SYMPOSIUM PIECES

A RIGHT OF PEACEABLE ASSEMBLY

*Tabatha Abu El-Haj**

The functional absence of the Assembly Clause in First Amendment law and constitutional discourse fundamentally distorts our analysis of the proper scope of constitutional protection for political assemblies. This Symposium Piece develops a much-needed independent Assembly Clause doctrine. An independent Assembly Clause doctrine would not only be consistent with the text and original understanding of the Founders but also allow for a jurisprudence capable of distinguishing between protected and unprotected assemblies in relation to assembly's distinct contribution to self-governance. The Piece recognizes that legal recognition of assembly as a textual right troubles the speech–conduct distinction that lies at the heart of contemporary First Amendment jurisprudence and upends existing determinations about the proper scope of constitutional protection for those who gather in public for political ends. The fact is, however, that the First Amendment explicitly protects a certain form of conduct (peaceable assembly), and it does so for good reasons (assemblies further liberal democracy in both instrumental and non-instrumental ways). This Piece, therefore, lays out a roadmap for an independent Assembly Clause doctrine capable of providing more appropriate constitutional protection, accounting for both assembly's value and its social costs.

* Professor of Law, Drexel University Thomas R. Kline School of Law. I would like to extend a special thanks to Kristina Daugirdas, RonNell Andersen Jones, Jeremy Kessler, David Pozen, and Timothy Zick for their thoughtful comments on earlier drafts as well as my research assistant, Emma Austin. I also owe a debt to the members of the *Columbia Law Review*, most especially Abigail George and Shaunak M. Puri, and their extraordinary Symposium. This Symposium Piece would not be where it is without the excellent and constant support of Jessa Feiler.

INTRODUCTION

We are living in an age of protest. Social, political, and technological conditions—from economic inequality and partisan polarization to the development of social media and a deadly pandemic—have converged in the past two decades to afford new salience to public assembly as a central tactic of politics in the United States and abroad.[1] The wave of pro-Palestinian, antigenocide campus protests in 2023 and 2024 is the most recent manifestation of this renewed interest in a contentious form of outdoor politics that started in the United States with Occupy Wall Street (Occupy) in 2011.[2]

---

1. See Tabatha Abu El-Haj, Defining Nonviolence as a Matter of Law and Politics, *in* Nomos LXII: Protest and Dissent 201, 201 (Melissa Schwartzberg ed., 2020) [hereinafter Abu El-Haj, Defining Nonviolence] (describing the recent reinvigoration of disruptive protests).

2. See Andrew Ross Sorkin, Occupy Wall Street: A Frenzy that Fizzled, N.Y. Times: Dealbook (Sept. 17, 2012), https://archive.nytimes.com/dealbook.nytimes.com/2012/09/17/occupy-wall-street-a-frenzy-that-fizzled/ [https://perma.cc/2WKE-WTE9] ("A year ago this week, the Occupy Wall Street movement got under way in Zuccotti Park in Lower Manhattan."); Michael Wines, In Campus Protests Over Gaza, Echoes of Outcry Over

Yet, despite the First Amendment's explicit guarantee,[3] those who gather in the United States, on campus and off, are functionally left without a constitutional right to assemble. The Assembly Clause has no independent significance in contemporary First Amendment doctrine.[4] The Supreme Court has not decided an important public protest case in decades.[5] And despite multiple forcible dispersals and thousands of arrests of nonviolent protesters,[6] no Occupy or Black Lives Matter (BLM) activist

---

Vietnam, N.Y. Times (Dec. 24, 2023), https://www.nytimes.com/2023/12/24/us/gaza-vietnam-student-protest.html (on file with the *Columbia Law Review*) (noting that "a sustained antiwar protest like the one against the Gaza invasion has not been seen for decades").

3. See U.S. Const. amend. I (providing for "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

4. See McDonald v. Smith, 472 U.S. 479, 489–90 (1985) (Brennan, J., concurring) ("The Court previously has emphasized the essential unity of the First Amendment's guarantees . . . ."); First Lutheran Church v. City of St. Paul, 326 F. Supp. 3d 745, 767 (D. Minn. 2018) ("In modern First Amendment law . . . there is no free-standing right to free assembly.").

5. The Court granted certiorari in *Mckesson v. Doe*, which involved an effort to impose tort liability on the organizer of a Black Lives Matter protest after a police officer was injured by an unidentified member of the crowd. 141 S. Ct. 48, 49–51 (2020) (per curiam). The Court did not, however, reach the merits of the First Amendment claim, sending the case back to the Fifth Circuit to certify a state tort law question to the Louisiana Supreme Court. Id. at 51. When the Court was subsequently asked to review the Fifth Circuit's determination that civil liability could attach in ways arguably inconsistent with NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), it denied certiorari. See Mckesson v. Doe, 144 S. Ct. 913, 913–14 (2024) (mem.) (statement of Sotomayor, J., respecting the denial of certiorari) (expressing "no view about the merits of Mckesson's claim" and suggesting that the Court's recent decision in *Counterman v. Colorado*, which held that negligence is not the proper standard when it comes to political speech and that incitement requires intent, should govern "any future proceedings in this case").

6. The Washington Post found that in 2020, seventeen thousand individuals across more than fifty cities were arrested on nonviolent misdemeanor charges during the initial weeks of the George Floyd protests. Meryl Kornfield, Austin R. Ramsey, Jacob Wallace, Christopher Casey & Verónica Del Valle, Swept Up by Police, Wash. Post (Oct. 23, 2020), https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests/ (on file with the *Columbia Law Review*). These dispersals and arrests occurred even though the protests were overwhelmingly peaceful. See Erica Chenoweth & Jeremy Pressman, This Summer's Black Lives Matter Protesters Were Overwhelmingly Peaceful, Our Research Finds, Wash. Post (Oct. 16, 2020), https://www.washingtonpost.com/politics/2020/10/16/this-summers-black-lives-matter-protesters-were-overwhelming-peaceful-our-research-finds/ (on file with the *Columbia Law Review*) (reporting that 96.3% of BLM protests in 2020 involved no property damage and 97.7% involved no injuries to persons). Those arrested generally had their charges dropped. See Neil MacFarquhar, Why Charges Against Protesters Are Being Dismissed by the Thousands, N.Y. Times (Nov. 19, 2020), https://www.nytimes.com/2020/11/19/us/protests-lawsuits-arrests.html (on file with the *Columbia Law Review*) (last updated Feb. 11, 2021) (noting that "a vast majority of cases against protesters are being dismissed" and "[o]nly cases involving more substantial charges like property destruction or other violence remain").

has won a case on the grounds that their right to peaceably assemble had been infringed.[7]

This is not to say that participants in outdoor assemblies lack First Amendment protection.[8] A quagmire of intersecting doctrines is available to those who organize and participate in political protests. It is rather to draw attention to the fact that these protections emerge from a doctrine that has conflated the First Amendment's separate protections for freedom of speech and peaceable assembly out of a mistaken assumption that the value of assembly, like speech, is primarily expressive.[9]

A wholly expressive conception of assembly, however, weakens constitutional protection.[10] When courts balance the inconvenience of protest against its contribution to public discourse, assembly inevitably loses. Assembling is not "behavior designed to advance the pursuit of truth."[11] There is little "reasoned disquisition[]," especially between opposing perspectives.[12] Thus, efforts to manage, even mute, assemblies often seem reasonable and justified.[13] Through an expressive lens, assembly's value seems conceptual, its costs salient and material, especially in the face of concerns for public order (however speculative). Protesters can surely find less disruptive ways to contribute to the marketplace of ideas.

---

7. See Tabatha Abu El-Haj, All Assemble: Order and Disorder in Law, Politics, and Culture, 16 U. Pa. J. Const. L. 949, 963–67 (2014) [hereinafter Abu El-Haj, All Assemble] (describing the litigation around Occupy); Tabatha Abu El-Haj, Breathing Room for the Right of Assembly, 28 Wm. & Mary J. Race, Gender & Soc. Just. 29, 38–42 (2021) [hereinafter Abu El-Haj, Breathing Room] (summarizing the litigation after the BLM protests in 2020).

8. See Seth F. Kreimer, The 'Weaponized' First Amendment at the Marble Palace and the Firing Line: Reaction and Progressive Advocacy Before the Roberts Court and Lower Federal Courts, 72 Emory L.J. 1143, 1181–84 (2023) (reviewing a sample of cases decided between January 2020 and August 2021 in which a First Amendment claim was asserted and coding them as a "win" if the party prevailed on *any* issue, without disaggregating the First Amendment issues presented). For a further explanation of protesters' First Amendment rights, see infra notes 139–180 and accompanying text.

9. See Tabatha Abu El-Haj, How the Liberal First Amendment Under-Protects Democracy, 107 Minn. L. Rev. 529, 532 (2022) [hereinafter Abu El-Haj, Liberal First Amendment] (explaining how the Supreme Court's "misconception that democracy is a product of political discussion rather than political participation" has led to a doctrine in which a "multifaceted Amendment" has been reduced to "a singular protection for free *expression*").

