2239, 2246 (2015) ("[T]he Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government . . . ."); Snyder v. Phelps, 562 U.S. 443, 452 (2011); Buckley v. Valeo, 424 U.S. 1, 53 (1976) (per curiam); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

[30] *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 787 (2000) (Kennedy, J., dissenting); R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment); Wilkinson v. United States, 365 U.S. 399, 421–23, 422 n.11 (1961) (Black, J., dissenting).

[31] 274 U.S. 357, 372–79 (1927) (Brandeis, J., concurring). For a discussion of the enormous influence of Brandeis's *Whitney* opinion, see Ashutosh A. Bhagwat, *The Story of* Whitney v. California*: The Power of Ideas*, *in* CONSTITUTIONAL LAW STORIES 383, 403–06 (Michael C. Dorf ed., 2d ed. 2009).

Revolution, the primary meaning of the term "freedom of speech" referred to the immunity that legislators enjoyed for their speeches on the floor of the legislature.[32] This immunity was explicitly recognized in the English Bill of Rights.[33] It was also protected by most colonial charters,[34] and of course found its way into the U.S. Constitution in the form of the Speech and Debate Clause.[35] It should be perfectly obvious, however, that immunizing the speech of legislators has no connection to putative First Amendment justifications such as individual self-fulfillment[36] or the search for truth.[37] The sole purpose of protecting legislative speech is advancing democratic self-governance by protecting the elected legislature—the representatives of the people—from royal tyranny. Insofar as the Free Speech Clause of the First Amendment was seen to derive from these earlier legislative protections, presumably its function was understood in similar terms.

B. Freedom of the Press

When we move beyond free speech to the rest of the First Amendment, the instrumental, democratic functions of the relevant rights become even more self-evident. Let us begin with speech's cousin, freedom of the press. Whether and to what extent the press should be subject to regulation was a central issue of contention in both England and the colonies prior to the Revolution. In the seventeenth century the great debate was over licensing the press, but after licensing was abandoned in 1694 in England (and soon thereafter in the colonies)[38] the debate switched to the propriety of punishing the press, primarily for seditious libel.[39] This history has produced a raging debate over whether the Press Clause of the First Amendment prohibits only licensing and other prior restraints, or also limits subsequent punishments.[40] Regardless of the outcome of this debate,

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[32] *See* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 431 (1983); Kurland, *supra* note 22, at 255.

[33] ENGLISH BILL OF RIGHTS, *supra* note 19.

[34] Bogen, *supra* note 32, at 431–34.

[35] U.S. CONST. art. I, § 6, cl. 1.

[36] *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47–69 (1989); THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4–7 (1966); *see also* Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1158–85 (2003).

[37] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[38] Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. PROBS. 648, 651 (1955).

[39] LEVY, *supra* note 21, 16–172 (detailing debates over permissibility of seditious libel prosecutions in both England and the United States).

[40] *Compare* LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960) (advocating a narrow, prior-restraints-only view), *and* Patterson v.

however, what is clear is that the framing generation understood that liberty of the press *mattered*.[41]

Why did it matter? Antecedents of the Press Clause provide a fairly clear answer. As noted earlier, the Virginia Declaration of Rights of 1776 protected the press, but not speech or assembly. Section 12 of the Declaration reads: "That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments."[42] Similarly, § 16 of George Mason's Master Draft of the Bill of Rights reads: "That the People have a right to Freedom of speech, and of writing and publishing their Sentiments; that Freedom of the Press is one of the great Bulwarks of Liberty, and ought not to be violated."[43] Finally, James Madison's original proposal to Congress copied Mason's Master Draft almost verbatim.[44] All of these formulations make it clear that the reason to protect the press is because it is a "bulwark"—i.e., a protector against external danger—of liberty. The external danger to be feared, of course, was despotic government. The press, in other words, was an essential tool for the preservation of liberal democracy because it kept the people informed of misbehavior by government officials, and so permitted a response—ideally through the democratic process, but if that was denied then through revolution. That the Press Clause plays this role has been acknowledged by hordes of commentators[45] and is not really controversial. But this acknowledgement places the Press Clause squarely at the center of the Democratic First Amendment.

C. Assembly

In addition to protecting expression (in the form of speech and the press), the First Amendment also guarantees "the right of the people peaceably to assemble."[46] As it turns out, in modern times the Assembly Clause has essentially disappeared from judicial discourse—the Supreme

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Colorado *ex rel.* Attorney Gen., 205 U.S. 454, 462 (1907) (Holmes, J.) (same), *with id.* at 465 (Harlan, J., dissenting) (defending a broader reading of the Press Clause), Grosjean v. Am. Press Co., 297 U.S. 233, 248 (1936) (same), ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 11 (1967, reprinted 2001) (same), *and* David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985) (same).

[41] *See* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 487 (1983) (confirming the significance of press freedoms to the framing generation).

[42] THE VIRGINIA DECLARATION OF RIGHTS, *supra* note 16, § 12.

[43] GEORGE MASON'S MASTER DRAFT OF THE BILL OF RIGHTS, *supra* note 10, § 16.

[44] *Amendments Offered in Congress by James Madison June 8, 1789*, *supra* note 15.

[45] *See, e.g.*, Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 633–34 (1975); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1042 (2011); Anderson, *supra* note 41, at 488–93.

[46] U.S. CONST. amend. I.

Court has not addressed the Clause in over thirty years,[47] and when issues arise regarding regulation of public gatherings, they are inevitably litigated under the public forum doctrine, which the Court treats as a branch of free speech law.[48] It is noteworthy, however, that the framing generation did not consider assembly to be simply a subset of speech, and indeed, in Madison's original proposed amendments (as in George Mason's Master Draft), assembly did not even appear in the same provision as speech and press protections. What were the historical meaning and purposes of assembly?

