

**ALL ASSEMBLE:
ORDER AND DISORDER
IN LAW, POLITICS, AND CULTURE**

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INTRODUCTION

It is December 22, 2011. A gathering of citizens stands holding hands to form a human chain around a large, square, yellow tent. They are members of Occupy Albany, a group that believes that “the voice of the People is drowned out by the corrupting influence that concentrated economic power exerts on the government”—and that this largely explains the economic crisis the United States has faced since 2008.¹ Their demand? A “true democracy, unshackled from the corrosive influence of concentrated economic power.”² The yellow tent the crowd protects has housed the group’s informational materials for weeks. On this particular winter evening, the collective stands in still formation for several long hours. As the sun begins to set, there is movement. Seemingly spontaneously, members of the group, smiling and confident, lift the tent. Thus begins a procession through the streets of Albany. Protestors trail the tent, chanting and carrying handmade signs that read, “This is What Democracy Looks

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1 Press Conference, Occupy Albany (Dec. 2011), *available at* <http://www.occupyalbany.org/working-groups/political-strategy/press-conference>.

2 *Id.* For more on the grievances of the movement see THE GLOBAL JUSTICE CLINIC (NYU SCHOOL OF LAW) & THE WALTER LEITNER INT’L HUMAN RIGHTS CLINIC AT THE LEITNER CTR. FOR INT’L LAW & JUSTICE (FORDHAM LAW SCHOOL), PROTEST AND ASSEMBLY RIGHTS PROJECT, SUPPRESSING PROTEST: HUMAN RIGHTS VIOLATIONS IN THE U.S. RESPONSE TO OCCUPY WALL STREET 9–10 (2012) [hereinafter SUPPRESSING PROTEST 2012 REPORT].

Like” and “We Aren’t Camping. We are Building a Revolution.”³ The crowd weaves through Albany’s rush-hour traffic for more than an hour.

Flash back two hundred years to a different winter evening. It was January 24, 1793, and a group of seafarers had taken to the streets, with an ox head—the remains of a public meal that had been held in front of the State House. Based on newspaper accounts (rather than a *YouTube* video), historian Simon P. Newman recreates the scene:

Following the great civic feast a group of seafarers took possession of the horns of the roasted ox and marched with them to the liberty pole that stood in the newly named Liberty Square. Once there these impoverished men announced their intention of paying to have the horns gilded and mounted atop the liberty pole, in honor of the Boston celebration and the event it commemorated.⁴

The procession was the final one on a day in which residents of Boston celebrated a military victory by the French revolutionaries. The choice to celebrate the French Revolution was an implicit critique of the Federalist administration’s perceived aristocratic tendencies. The uniformed butchers, who carved the meat at the public meal, were described as “carving up the ox on the ‘Altar of Democracy.’”⁵

As in Albany, the Boston crowd transformed a mundane object into a political symbol by marching it through the city streets. Although violence did not in fact occur either night, the specter of both disorder and violence was clearly present in both—in Boston due to the crowd, the alcohol, and the dwindling daylight, while in Albany due to the politics, the traffic, and the police presence.

The history of outdoor assembly in the United States is one of continuity and discontinuity. While citizens have periodically taken to the streets in inconvenient and risky ways throughout our history, our contemporary attitudes, as evidenced in law, practice, and public discourse, stand in stark contrast to the attitudes of previous generations of Americans. Contemporary Americans value individual freedom and various sorts of expression far more than previous generations, but our fears of the disorder associated with outdoor gatherings are undermining the right of peaceable assembly and the critically important form of political participation it safeguards.

3 For a video of the procession, see #*Occupy Albany: D22: The Day of Eviction*, VIMEO (Dec. 27, 2011, 9:40 PM), <http://vimeo.com/34275304>.

4 SIMON P. NEWMAN, *PARADES AND THE POLITICS OF THE STREET: FESTIVE CULTURE IN THE EARLY AMERICAN REPUBLIC 2* (1997).

5 *Id.* at 123.

By comparing the recent experience of the Occupy movement with the experiences of ethnic, religious, and labor assemblies in the late nineteenth century, this Article seeks to develop two themes.⁶ First, it seeks to remind us that outdoor assembly is ever present in American history and that such assemblies are inevitably messy and inconvenient.⁷ Frequently, they create a risk of disorder, and occasionally even lead to violence, especially against property.⁸ The Albany procession, which by historical standards was quite orderly and unthreatening, for example, ended with police officers pepper spraying protestors and destroying their tent with a chainsaw. Second, it uses this history to open up a conversation about the reasons that tolerance of the disruption associated with outdoor gatherings is necessary to sustain the central functions of a form of political participation that has been with us from time immemorial.

Contemporary Americans are exceedingly wary of the risks presented by crowds. Disorder—from increased traffic and trampled grass to police confrontations and smashed windows—makes most of

6 This Article is the third in a series in which the first focused on changes in our understanding of the contours of the right of assembly. Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009) [hereinafter Abu El-Haj 2009]. The second recounted changes in the ways that municipalities regulate outdoor gatherings, situating this change in a pattern of similar regulatory changes with respect to other political practices. Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1 (2011) [hereinafter Abu El-Haj 2011]. This Article primarily addresses the nature of public assemblies and changes in public attitudes toward them as evidenced in law and public discourse, but also explores how this has affected both the right and practice of assembly.

7 Until recently, among First Amendment scholars, other than myself, only Timothy Zick has forcefully argued that outdoor public expression remains important, raising concerns about the fact that speakers are increasingly displaced from public places through law, policing, architecture, and social and political force. See TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES*, at xii (2009). Recent years, however, have seen renewed interest in the protection of dissenting collective action. See, e.g., RONALD J. KROTOSZYNSKI, JR., *RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 2-7*, 152 (2012) (documenting the rise in reluctance of officials to be confronted by dissenters and overuse of security concerns as a justification for preventing protestors such access, and arguing that while the speech and assembly provisions of the First Amendment do not provide a right to an audience with government officials and access to government spaces, the Petition Clause, at least in some circumstances, does).

8 See, e.g., John D. McCarthy et al., *Policing Disorderly Campus Protests and Convivial Gatherings: The Interaction of Threat, Social Organization and First Amendment Guarantees*, 54 SOC. PROBS. 274, 275 n.2, 280 (2007) (noting as common sociological knowledge that "[p]ublic gatherings of all kinds have the potential to become disorderly" even as "only a relatively small percentage . . . of political protest gatherings in the United States . . . involve violence against property or person").

us extremely nervous. Any hint of a risk of violence, however incidental, frankly terrifies the public, the police, and lawyers.

The result is that Americans today accept a high level of regulation of outdoor assembly. This is evident in the laws to which assemblies are subject, the responses of local governments to outdoor assemblies, the decisions of courts, and the public's attitudes toward the crowds associated with movements such as Occupy.

Our intolerance of disorder, well short of violence, has implicated our constitutional freedoms.⁹ It facilitates a constitutional order that undervalues outdoor assembly and undermines democratic participation.

Outdoor assembly has a variety of unique attributes as a form of political participation—perhaps most importantly, it is social by definition.¹⁰ Ideas and political commitment alone turn out to be poor motivators for political engagement.¹¹ Political participation is, instead, importantly driven by relationships with others.¹² Congregating outdoors for both social and political ends is, therefore, important because it is a face-to-face experience of citizenship—one that is especially significant for dissenters.

Gathering outdoors, however, inevitably involves complications, some more serious than others. For one, the very fact of collecting outdoors, typically in urban spaces, causes inconvenience. For another, disruption of ordinary routines is often necessary to challenge that which is taken for granted. Politically, disruption can be an essential element of the power of congregating together, especially for dissenting groups. Disruption of ordinary routines—even mundane traffic routines—however, creates risks, including, albeit rarely, the

⁹ See *Kuznetsov v. Russia*, Judgment (Merits and Just Satisfaction), App. No. 10877/04 ¶ 44, Eur. Ct. Hum. Rts. (Oct. 23, 2008) as quoted in SUPPRESSING PROTEST 2012 REPORT, *supra* note 2, at 54 (“[A]ny demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic . . . it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly . . . is not to be deprived of all substance.”).

¹⁰ See generally Tabatha Abu El-Haj, *Friends, Associates and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53, 82 (2014) (noting that a “foundational sociological finding . . . is that information rarely prompts political activity unless it is transmitted through personal ties”).

¹¹ *Id.*

¹² See, e.g., Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, 90 FOREIGN AFF. 28, 34–35 (2011) (discussing a sociological study of the 1948 U.S. presidential election that found that “mass media alone do not change people’s minds;” rather, ideas transmitted in the media must be “echoed by friends, family members, and colleagues” before political beliefs are formed).

risk of violence, typically incidental and directed at property.¹³ Because disorder is inherent to the practice of assembling outdoors, tolerance of this risk is essential to protecting this important avenue of political participation.

A quick read of the First Amendment's text might lead one to conclude that like the freedom of speech, the right to assembly, limited as it is by the word *peaceable*, "does not encompass the right to cause disruption."¹⁴ While courts today regularly define *peaceable* narrowly, for example, by defining nonviolent, illegal action as unpeaceable, this is a distinctly modern interpretation.

As with all language, the term *peaceable* is not self-defining. Nineteenth-century American law accommodated the inconveniences associated with assemblies, regulating only when they descended into disorder just short of violence.¹⁵ Contemporary constitutional law, by contrast, upholds virtually all means devised by government officials to quash the disruptive elements of assemblies, so long as they do not engage in content or viewpoint discrimination.¹⁶

The Article's ultimate purpose is provocative. While contemporary law's intolerance for mob violence, and anything even remotely approaching it, is laudable, it has not been without its costs. The history of public assembly poses a challenge to our apparent decision to value safety above all else. In our understandable nervousness about disorder and condemnation of violence, we have lost sight of the fact that disorder and disruption arise out of the very nature of assembly—a crowd out of doors being policed by government officials. Perhaps more critically, we have lost sight of the fact that for dissenters, in particular, disruption is central to the efficacy of public protest.¹⁷ While unlawful and violent actions on the part of gatherers obviously must be addressed, a robust right of assembly would seem to require a recalibration of the balance.

Like free speech, free assembly needs breathing room, needs room for disorder and tolerance of the related, if low, risk of violence

13 Cf. SUPPRESSING PROTEST 2012 REPORT, *supra* note 2, at 72–82 (documenting violence on the part of police in response to Occupy Wall Street).

14 *Startzell v. City of Philadelphia*, 533 F.3d 183, 198 (3d Cir. 2008).

15 See *infra* notes 90–93 and accompanying text.

16 Interestingly, international and European human rights laws are in certain, critical respects closer to nineteenth-century American law than contemporary American law when it comes to protecting assemblies in public spaces. Cf. SUPPRESSING PROTEST 2012 REPORT, *supra* note 2, at 54–61 (summarizing international norms including tolerance for disorder and incidental violence and a presumption against permit requirements).

17 See *infra* notes 486–87 and accompanying text.

that comes with it. Our democracy is diminished when assemblies are significantly regulated in advance. By allowing authorities to ritualize and sanitize the act of assembling together outdoors, courts have permitted authorities to sap assemblies of their ability to “impress their strength upon the public mind” as well as their ability to be politically life-changing events for participants.¹⁸ Robbed of spontaneity and agency, much of the experience and power of the people outdoors is lost. Moreover, both the experience and the political value of gathering outdoors are undercut when authorities are able to physically and symbolically marginalize these important moments of political participation. Finally, participating in protest action is chilled when local police use a wide array of minor offenses to arrest protestors, even when it is done out of a sincere belief in their obligation to maintain order.

The Article consciously focuses not on historically momentous examples of the people outdoors (the Boston Tea Party, Martin Luther King’s March on Washington, or historic Vietnam protests).¹⁹ Instead, it recounts a host of mundane and long-forgotten controversies over outdoor assembly from the nineteenth century primarily involving ethnic, religious, and labor groups. It does so for two reasons. First, the extraordinary builds on the ordinary. Second, the importance of public gathering does not depend on whether the gatherers achieve their ends or become a major political, social, or religious movement. Rather, the importance lies in the continuing availability and vibrancy of outdoor assembly in the repertoire of American politics and in the unique experience for participants of gathering as political actors.

The removal of Occupy Albany, even the movement itself, is likely to be forgotten within the decade. Still, for participants and for our democracy, the very presence of citizens gathered in public has been valuable. The gatherings have offered important opportunities for participants to develop a collective identity through new relationships, shared experiences, and ongoing discussion. They have served as a reminder of the possibility and power of mass mobilization, and they have shifted political debate, as evidenced by the widespread use of the dichotomy between the ninety-nine percent and the one percent.

¹⁸ *Anderson v. City of Wellington*, 19 P. 719, 722 (Kan. 1888).

¹⁹ For a quick recap of some of these momentous marches, see KROTOSZYNSKI, *supra* note 7, at 122–26 (describing key marches between 1880–1980 and the petitioning element involved in them).

Part I uses the recent experience of the Occupy movement as a window into assembly today. After a brief overview of the movement's origins, goals, and use of public spaces, it focuses on the legal order within which Occupy was forced to operate. Occupy's experience provides a point of comparison for the history of outdoor assembly in the nineteenth century recounted in Part II.

Through the stories of various ethnic, religious, and labor assemblies in the late nineteenth century,²⁰ Part II illustrates that nineteenth-century Americans were more tolerant of the disorder created by the people outdoors and discusses the ways that nineteenth-century law accommodated the inherent tension between order and disorder, between a right of peaceful assembly and the concomitant risk of unlawful assemblies. Specifically, it shows that nineteenth-century law was more tolerant of the inconvenience associated with the people outdoors because Americans at the time—both ordinary citizens and those involved in the legal system—placed great value on the right of assembly as a privilege and immunity of American citizenship. The constitutional right of assembly, as such, was more robust, even though the right was not enforceable in federal courts and even though, by our standards, nineteenth-century Americans were quite intolerant of many First Amendment freedoms that we value today (in particular, individuality and free exercise of religious liberty). Finally, Part III describes the origins of contemporary attitudes toward public assembly.

The Article concludes with the suggestion that the history recounted here raises serious questions about whether we have gone too far in the direction of order. It suggests that it is time to revisit the political value of discord and explores reasons to embrace the inconvenience and disorder associated with the people outdoors, including the risks of incidental violence. In doing so, it offers some preliminary thoughts as to how a more robust right of assembly could be adapted to modern conditions.

²⁰ The history presented in this Article is based on comprehensive Ph.D. dissertation research in which local newspapers, court documents, Salvation Army records, and the municipal codes of thirty-three of the one hundred most populous American cities in 1880 were systematically reviewed. For a full account of the methodology as well as primary and secondary sources see Tabatha Abu El-Haj, *Changing the People: Transformations in American Democracy (1880–1930)* 11–15, 376–98 (Sept. 2008) (unpublished Ph.D. dissertation, New York University) (on file with author).

I. OUTDOOR ASSEMBLY TODAY

Americans have assembled in public places for political, religious, civic, and social ends for over two hundred years.²¹ As Justice Owen Roberts remarked in 1939, “Wherever the title of streets and parks may rest, . . . time out of mind, [they] have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”²²

Physical demonstrations are not a relic of the past. Despite population growth, globalization, and the rise of the Internet, Americans have not given up on gathering outdoors.²³ Even before Occupy emerged, tens of thousands participated in labor demonstrations in Wisconsin and elsewhere in the Midwest to protest efforts to quash public unions.²⁴ Protesters in Madison, Wisconsin, deliberately designed Walkerville, in June 2011, to evoke comparisons with “Hooverilles,” the shantytowns constructed during the Great Depression, which were named to draw attention to President Herbert Hoover’s perceived failure to address widespread social and economic suffering.²⁵

Occupy, the most widespread and persistent recent phenomenon of Americans taking the streets officially began on September 17,

²¹ Cf. *City of Chicago v. Alexander*, No. 11 MCI-237718, 2012 WL 4458130, at *15–19 (Ill. Cir. Ct. Sept. 27, 2012) (listing significant assemblies that have taken place on Chicago’s Grant Park since its dedication to the public in 1835).

²² *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring).

²³ Some might ask whether the people gathering outdoors is outdated. Do we need demonstrations in the world of Twitter and Facebook? Perhaps, nineteenth-century Americans tolerated the disorder created by the people outdoors because the people outdoors were more important in an era when elections were more problematic. On the other hand, large-scale social and political change has yet to happen without people taking to the streets in great numbers, preferably with energy and spontaneity. As the recent experiences of the Arab Spring only too vividly demonstrate, Facebook and Twitter alone will not carry the day. People, not talk, make history. See James Glanz & John Markoff, *Egypt Leaders Found ‘Off’ Switch for Internet*, N.Y. TIMES, Feb. 15, 2011, <http://www.nytimes.com/2011/02/16/technology/16internet.html> (describing Hosni Mubarak’s shutdown of internet access in response to protests). Recent experience appears to vindicate Professor Zick’s assertion that the evidence shows that, notwithstanding the rise of virtual spaces, the people continue to choose to exercise their First Amendment rights in public. See ZICK, *supra* note 7, at xii (criticizing First Amendment scholars for having “abandon[ed] the field [of public expression] for trendier subjects and agendas”).

²⁴ See Peter Grier, *How Long Can Wisconsin Protesters Occupy the State Capitol?*, CHRISTIAN SCI. MONITOR, Feb. 28, 2011, <http://www.csmonitor.com/USA/Politics/The-Vote/2011/0228/How-long-can-Wisconsin-protesters-occupy-the-State-Capitol> (describing a sit-in in the Wisconsin State Capitol).

²⁵ See Greg Botelho, *Wisconsin Activists Create Walkerville to Taunt Governor, Tout Change*, CNN, June 5, 2011, <http://www.cnn.com/2011/POLITICS/06/05/wisconsin.walkerville>.

2011, with Occupy Wall Street.²⁶ Inspired by recent international protests, the movement “used the occupation of public space and mass demonstrations to call attention to a wide array of shared concerns” about income inequality and the pervasive influence of special interests on our government.²⁷

Its most distinctive practice was the introduction of a nightly assembly wherein participants debated political but also strategic and administrative concerns. In Zuccotti Park, some recount, “[O]ne could witness—and quickly become part of—dozens of simultaneous small group conversations about student debt, veterans’ post-traumatic stress, or the complexities of credit-default swaps, ‘fracking,’ and more.”²⁸ Night and day, “[p]eople filled the walkways and sidewalks surrounding the occupation They ate, chatted, held spontaneous teach-ins and occasionally nasty fights.”²⁹

The General Assembly, in turn, gave birth to the practice of encamping in prominent places to attract attention but also encouraged those who came from far afield to stay and participate. Replicas of Occupy Wall Street quickly popped up in cities across the country.³⁰

These occupations around the nation have functioned as a reminder that “[p]ublic political assemblies . . . serve democracy by bringing individuals together to speak directly to each other, exchange ideas, [and] confront ideological and political difference.”³¹ By “creat[ing] the physical and discursive space necessary for political debate on issues of public interest” these occupations became places where new ideas and political identities emerged, where activists were born and rejuvenated.³²

Quite unlike the ritualized marches on Washington or the significantly confined protests at recent political conventions, the Occupy assemblies evidenced an energy and spontaneity that was unusual and

26 SUPPRESSING PROTEST 2012 REPORT, *supra* note 2, at 6; *see also id.* at 14 (noting that “Occupy Wall Street began in the context of an intense period of mass social mobilization around the globe” in which “[m]any countries erupted in mass protest . . . in a way rarely seen previously”).

27 *Id.* at vi.

28 *Understanding Occupy*, 11 CONTEXTS 12, 13 (2012).

29 *People v. Nunez*, 943 N.Y.S.2d 857, 861 (N.Y. City Crim. Ct. 2012) (quoting Quinn Norton, *Scenes from the Occupation: Before and After the Wall Street Eviction*, WIRED, Nov. 16, 2011, <http://www.wired.com/threatlevel/2011/11/zuccotti-before-after/all>).

30 *See* SUPPRESSING PROTEST 2012 REPORT, *supra* note 2, at 8 (“Occupy protests formed in Washington D.C., Oakland, California, and Anchorage, Alaska, among many others in the United States.”).

31 *Id.* at 51.

32 *Id.*

inspirational to many.³³ Among other things, many occupations proceeded without obtaining required permits from local authorities.³⁴

Cities, however, soon tired of the inconveniences associated with the Occupy movement. They focused in particular on the long-term tent cities that occupations around the country had set up.

Local and constitutional law was on their side, and cities quickly were able to contain, and in some cases even disperse, the gatherings.³⁵ In Philadelphia, for example, while Mayor Michael A. Nutter was initially quite tolerant of Occupy Philadelphia, offering the group an open permit and a waiver of the insurance fees that normally ap-

³³ For more on the cabining of protests, see Abu El-Haj 2009, *supra* note 6, at 548–52 (demonstrating the extensive regulations, requirements, and conditions that confine or burden large gatherings and political protests in Washington, D.C., and other cities nationwide).

³⁴ Occupations in Albany, Augusta, New Haven, Portland, Rochester, Sacramento, and Tucson proceeded without permits for various lengths of time. *See Mitchell v. City of New Haven*, 854 F. Supp. 2d 238, 242–44 (D. Conn. 2012) (discussing that Occupy New Haven set up in the Upper New Haven Green, located near Yale’s old campus, without any application for a permit from the City of New Haven and stayed there for several months); *Occupy Sacramento v. City of Sacramento*, 878 F. Supp. 2d 1110, 1112–13 n.5 (E.D. Cal. 2012) (noting Occupy Sacramento did not have a permit for overnight occupations of Cesar Chavez Plaza Park in early October 2011 and that the City rejected its application for such a permit in November 2011); *Miller-Jacobson v. City of Rochester*, 941 N.Y.S. 2d 475, 481 n.2 (N.Y. Sup. Ct. Monroe Cnty. 2012) (stating that Occupy Rochester never applied for a permit); *Occupy Tucson v. City of Tucson*, No. CV-11-699-TUC-CKJ, 2011 WL 6747860, at *8 (D. Ariz. Dec. 22, 2011) (noting that members of Occupy Tucson, located in Armory Park in downtown Tucson, did not seek a permit from the City of Tucson before gathering at the site); *Freeman v. Morris*, No. 11-cv-00452-NT, 2011 WL 6139216, at *2–3 (D. Me. Dec. 12, 2011) (noting that Occupy Augusta’s members assembled regularly in Capitol Park, strategically in view of the Maine State Capitol, without ever applying for a permit); *City of Albany v. Occupy Albany*, No. 1:11-cv-1524 (NAM/ATB), 2012 WL 4485693, at *2, *4 (N.D.N.Y. Sept. 27, 2012) (noting Occupy Albany began its occupation of Academy Park on October 21, 2011, but did not obtain a permit from the City until December 7, 2011, although this permit did not allow an encampment); *see also* Denis C. Theriault, *City to Occupy Portland: No More “Unpermitted” Meetings in Director Park*, PORTLAND MERCURY (June 15, 2012, 6:09 PM), <http://www.portlandmercury.com/BlogtownPDX/archives/2012/06/15/city-to-occupy-portland-no-more-unpermitted-meetings-in-director-park> (noting that after Occupy Portland was cleared from its original encampments in November of 2011, members of the group continued to regularly assemble without a permit in Director Park until the City issued a notice on June 15, 2012, announcing that it would no longer allow these unpermitted meetings); *see generally* SUPPRESSING PROTEST 2012 REPORT, *supra* note 2, at 119 (“Most of Occupy’s public marches and rallies in New York City have not been carried out with the permits required by local law.”).

³⁵ *See, e.g.*, SUPPRESSING PROTEST 2012 REPORT, *supra* note 2, at vii (“While after just two months city authorities dismantled many of the high-profile around-the-clock Occupy encampments that initially defined the movement, regular marches, demonstrations, and assemblies continue in many places, including New York City.”).

ply, the city and its leaders eventually changed their tune.³⁶ On November 25, 2011, fifty-one days after the encampment began, officials notified Occupy Philadelphia that it would need to clear Dilworth Plaza within forty-eight hours. A new, renewable, thirty-day permit was issued for the less central Thomas Paine Plaza. The new permit limited assembly to the hours of nine a.m. to seven p.m. and allowed only three small canopies, which had to be disassembled each day.³⁷ Other cities took less conciliatory approaches. In Oakland, city officials simply cleared the plaza where movement participants had encamped. Other cities followed suit.³⁸ There is even evidence that these cities moved in concert, consulting in advance with one another about how best to dismantle their occupations.³⁹ Removal actions were only the most dramatic final step in cities' efforts to quash the Occupy movement.

Pervasive regulation ensured that the movement had conflict with cities long before their efforts to remove the encampments. Right from the start, Occupy Wall Street clashed with city officials over ac-

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- 36 In several cities, including Augusta, New York City, and New Haven, mayors started out not enforcing permit requirements but then changed their minds. See, e.g., Anthony M. DeStefano, *City Eyes Permits for Occupy Wall Street*, NEWSDAY, Oct. 21, 2011, www.newsday.com/news/new-york/city-eyes-permits-for-occupy-wall-street-1.3263993 (“Mayor Michael Bloomberg indicated the city was about to start taking a tougher line with the Occupy Wall Street movement, perhaps by requiring permits for marches and demonstrations.”).
- 37 See Miriam Hill et al., *Police Clear Occupy Encampment, 52 Arrested*, THE INQUIRER (Nov. 30, 2011, 1:05 PM), http://www.philly.com/philly/news/breaking/20111130_Police_order_Occupy_Philly_to_leave_Dilworth_Plaza.html (reporting that “Mayor Nutter initially embraced the protest, arranged for his staff to meet with the movement’s representatives, and even provided electricity for their computers,” but that “Nutter began losing patience with the protesters as problems mounted at the site, including public urination, other unsanitary conditions and one reported sexual assault”); Tina Susman, *Another One Gone: Occupy Philly Camp Joins List of Cleared Camps*, L.A. TIMES (Nov. 30, 2011, 6:54 AM), <http://latimesblogs.latimes.com/nationnow/2011/11/occupy-philly-camp-dismantled.html> (noting that Occupy Philadelphia set up in Dilworth Plaza on October 6 and remained there until police evicted the protesters from that location on November 30, 2011, after protestors rejected the city’s offer of a permit that did not include overnight hours for a nearby location).
- 38 See *OWS Camp Crackdown Coordinated by US City Mayors*, RT (Nov. 15, 2011, 5:28 PM), <http://rt.com/usa/occupy-crackdown-oakland-mayor-419> (noting that concurrent with the City of Oakland’s clearing of Occupy Oakland’s gathering at Frank Ogawa Park, other cities, including New York City, Albany, Denver, and Salt Lake City, conducted Occupy sweeps as well).
- 39 See Joe Coscarelli, *Oakland Mayor Jean Quan: Eighteen Cities Discussed Occupy ‘Situation,’* N.Y. MAG. (Nov. 15, 2011, 2:38 PM), www.nymag.com/daily/intelligencer/2011/11/cities-conferenced-about-occupy-situation.html (explaining that the Mayor of Oakland admitted to participating in a conference call with eighteen other cities regarding the Occupy movement and noting that the recent crackdowns on Occupy in Oakland, San Francisco, Denver, New York City, and Chapel Hill seemed to have been coordinated).

cess to parks and streets. There were mass arrests on the Brooklyn Bridge for failing to have a parade permit and engaging in disorderly conduct by interrupting traffic.⁴⁰ These arrests were quickly succeeded by a controversy over whether Zuccotti Park could lawfully be cleared, given that it was a privately owned public space subject to a zoning permit requiring it to be open to the public around the clock.⁴¹ This question proved to be particularly intricate under the First Amendment's convoluted public forum doctrine.⁴² More notably, the question only arose because when the original assembly arrived at the city's park, the park was closed.⁴³

Occupy Albany's access to Academy Park was similarly complicated by questions of ownership because that park is partially owned by the state and partially owned by the city. Until December 22, city officials had generously, to their minds, allowed the assembly to remain in the city's portion of the park, refraining from prosecuting those who broke the curfew or other park rules.⁴⁴ New York's Governor, by contrast, had ordered state police troopers to arrest members of Occupy Albany as necessary.⁴⁵ More than eighty demonstrators were charged with disorderly conduct and trespass by state police in No-

40 See *Garcia v. Bloomberg*, 865 F. Supp. 2d 478, 482 (S.D.N.Y. 2012) (considering the claim of unlawful arrest by members of Occupy Wall Street who were arrested on the Brooklyn Bridge).

41 SUPPRESSING PROTEST 2012 REPORT, *supra* note 2, at 7; see generally John D. McCarthy & Clark McPhail, *Places of Protest: The Public Forum in Principle and Practice*, 11 MOBILIZATION 229, 232-34 (2006) (reviewing the recent trend to privatize large portions of what were once public places).

42 For a comprehensive analysis of the difficult legal issues involved in applying First Amendment rights to Occupy Wall Street, see Nancy Scola, *Lawyers for Occupy Wall Street Wade Through 'Legal Morass' of First Amendment Rights at Zuccotti Park*, CAPITAL, Oct. 18, 2011, www.capitalnewyork.com/article/politics/2011/10/3788610/lawyers-occupy-wall-street-wade-through-legal-morass-first-amendmen?page=all. Similar questions regarding when private spaces become public forums that are constitutionally required to be open for First Amendment activity also arose in Pittsburgh. See *BNY Mellon, N.A. v. Occupy Pittsburgh*, No. GD 11-025549, 2012 Pa. Dist. & Cnty Dec. LEXIS 17, at *28-29 (C.P. Allegheny Cnty. Pa. Feb. 2, 2012) (holding Mellon Green to be private property).

43 See SUPPRESSING PROTEST 2012 REPORT, *supra* note 2, at 7 ("When protesters arrived on Wall Street on September 17, they found that the New York Police Department (NYPD) had closed off much of Wall Street with metal barricades. Protesters ended up gathering in nearby Zuccotti Park, a one-square-block plaza in the financial district in lower Manhattan.")

44 See *City of Albany v. Occupy Albany*, No. 1:11-cv-1524 (NAM/ATB), 2012 WL 4485693, at *2 (N.D.N.Y. Sept. 27, 2012) (recounting negotiations between the city and the demonstrators in the Fall of 2011).