10. Tabatha Abu El-Haj, Assembly as Political Practice, *in* The Oxford Handbook of Peaceful Assembly 81, 84 (Tabatha Abu El-Haj, Michael Hamilton, Thomas Probert & Sharath Srinivasan eds., forthcoming Aug. 2025) [hereinafter Abu El-Haj, Assembly as Political Practice].

11. Keith E. Whittington, Speak Freely: Why Universities Must Defend Free Speech 105–06 (2019).

12. Abu El-Haj, Assembly as Political Practice, supra note 10, at 84.

13. See, e.g., C. Edwin Baker, Human Liberty and Freedom of Speech 125 (1989) (observing that it "is possibly the most universally accepted tenet of first amendment doctrine" that "[t]he constitutionality of regulating . . . assemblies and . . . the physical components of expressive conduct depends on the 'reasonableness' of a particular restriction").

Protesters fare no better when assembly's value is measured in terms of its instrumental political returns because, as with most political acts, such returns are highly uncertain.[14] First Amendment law and discourse are thus perpetually preoccupied with the costs of assembly in ways that fundamentally distort the analysis of the proper scope of constitutional protection, and those who engage in political protests are left to seek constitutional protection under doctrines designed to protect values other than those of assembly.

Assembly looks different when considered as a social, not discursive, practice.[15] Assemblies are not primarily about ideas. The decision to appear in public is often first and foremost a claim to civic inclusion and recognition. When students show up or walk out, wearing keffiyehs and flying the Palestinian flag, chanting slogans (even offensive ones), they are demanding recognition. "We are here too!" they say. "Palestinians exist in Gaza. And our campus community includes Palestinians, Muslims, Americans of Arab and South Asian descent, and Jews who do not support Israel!" Acts of assembling—in public but also in private to plan and organize—build social solidarity. They reinforce and forge new social ties, instill habits of civic and political engagement, and create social networks with political potential.

Being together physically and socially contributes to democracy in ways that are distinct from the contribution of public discourse. Influencing public decisionmaking requires translating ideas into political power through political acts, and assembly, as a social form of politics, builds the civic capacity for political action.[16] When assemblies demonstrate mass, persistence, and authenticity, they have the power to disrupt political settlements and orthodoxies.[17] The protests that are the focus of this Symposium Piece were a form of political action.[18] The national scope and persistence of student protests opposing Israel's conduct of the war in Gaza disrupted the political discourse about Israel and placed strains on the Democratic coalition, even threatening to undermine the party's electoral prospects with the emergence of a

---

14. Cf. Zeynep Tufekci, Opinion, How the Powerful Outmaneuvered the American Protest Movement, N.Y. Times (Sept. 21, 2024), https://www.nytimes.com/2024/09/21/opinion/campus-protests-internet-america.html (on file with the *Columbia Law Review*) (observing that "as much as it pains me to say it, protesting just doesn't get results anymore," as the anti–World Trade Organization and Occupy movements show).

15. See infra notes 264–287 and accompanying text.

16. See Abu El-Haj, Assembly as Political Practice, supra note 10, at 85–87 (developing the case that the social nature of assembly encourages participation in politics).

17. See Tufekci, supra note 14 ("[P]rotests and mass demonstrations of dissent are a necessary part of a healthy democracy.").

18. See Abu El-Haj, Liberal First Amendment, supra note 9, at 534 (arguing that "[s]peech has never been the primary mechanism for demanding responsiveness" and that "[d]emocratic accountability and responsiveness, like social and political change, depend on political participation as *conduct*").

significant Uncommitted Movement.[19] Indeed, beyond the confines of campuses, and certainly outside of the United States, the true threat of allowing people to gather in great numbers is not that an assembly might descend into violence; it is that, like the Boston Tea Party, it will upend a political regime.[20] But again, the potential to build that power depends on the social solidarity and networks that arise from prior acts of assembling.[21]

Freed of the wholly expressive account of assembly, it becomes possible to understand why an independent Assembly Clause doctrine is warranted and could make a material difference for those who gather in public. First, renewed attention to the text of the First Amendment would involve remembering that it explicitly protects a particular form of conduct (peaceable assembly), thereby troubling the assumption in existing doctrine that assembly is a lesser form of expression because it is not pure speech.[22] Second, while the introduction of an independent Assembly Clause doctrine would not obviate the need to manage assembly's social costs, it would provide a more coherent basis for distinguishing between protected and unprotected assemblies by using assembly's distinct contribution to self-governance as the measure.

An independent Assembly Clause jurisprudence would start from the premise that all assemblies implicate the constitutional right of peaceable assembly. It would recognize that the collective activities of campus protesters—their walkouts, vigils, die-ins, and encampments—are instances in which individuals gather together as a group, thereby easily meeting the ordinary meaning of "assembly." Jurisdictions that recognize assembly as an independent right generally define assembly as "the *common presence* of *at least two persons* in a *common space* at *the same time*."[23]

---

19. See Khaled Elgindy, Opinion, The Case for Hope for Palestinians, N.Y. Times (Jan. 3, 2025), https://www.nytimes.com/2025/01/03/opinion/palestinians-israel-gaza.html (on file with the *Columbia Law Review*) (suggesting that "[t]he persistence of protests on university campuses across North America and Europe" both reflects and fuels "an international solidarity movement committed to Palestinian liberation" and "the global recognition of the justice of [the Palestinian] cause"); Camonghne Felix, Opinion, Uncommitted Achieved Its Goal in Making Gaza a Mainstream Issue, The Guardian (Nov. 18, 2024), https://www.theguardian.com/commentisfree/2024/nov/18/uncommitted-campaign-democrats-gaza-election [https://perma.cc/5GEB-PR4E] (describing the internal debates among Democrats over the impact of their party's stance on Gaza in the wake of its electoral losses).

20. See Abu El-Haj, Assembly as Political Practice, supra note 10, at 89 (arguing that "[a]ssembly as a form of social and political action [disrupts] public narratives, social and economic patterns, [and] political priorities," sometimes even upending regimes).

21. See id. at 91 (explaining how assembly's capacity to reinforce social ties and solidarity means that "[a]ssemblies, great and small, reinforce the capacity for democratic politics and thereby hold open the path to political change on a transformative scale").

22. See infra note 256 and accompanying text.

23. Orsolya Salát, The Right to Freedom of Assembly: A Comparative Study 3 (2015) (emphasis added); see also UN Hum. Rts. Comm., General Comment No. 37 (2020) on the Right of Peaceful Assembly (Article 21), ¶ 4, U.N. Doc. CCPR/C/GC/37 (Sept. 17, 2020)

Coverage for particular assemblies would still have to be delineated, as would the scope of protection if covered. A BLM die-in at the Mall of America may be unprotected because it constitutes trespass; an effort to obstruct the construction of a pipeline may be unprotected because it is vandalism (violence to property); a student protester may have no constitutional protection from the decisions of private university administrators because only government actors are bound by the Constitution. Gatherings, in other words, might still fall outside the bounds of constitutional protection for a variety of reasons.

This Piece is about how those boundaries should be discerned. It is about the boundaries that currently exist and those that ought to exist. The claim is not that the introduction of an independent Assembly Clause doctrine would obviate the need to address tradeoffs or to draw lines: It is that, in making those determinations, we should closely track the approach of existing free speech jurisprudence. We should start with a robust defense of the value of assembly, rather than the preoccupation with its costs that pervades existing constitutional law and discourse.

The social costs of free speech are at least as concerning as those associated with outdoor assemblies. Misinformation, disinformation, and defamation of public figures take a significant toll on the functioning of our democratic institutions, while hate speech, doxing, and pornography, including revenge porn, harm individuals—frequently exacting an extra penalty on women and people of color.[24] Nevertheless, even as there is a robust academic debate about whether constitutional protection for free speech has gone too far,[25] in the main, these harms are recognized as the transaction costs of a liberal democracy. Why? Because there is a well-developed and shared understanding of the value of free speech. The same is not true for assembly. The discounted constitutional protection protesters currently receive is driven by a misunderstanding about assembly's contribution to democracy that leads to an exclusive stress on

---

[hereinafter Committee, General Comment 37] (defining covered assemblies as "nonviolent gathering[s] by persons for specific purposes, principally expressive ones").

24. See, e.g., Maria Pawelec, Deepfakes and Democracy (Theory): How Synthetic Audio-Visual Media for Disinformation and Hate Speech Threaten Core Democratic Functions, Digit. Soc'y, Sept. 8, 2022, at 1, 22–23 (arguing that deepfake pornography targets women and minorities for purposes of control); Gabriel R. Sanchez & Keesha Middlemass, Misinformation Is Eroding the Public's Confidence in Democracy, Brookings Inst. (July 26, 2022), https://www.brookings.edu/articles/misinformation-is-eroding-the-publics-confidence-in-democracy/ [https://perma.cc/M9QF-FWHZ] (arguing that false claims of voter fraud are eroding voter confidence in democracy).