We can begin by eliminating a red herring. Because the Assembly Clause appears in close juxtaposition to the Petition Clause, separated by the word "and," some commentators have suggested that the Assembly Clause only protects assemblies that are organized to prepare and present petitions to the government.[49] As John Inazu has convincingly demonstrated, however, that reading is inconsistent with the drafting history, which clearly shows that the Framers viewed assembly and petition as distinct (albeit related) rights since Madison's original proposal to Congress contained two separate rights—a right of "peaceably assembling and consulting for their common good," and a right to petition for a redress of grievances—separated by a semicolon.[50]

The true meaning of assembly is substantially clarified by an examination of antecedent versions of the Clause. Assembly is not an ancient right—it appears in neither the English Bill of Rights, nor the Virginia Declaration of Rights of 1776. Indeed, assemblies continued to be suppressed in England before and after the American Revolution.[51] That makes the appearance of the assembly right in George Mason's Master Draft noteworthy. Section 15 of the Draft, in full, reads as follows: "That the People have a Right peaceably to assemble together to consult for their common Good, or to instruct their Representatives, and that every Freeman has a right to petition or apply to the Legislature for redress of Grievances."[52] The assembly right is thus matched with the explicitly political right to instruct representatives, as well as the ancient, and also

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[47] INAZU, *supra* note 4, at 62.

[48] *See, e.g.*, Thomas v. Chi. Park Dist., 534 U.S. 316 (2002); Forsyth Cty. v. Nationalist Movement, 505 U.S. 123 (1992).

[49] *See, e.g.*, Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 713 (2002).

[50] INAZU, *supra* note 4, at 22–23; *Amendments Offered in Congress by James Madison June 8, 1789*, *supra* note 15.

[51] Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1547 (2004).

[52] GEORGE MASON'S MASTER DRAFT OF THE BILL OF RIGHTS, *supra* note 10, § 15.

political (as we shall see) right to petition for a redress of grievances.[53] When Madison introduced his proposed amendments to Congress, he eliminated Mason's proposed right to instruct representatives, but otherwise largely duplicated Mason's language (with minor changes in wording).[54] The proposed right, then, was that of the people to assemble to "consult[] for their common good."[55] The juxtaposition with the instruction and petition rights also makes clear that this consultation is for political purposes, in the people's capacity as citizens. There can be no serious doubt that this new understanding of the importance of popular assemblies in democratic politics had been shaped by the experience of the American Revolution. After all, groups such as the Sons of Liberty, and raucous assemblies such as the Boston Tea Party (to say nothing of the events leading up to the Boston Massacre), played a central role in galvanizing and organizing resistance to British rule, and more broadly in the formation of the revolutionary ethos.[56] Moreover, as the principle of popular sovereignty began to be broadly accepted in the post-revolutionary era, the importance of permitting sovereign citizens to consult with each other must have become increasingly clear, if that principle was to play a meaningful role in the new republic.

Of course, the phrase "to consult for their common [g]ood" was eventually dropped from the language of the First Amendment. As is so often the case, however, the reasons for this change are obscure, but do not seem to have been driven by a desire to change the meaning of the Assembly Clause. There were several proposals in Congress to drop the "common good" language from the proposed amendment, but they were repeatedly defeated.[57] As late as September 3, 1789, the Senate explicitly rejected a motion to drop the "common good" language.[58] Then on September 9, with no explanation, it combined the Democratic First Amendment with the Religion Clauses, and dropped the language

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[53] The fact that Mason placed the instruction right between assembly and petition obviously negates any notion that assembly is limited to petitioning assemblies.

[54] *Amendments Offered in Congress by James Madison June 8, 1789*, *supra* note 15 ("The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances."). Madison's primary change, then, was to rephrase the amendment as a restriction on government authority rather than a recognition of a right, but the substance is identical.

[55] *Id.*

[56] HARLOW GILES UNGER, AMERICAN TEMPEST: HOW THE BOSTON TEA PARTY SPARKED A REVOLUTION (2011); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 878, 884–85 (1978).

[57] THE COMPLETE BILL OF RIGHTS, *supra* note 17, at 220–21, 232–33.

[58] *Id.* at 220.

"consulting for the common good."[59] The primary purpose of the September 9 changes appears to have been to shorten and combine the proposed amendments rather than to change their substantive content. All indications are that assembly was viewed as a political right, tied to citizenship in a system based on popular sovereignty, and there is no reason to believe that the rewording of the Assembly Clause was intended to alter that basic understanding.

D. Association/Assembly II

Freedom of association is a right of group membership, meaning a right to form groups with fellow citizens, or to join preexisting groups. The Supreme Court has also interpreted association to include rights to anonymous membership,[60] and to exclude members that a group objects to.[61] The word "association" of course does not appear in the text of the First Amendment, but the Court has found "implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[62] The origins and development of the modern right of association are highly convoluted subjects that have been recounted at length elsewhere,[63] and can only be summarized in this space. Modern judicial recognition of a right of group membership can be traced to the 1927 decision in *Whitney v. California*, in which the Court affirmed Anita Whitney's conviction for criminal syndicalism, based on her membership in the Communist Labor Party.[64] Though *Whitney* is often described (and taught) as a free speech case, it was conceded that Whitney herself had never spoken in favor of violence, the essence of syndicalism.[65] Instead, she was prosecuted because of her membership in an organization that advocated criminal syndicalism—in other words, for her associational ties.[66] Recognizing this, the majority

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[59] *Id.* at 221–22.

[60] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462–63 (1958).

[61] Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

[62] Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

[63] *See* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 983–89 (2011); INAZU, *supra* note 4, ch. 3, 4.

[64] 274 U.S. 357 (1927). Criminal syndicalism was defined as "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage . . . or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." *Id*. at 359–60.

[65] *Id*. at 367; Bhagwat, *supra* note 31, at 387.