45 Michael Virtanen, *Occupy Rents Office Space*, THE DAILY NEWS, Jan. 10, 2012, at 5 (noting that "Albany officials let [Occupy Albany] stay in Academy Park . . . while Cuomo insisted state police enforce an 11 p.m. curfew in adjacent state-owned Lafayette Park").

vember 2011.⁴⁶ The spontaneous procession in Albany discussed in the Introduction was precipitated by the arrival of a court order, empowering local law enforcement to clear Occupy Albany's tents, including the informational tent, from Academy Park, in which the group had been encamped for three months.⁴⁷

Occupy's experience amply demonstrates the ways that cities today regulate virtually all assemblies, including those that are peaceful and minimally inconvenient. Individuals and organizations that wish to demonstrate, parade, or speak in public, must typically obtain a permit from government officials well in advance.⁴⁸ Occupy Albany, in particular, was required to navigate a complex legal landscape governing the group's access to Academy Park, the complexity of which was exacerbated by the fact that the park is partially owned by New York State and partially owned by the city and thus subject to two separate regulatory authorities.⁴⁹

Even where permits are not required or have been issued, assemblies may be dispersed for actual and anticipated disorder, including obstructions of vehicular or pedestrian traffic.⁵⁰ In New York City, author Naomi Wolf simply questioned a police officer's account of the conditions of a permit issued to Occupy Wall Street, and she was arrested for obstructing pedestrian traffic.⁵¹ Stories such as Wolf's are not uncommon.⁵² Typical charges include trespass, disorderly con-

⁴⁶ *Id.* (estimating 130 people had been arrested by the state).

⁴⁷ This information was obtained from lawyers participating in Occupy Albany. *See also* Occupy Albany, 2012 WL 4485693, at *4 (noting that “[o]n December 22, 2011, the City filed a verified petition and commenced a special proceeding seeking to enjoin respondents from continuing an encampment within Academy Park”).

⁴⁸ *See* Abu El-Haj 2009, *supra* note 6, at 548–54 (describing constitutionally enacted regulations with which prospective demonstrators must first comply in order to legally gather in urban spaces); *see also* KROTOSZYNSKI, *supra* note 7, at 1–4, 31–35 (detailing recent efforts to restrict protesters' access to government officials in the name of security, and arguing that it is essentially in an effort to drown out dissenting opinions); ZICK, *supra* note 7, at 190–96 (comprehensively explaining wide range of ways that outdoor gatherings are controlled today); McCarthy & McPhail, *supra* note 41, at 230–32 (describing the public forum doctrine and regulatory practices, including policing strategies, for managing political demonstrations of contemporary municipalities).

⁴⁹ *See* E-mail from John Cannan, Research and Instructional Services Librarian, Drexel University School of Law, to Author (Feb. 25, 2014) (on file with author) (“New York State owns Lafayette Park and Albany City owns Academy park. The two are side by side.”).

⁵⁰ For a comprehensive analysis of the strategies employed against Occupy protestors in New York City, *see* generally SUPPRESSING PROTEST 2012 REPORT, *supra* note 2.

⁵¹ *Id.* at 117, n.20 (describing the incident).

⁵² *See id.* at 73–75 (documenting a police strategy of arresting protestors for minor offenses such as blocking traffic and obstructing justice).

duct, and unlawful assembly.⁵³ Another example hails from Denver, in which city police arrested protestors for an array of violations, including obstructing the streets, disobeying a lawful order, impeding traffic, disturbing the peace, and improperly honking car horns.⁵⁴

The movement's transformative potential, whatever it may have been, was significantly undercut by such regulation and the constitutional doctrine that largely sanctions them. While one can only speculate about Occupy's full potential, given its influence on political discourse even with its shortened lifespan, it is not implausible to be concerned that it might have been more influential if it had not been moved indoors by cities.⁵⁵

Contemporary First Amendment doctrine is particularly tolerant of permit requirements. Cities' standing permit ordinances are generally upheld against constitutional challenge as necessary to ensure that city life can continue in an orderly fashion despite political demonstrations, meetings, and parades.⁵⁶ Both permanent and temporary permit requirements for outdoor gatherings are generally analyzed as regulations of the time, place, and manner of speech rather than assembly.⁵⁷ While the state cannot prohibit free speech rights in

⁵³ See, e.g., *People v. Nunez*, 943 N.Y.S.2d 857, 859 (N.Y. City Crim. Ct. 2012) (assessing charges of trespass, disorderly conduct, and second degree obstruction of governmental administration); *Occupy Bos. v. City of Boston*, No. SUCV201104152G, 2011 WL 7460294, at *1 (Mass. Super. Nov. 17, 2011) (explaining that Occupy Boston sought a declaratory judgment that the city's trespass and unlawful assembly statutes could not be applied to them insofar as they were exercising First Amendment rights).

⁵⁴ See *Occupy Denver v. City & Cnty. of Denver*, No. 11-cv-03048-REB-MJWW, 2011 WL 6096501, at *2-3 (D. Colo. Dec. 7, 2011) (noting that all charges for offenses, such as improper use of a car horn, were subsequently dismissed).

⁵⁵ Cf. SUPPRESSING PROTEST 2012 REPORT, *supra* note 2, at 14 ("In a relatively short span of time, the Occupy movement altered national political discourse News coverage of income inequality increased five-fold between September and November, a fact some commentators attributed to Occupy. During the week of November 14, 2011, when some of the largest U.S. Occupy encampments were evicted, Occupy-related stories accounted for approximately 13 percent of total U.S. news media coverage. However, after the eviction of most encampments, the movement suffered a decline in mainstream media visibility that it has struggled to overcome." (footnotes omitted)).

⁵⁶ See, e.g., *Startzell v. City of Philadelphia*, 533 F.3d 183, 198 (3d Cir. 2008) ("Permits allow the government to arrange a public forum 'so that individuals and groups can be heard in an orderly and appropriate manner,' and 'enforcement of a permit system inevitably requires taking cognizance of content.'" (quoting *Kroll v. U.S. Capitol Police*, 847 F.2d 899, 903 (D.C. Cir. 1988) (internal emphasis omitted))).

⁵⁷ See *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002) (upholding the Chicago Park District's permit requirement as a valid time, place, and manner regulation and rejecting the suggestion that, as a prior constraint, it was subject to the procedural safeguards of *Freedman v. Maryland*, 380 U.S. 51 (1965)); *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (upholding New Hampshire's permit requirement as a valid regulation of the time, place, and manner of public assembly).

public forums such as parks and streets (unless it can meet a strict scrutiny test),⁵⁸ it can regulate the time, place, and manner of such speech, using statutes that give limited discretion to officials,⁵⁹ so long as the justification for such regulation is not content-based, the regulation is “narrowly tailored to serve a significant governmental interest,” and the regulation “leave[s] open ample alternative channels for communication.”⁶⁰ Maintaining order, preventing traffic jams, and ensuring security are all considered significant governmental interests.⁶¹

Forced to frame their right to gather as a right to speak in a public forum, at every turn, when Occupiers went to court seeking the protection of the First Amendment, they were disappointed.⁶² Gather-

58 See *United States v. Grace*, 461 U.S. 171, 177 (1983) (explaining the presumption of access to public forums); *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (explaining that the streets and parks are “quintessential public forums”); see also Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1749–52 (1987) (summarizing the doctrinal structure, established in *Perry*, which distinguishes between public, nonpublic, and limited public forums).

59 See, e.g., *Thomas*, 534 U.S. at 323 (explaining that the licensing official must not “enjoy[] unduly broad discretion in determining whether to grant or deny a permit”); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) (striking down an ordinance where the decision to grant or withhold a permit was “guided only by [the Commissioners’] own ideas of ‘public welfare, peace, safety, health, decency, good order, morals or convenience’” and the guarantee of free speech and assembly was “contingent upon the uncontrolled will of an official”).

60 See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’” (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984))).

61 See, e.g., *Occupy Fresno v. Cnty. of Fresno*, 835 F. Supp. 2d 849, 859 (E.D. Cal. 2011) (explaining that permit requirements “promote public health, safety and welfare” and allow cities to anticipate competing uses); *Occupy Minneapolis v. Cnty. of Hennepin*, 866 F. Supp. 2d 1062, 1070 (D. Minn. 2011) (“Notably, the Court agrees with the County that it has a significant interest in controlling the aesthetic appearance of the Plazas.” (internal quotation omitted)); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1042 (9th Cir. 2006) (holding that regulating traffic flow was a significant interest).

62 See, e.g., *Occupy Sacramento v. City of Sacramento*, 878 F. Supp. 2d 1110, 1111 (E.D. Cal. 2012) (granting the city’s motion to dismiss); *Waller v. City of New York*, 933 N.Y.S.2d 541, 544–45 (N.Y. Sup. Ct. N.Y. Cnty. 2011) (holding that the “movants have not demonstrated that the rules adopted . . . are not reasonable time, place, and manner restrictions permitted under the First Amendment”); *Isbell v. City of Oklahoma City*, No. Civ-11-1432-D, 2011 WL 6152852, at *9 (W.D. Okla. Dec. 12, 2011) (“[T]he Court finds that Plaintiffs have not made a sufficient showing of likely success on the merits of their claims of improper enforcement action by the City in derogation of Plaintiffs’ First Amendment rights.”). They have not been alone in presenting this argument in court unsuccessfully.

ings that inconvenience traffic (pedestrian and vehicular) or trample pristine lawns have been successfully cast as disorderly and, therefore, constitutionally subject to regulation. In Boston, for example, a trial court concluded that the city's regulations were "narrowly tailored to further the Conservancy's substantial interest in offer[ing] beautiful, well-cared for spaces as well as to ensure unobstructed public access to the parks for all."⁶³

The few cases Occupy has won have amounted to short-lived victories that turned on factual quirks.⁶⁴ The federal district court in Idaho, for example, upheld Occupy Boise's constitutional right to maintain a symbolic tent city on grounds of the old Ada County Courthouse, but its decision turned importantly on evidence that the relevant statute had been adopted specifically in response to the movement. In the court's view, the Governor's interpretation "create[d] the appearance that the State [was] stretching to shut down a political message—a tent city—presented in a public forum."⁶⁵ Cities like Nashville and Trenton were rebuffed by courts for implementing new regulations specifically in response to their local Occupy groups

See, e.g., Marcavage v. City of New York, 689 F.3d 98, 109 (2d Cir. 2012) (holding constitutional a "no-demonstration zone" at the 2004 Republican National Convention).

63 *Occupy Bos. v. City of Boston*, No. 11-4152-G, slip op. at 20 (Mass. Super. Dec. 7, 2011) (internal quotation omitted); *see also Occupy Sacramento*, 878 F. Supp. 2d at 1120 (finding ordinance narrowly tailored to the following asserted government interests: "(1) the general public's enjoyment of park facilities; (2) the viability and maintenance of those facilities; (3) the public's health, safety and welfare; and (4) the protection of the City's parks and public property from overuse and unsanitary conditions"); *accord Clark*, 468 U.S. at 296 ("It is also apparent to us that the regulation narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence. To permit camping—using these areas as living accommodations—would be totally inimical to these purposes, as would be readily understood by those who have frequented the National Parks across the country and observed the unfortunate consequences of the activities of those who refuse to confine their camping to designated areas.").

64 A notable exception to this characterization was the experience of Occupy Fresno, which was able to obtain an injunction against the city because the trial court held that requiring a permit for an assembly of less than ten persons is unconstitutional in the Ninth Circuit. *See Occupy Fresno*, 835 F. Supp. 2d at 859–60 ("The Ninth Circuit appears to hold that permit requirements for groups of fewer than ten individuals are unconstitutional or constitutionally infirm, whereas those for groups of fifty or greater are narrowly tailored."). The judge, however, found the city's curfew constitutional since the occupiers could assemble overnight on the city's sidewalks. *Id.* at 864.

65 *Watters v. Otter*, 854 F. Supp. 2d 823, 829–30 (D. Idaho 2012); *cf. Occupy Columbia v. Haley*, 866 F. Supp. 2d 545, 558 (D.S.C. Dec. 16, 2011) ("[C]ontent-based restrictions may be imposed in a traditional public forum where there is 'a clear and present danger that [the speech] will bring about the substantive evils that [government] has a right to prevent,' . . . and where the restrictions are narrowly drawn to serve that compelling state interest." (internal citation omitted)).

without following proper procedures.⁶⁶ Similarly, Occupy Columbia's initial successes in court were the result of the fact that the city had no official permit requirements or rules governing overnight use of its parks.⁶⁷ After a federal court issued an injunction against Columbia, however, it adopted regulations similar to those in other cities.⁶⁸ Those regulations were promptly upheld against constitutional challenge.⁶⁹ Not all rules adopted in direct response to an occupation, however, were held unconstitutional. In New York City, a local court ruled that the owners of Zuccotti Park had not violated the Constitution when they implemented rules prohibiting camping and sleeping in the park in response to Occupy Wall Street.⁷⁰

The First Amendment arguments available to Occupy are so limited that in one instance, the lawyers for Occupy simply abandoned any reliance on the First Amendment, arguing instead that their tents were protected by the Fourth Amendment, which prevents unreasonable seizures of property, and by the Fifth Amendment, which prevents deprivation of property without due process, generally in the form of a hearing.⁷¹ They lost on those grounds as well.⁷²

66 See *ACLU-NJ Wins Temporary Restraining Order in Favor of Occupy Trenton Protesters*, AM. CIVIL LIBERTIES UNION OF N.J., Nov. 7, 2011, <http://www.aclu-nj.org/news/2011/11/07/aclu-nj-wins-temporary-restraining-order-in-favor-of-occupy-trenton-protesters> (“[Judge Jacobson] explained that the Occupy Trenton demonstrators ‘are entitled to have restrictions on their constitutionally protected activities imposed by rulemaking and not informal action targeted at their demonstration.’” (citing *Occupy Trenton v. Zawacki*, No. C-72-11 (N.J. Super. Ct. Ch. Div. Mercer Cnty. Nov. 7, 2011)); Plaintiffs’ Motion for Temporary Restraining Order and Memorandum of Law in Support of Motion at 2, *Occupy Nashville v. Haslam*, No. 3:11-cv-01037 (M.D. Tenn. filed Oct. 31, 2011) (noting that the city “created by mere fiat . . . and without following required procedures—*ad hoc* restrictions on use of a public forum . . . to prohibit free speech”), available at <http://www.aclu-tn.org/pdfs/OccupyNashvilleMotionTRO.pdf>).

67 See *Haley*, 866 F. Supp. 2d at 561–62 (noting that although unwritten policies at times can be constitutional, “the court [was] not convinced that this [unwritten, no-camping] policy [was] content-neutral and [was] applied equally to all persons and groups on the State House grounds”).

68 See *Occupy Columbia v. Haley*, No. 3:11-cv-03253-CMC, 2011 WL 6698990, at *1 (D.S.C. Dec. 22, 2011) (“The Board met and ‘unanimously passed an emergency regulation . . . prohibiting use of the State House grounds and all buildings located on the grounds for camping, sleeping, or any living accommodation purposes.’” (internal citation omitted)).

69 See *id.* at *4–7 (upholding the Board’s interests and means used to achieve those interests).

70 See *Waller v. City of New York*, 933 N.Y.S.2d 541, 544–45 (N.Y. Sup. Ct. N.Y. Cnty. 2011) (“[M]ovants have not demonstrated that the rules adopted by the owners of the property . . . are not reasonable time, place, and manner restrictions permitted under the First Amendment.”).

71 See, e.g., *Henke v. Dep’t of Interior*, 842 F. Supp. 2d 54, 56 (D.D.C. 2012) (“Eschewing any reliance on the First Amendment, Plaintiffs argue that their tents are protected from seizure and destruction by the Fourth and Fifth Amendments.”).

72 *Id.*

The Occupy movement's legal losses were particularly exacerbated by the fact that under current law, the movement was not effectively able to argue that local ordinances had infringed the First Amendment's guarantee of peaceable assembly.⁷³ The array of advanced regulations occupations around the nation confronted are probably best understood, not as speech regulations, but as direct, prior restraints on assembly—conduct explicitly protected by the First Amendment. Yet, advocates for Occupy were foreclosed, by existing Supreme Court free speech precedent, from arguing that these permit requirements constituted prior restraints.⁷⁴

Instead, operating within the confines of a doctrine that sees speech and assembly as fungible, lawyers for Occupy framed Occupy as a movement “engaged in protected speech” and its encampments as expressive conduct.⁷⁵ Local authorities responded that Occupy's ability to use the Internet and social media constitute adequate alternatives to its assembling.⁷⁶ And, courts largely accepted those arguments, asserting that the ability to disseminate a message is an adequate substitute for the ability to gather in order to form and express that message.⁷⁷ Even the few courts that focused on alternative spaces

⁷³ See, e.g., *Occupy Maine v. City of Portland*, No. CV-11-549, 2012 WL 368333 (Me. Super. Ct. Jan. 31, 2012) (analyzing plaintiff's interest as expressive conduct subject to reasonable time, place, and manner restriction notwithstanding plaintiff's assertion of right to free assembly); *Occupy Bos. v. City of Boston*, No. 11-4152-G, slip op. at 21 (Mass. Super. Dec. 7, 2011) (noting that plaintiffs had sought “a declaration that their occupation . . . is protected as free speech, assembly, [and] association”); see generally 5 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* § 20.54 (4th ed. 2008) (“When the government limits the rights of persons to communicate in public, it is most common for courts to examine the governmental action in terms of the freedom of speech rather than the freedom of assembly.”).

⁷⁴ See *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002) (rejecting suggestion that park's permit requirement constituted a prior constraint on speech).

⁷⁵ *Mitchell v. City of New Haven*, 854 F. Supp. 2d 238, 246 (D. Conn., 2012); accord *Occupy Bos.*, No. 11-4152-G, slip op. at 11–13 (analyzing whether the First Amendment protected plaintiffs' conduct insofar as they claim that the “occupation and habitation of Dewey Square is expressive conduct and a symbol” of economic inequality).

⁷⁶ Cf. *Mitchell*, 854 F. Supp. 2d at 253 (rejecting the City's argument with the comment that “[t]here is something unsatisfying about telling a movement that aims to make visible an often unseen, ignored population that it should content itself with forms of communication that are only seen when someone seeks them out”).

⁷⁷ See, e.g., *Miller-Jacobson v. City of Rochester*, 941 N.Y.S.2d 475, 481 (N.Y. Sup. Ct. Monroe Cnty. 2012) (“There [were] ample alternative channels for communication of information by plaintiffs [because] [t]hey may protest and disseminate information in the Park during the permitted hours as well as in other public forums, the Internet, and traditional and social media.”); see also *Bl(A)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004) (finding that “many other opportunities for demonstrations existed” and that these were adequate notwithstanding fact that “none of them were within sight and sound of the delegates assembled” because, *inter alia*, “[a]t a high-profile

for assembling, for the most part, accepted that any other possible location constitutes a satisfactory alternative because the law fails to provide them with a comprehensive rubric by which to measure whether substitute spaces are adequate.⁷⁸

Of equal concern, the public largely appeared unfazed by the movement's experience. This appears to be because it does not value outdoor assembly and thus focuses almost exclusively on the disorder associated with it. It was not uncommon to read editorials about the Occupy movement in the following vein:

Too often, we see public events marred by the angry outbursts of misguided protesters of one political stripe or another who demand attention. Not only do these disruptions breach proper decorum, but they accomplish little or nothing because they more than likely alienate everyone else in attendance. In other words, the protest message falls on deaf ears. So what is the point? Simply to cause trouble? In Iowa, we believe, we are better than this.⁷⁹

The wider public appears more tolerant of the disorder associated with sporting events than that associated with politics.⁸⁰ Even supporters of the movement struggled to articulate the value of assembly

event . . . messages expressed beyond the first-hand sight and sound of the delegates nonetheless have a propensity to reach the delegates through television, radio, the press, the internet, and other outlets"). *But see Occupy Maine*, 2012 WL 36833, at *33 (noting that adequate alternatives existed for plaintiffs insofar as they could demonstrate on public streets, sidewalks and other places throughout the city); *Occupy Fresno v. Cnty. of Fresno*, 835 F. Supp. 2d 849, 863 (E.D. Cal. 2011) (noting that adequate alternatives existed because the assembly could move to a sidewalk, which is outside of the jurisdiction of the park, and has no similar permit requirements).

⁷⁸ *See Occupy Bos.*, No. 11-4152-G, slip op. at 21 (accepting the city's view that Occupy Boston's ability to camp on distant Harbor Islands provided an adequate alternative forum). Elaborating a rubric for such an analysis is beyond the scope of this project, but location, duration, timing, and historic symbolism would at a minimum be significant factors to consider. *See City of Chicago v. Alexander*, No. 11 MC1-237718, 2012 WL 4458130, at *27 (Ill. Cir. Ct. Sept. 27, 2012) (finding that the City of Chicago lacked adequate alternative places for large demonstrations to gather at night).

⁷⁹ *Disruptive Protest Strategy Seems Counterproductive (Editorial)*, GLOBEGAZETTE.COM (Aug. 30, 2012, 12:02 AM), http://globegazette.com/news/opinion/editorial/disruptive-protest-strategy-seems-%20counterproductive-editorial/article_e92d7dae-f25f-11e1-950e-0019bb2963f4.html.

⁸⁰ *See Cleve R. Wootson Jr., CMPD: Charlotte Might Need Bigger Protest Spaces for DNC*, CHARLOTTE OBSERVER, May 24, 2012, <http://www.charlotteobserver.com/2012/05/24/3262306/police-learn-lessons-from-nato.html#.UuqBANewLd0> (quoting a University of Chicago economist as saying, "I think 2012 is a particularly bad time because we've gotten into this Occupy fever . . . [Political events like NATO or the DNC can be] very disruptive. You've got to cordon off a large area of the city. If you have a Super Bowl in Charlotte, you're not going to have a big section of people looking to protest").

and frequently felt the need to downplay the disruption it has caused.⁸¹

While the public, and most of us in the legal academy, take for granted that cities can and do extensively regulate public assemblies, today's pervasive regulation is a radical break from earlier regulatory approaches. The earlier, much simpler regulatory regime was not just a product of its time. It was instead bolstered by a popular commitment to a robust right of assembly and a belief in the value of assembly even in the face of potential disorder and real risks of violence. A reminder as to this history is particularly timely in this regard.

II. OUTDOOR ASSEMBLY AS A PRIVILEGE AND IMMUNITY OF CITIZENSHIP

American streets and public places have, indeed, been used “time out of mind . . . for purposes of assembly,” including to discuss public questions.⁸² While both the regulations to which outdoor gatherings have been subject and the constitutional protections available to them have radically changed, important similarities remain between contemporary and historical assemblies. Attitudes toward crowds, particularly political crowds, however, have changed dramatically.

Political crowds played a central role in the American Revolution and in the democratic politics that emerged after the Founding.⁸³ Throughout the period, Americans tolerated a relatively high degree of disorder associated with crowds.⁸⁴ For example, a newspaper description of a nighttime procession in Philadelphia on Independence Day in 1795 makes clear that the burning in effigy of John Jay, in a politically fraught context with counterdemonstrators nearby, did not constitute a per se risk of violence or disorder, subject to dispersal.⁸⁵

81 See, e.g., Jeremy Kessler, *The Closing of the Public Square*, NEW REPUBLIC, Jan. 12, 2012, <http://www.newrepublic.com/node/97901/print> (stressing that Occupy has, by and large, been a peaceful, orderly civic moment).

82 *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring).

83 See Abu El-Haj 2009, *supra* note 6, at 554–61 (identifying a range of contexts that brought early Americans into the streets, including elections, national holidays, political crises and public meetings); ZICK, *supra* note 7, at 26–31 (describing the history of political mobs and riots in the Revolutionary period).

84 See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 26–27 (2004) (explaining that Whig ideology allowed for a constitutional mob which was permitted by custom to exercise a reasonable amount of violence in the face of governmental oppression of customary constitutional rights); ZICK, *supra* note 7, at 27 (noting that during the Revolutionary period “[s]o long as [crowds] did not seriously threaten public order, . . . [they] were not only tolerated but generally supported”).

85 See Abu El-Haj 2009, *supra* note 6, at 563–64 (recounting a description of the parade as “peaceable” even though it “nearly did descend into violence”).

Americans' toleration of the disorder associated with the people outdoors lasted well into the late nineteenth century. Streets remained important places for political, social, and, increasingly, ethnic gatherings into the late nineteenth century,⁸⁶ and Americans valued unfettered access to public space for civic and political purposes, viewing it as a central privilege and immunity of American citizenship. They did so even though judicial enforcement was intermittent.⁸⁷ In sum, through the nineteenth century, as the stories that follow show, civic and political "use[s] of the streets and public places" were indeed understood to be "part of the privileges, immunities, rights, and liberties of citizens."⁸⁸

Order was not the order of the day, both with respect to outdoor assembly and generally. Before recounting the controversies that would emerge in the face of increased immigration and the beginnings of industrialization, it is important to understand the legal regime regulating outdoor assembly at the time.⁸⁹

From the Founding through the late nineteenth century, American authorities were formally limited to the criminal law in their efforts to regulate outdoor assemblies. Officials were only entitled to interfere with assemblies that could justifiably be charged with unlawful assembly, riot, or breach of the peace.⁹⁰

The legal threshold for disorder, moreover, was quite high. Government officials were required to show that they were responding to actual breaches of the peace. In 1863, the Superior Court of Judicature of New Hampshire noted "that the common law in respect to riots [might be] inconsistent with the spirit of our institutions . . . [if] mere political demonstrations and parades, unattended by violence, actual or threatened, are held to be riots, or unlawful assemblies."⁹¹

86 *See id.* at 559 (explaining that "[b]y the mid-nineteenth century, workers, poor people, racial minorities, and social movements all used city streets to further their political goals").

87 Federal courts were not available for the assertion of First Amendment claims against states until 1925. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

88 *Hague*, 307 U.S. at 515.

89 The details of the nineteenth-century regulatory regime as well as its transformation are recounted in Abu El-Haj 2011, *supra* note 6, at 42–45. That history is a distillation of dissertation research into the question. *See* Abu El-Haj, *supra* note 20, at 105–31.

90 *See* Abu El-Haj 2009, *supra* note 6, at 561–69 (reviewing common law at the time); *see also* Abu El-Haj, *supra* note 20, at 105–18 (recounting common law and reviewing municipal codes in the study's sample).

91 *State v. Russell*, 45 N.H. 83, 85 (N.H. 1863).

Although nineteenth-century judges and juries were consistently tolerant of the disorder associated with crowds, the law at the time distinguished between types of crowds, only some of which were constitutionally protected. Outdoor music and other types of individual expression were not considered central to the privileges and immunities of citizenship. In the South, the assembly of blacks (free and enslaved) was restricted.⁹² Finally, as we will see, religious assemblies, to the degree that they were cast as outside of American political traditions, struggled to access the protection of the right of peaceable assembly.

White (and ethnic) Americans who gathered in city streets, squares, and greens for core political and civic purposes, however, were unencumbered by regulation as the law protected a right to unrestricted access so long as the assembly was peaceful.⁹³ Such groups were not required to ask permission prior to exercising their right of assembly, and the government was not considered entitled to regulate in anticipation of possible disorder. As late as 1881, most of America's largest cities—cities including Detroit, San Francisco, St. Paul, Chicago, and Denver—did not require citizens seeking to assemble outdoors to obtain permission in advance.⁹⁴

The introduction of permit requirements for outdoor assemblies profoundly undercut this default presumption in favor of outdoor

92 For example, in Tennessee “[a]ll assemblages of slaves in unusual numbers, or at suspicious times and places, not expressly authorized by the owners, [were] held and considered an unlawful assemblage.” *Leetch v. State*, 39 Tenn. (2 Head) 87, 88 (Tenn. 1858). Similarly, New Orleans forbade public addresses by “colored person[s]” absent “written permission from the Mayor.” John W. Wertheimer, *Free-Speech Fights: The Roots of Modern Free-Expression Litigation in the United States* 143 (Jan. 1992) (unpublished Ph.D. dissertation, Princeton University) (on file with author) (internal citation omitted). For more on restrictions placed on gatherings of slaves and free blacks in the South in the Antebellum period, see JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* 30–33 (2012).

93 See Abu El-Haj, *supra* note 20, at 105–31 (documenting the rise of the permit system and comparing it to earlier legal regulation based on an extensive study of municipal ordinances from a sample of the most populous American cities).

94 See DETROIT, MICH., REV. ORDINANCES chs. XXXII–L (1884) (regulating streets, alleys, public places, and public property); S.F., CAL., GENERAL ORDERS OF THE BOARD OF SUPERVISORS Order 1588 (1884) (regulating construction and use of streets and public sidewalks); ST. PAUL, MINN., MUNICIPAL CODE arts. XXXIX, XLV, LXXVII–LXXVIII (1884) (regulating licenses, parks, streets, alleys, public grounds, and sidewalks); CHL., ILL., MUNICIPAL CODE art. XLII §§ 1686–1703 (1881) (regulating parks and public grounds); DENVER, COLO., ORDINANCES ch. IX, art. 2 (1881) (regulating sidewalks). For a more systematic analysis of rise of permit requirements, see Abu El-Haj, *supra* note 20, at 131–85.

gatherings of the people (narrowly construed).⁹⁵ The controversies surrounding the introduction of advance regulation of outdoor gatherings provide a window into nineteenth-century attitudes about outdoor gatherings. Those who sought access believed that they too should be entitled to the robust constitutional protections afforded to political crowds. Experiences in New York City and Grand Rapids illustrate the tradition of outdoor assembly from which the Occupy movement descends, but also reveal a fundamental disjuncture between prevailing attitudes toward both the disorderly potential of outdoor assembly and the value and scope of the constitutional right of assembly. As these stories unfold, we will see that the contemporary understanding is both broader and narrower than that from which it broke.

A. *Privileges and Immunities in the Wake of Rioting*

New York City was the first city to pass an ordinance requiring citizens who sought to assemble in public to request permission in advance from local officials.⁹⁶ Although the first ordinance produced limited controversy given its limited scope, subsequent developments gave rise to a public debate about the constitutional implications of the regulatory change. The debate—in newspapers and legislative halls—illuminates both attitudes toward outdoor assemblies and the ways that tolerance for disorder was framed by a particular understanding of the constitutional privileges and immunities involved.

Since 1790, when the Census Bureau began keeping population counts, New York City has been the largest city in the United States.⁹⁷ The city's first permit requirement for assemblies in public was

⁹⁵ One other limit is perhaps worth noting: The presumption of access was frequently withdrawn for the Sabbath. See, e.g., KAN. CITY, MO., CHARTER AND ORDINANCES, art. I § 3 (banning processions with music on Sundays) (1864); RICHMOND, VA., CHARTER AND ORDINANCES ch. 44, § 20 (1875) (prohibiting parades with musicians “between the hours of eleven o’clock in the forenoon and two o’clock in the afternoon of Sunday”).