25. See, e.g., Jeremy K. Kessler & David E. Pozen, The Search for an Egalitarian First Amendment, 118 Colum. L. Rev. 1953, 1959–60, 1960 n.46 (2018) (criticizing the Court for using First Amendment jurisprudence to protect powerful interests at the expense of more vulnerable groups while noting that "[i]n keeping with the Symposium's theme, we focus on free expression and largely bracket First Amendment jurisprudence relating to the freedoms of religion, press, assembly, and petition").

its costs.[26] The importance, therefore, of developing a shared understanding of assembly's value cannot be understated. Only by doing so can we restore meaningful constitutional protection for those who gather for political ends.[27]

This Piece partakes of a limited turn in First Amendment scholarship to revive the right of assembly as an independent and distinct source of constitutional protection.[28] It uses the management of, and public discourse surrounding, student protests opposing Israel's conduct of the war in Gaza at Columbia University to illustrate the failures of existing First Amendment doctrine and to ground the discussion of how things might look different were the right of assembly to be given independent significance in legal analysis.[29]

---

26. See infra Part III.

27. Existing speech doctrine eschews distinguishing between political and nonpolitical speech. This Piece's emphasis on gatherings for *political ends* is meant only to illustrate how existing First Amendment doctrine impacts even those gatherings that no one would deny lie at the core of any reasonable construction of the First Amendment. Were courts to be persuaded to adopt a peaceable assembly doctrine, it might well extend to gatherings for nonpolitical ends, or it might not. Those questions are, however, beyond the scope of this Piece.

28. See John D. Inazu, Liberty's Refuge: The Forgotten Freedom of Assembly 4–5 (2012) [hereinafter Inazu, Liberty's Refuge] (arguing that the Assembly Clause textually grounds and also expands the contours of the right of association); Tabatha Abu El-Haj, The Neglected Right of Assembly, 56 UCLA L. Rev. 543, 547, 586–89 (2009) [hereinafter Abu El-Haj, Neglected Right of Assembly] (arguing that "the right of assembly should not be collapsed into the right of free expression" given its "political origins and functions"); Nick Robinson & Elly Page, Protecting Dissent: The Freedom of Peaceful Assembly, Civil Disobedience, and Partial First Amendment Protection, 107 Cornell L. Rev. 229, 237 (2021) (arguing that the freedom of assembly clause is a vehicle to giving partial First Amendment protection to civil disobedience at demonstrations); see also Nicholas S. Brod, Note, Rethinking a Reinvigorated Right to Assemble, 63 Duke L.J. 155, 161–62 (2013) (criticizing the associational view of assembly for seeking to "blunt the force of antidiscrimination norms" and offering a textual and originalist argument that "the right to peaceably assemble is best understood *as an assembly right*, one that protects in-person, flesh-and-blood gatherings like protests"). This literature has, in turn, fueled a nascent litigation strategy to revive the right of assembly, primarily as a textual hook for the right of association. To date, the effort to ground the right of association in the Assembly Clause has had little success, despite indications that Justice Clarence Thomas is intrigued. Compare Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2390 (2021) (Thomas, J., concurring in part and concurring in the judgment) ("The text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously."), with Legacy Church, Inc. v. Kunkel, 472 F. Supp. 3d 926, 1016–21 (D.N.M. 2020) (concluding that the church was unlikely to succeed on the merits both because existing doctrine "has conflated the freedom of association with the freedom of assembly" and because the latter was originally a political right, which, like all rights, is "subject to restrictions"), and First Lutheran Church v. City of St. Paul, 326 F. Supp. 3d 745, 767 (D. Minn. 2018) (rejecting a challenge claiming that a zoning resolution establishing a twenty-person limit on a day shelter violated the Assembly Clause).

29. See infra sections III.E, IV.C and accompanying text.

Why campus protests? And why Columbia? Protests on college campuses are complicated by the unique attributes of higher education.[30] And it is also true that Columbia, like other private institutions, is not bound by the First Amendment.[31] Still, the pro-Palestinian, antigenocide campus protests of 2023 and 2024 are a particularly good case study because they illuminate the distinct value of assembly as a political practice but also its social costs. The handling of the protests vividly illustrates the shortcomings of existing First Amendment doctrine while official explanations of university policy and public discourse surrounding those choices reveal just how ingrained two mistaken assumptions about assembly are: that First Amendment protection attaches to the expressive elements of assembly and that assembly is fundamentally disruptive and thus reasonably subject to regulation.

In addition, to the degree university administrators have become the target of congressional investigations in relation to their handling of these particular protests, the pro-Palestinian, antigenocide protests vindicate an underlying assumption of this Piece: namely, that constitutional discourse (the ideas generally held about what the First Amendment protects) matters because it reinforces not only constitutional doctrine but more importantly what people do voluntarily. Notably, during the 2023 to 2024 academic year, private universities did not seek to justify their actions on the grounds that they were not bound by the First Amendment or to argue that they should be entitled, as universities, in line with their educational mission, to limit protests that did not meet their educational commitments.[32] Quite to the contrary, these institutions routinely justified their most controversial choices—suspending student groups, sanctioning student protesters, and calling in the police to disperse student encampments—as broadly congruent with First Amendment principles

30. See, e.g., Stanley Fish, A Note to University Administrators, The Lamp (Apr. 26, 2024), https://thelampmagazine.com/blog/a-note-to-university-administrators [https://perma.cc/JTG4-A3WF] (decrying the public's failure to recognize "that colleges and universities are not in the free speech business"). But see Widmar v. Vincent, 454 U.S. 263, 268–69 (1981) ("[O]ur cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."); Healy v. James, 408 U.S. 169, 180 (1972) (emphasizing that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large").

31. See Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019) ("[A] private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor.").

32. For the view that even public universities should not be bound by the First Amendment, see Robert C. Post, The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University, *in* The Free Speech Century 106, 106–22 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

and law.[33] The mantra at private universities was and remains that their policies are coterminous with First Amendment principles.[34]

It is thus the very complexity of the campus protests in opposition to Israel's conduct of the war in Gaza that makes them an excellent case study not only for considering the shortcomings of existing First Amendment doctrine and constitutional discourse but also for imagining an independent right of assembly. This Piece proceeds as follows. Part I lays out a description of the events on campuses in the 2023 to 2024 academic year, using Columbia University as a case study. The description is designed to highlight both how university administrators' responses to the events on campus raise questions about the current scope of First Amendment protection and illustrate the genuine complexity of the proper scope of the right. Part II turns to a description of existing First Amendment doctrine—not to be confused with contemporary doctrine on the right of assembly, which is nonexistent. It shows how the current doctrinal framework operates at every turn to tame assembly. It thus explains why Columbia's choices would have been on solid constitutional footing had the University been bound by the First Amendment. Part III turns to the Piece's central argument, offering an account of what the boundaries of First Amendment coverage and protection might look like were the right of assembly restored as an independent source of constitutional protection and its democratic contribution better understood. Part IV turns to more specific doctrinal implications.

I. PRO-PALESTINIAN CAMPUS PROTESTS AT COLUMBIA UNIVERSITY

On October 7, 2023, Hamas-led forces, in gross violation of international law, violently attacked Israeli civilians in cities, kibbutzim, and other residential communities, as well as at a music festival near Israel's border

33. See, e.g., Columbia Univ., Charters and Statutes 137 (Apr. 6, 1959), https://secretary.columbia.edu/sites/default/files/content/University%20Charter_Statutes_May2024.pdf [https://perma.cc/RRB9-6598] [hereinafter Columbia Charters and Statutes] (last amended May 2024) ("Because of the University's function as an incubator of ideas and viewpoints, the principle of free expression must be jealously guarded."); see also Free Speech FAQs, Univ. of Pa., https://supporting-our-community.upenn.edu/university-policies [https://perma.cc/JKJ8-RDW3] (last visited Feb. 3, 2025) (declaring that "[w]hile as a private institution we are not subject to the First Amendment, the University's policies have embraced these values").

34. This has changed somewhat. A fair read of the new policies adopted in summer 2024 and discussed in Part I is that private universities have taken up the mantra that protest's disruption is orthogonal to the mission of the university. Cf. Whittington, supra note 11, at 95 (arguing that different forms of protest should be assessed relative to the university's mission of "maintaining social spaces that allow for both vigorous protest and critical dialogue" while "allow[ing] for both the expression of grievances and argumentation . . . [and] inclusive participation" in "the productive exchange of ideas").

with Gaza.[35] Shock at the level of violence, the hostage situation, and the loss of life reverberated around the world, reminding many of 9/11.[36] Within days, however, amid genocidal rhetoric from some Israeli officials,[37] Israel effected a near-total blockade of the Gaza Strip, and many—including many of those horrified by the October 7 attack—realized that Israel's response, at the very least, would be brutal and involve gross violations of humanitarian law, exacting an enormous toll on Palestinian civilians.[38]

---

35. Hum. Rts. Watch, "I Can't Erase All the Blood From My Mind": Palestinian Armed Groups' October 7 Assault on Israel 1–10 (2024), https://www.hrw.org/sites/default/files/media_2024/08/israel_palestine0724web.pdf [https://perma.cc/DU8Q-DYLR].