[66] *Whitney,* 274 U.S. at 366–67.

described the rights at issue as "free speech, assembly, and association,"[67] while Justice Brandeis's separate opinion (which was also the leading judicial exposition of the self-governance reading of the First Amendment) spoke of "free speech and assembly."[68] *Whitney* and other cases from this era thus clearly recognize that the First Amendment protects a right of group membership, sometimes called a right of association and sometimes simply called assembly, and that this right derives squarely from the Assembly Clause.[69]

It should also be noted that while judicial recognition of a right of group membership did not occur until the twentieth century, arguments to that effect can be traced back to the very origins of the republic, during the great debates over the Democratic-Republican societies in the mid-1790s.[70] These societies, groups of citizens united in support of the French Revolution, were highly controversial, especially among their Federalist political opponents. For our purposes, what is important is that supporters of the societies explicitly invoked the rights of association and assembly to defend their legitimacy.[71] Indeed, even Federalist opponents of the societies, including John Adams, often described them as assemblies, albeit subversive and therefore illegal ones.[72] Admittedly, not everyone supported such a reading of the First Amendment—Washington himself argued that while temporary gatherings of citizens were protected assemblies, permanent groups that arrogated to themselves the right to criticize elected officials were impermissible.[73] And no doubt other Federalists shared his views—though, given that these same people shortly thereafter passed the Alien and Sedition Acts, their fealty to First Amendment principles might be questioned. Regardless, there has existed in the United States a long, albeit contested, tradition of recognizing group membership as a core First Amendment right. I will argue later in this Article that history supports the view that this tradition, associated with the Republican politics of Jefferson and Madison, is more closely reflected in the First Amendment than the countervailing Federalist perspective.[74]

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[67] *Id.* at 371.

[68] *Id.* at 372–79 (Brandeis, J., concurring).

[69] *See, e.g.*, Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 399–402, 409 (1950); Thomas v. Collins, 323 U.S. 516, 530–32 (1945); De Jonge v. Oregon, 299 U.S. 353, 364–65 (1937).

[70] *See generally* Chesney, *supra* note 51; Mazzone, *supra* note 49, at 730–42.

[71] Chesney, *supra* note 51, at 1565 n.203, 1567–69.

[72] *Id.* at 1563, 1578–79.

[73] *Id.* at 1558–60; Mazzone, *supra* note 49, at 739–40.

[74] *See infra* Part III.

It must be acknowledged, however, that the modern Supreme Court no longer recognizes the broad right of association described above. Instead, since its 1958 decision in *NAACP v. Alabama ex rel. Patterson*,[75] the Court has steadily narrowed the association right, redefining it as a right of "expressive association," restricted to groups that engage in expressive activities, and one derived from and subsidiary to the right of free speech.[76] Nonexpressive associations, under the modern approach, receive no constitutional protection, and even expressive ones may be regulated with respect to their membership policies if the regulations do not interfere with their ability to communicate.[77] It is clear, however, that these doctrinal developments are entirely inconsistent with the text and history of the First Amendment since they ignore the fact that the association right is historically rooted in the Assembly Clause, not the Speech Clause. They should therefore not be permitted to obscure our broader understanding of the Democratic First Amendment.

Finally, once the history of the right of association/assembly is understood, its link to democratic self-governance becomes obvious. First of all, the right of group membership derives from the Assembly Clause, which, as we have already seen, has always been closely tied to democratic citizenship and self-governance. Second, as early as the 1790s, defenders of private associations—in particular, of the Democratic-Republican societies—argued that such groups were essential in a democracy to communicate the people's wishes to public officials, and to act as sentinels against official misconduct.[78] Third, the Supreme Court has itself repeatedly recognized that democratic politics require free associations of citizens.[79] In short, once it is acknowledged that the First Amendment protects group membership, it becomes obvious beyond peradventure that the reason it does so is to enable and advance democratic self-governance.

E. Petition

The last clause of the First Amendment protects "the right of the people . . . to petition the Government for a redress of grievances."[80] Despite its modern obscurity, the petition right is in fact the most ancient of the First Amendment's guarantees. Petitioning was practiced in pre-

[75] 357 U.S. 449 (1958).

[76] These developments are described in detail in INAZU, *supra* note 4, ch. 3, 4.

[77] Roberts v. U.S. Jaycees, 468 U.S. 609, 626–27 (1984).

[78] Chesney, *supra* note 51, at 1539, 1549–50, 1569.

[79] *See, e.g.*, NAACP v. Button, 371 U.S. 415, 431 (1963); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[80] U.S. CONST. amend. I.

Norman England, and a partial right of petition (for Barons) was recognized in the Magna Carta.[81] Petitions by the public, directed at both King and Parliament, became common during the Middle Ages,[82] and crucially, the English Bill of Rights of 1689 codified an absolute right of "the subjects to petition the king," further providing that "all commitments and prosecutions for such petitioning are illegal."[83] As such, petitioning government officials was a well-established right and practice, both in England and in the colonies, well before the American Revolution.[84]

Petitioning was also an explicitly political practice well before the American Revolution. In the early days, petitions addressed largely private matters, and were really akin to modern judicial suits.[85] By the seventeenth century, however, petitioning had evolved to the point where petitions regularly sought broader legislation or policy changes,[86] and were also regularly presented by groups or associations formed for the purpose of petitioning.[87] These petitioning practices, though they evolved in England, migrated fully to the American colonies.[88] Indeed, probably because of a very different political culture, petitioning was *more* common, and more significant, in the colonies than in the mother country.[89] And after the adoption of the Constitution, petitions began flowing to the First Congress immediately, well before the First Amendment was proposed or ratified.[90]

There can also be no doubt about the essentially political nature of most petitioning. Petitioning, of course, can exist in the absence of democracy—as in medieval England—and even then can serve a political function. In the political culture of the early American Republic, however, petitioning served as a key tool by which citizens could communicate their wishes and desires to their elected representatives. Indeed, in an era when a large percentage of citizens were disenfranchised, petitioning was often one of the only forms of political participation available to those citizens.[91] And even for voting citizens, petitioning provided a means to convey their wishes to representatives between elections. This is no doubt why George

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[81] KROTOSZYNSKI, *supra* note 8, at 84–85.
[82] *Id.* at 85–86.
[83] ENGLISH BILL OF RIGHTS, *supra* note 19.
[84] KROTOSZYNSKI, *supra* note 8, at 86–88.
[85] *Id.* at 85–86.
[86] *Id.* at 86–87.
[87] Mazzone, *supra* note 49, at 722–23.
[88] *Id.* at 724–25.
[89] KROTOSZYNSKI, *supra* note 8, at 104–07.
[90] *Id.* at 10–11, 110–11.
[91] *See* Mazzone, *supra* note 49, at 729–30 (making a similar point).