⁹⁶ The history presented in this Section is based on local newspaper accounts of the incidents found in the 19th Century U.S. Newspapers Digital Archive along with secondary sources. In addition, the Salvation Army National Archives and Research Center provided a few relevant details. Finally, eight editions of New York City’s municipal codes between 1823 and 1931 were systematically reviewed. For a full account of the methodology, see Abu El-Haj, *supra* note 20, at 10–15.

⁹⁷ See Campbell Gibson, *Population of the 100 Largest Cities & Other Urban Places in the United States: 1790 to 1990*, (U.S. Census Bureau Population Division, Working Paper No. 27, 1998), available at <http://www.census.gov/population/www/documentation/twps0027/twps0027.html>.

passed in 1810, long before any other American city, but was limited to certain religious gatherings.⁹⁸

Fundamental changes to New York City's regulatory framework would not arise until 1872, when the first significant regulation of nonreligious gatherings was passed.⁹⁹ The change was prompted by ethnic parades that degenerated into riots in 1870 and 1871.¹⁰⁰

Prior to the 1870s, outdoor assemblies that did not involve religious worship were governed only by criminal law—specifically the crimes of unlawful assembly, riot, and breach of the peace.¹⁰¹ Although the city had numerous ordinances regulating the public's use of streets and other outdoor spaces—including ones governing public markets, commerce, gambling, ball playing, and kite flying on streets and in public places—only one ordinance had potential, ambiguous implications for nonreligious gatherings.¹⁰² The ordinance in question prohibited the beating of drums or other instruments “for the purpose of attracting the attention of passengers, in any street in the City of New York, to any show of beasts or birds *or other*

98 Passed in response to a certain Johny Edwards, a street preacher whose outdoor religious services apparently provoked disorder with some frequency, the ordinance simply banned religious gatherings in the city's streets. See Wertheimer, *supra* note 92, at 139 (“In July of 1810, . . . the New York Common Council passed an ordinance mandating that from that time forward, ‘no assembly or assemblies of persons shall be permitted . . . under the pretense of public worship’ in the streets or parks of New York City.” (internal citation omitted)). Within a month, however, it was amended in response to objections from local clergymen. The revised version provided an exception for clergymen of any “regularly established congregation.” *Id.* at 139 n.22 (quoting VI N.Y.C., N.Y., MINUTES OF THE COMMON COUNCIL, 1784–1831, at 268–69 (1917) (emphasis added)). A subsequent amendment criminalized the act of disturbing any assemblage permitted under the ordinance. See N.Y.C., N.Y., BY-LAWS AND ORDINANCES ch. XXV, § 6 (1839) (“No person shall disturb, molest or interrupt any clergyman or minister who shall have obtained permission according to the fourth section of this title, or who shall be performing the rites of baptism as permitted by the fifth section of this title, or shall commit any riot or disorder in any such assembly, under the penalty of twenty five dollars for each offence.”). The ordinance was not challenged in litigation until the 1930s when it was ultimately upheld. The ordinance is best understood as akin to the ordinances banning assemblies on the Sabbath, and an example of the lower protection offered to assemblies grounded in free exercise claims. See *People v. Smith*, 188 N.E. 745, 745 (N.Y. 1934) (holding the neutral ordinance constitutional because “[i]t is too well settled by judicial decisions in both the state and federal courts that a municipality may pass an ordinance making it unlawful to hold public meetings upon the public streets without out a permit . . . to require discussion” (internal citation omitted)).

99 See *infra* notes 158–60 and accompanying text.

100 See *infra* notes 105–20, 141–59 and accompanying text.

101 Cf. N.Y.C., N.Y., PENAL CODE, tit. XIII (1865) (including unlawful assembly and rioting as “crimes against the public peace”). The earliest publication of New York's penal law was a draft in 1864. The final penal code was published in 1865.

102 See N.Y.C., N.Y., BY-LAWS AND ORDINANCES ch. XII, XXIII, XXVIII (1839) (listing ordinances regulating public markets, the use of horses, and public places).

things in said City,” and, as such, was sufficiently vague as to arguably apply to the music in parades.¹⁰³ Revealingly, this ordinance was subsequently amended to foreclose this arguable interpretation.¹⁰⁴

The political and regulatory debates precipitated by the riots in the 1870s provide an invaluable window into the attitudes of nineteenth-century New Yorkers toward the importance of a robust right of outdoor assembly. In 1870, a parade of Orangemen in New York City resulted in a riot.¹⁰⁵ The following year, rumors surfaced that both Protestant and Irish-Catholic groups were preparing for armed battle.¹⁰⁶

In response, New York City’s Police Chief issued a remarkable order. He announced that the Orangemen’s parade called for July 12 was prohibited.¹⁰⁷ In justifying his decision, the Police Chief asserted unequivocally that “[a]ssemblages of any kind in places of public access, and public street processions of every character, have never become matters of popular right.”¹⁰⁸ While “they are generally permitted, and usually enjoy by popular assent, much freedom of action,” he insisted that this was only because American authorities were particularly lenient and liberal.¹⁰⁹ Street processions were, in his view, proper objects “for police regulation and supervision” because they impose costs on others—“often” requiring “considerable sacrifice of public comfort.”¹¹⁰ The only real consideration, he concluded, was the “delicate task [of] . . . decid[ing] when . . . regulation and supervision shall begin, or how far it shall extend.”¹¹¹ In this case, outright prohibition was obviously required.

The Police Chief’s order and his comments provoked public furor. Reporting on the debate in New York City, the *Boston Daily Ad-*

103 *Id.* at ch. XLIV, § 12 (emphasis added).

104 *See* N.Y.C., N.Y., ORDINANCES ch. 8, art. XXIV, § 245 (1881) (clarifying that the ordinance “appl[ie]d only to itinerant musicians and side shows, and *shall not be construed so as to affect any band of music or organized musical society engaged in any military or civic parade*” (emphasis added)).

105 *See* MARY P. RYAN, CIVIC WARS: DEMOCRACY AND PUBLIC LIFE IN THE AMERICAN CITY DURING THE NINETEENTH CENTURY 229–30 (1997) (giving an account of the violence in 1870 and discussing in general terms the debate that ensued about the legitimacy of ethnic processions in light of the constitutional right of assembly).

106 *Id.* at 230.

107 *Id.* at 230–31.

108 *Id.* at 231 (quoted without citation); *see also* *The Orange Procession*, BOS. DAILY ADVERTISER, Issue 8, col. B, July 11, 1871, (paraphrasing the police superintendent as having said that “[l]egal discussions have settled that the occupation of the streets by a procession is a matter of usage or toleration, and is always subject to police regulation and supervision”).

109 RYAN, *supra* note 105, at 231.

110 *Id.*

111 *Id.*

vertiser related that the order “was almost universally condemned as a cowardly surrender on the part of the city authorities of New York.”¹¹²

Even Irish-Catholic representatives, who supported the Police Chief’s decision to ban the parade, staked out a more limited defense, arguing that since the Orangemen’s planned procession was intended to provoke a fight, it was outside the constitutional protection of peaceable assembly.¹¹³ To the degree the Orangemen anticipated rioting, a riot had never been constitutionally protected.

The Police Chief was quickly overruled by New York’s Governor who responded to public opinion and revoked the order. In doing so, he explained that the appropriate response to a real risk of violence was to promise to maintain order.¹¹⁴

The views of both the Irish-Catholic representatives and the Governor, despite their divergent conclusions, evidence the typical nineteenth-century understanding of outdoor assembly. Both groups understood assembly as a privilege and immunity of citizenship, one that protected any peaceful gathering including outdoor gatherings and which, absent a credible threat of violence, did not require a weighing of the interests of the gatherers against the convenience of the public.

The Orangemen paraded the next day with the protection of about three thousand police and National Guardsmen.¹¹⁵ Despite, or perhaps because of the police presence, violence ensued. Of the sixty-two fatalities, fifty-five were killed at the hands of state forces.¹¹⁶

The violence prompted a more extended public discussion about the contours of the right of assembly—most of which defended the right to unrestricted access to public spaces for assemblies until they actually became riots. A short editorial in *Harper’s Weekly* defended

112 *The order of Superintendent Kelso of New York, forbidding the Orange procession and the Irish target-shooting excursions, was the general topic of conversation yesterday, and it was almost universally condemned as a cowardly surrender on the part of the city authorities of New York*, BOS. DAILY ADVERTISER, July 12, 1871, Issue 9, col. A.

113 *Cf. A Fenian Manifesto*, N.Y. TIMES, Jul. 17, 1871, at 1 (reprinting resolutions adopted by the Fenian Brotherhood praising “the Municipal authorities” for banning the parade since they knew “that the intended procession was calculated to dangerously excite a large portion of the citizens”).

114 *See RYAN, supra note 105, at 231* (noting that the Governor was responding to public opinion); *cf. Irish Difficulty in New York: Police Prohibition of Processions Revoked*, DAILY EVENING BULL. (S.F., Cal.), Issue 81, col. C, July 12, 1871 (describing the scene in New York City on July 12, 1871, after Governor Hoffman revoked the order). Some suggested that the Governor’s decision was politically motivated.

115 *See RYAN, supra note 105, at 232* (“The *Times* calculated the demographics of this strange parade as follows: 160 citizens, 800 police, and 220 soldiers of the state.”).

116 *Id.* at 233.

the Governor's decision, forcefully objecting to the notion that a peaceful parade could be suppressed in advance in response to the threats of hecklers.¹¹⁷ It dismissed the Police Chief's original order as having been "made under the absurd pretext that processions in the streets are not matters of right, but of toleration."¹¹⁸ The piece argued, further, that even in the face of a potential riot, the duty of officials is to "master[] the mob," not to prevent it by suppressing speech or assembly.¹¹⁹ Others shared these views. Henry Ward Beecher, writing about the New York City controversy for *The Yankton Press* in South Dakota, argued, for instance, that a true vindication of the right of assembly required authorities to protect the peaceful assembly from the mob. Suppression was not an option.¹²⁰

This high tolerance for the irritations and turbulence that accompany popular democracy, and the invocation of assembly as a privilege and immunity of American citizenship, was typical and longstanding. Consider the reaction of a Justice of the Peace in response to a crowd in Northumberland, Pennsylvania during the Whiskey Rebellion in 1794. The crowd had gathered to erect a liberty pole to express its dismay at learning that the state militia had begun its march from Philadelphia to Western Pennsylvania to suppress the rebellion.¹²¹ When two judges from the Court of Common Pleas for Northumberland County asked the Justice of the Peace, Daniel Montgomery, to go with them to read the riot act, Montgomery replied that "the people were determined to have their grievances redressed, and would erect the pole; and for his part he would put to his shoulder to lift or pull at the rope, if required by the people."¹²² Although Montgomery eventually went reluctantly with the judges, and violence did ensue, Montgomery never "render[ed] . . . assistance in preserving the peace."¹²³

117 *Plain Talk for Plain People*, N.Y. TIMES, Jul. 21, 1871, at 2 (reprinting *Harper's Weekly* editorial that interpreted the forbidding of the parade as an indication "that every public parade of peaceable citizens through the streets may rightfully be forbidden if a band of desperadoes and assassins announce that they do not choose to favor the procession").

118 *Id.*

119 *Id.*

120 Henry Ward Beecher, *The Orange Procession—Not the Battle of the Boyne, but the Question of Liberty in New York*, YANKTON PRESS (Yankton, S.D.), Issue 2, col. G, Aug. 16, 1871 (arguing that "[n]o man has a right to be provoked at any exercise of another's rights, which does not restrict his own").

121 *Respublica v. Montgomery*, 1 Yeates 419, 419 (Pa. 1795) (per curiam).

122 *Id.*

123 *Id.* Montgomery was subsequently sued for failing to fulfill his official duties by "not actively assisting in suppressing a riot." *Id.* On appeal, the Supreme Court of Pennsylvania held that the crowd had constituted a riot given the ongoing insurrection and the pres-

The 1875 North Carolina case of *State v. Hughes* evidences a similar high tolerance for the disorder associated with people congregating outdoors.¹²⁴ The case arose out of a similarly politically fraught situation. A crowd “assembled in the town of Oxford to celebrate the emancipation proclamation, and with two drums and fifes, marched up and down the streets for two or three hours.”¹²⁵ At some point, the group was “told by the mayor to desist.”¹²⁶ It refused.¹²⁷ A constable arrived and also told them to stop.¹²⁸ At this point, the procession’s leader took the initiative to test the lawfulness of the local officials’ orders: “Hughes, with the procession, beating the drum, went to the Mayor’s to make up a case to be tried before a magistrate, to test the mayor’s right to forbid the procession.”¹²⁹ The defendants were indicted and convicted by a jury for three offenses: riot; “common nuisance by the beating of drums and the blowing of fifes, and shouting;” and “obstructing the streets.”¹³⁰ The verdict was appealed on the grounds there had been no violence, although “[t]he streets [had been] obstructed from time to time during the interval.”¹³¹

On appeal, the Supreme Court of North Carolina overturned each conviction.¹³² Most interestingly, the court overturned the conviction for “obstructing the streets,” holding that since the procession was lawful, there needed to be evidence that the obstruction was more than that which “is usually incident to such assemblies” for there to be an indictable offense.¹³³

Stressing the importance of public assembly to American democratic politics, the court emphasized the need to set limits on the extension of these offenses:

In a popular government like ours, the laws allow great latitude to public demonstrations, whether political, social or moral, and it requires but little reflection to foresee, that if such acts as are here found by the jury, are to be construed to be indictable, that the doctrine of riots and common nuisances, would be extended far beyond the limits heretofore cir-

ence of arms, and, as such, ordered a trial to determine whether Montgomery had indeed failed in his active duty. *Id.* at 422.

124 *State v. Hughes*, 72 N.C. 25, 26 (N.C. 1875).

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.* at 27–28.

133 *Id.*

cumscribing them, and would put an end to all public celebrations, however innocent or commendable the purpose.¹³⁴

Returning to New York City, it must be acknowledged that by 1872 and in the face of an actual pattern of violence, dissenting voices to this tradition had emerged, but they remained in the minority. The Police Chief was not without allies who agreed that parading on the public streets was a privilege not a right. For example, an editorial in *Every Saturday* asserted,

There is either a wanton or a careless confusion of terms and ideas in some quarters relative to the question of street parades. The right of assemblage for peaceful purposes is specifically guaranteed by our constitution to all classes of citizens; but this guarantee of the fundamental law neither concedes nor implies the right of any body or society to occupy the public streets with a procession.¹³⁵

The right of public assembly, the author argued, only protected meetings in private halls where the group is not trespassing: “[I]t is an extravagant and wholly unauthorized misuse of words to say that this great right of quiet assemblage, either gives or covers a right to monopolize the public highways. The streets of a city are its corporate property”¹³⁶

Like the Police Chief, the author conceded that “[t]he privilege of parade has heretofore been allowed to everybody, and it must be so allowed and protected till statutes of general application have been passed.”¹³⁷ He maintained, however, that one “ought always to keep in view that there is a line between absolute right and permissive right.”¹³⁸ Public inconvenience had to be recognized as a countervailing interest: “Except on public holidays a street parade is inevitably something of a nuisance[,]” and “each of our large cities . . . will soon be compelled to prohibit all these parades . . . except those of a civic or military character in which everybody is supposed to participate.”¹³⁹ In a move typical of our contemporary worldview, but extremely unusual for the time, the author criticized city officials for having “discriminat[ed] against one class of citizens.”¹⁴⁰

Dissenting views were not limited to the editorial pages. The 1871 riot prompted legislative action.¹⁴¹ The first government body to

134 *Id.* at 28.

135 Editorial, *The Right of Street Parades*, EVERY SATURDAY, Aug. 12, 1871, at 146.

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.* at 146–47.

140 *Id.* at 146.

141 *See infra* note 158 and accompanying text.

move for change was New York City's Board of Police, which proposed the introduction of a permit requirement for all street parades, except funeral processions and those undertaken by the National Guard.¹⁴² Under the proposed resolution, if permission were granted, then a police escort would be provided.¹⁴³ Weighing in, the Mayor explained that he considered the "authorities . . . perfectly justified in forbidding processions; [the fact] that it was done in the recent instance for the first time, simply show[ed] that the question was never before presented for decision."¹⁴⁴

Although the proposal was quickly referred to a legislative committee tasked with giving a "legal opinion on the best method of *doing away* with street processions," no ordinance materialized, and the matter was apparently dropped.¹⁴⁵ Shortly thereafter, though it is not clear why, groups seeking to march considered themselves required to seek permission from the Board of Police.¹⁴⁶

Controversy broke out again, in December, after the Board of Police issued a notice prohibiting the International Society from undertaking a Sunday procession to commemorate the death of recently executed Communists.¹⁴⁷ "[T]he secular Press . . . with but few exceptions, condemn[ed] the order as a violation of the rights of the citizen, [and] as ill-timed and arbitrary,"¹⁴⁸ and the Internationalists decided to parade without permission. They were arrested.¹⁴⁹ In protest, they held an indignation meeting at which, after much debate, they resolved, among other things, to appeal to the Governor.¹⁵⁰

Pressure from the International Society soon prompted the local officials to back down. In exasperation, the Police Commissioner an-

142 See *The Recent Riot, Action of the New York Police Board as to Future Parades, Etc.*, MORNING REPUBLICAN (Little Rock, Ark.), Issue 54, col. D, July 18, 1871, (noting that the police "resolved, that excepting parades of the national guard and funeral processions, no procession of any kind shall be permitted to occupy the streets of New York, without permission from the board of police").

143 See *id.* (noting that if permission for a parade was granted "the superintendent shall give an escort and proper protections").

144 *Id.*

145 *Id.* (emphasis added).

146 Cf. *The Red Flag*, N.Y. TIMES, Dec. 12, 1871, at 1 (making clear that the Communists wishing to conduct a commemorative procession considered themselves required to seek permission from the board of police, though they disagreed with this requirement).

147 See *The Communist Parade Prohibited by the Police*, N.Y. TIMES, Dec. 9, 1871, at 1 (noting that the Board of Police ruled "that the proposed parade of the [International] Society on Sunday next, Dec. 10, will not be permitted on that day").

148 *The Internationals*, N.Y. TIMES, Dec. 15, 1871, at 1 (quoting the Police Commissioner's gloss of the press's response).

149 See *The Red Flag*, *supra* note 146, at 1 (documenting "the arrest of our brethren").

150 *Id.*

nounced that “[t]he Legislature, by such laws as may be deemed just, should regulate this whole subject of street processions, whether on week days or Sundays.”¹⁵¹ The Mayor similarly asserted his continued belief that “[a]ll street processions composed of the few or of the many are illegal,”¹⁵² but presented a resolution asking the Legislature to pass an act regulating street processions, which reaffirmed the lawfulness of processions in the public streets subject to a set of conditions, including that such processions would notify the Mayor in writing at least six hours in advance so that officials could determine where the procession marched and that processions would not be permitted on Sundays except for “funeral, or benevolent, or religious purposes.”¹⁵³ The proposal also included a provision under which violent bystanders could be prosecuted.¹⁵⁴

The Governor’s broad view of the value of “occupation[s] of the public streets by bodies of men for the purpose of civic as well as military processions” ultimately prevailed when the state legislature took up the matter in January of 1872.¹⁵⁵ The first bill introduced in the legislature, which called for the regulation of processions by permitting,¹⁵⁶ was quickly shelved after being subjected to stinging criticism.¹⁵⁷

151 *The Internationals*, *supra* note 148, at 1.

152 *The Internationalists*, N.Y. TIMES, Dec. 14, 1871, at 8 (explaining further that “[c]ustom, usage, and toleration, both of the governors and the governed, have permitted the technical trespasses of many processions,” but this custom does not prevent the lawful prohibition of a procession likely to “invite disorder”).

153 *The Internationals*, *supra* note 148, at 1.

154 *Id.*

155 *The Governor’s Message*, N.Y. TIMES, Jan. 3, 1872, at 1 (“The occupation of the public streets by bodies of men for the purpose of civic as well as military processions has been permitted under a custom so long established that it has come to be looked upon as a common right. It has been the practice of New York City to afford them protection by the presence and escort of part of the Police force, without reference to the occurrences which the demonstrations were designed to celebrate, or to the race, color or sentiments, political or religious, of those engaging in them. This right of procession has been considered to be established by custom as firmly as the right of free discussion and as is the right of the people ‘peaceably to assemble’ by the Constitution of the United States, and may be regarded, in some sense, as a practical exercise of those rights.”).

156 *See The State Capital*, N.Y. TIMES, Feb. 10, 1872, at 10 (“All processions, except of the National Guard, the Police and the Fire Department, are forbidden, unless notice of the object, time and route be given beforehand to the Police authorities, and their written consent obtained, when suitable protection shall be furnished.”). The proposed bill also banned all processions, except funeral processions, on Sundays. *Id.*

157 *See, e.g., Public Processions*, N.Y. TIMES, Feb. 10, 1872, at 6 (offering a laundry list of objections to the proposed bill).

The new law, enacted in May 1872, constituted the first substantial development of the law of public assembly in New York City.¹⁵⁸ It prohibited parades on Sundays except for funeral and other religious processions.¹⁵⁹ Processions on streets with railway tracks were also regulated.¹⁶⁰ Otherwise, organizers of any parade were required to provide to police authorities “*written notice* of the object, time and route of such procession or parade . . . not less than *six hours* previous to its forming or marching” in order that the police authorities could provide escorts “as may be necessary to protect persons and property, and maintain the public peace and order.”¹⁶¹ This final provision empowered authorities to “designate to such procession or parade how much of the street in width it [could] occupy.”¹⁶²

The new legislation was significant for what it did, but also for what it did not do. Unlike the ordinances that would come later, local officials were not given the power to grant or deny a permit.¹⁶³ The legislation did not even empower authorities to determine the route. Instead, while authorities were given substantial new authority—to determine the amount of the street that could be used, to forbid processions on Sunday, and to ensure noninterference with operation of streetcars—they were also required to furnish whatever police presence was necessary to ensure public safety.¹⁶⁴ Participants, meanwhile, were only required to give six hours’ notice.¹⁶⁵

The new act illustrates once again the value nineteenth-century Americans placed on the tradition of the people outdoors, notwithstanding the very real risks of disorder, even violence, associated with that tradition.¹⁶⁶ Although congested and ripe for regulation, New

158 See *Order of the Police Superintendent Relative to Street Parades*, N.Y. TIMES, May 25, 1872, at 8 (summarizing the provisions of the new law).

159 An Act to Regulate Processions and Parades in the Cities of the State of New York § 3 (passed May 7, 1872), reprinted in N.Y., 1 THE SPECIAL AND LOCAL LAWS AFFECTING PUBLIC INTERESTS IN THE CITY OF NEW YORK IN FORCE ON JANUARY 1, 1880, at 868 (1880).

160 *Id.* § 1.

161 *Id.* § 2.

162 *Id.*

163 *Id.* §§ 1-5.

164 *Id.* § 2.

165 *Id.*

166 New York City was not the only city to move to a notice rather than a permit requirement in its effort to enhance control over outdoor processions. San Francisco also opted for a notice requirement for street parades. Ordinance No. 1857 (New Series) § 72 (Approved March 26, 1912), reprinted in S.F., CAL., SAN FRANCISCO TRAFFIC ORDINANCES 20-21 (1924). In 1912, it passed an ordinance that predicated the lawfulness of a parade on giving authorities twenty-four-hour notice. *Id.* Unlike in New York City, in San Francisco, the ordinance, which was passed significantly later and at a time when a newer more cir-

York City for a very long time chose only to interfere with those political assemblies that had actually become disorderly.¹⁶⁷ In fact, New York, despite its population and history of riots, did not require permits for street parades until 1914, significantly later than other American cities.¹⁶⁸ New York City's Police Commissioner, particularly for the time, was a strong advocate of freedom of speech and assembly even for radicals, implementing a policy for Union Square in which his officers were "instructed . . . to intercede . . . only if obstructions to the streets or sidewalks resulted [from speeches in the square] or if the speakers incited immediate violence."¹⁶⁹ Although by the twentieth century the city had gone a long way toward regulating outdoor gatherings through permits, as late as 1931, New York did not require permits for political gatherings on its streets.¹⁷⁰ New Yorkers continued to have free access to public streets for purposes of holding a meeting or giving a political speech, so long as they acted peaceably.¹⁷¹

cumscribed conception of the right had gained traction, authorized the Chief of Police to "designate the street or streets such procession or parade can occupy." *Id.*

167 For the full account of New York City's regulatory history with respect to outdoor gatherings, see Abu El-Haj, *supra* note 20, at 152–78 (systematically reviewing eight editions of the city's municipal codes between 1823 and 1931 as well as one edition of its park regulations).

168 The new ordinance applied to any "procession, parade, or race" and required that the application for a permit "be made in writing . . . not less than 36 hours previous to the forming or marching of such procession, parade or race." N.Y.C., N.Y., CODE OF ORDINANCES ch. 34, art. I, § 38(1) (1922). It exempted certain groups—most interestingly, "processions or parades, which have marched annually upon the streets for more than 10 years, previous to July 7, 1914." *Id.* § 38(3)(c). Finally, the ordinance laid out guidelines constraining the police commissioner's decision-making. *Id.* § 38(2)(a). Prior to this ordinance, the city issued certificates when it had been notified of a parade (time, location, and size) as required under the 1872 Act. The certificate set out how much of the street the parade could occupy and reminded the organizers that the 1872 Act prohibited interfering with surface railways. *Cf.* Certificate for Salvation Army Parade, July 8, 1909 (RG. 2.12, 109/3) (on file with the Salvation Army National Archives and Research Center, Alexandria, Va.) (noting also the prohibition on carrying red flags during a parade).

169 DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 102 (1997); *see also id.* at 101–03 (recounting New York City Police Commissioner Arthur Woods' views and noting his tolerance is confirmed by contemporary newspaper reporting and internal police documents).

170 San Francisco, similarly, maintained through the 1920s a unique 1903 ordinance exempting public meetings from its unlawful crowd provision. Ordinance No. 833 § 1 (June 11, 1903) ("Whenever the free passage of any street or sidewalk shall be obstructed by a crowd, *except on occasion of public meeting*, the persons composing such crowd shall disperse or move on when directed so to do by any police officer." (emphasis added)), *reprinted in* S.F., CAL., POLICE ORDINANCES 13 (1924).

171 *See* AM. CIVIL LIBERTIES UNION, THE POLICE AND THE RADICALS: WHAT 88 POLICE CHIEFS THINK AND DO ABOUT RADICAL MEETINGS 4 (1921) [hereinafter ACLU 1921] ("New York

B. Privileges and Immunities for Religious Gatherings

Ordinances prohibiting assembly or requiring advance permission to gather were not consistent with the traditional regulatory approach to public assemblies, which targeted only those gatherings that had actually become violent and disruptive. For one, the ordinances regulated gatherings that were peaceful. For another, they transformed access to outdoor space from being a matter of right to being a privilege dispensed by local authorities at their discretion.

The first of such ordinances masked the full implications of this tension because initial reforms were circumscribed. They applied only to the margins—to parks and religious gatherings.¹⁷² More importantly still, as we will see, they were enforced only against the least respectable members of society. “Good” citizens, for now, were unaffected.

As the new regulatory framework expanded from the margins to the center, however, its consequences became harder to avoid. And state courts were soon forced to wrestle with the constitutional implications in the context of ordinances passed to suppress the Salvation Army’s outdoor religious missionary work.¹⁷³

The Michigan Supreme Court was the first to do so, in a case arising out of Grand Rapids. After being repeatedly thwarted in their effort to suppress the Salvation Army in criminal court, government officials in Grand Rapids opted to introduce the city’s first ordinance to restrict access to public streets—one of the first such ordinances in the country.¹⁷⁴ Grand Rapids’s experience of regulatory change was more typical in terms of its timing and context than New York City’s.¹⁷⁵

When the Salvation Army began its work in the United States in 1880, it was a loud, subversive and somewhat shabby religious move-

City . . . permits meetings in the public streets and public halls without any police control whatever.”).

172 Abu El-Haj, *supra* note 20, at 130–34 (describing scope of earliest permit requirements for public gatherings).

173 See, e.g., *In re Garrabad v. Dering*, 54 N.W. 1104 (Wis. 1893); *City of Chicago v. Trotter*, 26 N.E. 359 (Ill. 1891); *Anderson v. City of Wellington*, 19 P. 719 (Kan. 1888); *In re Frazee*, 30 N.W. 72 (Mich. 1886).

174 Abu El-Haj, *supra* note 20, at 128–29 (demonstrating that “[v]ery few cities required a permit in order to assemble in public places” as of 1881).

175 The story recounted here was developed after reading the full run of the only local newspaper to survive for the relevant period as well as a few articles about Grand Rapids that appeared in the 19th Century U.S. Newspapers Digital Archive. In addition, I was able to review court decisions and a few surviving court records, among other things. Finally, three editions of Grand Rapids’s municipal codes between 1873 and 1929 were reviewed. For a full account of the methodology, see Abu El-Haj, *supra* note 20, at 10–15.

ment. Its arrival in Grand Rapids—the second largest city in Michigan with a population of just over 50,000—in November 1883 was not surprisingly greeted with mixed reviews. Although some in the community were enthusiastic, one particular member of the Grand Rapids elite, Mr. D. A. Blodgett, was keen to prevent the Salvation Army from gaining a hold in the city.¹⁷⁶ By 1885, he was reported to be “generously using considerable of his wealth in the endeavor to drive religious superstition (such as the ‘Salvation Army’ . . .) from this part of the State.”¹⁷⁷

Possibly because of such sentiment, in 1883, the city’s Chief of Police forbade the Salvation Army from parading on the city’s streets, particularly on Sundays.¹⁷⁸ This prohibition did not, however, put an end to Salvationist parades.

The Army continued to parade in Grand Rapids for at least two years, thanks to the license afforded them by juries and judges. These local fact-finders repeatedly evidenced a high tolerance for the disorder that resulted from Salvationist street preaching.¹⁷⁹ Local juries, in particular, repeatedly acquitted the marchers of public nuisance charges brought by local officials.¹⁸⁰

1886 saw the election of a new Mayor, who was determined to put an end to Salvationist parades. Upon assuming office, he quickly announced that he was “refus[ing] to further grant the [Salvation] army the freedom of the city for street parades with red banners *and horrible music*” because they were “in their present form . . . a nuisance.”¹⁸¹ To support his position, Mayor Dikeman recounted an accident he

176 See J.M. Jamison, Letter to the Editor, *Mr. Charles Watts at Grand Rapids, (Mich.)*, BOS. INVESTIGATOR, Dec. 9, 1885, at 2 (submitted by the author on Nov. 24, 1885).