36. See, e.g., Isabel Kershner, For Israelis, Scale of Tragedy Starts to Set In, N.Y. Times (Oct. 9, 2023), https://www.nytimes.com/2023/10/09/world/israel-hamas-attack-reaction.html (on file with the *Columbia Law Review*) (last updated May 6, 2024) (characterizing the event as "the worst attack on civilians in Israeli history," and noting "many in the country were describing [it] . . . as their country's 9/11, or Pearl Harbor").

37. See, e.g., Ishaan Tharoor, The Israeli Right Hopes Not Just for Victory in Gaza, But Also Conquest, Wash. Post (Nov. 17, 2023), https://www.washingtonpost.com/world/2023/11/17/israel-government-right-gaza-endgame-conquest/ (on file with the *Columbia Law Review*) (citing remarks by Israeli ministers suggesting the goal of military operations would be to "erase 'all of Gaza from the face of the earth'" (quoting Galit Distel Atbaryan, former Israeli Minister of Information)).

38. A central concern throughout the conflict has been that Israel appears to be intentionally engaged in a policy of starvation, a gross violation of international humanitarian law. See Press Release, Off. of the High Comm'r for Hum. Rts., UN Special Committee Finds Israel's Warfare Methods in Gaza Consistent With Genocide, Including Use of Starvation as Weapon of War (Nov. 14, 2024), https://www.ohchr.org/en/press-releases/2024/11/un-special-committee-finds-israels-warfare-methods-gaza-consistent-genocide (on file with the *Columbia Law Review*) (concluding based on the evidence set forth, including Israel's noncompliance with the International Court of Justice's repeated orders, that Israel has used "starvation as a method of war" in Gaza). The first humanitarian supplies did not enter Gaza until October 21, 2023, and the delivery of food and humanitarian supplies remained interrupted and insufficient for the next year. See UN Secretary-General, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, ¶¶ 23, 30, U.N. Doc. A/79/363 (Sept. 20, 2024) (noting that "Israel blocked all aid entry into Gaza until 21 October, when the Rafah crossing was re-opened"); see also Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), 2023 I.C.J. 1, ¶¶ 18, 61 (Dec. 29), https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf [https://perma.cc/VT92-YFR5] (stating that the provision of supplies, although "partially alleviated" since October 2023, "remains wholly insufficient"). A related concern has been the vast swaths of agricultural land in Gaza that have been rendered infertile. See Nilo Tabrizy, Imogen Piper & Miriam Berger, Israel's Offensive Is Destroying Gaza's Ability to Grow Its Own Food, Wash. Post (May 3, 2024), https://www.washingtonpost.com/investigations/interactive/2024/gaza-israel-agriculture-food-fisheries/ (on file with the *Columbia Law Review*) (explaining how Israeli airstrikes and bulldozers have destroyed farms and Gaza's agricultural system). High numbers of civilian casualties in the Gaza Strip and the Israeli Defense Forces' targeting of healthcare infrastructure have raised additional concerns about the lawfulness of Israel's conduct of the war in Gaza. Press Release, Off. of the High Comm'r for Hum. Rts., UN Commission Finds War Crimes and Crimes Against Humanity in Israeli Attacks on Gaza Health Facilities and Treatment of Detainees, Hostages (Oct. 10, 2024), https://www.ohchr.org/

While it would take until May 2024 for the Prosecutor for the International Criminal Court to apply for arrest warrants for both Hamas's and Israel's leaders,[39] students on college campuses were much quicker to take action.[40] To the surprise and chagrin of many alumni and donors, the war in Gaza would lead to a major campus protest movement with echoes of the Vietnam anti-war movement.[41]

This section offers a description of the events that followed at Columbia University not only in honor of the location of this Symposium[42] but also because Columbia University would find itself at the epicenter of the controversy.[43] Although not formally bound by the First Amendment,

---

en/press-releases/2024/10/un-commission-finds-war-crimes-and-crimes-against-humanity-israeli-attacks (on file with the *Columbia Law Review*). Housing has also been destroyed at a pace not seen since World War II. Edith M. Lederer, The Unprecedented Destruction of Housing in Gaza Hasn't Been Seen Since World War II, the UN Says, AP News (May 2, 2024), https://apnews.com/article/un-report-gaza-destruction-housing-economy-recovery-4f61dcca7db3fd5eb3da5c6a25001e12 (on file with the *Columbia Law Review*). The United Nations estimates it will take eighty years to rebuild Gaza's destroyed homes, a process that cannot begin before the land is cleared of rubble and thousands of unexploded ordinances. Aaron Steckelberg, Janice Kai Chen, Júlia Ledur & Ruby Mellen, The Long Road to Reconstruction, Wash. Post (Oct. 6, 2024), https://www.washingtonpost.com/world/interactive/2024/gaza-reconstruction-rebuild-process-plans/ (on file with the *Columbia Law Review*). But see Amichai Cohen & Yuval Shany, Between Rhetoric and Effects: The ICJ Provisional Measures Order in *South Africa v. Israel*, Just Sec. (Feb. 1, 2024), https://www.justsecurity.org/91728/between-rhetoric-and-effects-the-icj-provisional-measures-order-in-south-africa-v-israel/ [https://perma.cc/6RXM-GKHB] (disputing the genocide charges given the high evidentiary standard under international law).

39. ICC Seeking Arrest Warrants for Hamas Leaders and Israel's Netanyahu, UN News (May 20, 2024), https://news.un.org/en/story/2024/05/1149966 [https://perma.cc/BC47-Z7DV]. The application is pending before the International Criminal Court, but Israel has since taken responsibility for killing the three named leaders of Hamas. See Three Hamas Leaders Killed Months Ago, IDF Says, BBC (Oct. 3, 2024), https://www.bbc.com/news/articles/cx2kyydjrlyo [https://perma.cc/F26K-N3GP] (describing Israel's admission that its forces had killed Hamas leaders Ismail Haniyeh, Wissam Khazem, and Rawhi Mushtaha).

40. See Tim Craig, Hannah Natanson & Richard Morgan, Secret Meetings, Social Chatter: How Columbia Students Sparked a Nationwide Revolt, Wash. Post (Apr. 26, 2024), https://www.washingtonpost.com/nation/2024/04/26/columbia-protest-students-israel-gaza/ (on file with the *Columbia Law Review*) ("At Brown University, protests against Israel's response to the Oct. 7 attack by Hamas erupted almost immediately.").

41. See Consider This, How the College Protests Echo History, NPR (Apr. 29, 2024), https://www.npr.org/2024/04/29/1198911364/student-protests-palestine-israel-vietnam-compared-history-1968-columbia-campus [https://perma.cc/5U3B-HWBL]; Wines, supra note 2.

42. The location of the Symposium assures better information about what happened on campus. Moreover, in full disclosure, my son attends Columbia College. As a result, I took an additional interest in the University's response and was the recipient of various University announcements.

43. See Alan Blinder & Sharon Otterman, Columbia President Resigns After Months of Turmoil on Campus, N.Y. Times (Aug. 14, 2024), https://www.nytimes.com/2024/08/14/us/columbia-president-nemat-shafik-resigns.html (on file with the *Columbia Law Review*) (noting that Columbia "emerged as a hub of the campus protests that began

Columbia's handling of the student protests was similar to that utilized by universities across the country, including state universities,[44] and its policies consistently assert its commitment to upholding the First Amendment tradition.[45] Indeed, as Part II will explain, its tactics were, in the main, unlikely to have run afoul of existing First Amendment doctrine. Columbia's experience thus provides a baseline from which to assess existing law and to consider how an independent right of assembly might view the campus protests and manage their social costs differently.

A. *The University's Initial Response*

On October 12, five days into the Israeli blockade of Gaza, Columbia's chapters of Students for Justice in Palestine (SJP) and Jewish Voice for Peace (JVP) organized an on-campus protest on the South Lawn.[46] While

---

after the Israel-Hamas war erupted"). A LEXIS search of the *New York Times* for words associated with Columbia University in headlines confirms this assessment: Whereas in the 2022 to 2023 academic year the University appeared in only 13 search results, in 2023 to 2024 there were 111 results. During the 2023 to 2024 academic year, the *New York Times* ran ninety-nine headlines that included a term associated with Columbia and the word "protest." Memorandum from Tabatha Abu El-Haj on LexisNexis Search Results (Jan. 10, 2025) (on file with the *Columbia Law Review*).