Mason in his Master Draft placed the right to petition immediately after the people's right to instruct their representatives (a right that Madison rejected)[92]—both were avenues for citizens to influence and control their legislators, aside from the crude tool of representative elections.

In sum, what we find through a close examination of the First Amendment as a whole is that each of the five rights protected by the non-religious parts of the Amendment—freedom of speech, freedom of the press, assembly, association, and petition—are important, independent rights with distinct histories. What they have in common, however, is that each of the rights has as its primary goal the advancement of democratic self-governance. Each, moreover, provides a distinct path for citizens to participate in and influence their government. Now we turn to the question of how these rights interact, and how they operate in tandem.

II. COGNATE RIGHTS

In *De Jonge v. Oregon*, the Supreme Court reversed Dirk De Jonge's conviction for criminal syndicalism, holding that the Assembly Clause of the First Amendment did not permit the State to criminalize simple attendance at a meeting held under the auspices of the Communist Party.[93] The Court used these words to describe the assembly right and its significance:

> The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. . . . 'The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.'[94]

Eight years later, in *Thomas v. Collins*,[95] the Court reiterated this point in even stronger language. It spoke of "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment."[96] The Court then said the following:

> It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition

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[92] GEORGE MASON'S MASTER DRAFT OF THE BILL OF RIGHTS, *supra* note 10, § 15.

[93] 299 U.S. 353, 365–66 (1937).

[94] *Id.* at 364 (quoting United States v. Cruikshank, 92 U.S. 542, 552 (1875)).

[95] 323 U.S. 516 (1945).

[96] *Id.* at 530.

> for redress of grievances. All these, though not identical, are inseparable. They are cognate rights . . . and therefore are united in the First Amendment's assurance.[97]

What did the Court mean when it described assembly and petition as "cognate rights" to freedom of speech and the press? And why did it describe these four rights as "democratic freedoms?" The answers to these questions go the heart of my argument in this Article.

At first glance, the above questions seem trivial. These rights are "cognate" because they are similar in nature and share common roots (that is the definition of cognate[98]), and they are "democratic freedoms" because their common nature is that they all advance democratic self-governance. It turns out, however, that this simple answer hides a multitude of sins. In particular, it does not seriously address what exactly we mean by democratic self-governance, or how First Amendment freedoms advance that process. Once one delves into those questions, serious difficulties emerge.

The problems began at the very beginning. The philosopher Alexander Meiklejohn was in his time (the mid-twentieth century) the leading academic exponent of the democratic reading of the First Amendment (or rather of the Free Speech Clause, which was Meiklejohn's focus). Mieklejohn chose as his model for democratic self-governance a New England town meeting.[99] Meiklejohn thus envisioned self-governance, and the activities protected by the First Amendment, as part of an organized, moderated event with strict, and strictly enforced, rules of procedure.[100] Speakers must have the floor to speak, must stay on topic, and must speak civilly.[101] And at such meetings, the *only* things that happen are speeches, followed by votes. The purpose of the speeches presented at the meeting is to educate citizens and share views; consequently, Meiklejohn describes voter education as the sole purpose of speech and press freedoms.[102] Finally, one important implication of Meiklejohn's democratic vision is

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[97] *Id.* (citing De Jonge, 299 U.S. at 364).

[98] *See Cognate*, MERRIAM-WEBSTER (2015), http://www.merriam-webster.com/dictionary/cognate [perma.cc/PQ85-PK94].

[99] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24–25 (1979).

[100] *Id*. at 24 ("The moderator assumes, or arranges, that in the conduct of the business, certain rules of order will be observed.").

[101] *Id.* at 24–25 ("[N]o one shall speak unless 'recognized by the chair' . . . debaters must confine their remarks to 'the question before the house'" and "if [a speaker] is abusive or in other ways threatens to defeat the purpose of the meeting, he may be and should be declared 'out of order.'").

[102] *Id*. at 26 (explaining that the purpose of free speech is to ensure that voters are "made as wise as possible").

that the significance of citizens, even as speakers, is truncated. As Meiklejohn put it: "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[103]

A moment's thought should make clear what a radically incomplete vision of self-governance this is. Critically, it abstracts away from the representative nature of most American democracy (town meetings and popular referendums being the rare and narrow exceptions to that rule). It also ignores the vast complexities introduced by population size and diversity. Town meetings only work in small jurisdictions, usually with fairly homogenous populations. Representative democracy in the United States varies radically from this model, in almost every respect. In particular, the relative anonymity of citizens in large jurisdictions, the need for avenues by which citizens may effectively communicate with their representatives and be *heard*, and the possibility that citizens might help shape ideas, public opinion, and the broader culture rather than being passive targets of education, are all absent from the town meeting model.

A related point is that the Meiklejohn model reduces the Democratic First Amendment to the Speech Clause and perhaps the Press Clause. There is no need and no room in the town meeting model for assembly, for associations of citizens, and for petitions directed at representatives. Instead, citizens act directly by voting on legislation after interacting directly with each other. This is not the way real citizens experience real democracy in the United States, and it is not the vision of democracy encapsulated in the First Amendment.

The shortcomings of Meiklejohn's vision are shared, though to a lesser degree, by two leading modern expositions of the relation between democracy and the First Amendment: Robert Post's concept of public discourse and Cass Sunstein's concept of public deliberation. Beginning with Post, in his book *Constitutional Domains*,[104] Dean Post argues that the concept of "public discourse" has played a central role in the development of the Supreme Court's First Amendment doctrine.[105] While Post never provides a single definition of public discourse, he appears to equate the concept with speech relevant to democratic self-governance, albeit with some ultimately arbitrary limitations.[106] He also emphasizes that because of the importance of public discourse and the diversity of the American

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[103] *Id.*

[104] ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995).

[105] *Id.* at 119.