177 *Id.* (reporting Blodgett to be a millionaire lumber magnet).

178 *Latest News Items*, DAILY EVENING BULL. (S.F., Cal.), Issue 57, col. F, Dec. 12, 1883; see also Corps History, Grand Rapids Centennial Temple Corps, Writing Contest Entry 43 in Vertical File Collection, Grand Rapids (Fulton Heights Citadel), Mich., Corps History at S.A. Archives (“Open air evangelism was an important part of the early Army. City laws were printed in Grand Rapids, however, stating that The Salvation Army could march, play tambourines, etc. during the week, but *never on Sunday*.”).

179 See *In re Frazee*, 30 N.W. 72, 73 (Mich. 1886) (noting that “the ‘Salvation Army’ . . . had paraded in Grand Rapids during two years or more”).

180 *Id.* (“[T]he ‘Salvation Army’ . . . on repeated prosecutions for public nuisance, had been acquitted”). The only respite from this pattern was in 1885 when the city’s “new Mayor . . . granted [the Salvation Army] our rights, in allowing us to march, sing and play on the street.” *The Michigan War, Divisional Demonstration, Victory all along the Line—Opening of Charlotte—And Other Items of Interest—Read! Read!*, WAR CRY, May 30, 1885, at 1.

181 *No More Salvation Parades, Mayor Dikeman Refuses the Salvationists Further Use of the Streets*, EVENING LEADER, (Grand Rapids, Mich.), Aug. 4, 1886, at 4 (emphasis added).

had recently witnessed that had been caused by a horse, which had been frightened by a Salvationist parade.¹⁸²

The Salvation Army was undeterred, promptly defying the Mayor and parading the streets as usual.¹⁸³ The following evening, fourteen members of the Army, including Captain Andrew Frazee, were arrested for disturbing the peace.¹⁸⁴

When a hearing was held in police court the following morning, counsel for the Salvationist defendants moved to quash the complaint, arguing that noise from “singing, shouting and playing upon musical instruments” could not amount to “disturbing the peace.”¹⁸⁵ The judge promptly ruled that it was a question for the jury.¹⁸⁶ The jury, once again, acquitted all of the defendants “after deliberating an hour and a half.”¹⁸⁷

Of particular interest is the fact that the jury acquitted the Salvationists even after hearing an array of testimony about the inconvenience and disorder caused by their repeated parades. Mayor Dikeman, for example, testified that “during the past ten days” the parades had caused large crowds, that he had witnessed a horse frightened by the noise, and that he himself found the processions very loud, although he was not irritated by them.¹⁸⁸ Of the twelve additional witnesses heard, ten testified that horses were frightened by the noise from Salvationist parades.¹⁸⁹ One of them stated that he rode his horse “on the back streets lately” because his horse had been frightened by a Salvation Army parade two years ago.¹⁹⁰ Many of the witnesses complained of the crowds that the Army attracted.¹⁹¹ One asserted that a crowd of between “800 and 1,500 people” had amassed

182 *Id.*

183 *Salvationists in Limbo, Fourteen Members of the Army and Seven Sympathizers Under Arrest*, EVENING LEADER (Grand Rapids, Mich.), Aug. 6, 1886, at 4.

184 *Id.* That same evening, a second parade, consisting of “seven members of the State Holiness association” was also stopped. It had taken to the streets to express sympathy for the Army, after hearing of the first arrests. *Id.*

185 *Id.* (internal quotation marks omitted).

186 *Id.*

187 *The Happy Army, The Salvationists Are Preparing for a Great Love Feast*, EVENING LEADER (Grand Rapids, Mich.), Aug. 13, 1886, at 4. The case against the second parade was dismissed.

188 *The Salvationists, Their Examination Begun—Mayor Dikemen [sic] Tells What He Knows of the Army's Parades*, EVENING LEADER (Grand Rapids, Mich.), Aug. 10, 1886, at 4.

189 *Id.*

190 *Id.*

191 *Id.*

on the streets the previous Thursday evening.¹⁹² Finally, several testified that the Army made “a great deal of noise.”¹⁹³

Having won, again, the Salvation Army immediately started to prepare “for a grand jubilee celebration at the barracks.”¹⁹⁴ That evening the Salvation Army paraded in its usual manner.¹⁹⁵

Midway through, the police arrived and arrested eleven of them.¹⁹⁶ This time, the charge was *causing a public nuisance*.¹⁹⁷ The defendants pled not guilty, opting for a bench trial.¹⁹⁸ In late August 1886, they were acquitted when the court found that their parade was not a nuisance.¹⁹⁹

The city’s efforts to crack down on the Salvation Army had failed once again. While we cannot know specifically what the Grand Rapids juries and judges were thinking, one thing is clear: they rejected the city officials’ view that the processions were disruptive and disorderly and thus worthy of suppression. Twice in one month the city was rebuffed. The evening processions, however noisy and unharmonious, and despite the crowds they collected, constituted neither a breach of the peace nor a public nuisance in the view of the local populace.

These Grand Rapids fact-finders were not the only ones to reject municipal efforts to use criminal law to suppress Salvationists parades. In 1893, New Jersey prosecuted a member of the Salvation Army engaged in an open-air meeting for disturbing the peace and unlawful assembly.²⁰⁰ The Salvation Army won its case “on grounds of peaceable assembly and freedom of religion.”²⁰¹

After having been repeatedly thwarted by local juries, the government officials in Grand Rapids turned to a legislative solution: the enactment of the city’s first permit requirement for public parades. A front-page headline, announcing the proposed ordinance,

192 *Id.*

193 *Id.*

194 *Police v. Soldiers*, THE EVENING LEADER (Grand Rapids, Mich.), Aug. 14, 1886, at 4.

195 *Id.* (describing the procession as consisting of “nothing but the same plain old army . . . dressed about the same as for the past two years,” singing “the same songs and with voices about as strong as usual; played upon the same musical instruments,” and parading “the same streets”).

196 *Id.*

197 *Lads and Lassies in Court*, EVENING LEADER (Grand Rapids, Mich.), Aug. 16, 1886, at 4 (emphasis added).

198 *Id.*

199 *Latest News Items*, DAILY EVENING BULL., (S.F., Cal.), Aug. 26, 1886, at F.

200 Edward Carey, *Vignettes of Army History—‘You should be at home with your mother!’*, WAR CRY, Apr. 19, 1980, at 5 (reference to case not included).

201 *Id.*

read simply, “It Means Salvation Army, An Ordinance Now Pending That Will Prevent Singing and Shouting in the Streets.”²⁰²

On September 13, an ordinance, which rendered parades on the streets unlawful in the absence of a permit, was passed, by a vote of ten to four.²⁰³ The new ordinance explicitly preserved the city’s pre-existing street regulations, including its nuisance provision.²⁰⁴

During the legislative debate, only one Alderman spoke out against the ordinance. He “said he was not a Salvation Army man, but he was opposed to curtailing any religious privileges or the personal freedom of any man.”²⁰⁵ His colleagues were not persuaded. One Alderman, in response, retorted,

that he was as much in favor of liberty as anybody. . . . but he did not believe this twaddle about the rights of the Salvation Army being violated. They had a right to worship as they pleased but not to interfere with his rights and make themselves a nuisance.²⁰⁶

Another remarked that “the crazy crowd dancing and drumming on the streets—[is] enough to almost convince [me] that there is more than one God” and argued that “it [was] the duty of the council to make ordinances to secure citizens from annoyances and protect them from crazy fanatics and fools.”²⁰⁷ The debate in city council focused entirely on the Salvation Army and whether it was appropriate to curtail the group’s religious activities in the public streets.²⁰⁸

Once the new ordinance passed, the Salvation Army, an organization interested in making converts not law, was quick to petition the

202 *It Means Salvation Army, An Ordinance Now Pending That Will Prevent Singing and Shouting in the Streets*, EVENING LEADER, (Grand Rapids, Mich.), Aug. 31, 1886, at 1.

203 *The City’s Law Makers: The Salvation Army Ordinance Passes—A New Name Wanted—People Who Don’t Want the Dummy Line*, EVENING LEADER (Grand Rapids, Mich.), Sept. 14, 1886, at 4. The new ordinance provided, in relevant part,

No person or persons, association or organizations, shall march, parade, ride, or drive in or upon or through the public streets of the city of Grand Rapids, with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without having first obtained the consent of the mayor or common council of said city; funeral and military processions, however, shall not be subject to the foregoing provisions of this section; but such processions, as well as those having the permit or consent of the mayor or common council, when using the public streets of said city, shall conform to such directions as the mayor or chief of police may give in relation to the streets to be used, and the portion thereof to be occupied by them, and in relation to the manner of such use.

In re Frazee, 30 N.W. 72, 73 (Mich. 1886) (quoting the ordinance) (internal quotation marks omitted).

204 *In re Frazee*, 30 N.W. at 73.

205 *The City’s Law Makers, The Salvation Army Ordinance Passes—A New Name Wanted—People Who Don’t Want the Dummy Line*, *supra* note 203, at 4.

206 *Id.*

207 *Id.*

208 *Id.*

Common Council for permission to parade the streets. Its application emphasized that “[t]he parades [were] held as a duty to God and a necessity to the good work, and ceasing the parades [would] badly cripple the salvation operations inasmuch as the class of people sought to be reached will be beyond the effect of the hallelujah corps.”²⁰⁹

After tabling the matter for a week,²¹⁰ at the Mayor’s urging, the Common Council voted, nine to six, to deny the Salvation Army’s request for permission to parade.²¹¹ It also “instruct[ed] the superintendent of police to enforce the ordinance relative to street parades.”²¹²

Once again, the Salvationists’ response was to defy the ordinance and parade the streets with their drums and tambourines, and once again the marchers were arrested—this time for failing to have the requisite permission as required by the new ordinance.²¹³

Before the police court, counsel for the Salvation Army challenged the ordinance, among other things, for taking from the jury the question of the lawfulness of the assembly.²¹⁴ The city’s charter typically “impowered [sic] the council to pass ordinances for the punishment of unlawful acts,” he said, and a “person arrested for an alleged unlawful act *ha[s] a right to ask a jury to pass upon its legality.*”²¹⁵ The ordinance, however, “foreclosed all inquiry into the legality of the act” by the jury.²¹⁶ “The only questions of fact were, *did they parade and did they have permission.*”²¹⁷ The attorney also made the point that the decision to prohibit an assembly was entirely up to the “caprice” of the Mayor, who “might permit the most disorderly mob to parade

209 *Aldermanic Wisdom*, EVENING LEADER (Grand Rapids, Mich.), Sept. 21, 1886, at 4. There is no internal legal correspondence pertaining to Grand Rapids from this period at the Salvation Army National Archives and Research Center in Alexandria, Virginia.

210 *See id.* (noting that “[o]n motion of Ald. Brenner the matter was tabled for a week”).

211 *The Streak of Economy, The Aldermen Chop Down Expenses—The Dummy Line Extension—The Mayor Calls a Relief Meeting*, EVENING LEADER (Grand Rapids, Mich.), Sept. 28, 1886, at 4.

212 *Id.*

213 *See The Army Again in Limbo*, EVENING LEADER (Grand Rapids, Mich.), Sept. 29, 1886, at 4 (explaining that “[t]he Salvation Army defied the powers that be and the new ordinance last night and paraded the streets as usual” and “spent the night at headquarters”); *In re Frazee*, 30 N.W. 72, 72–74 (Mich. 1886) (noting that “[o]n the twenty-ninth of September, 1886, petitioner and several others were arrested for having violated the ordinance on the previous evening”).

214 *Will Test the Ordinance, Attorney Carroll’s Present Job—The Highest Courts Will Deal With the Salvation Army Case, If Necessary*, EVENING LEADER (Grand Rapids, Mich.), Sept. 30, 1886, at 4.

215 *Id.*

216 *Id.*

217 *Id.* (emphasis added).

the streets, and refuse permission to the most orderly procession.”²¹⁸ The hearing was continued after the presiding judge asked the city’s attorney for authorities to support the validity of the ordinance.²¹⁹

That same day, the Army’s attorney also sought a writ of habeas corpus from the circuit court on the ground that the ordinance was unconstitutional.²²⁰ When the writ was denied by a circuit judge, Captain Frazee opted to remain in prison in order to appeal the denial of habeas to the Michigan Supreme Court.²²¹

In his habeas petition to the state’s highest court, Frazee argued that the provision requiring advance permission to parade in the public streets with music and banners was void “as an unreasonable and unlawful interference with the streets” by the municipality and “outside of any inference or grant of authority in the charter.”²²² These were standard arguments about transgressing the limits of municipal powers as defined by the city’s charter.

The city’s primary argument on appeal was that the Salvation Army had defied the law by refusing to accept that it was making “a public nuisance” of itself with its “instruments, drums, tambourines and horns and . . . loud singing and shouting on the public streets.”²²³ The brief continued,

[U]nder certain restrictions and regulations the marches of these people may be harm[less] and lawful, on the other hand left unrestrained and without any control over them by the City under its general police power to regulate the use of the public streets, *their parades will unquestionably tend to a breach of the peace—to frighten horses, to impede the progress of travel and thereby endanger the public safety and perhaps ultimately result in bloodshed* as it has been shown by counsel in the court below resulted from parades of this character in England.²²⁴

While no doubt this was the view of Grand Rapids’ elected officials, local juries had repeatedly decided that the Salvation Army had not created a public nuisance through its actions.

Oral argument on the habeas petition was held before the Michigan Supreme Court on October 19, 1886.²²⁵ The argument lasted for

218 *Id.*

219 *Id.*

220 *Id.*

221 *Taken to the Supreme Court*, EVENING LEADER (Grand Rapids, Mich.), Oct. 7, 1886, at 4. The trial in police court was adjourned pending resolution of the habeas proceeding. *Id.*

222 *In re Frazee*, 30 N.W. 72, 73–74 (Mich. 1886).

223 Brief for Respondent at 6–7, *In re Frazee*, 30 N.W. at 73 (internal citation omitted).

224 *Id.* at 7–8 (emphasis added).

225 *See Salvation is Free*, EVENING LEADER (Grand Rapids, Mich.), Oct. 20, 1886, at 4.

five hours.²²⁶ At its conclusion, “[T]he court rendered an order releasing the prisoner, thus declaring the city ordinance . . . invalid and unconstitutional.”²²⁷

The Salvation Army was quick to celebrate, parading “with the whole musical and spectacular paraphernalia of the order, including the relic of [a] famous brass band.”²²⁸ The parade was followed by a celebration at the barracks. “The music was not wholly musical, but the fourteen members of the band showed their willingness to produce something akin to harmony.”²²⁹

Nine days later, on October 28, the Michigan Supreme Court issued an opinion explaining its decision that the ordinance was unreasonable and void.²³⁰ Viewing the central issue as one of municipal powers, the bulk of the decision was devoted to explaining why the ordinance was not authorized by the powers conferred by the charter.²³¹ The rest of the decision was devoted to explaining how it would be improper to infer such a power since the ordinance infringed on constitutional rights—particularly the right of peaceable assembly.²³²

The opinion emphasized that “[i]t has been customary, from time immemorial, in all free countries, and in most civilized countries, for people who are assembled for common purposes to parade together, by day or reasonable hours at night, with banners and other paraphernalia, and with music of various kinds.”²³³ The court further noted that “processions for political, religious, and social demonstrations are resorted to for the express purpose of keeping unity of feeling and enthusiasm, and frequently to produce some effect on the public mind by the spectacle of union and numbers.”²³⁴

226 *Id.* (noting that “[t]he arguments commence at 11 o’clock in the forenoon and the flow of eloquence did not cease until four in the afternoon”).

227 *Id.*

228 *Celebrating Their Independence*, EVENING LEADER (Grand Rapids, Mich.), Oct. 21, 1886, at 4.

229 *Id.*

230 *In re Frazee*, 30 N.W. 72, 73–74 (Mich. 1886).

231 *Id.*

232 *See id.* at 74 (“We must therefore construe this charter, and the powers it assumes to grant . . . as only conferring such power over the subjects referred to as will enable the city to keep order, and suppress mischief, in accordance with the limitations and conditions required by the rights of the people themselves, as secured by the principles of law, which cannot be less careful of private rights under a constitution than under the common law.”).

233 *Id.* at 75.

234 *Id.*

The court explicitly acknowledged that processions create a risk of disorder, but it explained that such risks could be addressed when they actually arose, as they always had been:

[Processions] are . . . capable of perversion to bad uses, and, when so perverted, may be dangerous. When people assemble in riotous mobs, and move for purposes opposed to private or public security, they become unlawful, and their members and abettors become punishable. These dangers are as well-known as the customs themselves are, and are sometimes very great dangers. There may be times and occasions when such assemblies may for a while be dangerous in themselves, because of inflammable conditions among the population. All of these things are as ancient as the law, and are generally within reach of the law, unless the law itself is, for the time, suspended by military necessity. . . . It is only when political, religious, social or other demonstrations create public disturbances, or operate as nuisance, or create or manifestly threaten some tangible public or private mischief that the law interferes.²³⁵

After the decision from the Michigan Supreme Court, Grand Rapids abandoned its regulatory efforts.

The Michigan Supreme Court's tolerance of the disruption associated with outdoor gatherings was typical of the period. Prior to 1897, all but one of the state supreme courts asked to review ordinances requiring advance permission to gather in public places found the ordinances void.²³⁶

Nineteenth-century judges were not impressed by the risk of disorder or the inconvenience to passers-by posed by large public gatherings. Instead, they emphasized that the genius of the nation's free and democratic institutions was that they allowed great latitude when the people came out to demonstrate in the street for political, religious, and social purposes. As one court put it,

The spirit of our free institutions allows great latitude in public parades and demonstrations, whether religious or political, and if they do not threaten the public peace, or substantially interfere with the rights of others, every measure repressing them, whether by legislative enactment, or municipal ordinance, is an encroachment upon fundamental and constitutional rights.²³⁷

The 1888 decision of the Supreme Court of Kansas, in *Anderson v. City of Wellington*, is illustrative. Like the Michigan Supreme Court in the *Frazer Case*, the Supreme Court of Kansas completely rejected the

²³⁵ *Id.*

²³⁶ See Abu El-Haj 2009, *supra* note 6, at 570 n.125 (comprehensively reviewing decisions from the period). The history offered here shows that the standard account of the legal history has been mistaken in its analysis. See, e.g., ZICK, *supra* note 7, at 183–86 (offering a quick summary of the standard historical account based on *Davis v. Massachusetts*, 167 U.S. 43 (1897)).

²³⁷ *Rich v. City of Naperville*, 42 Ill. App. 222, 223–24 (Ill. App. Ct. 1891).

city's argument that the ordinance was justified because an unusual crowd or congregation of people upon the public streets is a disturbance of the public peace or, at least, threatens a disturbance of the peace and, thus, threatens the good order of the community:

A crowd of people is one of the most ordinary incidents of every-day life in any city of considerable size in this country . . . it is not a fair estimate of the character and habits of the American people to assume that the public peace is threatened when numbers of them congregate.²³⁸

Instead, it found the requirement of advance permission patently unreasonable because under the ordinance, “political parties . . . Masonic and Odd Fellow’s organizations . . . [e]ven . . . Sunday-School children . . . [and] [t]he Grand Army of the Republic” would be prevented from parading the streets, in the manner to which they were accustomed, in the absence of “the written consent of some municipal officer.”²³⁹ In holding that the city’s charter did not confer the power to pass the parading ordinance, the Kansas Supreme Court explicitly invoked the right of peaceable assembly as a limit on the city’s power:

The right of the people in this state, by organization to co-operate in a common effort, and by a public demonstration or parade to influence public opinion, and impress their strength upon the public mind, and to march upon the public streets of the cities of the states with the usual accompaniments of bands, banners, transparencies, glee clubs, and all the accessories of public meetings, is too firmly established, and has been too often exercised, to be now questioned. . . .²⁴⁰

In sum, while Mayor Dikeman and various members of the Grand Rapids Common Council considered the Salvation Army to be a nuisance and believed they were entitled to repress the organization, local juries, trial judges, and ultimately the justices on the Michigan Supreme Court stood in their way. In doing so, these nineteenth-century actors evidenced an appreciation of the value of assembly to politics and a respect for the right to assemble as a privilege and immunity of American citizenship even in the face of evidence of disorder and inconvenience—if not actual violence. Their views, more importantly, were typical of the period.

²³⁸ Anderson v. City of Wellington, 19 P. 719, 721 (Kan. 1888).

²³⁹ *Id.*

²⁴⁰ *Id.* at 722 (finding the ordinance unreasonable for its violation of “recognized rights and privileges”).

C. Conclusion

Through the nineteenth century, Americans vigilantly defended their right to assemble in public, free from prior constraints, even when forced to acknowledge the inconvenience and disorder associated with crowds and the risk of violence sometimes posed by them. Notice requirements and criminal prosecutions, if and when actual violence ensued, were considered sufficient.

This high tolerance for the irritations that come with democracy derived from the importance placed on assembling and parading in public in the American political tradition. The fact that the state supreme courts that reviewed the first municipal ordinances requiring a permit to lawfully gather on the streets consistently found them void is a testament to the value placed on the right of assembly at the time. These courts balked at the suggestion that general permit requirements were reasonable efforts to regulate street gatherings, emphasizing that the ordinances infringed upon important democratic and constitutional traditions of assembling.

An editorial in Detroit's *The Evening News* in 1901, reflected the nineteenth-century view well when it explained that while the main purpose of a road is travel, and, as such, the roadways should not be obstructed, the gatherings of citizens has traditionally been importantly exempted from that general principle.²⁴¹ In the words of its author,

When the people at large want to assemble to discuss public affairs, they are not under any obligation to 'hire a hall.' *The open public squares are theirs to use for such a purpose.* . . . [this understanding, even applicable in] great cities[,] . . . has come about from common sense and common custom, as derived from a broad and liberal application of the constitutional privilege of assembly and petition. . . . When they come out in their thousands, and fill the public squares for a peaceful and orderly purpose, they literally take possession of and make use of their own property, and, for the time being, the ordinary law of the road is suspended. . . . Some lawyers might cavil at this, but the custom is universal in free countries, and the well-established custom is law.²⁴²

This tolerance is less surprising than one might think at first. Aside from the fact that, as we have seen, tolerance for the inconvenience and risk associated with outdoor assemblies had been ingrained

²⁴¹ Editorial, *The Law of the Road*, EVENING NEWS DETROIT, May 20, 1901, at 2 (noting that as a general rule and "[s]trictly, the road may not be used for other purposes than those for which it is designed," but "[t]here is an exception to the strict law of the road in great cities, which has come about from common sense and common custom as derived from a broad and liberal application of the constitutional privilege of assembly").

²⁴² *Id.* (emphasis added).

in American culture since the American Revolution, nineteenth-century Americans lived with much more chaos and disorder generally. Cities were cramped and crowded. Pigs did the garbage collecting.²⁴³ Horses, wagons, and carts filled the cities' largely unpaved streets, but traffic laws were nascent.²⁴⁴ Perhaps more importantly, lives were short and fragile.

III. ORIGINS OF CONTEMPORARY PUBLIC ATTITUDES

The nineteenth-century worldview would change. Under pressure from immigration and industrialization, the Progressive Movement would arise and American cities would become more orderly. Changing conceptions of the right of assembly, however, would start with the Massachusetts judiciary. Unlike other state courts, Massachusetts courts repeatedly upheld ordinances regulating public assemblies, even when those ordinances operated as outright prohibitions.²⁴⁵ This view, rather than those of the other state courts, as it happened, was the one to be taken up by the United States Supreme Court in 1897.²⁴⁶ Thereafter, state courts around the nation changed their tune and began upholding the new regulations.²⁴⁷

Public opinion did not immediately change, though. Americans continued to evidence a high tolerance for the disorder associated with assemblies well into the twentieth century, despite the fact that permit requirements, once they were held constitutional, were widely adopted.

Still, public tolerance of disorder would not last forever. As more extensive regulations became normalized, advance regulation of peaceful outdoor gatherings became more acceptable to the public. Our current attitudes arise out of these changes, among others.

²⁴³ Hendrick Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 901 (1985) (“[I]n a world without professional streetcleaners, a world in which private citizens were expected to provide the manpower . . . to remove the excrement and the wastes of urban street life, pigs assumed a necessary public role, particularly in wards whose residents lacked available servants.”).

²⁴⁴ See generally PETER C. BALDWIN, *DOMESTICATING THE STREET: REFORM OF PUBLIC SPACE IN HARTFORD, 1850–1930* (1999); CLAY MCSHANE, *DOWN THE ASPHALT PATH: THE AUTOMOBILE AND THE AMERICAN CITY* (1995). My own review of municipal codes from the period turned up a handful of early efforts to regulate specific concerns. Traffic laws as we know them, however, are a result of the advent of the automobile.

²⁴⁵ See, e.g., *Commonwealth v. Abrahams*, 30 N.E. 79 (Mass. 1892); *Commonwealth v. Plaisted*, 19 N.E. 224 (Mass. 1889); *Commonwealth v. Davis*, 4 N.E. 577 (Mass. 1886).

²⁴⁶ *Davis v. Massachusetts*, 167 U.S. 43 (1897).

²⁴⁷ See Abu El-Haj, *supra* note 20, at 207–17.

A. *Massachusetts: The Origin of Judicial Reconsideration of the Right of Peaceable Assembly*

The origins of the constitutional sanctioning of extensive regulation of outdoor gatherings lie in Boston.²⁴⁸ Although public opinion in Boston was not that different from attitudes in New York and Grand Rapids, Boston officials at all levels consistently dismissed claims that efforts to regulate public assembly in any way infringed on traditional privileges and immunities of citizenship, even when what was challenged were outright prohibitions of outdoor gathering in certain places.

In contrast to the views of its sister courts around the nation, the Supreme Judicial Court of Massachusetts at no point recognized, let alone espoused, a commitment to American traditions of outdoor politics and a concomitant strong conception of the right of assembly. In fact, Massachusetts housed the only state supreme court to consistently uphold all variations of regulations of public gatherings.²⁴⁹

Similarly, only twice in a twenty-year period did local Boston officials acknowledge any constitutional interests at stake in the new regulations. The first time was right at the beginning of the two-decade controversy that is the subject of this section.²⁵⁰

When the Salvation Army arrived in Boston for the first time, in September 1884, the group was under the impression that official permission was necessary for street parades and thus refrained from undertaking such parades.²⁵¹ This impression was quickly dispelled by the Mayor, when, a month later, three delegates of the Salvation Army visited his office to request a parade permit.²⁵²

The Mayor, in what would turn out to be an outlying stance for Boston officials, related the classic nineteenth-century understand-

248 The history recounted here is based on primary research that included, inter alia, a review of court decisions and records from the Massachusetts Supreme Judicial Court, William F. Davis's own account of the events, coverage of the controversy in many different newspapers using the 19th Century U.S. Newspapers Digital Archive, and critical issues of *The Boston Daily Globe*. In addition, I was able to obtain and review the municipal code for Boston in 1882 and compare it to the city's code in 1925. For a full account of the methodology, see Abu El-Haj, *supra* note 20, at 10–15.

249 See *supra* note 245 and accompanying text.

250 The second instance is discussed *infra* notes 267–69 and accompanying text.

251 *The Salvation Army: Opening of Its Campaign in Boston—Yesterday's Meetings at the West End—Great Crowds, but No Disorder*, BOS. DAILY ADVERTISER, Sept. 8, 1884, at 8 (noting that “[t]he promised street parade was postponed until this evening as, through some oversight, no permit had been obtained from the police authorities”).

252 *The Salvation Army: The Interposition of the Mayor and the Aldermen Sought in Their Behalf*, BOS. DAILY ADVERTISER, Oct. 7, 1884, at 8.

ings of the legal parameters for public assemblies.²⁵³ He explained to the Salvationists that they were not required to have a permit and assured them that “there could be no objection to their parading in the streets more than for any organized body having peaceful designs.”²⁵⁴ The only role for the police, he continued, would be “to preserve the [public] peace and to prevent any obstruction of the streets that might seriously interrupt public travel.”²⁵⁵ When the content of this meeting was reported, the *Boston Daily Advertiser* mocked the Salvation Army for its “unfamiliarity . . . with our civic affairs” and for “*not duly consider[ing] the difference between civil and military rule.*”²⁵⁶ There was no major interference by the police with Salvationist parades on the streets of Boston that year.

Controversy about public assembly in Boston ultimately arose not over Salvationist parades, but over access to the Boston Common by other evangelical groups. In 1862, almost exactly fifty years after New York City, Boston adopted an ordinance prohibiting any person from “deliver[ing] any sermon, lecture, address, or discourse on the [Boston] common, public garden, public squares, or common lands of the city without the permission of the mayor and aldermen.”²⁵⁷ Until then, speaking on the Boston Common and in the city’s gardens and squares was not regulated, except through the criminal law, and preaching on the Common was not interfered with.²⁵⁸

In 1885, for the first time, police officers assigned to the Boston Common were given orders to enforce the 1862 ordinance.²⁵⁹ In response, on May 17, more than a dozen religious figures of various denominations spoke on the Common without the required permit.

253 *Id.*

254 *Id.*

255 *Id.*

256 *Id.* (emphasis added).

257 Br. of James F. Pickering for Plaintiff in Error at 2, *Davis v. Commonwealth*, 167 U.S. 43 (1897) (No. 229).

258 See, e.g., *Preaching on the Common: The Congregational Ministers Discuss the Question in Its Various Aspects*, BOS. DAILY ADVERTISER, June 16, 1885, at 8 (“In 1862, for the first time, preaching upon the Common was prohibited without permission from the mayor and aldermen.”); *Boston Common: The Evangelical Ministers Champion Rev. W.F. Davis*, BOS. DAILY ADVERTISER, Jan. 10, 1888, at 2 (“So far as is known this privilege [of preaching on the Boston Common] was valued and frequently enjoyed, and never interfered with until January 1862. . .”).

259 See *Worship on the Common: The Preachers of Last Sunday Fined Thirty Dollars Each—Their Defence*, BOS. DAILY ADVERTISER, May 29, 1885, at 8 (paraphrasing the testimony of a police officer, “Have been an officer on the Common during the summer months for three years past, . . . but had no expressed orders to preserve the peace until within a few weeks. Have lately received orders from my superior officer . . . to preserve order on the Common, and enforce the ordinance bearing on the subject of preaching on the Common”).