44. See Andrew Atterbury, Florida Orders Universities to 'Deactivate' Pro-Palestinian Group, Politico (Oct. 24, 2023), https://www.politico.com/news/2023/10/24/florida-universities-israel-hamas-war-00123350 (on file with the *Columbia Law Review*) ("Florida's university system chancellor . . . directed state universities . . . to disband campus groups with ties to the national Students for Justice in Palestine organization . . . ."); Ikram Mohamed, Pooja Salhotra, Stephen Simpson, Julius Shieh & William Melhado, Dozens More Arrested at UT-Austin as Police Use Pepper Spray, Flash Bangs to Break up Protests, Tex. Trib. (Apr. 29, 2024), https://www.texastribune.org/2024/04/29/university-texas-pro-palestinian-protest-arrest/ [https://perma.cc/5TZH-DR83] ("The UT police department issued a dispersal order Monday afternoon, telling [pro-Palestinian] protesters that . . . they would be arrested if they did not leave."); Hadas Thier, College Administrations Are Failing Their Palestinian and Jewish Students, The Nation (Nov. 22, 2023), https://www.thenation.com/article/activism/university-protests-antisemitism-islamophobia/ [https://perma.cc/3VEU-WSS6] (describing how Hunter College, a part of the City University of New York, canceled, but later rescheduled, a screening of the documentary *Israelism*); Niraj Warikoo & David Boucher, Police Remove Tent Encampment at University of Michigan Protesting Israel, Detroit Free Press (May 21, 2024), https://www.freep.com/story/news/local/michigan/2024/05/21/university-michigan-encampment-protest-removed-ann-arbor-police/73782981007/ [https://perma.cc/P5QK-4E8N]; Jonathan Wolfe & Benjamin Royer, U.C.L.A. Declares Encampment Illegal, Says Protesters Should Leave, N.Y. Times (Apr. 30, 2024), https://www.nytimes.com/2024/04/30/nyregion/ucla-encampment-protests.html (on file with the *Columbia Law Review*).

45. See, e.g., Columbia Charters and Statutes, supra note 33, at 136–37.

46. Sarah Huddleston, Columbia Updated Its Event Policy Webpages. Seventeen Days Later, It Suspended SJP and JVP., Colum. Spectator (Nov. 17, 2023), https://www.columbiaspectator.com/news/2023/11/17/columbia-updated-its-event-policy-webpages-seventeen-days-later-it-suspended-sjp-and-jvp/ [https://perma.cc/JAB6-UC92] [hereinafter Huddleston, Columbia Updated Its Event Policy] (last updated Dec. 4, 2023).

hundreds gathered to protest the war in Gaza on one side of the lawn, pro-Israel students gathered on the other.[47]

Within three weeks, Columbia University rushed out a policy restricting access to public space on campus without advance permission.[48] Under the new policy, students planning events of a certain size were required to apply for permission to use campus space ten business days prior to any planned event. Violators were subject to a different disciplinary procedure that granted the University "'sole discretion' to determine sanctions against student organizations" under a policy that rendered those decisions unappealable.[49]

The new policy's impact was felt almost immediately. On November 10, after a walkout and a die-in on Low Plaza to draw attention to the Palestinian lives lost in the previous month, the University suspended recognition of SJP and JVP, the two student groups that organized the protest.[50] Official explanations from Columbia's administration stressed the groups' repeated failure to comply with policies related to holding campus events.[51] The announcement of the groups' suspensions further

---

47. Isabella Ramirez, Esha Karam, Daksha Pillai, Grace Hamilton, Oscar Noxon, Joseph Zuloaga, Cameron Spurr & Shea Vance, Hundreds of Protesters Pack Campus Following Escalation of Violence in Israel and Gaza, Colum. Spectator (Oct. 12, 2023), https://www.columbiaspectator.com/news/2023/10/12/hundreds-of-protesters-pack-campus-following-escalation-of-violence-in-israel-and-gaza/ [https://perma.cc/LB2Y-4GLV] (last updated Oct. 17, 2023).

48. Huddleston, Columbia Updated Its Event Policy, supra note 46. Other colleges and universities did the same. See, e.g., Isabelle Taft, Alex Lemonides, Lazaro Gamio & Anna Betts, Campus Protests Led to More Than 3,100 Arrests, but Many Charges Have Been Dropped, N.Y. Times (July 21, 2024), https://www.nytimes.com/2024/07/21/us/campus-protests-arrests.html (on file with the *Columbia Law Review*) (noting that Indiana University "abruptly changed campus rules" for the Dunn Meadow, a space that had been designated a "public forum" since 1969, "to prohibit temporary structures without prior permission").

49. Sarah Huddleston, Top Administration Revised Policies Cited in SJP and JVP's Suspension Without University Senate Input, Rosberg Confirms, Colum. Spectator (Nov. 17, 2023), https://www.columbiaspectator.com/news/2023/11/17/top-administration-revised-policies-cited-in-sjp-and-jvps-suspension-without-university-senate-input-rosberg-confirms/ [https://perma.cc/KH4X-WLXU] [hereinafter Huddleston, Top Administration Revised Policies] (last updated Nov. 20, 2023) (quoting Jaxon Williams-Bellamy, Columbia Univ. Senator).

50. Sarah Huddleston & Chris Mendell, Columbia Suspends SJP and JVP Following 'Unauthorized' Thursday Walkout, Colum. Spectator (Nov. 10, 2023), https://www.columbiaspectator.com/news/2023/11/10/columbia-suspends-sjp-and-jvp-following-unauthorized-thursday-walkout/ [https://perma.cc/9DAR-TVGM] (last updated Nov. 11, 2023). For a description of the demands of the walk-out and the art installation it created, see Chris Mendell, Hundreds of Pro-Palestinian Students Walk Out as Part of National Call to Action, Gather for 'Peaceful Protest Art Installation', Colum. Spectator (Nov. 10, 2023), https://www.columbiaspectator.com/news/2023/11/10/hundreds-of-pro-palestinian-students-walk-out-as-part-of-national-call-to-action-gather-for-peaceful-protest-art-installation/ [https://perma.cc/84F9-W26B].

51. Gerald Rosberg, Statement From Gerald Rosberg, Chair of the Special Committee on Campus Safety, Colum. News (Nov. 10, 2023), https://news.columbia.edu/

expressed a general concern about "threatening rhetoric and intimidation," but did not include specific accusations of hate speech or harassment.[52] And in a subsequent colloquy with the University Senate, Gerald Rosberg, the then–Senior Vice President of the University and Special Chair of the Special Committee on Public Safety (the decisionmaker), stated that the groups' rhetoric was not "the reason for the suspensions," even as he called on faculty to appreciate that "the administration was dealing with a situation in which opposing groups each think the other is engaged in genocide," creating a "fraught . . . environment."[53] Most importantly, the suspension announcement failed to mention that the campus policy requiring students to apply for permission had been implemented in response to the political fallout of October 7,[54] or that it had been implemented without observance of established internal procedures.[55]

The University's suspension decision had broad consequences. Not only were the two groups ineligible for any university funding, but the suspension deprived SJP and JVP of holding any future events on campus because, under the new rules, banned groups were ineligible to apply for permission to assemble.[56] The students who had been most motivated to protest Israel's actions in Gaza were thus left unable to *lawfully* assemble on campus.

Widely perceived as unfair, the decision also facilitated coalition building and broadened the movement on campus. Immediately thereafter, student groups that remained recognized formed a coalition, Columbia University Apartheid Divest (CUAD), to organize solidarity protests and events.[57] Roughly four hundred students appeared for

---

news/statement-gerald-rosberg-chair-special-committee-campus-safety (on file with the *Columbia Law Review*).

52. Id.

53. Columbia Univ. Senate, University Senate Plenary December 8, 2023, at 16 (2023), https://senate.columbia.edu/sites/default/files/content/Plenary%20Binders%202023-24/US_Plenary%20Binder_20231208-PP-R.pdf [https://perma.cc/LF5T-MRAV]; see also Huddleston, Top Administration Revised Policies, supra note 49 (describing a senior administrator's statement that "[t]he Nov. 10 email's citation of 'threatening rhetoric' was 'intended to be descriptive of the event and of the environment in which we were operating, not a basis on which the action was taken'" (quoting Rosberg)).

54. Rosberg, supra note 51.

55. See Huddleson, Top Administrator Revised Policy, supra note 49 (noting that the revision occurred without Senate input).

56. Huddleston, Columbia Updated Its Event Policy, supra note 46 (noting that the email announcing the new policy "emphasized that 'individuals and unrecognized groups do not have the ability to reserve space on-campus'" (quoting Email from Columbia Undergraduate Student Life to the student body (Nov. 7, 2023))).

57. See Liset Cruz & Claire Fahy, Columbia Faces Protests After Suspending 2 Pro-Palestinian Groups, N.Y. Times (Nov. 15, 2023), https://www.nytimes.com/2023/11/15/nyregion/columbia-university-ban-student-groups-israel-hamas-war.html (on file with the

CUAD's first rally.[58] Soon, faculty were also organizing protests.[59] The perceived unfairness of the decision may also explain why many students were willing to flout University rules even when threatened with sanctions.

B. *The University's Revised Policy*

Although the campus protests died down to some degree toward the end of the fall 2023 semester, the controversy did not. On February 19, 2024, the University issued a revised policy governing gatherings on campus, which shortened the notification period to two business days, but also limited the spaces on campus that would be available for student protests; it further restricted their availability to weekday afternoons and weekends.[60] The new policy maintained the provision that only recognized student groups could access available campus spaces, and it made no

---

Columbia Law Review) ("[CUAD is] a collection of 40 student organizations representing a range of racial, ethnic and religious backgrounds . . . .").