[106] The examples Post gives of such limitations are the exclusion from protected speech of fighting words, vulgarity, or indecency accessible to children, and obscenity. *Id.* at 174–77.

public, the First Amendment has been interpreted to protect even highly intemperate and uncivil speech, so long as it falls within the broad definition of public discourse.[107] Indeed, Post argues that the American concept of public discourse is entirely dependent on that diversity, because it is the very act of communicating across different communities and different cultural values that makes discourse *public*.[108]

Cass Sunstein's vision of the First Amendment shares many similarities with Robert Post's vision, albeit with different emphases. Indeed, Post acknowledges this parallel by citing Sunstein in the very first footnote of his chapter on public discourse.[109] Rather than focusing on public discourse, Sunstein argues that the constitutional significance of free speech is that it creates "a system of democratic deliberation."[110] From this premise, Sunstein concludes that we have a "'two tier' First Amendment," which grants greater protection for political speech than other forms of speech.[111] He in turn defines speech as political "when it is both intended and received as a contribution to public deliberation about some issue."[112] Sunstein then goes on to discuss in detail why some forms of speech, such as art and literature, are generally political,[113] while other forms, such as pornography, are not.[114]

From these brief descriptions, the parallels between Post's and Sunstein's visions of free speech are clear. Both would favor speech related to democracy over other speech. Both emphasize public debate as the key value advanced by the First Amendment. And both emphasize the benefits of diversity and heterogeneity, seeing these aspects of American democracy as strengthening rather than weakening public discourse and deliberation, respectively.[115] There are also some important differences between the two. In particular, Sunstein's more narrow focus on deliberation, rather than discourse, suggests that he would be less tolerant of uncivil speech than Post[116]—though to be sure, Sunstein concedes that

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[107] *Id.* at 137–40.

[108] *Id.* at 141–42.

[109] *Id.* at 119, 371 n.1.

[110] CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xviii (1995).

[111] *Id.* at 122.

[112] *Id.* at 130 (emphasis omitted).

[113] *Id.* at 152–53.

[114] *Id.* at 215–16.

[115] POST, *supra* note 104, at 141–42; SUNSTEIN, *supra* note 110, at 242.

[116] *See* POST, *supra* note 104, at 119 (suggesting that Civil Republicans such as Sunstein and Frank Michelman would not protect uncivil speech, which undermines deliberation).

"racist and sexist speech usually falls within the free speech 'core.'"[117] For our purposes, however, the key is the commonality.

Post's and Sunstein's First Amendment theories are insightful and, to a substantial extent, convincing. They are also, however, incomplete, in some of the same ways as Meiklejohn's approach. To be fair, both Post and Sunstein are more convincing and more nuanced than Meiklejohn because both of them, unlike Meiklejohn, take into account the importance of cultural diversity to American democracy. Post also makes the important point that Meiklejohn's highly managed description of democracy, based on the town meeting, is inconsistent with the premise that citizens may contest not just substantive issues of policy, but also how a democracy should procedurally operate.[118] Indeed, he dedicates an entire chapter of *Constitutional Domains* to this point, calling it "Meiklejohn's Mistake."[119] Nevertheless, Post and Sunstein share with Meiklejohn one important thing: a myopic focus on speech, ignoring the rest of the Democratic First Amendment. Sunstein concedes his focus in the very title of his book. And although Post speaks regularly about "the First Amendment," his focus too is entirely on speech. There are, however, entire aspects of citizenship that this ignores, including collective action, emotional appeals, and demands upon political leaders. But these types of activities are no less protected by the First Amendment than polite discourse on public issues.

It is here, of course, that we enter the realm of the broader Democratic First Amendment: the rights of assembly, association, and petition. At one point in his discussion of public discourse, Post posits that a critical function of such discourse is "collective self-definition," meaning the creation of a shared public identity that in turn "enables a culturally heterogeneous society to forge a common democratic will."[120] He also argues that this process is an essential aspect of citizenship protected by the First Amendment. I completely agree with the latter point, but do not see this as a theory of speech. Instead, I would argue that for individual citizens, forming and joining in groups with other citizens is even more important to self-definition than public discourse—indeed, it is necessarily groups that make this process "collective." Post's and Sunstein's visions of democracy, and of public debate, are notably individualistic. Citizens are viewed as speaking as individuals to other individuals, and through this public process of discourse or deliberation, reaching joint conclusions. Post

[117] SUNSTEIN, *supra* note 110, at 122.
[118] POST, *supra* note 104, at 270–75.
[119] *Id.* at ch. 7.
[120] *Id.* at 166.

in particular confirms this point early in his book by describing "individual autonomy" as an essential prerequisite of democracy.[121] But again, this is not how real citizens experience either democracy or public debate. Certainly, voting is a solitary experience. But when citizens want to act in a political capacity, they almost always do so through groups, whether it be formal entities such as political parties, the NRA, and the Sierra Club, or more informal gatherings such as Occupy. They discover and develop their values and identities through such groups, and it is only through such groups that individual citizens can hope to be *heard*, either by other citizens or by public officials. In other words, association is essential to citizenship.

Unsurprisingly, assembly plays a similar role, given the common roots of the association and assembly rights.[122] When citizens assemble—meaning gather together physically (or perhaps virtually as well)[123]—entirely new avenues of political participation and citizenship are opened. For one thing, as noted earlier, the original phrasing of the assembly right was the right of the people "peaceably to assemble together to consult for their common Good."[124] This sounds like precisely the sort of "collective self-definition" that Post attributes to public discourse; but the Assembly Clause envisions this as a collective activity requiring physical presence as well as, of course, words. Assemblies, like associations, permit citizens to magnify their voices manyfold, and so vastly increase the possibility that they will be heard. Finally, assemblies of citizens do more than develop or convey specific views about public issues. They also send a signal of strength and solidarity, which can be as or more important than the "message." Indeed, some assemblies—such as Occupy—can be notably incoherent in their "message," but that does not necessarily reduce their political and social significance. Sometimes, in the case of assembly, what matters is numbers and cohesion, not discourse or deliberation.

Petitioning seems different from association and assembly, and more like speech, because it is not inherently collective, and because it necessarily consists of words, albeit in the modern era written words.[125] But petitioning is also meaningfully distinct from most speech. For one thing,

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[121] *Id.* at 7.