Not once in the following decades would a Massachusetts court see any reason to be concerned about the rights of religious freedom, peaceable assembly or free speech. Instead, Massachusetts courts facing criminal prosecutions under this ordinance consistently upheld municipal efforts to repress “objectionable people” as a lawful exercise of the police power.

This trend began right from the start, at the police court proceedings surrounding the first prosecution under the ordinance. The criminal cases were set up to test the constitutionality of the ordinance, which the ministers considered an unconstitutional infringement on religious freedoms.²⁶⁰ At the hearing that was held in police court, the trial court judge quickly dismissed their arguments, viewing the ordinance as a proper exercise of the police power. The judge’s only articulated reservation was that the targets of the ordinance had not been Reverend Hastings’ respectable audience: “Of course no such class of people as that represented by the defendant [Reverend Hastings] was involved; *the ordinance was intended for objectionable people*. If good people wish to hold services, they can very easily get a permit.”²⁶¹

After a couple of ministers defied the ordinance again, a second police court hearing took place on May 27, 1885.²⁶² Once again, defense counsel “made an argument of over an hour’s length” against the constitutionality of the ordinance.²⁶³ Once again, the court summarily upheld the ordinance, stating, “I know nothing of the history of this ordinance, and we must presume that it was enacted in the interest of order, and to prevent disorder *I accept the ordinance as not in conflict with the Bill of Rights.*”²⁶⁴

²⁶⁰ See WILLIAM F. DAVIS, CHRISTIAN LIBERTIES IN BOSTON: A SKETCH OF RECENT ATTEMPTS TO DESTROY THEM THROUGH THE DEVICE OF A GAG-BY-LAW FOR GOSPEL PREACHERS 46 (1887) (quoting the “Secretary of the Y.M.C. Association” as saying, “We have come to try whether Christian citizens can be robbed of their constitutional rights to worship God freely on common grounds of Boston . . . by a city ordinance” (internal quotation marks omitted); accord Reverend A.H. Plumb, *Preaching on the Common: Permits Refused*, CONGREGATIONALIST (Bos.), Dec. 22, 1887, at 10 (“[T]he Y.M.C.A., tired of the arbitrary refusals of the city authorities,” wanted to “[make] a test case.”).

²⁶¹ *Freedom of Worship: Clergymen and Laymen Fined in the Police Court for Preaching on the Common*, BOS. DAILY ADVERTISER, May 22, 1885, at 2 (emphasis added). During the hearing, a police officer testified that the “audience was of the middle class, and well behaved, and made no disturbance whatever.” *Id.*

²⁶² See *Worship on the Common: The Case of the Preachers Continued—Some New Points Claimed by the Defence*, BOS. DAILY ADVERTISER, May 28, 1885, at 8 (describing the hearing the previous day and the events that led to the hearing).

²⁶³ *Worship on the Common, The Preachers of Last Sunday Fined Thirty Dollars Each—Their Defence*, *supra* note 259, at 8.

²⁶⁴ *Id.* (emphasis added).

The attitudes of Massachusetts courts did not change even when officials sought to implement the ordinance as an outright prohibition on outdoor preaching. A few years later, while Boston's Mayor was proudly boasting that no permit request to preach on the Boston Common had been denied during his tenure, the city's independent Park Commission refused to grant the Y.M.C.A. (another evangelical group) a permit to hold open-air meetings in two of its parks.²⁶⁵ The Commissioners justified their decision to deny the Y.M.C.A. access to the parks by explaining that they considered the city's parks to be places for quiet recreation.²⁶⁶

In the spring of 1889, the Commissioners also denied the Central Labor Union a permit to hold a public meeting in Franklin Park on July 4, using the same rationale. The labor union, however, was not as willing to go along, and the controversy that erupted illustrates the unusual attitudes of Massachusetts officials, including its courts.

When the permit was denied, the Union's first recourse was to the City's new Republican Mayor, Thomas N. Hart. Upon the advice of corporation counsel, the Mayor refused the Union's request for him to overrule the Park Commissioners. Hart's letter to the Secretary of the Central Labor Union, however, expressed sympathy for the Union and acknowledged both the people's right of peaceful assembly and the park's expansiveness:

Our Declaration of Rights (Art. 19) says: "The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good." It seems to me proper that the law-abiding people should assemble, under proper rules, in the public parks which, like Faneuil Hall, belong to the people. *Franklin Park is large enough to hold every man, woman and child in Boston, and your choice of time and place is both reasonable and in such entire harmony with the fundamental rights guaranteed by our constitution*

²⁶⁵ See *Boston Common: the Evangelical Ministers Champion Rev. W.F. Davis*, *supra* note 258, at 2 ("However, Rev. . . . Deming says that in the summer of 1887[,] the park commissioners refused to permit the Boston Young Men's Christian Association to hold open-air meetings at the Marine Park and at Franklin Park.").

²⁶⁶ See, e.g., *No Preaching in Franklin Park*, BOS. DAILY ADVERTISER, Aug. 16, 1888, at 3 (reporting that the park commission explained its denial of access on the grounds that "the park is intended to be a place of recreation for the people, and this would not be the case were it used for holding meetings of any sort" (internal quotation marks omitted)); *The Religious Outlook*, BOS. DAILY ADVERTISER, Sept. 1, 1888, at 4 ("The refusal . . . is sought to be justified by the plea that such permission would defeat the purpose for which the park exists—to provide a space for rest and recreation, from noise and disturbances." (quoting *The Watchman*) (internal quotation marks omitted)).

*that I shall immediately urge the Honorable Park Commissioners to modify or reverse their decision of May 31, 1889.*²⁶⁷

The Mayor's letter is remarkable because it was the first time since 1884 (when Boston's Mayor lectured the Salvation Army that they were free to parade the streets so long as they did not create a disturbance) that a government official in Massachusetts acknowledged the people's "right, in an orderly and peaceable manner, to assemble to consult upon the common good."²⁶⁸ The letter did not go so far as to question the very requirement of a permit (as other state supreme courts had). Still, for Boston, where official voices consistently saw no constitutional concerns, even when individuals were entirely prohibited from speaking or gathering in public, the letter was notable.

The Mayor's political support turned out not to be enough to change the position of the Park Commissioners. In late June, after some back and forth, the Park Commission issued an open letter to the Mayor in which it reiterated its resolve that Franklin Park was not an appropriate venue for public meetings.²⁶⁹

The city's organized labor responded in turn by orchestrating a test case after holding multiple public meetings at private venues.²⁷⁰ On July 3, an official of the Central Labor Union sent notice to the City of its intent to challenge the law. In an open letter, published in *The Boston Daily Globe*, the Union clarified that labor "desired [access to] Franklin Park because [they] believe[d they] could find listeners who do not usually attend labor meetings" there.²⁷¹ In doing so, the Union explicitly invoked the traditions of street politics in Boston:

Nearly 60 years ago the workingmen of Boston celebrated the Fourth of July by a procession, oration and banquet at Faneuil Hall. The labor men desire to revive this method of observing the day of our country's declaration of independence from monarchical control by demonstrations in favor of the new declaration of economic independence.²⁷²

267 Letter from Thomas N. Hart, Mayor of Boston, to Mr. Frank K. Foster, Secretary Central Labor Union, *reprinted in* Brief for Defendant at 16, *Commonwealth v. Abrahams*, 30 N.E. 79 (Mass. 1892).

268 *Id.*

269 *See No Meetings: The Commissioners' Decision as to the Franklin Park Question*, BOS. DAILY ADVERTISER, June 27, 1889, at 8 ("The only question is whether such a meeting place should be established in this park, and it is with great regret that we find ourselves obliged to say that our judgment upon this question is not the same as your honor's.").

270 *See Peace with Honor, Way Opened for Honorable Compromise, Mayor Offers Oakland Garden to Central Labor Union for July 4, Belief that United Workingmen Will Adopt the Wisest Course*, BOS. DAILY GLOBE, July 1, 1891, at 4 (discussing potential labor demonstration at Oakland Gardens on July 4).

271 George E. McNeill, Letter to the Editor, *Oakland Garden: Arrangements Made for Labor Meeting—Franklin Park Idea Entirely Abandoned*, BOS. DAILY GLOBE, July 3, 1891, at 1.

272 *Id.*

The test case was carefully coordinated. At 10 a.m. on July 4, Henry Abrahams, Secretary of the Central Labor Union, “and other prominent members” of the Union met “at Oakland Garden and then proceeded to Franklin Park, followed by quite a gathering. Here, they were met by several park policemen who displayed a copy of the city ordinances in relation to the park system.”²⁷³ The Union members were told that a gathering in the park would be a violation of the park rules.²⁷⁴ “Secretary Abrahams replied that the Central Labor Union was determined that the laws established by the park commissioners should be brought before the court in order that their constitutionality might be fully determined.”²⁷⁵

What followed was a “quiet[] but technical[] violat[ion of] the law.”²⁷⁶ Abrahams made a brief statement to the effect “that they had not assembled to create a riot, nor to destroy any of the flowers, the shrubbery, nor adornments of the park. They were there, however, to assert what, in their opinion, was a right—namely, the right of public assemblage.”²⁷⁷

On July 8, in the West Roxbury police court, Abrahams was charged with violating the rules of the Board of Park Commissioners of the City of Boston, first, by delivering an oration in Franklin Park “without the prior consent of the Board of Park Commissioners” and, second, by failing to comply with a park police officer’s request not to make the oration.²⁷⁸ As expected, the case was appealed all the way to the Supreme Judicial Court.²⁷⁹

On appeal, Abrahams made two constitutional arguments. He argued, first, that the park rules conferred unfettered discretion in violation of constitutional guarantees of equal protection and the rule of law,²⁸⁰ and, second, that they conflicted with the Massachusetts Bill of

273 *They Broke the Law and are Awaiting Developments—Central Labor Union at Franklin Park*, BOS. DAILY ADVERTISER, July 6, 1891, at 4.

274 *Id.*

275 *Id.*

276 C.F. Willard, *In the Forum, Laborers’ Mass Meeting at Oakland Garden, Many Speakers Discuss the Eight-Hour Question, Still Claim the Right to Use Franklin Park, Test Case To Be Tried in the Near Future, Committee Has Laid Itself Liable to Prosecution*, BOS. DAILY GLOBE, July 5, 1891, at 10.

277 *They Broke the Law and are Awaiting Developments—Central Labor Union at Franklin Park*, *supra* note 273, at 4.

278 *Before the Court, Henry Abrahams and the Central Labor Union, Testimony in Important Test Case Heard by Judge Howard, Technical Violation of Park Ordinances Agreed To—Appealed*, BOS. DAILY GLOBE, July 9, 1891, at 9.

279 *See id.* (noting that the city solicitor informed the judge the case would be a test case).

280 *See* Brief for Defendant at 12, *Commonwealth v. Abrahams*, 30 N.E. 79 (Mass. 1892) (arguing that “even if the Commissioners have not exceeded their delegated authority, their ‘rule’ prohibiting the making of an oration or harangue is unconstitutional and void” be-

Rights, which provides that “the people have a right in an orderly and peaceable manner to assemble to consult upon the common good.”²⁸¹ Abrahams did not object to the advance regulation of peaceable public meetings should they be permitted to occur.²⁸²

More specifically, Abrahams argued that since “*a public meeting is a reasonable public use of this particular public park*, it is ‘orderly’ and within the protection of the Constitution.”²⁸³ He argued further that, as a matter of policy, open public forums for speech in the public parks were necessary given the increasing “masses of . . . landless” persons without resources to hire halls and the increased privatization of land, rendering a meeting on any open space likely to be considered trespass.²⁸⁴ The Park Commissioners’ decision to “*prohibit*[] orations and harangues in Franklin Park,” as such, amounted to an unconstitutional prohibition on protected activity.²⁸⁵

The Massachusetts Supreme Judicial Court summarily dismissed Abrahams’s constitutional arguments.²⁸⁶ As to the claim that the Park Commissioners’ actions violated the right to peaceable assembly, it declared,

We see nothing in these rules inconsistent with Art. 19 of the bill of rights of this commonwealth, which declares that “the people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good” The defendant admits that the people would not have the right to assemble for the purposes specified in the public streets, and might not have such right in the public garden or on the common, because such an assembly would or might be inconsistent with the public uses for which these places are held. The same reasons apply to any particular park. The parks of Boston are designed for the use of the public generally; and whether the use of any park or a part of any park can be temporarily set aside for the use of a portion of the public is for the park commissioners to decide, in the exercise of a wise discretion.²⁸⁷

An absolute prohibition was constitutional.

The Massachusetts Supreme Judicial Court, in a radical departure from its sister courts, consistently upheld Boston’s efforts to suppress

cause the requirement of “prior consent” offends the Massachusetts Bill of Rights guarantee of the rule of law and because it violates the equal protection clause of the federal constitution).

281 *Abrahams*, 30 N.E. at 79; *see also* Brief for Defendant, *supra* note 280, at 15 (“The action of the Park Commissioners is obnoxious to Art. 19 of the Massachusetts Bill of Rights . . .”).

282 *See* Brief for Defendant, *supra* note 280, at 11 (“Rules regulating time, place, manner and notice to be given, would be perfectly proper.”).

283 *Id.* at 15.

284 *Id.* at 19–20.

285 *Id.* at 11.

286 *Abrahams*, 30 N.E. at 79.

287 *Id.*

gatherings in public streets, and it did so without any mention of American political traditions. It never made reference to the Masons or the Grand Army of the Republic, even though Boston shared this same history. *Commonwealth v. Abrahams* was one of a series of decisions involving access to public space that made no mention of the fact that traditionally the law interfered only when there was a breach of the peace and made no effort to articulate the substance of the right of assembly.²⁸⁸

The Massachusetts high court's consistent approval of Boston's new regulatory approach significantly shaped efforts to contest the regulations. For example, the court's position enabled the city government, in 1888, to dismiss out of hand constitutional arguments made by advocates for the repeal of the ordinance governing the Common.

If official attitudes to public assemblies were outliers for the period, public attitudes in Boston were not. Although the public had mixed views throughout the period, on the whole, its views were not that different from attitudes elsewhere in the United States.

In 1885, for example, there were rumors that the city wanted to deny permits to speak on the Boston Common on the ground that traffic to and from services would damage the lawns.²⁸⁹ These rumors provoked outrage.

The public was appalled to hear that the city was more concerned about preserving its lawns than allowing public preaching. One letter to the editor of a daily paper exclaimed,

Is it not an outrage upon everyone's common sense to claim that permits for preaching on the Common are refused because of the injury to the grass consequent? . . . Yesterday one could observe throngs pouring over the grass in every direction to witness some parade²⁹⁰

Another paper chided, "We cannot have preaching on Boston Common . . . because city fathers think that—the *grass* will be trodden up-

²⁸⁸ See *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895) (holding that the legislature has the power to regulate the Common and thus "may . . . exercise control over the use which the public may make of" it); *Abrahams*, 30 N.E. at 79 (relying on *Commonwealth v. Davis* and *Commonwealth v. Plaisted* to hold that "the people['s] . . . right, in an orderly and peaceable manner, to assemble to consult upon the common good" was not violated by the park's access rules); see also *Commonwealth v. Plaisted*, 19 N.E. 224, 224 (Mass. 1889); *Commonwealth v. Davis*, 4 N.E. 577, 577 (Mass. 1886).

²⁸⁹ See *Worship on the Common, The Preachers of Last Sunday Fined Thirty Dollars Each—Their Defence*, *supra* note 259, at 8; *City Hall Notes*, BOS. DAILY ADVERTISER, May 30, 1885, at 8. The permit allowed the Y.M.C.A. to hold a weekly one-hour Sunday service on the Common's parade ground for the duration of the summer.

²⁹⁰ Letter to the Editor, *Preaching on the Common*, BOS. DAILY ADVERTISER, May 30, 1885, at 8.

on! Then why are the public allowed on the grass on Memorial Day, or on any day when a regimental parade occurs?”²⁹¹

A few years later, in 1887, local religious sects organized to repeal the ordinance governing orations on the Boston Common. Concern about the ordinance was revived by a certain Reverend William F. Davis’s continued defiance of it. Despite initially divided views, local religious groups eventually came together to petition the Common Council to repeal the ordinance even though the city was issuing permits more regularly.²⁹²

Momentum for change began with a meeting of Baptists “to discuss the question, ‘Does the peace and good order of Boston Common require the imprisonment of reputable clergymen who preach without a permit?’”²⁹³ Among the concerns raised were doubts about the whether such activity disturbed the public as well as observations that permits were too readily denied.²⁹⁴

The debate soon spilled over to the pages of local newspapers. An article appearing in *The Congregationalist* defended the ordinance as necessary to preserve “the Common for its ordinary use as to light and air by women and children.”²⁹⁵ The author explained “that the court [had] decided, years ago, that the city had the right to regulate the use of the Common,” and maintained that the ordinance was necessary to maintain civic order:

If it should be repealed the Common would be open as well to advocates of Mormonism, anarchism, socialism, spiritualism and infidelity as to the gospel; to mass meetings of Democrats or Republicans; and with no power anywhere to prevent such use, which might practically close the Common for its ordinary use as to light and air by women and children. Forty meetings might go on side by side.²⁹⁶

Two weeks later a scathing attack on this article appeared. The author of the new article chastised the journal for “convey[ing] the idea that there is no need of agitation on the subject; that there has been no opposition to street preaching by the city government; [and]

291 *In Brief*, CONGREGATIONALIST (Bos.), June 4, 1885, at 4 (emphasis added).

292 For more details on Reverend Davis’s repeated defiance of authorities and the subsequent trials and public debate see Abu El-Haj, *supra* note 20, at 238–39, 244–45, 283–84.

293 *Preaching on the Common: Bowdoin Square Baptists Express Sympathy for Rev. W.F. Davis*, BOS. DAILY ADVERTISER, Nov. 7, 1887, at 4.

294 *See id.* (noting “that when the Young Men’s Christian Association applied for permission to preach in Franklin Park they were denied the privilege”); Plumb, *supra* note 260, at 10 (clarifying that this incident occurred in the summer of 1887).

295 *Preaching on the Common*, CONGREGATIONALIST (Bos.), Dec. 8, 1887, at 8.

296 *Id.*

that [the city government] has taken no action to prevent any reasonable man from preaching on the Common at any time[.]”²⁹⁷

The author specifically took issue with the suggestion that the ordinance was necessary to maintain order, insisting that the traditional regulatory framework was sufficient to address the problem of disorder:

[T]he statement referred to says: If this ordinance should be repealed, the Common would be open to all sorts of meetings, “with no power anywhere to prevent such use, which might practically close the Common for its ordinary use, as to light and air by women and children.” Still again wrong. *The moment any assemblage becomes a nuisance, or infringes upon the rights of the public or the peace of society, it can be stopped. There are statutes for abating nuisances, as for suppressing blasphemous or seditious harangues.* But it belongs to the courts, and not to any clique that may chance to get control of a city government, to determine what a nuisance is.²⁹⁸

A few months later, the Evangelical Ministers’ Association appointed a committee to investigate the matter and to consult with counsel.²⁹⁹ The committee concluded “that the ordinance . . . [was] unnecessary and dangerous to liberty.”³⁰⁰ The ordinance, it said, “establish[ed] a censorship of speakers and preachers, [and] commit[ed] to the discretion of some city official[s] the prerogative of determining beforehand who are fit to speak and who are not.”³⁰¹ The report formed the basis for a petition requesting the repeal of the ordinance.³⁰²

In February 1888, the Committee on Laws and Ordinances held several hearings on the petition for repeal.³⁰³ At the second hearing, “every seat on the floor and in the galleries” was filled.³⁰⁴

²⁹⁷ Plumb, *supra* note 260, at 10.

²⁹⁸ *Id.* (emphasis added). The author of the original piece responded in the same issue. A.H.Q., Letter to the Editor, CONGREGATIONALIST (Bos.), Dec. 22, 1887, at 10. This article anticipated the ultimate position of the Massachusetts Supreme Judicial Court: analogizing the Common to private property, it argued that “an individual citizen, while having certain well-defined rights in the Common, has no more right to take a portion of it for public meetings, without consent of the city, than he has to take Dr. Plumb’s garden without his consent, for the same purpose.” *Id.*

²⁹⁹ See *Evangelical Ministers’ Association*, BOS. DAILY ADVERTISER, Jan. 7, 1888, at 5.

³⁰⁰ *Boston Common: The Evangelical Ministers Champion Rev. W.F. Davis*, *supra* note 258, at 2.

³⁰¹ *Id.*

³⁰² See *id.* (noting that “[t]he report was accepted,” and “[a] resolution was presented providing for the appointment of a committee with instructions to petition the public authorities to recall the ordinance under discussion”).

³⁰³ For the details of this legislative debate, see Abu El-Haj, *supra* note 20, at 250–58.

³⁰⁴ *Out-Door Preaching: Shall It Be Prohibited on the Common? Continuation of the Hearing by the City Council Committee—Mr. Whitmore’s Caustic Remarks*, BOS. DAILY ADVERTISER, Mar. 1, 1888, at 8.

The ensuing hearings reveal that local public opinion was not all that different from public opinion in New York City or Grand Rapids, but also that dissenting voices were gaining ground. Advocates for repeal emphasized that the law was unnecessary while proponents of the ordinance warned, among other things, that “[a]narchism, socialism and all other isms of which the city is now free would be brought in if the repeal was made.”³⁰⁵

Advocates for repeal emphasized that legal tools were available to address disorder if it actually occurred. They argued, for instance, that “the enforcement of the laws against incendiary utterances” could be “depended upon to put a stop to teachings in favor of anarchists, free-love, etc.”³⁰⁶ One explained,

The right of orderly public discussion is a bulwark of American institutions, and must not be interfered with by any tyrannical government imported from abroad. Ample are the statute laws to repress the abuses of printing, and they are ample to repress the abuse of free speech. The present ordinance as regards preaching on the Common, not only prevents the abuse of free speech, but it prevents the use of it.³⁰⁷

Defenders of the ordinance, by contrast, emphasized that “[r]epeal of the ordinance would lead to disorder.”³⁰⁸ The ordinance was “a wise and necessary legal restriction.”³⁰⁹ If respectable preachers were allowed to preach without a permit “every believer in the wild, and sometimes revolting, religious and social theories of the day” would also have to be allowed:

[I]f all restraint was removed, the City Government might find it difficult to restrain what would be meetings of a dangerous and revolutionary character. It can now guard against such risks by refusing to permit the meetings to be held; but if it abandoned this right, . . . the authorities, instead of putting out the fire at the start, might have to wait until it was under good headway before they could take preventative action.³¹⁰

In late June, the Committee on Laws and Ordinances “unanimously reported against . . . repeal, and the board of aldermen (consisting of eight Republicans and four Democrats) . . . unanimously accepted [the] report.”³¹¹ The Committee identified three grounds

305 *Id.*

306 Letter to the Editor, CONGREGATIONALIST (Bos.), Feb. 23, 1888, at 4.

307 *The Monday Lectureship: Rev. Joseph Cook Protests Against “a Censorship of Preaching.”* BOS. DAILY ADVERTISER, Feb. 28, 1888, at 4.

308 *Preaching on the Common, Continuation of the City Council Hearing—The Speakers*, BOS. DAILY ADVERTISER, Mar. 8, 1888, at 1.

309 *Preaching on the Common*, BOS. INVESTIGATOR, Feb. 22, 1888, at 3 (reprinting comment from *The Boston Herald*).

310 *Id.*

311 *Preaching on Boston Common*, CONGREGATIONALIST (Bos.), June 21, 1888, at 4.

offered for repeal (unconstitutional, an undue interference with free speech, and unnecessary) and rejected each. In doing so, it specifically relied on an 1886 decision of the Supreme Judicial Court in *Commonwealth v. Davis*, arising out of the 1885 test cases, which had dismissed claims that the 1862 Boston Common ordinance was unconstitutional and an undue interference with free speech.³¹² As to the issue of individual rights, the report was basically silent, stating only that it would “leave to the good sense of the public to judge whether, in refusing the request for repeal, the liberty of any citizen of Boston suffers any detriment.”³¹³

Once again, Boston officials were unwilling to contemplate constitutional concerns. Ignoring the constitutional interests was largely possible because doing so comported with the Supreme Judicial Court’s view. The 1862 ordinance was not repealed.

The relationship between this history and our contemporary views of outdoor assembly, as well as the constitutional right that protects it, is the product of a historical accident. As it happened, the United States Supreme Court’s first encounter with a challenge to an ordinance rendering public gatherings unlawful in the absence of a permit involved the review of a decision of the Massachusetts Supreme Judicial Court.

The case, *Davis v. Massachusetts* (1897), arose out of a second appeal to the Massachusetts Supreme Judicial Court by Reverend W. F. Davis.³¹⁴ The facts of the case were straightforward. On June 10, 1894, Reverend Davis gave yet another public sermon on the Boston Common without obtaining advance permission, and he was convicted of violating the ordinance.³¹⁵

The Massachusetts high court held that since the Boston Common was the property of the city of Boston, the city could forbid or regulate speech on it just as “the owner of a private house [could] forbid [speech] in his house.”³¹⁶ Justice Oliver Wendell Holmes, then

³¹² See *id.* (reporting that “the repeal was asked on three grounds” including “‘unconstitutionality’ of the ordinance, which is answered by reference to the recent decision of the [Massachusetts] Supreme Court approving its legality” and interference “‘with free speech,’ as to which the committee quotes the decision, just named”).

³¹³ *Id.* (quoting report) (internal quotation marks omitted).

³¹⁴ See *Massachusetts v. Davis*, 167 U.S. 43, 45 (1897) (giving the procedural history of the case).

³¹⁵ Reverend Davis had been violating the Boston Common ordinance on and off since 1888. See, e.g., *News in Brief*, CONGREGATIONALIST (Bos.), Sept. 13, 1888, at 1 (recounting Reverend Davis’s continued insistence that the ordinance was not lawful but noting that his attorney had secured a permit for him “without [his] knowledge or consent”).

³¹⁶ *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895).

of the Massachusetts Supreme Judicial Court, explained that just as a police officer does not have a constitutional right to engage in political activity and remain a police officer, so too there is no constitutional right to speech or assembly on the Boston Common.³¹⁷ In elaborating, he wrote,

For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes, the Legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less[er] step of limiting the public use to certain purposes.³¹⁸

When the United States Supreme Court affirmed, it took up this language. It explained that Reverend Davis was mistaken in his assumption that he had a *right* “to use the common of the city of Boston free from legislative or municipal control or regulation.”³¹⁹ No record evidence supported Reverend Davis’s contention that the “Boston Common [was] the property of the inhabitants of the city of Boston, and dedicated to the use of the people of that city,” including for “the preaching of the gospel . . . form [sic] time immemorial to a recent period.”³²⁰ On the contrary, both a legislative act which lumped the Common with other public properties “and the ordinance passed . . . show an assumption by the state of control over the common in question.”³²¹ The Court emphasized further that the Massachusetts Supreme Judicial Court, “in affirming [Davis’s] conviction, placed its conclusion upon the express ground that the common was absolutely under the control of the legislature.”³²²

Justice Byron White, then, quoted with approval Justice Holmes’s reasoning.³²³ If the city had an absolute right to exclude public preaching on the Common, it followed that the municipality could determine the circumstances under which access was permitted.³²⁴

317 *See id.* (citing *McAuliffe v. New Bedford*, 29 N.E. 517, 517 (Mass. 1892) (involving the dismissal of a police officer for cause on grounds of political activity)).

318 *Id.* Holmes’s narrow conception of freedom of speech would follow him to the Supreme Court. *Cf. RABBAN, supra* note 169, at 132–41 (identifying Justice Holmes’s positions as part of an analysis of early First Amendment case law).

319 *Davis*, 167 U.S. at 46.

320 *Id.*

321 *Id.*

322 *Id.*

323 *See id.* at 47 (“For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.”).

324 *Id.* at 48.

In this way, the views of the Massachusetts Supreme Judicial Court became the law of the land. Justice Holmes's analogy between private and public property remains the foil for the First Amendment's public forum doctrine today—notwithstanding that it was both an outlying legal view at the time, and more importantly, entirely unnecessary as the constitutionality and lawfulness of the city's ordinance was settled and the only legal issue in the case was a narrow one of statutory interpretation.³²⁵

B. Regulatory Change

The United States Supreme Court's approval of Massachusetts's approach significantly changed the broader judiciary's attitudes towards ordinances regulating gatherings in public places. Judicial approval of the regulatory shift toward permit requirements gave birth to the contemporary constitutional right of assembly, one which "is not absolute . . . and must be exercised in subordination to the general comfort and convenience" of others.³²⁶ This new conception of the right and the more extensive regulatory landscape it engendered eventually gave rise to a radically less tolerant attitude within the judiciary towards the disorder associated with outdoor assemblies.

Once the United States Supreme Court appeared to have sanctioned the new regulatory approach, state courts around the nation, including the Michigan Supreme Court, began to uphold permit requirements.³²⁷ The Michigan Supreme Court followed *Davis* in 1901 even though doing so required it to distinguish the *Frazee Case* on

³²⁵ Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895) (noting that the constitutionality of "such an ordinance . . . is implied by the former decision, and does not appear to us open to doubt" and that the only question presented was whether "the words '[N]o person shall make any public address' prohibit public preaching). Moreover, the "right" under discussion in *Davis* was a *property* right since the Court had to accept the determination of the highest state tribunal that the ordinance did not infringe Reverend Davis's rights of free speech, assembly, or worship as secured by Massachusetts's constitution. The First Amendment did not constrain Massachusetts at the time. It would be twenty-eight years before the United States Supreme Court would hold that the First Amendment applied to the States. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."); see also *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (holding that the right of assembly is a fundamental liberty covered by the Fourteenth Amendment).

³²⁶ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939).

³²⁷ See *Love v. Phalen*, 87 N.W. 785, 787–88 (Mich. 1901) (upholding a Detroit ordinance requiring a permit for public gathering).

flimsy grounds.³²⁸ The highest courts of Georgia,³²⁹ Pennsylvania,³³⁰ New York³³¹ and Illinois (in a reversal similar to that of Michigan)³³² did the same.