58. Id.

59. See id. ("[R]oughly 200 faculty members walked out to protest the decision to suspend the groups, Students for Justice in Palestine and Jewish Voice for Peace.").

60. See Columbia Univ., Interim University Policy for Safe Demonstrations (2024), https://www.columbia.edu/content/sites/default/files/content/about/Task%20Force%20on%20Antisemitism/Interim%20University%20Policy%20for%20Safe%20Demonstrations%20archived.pdf [https://perma.cc/6QWB-5985] [hereinafter Columbia Interim Policy for Demonstrations] (outlining Columbia's now-replaced interim policy "defin[ing] the process that needs to be followed for safe demonstrations on campus"); see also Sarah Huddleston, Columbia Establishes 'Demonstration Areas' and Times, Alters Disciplinary Procedure for Students in Violation of New Event Policy, Colum. Spectator (Feb. 19, 2024), https://www.columbiaspectator.com/news/2024/02/19/columbia-establishes-demonstration-areas-and-times-alters-disciplinary-procedure-for-students-in-violation-of-new-event-policy/ [https://perma.cc/NKY7-T7K5] (describing the changes to the policy). In summer 2024, the University adopted its newest rules. Guide to the Rules of University Conduct, Colum. U., https://universitylife.columbia.edu/guide-rules-university-conduct [https://perma.cc/U82G-88XK] (last visited Feb. 3, 2025). According to the Columbia website, the Rules of University Conduct Committee was first established in 1968 in response to the events on campus that year. Id. The most recent substantive revisions prior to those undertaken since October 7, 2023, were in 2015. Id.

changes to SJP's and JVP's suspensions.[61] Meanwhile, the student movement had settled on a basic demand: divestment.[62]

The February 2024 policy reflected the speech–conduct distinction this Piece seeks to problematize. In rolling out the new rules, the University expressed its commitment "to *free and open debate*, and the principle that *the right to speak* applies equally to everyone, regardless of their viewpoint," and it emphasized the need to balance "[t]he right of students, faculty, and staff to *express their views*"—characterized as "the cornerstone of our academic community"—with the necessity of maintaining an orderly learning environment.[63] Neither the announcement nor the policy itself recognized peaceable assembly as a First Amendment right or assembly as a practice integral to either the health of liberal democracies[64] or the mission of American universities.[65]

The consequences of the new policy would not emerge until the last month of the academic year, when it would become the basis for student arrests and University disciplinary actions. In April 2024, students critical of Israel's conduct of the war in Gaza and its policies in the West Bank settled on a tactic in their effort to secure divestment: an encampment.[66] The Columbia encampment was set up on the South Lawn on April 17, 2024.[67]

---

61. Both student groups remained suspended throughout the fall 2024 semester after unsuccessfully suing for reinstatement. Press Release, N.Y. C.L. Union, Defying University Procedures and Legal Precedent, Court Upholds Columbia University's Suspension of Pro-Palestine Student Groups (Nov. 8, 2024), https://www.nyclu.org/press-release/defying-university-procedures-and-legal-precedent-court-upholds-columbia-universitys-suspension-of-pro-palestine-student-groups [https://perma.cc/6UE6-AWCF]. In October 2024, a new student organization was formed: the Columbia Palestine Solidarity Coalition. See Columbia Palestine Solidarity Coal., Opinion, Recentering Palestine, Reclaiming the Movement, Colum. Spectator (Oct. 19, 2024), https://www.columbiaspectator.com/opinion/2024/10/19/recentering-palestine-reclaiming-the-movement/ [https://perma.cc/H2V6-PFA3] (noting that the group defines itself as "a Palestinian-led coalition reclaiming the fight for divestment on Columbia's campus and for Palestinian liberation abroad" (emphasis omitted)).

62. See Columbia Univ. Apartheid Divest, Opinion, Columbia University Apartheid Divest: Who We Are, Colum. Spectator (Nov. 14, 2023), https://www.columbiaspectator.com/opinion/2023/11/14/columbia-university-apartheid-divest-who-we-are/ [https://perma.cc/2C2K-ZU3D] ("We are a continuation of the Vietnam anti-war movement and the movement to divest . . . .").

63. Columbia Interim Policy for Demonstrations, supra note 60 (emphasis added).

64. See infra notes 282–304 and accompanying text.

65. See infra notes 413–419 and accompanying text.

66. Isha Banerjee, Esha Karam & Manuela Silva, Encampments Inspired by 'Gaza Solidarity Encampment' Spring Up Across the World, Colum. Spectator (Apr. 28, 2024), https://www.columbiaspectator.com/news/2024/04/28/encampments-inspired-by-gaza-solidarity-encampment-spring-up-across-the-world/ [https://perma.cc/MHG2-WTM6].

67. See Judy Goldstein & Joseph Zuloaga, In Focus: The First 24 Hours of the 'Gaza Solidarity Encampment', Colum. Spectator (Apr. 18, 2024), https://www.columbiaspectator.com/main/2024/04/18/in-focus-the-first-24-hours-of-the-gaza-solidarity-encampme

For students in the growing movement, the Gaza Solidarity Encampment became a place of social solidarity and a demand for recognition.[68] For the fourteen days of its existence,[69] the encampment combined politics and sociality; political speeches and slogans coexisted with meals, prayer, and occasional dancing.[70] On the third day of the encampment, Muslim students held a midday Friday ("jummah") prayer "where 'supporters held up keffiyehs, scarves, and coverings to safeguard those in prayer'"; this was followed by an evening Shabbat service.[71] On April 22, 2024, the sixth day of the encampment, JVP and CU Jews for Ceasefire held a Passover seder in the encampment.[72] Throughout its existence, political speeches and other political activities occurred.[73]

Not everyone on campus, however, appreciated or experienced the encampment in positive ways. For some, the encampment was an inconvenience. But for some Jewish students and their allies both on and off campus, the encampment was viewed as a hotbed of antisemitism and an affront to the University's obligation to provide an inclusive educational

---

nt/ [https://perma.cc/TE2Z-R5NR] (reporting that the encampment was set up at "4 a.m. on Wednesday, hours before University President Minouche Shafik began testifying in front of the House Committee on Education and the Workforce on Capitol Hill").

68. See id. ("At midnight, students danced around the lawns holding hands in solidarity with the encampment.").

69. See Isha Banerjee, Timeline: The 'Gaza Solidarity Encampment', Colum. Spectator (May 2, 2024), https://www.columbiaspectator.com/news/2024/05/02/timeline-the-gaza-solidarity-encampment/ [https://perma.cc/YUB4-ALNU] (outlining "the key events of each day of the encampment . . . [o]ver the course of 14 historic days at Columbia"); Jay Ulfelder, Ash Ctr. for Democratic Governance & Innovation, Crowd Counting Consortium: An Empirical Overview of Recent Pro-Palestine Protests at U.S. Schools, Harvard Kennedy Sch. (May 30, 2024), https://ash.harvard.edu/articles/crowd-counting-blog-an-empirical-overview-of-recent-pro-palestine-protests-at-u-s-schools/ [https://perma.cc/A63Z-MUS9] (noting that Columbia's encampment was relatively short-lived compared to other universities' and that Columbia was not in the top thirty universities with the most encampment days in the 2023 to 2024 academic year).

70. Columbia Coll. Student Council, Opinion, We Columbia University Students Urge You to Listen to Our Voices, The Guardian (May 4, 2024), https://www.theguardian.com/commentisfree/article/2024/may/04/columbia-university-student-protest-gaza [https://perma.cc/622F-RZNV].

71. Sarah Huddleston & Shea Vance, 'Gaza Solidarity Encampment' Enters Day Four as Columbia Kicks off Admitted Students Weekend, Colum. Spectator (Apr. 20, 2024), https://www.columbiaspectator.com/news/2024/04/20/gaza-solidarity-encampment-enters-day-four-as-columbia-kicks-off-admitted-students-weekend/ [https://perma.cc/J6FN-YS7H].

72. See Amira McKee & Sarah Huddleston, 'Gaza Solidarity Encampment' Approaches One-Week Mark on South Lawn, Colum. Spectator (Apr. 23, 2024), https://www.columbiaspectator.com/news/2024/04/23/gaza-solidarity-encampment-approaches-one-week-mark-on-south-lawn/ [https://perma.cc/97J4-5T7L] (offering a detailed, almost hourly account of a day in the encampment).