[122] *See supra* Part II.

[123] *See* John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093 (2013).

[124] GEORGE MASON'S MASTER DRAFT OF THE BILL OF RIGHTS, *supra* note 10, § 15.

[125] In its early forms, petitioning appears to have been primarily oral—the Magna Carta, for example, recognizes a right of Barons to come to the King and lay before him transgressions. KROTOSZYNSKI, *supra* note 8, at 84–85. Obviously, however, as literacy spread and the scale of petitioning increased, petitioning became a primarily written exercise, as reflected by the fact that even today, in the British Parliament, a bag hangs on the back of the chair of the Speaker of the House of Commons to receive petitions. *Id.* at 83.

petitions are not broad discussions of public issues, they are specific calls for action, directed at a specific class of individuals: public officials. Cass Sunstein describes the goal of our "system of free expression" as "to ensure broad communication about matters of public concern among the citizenry at large and between citizens and representatives."[126] That is certainly true, but misses the point that petitioning is a specific form of communication between citizen and representative that is quite distinct from either discourse or deliberation. It is, rather, an antecedent for action (or at least hoped to be so). One strong indication of the distinctive nature of petitions was that historically, petition, unlike speech, was considered to require a (legislative) response.[127] Secondly, it is not quite true that petitioning is not a collective activity. While historically petitioning developed as a means for individuals to bring private grievances to leaders,[128] petitioning had evolved well before the American Revolution into a means for groups of citizens to request action on broader public policy issues.[129] Moreover, in England and in the colonies, group petitioning was closely linked to preexisting associations, and such petitions were important avenues for political participation for citizens, including otherwise disenfranchised ones.[130] In short, petitioning, like association and assembly, has historically played a central role in our democracy, and so cannot be ignored if the actual relationship between democracy and the First Amendment is to be understood properly.

Democratic theories which focus on speech alone rather than the broader Democratic First Amendment are not only too narrow, but they also lead to a misunderstanding about the fundamental nature of American democracy. Meiklejohn, Post, and Sunstein focus not just exclusively on speech, but on one particular type of speech: public debate over political, social, or policy issues. This debate, moreover, is envisioned in a particular way. Meiklejohn describes a civilized debate following rules of order.[131] Post emphasizes that public discourse, to be effective, must constitute "rational deliberation" (though he concedes that this requirement is in deep tension with his tolerance for incivility).[132] And Sunstein's description of democratic deliberation is quintessentially rational.[133] This is not

[126] SUNSTEIN, *supra* note 110, at 19.
[127] KROTOSZYNSKI, *supra* note 8, at 6, 11.
[128] *Id.* at 83, 85–86.
[129] *Id.* at 86, 88.
[130] Mazzone, *supra* note 49, at 722–25.
[131] MEIKLEJOHN, *supra* note 99, at 24–26.
[132] POST, *supra* note 104, at 145–47.
[133] SUNSTEIN, *supra* note 110, at 18–19.

surprising—after all, speech is widely associated in our culture with rationality. But real democracy does not work this way, nor does the broader Democratic First Amendment. Rational discourse is certainly (at least ideally) a part of our system of self-governance, but it is just a part. Associations can bond citizens on profoundly emotional terms such as love of nature (the Sierra Club) or guns (the NRA), with no need for rational explanation. And assemblies often send profoundly emotional messages of joy or rage, with little attempt at rationality. Antiwar rallies are not like debate club meetings. And while Martin Luther King, Jr. was a profoundly thoughtful man, nobody believes that the effectiveness of the civil rights protests he led stemmed only or primarily from rational arguments as to the justness of their cause. Indeed, sometimes, as arguably with Occupy and Donald Trump rallies, the *only* message sent by an assembly is one of rage, and demand for largely undefined change. This is not discourse or deliberation, but it is surely a part of our democracy.

One final point is in order about the workings of the Democratic First Amendment. Until now, I have emphasized the fact that the rights of association, assembly, and petition are as important as speech and the press to an effective democracy, and that all of these rights share common roots and purposes. They are distinct rights but, as the Supreme Court has said, "cognate."[134] To say that they are distinct, however, is not to say they are unrelated. To the contrary, these rights usually operate in combination with one another, and are much more effective in combination as well. A complete discussion of how these democratic rights interact is impossible in this space,[135] but some relationships are obvious. Speech is the lifeblood of associations, because the formation and activities of associations require speech. Group petitioning is fundamentally linked to assembly, since before the advent of mass, electronic communication, assemblies were the only means to create such petitions. Speech is greatly enhanced by association and assembly, because speech on behalf of large groups of citizens is far more likely to influence others (including public officials) than that of individuals acting alone. Indeed, the interrelationship between these rights is so deep that sometimes they blend together, creating a kaleidoscopic effect.

These relationships are not just theoretical, they are real and historically demonstrable. Thus in Ron Krotoszynski's discussion of the Selma March of 1965, he concedes that "the event was a synthesis of speech, assembly, association, and *petition*," though his focus is on the

[134] *See supra* text accompanying notes 93–98.

[135] For a more complete discussion of these relationships, see Bhagwat, *supra* note 63, at 995–99.

last.[136] Tabatha Abu El-Haj's description of street politics similarly reveals an unrestrained mixture of speech, association, assembly, and sometimes petitioning, although her particular focus is on assembly.[137] And Larry Kramer has noted the fundamental importance in the colonial period of a combination of assembly and petitioning, as a means of political participation.[138] It is these forms of collective, complex actions combining groups, assemblies, speech, and petitions that have given American democracy its vibrancy.

The kaleidoscopic nature of the Democratic First Amendment has an important consequence: it means that studies which focus exclusively on one or two rights of the Democratic First Amendment will necessarily produce an impoverished vision of the First Amendment, and of its relationship to democracy. Once the First Amendment is seen as a whole, a clearer and more accurate picture emerges of how American democracy functions, and why the First Amendment in its entirety is an essential part of that process.