In all of these cases, permits had been denied to the defendants expressly or implicitly because of the political views likely to be espoused.³³³ Nevertheless, the courts upheld the ordinances as lawful exercises of the police power, emphasizing that the United States Supreme Court had sanctioned Massachusetts's approach, which dismissed outright the presence of any speech or assembly considerations.³³⁴ By 1921, the New York Court of Appeals was able to declare,

It is too well settled by judicial decisions in both the state and federal courts that a municipality may pass an ordinance making it unlawful to hold public meetings upon the public streets without a permit therefor to require discussion.³³⁵

The new case law did not wrestle in any depth with constitutional considerations. Instead, it took comfort in the tenet, "The constitu-

³²⁸ *Id.* at 787 (distinguishing the *Frazer Case* as pertaining to a procession on a public highway whereas the case at hand involved a "stationary assemblage of people" on the city's public square).

³²⁹ *See Fitts v. City of Atlanta*, 49 S.E. 793, 795 (Ga. 1905) (holding, inter alia, that the city's ordinance declaring it unlawful to hold public meetings for political purposes in the streets without the consent of municipal authorities did not infringe liberty of speech).

³³⁰ *City of Duquesne v. Fincke*, 112 A. 130, 133-34 (Pa. 1920) (upholding an ordinance that forbid the holding of public meetings in city streets without a permit on the basis of the U.S. Supreme Court's decision in *Davis* and on the ground that the Pennsylvania bill of rights only confers a right to assemble at a place where one otherwise has a right to be).

³³¹ *People ex rel. Doyle v. Atwell*, 133 N.E. 364, 365 (N.Y. 1921) (upholding the validity of a city ordinance prohibiting gatherings on its public streets in the absence of official permission and denying that the ordinance "abridge[d] the right of free speech or assemblage" insofar as "[p]ublic streets are primarily for public travel").

³³² *Coughlin v. Chi. Park Dist.*, 4 N.E.2d 1, 10 (Ill. 1936) ("[T]he rights of peaceable assembly and of freedom of speech are not infringed by the refusal of a permit to an applicant for the use of a park facility.").

³³³ *See Atwell*, 133 N.E. at 366 (citing the Mayor as saying that "he would grant no further permits for Socialists' meeting while mayor"); *Fincke*, 112 A. at 131-32 (chastising the mayor for failing to respond to three permit requests "for it gave [the] appearance of truth to the probably unwarranted complaints" that the applications "were ignored because the mayor did not like [the applicants] or the cause they represented"); *see also Coughlin*, 4 N.E.2d at 2-3 (making it fairly clear that the denial was due to political views); *Fitts*, 49 S.E. at 794 (suggesting that the permit was denied, at least in part, due to applicant's political views).

³³⁴ *See William E. Lee, Modernizing the Law of Open-Air Speech: The Hughes Court and the Birth of Content-Neutral Balancing*, 13 WM. & MARY BILL RTS. J. 1219, 1235 (2005) ("By devaluing open-air speech and stressing the proprietary powers of the government, *Davis* set the tone for a generation of opinions that were plainly hostile to the idea that streets were appropriate to use for expressive activities."); *see also Coughlin*, 4 N.E.2d at 7-9 (quoting and relying on the Massachusetts decision); *Fincke*, 112 A. at 132-33 (citing the U.S. Supreme Court's decision for support).

³³⁵ *Atwell*, 133 N.E. at 365.

tional right of assembly . . . does not include the right to use for that purpose the streets and other places owned and controlled by [a] state or municipality, but presupposes that those who assemble have a right to control the place where they meet.”³³⁶ This principle was defended on the ground that “[i]f this were not so, the right of assembly would constitute a serious disturbance of the rights of others.”³³⁷

Only the supreme courts of Connecticut and Florida struck down permit requirements after 1897.³³⁸ They did so, however, on limited grounds that did not take issue with the principle that a municipality could require advance permission for public assemblies without running afoul of the right of assembly (as preserved by either the state or national constitution).

Once judicial attitudes had changed, reliance on the criminal law as the sole method for regulating gatherings in urban public spaces gave way.³³⁹ Only a handful of large American cities had permit requirements in 1881.³⁴⁰ By the early 1920s, however, permit requirements for outdoor gatherings were sufficiently widespread that they were the focus of two American Civil Liberties Union (“ACLU”) studies of the state of civil liberties at the time.³⁴¹ A student note in the 1921 volume of the *Columbia Law Review* declared that the most common type of municipal regulations of public assembly “vests in some city official or group of officials the discretionary power to grant permits for gatherings or processions on the public streets.”³⁴²

336 ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* § 480 (1904).

337 *Id.*

338 *See State v. Coleman*, 113 A. 385, 386–387 (Conn. 1921) (holding that an ordinance which regulates access to the streets for the purpose of speaking by use of permits does not per se infringe the individual’s right of free speech, but striking down the challenged ordinance as in violation of Connecticut’s equal protection clause because it was “hopelessly indefinite” and thus subjected the individual to arbitrary government action); *Anderson v. Tedford*, 85 So. 673, 674 (Fla. 1920) (holding Panama City’s ordinance prohibiting public meetings in its streets absent advance permission from local officials void since, inter alia, it failed to limit the licensing officials’ discretion in any way, without reaching the question of whether the ordinance abrogated the right of free speech).

339 *See generally* Abu El-Haj, *supra* note 20, at 347–53 (noting, for example, that “[i]t . . . became more common for courts to rationalize the permit requirements as a managerial strategy”).

340 *See id.* at 148 (“[F]our of the thirty-three cities in the sample had limited permit requirements . . . in 1881.”).

341 *See* AM. CIVIL LIBERTIES UNION, *BLUE COATS AND REDS* 8 (1929) [hereinafter *ACLU 1929*] (listing questions sent to the heads of police departments to gather information about law enforcement attitudes concerning public meetings and protests); *ACLU 1921*, *supra* note 171, at 6.

342 Note, *Control over Street-Meetings by Municipal Authorities*, 21 *COLUM. L. REV.* 257, 275 (1921).

By 1930, permit requirements were a mainstay in municipal control of social and political gatherings in public places.³⁴³ The second incarnation of the model traffic code, which was prepared at the federal level by the U.S. Department of Agriculture in 1936, included a provision requiring permits for “procession[s], or parade[s] containing 200 or more persons or 50 or more vehicles.”³⁴⁴ A 1938 comment in the *Yale Law Journal* explained that “ordinances prohibiting meetings in public places without a permit from some authorized municipal authority”³⁴⁵ and “ordinances requiring permits for street parades”³⁴⁶ were two of the three most important forms of municipal regulation of speech.³⁴⁷

With both criminal law and permit requirements available to them, city officials well into the twentieth century had the legal authority (if not always the political power) to prohibit any and all gatherings they considered undesirable.³⁴⁸ Labor protests, in particular, through the 1930s, took place within a legal landscape that “did not provide . . . wide freedoms to engage in public protest” and placed “few legal restraints . . . on authorities or their police agents” in their interactions with demonstrators.³⁴⁹ It was not uncommon for workers who protested to be suppressed through outright violence.³⁵⁰ On occasion, but only when police undertook acts that were too transparently repressive, courts would step in to protect those assembled.³⁵¹

343 See Abu El-Haj, *supra* note 20, at 148 (reporting that twenty-two of the cities in the sample required a permit for some public assemblies by the 1930s).

344 MODEL TRAFFIC ORDINANCES § 42 (U.S. Dep’t of Agric. 1936). The 1928 version had no such provision. See, MODEL MUNICIPAL TRAFFIC ORDINANCE 5–8 (Comm. on Mun. Traffic Ordinances and Regulations, 1928) (tentative draft) (failing to list a provision for permits in the table of contents).

345 Comment, *Public Order and the Right of Assembly in England and the United States: A Comparative Study*, 47 YALE L.J. 404, 413 (1938).

346 *Id.* at 429.

347 *Cf. id.* at 413 (identifying final category of municipal ordinances as “ordinances prohibiting obstruction in the streets”).

348 See, e.g., RABBAN, *supra* note 169, at 80–81 (explaining that generally “free speech fights followed a familiar pattern” in which “[h]undreds of Wobblies were arrested and charged with various offenses, such as obstructing the sidewalk, blocking traffic, vagrancy, unlawful assembly, or violating a local ordinance against street speaking”).

349 John D. McCarthy & Clark McPhail, *The Institutionalization of Protest in the United States*, in THE SOCIAL MOVEMENT SOCIETY: CONTENTIOUS POLITICS FOR A NEW CENTURY 83, 86 (David S. Meyers & Sidney Tarrow eds., 1998).

350 *Id.*

351 Accord RABBAN, *supra* note 169, at 107–09 (explaining that the primary constitutional concern of federal investigators regarding local responses to the I.W.W. protests was complete police discretion over both permits and the definition of an unlawful assembly); see also *supra* note 338 and accompanying text.

C. Holdover Public Attitudes

Politically, the new regulatory regime for public assemblies remained controversial. Throughout the Progressive Era important segments of the public continued to claim a much broader right of assembly than that recognized by federal and state courts.³⁵² Public support for a broad right of assembly would not last forever.

Speakers in Detroit, for example, resisted the Michigan Supreme Court's changed position in 1901.³⁵³ It did not help that Detroit's Mayor refused to issue any permits under the newly passed ordinance.³⁵⁴ Still, in Detroit as elsewhere, once the courts had sanctioned the new system, the terms of debates about access to public space for religious, social, and political ends had forever changed.

In 1900, Detroit, Michigan's largest city at the time, regulated gatherings in its public streets and squares with an array of state crimes and municipal ordinances. Three ordinances in particular

³⁵² The Detroit controversy recounted here is broadly consistent with David M. Rabban's important study of the I.W.W. free speech fights, even as Rabban does not distinguish claims regarding the freedom of speech from those about the right of peaceable assembly. See RABBAN, *supra* note 169, at 77–128 (discussing the “IWW free speech fights”). For one, as in Detroit, it was local merchants who first petitioned for San Diego to pass an ordinance restricting street speaking, and, as in Detroit, the final ordinance was limited to a much smaller radius than initially requested by those merchants. See *id.* at 100–01 (“By smashing the windows of employment agencies . . . Wobblies themselves provoked citizens to request the city council for an ordinance limiting street speaking. . . . [However,] [t]he final version of the ordinance . . . limited street speaking in six downtown blocks rather than the forty-two block area request by a group of local merchants.”). For another, at least some Wobblies claimed that they did not need a permit because the Constitution granted them a right to speak to a gathering on the street. *Id.* at 84 (noting an incident in which, when “confronted by a police demand for a permit” to speak in public, IWW speakers “replied that they ‘had none save the First Amendment to the Constitution of the U.S.’” (internal citation omitted)); see also INAZU, *supra* note 92, at 44 (observing, based on a review of the secondary literature, that “the people claiming the right to assemble insisted on a far broader purpose and meaning” than federal courts recognized and offering “the practices of three political movements”—the women’s movement, the African-American Civil Rights Movement, and the labor movement—as evidence).

³⁵³ The history of the controversy over Detroit’s permit requirements in 1901 was developed after reading full runs from the relevant period of two of the city’s leading, partisan newspapers as well as court decisions and remaining records. In addition, the Salvation Army National Archives and Research Center provided a few relevant details. Finally, three editions of the city’s municipal code between 1884 and 1936 were reviewed. For a full account of the methodology, see Abu El-Haj, *supra* note 20, at 10–15.

³⁵⁴ Only one permit was ever issued under the city’s original ordinance requiring a permit to assemble on the Campus Martius, the city’s largest square. *First Permit Issued Under Campus Ordinance Yesterday: Acting Mayor Magee Had the Honor of Doing It—Permission Given to State Troops to Parade With Band*, DETROIT NEWS—TRIBUNE, Feb. 23, 1902, at 5 (reporting that on February 22, 1902, while Mayor Maybury was out of town, Acting Mayor Magee issued a permit to the state troopers to parade with a band through the public streets on Washington’s Birthday as required by state law).

targeted disorder on the city's streets. A first covered routs and riots as well as noise and other sources of disruption.³⁵⁵ A second targeted individuals and crowds that interfered with pedestrian traffic.³⁵⁶ A third prohibited crowds that obstructed travel and individuals that loitered in the city's center.³⁵⁷ Detroit did not regulate gatherings in its parks, and advance permission was not required prior to gathering in public.³⁵⁸

That year, Detroit passed a fourth ordinance.³⁵⁹ Reflecting elements of the traditional nineteenth-century worldview, the new ordinance targeted disruptive crowds in the central business district.³⁶⁰ At the same time, it significantly expanded the scope of what was considered "disruptive."³⁶¹ The 1900 Campus Martius ordinance, as passed, essentially defined certain crowds as per se nuisances and thus beyond constitutional protection.

The main source of pressure for new regulation was owners of businesses on the city's central square, Campus Martius, who were frustrated about the impact of open-air assemblies on their Saturday night business.³⁶² As one early editorial put it,

Those who block the streets there night after night, making it difficult for theater-goers and intending customers of down-town merchants to reach their destinations, are a very small percentage of the population of the city, and are infringing in a manner wholly unjustifiable upon the rights of the majority.

355 DETROIT, MICH., REV. ORDINANCES ch. LXIII, § 2 (1884) ("Any person or persons who shall make or assist in making any noise, disturbance, or improper diversion, or any rout or riot, by which the peace and good order of the neighborhood are disturbed, or shall be guilty of disorderly conduct, shall be punished . . .").

356 *Id.* at § 6 ("Persons shall not collect, stand in crowds, or remain loitering on the sidewalks, or at the corners of the streets, so as to hinder or impede the passage of pedestrians, or in front of any church, any public hall or place of worship during service, or the gathering or departing of the congregation.").

357 *Id.* at ch. XXXIII, § 18 ("It shall be unlawful to gather in crowds on any sidewalk or in any street so as to obstruct travel over and along such sidewalk or in said street, and no person shall stand or remain idly loitering upon the sidewalks or streets adjacent to the City Hall building or in front of any church, public halls, theatre, opera house, hotel or restaurant, or upon the Campus Martius, or upon Woodward avenue from the City Hall to Jefferson avenue.").

358 *See id.* at *passim* (detailing restricted activities but not requiring advanced permission for public gatherings).

359 DETROIT, MICH., COMPILED ORDINANCES, ch. 52, § 15 (1904) (prohibiting the act of gathering a crowd "by the use of words, singing, beating of drums, or other noises").

360 *Id.*

361 *Id.*

362 *Hypocrisy of The Evening News Illustrated: Editorials From That Paper Show How It Stood a Few Months Ago on the Campus Question*, DETROIT FREE PRESS, May 13, 1901, at 1 (quoting the Editorial, *Nothing to Do with Freedom of Speech*, EVENING NEWS, DETROIT, Sept. 27, 1900).

. . . [T]here is no desire to interfere with peaceable assemblies for any lawful purpose; but there is a determination to restore the most prominent and important of the city's squares to the purposes for which it was designated and to permit free and untrammelled passage to those who are making their way from one part of town to another.³⁶³

Advocates for the new ordinance argued that the regular Campus crowds were a public nuisance and, therefore, not constitutionally protected.³⁶⁴

It was not until 1901 that Detroit adopted its first permit requirement for gatherings in public.³⁶⁵ Regulatory change was, once again, prompted by a riot—this time one brought on by a political showdown between Detroit's Democratic Mayor and the newly appointed Republican Police Commissioner, over the latter's efforts to clear regular crowds on the Campus Martius.³⁶⁶

Despite passage of the 1900 Campus Martius ordinance, business interests remained dissatisfied because city officials did not enforce it. In 1901, when the city's first Police Commissioner was appointed, the businesses on the Campus seized the opportunity to press their complaints afresh.³⁶⁷ Upon taking office, in response to a formal petition from these local businesses, the new Police Commissioner announced that he intended to "rigidly exclude Tom Bawden, the single tax speaker" from speaking on the Campus at night.³⁶⁸ Bawden, undeterred, defied the warning.

³⁶³ *Id.* (internal quotation marks omitted).

³⁶⁴ *Id.* (arguing that "talk of freedom of speech and the right of assembly . . . is wholly aside from the real question involved" because "[t]he fact of the matter is that the nightly array of shouting evangelists and lecturers has become a public nuisance").

³⁶⁵ Abu El-Haj, *supra* note 20, at 304–05.

³⁶⁶ The new office of Police Commissioner was adopted as part of a restructuring of city government imposed by Republicans in the state capitol—one which sought temporarily to remove various offices from the control of the city's mayor and city council for partisan ends. *See Id.* at 294–95 (discussing the "restructuring [of] Detroit's city government" by Republicans that was "intended to be a political blow to Detroit's current Democratic Mayor").

³⁶⁷ *Id.* at 288–89.

³⁶⁸ *Bawden Defiant, Single Tax Orator Says Commissioner Andrews Can't Bluff Him Out, The Man from Macomb Corners Does Not Like Bawden's "Attacks on Prominent Citizens,"* EVENING NEWS, DETROIT, May 9, 1901, at 7; *Saw His Duty and Did It, Commissioner Andrews Squelched the Campus Nuisance, Complaints of Property Owners Did Not Fall on Deaf Ears, Squad of Police Prevented Crowds from Obstructing the Highways,* DETROIT FREE PRESS, May 9, 1901, at 1 (discussing approvingly the Commissioner's response to the petition of "property owners and storekeepers"). The Salvation Army and a certain Will Allen, he allowed, would be spared unless he "receive[d] complaints from persons competent to make such complaints." *Bawden Defiant, supra.*

No violence occurred when the police sought to disperse Bawden's crowd that first night. And in fact, the public's reaction was mixed.³⁶⁹

Nevertheless, the city's Democratic Mayor saw a political opportunity.³⁷⁰ Claiming the high ground, the Mayor announced that he would stand on the Campus Martius, himself, to secure the people's constitutional right of peaceable assembly. Reflecting the classic nineteenth-century worldview, he proclaimed: "The people have the right to assemble on the streets, and so long as they are not creating a disturbance the only province of the police is to see that a way is kept clear, so that traffic is not obstructed."³⁷¹ In line with traditional tolerance for the inconveniences associated with crowds, the Mayor specifically denied that the crowds on the Campus were nuisances.³⁷²

When ten to twelve thousand appeared on the Campus Martius that night, geared up by the controversy, the police overreacted and a riot ensued. The riot followed an address by the Mayor to the crowd about traditional privileges and immunities of American citizenship:

Fellow citizens: This is a peculiar night—a night that will long be remembered in the history of Detroit. When I heard that last night men were being driven about like cattle, I made up my mind that I would be with them to-night. (Cheers.) . . . I will not uphold rioting and I disparage bitter speech. But, my friends, I will always be found upholding that right of every American citizen—free speech. (Cheers.) The birth of our republic grew out of just such gatherings as this and gathered for the same causes. Sacred old Boston common had been used as a public meeting spot for years, until one day the minions of King George drove the crowds from it and—the American revolution followed, giving to us all the liberties which are now in jeopardy.³⁷³

The speech went on to accuse the Police Commissioner of using the Campus ordinance passed in 1900 for a purpose to which it was never intended: "I signed the Campus ordinance and I am familiar with its provisions and its intent. It was aimed at loiterers only. As for men gathered to discuss peaceful topics, there is no law under heaven to stop it" so long as one "keep[s] open a suitable passage way."³⁷⁴

³⁶⁹ Abu El-Haj, *supra* note 20, at 289–92.

³⁷⁰ *Bawden Crowd Kept A-Moving, But the Salvation Army Audience Was Not Disturbed, Andrews's First Attempt to Clear the Campus A Failure, The Big Crowds Cheered Bawden and Jeered at the Commissioner of Police*, EVENING NEWS, DETROIT, May 10, 1901, at 8.

³⁷¹ *Maybury to Be There Tonight, the Mayor Advises the People That They Have the Right to Assemble on the Campus for Peaceful Purposes, He Says They Would Be Justified in Resenting Police Interference—Criticises Commissioner Andrews's Display of Authority Last Night*, EVENING NEWS, DETROIT, May 10, 1901, at 1.

³⁷² *See id.* (denying that significant complaints about the crowds had been made to him).

³⁷³ *Mayor Addressed the Crowd in Bawden's Favor*, DETROIT FREE PRESS, May 11, 1901, at 7.

³⁷⁴ *Id.*

After the Mayor's speech, everything quickly spun out of control. The ensuing riot raged for about four hours. No one was killed, but seventeen were injured.³⁷⁵ The riot was even reported in *The New York Times*.³⁷⁶ The following morning, Detroit's papers were filled with the sober, half apologies of partisan politics and the remarks of a Mayor who could hardly contain his glee at having embarrassed the new Police Commissioner.³⁷⁷

The riot prompted a prolonged debate in city papers and legislative halls—one that ultimately led to the city's first permit requirement for outdoor gatherings.³⁷⁸ One aspect of the debate is particularly worth noting. The *Detroit Free Press* printed a letter to the editor, responding to the Mayor's speech, in which the author pointed out that the Mayor (as we know) was misinformed about the status of speeches and gatherings on the Boston Common: Not only did Boston require those wishing to speak on the Common to obtain a permit, but the ordinance had been upheld by both the state's highest court and the United States Supreme Court (as we have seen).³⁷⁹

Relatively quickly, a legislative compromise was reached in the form of an ordinance, which was virtually identical to the ordinance governing the Boston Common.³⁸⁰ The new Detroit permit require-

375 See *Ten Thousand in a Fierce Riot in Detroit: Men and Boys in Running Fight with Police—Populace Objected to Order Forbidding a Single-Tax Exhorter to Speak*, N.Y. TIMES, May 11, 1901, available at <http://query.nytimes.com/gst/abstract.html?res=FA0C1EF7385A16738DDA80994DD405B818CF1D3>.

376 *Id.* (describing the scene as one in which “men and boys ran riot in the main streets of [Detroit] for more than three hours, and a continual running fight with police, both mounted and on foot, caused an exciting time in the heart of the city to-night”).

377 See, e.g., *Riot Raged in the Streets: Squad of Police Assaulted by Howling Thousands on East Fort Street, Pelted with Stones, They Fired Their Revolvers in the Air, but the Crowd Only Jeered, Two Hundred Blue Coats, Sent to Their Assistance, Dispersed the Disturbers—Culmination of the Bawden Incident*, DETROIT FREE PRESS, May 11, 1901, at 1 (reporting that Commissioner Andrews made a formal statement announcing his “deep[] regret” about the “unfortunate occurrences of last night” but placed blame for the riot on the Mayor's irresponsible speech, and commenting further that “[w]ithout the support of the mayor I do not feel called upon to enforce an ordinance that subjects to needless danger both the department under me and the citizens of this city”).

378 Early reporting indicated that both Police Commissioner Andrews and Mayor Maybury supported the new ordinance. See *Mayor's Permit May Be Required Hereafter by Speakers on the Campus: New Ordinance Will Be Introduced in the Council by Ald. Koch Tonight*, EVENING NEWS, DETROIT, May 14, 1901, at 1 (“The new ordinance, it is said, has received the sanction of both Commissioner Andrews and the mayor.”).

379 See Herbert E. Boynton, Letter to the Editor, DETROIT FREE PRESS, May 12, 1901, at 12 (concluding that, given the results in Boston, “the mayor could not do a better public service than to assist in preventing the nightly disturbances on the Campus Martius by following the lead of the official of the city of Boston”).

380 See *Koch's Campus Ordinance, It Provides a \$100 Fine or 90 Days Imprisonment for Violations*, EVENING NEWS, DETROIT, May 20, 1901, at 2.

ment, known as the Koch Campus ordinance, was passed over the Mayor's veto.³⁸¹ In a letter addressed to the Common Council explaining his veto decision, the Mayor emphasized his objection to an across-the-board permit requirement.³⁸² He explained that he considered "the ordinance . . . so restrictive of fair play, free speech and the general public concern as to be unreasonable in its terms."³⁸³ Finally, he reminded readers that "[o]n many public occasions and in political campaigns particularly, addresses are often delivered upon public streets and grounds, and at convenient hours without restricting public use."³⁸⁴ The best course, he argued, would be proper enforcement of the 1900 Campus Martius ordinance.³⁸⁵

Even after the Koch Campus ordinance passed, the regular speakers on the Campus, like the Mayor, continued to assert a more robust entitlement to access to the square.³⁸⁶ The stakes for local speakers were high. The local Salvation Army, for example, had been told that no permits would be forthcoming.³⁸⁷

381 The ordinance was passed, in amended form, on June 11, 1901. *See Mayor to Issue Permits: Campus Ordinance Passed by Common Council, One Night a Week the Limit for All*, DETROIT FREE PRESS, June 12, 1901, at 12 ("An amendment to the Campus ordinance was finally agreed to and adopted by the common council last night . . ."); *see also Over Mayor's Veto: Koch's Campus Ordinance Passed by Council, Ald. Smith Starts His Movement for Investigation of the City's Alleged Coal Combine*, EVENING NEWS, DETROIT, June 19, 1901, at 7 ("The common council this morning passed Ald. Koch's Campus ordinance over the mayor's veto.").

382 *See* Unidentified Newspaper Clipping attached to Letter from Major W.F. Jenkins to Colonel Higgins (June 25, 1901) (RG. 2.15 143/7) (on file with the Salvation Army National Archives and Research Center, Alexandria, Va.) (arguing that the ordinance is unreasonable due to its restrictiveness and should be reconsidered); *see also Mayor Did Not Want to Be Bothered to Death: Has Vetoed Ordinance Regarding Campus Martius Permits*, DETROIT FREE PRESS, June 16, 1901, Part III at 3 ("Mayor Maybury has decided to veto Ald. Koch's amendment to the campus ordinance . . . He stated that in his opinion the amendment is not only worthless, but unreasonable . . .").

383 *Mayor Did Not Want to Be Bothered to Death: Has Vetoed Ordinance Regarding Campus Martius Permits*, *supra* note 382, Part III at 3; *see also Veto Goes In: Mayor Maybury Doesn't Like the New Campus Ordinance*, EVENING NEWS, DETROIT, June 16, 1901, at 6 (indicating that Corporation Counsel was consulted in reaching this conclusion).

384 *Mayor Did Not Want to Be Bothered to Death: Has Vetoed Ordinance Regarding Campus Martius Permits*, *supra* note 382, at 3.

385 Unidentified Newspaper Clipping, *supra* note 382, at 6 (noting that "[t]he only reason" it had been ineffective to date in dealing with disorderly parties and those interfering with the rights of property-owners was "due to the fact that the attempt to enforce it was in a manner which was resented very effectively and properly by Citizens." (internal quotations marks omitted)).

386 Abu El-Haj, *supra* note 20, at 305–11.

387 *See* Letter from Major W.F. Jenkins to Colonel Higgins (June 25, 1901), at 1–2 (RG 2.15, 143/7) (on file with the Salvation Army National Archives and Research Center, Alexandria, Va.) (noting that the Mayor was unwilling to issue the seven permits requested by the Salvation Army). In this letter, the local officer also wrote,

The dissenters' views were quickly endorsed by a local judge. The critical decision arose out of an action against Tom Bawden.³⁸⁸ His only defense was the unconstitutionality of the new ordinance:

an unwarranted infringement of the personal liberty of the citizen of the city of Detroit, *who has of common right the privilege of peaceably addressing his fellow citizens upon any subject they care to hear him upon, so long as said speaker does not produce disorder, nor conduce to or provoke riot, but behaves himself in a lawful manner . . .*³⁸⁹

During oral argument, Bawden's attorney dramatically claimed that the permit requirement resulted in a republic without free speech.³⁹⁰

On August 6, the Recorder's Court held that even though the Campus Martius was not a public highway, under the rationale of the *Frazee Case*, "this ordinance is void, so far as it applies to the Campus Martius, also as to the streets, where no riot or disturbance is created, as unreasonable, and against common right that has obtained for centuries in every English-speaking city."³⁹¹ Judge James Phelan observed, first, that "[t]he name itself implies a home for the people. Its literal meaning being a field for the people."³⁹² He emphasized, further, that "history shows that it was used for no one purpose oftener than the assembling of its citizens where any person whom the people would listen to was permitted to address them."³⁹³ Therefore, "[i]n this respect the people of this city have superior rights in the

You will see by the ordinance that it practically sweeps us off the street entirely and we are not proposing to take any notice of the said ordinance It is certain if the ordinance stands then it is death to our open air fight because if we get beyond the 1/2 mile limit of the City Hall then we get beyond our present radius of operation all together [P]lease don't surrender our right to stand where we have stood for these last 16 years.

Id. Between 1890 and 1920, state and local subdivisions of the Salvation Army regularly consulted with headquarters in New York City whenever legal matters arose. Many of these inquiries involved municipal repression of open-air work. The letters usually asked for both technical advice about legal precedents and strategic advice about how to proceed with local officials.

388 *Judge Phalen [sic] Declares New Ordinance Unreasonable: Tom Bawden Was Discharged in the Recorder's Court This Morning—Case Will Be Appealed to Supreme Court*, EVENING NEWS, DETROIT, Aug. 6, 1901, at 5.

389 *Id.* (as characterized in the opinion of the court) (emphasis added) (internal quotation marks omitted).

390 *See Freedom of Speech: Ed Greece's Strong Appeal to Judge Phelan, Tom Bawden Claimed Right to Violate the Campus Permit-Ripper Ordinance*, EVENING NEWS, DETROIT, Aug. 2, 1901, at 5 ("Attorney Greece made a strong appeal for the rights of citizens and told the court very plainly that things were going to the dogs in the Detroit division of this glorious republic where the free and the brave must get a permit before they can open their mouths.").

391 *Judge Phalen [sic] Declares New Ordinance Unreasonable: Tom Bawden Was Discharged in the Recorder's Court This Morning—Case Will Be Appealed to Supreme Court*, *supra* note 388, at 5 (quoting the opinion of the court) (internal quotation marks omitted).

392 *Id.* (quoting the opinion of the court) (internal quotation marks omitted).

393 *Id.* (quoting the opinion of the court) (internal quotation marks omitted).

Campus Martius than in an ordinary highway, in that in a highway the public generally has only an easement or right of passage therein.”³⁹⁴ In his view, the long-tradition of public gathering on the square was particularly relevant: “For almost half a century this public place has been used by speakers, political, secular and religious; no riot has ever arisen therefrom; no great inconvenience arises from the exercise of this right.”³⁹⁵

In a dramatic change of direction, Judge Phelan’s ruling was rejected by the Michigan Supreme Court, which upheld the ordinance as a lawful exercise of the city’s municipal powers.³⁹⁶ In a formalist move, the court distinguished its earlier *Frazee Case* on the ground that it applied to processions whereas the newer ordinance covered stationary addresses.³⁹⁷ The court found that the ordinance presented a reasonable managerial solution to popular demand on a limited resource (public space) and dismissed the suggestion that the ordinance was “directed against freedom of speech,” finding, instead, that it was “simply directed to the method of using a public space, and is no more a curtailment of the right of free speech than would be an ordinance that prohibited the making of public addresses in the corridors of the city hall.”³⁹⁸ The decision was significantly influenced by the views of the United States Supreme Court in *Davis v. Massachusetts*, which it quoted extensively.³⁹⁹

The Michigan high court rendered this judgment notwithstanding that it had been made fully aware of three critical facts: first, that Detroit’s Mayor refused to grant any permits and, as such, the ordi-

³⁹⁴ *Id.* (quoting the opinion of the court) (internal quotation marks omitted).