73. See id. (describing the various speeches given by faculty and student-organized responses).

environment for its Jewish students who identified with and supported Israel.[74] Unsurprisingly, the encampment drew counterprotests.[75]

C. *NYPD on Campus*

During President Minouche Shafik's voluntary testimony before a congressional committee critical of how universities were handling anti-Israel protests on their campuses, the existence of the encampment became a source of tension on campus.[76] On April 18, 2024, shortly after Shafik's congressional testimony wrapped up and just twenty-four hours after the Gaza Solidarity Encampment was established, Columbia would become the first university to invite law enforcement onto campus to forcibly disperse protesters and dismantle the encampment.[77]

Shafik's statement to the University community explained that she had taken the "extraordinary step" of inviting the police to clear the encampment "because these are extraordinary circumstances" and "[t]he individuals who established the encampment violated a long list of rules and policies."[78] Her statement continued, "The current encampment violates all of the new policies, severely disrupts campus life, and creates a harassing and intimidating environment for many of our students."[79] Her

---

74. See Task Force on Antisemitism, Columbia Univ., Report #1: Columbia University's Rules on Demonstrations 2 (2024), https://www.columbia.edu/content/sites/default/files/content/about/Task%20Force%20on%20Antisemitism/Report_1_Columbia_University's_Rules_on_Demonstrations_March_04_2024.pdf (on file with the *Columbia Law Review*) (collecting concerns, some of which predated the encampment, about the student protests' impact on students, including "Jewish and Israeli Columbia affiliates [who] have been the object of racist epithets and graffiti, antisemitic tropes, and confrontational and unwelcome questions").

75. McKee & Huddleston, supra note 72.

76. See Noah Bernstein, Sarah Huddleston, Shea Vance & Esha Karam, 'Columbia in Crisis': Shafik Testifies Before Congress About Antisemitism at Columbia, Colum. Spectator (Apr. 21, 2024), https://www.columbiaspectator.com/news/2024/04/21/columbia-in-crisis-shafik-testifies-before-congress-about-antisemitism-at-columbia/ [https://perma.cc/LY55-GJC6] (reporting that, while President Shafik was testifying before Congress in Washington, D.C., "[o]n Columbia's campus . . . Public Safety officers barricaded the entrances to the lawns and informed protesters of the disciplinary consequences of entering the protest area").

77. See Banerjee, supra note 69 (reporting that, "[a]t around 1 p.m." the day after her appearance before Congress, "Shafik authorized the NYPD to come to campus and sweep the encampment, leading to 108 arrests"); see also Bernstein et al., supra note 76 (reporting that the decision was quickly praised by at least one member of the congressional committee).

78. Letter from Minouche Shafik, President, Columbia Univ., to Columbia Community (Apr. 18, 2024), https://president.columbia.edu/news/statement-columbia-university-president-minouche-shafik-4-18 (on file with the *Columbia Law Review*) [hereinafter Shafik, April 18 Statement].

79. Id. Her statement concluded by professing that "Columbia is committed to academic freedom and to the opportunity for students and faculty to engage in *political*

letter to the New York Police Department (NYPD) struck a different tone, emphasizing that she had "determined that the encampment and related disruptions pose a clear and present danger to the substantial functioning of the University."[80]

Throughout the year, Shafik and other administrators had raised concerns that the protests critical of Israel were creating discomfort for some students.[81] Given the highly charged debate about the line between criticism of the Israeli state and its actions and antisemitism, however, the University did not primarily rely on allegations that the campus environment had become "harassing or intimidating" as the basis for its decisions.[82] While senior administrators frequently acknowledged the "intense emotions on all sides" and the need "to preserv[e] the safety of our campuses,"[83] incidents of harassment and discrimination against Jewish, Palestinian, and Muslim members of the Columbia University community, though they occurred, were not pervasive.[84] Notably, Shafik's announcement did not identify any specific instances of harassment.[85]

---

expression—within established rules and with respect for the safety of all." Id. (emphasis added).

80. Letter from Minouche Shafik, President, Columbia Univ., to Michael Gerber, Deputy Comm'r, Legal Matters, N.Y.C. Police Dep't (Apr. 18, 2024), https://publicsafety.columbia.edu/content/letter-nypd (on file with the *Columbia Law Review*).

81. See Sharon Otterman & Stephanie Saul, Faculty Group at Columbia Says It Has 'Lost Confidence' in the President, N.Y. Times (Apr. 19, 2024), https://www.nytimes.com/2024/04/19/nyregion/columbia-campus-protest-gaza-war.html (on file with the *Columbia Law Review*) (explaining that Shafik had previously suggested that chants such as "'We don't want no Zionists here' and 'Israel is a racist state' . . . were creating a 'harassing and intimidating environment for many of our students'" (quoting Shafik, April 18 Statement, supra note 78)).

82. See, e.g., Shafik, April 18 Statement, supra note 78.

83. Huddleston, Columbia Updated Its Event Policy, supra note 46 (internal quotation marks omitted) (quoting a University official).

84. See Chris McGreal, How Pervasive Is Antisemitism on US Campuses? A Look at the Language of the Protests, The Guardian (May 3, 2024), https://www.theguardian.com/us-news/article/2024/may/03/college-gaza-protests-antisemitism [https://perma.cc/586R-5BAZ] (describing the fraught debate over the prevalence of antisemitism on Columbia's campus and reporting that "instances of threatening behaviour directed at individuals appear to have been relatively isolated and more likely to occur at parallel protests by non-students outside the campus").

85. See Shafik, April 18 Statement, supra note 78; see also David Pozen, Norm Breaking at Columbia, Balkinization (Apr. 19, 2024), https://balkin.blogspot.com/2024/04/norm-breaking-at-columbia.html [https://perma.cc/P7HT-89ZQ] [hereinafter Pozen, Norm Breaking at Columbia] (noting that the decision to bring the NYPD to campus was made without complying with the fact-finding procedures and procedural safeguards that accompany the University rules). A later statement also does not indicate that the encampment's actions constitute harassment. Its strongest language reads: "The encampment has created an unwelcoming environment for many of our Jewish students and faculty. *External actors have contributed to creating a hostile environment* in violation of Title VI, especially around our gates . . . ." Letter from Minouche Shafik, President, Columbia Univ., to Columbia

One thing, moreover, is undisputed: At the time of its dispersal, there was no violence or imminent threats of violence on the part of the students in the encampment.[86] Indeed, police officers at the scene reported that the camp was peaceful, a conclusion corroborated by images and student reporting at the time.[87] It was, instead, the failure to comply with the February 2024 demonstration policy that provided the legal basis for the dispersal and arrests on April 18.[88] Legally, the NYPD's basis for the removal was trespass, but Columbia and Barnard students have legal access to the campus.[89] The trespass charges, therefore, were only made possible by the University's decision to suspend students for violating University

---

Community (Apr. 29, 2024), https://president.columbia.edu/news/statement-columbia-university-president-minouche-shafik-4-29 (on file with the *Columbia Law Review*) [hereinafter Shafik, April 29 Statement] (emphasis added). This statement, explaining Shafik's decision to call the NYPD onto campus for a second time, similarly asserted that "[a]ntisemitic language and actions are unacceptable and calls for violence are simply abhorrent," but it did not explicitly accuse the encampment of either using antisemitic language or calling for violence. Id.

86. The reporting on the day does not explicitly use these terms because, under current law, a clear and imminent risk of violence is not necessary to justify a dispersal order. See infra notes 175–176 and accompanying text. Nevertheless, contemporaneous reporting makes evident that the decision to disperse the encampment was not precipitated by an escalation at the encampment or an imminent risk of violence. See, e.g., Dozens of Pro-Palestinian Protesters Arrested as Columbia Clears Encampment, Al Jazeera (Apr. 19, 2024), https://www.aljazeera.com/news/2024/4/19/dozens-of-pro-palestinian-protesters-arrested-as-columbia-clears-encampment [https://perma.cc/82FE-C3BJ] (reporting that Shafik justified her decision to "authorise[] police to clear the dozens of tents set up by protesters" on the grounds that "they had breached the university's rules and policies against holding unauthorised demonstrations," with no mention of a risk of violence); Sharon Otterman & Alan Blinder, Over 100 Arrested at Columbia After Pro-Palestinian Protest, N.Y. Times (Apr. 18, 2024), https://www.nytimes.com/live/2024/04/18/nyregion/columbia-university-protests (on file with the *Columbia Law Review*) (last updated May 5, 2025) (offering a detailed account of events surrounding Columbia's decision to call police onto campus that includes no mention of violence on the part of participants in the encampment); see also Maya Stahl, Sarah Huddleston & Shea Vance, Shafik Authorizes NYPD to Sweep 'Gaza Solidarity Encampment,' Officers in Riot Gear Arrest Over 100, Colum. Spectator (Apr. 18, 2024), https://www.columbiaspectator.com/news/2024/04/18/shafik-authorizes-nypd-to-sweep-gaza-solidarity-encampment-officers-in-riot-gear-arrest-over-100/ [https://perma.cc/7CN3-YHV2] (last updated Apr. 19, 2024) ("To put this in perspective, the students that were arrested were peaceful . . . and were saying what they wanted to say in a peaceful manner . . . ." (internal quotation marks omitted) (quoting John Chell, Chief, NYPD)).

87. See Amira McKee & Isha Banerjee, Adams, NYPD Announce Over 108 Arrests During 'Gaza Solidarity Encampment' Sweep, Colum. Spectator (Apr. 18, 2024), https://www.columbiaspectator.com/city-news/2024/04/18/adams-nypd-announce-over-108-arrests-during-gaza-solidarity-encampment-sweep/ [https://perma.cc/AY4A-77BG] ("The NYPD said the protest was peaceful and arrests were made 'without resistance' in response to 'the University's wishes.'" (quoting Edward Caban, Comm'r, NYPD)).