There is, however, one piece of the puzzle unresolved: how the Democratic First Amendment interacts with the *representative* nature of American democracy. As noted earlier, one of the key weaknesses of Meiklejohn's description of American democracy is that he neglects its representative nature. There are, as we shall see, similar ambiguities about how Post's public discourse, as well as Sunstein's democratic deliberation, fit into a representative system. As it turns out, the role of democratic rights in a representative system of democracy raises some rather complicated questions, reflecting sharp disputes in the early Republic about the fundamental nature of citizenship in a representative system. It is to these questions that we now turn.

III. MODELS OF CITIZENSHIP

Ours is a representative democracy. Aside from a handful of narrow exceptions—mainly town meetings in New England, and the various popular initiative processes that emerged during the Progressive era—essentially all laws in this country are adopted by legislatures made up of elected representatives.[139] Indeed, in *Federalist No. 10*, Madison invoked

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[136] KROTOSZYNSKI, *supra* note 8, at 12–13.

[137] Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 554–61 (2009).

[138] LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 25–27 (1994).

[139] *Cf.* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (holding a constitutional challenge to a provision authorizing popular initiatives added to Oregon Constitution in 1902 was nonjusticiable).

the representative nature of the system it created as a major strength of the new Constitution.[140] This obvious point, however, creates some difficulties for democratic First Amendment theory. The difficulty, in a nutshell, is that if laws are to be made by elected representatives, of what use is public debate on policy issues among citizens who have no direct say over legislation? And for that matter, what is the relevance of other forms of citizen activism, including association and assembly, in such a system?[141]

The answer to both these questions at first glance seems obvious—even if citizens do not directly make laws, they do vote to choose representatives, and surely First Amendment liberties are relevant to that process of choosing. Perhaps, but perhaps not. As it turns out, it all depends on what we believe to be the nature of representation. When citizens select legislative representatives, they do not vote solely, or even necessarily primarily, based on the substantive policy positions adopted by the candidates. This is true for two reasons: first, because no candidate can possibly match all of a voter's policy preferences, compromise is necessary; second, and more importantly, representatives are not meant to be simple conduits for the views of their constituents. Rather, they are supposed to, as Madison puts it, use their "wisdom [to] discern the true interest of their country."[142] In a similar vein, Cass Sunstein has convincingly argued that the choice of the First Congress to refuse to include in the Bill of Rights a right to instruct one's representatives (and for that matter, Madison's choice to drop that provision from George Mason's Master Draft) clearly reflected the view that representatives were to deliberate with their colleagues with an open mind on the issues before them.[143] But this again suggests that citizens should choose representatives based on their "wisdom," knowledge, and open-mindedness, not based on their substantive positions. And if that is the case, what is the point of substantive discussions among citizens?

For Meiklejohn, the tension described above appears to be irresolvable. He avoids it simply by assuming (inaccurately) that our democracy is a direct one, analogous to town meetings.[144] Post does not directly address the issue. It is in Sunstein's work, however, that this ambiguity is most apparent. Throughout his book *Democracy and the*

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[140] THE FEDERALIST NO. 10, at 46–47 (James Madison) (Garry Wills ed., 1982).

[141] The one First Amendment right that, of course, has no difficulty with representative democracy is petitioning, which is meaningful *only* in a representative system, since in a direct democracy voters can hardly petition themselves.

[142] FEDERALIST NO. 10, *supra* note 140, at 46–47.

[143] SUNSTEIN, *supra* note 110, at 242.

[144] MEIKLEJOHN, *supra* note 99, at 24–26.

Problem of Free Speech, Sunstein insists on the deliberative nature of American democracy.[145] He is, however, studiously ambiguous about *who* exactly is supposed to be doing this deliberation. Most of the time, he appears to envision citizens doing the deliberating, since he ties deliberation to speech by citizens.[146] When he discusses the rejected right of instruction, however, he clearly views deliberation as occurring among representatives.[147] But of course, it matters a great deal from a First Amendment perspective which model we believe better reflects American democracy.

As it turns out, this conflict between two different models of representation can be traced to the very beginnings of our Republic, as revealed by two major political crises: the debate over the Democratic-Republican societies during the Washington Administration, and the controversy surrounding the Sedition Act during the first Adams Administration. In each of these instances, disputes between Federalists, led by John Adams and Alexander Hamilton, and Republicans, led by Thomas Jefferson and James Madison, brought to the fore two distinct views about the role of citizens in a representative democracy.

The Democratic-Republican societies were private groups of citizens, supportive of the French Revolution, which operated in the United States between 1793 and 1795. Their history has been recounted in detail elsewhere, notably by Robert M. Chesney, and will not be repeated here.[148] Unsurprisingly, the societies were generally associated with Jeffersonian Republicans, who were generally Francophiles, and opposed by the Federalists, with their more Anglophile orientation. For our purposes, the key fact is that the Federalist objection to the societies was based on their view that such groups had no place in a representative system. As both Chesney and James P. Martin discuss in detail, the Federalist vision of representative government was that citizens should elect their representatives based on their abilities, but then leave deliberation over public issues to those representatives.[149] A corollary of this narrow view of citizenship was that permanent, private groups of citizens dedicated to political issues, including critiquing representatives, were entirely

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[145] *See, e.g.*, SUNSTEIN, *supra* note 110, *passim*.

[146] *Id.* at xvii, 19, 130, 244–45.

[147] *Id.* at 242.

[148] Chesney, *supra* note 51, *passim*; *see also* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 577–81 (2010); Mazzone, *supra* note 49, at 734–42.