³⁹⁵ *Id.* (quoting the opinion of the court) (internal quotation marks omitted).

³⁹⁶ *Love v. Phalen*, 87 N.W. 785, 786 (Mich. 1901). Review took an unusual turn. Instead of pursuing an appeal, Corporation Counsel requested and received from the Michigan Supreme Court an order to Judge Phelan to show cause as to why mandamus should not be issued to compel him to hear various cases he had dismissed under the ordinance. See *Campus Case in Lansing: Counsel Tarsney Will Ask for an Order on Judge Phelan Today*, EVENING NEWS, DETROIT, Sept. 24, 1901, at 5. For additional details of the procedural wrangling, see Abu El-Haj, *supra* note 20, at 323–27.

³⁹⁷ *Love*, 87 N.W. at 787 (“We think, in his application of the *Frazee Case* to the case at bar, counsel has misunderstood the former case. The question in that case was, who may travel in the highways? The question in this case is, who may occupy the public spaces in the city . . .”). This was apparently the primary distinction argued by Detroit’s Corporation Counsel. Cf. Supplemental Brief for Respondent at 1, *Love*, 87 N.W. 785 (“[T]he only point Mr. Tarsney makes use of to differentiate this case from the *Frazee Case* is that the *Frazee Case* applied to processions of [sic] moving people in the public highway, and that in this case the person making the address is stationary . . .”). Corporation Counsel’s brief is no longer available.

³⁹⁸ *Love*, 87 N.W. at 787.

³⁹⁹ *Id.* at 787–88.

nance, in practice, amounted to a total prohibition on assembly in the covered district;⁴⁰⁰ second, that the high court of Massachusetts stood alone in upholding “what is known as the Salvation Army legislation contrary to all the other States”;⁴⁰¹ and third, that the United States Supreme Court decided *Davis* without reference to constitutional considerations about speech and assembly because it affirmed the Massachusetts court “squarely upon the principles which underlie *private property alone*.”⁴⁰²

Although the Michigan Supreme Court’s reversal in *Love v. Phalen* (1901) was a reflection of the new state of the law, important constituents continued to resist the attitudes that the judiciary propounded. Still, the terms of resistance had significantly changed. For example, while the Salvation Army was the first to resist the court’s decision, it initially did so by engaging in gatherings that were not technically covered by the ordinance (*e.g.* processions without music).⁴⁰³ Others followed suit, and talk quickly surfaced about amending the ordinance.⁴⁰⁴

⁴⁰⁰ See *Pound Appointed: He Will Represent Judge Phelan in Supreme Court Proceedings, Judge Phelan Gives Reasons Why Campus Defendants Should Not Appear for the Court*, EVENING NEWS, DETROIT, Sept. 28, 1901, at 6 (“The mayor, upon his part, having once vetoed the ordinance, declines to issue any permits, he having made public proclamation of his intended acts in this regard, which is fortified by the further fact that no permits have been issued by the mayor since the adoption of this ordinance.” (quoting opinion of Judge Phelan) (internal quotation marks omitted)).

⁴⁰¹ Supplemental Brief for Respondent, *supra* note 397, at 18–19, 21.

⁴⁰² *Id.* at 18 (emphasis added). This point was returned to in the reply brief and made even more explicit, noting that the United States Supreme Court “has never decided” whether “such an ordinance . . . infringe[s] the United States Constitution in that part affecting free speech . . . and cannot well be called upon to unless it arises in the City of Washington.” Supplemental Brief for Respondent, *supra* note 397, at 4–5.

⁴⁰³ See, *e.g.*, Editorial, EVENING NEWS, DETROIT, Nov. 7, 1901, at 2 (explaining that the Salvationists had parades but “played no drums, blew no trumpets and engaged in no exhorting”); *Salvation Army Making a Loop on Cadillac Square*, EVENING NEWS, DETROIT, Nov. 9, 1901, at 1 (noting that “[i]nstead of standing still to collect a crowd, they kept on the march”).

⁴⁰⁴ See *Campus Was Clear: Evangelists Honored the Supreme Court Decision Last Night*, EVENING NEWS, DETROIT, Nov. 6, 1901, at 2 (noting that “Will Allen and the other Salvationists are considering an effort to have the ordinance so amended that public speaking shall be allowed from 8 to 10 in the evening”); *The Volunteers of Salvation Become Volunteers Militant*, EVENING NEWS, DETROIT, Nov. 13, 1901, at 1 (describing one parade of the Volunteers of America which included “beating an empty tin . . . pan with a poker”); *Were On Parade: Both Brands of Salvationists Marched the Streets*, EVENING NEWS, DETROIT, Nov. 10, 1901, at 5 (describing how others engaged in defying the ordinance); see also *A Mass Meeting: Will Allen Asks Permit to Hold One on the Campus, Proposed to Agitate for an Amendment to the Campus Ordinance, Permitting Public Meetings*, EVENING NEWS, DETROIT, Nov. 18, 1901, at 1 (“Evangelist Will Allen this morning appealed to the mayor for permission to hold a mass meeting on the Campus next Saturday night for the purpose of discussing a new Campus ordinance . . .”).

Political pressure would ultimately make some difference. Within a few months of the Michigan Supreme Court's decision, the Salvation Army launched an all-out campaign of resistance.⁴⁰⁵ The new campaign began in January 1902 with the arrival from Indianapolis of Major Blanche Cox.⁴⁰⁶ Determined to secure a place for open-air assembly within reach of the people the Army sought to convert, Major Cox began holding outdoor services without a permit at various locations within the half-mile circle covered by the Koch Campus ordinance, although not on the Campus Martius itself.⁴⁰⁷ Between January and April, when the Koch Campus ordinance was amended, Major Cox was arrested more than eight times.⁴⁰⁸ Other members of the Salvation Army as well as the city's regular street speakers were also arrested during this period.⁴⁰⁹

405 Abu El-Haj, *supra* note 20, at 323–33.

406 *Id.* at 323.

407 See Blanche B. Cox, Letter to the Editor, *Maj. Cox's Position: Did Not Insist Upon Campus Meetings*, DETROIT FREE PRESS, Mar. 10, 1902, at 5 (“From the first I have not sought to hold meetings on the Campus, and have never yet stood there.”). Unfortunately, the legal records of the Salvation Army do not shed any light on the decision to bring in Major Cox. It is likely, however, it was undertaken reluctantly. Correspondence relating to similar controversies in other localities makes clear that the Army considered defiance of local law an option of last resort. This was partly strategic and partly a product of the fact that their leader, General Booth Tucker, disapproved of law breaking. The Salvation Army was dedicated to reforming sinners and law-breakers; modeling law breaking was somewhat inconsistent. See, e.g., Letter from Staff Capt. Ferris to Commander Booth Tucker (Jan. 24, 1899) (RG. 2.15, 143/8) (on file with the Salvation Army National Archives and Research Center, Alexandria, Va.), at 1 (explaining that Commander Booth Tucker believed in avoiding conflict given the organization's efforts to formulate a policy of self-denial). What likely tipped the scale was the fact that that access to the public squares near City Hall in Detroit was being denied outright. General counsel consistently considered the complete denial of the right to preach in public worth fighting. See, e.g., Letter from Major Ferris to Major J.N. Parker (Oct. 9, 1899) (RG. 2.15, 143/8) (on file with the Salvation Army National Archives and Research Center, Alexandria, Va.), at 1 (expressing willingness to fight for “rights that we are deprived of”).

408 See, e.g., *Complaint Against Maj. Cox*, EVENING NEWS, DETROIT, Jan. 30, 1902, at 5 (reporting a complaint filed against Major Cox for addressing the public without a permit); *Sympathy for Maj. Blanche Cox: Imprisoned Salvationist Has Many Friends Who Call Her Arrest an Outrage, Marine City Man Sends Her a Check for \$10—New Complaint Made Against Crawford*, EVENING NEWS, DETROIT, Feb. 19, 1902, at 1 (quoting letters “protesting against the arrest and imprisonment of Maj. Blanche Cox”); *Mayor Will Give No Permits Now: Maybury Displeased Because Maj. Cox Went on the Campus, As a Result Whatever Meetings Are Held Sunday Will Be Without His Sanction—Complaint Issued*, EVENING NEWS, DETROIT, Feb. 21, 1902, at 12 (reporting Major Cox's arrest the previous night).

409 See, e.g., *Tom Bawden Goes To Prison: Prefers House of Correction to Giving Up Fifteen Single Tax Dollars, Evangelist Will Allen Was Also Convicted in Short Order, Both Were Given 15 Days in House of Correction as Alternative—Allen Pays Under Protest*, EVENING NEWS, DETROIT, Mar. 15, 1902, at 1 (reporting the conviction and sentencing of Tom Bawden for making a public address without permission).

The media attention given to these colorful arrests and to Major Cox's sentences to the workhouse bolstered pressure for legislative reform.⁴¹⁰ *The Evening News*, in particular, was quite willing to run stories humanizing and pitying the "Heroic Young Woman."⁴¹¹

By the end of February, the Salvation Army, with the Volunteers of America and several other evangelical preachers, had petitioned the Common Council to repeal the ordinance—an action undertaken at the Mayor's suggestion.⁴¹² Shortly thereafter, 700 members of a local Methodist church "unanimously adopted resolutions requesting the common council to revise the [Koch] Campus ordinance" to permit open-air services by the Salvation Army and others.⁴¹³

The legislative strategy was paired with a litigation strategy. The attorney, who had served as independent counsel for Judge Phelan, sought to convince the Michigan Supreme Court to revisit its decision—without success.⁴¹⁴

When the Common Council was formally presented with the petitions calling for the repeal of the Koch Campus ordinance on February 25, there were over one thousand signatures attached.⁴¹⁵ The

410 See, e.g., *Major Blanche Cox A Martyr to Her Religious Convictions: Heroic Young Woman Goes to the House of Correction for Four Days Rather Than Surrender Her Salvation Army Principles, Judge Phelan Reluctantly Imposed a Fine of \$10 for Violation of the Campus Ordinance, but the Major Smilingly Said She'd Prefer the Prison*, EVENING NEWS, DETROIT, Feb. 17, 1902, at 1 (quoting Major Cox as stating that "we never pay fines" as "[w]e have much better use for our money" (internal quotation marks omitted)).

411 See *id.* (using the phrase "Heroic Young Woman" in a title to describe Maj. Cox); see also *Major Cox in Isolation: Salvation Army Martyr Remains Alone From Morning Till Night, Plucky Woman Preserves Brave and Cheerful Spirit in House of Correction*, EVENING NEWS, DETROIT, Feb. 18, 1902, at 1 (sympathetically reporting that Maj. Cox spends her days in prison "in dignified retirement," but also in complete isolation).

412 See *Petition to Repeal Campus Ordinance: Mayor May Give Permits to Speak Sunday*, DETROIT FREE PRESS, Feb. 21, 1902, at 5 ("The members of the Salvation Army, the Volunteers, Allen Rescue Mission and other citizens and taxpayers have prepared a petition to the common council to repeal the Campus ordinance.").

413 *Revise the Ordinance: Cass Avenue Methodists Adopt Resolutions on Campus Legislation*, EVENING NEWS, DETROIT, Feb. 24, 1902, at 2.

414 See *Campus Law Again Upheld: Supreme Court Affirms the Sentence of Maj. Blanche Cox, But the Major Says She Will Not Stop Her Work, Hints That the Case May Be Taken Up to the U.S. Supreme Court*, EVENING NEWS, DETROIT, Mar. 13, 1902, at 1 (describing the reasoning of the case); *Says Maj. Cox Is Not Criminal: Attorney Pound Urges that She Cannot Legally Be Imprisoned, Asking Writ of Habeas Corpus He Says It Is No Crime to Break City Ordinance*, EVENING NEWS, DETROIT, Mar. 7, 1902, at 1 (detailing the attorney's switching focus to the nature of the penalty); *Taken Under Advisement: Maj. Cox Habeas Corpus Proceeding at Lansing*, DETROIT FREE PRESS, Mar. 2, 1902, at 10 (describing the attorney's arguments).

415 See *Storm of Protest: Council Unwilling to Repeal Campus Ordinance, Plan to Give Up Part of Cadillac Square Park, M.C.R.R. Given 48 Hours to Repair Bridge*, DETROIT FREE PRESS, Feb. 26, 1902, at 5 ("The agitation in favor of amending the Campus ordinance received a healthy boost last evening, when three resolutions containing an aggregate of over 1,000 names were introduced before the common council . . .").

Committee on Ordinances held a legislative hearing at which the primary objective of the outdoor evangelists was to secure the ability to hold services on the Campus.⁴¹⁶ Businesses on the Campus strongly opposed any change that might return the crowds of the past.⁴¹⁷ As such, a key consideration at the hearing was the possibility of dedicating a portion of Cadillac Square, a square within the half-mile radius of City Hall, to open air services.⁴¹⁸

Throughout the campaign, concerns raised about the permit requirement were limited to worries about officials abusing their permitting powers. Neither the Salvation Army nor anyone else who advocated for more access to Detroit's central square questioned the power to regulate through permits.⁴¹⁹ In Detroit, as elsewhere, constitutional questions about the permits had come to focus exclusively on the question of unbridled discretion.⁴²⁰ Those who advocated against a permit system did so on the grounds that it gave the mayor free reign to refuse permits.⁴²¹ Proponents argued that permits would provide a mechanism to allow "*legitimate organizations* the right to assemble."⁴²²

416 See *Crack at Maybury, Bro. Will Allen Says He Changes His Mind Too Often*, EVENING NEWS, DETROIT, Feb. 27, 1902, at 2 ("[B]rother Allen and Maj. Johnson of the Volunteers of America, urged that the Koch Campus ordinance be modified so as to permit religious bodies to hold open air meetings on the Campus.").

417 See *Opposed to Any Change: Campus Merchants Want the Ordinance Left Alone, No Trouble Now in Keeping the Streets Clear, Council Committee Hears Arguments for Amendments*, DETROIT FREE PRESS, Feb. 27, 1902, at 5 ("[T]he merchants on the Campus . . . are all bitterly opposed to any movement that may possible mean the return to conditions that existed on the public square last summer.").

418 See *Storm of Protest: Council Unwilling to Repeal Campus Ordinance, Plan to Give Up Part of Cadillac Square Park, M.C.R.R. Given 48 Hours to Repair Bridge*, DETROIT FREE PRESS, Feb. 26, 1902, at 5 (discussing the argument of one alderman "who favored giving the lower part of Cadillac square over to those who desired to hold outdoor meetings").

419 This was certainly the case among legal experts by the early 1900s. See, e.g., FREUND, *supra* note 336, § 480 (assuming the validity of "proper regulations").

420 Abu El-Haj, *supra* note 20, at 336–38.

421 *Id.* at 323, 327–31.

422 *People Want Law Modified: Council Committee Met An Enthusiastic Crowd Last Night, Overwhelming Sentiment Was in Favor of Repeal or Change in the Campus Ordinance*, EVENING NEWS, DETROIT, Mar. 21, 1902, at 4 (emphasis added). A subsequent hearing was held in March. See *Up to Maybury: Aldermen Want His Views on the Hugh Guy Investigation, Ald. Magree Opens His Fight for a Revision of the Koch Ordinance—Doty in the Common Herd*, EVENING NEWS, DETROIT, Mar. 19, 1902, at 5 (describing the meeting the previous night). At that hearing, which approximately three hundred people attended, "[w]ith perhaps one or two exceptions, all appeared to be in favor of repealing or amending the campus ordinance so as to give the Salvation Army and others the right to assemble and talk in any part of the city except the campus." *Amend Campus Ordinance: Prevailing Sentiment at Public Meeting Last Night, About 300 Met with a Council Committee, Aldermen Took the Matter Under Advisement*, DETROIT FREE PRESS, Mar. 21, 1902, at 10.

On April 7, 1902, the Koch Campus ordinance was amended.⁴²³ The amended ordinance confined the space within which public gatherings would be prohibited by splitting the covered half-mile radius from City Hall into two regulatory spaces.⁴²⁴ In the first, which included the Campus Martius, no permits would be granted.⁴²⁵ Elsewhere within the half-mile radius, regular speakers could obtain permits.⁴²⁶ In a nod to the continued validity of the *Frazee Case*, the ordinance did not cover processions.

While the newspapers seemed generally satisfied with this outcome, the Salvation Army was not.⁴²⁷ Major Cox explained that there was nothing in the ordinance to require the Mayor to issue permits to the Salvation Army near its hall.⁴²⁸ More importantly, the areas for which permits were not required were empty spaces where it was pointless for the Salvation Army to do its work.⁴²⁹

As in Boston, however, the tide had already turned. In 1912, the Koch Campus ordinance was amended to include parades.⁴³⁰ By 1930, permits were also required for gatherings in the city's parks.⁴³¹ These ordinances were all additions to the city's code which continued to include ordinances of the nineteenth-century variety—

423 See *Signed Ordinance: Mayor Maybury Satisfied with Revised Campus Law, Uncle Tom's Cabin Co. After Being Refused a Permit Violated the Ordinances*, EVENING NEWS, DETROIT, Apr. 7, 1902, at 6 (“Mayor Maybury decided this noon to sign the amended Campus Ordinance . . .”).

424 Detroit, Mich., THE COMPILED ORDINANCES OF THE CITY OF DETROIT OF 1904, ch. 53, *Use of Certain Streets, Parks and Public Places*, §§ 1–2.

425 *Id.* § 1.

426 *Id.*

427 See Editorial, EVENING NEWS, DETROIT, Apr. 2, 1902, at 2 (“As the Koch, or Campus, ordinance now stands, it is a great improvement over the original.”); *No More Meetings on Campus: Ordinance Was Amended and Passed by Council, Permits Necessary on Five Specified Streets, Drum and Horn Can Be Used During Parades, Beamer Disgusted by the Asphalt Plant Delay, Moran and McCurdy Nominations Were Held Up*, DETROIT FREE PRESS, Apr. 2, 1902, at 1 (noting that the amended ordinance “is believed . . . will be satisfactory to all concerned”).

428 See *Major Cox Is Not Satisfied: Necessity of Permits in Revised Campus Ordinance Objected to, Mayor Given Power to Issue Permits on Advice of Police Commissioner With Certain Streets Barred*, EVENING NEWS, DETROIT, Apr. 2, 1902, at 5.

429 *Id.* (“The major is especially disappointed because the measure prevents us from speaking in front of our hall The side streets where we may hold open air meetings without permit are of no value, as we must be where the crowd is.”).

430 DETROIT, MICH., THE MUNICIPAL CODE OF THE CITY OF DETROIT, ch. 198, § 1 (1936) (“No person shall in or upon any of the public streets . . . within the one-mile circle from the City Hall, make any public address, beat drums, blow horns, or *hold any parade or procession*, except . . . (emphasis added)”) (amended Mar. 5, 1912).

431 *Id.* at ch. 164, § 24 (“No parade, procession, exercises or other activities which result in the congregating together or [sic] a large number of people shall be permitted within said park or boulevards without a permit having been obtained therefore from the Commissioner.”).

covering disorderly conduct, routs, and riots as well as ordinances covering traffic-impeding crowds.⁴³²

The changed stance of the Michigan Supreme Court made this result possible. Still, the fact that state courts consistently upheld the lawfulness of permit requirements in circumstances of outright repression significantly limited their ability to confer legitimacy on the new regulatory approach.

Constitutional debates remained, although they took place outside of courts and were largely limited to concerns about the arbitrary and capricious ways in which the permitting power often was exercised.⁴³³ No one argued for a return to the nineteenth-century approach of regulating disruption when it actually occurred, but concerns about official caprice frequently led to suggestions that municipalities return to permit-free open-air speaking.⁴³⁴ Important legal authorities advocated permanently designated public forums.⁴³⁵ Meanwhile, the ACLU argued that cities should replace permit requirements with notice requirements under which “the police might designate another location if it appeared that traffic would be interfered with.”⁴³⁶

D. *From Repression to Permission: The Taming of the People Outdoors*

In the mid-twentieth century, the United States Supreme Court began to institute more constraints on official discretion. New constitutional constraints provided legitimacy to permit regimes but ironi-

⁴³² *Id.* at ch. 137, §§ 2, 6; *see also id.* at ch. 164, § 21 (covering disorderly conduct in parks). The 1900 Campus Ordinance was also still on the books. *See id.* at ch. 197, § 12.

⁴³³ *See* James M. Jarrett & Vernon A. Mund, *The Right of Assembly*, 9 N.Y.U. L. Q. REV. 1, 33–34 (1931) (discussing the Supreme Court’s determination that the right to assembly is not absolute and characterizing the difficulty with respect to the right of assembly as the discretion afforded officials in distinguishing between lawful and unlawful assemblies); *accord* RABBAN, *supra* note 169, at 110 (noting that by the early twentieth century “[v]irtually everyone . . . agreed that public speaking could be limited by reasonable regulations,” even as disputes arose over which restrictions were reasonable).

⁴³⁴ Abu El-Haj, *supra* note 20, at 342–44.

⁴³⁵ *See, e.g.*, ZECHARIAH CHAFEE, JR., *THE INQUIRING MIND* 150–55 (1928) (noting that the problem of municipal censorship when speaking in outdoor spaces is regulated by permits and advocating the introduction of a version of Hyde Park, wherein “so long as the gates remain open, any one can speak without any official’s license”); Richard C. Barrett, *Limitations on the Right of Assembly*, 23 CALIF. L. REV. 180, 192 (1935) (articulating concern about subjecting “the right or privilege of assembly to the uncontrolled discretion of an administrative official” and recommending, among other things, that every community provide a place for people to hold meetings without the need for permission).

⁴³⁶ ACLU 1929, *supra* note 341, at 16–17.

cally may have reduced the public's tolerance for unfettered and spontaneous assemblies.

The United States Supreme Court in the mid-twentieth century was instrumental in legitimating the permit system. A series of decisions rendered by the Court put an end to constitutionally authorized outright prohibition of assemblies and enabled the development of a more elaborate and routinized permitting regime.⁴³⁷

The first move in this direction took place in 1939, although initially it was only a change in the formal law. In *Hague v. Committee for Industrial Organization*, the United States Supreme Court reintroduced into constitutional law the principle that the use of "streets and parks . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions" was a longstanding privilege and immunity of citizenship.⁴³⁸ Municipalities were no longer able to prohibit assemblies in their streets and parks at will.⁴³⁹ In particular, the Court underscored that arbitrary, capricious, and discriminatory licensing restrictions would not be tolerated.⁴⁴⁰

While *Hague* reinstated the presumption that assemblies in public are lawful as a matter of constitutional law, it did not require a return to the antecedent legal regime, which regulated only assemblies that were actually disruptive and only after they had begun. *Massachusetts v. Davis* was distinguished rather than overruled.⁴⁴¹ In fact, shortly thereafter, the Supreme Court held that permit requirements for public assemblies were presumptively constitutional.⁴⁴²

437 See Clark McPhail et al., *Policing Protest in the United States: 1960–1995*, in *POLICING PROTEST: THE CONTROL OF MASS DEMONSTRATIONS IN WESTERN DEMOCRACIES* 49, 58–59 (Donatella della Porta & Herbert Reiter eds., 1998) (describing the role of the United States Supreme Court in the development of the modern regulatory approach to demonstrations).

438 307 U.S. 496, 515 (1939).

439 *Id.*

440 *Id.*

441 *See id.* ("We have no occasion to determine whether, on the facts disclosed, the *Davis* case was rightly decided, but we cannot agree that it rules the instant case."). The ghost of *Massachusetts v. Davis* reared most recently in a state court opinion regarding Occupy Boston in which the judge asserted that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated" and that this justified the lawfulness of criminal prosecution for trespass or unlawful assembly against those engaged in the occupation of Dewey Park. *Occupy Boston v. City of Boston*, No. 11-4152-G, slip op. at 14–15 (Mass. Super. Dec. 7, 2011) (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966)).

442 *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (holding that the government constitutionally can predicate the lawfulness of assembly on obtaining advance permission in cases involving no record or evidence of official discrimination).

Even so, government officials did not eagerly abide by *Hague's* new constitutional requirements, and permits did not play a large role in the southern civil rights movement.⁴⁴³ Throughout the 1950s and 1960s, southern officials routinely prohibited assemblies.⁴⁴⁴ They were even able on occasion to obtain injunctions from local courts to do so.⁴⁴⁵ More frequently, they resorted to alternative strategies—harassment through criminal law and intimidation through violence.⁴⁴⁶

Even in Washington, D.C., the permitting processes for marches on the National Mall were not elaborate during the Civil Rights Era.⁴⁴⁷ The “primitive permit system” that did exist allowed for a great deal of official discretion which was exercised in highly political ways.⁴⁴⁸ Thus, observers have noted that “the outcome of negotiations involving the civil rights and antiwar demonstrations was more a function of who was negotiating . . . than it was of the permit system itself.”⁴⁴⁹ In the early period, the White House was a key player.⁴⁵⁰

During this period, the Supreme Court repeatedly affirmed that it was unconstitutional to invoke crimes such as disorderly conduct, breach of the peace, and obstructing public passage to suppress the freedom of speech and assembly.⁴⁵¹ But once again, it failed to

443 That being so, where permit requirements were in place, southern officials certainly used them. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 148 (1969) (reviewing the conviction of the petitioner for violating a permit ordinance).

444 *See* McPhail et al., *supra* note 437, at 51 (explaining that in the 1960s, “[t]he right to protest was denied and permits were not issued”).

445 *See, e.g.*, Steven E. Barkan, *Legal Control of the Southern Civil Rights Movement*, 49 AM. SOC. REV. 552, 555 (1984) (“State and federal judges in the South also aided the social control effort when they granted injunctions that limited or banned civil rights activity.”).

446 *See id.* (describing how criminal law, police, and prisons impacted civil rights protests).

447 *See* McPhail et al., *supra* note 437, at 59–60 (noting that in the early 1960s “there was but a mere semblance of the permit system now in place”).

448 *Id.* at 60.

449 *Id.*

450 *See id.* (commenting on “[t]he dramatic differences in the negotiations for permits for Martin Luther King’s 1963 March on Washington, with the support of the Kennedy administration . . . [and those] for the 1967 March on the Pentagon, with opposition from the Johnson administration”).

451 *See* *Brown v. Louisiana*, 383 U.S. 131, 133 (1966) (Fortas, J., plurality opinion) (noting that it was “the fourth time in little more than four years that this Court has reviewed convictions by the Louisiana courts for alleged violations, in a civil rights context, of that State’s breach of the peace statute” and that “[i]n the three preceding cases the convictions were reversed”); *Cox v. Louisiana*, 379 U.S. 536, 552, 558 (1965) (holding that the State infringed appellant’s rights of free speech and free assembly by convicting him of breaching the peace and obstructing passages while participating in a peaceful march and demonstration against segregation); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (holding that a conviction for breach of the peace where defendants were marching peacefully to publicize dissatisfaction with racial segregation “infringed [their] consti-

reestablish the old constitutional order in which only assemblies that were actually disruptive could be regulated. Instead, it reaffirmed the reasonableness of regulation in the name of order so long as regulatory choices were made by statutes, not local officials, and official discretion was sufficiently cabined.⁴⁵² Squarely addressing the issue in *Cox v. Louisiana*, the Court declared,

The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement.⁴⁵³

Meanwhile, the police tended to overreact to crowds in a form of order maintenance that has aptly been described as “marked by ‘escalated force.’”⁴⁵⁴ In the North, it was not uncommon for assemblies to degenerate into violence—often at the hands of police.⁴⁵⁵ The violence at the 1968 Democratic National Convention in Chicago is only

tionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances”); *see also* *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (reversing conviction for disorderly conduct where petitioners engaged in peaceful and orderly march).

452 *See Gregory*, 394 U.S. at 118 (Black, J., concurring) (“Plainly, however, no mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes, wherein they can escape the hurly-burly of the outside business and political world, or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals.”); *see also* *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) (explaining that under “the ambit of the many decisions of this Court over the last 30 years . . . a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional”).

453 *Cox*, 379 U.S. at 554–55.

454 McPhail et al., *supra* note 437, at 50.

455 *Id.* at 54–55.

the most memorable of these events. Those who lived through the period are quick to remember many others.⁴⁵⁶

Civil rights marches and Vietnam protests, in this fraught context, made it difficult for Americans to ignore the risks associated with politically fraught outdoor protests. No amount of singing could disguise the terrifying nature of civil rights marches in the South and the constant threat experienced by those who participated. Similarly, every time the National Guard was called out—whether to Little Rock or Kent State—the risk of state violence was present. Moreover, not all Americans backed down in the face of state violence, which too heightened anxiety, as mainstream citizens balked at the violence of the Black Panthers and the Weathermen. The period was also marred by a series of high profile political assassinations.

Litigation over the Civil Rights Movement, which frequently highlighted, if only implicitly, the degree to which Movement participants were under constant threat of violence by southern officials, forced the Court to elaborate *Hague's* promise to curtail official discretion, and ultimately gave rise to the public forum doctrine, which remains the primary constitutional framework within which regulatory action can take place.⁴⁵⁷ The notion that procedure could both contain violence and enhance legitimacy gained ground.⁴⁵⁸

Permit requirements, as we know them, were a legislative response to the violence (largely at the hands of government officials) that occurred during marches in the 1960s and 1970s.⁴⁵⁹ The impetus to develop more elaborate permit requirements to be implemented in a more bureaucratic fashion—ones that complied with the new constitutional constraints—grew out of public dismay at violence on the streets but also at outrageous disregard of First Amendment rights and led to the creation of a series of investigative commissions.⁴⁶⁰

456 This was also the era of urban riots, which fit the same pattern. *See id.* (discussing urban riots of the 1960s).

457 *See id.* at 57–59 (explaining that “the arrest of of [sic] protesters, and the denial of demonstration permits produced a series of legal challenges” out of which the public forum doctrine, which creates constitutional constraints on the regulation of public assemblies today, arose).

458 *Id.*

459 *Id.*

460 *See id.* at 58–59, 61 (discussing violence and the meaning of the First Amendment and commenting that “it is obvious that the courts were important in shaping the dimensions of the shift between the two forms of protest policing” and that “these evolving constitutional principles had to be implemented in practical situations, and that is where the evolving protest permit system assumed central importance in turning those lofty principles into practical bureaucratic guidelines for managing protest”).

The result was the intricate legal regulation with which we have all become familiar. While in 1959, only one page in the Federal Register was required to detail the law governing parades and public meetings in the National Park Service's jurisdiction, by 1993, there were seven pages of requirements.⁴⁶¹ The National Park Service's development of a more elaborate permitting system was a key turning point, as that federal agency's approach was subsequently adopted in other localities.⁴⁶²

The emergence of this less confrontational order maintenance approach in the 1970s and 1980s increased government control over crowds.⁴⁶³ It emphasized managing the time, place, and manner of gatherings but in practice frequently worked to distance protestors from their audiences.⁴⁶⁴ Both officials and assemblers, ultimately, were forced to operate within a narrower definition of "peaceable."

Recent years have seen authorities use their legal powers more aggressively.⁴⁶⁵ In particular, since the 1999 protests against the World Trade Organization in Seattle, "authorities [have become] much more aggressive in their use of such discretion to place and displace protest groups."⁴⁶⁶ Boston's "'designated demonstration zone,'" which, according to the court that upheld it, resembled nothing other than an internment camp, has become the new normal.⁴⁶⁷ This approach has been characterized in the sociological literature as one of "strategic incapacitation" and for reasons that should now be clear, has generally been upheld in federal courts.⁴⁶⁸

Part of a larger trend in policing and criminal punishment that emphasizes risk management through information and incapacitation, the policing of demonstrations has increasingly been intolerant of disruption. This intolerance, in turn, has manifested itself in in-

⁴⁶¹ *Id.* at 61.

⁴⁶² *Id.* at 49, 59–64.

⁴⁶³ McCarthy & McPhail, *supra* note 41, at 234 (explaining that the 'negotiated management' approach to regulating demonstrations, which relies heavily on the permitting process, has resulted in a near absence of fatalities and significant injuries at protests, it has also given "authorities great discretion in determining which places [are] actually available for protest").

⁴⁶⁴ *See id.* at 234–35. For more on the ways that officials seek to control protest through time, place, and manner regulations see Abu El-Haj 2009, *supra* note 6, at 544–45, 548–54.

⁴⁶⁵ *See* Lesley J. Wood, *Breaking the Wave: Repression, Identity, and Seattle Tactics*, 12 MOBILIZATION 377, 379–82 (2007) (describing series of Seattle-style protests and aggressive police responses to them).

⁴⁶⁶ McCarthy & McPhail, *supra* note 41, at 232–34.

⁴⁶⁷ *Coal. to Protest the Democratic Nat'l Convention v. City of Boston*, 327 F. Supp. 2d 61, 66 (D. Mass. 2004), *aff'd sub nom.* Bl(A)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004).

⁴⁶⁸ *See* McCarthy et al., *supra* note 8, at 279 n.8 (summarizing and citing new literature).

creased micromanagement of protest through surveillance, preventative arrest and detention, the use of barricades and other forms containment, and the use of force in the last instance.⁴⁶⁹

CONCLUSION

Like the gatherings described earlier, most outdoor assemblies of citizens are insignificant in the grand scheme of American political history. As a political practice, however, gatherings of people are not.⁴⁷⁰

Outdoor assembly has been an integral component of American politics time out of mind. Groups, not individuals, exercise power in a democracy.⁴⁷¹ Elections are one way to aggregate citizens to effect political change, but they have their limits. For one, they are “a singularly blunt instrument for the communication of information.”⁴⁷² For another, they are rarely experienced as collective acts, at least in the modern era.⁴⁷³

Outdoor assembly complements voting in a number of important ways. Public protest can increase the odds that electoral victories return desired political changes. For example, newfound political sway of northern Blacks in the post-war period combined with the strategic use of public protest to create the successes of the Civil Rights Movement.⁴⁷⁴ Similarly, increasing electoral power of Latino citizens has placed immigration reform on the national agenda today; at the same time, it has emboldened disenfranchised, undocumented workers to

469 See Alex S. Vitale, *The Command and Control and Miami Models at the 2004 Republican National Convention: New Forms of Policing Protests*, 12 MOBILIZATION 403, 405–06 (2007) (situating recent protest policing strategies in wider policing trends).

470 For a different accounting of the range of values served by public assembly, see SUPPRESSING PROTEST 2012 REPORT, *supra* note 2, at 47–52 (summarizing the value of assembly as articulated by international and European human rights law).

471 Cf. *Reverse-Engineering Chinese Censorship*, HARV. MAG. (Sept. 2013), available at <http://harvardmagazine.com/2013/09/reverse-engineering-chinese-censorship> (reporting a study showing that “the Chinese government is not interested in stifling opinion, but in suppressing collective action,” as such, “[w]ords alone are permitted no matter how critical and vitriolic,” while “mere mentions of . . . any large gathering not sponsored by the state, whether peaceful or in protest . . . are censored immediately”).

472 SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 24 (1995).

473 For a description of the festive, social quality of early American elections, see Abu El-Haj 2011, *supra* note 6, at 14–15.

474 See, e.g., TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 42–43 (2011).

publicly protest, along with their enfranchised supporters, for fairer working conditions.⁴⁷⁵

The complementary function of public assembly is not limited to the marginalized within our society. Mainstream political activists, most recently the Tea Party, frequently support their electoral strategies with outdoor gatherings.⁴⁷⁶

Outdoor assembly also has its own distinctive attributes as a form of political participation. For participants, public assemblies are frequently powerful experiences in and of themselves. This appears to be a product of the fact that they are unique in being, by definition, political experiences that take place in person with others. This collective experience frequently proves to be a profound one for the individuals participating.⁴⁷⁷ Such collective political experiences strengthen the likelihood of future civic and political engagement.⁴⁷⁸ Ideas and political commitment alone turn out to be poor motivators for political engagement. Assembling is a critically important form of politics because it provides opportunities to strengthen, even create,

⁴⁷⁵ See Julia Preston, *Showing Grass-Roots Support for Immigration Overhaul: Local Events Help Organizers Display Momentum*, N.Y. TIMES, May 2, 2013, at A11 (explaining the conscious decision of immigration reform advocates to hold small May Day protests across the country and the ways some undocumented workers have felt emboldened by strong Latino turnout in the 2012 election to join protests, even in the face of increased deportation); accord McCarthy & McPhail, *supra* note 349, at 108 (noting that public “[p]rotest has long been perceived as ‘politics by other means’” insofar as it “provides the less powerful an alternative way of influencing public decisions”).

⁴⁷⁶ See, e.g., THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* 86–87 (2012) (explaining how outdoor gatherings created momentum for the Tea Party).

⁴⁷⁷ See, e.g., ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* 184 (2012) (noting that collective protests have traditionally created “enduring bonds of solidarity” and offering as examples marches in San Francisco for gay rights; prayers on the Mall in Washington, D.C. by evangelicals; and the drowning of tools by autoworkers in Flint, Michigan (internal quotation marks omitted)); see also SUPPRESSING PROTEST 2012 REPORT, *supra* note 2, at 10 (quoting one participant in Occupy Wall Street as saying, “The thing that was special about Occupy was that people used their bodies to create a safe space to talk and to listen. Being able to go there, to Liberty, and be part of that safe space, was wonderful for me and a lot of people. I vote, I do phone calls for campaigns, I have money, but nothing changes. We occupied that space for democracy, for politics, for discussion”).

⁴⁷⁸ Cf. Debra C. Minkoff, *Producing Social Capital: National Social Movements and Civil Society*, in *BEYOND TOCQUEVILLE: CIVIL SOCIETY AND THE SOCIAL CAPITAL DEBATE IN COMPARATIVE PERSPECTIVE* 183, 189 (Bob Edwards et al. eds., 2001) (summarizing sociological literature as illustrating ways “that involvement in social movements can be a mechanism in the creation of solidarity and the deepening of collective identities that anchor individuals in participatory cultures”); see also Abu El-Haj, *supra* note 10, at 76-87, 91-93 (reviewing sociological literature that shows that relationships far more than ideas explain the decision to take civic or political action).

personal relationships that are likely to encourage additional civic and political participation.⁴⁷⁹

Finally, outdoor assemblies have been important sites of dissent throughout American history. Small acts of taking to the streets serve as placeholders for the remote possibility of social and political change through collective action. They echo the momentous marches that gave rise to the Civil Rights and Voting Rights Acts. By doing so, they maintain the possibility of transformative political assemblies in the future. They preserve the promise of fundamental change in the name of self-governance, ensuring the power to end a much despised international conflict such as Vietnam or the power to found the first republic in the modern world.

To serve its unique function in our democracy, outdoor assembly must be allowed to be disruptive. Gathering outdoors, particularly in busy urban spaces, is inevitably messy and inconvenient as a result of the competing demands on such spaces. For at least some assemblies, however, the reasons go deeper: Disruption is an essential element of both the practice and the political sway of taking to the streets to dissent.⁴⁸⁰ As with a general strike in the labor context, disruption of ordinary patterns of life is frequently a central aim of political protest. The ability to bring a city to a standstill is the ability to make elected officials take notice. It forces recognition and compels attention. Disorder is only exacerbated when crowds take to the streets spontaneously in response to current events, yet such gatherings are at the core of what the right of peaceable assembly protects.⁴⁸¹

Preserving the intrinsic and instrumental value of peaceable assembly to our democracy requires tolerating its associated disorder—

479 See, e.g., SKOCPOL & WILLIAMSON, *supra* note 476, at 93 (noting that local Tea Party groups were often founded by organizers who had met for the first time at “rallies or other protest settings”).

480 See McCarthy & McPhail, *supra* note 349, at 108 (noting that the power of public protest “deriv[es], importantly, from [the] ability to disrupt normal routines”).

481 See, e.g., Ian Lovett, *Call for Calm as Los Angeles Girds for More Unrest*, N.Y. TIMES, July 17, 2013, at A12 (reporting that, in response to a recent court decision, “[a] group of about 150 mostly young people broke away from a peaceful demonstration” and proceeded to “[run] through the streets, blocking traffic, hitting cars, assaulting pedestrians and ransacking businesses,” at which point the police sought to stop the demonstration); Adam Nagourney, *Prayer, Anger and Protest Greet Florida Verdict: Renewed Radical Debate, President Urges Nation to Accept Acquittal of Zimmerman*, N.Y. TIMES, July 15, 2013, at A1 (recounting that “[a]s dusk fell in New York, a modest rally that had begun hours earlier in Union Square grew to a crowd of thousands that snaked through Midtown Manhattan toward Times Square in an unplanned parade” and that “[h]undreds of bystanders left the sidewalks to join the peaceful demonstration, which brought traffic to a standstill”).

from trampled grass to disrupted traffic. If outdoor assembly is not to be sapped of its worth, we must even tolerate some risk that violence will break out, although the evidence is that most protest events are orderly and peaceful.⁴⁸²

Focused as they are on public assemblies as a form of speech, contemporary courts are unable to countenance the value of disruption.⁴⁸³ Disorganized, uncivil, and incoherent speech, while frequently protected by the courts, does not obviously further First Amendment interests in democratic deliberation. Unable to see the distinct qualities of assembly and hence why the right of assembly should work differently, courts tend to uncritically accept government officials' efforts to minimize the inconvenience associated with gatherings by placing conditions on permits granted. They are thus prone to conclude, for instance, that "[i]t seems unlikely that the First Amendment requires" North American Trade Organization delegates, baseball fans, and city residents to tolerate disruption or to compromise public safety "in order that *an organization's desire to get its message out in what some perceive as a more visible fashion* be accommodated."⁴⁸⁴

To suppose that outdoor assemblies are primarily about communicating messages is to miss a fundamental point. As Ashutosh Bhagwat recently noted,

In the typical modern protest or assembly utilizing the public forum, speeches are no doubt made and signs are waved, but they are hardly the main point of the exercise. After all, most of the speeches are inaudible and the signs often illegible. The point, rather, is the assembly itself.

482 See, e.g., SAMPSON, *supra* note 477, at 188 (emphasizing that "[a]lthough protest events present a challenge to the existing social order and sometimes entail disruption or violence (by either protestors or responding authorities), most are orderly and peaceful").

483 See, e.g., Dinler v. City of New York, No. 04 Civ. 7921(RJS) (JCF), 2012 WL 4513352, at *25 (S.D.N.Y. 2012) ("Writ large, the chaos on East 16th Street could have paralyzed the City and denied its residents access to the emergency services on which lives depend. The protestors simply had no right to hold ambulances, cabs, and commuters hostage by staging an impromptu parade in the middle of Manhattan.").

484 *In re Denial of Parade Permit Application of Coal. Against the NATO/G8 Poverty & War Agenda*, No. 12 PA 02, slip op. at 22 (Chi. Dep't of Admin. Hearings Mun. Div. Mar. 29, 2012) (emphasis added) (holding that insofar as adequate alternative means were available to CANG8 the city's denial of a permit for its preferred marching routine, which would have blocked two of Chicago's major thoroughfares, was constitutional); see also KROTOSZYNSKI, *supra* note 7, at 194 (arguing that today First Amendment law does not support a right to march on a public highway insofar as a highway is unlikely to be considered a public forum); cf. Williams v. Wallace, 240 F. Supp. 100, 108 (M.D. Ala. 1965) (authorizing a fifty-two mile, twenty-five thousand person march from Selma to Montgomery to take place over four days on Alabama's main highway).

The fact of a large public gathering forms a sense of solidarity, helps to influence public opinion, and sends a message to political officials.⁴⁸⁵

Being together as a crowd—with its inevitable inconvenience and mess, even risk of violence—is a large part of the point of outdoor assembly. As one prominent political scientist has explained,

[M]ovements that make an imprint do more than communicate. They also threaten to exert a distinctive kind of power that results from refusing co-operation in the routines that institutionalized social life requires. That is the power that workers wield when they walk off the job, or that students muster when they refuse to go to class, or that tenants have when [they] refuse to pay the rent, or that urban crowds exert when they block streets and highways.⁴⁸⁶

In deciding that the First Amendment protects orderly expression, not disorderly conduct, courts have undermined the value of assembly as a political practice by “rob[bing] challengers of their ability to disrupt—or threaten to disrupt—public order as a means of creating negative inducements to bargaining on the part of their opponents.”⁴⁸⁷

Our notions of the right of public assembly today are akin to notions of free speech in the early twentieth century when the Supreme Court considered advocacy of lawlessness to be unprotected. During that period, the Court held that there was no constitutional violation in suppressing speech that arguably had a tendency to produce lawlessness or violence.⁴⁸⁸ Today, a similar constitutional understanding applies to assemblies.

⁴⁸⁵ Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1016 (2011).

⁴⁸⁶ Francis Fox Piven, *Occupy's Protest Is Not Over. It Has Barely Begun*, GUARDIAN, Sept. 17 2012, <http://www.guardian.com/commentisfree/2012/sep/17/occupy-protest-not-over>.

⁴⁸⁷ Doug McAdam, *The Future of Social Movements*, in FROM CONTENTION TO DEMOCRACY 229, 234 (Marco G. Giugni, et al., eds. 1998); see also *id.* at 232 (observing that social movements, like political parties and unions before them, are losing their radicalness, and as a result there has been a “sharp decline in [their] effectiveness as a means of mobilizing political leverage”); McCarthy & McPhail, *supra* note 349, at 84 (noting that protest has “become institutionalized and therefore routinized, predictable, and, perhaps as a result, of diminishing impact”). Of course, courts alone are not responsible for this effect. See generally ZICK, *supra* note 7, at 5–7, 36–42 (exploring range of relevant changes that account for the state of contemporary public assembly, perhaps most importantly the changing architecture of public places); Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 584 (2006) (exploring and “highlighting the significance of place” and spatial tactics “to expressive and associative rights”).

⁴⁸⁸ See RABBAN, *supra* note 169, at 132–46 (describing the “bad tendency” case law); cf. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that the First Amendment protects even advocacy of violence so long as the speech is not “directed to inciting or producing imminent lawless action and is [not] likely to incite or produce such action”).

Out of a fear of even a tiny risk of mayhem, the courts allow states to define unlawful assembly and riot broadly, ensuring that they can capture assemblies that once would have been considered peaceable.⁴⁸⁹ Perhaps more detrimentally still, given its broad effect on peaceable assemblies, courts consent to the regulation of virtually all outdoor assemblies in advance through an array of time, place, and manner regulations. Willingly accepting virtually any proffered government interest, the courts legitimate pervasive regulation that contains, even quashes, the spontaneity, disorder, and inconvenience associated with outdoor gatherings, as the Occupy movement's experiences amply demonstrate.

The freedom of assembly, like the freedom of speech, must allow breathing room for collective action in the name of self-determination. Creating breathing room requires keeping in mind the "huge debt this nation owes to its 'troublemakers.'"⁴⁹⁰ As Judge Jed S. Rakoff recently noted,

From Thomas Paine to Martin Luther King, Jr., they have forced us to focus on problems we would prefer to downplay or ignore. Yet it is often only with hindsight that we can distinguish those troublemakers who brought us to our senses from those who were simply . . . troublemakers. Prudence, and respect for the constitutional rights to free speech and free association, therefore dictate that the legal system cut all non-violent protestors a fair amount of slack.⁴⁹¹

The right of assembly is textually limited to "peaceable assembly." *Peaceable*, however, is not self-defining. It can be construed, as we have seen, more or less broadly in law and in practice. What constitutes a riot? Must violence be actual or imminent to constitute an unlawful assembly, or is the mere tendency to produce violence suffi-

⁴⁸⁹ See generally Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1, 10–33, 42–66 (2012) (demonstrating ways that modern statutory definitions of incitement-to-riot and riot criminalize attenuated risk of violence, essentially criminalizing the production of fear by large groups, and arguing that in many instances the statutes criminalize conduct that likely is constitutionally protected under the right of assembly).

⁴⁹⁰ *Garcia v. Bloomberg*, 865 F. Supp. 2d 478, 482 (S.D.N.Y. 2012); accord *Edwards v. South Carolina*, 372 U.S. 229, 237–38 (1963) ("The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views. [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. . . . That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view.") (internal citations and quotations omitted).

⁴⁹¹ *Garcia*, 865 F. Supp. 2d. at 482.

cient? Does property damage constitute violence? How extensive do permit requirements need to be to ensure that assemblies are peaceable? The textual limitation only entails that constitutional protection does not extend to violence—that unlawful assembly and riot mark the outer bounds of the constitutional right.⁴⁹²

Contemporary law, however, interprets the constraint of peaceability very broadly, and the public to date has not seemed particularly troubled by this choice. Even protestors largely embrace the orderliness—perhaps out of fear of drawing out state violence. Unlike previous generations, including those in 1960s, protestors today are typically reluctant to confront officials when they disagree with the terms set for their protest. According to one report, when a leader of the Chicago People’s Convention Coalition during the 1996 Convention “asked the twenty-odd people in his group whether they would risk arrest by leaving the sidewalk and marching down Michigan Avenue,” the response was “[a] loud ‘no.’”⁴⁹³ When his co-organizer “shouted, ‘Into the streets,’ . . . no one followed.”⁴⁹⁴ At that point, the first guy said “Well, guys, we’ve got the permit for the sidewalks. Shall we just do that?”⁴⁹⁵ In fact, protestors who refuse to obtain required permits or who embrace disruption are actively marginalized. Groups, such as ACT-Up, Queer Nation, and Operation Rescue, that consciously choose to defy local time, place, and manner regulations, are frequently vilified,⁴⁹⁶ and police frequently curtail their actions with the use of force even when they fall short of violence against persons or property.⁴⁹⁷

492 See *Brandenburg*, 395 U.S. at 449 n.4 (noting that “[s]tatutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action”); accord *NAACP v. Claibourne Hardware Co.*, 458 U.S. 886, 916 (1982) (“The First Amendment does not protect violence. Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of advocacy.” (internal quotations and citations omitted)).

493 McCarthy & McPhail, *supra* note 349, at 84 (noting that during the 1996 Democratic National Convention in Chicago “for the most part protestors were willing to accept the tight restrictions imposed on the ‘time, place, and manner’ in which they could demonstrate” even those that displaced and caged them).

494 *Id.*

495 *Id.*

496 *Cf. id.* at 101–02.

497 See John Noakes & Patrick F. Gillham, *Police and Protestor Innovation Since Seattle*, 12 *MOBILIZATION* 335, 336 (2007) (noting that “[f]or those protestors willing to cooperate with authorities, police still employ negotiated management tactics,” but for those committed to “direct-action . . . [and] to disrupt[ing] the operations of their target, police [have] adopted new tactics to control them”).

Contemporary attitudes stand in stark contrast to those of generations of Americans before us. As we have seen, as late as the Progressive Era, Americans defended their right to assemble in public free from prior constraints, even when the risk of violence was painfully real. Outraged citizens challenged the new regulatory regime in court into the mid-1880s. More surprisingly, they repeatedly won. All but one state supreme court to review the newly established permit requirements struck them down. These courts soundly rejected the suggestion that official permits were a necessary and constitutional means to control the potential disruptions associated with traditional street politics. Only the Massachusetts Supreme Judicial Court held otherwise.⁴⁹⁸

This high tolerance in the nineteenth century for the irritations that accompany democracy derived from the importance placed in the American constitutional and political tradition on assembling and parading in public. It was bolstered, in turn, by a robust conception of the right of assembly in which access to public spaces for political purposes was presumed.⁴⁹⁹

None of this is meant to deny that in many, possibly most, ways our current constitutional sensibilities are more normatively appealing. For one, nineteenth-century officials differentiated between categories of gatherings. Certain forms of outdoor gatherings were viewed as more central to the constitutional tradition and thus more worthy of protection. New York City initially distinguished between religious and nonreligious gatherings. Other cities tended to distinguish between parks and streets.⁵⁰⁰ For another, music, while part of American traditions of democratic politics, was not constitutive of any constitutional right.⁵⁰¹ When nineteenth-century state courts were asked to rule on municipal ordinances requiring permits to play mu-

498 See *supra* notes 245, 286–88, 316–18 and accompanying text (discussing outlying views of Massachusetts Supreme Judicial Court).

499 Nineteenth-century American law was much closer to contemporary international law in this regard. See SUPPRESSING PROTEST 2012 REPORT, *supra* note 2, at 54–61 (explaining that international law requires officials to tolerate disorder and incidental violence when the right of assembly is exercised and generally frowns upon extensive advance regulation).

500 Abu El-Haj, *supra* note 20, at 130–35.

501 Writing in 1895, the California Supreme Court was explicit about the rationale:
The cases cited [by the Petitioner] all deal with ordinances regulating the right of the people to have processions or parades in the streets; . . . But the proposition that a man has a natural, ingrained, inviolate, common-law or constitutional right to beat a drum on the traveled streets of a city has no foundation in reason or authority.

In re Flaherty, 38 P. 981, 983–84 (Cal. 1895).

sical instruments on the streets, they almost uniformly upheld them.⁵⁰²

Most importantly, there is no question that the rights of dissenters are more broadly protected today than in any previous period of American history. Nineteenth-century authorities, as we have seen, routinely and without a second-thought, distinguished between the rights of established, law-abiding groups and individuals and those considered to be fringe. The need to maintain neutrality between citizens was not considered pressing. In fact, the hostility of nineteenth-century government officials toward evangelicals and their practice of preaching outdoors lies at the origins of our current regulatory framework in which permit requirements for outdoor gatherings play a central role. Boston officials clearly considered all evangelicals disruptive, although they did—for a time at least—hold to a distinction between gatherings in the city's parks and processions on its streets, which were permissible as a matter of right, as the Salvation Army was schooled when it first arrived to the city.⁵⁰³

Still, the history of outdoor assembly in the nineteenth century illustrates that changes in public attitudes and law (legislative, administrative, and constitutional) have not come without costs. While widespread intolerance for the inconvenience, disorder, and risks of violence associated with outdoor assembly is understandable, it facilitates a constitutional order that undervalues outdoor assembly, partly because it underappreciates the dynamics of political participation.

While unlawful and violent actions on the part of gatherers obviously must be addressed, a robust right of assembly would seem to require a recalibration of the balance. In order to protect the important avenue of political participation it was established to protect, the right of assembly must be reconceived to require the public to tolerate the irritations posed by outdoor assembly, including associated risks of violence.⁵⁰⁴ How this should be accomplished doctrinally

⁵⁰² See, e.g., *id.* at 984 (upholding ordinance requiring a permit to beat drums on public streets); *People v. Garabed*, 45 N.Y.S. 827, 830 (N.Y. Sup. Ct. N.Y. Cnty. 1897) (upholding a conviction under an ordinance that included prohibitions on beating drums and tambourines in public). *But see In re Gribben*, 47 P. 1074, 1078–79 (Okla. 1897) (holding that Oklahoma City was without power—express, implied or essential to further the purposes of the municipal corporation—to pass an ordinance that prohibited drumming and music on the city streets or sidewalks to the extent that it annoyed or disturbed others).

⁵⁰³ See *supra* notes 251–56 and accompanying text.

⁵⁰⁴ *Cf. Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971) (“The ordinance . . . violates the constitutional right of free assembly and association . . . [because] mere public intolerance . . . cannot be the basis for abridgment of these constitutional freedoms;” in particular, a state may not “make criminal the exercise of the right of assembly simply because its exercise may be ‘annoying’ to some people.”).

would need to be worked out. It will require some mechanism for forcing authorities to address violence only when the risk is substantial and immediate, rather than well in advance as we are prone to do.⁵⁰⁵ That said, the *Brandenburg* framework might not work well in the assembly context given the unique dynamics of groups, including ones that are outdoors.⁵⁰⁶

Whatever the precise solution, one thing is clear: we need to move closer to a regime that focuses on real risks of violence rather than on disorder and illegality. A robust right of assembly would also require government officials to scale back the strategic use of misdemeanor offenses to harass those exercising the right.

Finally, and perhaps most controversially, protecting the unique attributes of public assembly as a political practice likely requires a constitutionally imposed obligation to be more circumspect in setting limits on an assembly's right to disrupt in advance. While the wholesale abandonment of time, place, and manner regulations would frankly be foolish in our contemporary, congested cities, the form advance regulation currently takes is overbroad and under protective of the value of having citizens congregating outdoors for political ends. Again, doctrinal details would need to be worked out. Perhaps, a notice requirement would be sufficient in most circumstances, as it is under international law, to address reasonable concerns of disorder.

A new balance could take many forms, but the thumb on the scale would be in favor of access as requested. Where permit requirements remain and are challenged, the new balance would also require courts to take a harder look at proffered government interests. Even more importantly still, when considering the adequacy of available alternatives, courts would need to focus on the adequacy of alterna-

505 *Cf.* *Edwards v. South Carolina*, 372 U.S. 229, 237–38 (1963) (“The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views. . . . For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.” (internal quotation marks and citations omitted)).

506 *Cf.* Ashutosh Bhagwat, *Liberty's Refuge, or the Refuge of Scoundrels?: The Limits of the Right of Assembly*, 89 WASH. U. L. REV. 1381, 1394–95 (2012) (“Groups are dangerous. A group of individuals who start off merely discussing the propriety or need for violence, as an abstract matter, can evolve into a group planning violence quite easily. Moreover, the very fact of a *group*, an assembly, arguably makes that transition easier. Individuals who interact with each other regularly, especially in some isolation from the broader community, can build up a set of shared, dissident values which can diverge dramatically from commonly held social beliefs. In general, we celebrate such diversity, but when those values touch on violence, this can be a profoundly dangerous process. Members of a group that endorses violence can build up each other's beliefs, form a sense of solidarity, and ultimately push each other on into a commitment to action.”).

tive opportunities to assemble, because the act of assembling is much more than the dissemination of a message.⁵⁰⁷

While constitutional change is difficult, thankfully, it is not the only option. Public perception of the value of assembly plays a role in how the term *peaceable* has been defined legislatively as well as in how government officials ultimately enforce the law on the books. Were the public to find more tolerance for outdoor assembly, including the disruption it entails and the marginal risk of violence associated with it, legislatures might be persuaded to repeal or scale back permit requirements. The crimes of unlawful assembly, riot, and disorderly conduct, at least in the context of protected First Amendment activity, could also be redefined legislatively. Similarly, changes in public attitudes might influence judges to be more mindful of the value of troublemakers in our democracy.

Legislative reforms will not occur, however, until the public rediscovers the value of public assembly and recalibrates the balance between order and politics. Changing public attitudes requires articulating the value of public assembly and therefore of the right of peaceable assembly. Although a number of factors explain our new attitudes, one that should be acknowledged is that the complete non-violence of the Civil Rights Movement, which brought forth many positive changes in our constitutional and political culture, also set up a perhaps unreasonable standard for the peacefulness of assemblies.⁵⁰⁸ While the Civil Rights Movement's strategy of drawing out the violence of the segregationist South through peaceable assembly and civil disobedience was certainly politically necessary and effective, it has left the public culture with a mistaken view that public assembly does not need to be disorderly to be effective and has limited our vision of the worthy protestor to the perfectly peaceful protestor with justice on his side.⁵⁰⁹

⁵⁰⁷ Although largely overshadowed by free speech and expressive conduct claims, a handful of advocates for Occupy did invoke the right of peaceable assembly itself and tried to argue that the relevant question was the adequacy for purposes of assembly of alternative locations. See, e.g., Defendants' Corrected Motion to Dismiss at 2, 17, 24–25, *Commonwealth v. Hill*, No. 11 CR-5534 (Bos. Mun. Ct. Central Div. Suffolk Cnty.) (on file with author) (arguing that the city unconstitutionally charged defendants with trespass and unlawful assembly insofar as they were exercising constitutionally protected rights, including the right of assembly).

⁵⁰⁸ Cf. *Gregory v. City of Chicago*, 394 U.S. 111, 116–18 (1969) (Black, J., concurring) (describing the peacefulness of a civil rights march).

⁵⁰⁹ Cf. ZICK, *supra* note 7, at 142–43 (recognizing the disruptive aspect of outdoor assembly while holding up an ideal of nonviolence after describing in depth the Civil Rights Movement's uses of outdoor space for political ends); Barkan, *supra* note 445, at 559–60, 562 (describing effective, peaceful civil rights marches).