[149] James P. Martin, *When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117, 129–30, 174 (1999); Chesney, *supra* note 51, at 1542–43.

illegitimate. Only representatives could speak for the people, and when private groups purported to do so, they violated basic democratic precepts.[150] Ultimately, when President Washington endorsed this critique in a speech, the societies were forced to disband because of Washington's unmatched prestige.[151] And a few years later, similar thinking led to the adoption by a Federalist-dominated Congress and President Adams of the Sedition Act of 1798, which explicitly prohibited both organized opposition to government measures and seditious speech about the government.[152]

What is noteworthy about the Federalist model of citizenship in representative democracies is how restricted a role it leaves for the liberties protected by the Democratic First Amendment. Criticism of the work of representatives is generally suspect, and indeed, citizens and the press were not generally expected to consider the wisdom of legislation at all.[153] Permanent associations of citizens, or at least those directed at political issues, were also highly suspect because they were usurping the exclusive role of elected officials as representatives of the people.[154] At most, what citizens could do in this model was occasionally assemble in public to discuss matters, without any permanent groups or structures,[155] and in case of great need, address petitions to their representatives to communicate their views.[156]

This stunted view of citizenship and of the First Amendment is of course entirely inconsistent with modern sensibilities and with modern readings of the First Amendment. It is important to note, however, that the Federalist model did not go unchallenged even during the 1790s. Rather, Republican supporters of the societies and later opponents of the Sedition Act, including Madison and Jefferson, articulated a strong vision of citizenship which was much more active. The Republicans also explicitly recognized the importance of political associations as a form of intermediation between citizens and the state, and as vehicles through which citizens could safely and effectively articulate criticism of government policies.[157] Significantly, these arguments in support of active

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[150] Martin, *supra* note 149, at 126–27, 134–35, 152–53; Chesney, *supra* note 51, at 1542–43, 1578–79.

[151] Chesney, *supra* note 51, at 1560–74.

[152] *Id.* at 1574–75; Martin, *supra* note 149, at 122–23.

[153] Martin, *supra* note 149, at 126–27, 144–45, 174; Chesney, *supra* note 51, at 1542, 1560–62.

[154] Chesney, *supra* note 51, at 1542–43, 1560–61; Martin, *supra* note 149, at 132–34, 144, 152–53.

[155] Martin, *supra* note 149, at 171; Chesney, *supra* note 51, at 1558–60.

[156] Chesney, *supra* note 51, at 1543; Martin, *supra* note 149, at 160–66.

[157] Chesney, *supra* note 51, at 1565–69.

citizenship were often tied directly and explicitly to First Amendment rights.[158] And at the end of the decade, Republicans reprised and expanded these arguments to develop their arguments against the Sedition Act of 1798, which were ultimately politically (if not legally) successful.[159]

In short, what becomes relatively clear is that in the very early American Republic, two very different models of citizenship in a representative democracy coexisted with each other. One, the Federalist model, envisioned a largely passive, respectful, and subordinate citizenry. The other, the Republican model, was much more active, collective, disrespectful, and even sometimes incendiary. It is doubtful if either side had fully thought out its competing vision before being forced to do so during the great crises of the 1790s, but obviously both views had to have been latent in their thinking before then. The vision of the Democratic First Amendment that I have outlined above is entirely consistent with the Republican model, but not with the Federalist one. As a matter of positive law, the Supreme Court, as well as essentially all scholars, have obviously adopted the Republican model. I would argue that this is entirely justified, as a matter of history and common sense. After all, the Federalists were not the original proponents of the First Amendment, or any Bill of Rights; to the contrary, they opposed such amendments consistently. The Bill of Rights was championed by Jefferson,[160] and by anti-Federalist opponents of the Constitution,[161] many of whom (such as James Monroe) eventually became part of the Republican movement. And it was, of course, James Madison who actually introduced the Bill of Rights into Congress. Given this uncontroverted background, it seems entirely appropriate to read the political rights of the Democratic First Amendment from a Jeffersonian-Republican angle.

CONCLUSION

The five rights of the Democratic First Amendment—speech, press, assembly, association, and petitioning—are the linchpins of American democracy. They protect and nurture the sort of active citizenship and collective action that have been the lifeblood of our system of government since its founding. As this Article demonstrates, however, in recent years

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[158] *Id.* at 1565 n.203, 1567–68.

[159] *See generally* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME ch. 1 (2004); LEVY, *supra* note 21, at 301–23.

[160] *See* PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 69–70 (1999); 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826, at 512–13 (James Morton Smith ed., 1995).

[161] *See* HERBERT J. STORING, WHAT WERE THE ANTI-FEDERALISTS FOR ch. 8 (1981).

the judiciary has restricted, and largely forgotten the independent significance of many of these rights, focusing instead myopically on free speech. These developments are deeply unfortunate for two related reasons. First, this judicial truncation of the First Amendment is inconsistent with the deeper structure and purposes of the Amendment. Sensible interpretation requires attention to structure and purpose, regardless of one's interpretational philosophy. As a result, failure to attend to structure and purpose leads to interpretations and outcomes that lack both internal cohesion and logical justification.

Second, these developments impose substantial barriers to a revival of the kind of active citizenship that our democracy desperately needs. The reason, quite simply, is that the Court's current fragmented and narrow approach to the First Amendment regularly leads to the narrowing or even eradication of important democratic rights. Nonexpressive, but politically relevant associations are unprotected under current law.[162] Reliance on free speech doctrine exclusively permits the state to impose time, place, and manner restrictions on public assemblies that are stifling in practice, and inconsistent with the Assembly Clause in principle.[163] And the right to petition has been stripped of the legal immunity that it was historically accorded.[164] In combination, such judicial abdication results in systematic underprotection of important political movements such as Occupy and Black Lives Matter, which are some of the primary vehicles for active citizenship in contemporary America. There are signs all around us that the American people may be ready for a revival of active citizenship. But unless courts are willing to reinvigorate the Democratic First Amendment, that revival risks being hobbled by unnecessary and unconstitutional restrictions on the ability of citizens to associate, to assemble in public places, and to force public officials to attend to their demands.

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[162] Roberts v. U.S. Jaycees, 468 U.S. 609, 612, 626–27 (1984) (denying associational protection to U.S. Jaycees, a national membership corporation that nurtures the development of young men's civic organizations, because admitting women as full voting members did not impair its male members' freedom of expressive association).

[163] Thomas v. Chi. Park Dist., 534 U.S. 316, 323–24 (2002) (upholding an ordinance requiring individuals to acquire permits for large assemblies in public parks); Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 12 (1st Cir. 2004) (upholding denial of protestors' request to modify a designated demonstration zone at 2004 Democratic National Convention because prohibition was content-neutral).

[164] McDonald v. Smith, 472 U.S. 479, 485 (1985) (permitting libel claim based on statements in petitions to national officials).