88. Failure to comply with the February 2024 policy was also the legal basis for a second round of arrests later in the month. See Shafik, April 29 Statement, supra note 85 ("[P]rotests must comply with time, place, and manner restrictions . . . .").

89. See Pozen, Norm Breaking at Columbia, supra note 85 (noting that the trespass charges depended on suspensions for violating University rules).

rules immediately before the police came.[90] As New York City Mayor Eric Adams told reporters at the time, "Columbia University's students have a proud history of protest and raising their voices[,] . . . but [students] do not have the right to violate university policies and disrupt learning on campus."[91] In total, over one hundred students were arrested, and the fifty-tent encampment was cleared.[92]

Shafik's effort proved futile. As the NYPD made its arrests, students erected a new encampment in a different part of the quad after an apparently spontaneous solidarity march.[93] Meanwhile, Shafik's decision to call police onto campus catalyzed greater opposition to the University's handling of the protests and bolstered support for the new encampment.[94] Even among those unsympathetic to the protesters' political positions, the decision to invite the NYPD onto campus proved controversial as a breach of "an informal settlement" to avoid clashes between police and student protesters made in the wake of April 1967.[95] The fact that the decision immediately followed her highly controversial testimony before Congress,

---

90. Id.

91. Eric Adams, Mayor, N.Y.C., Remarks on Recent Protests at Columbia University (Apr. 18, 2024), https://www.nyc.gov/office-of-the-mayor/news/289-24/transcript-mayor-adams-briefs-media-recent-protests-columbia-university-nypd [https://perma.cc/5QEE-X6EJ]. There is some reason to believe Mayor Adams's eagerness to clear the protests on Columbia's campus was a response to private lobbying from wealthy donors to his campaign. See Hannah Natanson & Emmanuel Felton, Business Titans Privately Urged NYC Mayor to Use Police on Columbia Protesters, Chats Show, Wash. Post (May 16, 2024), https://www.washingtonpost.com/nation/2024/05/16/business-leaders-chat-group-eric-adams-columbia-protesters/ (on file with the *Columbia Law Review*) (describing a chat composed of donors coordinating efforts to pressure Adams to dispel the encampments).

92. See McKee & Banerjee, supra note 87 (reporting that NYPD officials confirmed the 108 arrested students were charged with trespass and that this followed Shafik's announcement of their suspension and request to the NYPD to enter campus); Sharon Otterman, Columbia Sends in the N.Y.P.D. to Arrest Protesters in Tent City, N.Y. Times (Apr. 18, 2024), https://www.nytimes.com/2024/04/18/nyregion/columbia-university-tent-city-palestinian-protest.html (on file with the *Columbia Law Review*) (noting that the encampment had more than fifty tents and was dismantled).

93. See McKee & Banerjee, supra note 87 (noting that the new encampment arose as students watched the NYPD make arrests on their campus).

94. See Spectator Ed. Bd., Opinion, Our Columbia, Colum. Spectator (Apr. 25, 2024), https://www.columbiaspectator.com/opinion/2024/04/25/our-columbia/ [https://perma.cc/FBT8-MMDR] ("Over the past few days, a wide range of groups and individuals have decried University leadership."); see also Columbia Coll. Student Council, supra note 70 ("This neglectful decision was met with harsh rebuke from much of Columbia and mischaracterized our community as violent extremists.").

95. See Pozen, Norm Breaking at Columbia, supra note 85. Pozen notes that April 2024 was not, in fact, the first time Columbia University had invited police on its campus to arrest protesters. Id. Nevertheless, a widely accepted understanding was that the student protests in 1968 "yielded a norm of police noninvolvement" and that since then "student protesters have repeatedly occupied Low Library, blockaded Hamilton Hall, held sit-ins in administrative offices, waged hunger strikes, [and] staged walkouts" without "elicit[ing] a criminal law enforcement response." Id.

in which she appeared to eschew basic principles of academic freedom, did not improve her popularity on campus.[96]

Shafik, however, held firm in her approach, insisting that the Gaza Solidarity Encampment amounted to "one group dictat[ing] terms and attempt[ing] to disrupt important milestones like graduation to advance their point of view."[97] The stalemate would ultimately end in a second round of arrests on campus after a subgroup of student activists upped the ante by occupying Hamilton Hall, an administrative building.[98] This controversial decision was apparently precipitated by Shafik's refusal to negotiate with student leaders and her decision to cut short ongoing mediation efforts. In the early hours of April 30, 2024, the University would once again invite the NYPD onto campus.[99] Dozens of students were arrested in Hamilton Hall, the encampment was removed, and its participants arrested.[100] Immediately thereafter, Shafik instituted a campus-wide lockdown.[101] Students received a shelter-in-place announcement and the next morning woke to find they lacked access to dining halls and the

96. See id. (criticizing Shafik's naming of faculty at the hearing and quoting the American Association of University Professors' statement characterizing it as "set[ting] a dangerous precedent for academic freedom [that] echoes . . . the cowardice often displayed during the McCarthy era" (internal quotation marks omitted) (quoting Stephanie Saul, Who Are the Columbia Professors Mentioned in the House Hearing?, N.Y. Times (Apr. 17, 2024), https://www.nytimes.com/2024/04/17/nyregion/jospeh-massad-katherine-franke-mohamed-abdou-columbia-university.html?smid=nytcore-ios-share&referringSource=articleShare (on file with the *Columbia Law Review*))).

97. Letter from Minouche Shafik, President, Columbia Univ., to Columbia Community (Apr. 22, 2024), https://president.columbia.edu/news/statement-columbia-university-president-minouche-shafik-4-22?j=1291835&sfmc_sub=217263994&l=179_HTML&u=24638183&mid=100022875&jb=8 (on file with the *Columbia Law Review*).

98. See Sharon Otterman & Chelsia Rose Marcius, Locks, Chains, Diversions: How Columbia Students Seized Hamilton Hall, N.Y. Times (May 2, 2024), https://www.nytimes.com/2024/05/02/nyregion/columbia-students-hamilton-hall.html (on file with the *Columbia Law Review*) (noting that "[t]he people who took over the building were an offshoot of a larger group of protesters who had been camping out on campus in an unauthorized pro-Palestinian demonstration").

99. This time Shafik's announcement of the decision to bring the NYPD back on campus invoked Title VI and Columbia's obligation "to condemn hate and to protect every member of our community from harassment and discrimination." Shafik, April 29 Statement, supra note 85. Still, the statement did not directly accuse the encampment of such actions. See supra note 86.

100. Diana Ramirez-Simon, Jonathan Yerushalmy, Edward Helmore & Erum Salam, Dozens Arrested at Columbia University as New York Police Disperse Gaza Protest, The Guardian (May 1, 2024), https://www.theguardian.com/us-news/2024/apr/30/new-york-police-columbia-university-student-protests [https://perma.cc/7PV2-KYCK].

101. Columbia Coll. Student Council, supra note 70.

library.[102] Columbia's graduation celebrations would be held at the Baker Athletics Complex, not on the South Lawn.[103]

D. *Broader Impacts*

Columbia University was not alone. The first round of arrests at Columbia prompted encampments and solidarity actions at other universities.[104] In response, many universities took similar steps to remove encampments, including in the absence of takeovers of university buildings.[105] In total, more than 3,100 arrests were made on college campuses in spring 2024.[106] At Columbia, 217 were arrested, the second largest number of arrests after UCLA, where there were 271 arrests.[107] Most of those arrested would later have their charges dropped.[108] Students at Columbia did, however, face school disciplinary hearings, and some were suspended.[109]

Pro-Palestinian, antigenocide protests on Columbia's campus, as elsewhere, tee up the complexity of the law of assembly by illuminating both its distinct value as a political practice and its costs—issues which this Piece returns to below. For now, however, the critical points are how this

---

102. See id. ("Within hours, the administration imposed a campus-wide lockdown, preventing all students from accessing vital resources—food and medical assistance—as well as one another—during final exam season.").

103. Rachel Treisman, Columbia and Emory Universities Change Commencement Plans After Weeks of Turmoil, NPR (May 6, 2024), https://www.npr.org/2024/05/06/1249326201/columbia-commencement-canceled-student-protests-war-gaza [https://perma.cc/7CJ4-UF8T] (noting that Columbia University was moving ceremonies "originally scheduled to take place on the South Lawn" to the Baker Athletics Complex).

104. Susan H. Greenberg, Another Wave of Unrest Grips Campuses, Inside Higher Ed. (Apr. 22, 2024), https://www.insidehighered.com/news/students/free-speech/2024/04/22/israel-hamas-war-sparks-new-wave-campus-discord [https://perma.cc/NF7U-DVA9] (describing how Gaza solidarity protests at UNC, Brown, Ohio State, and Yale grew out of the protests at Columbia).

105. Id.

106. Taft et al., supra note 48 (noting that prosecutors deprioritized trespassing charges against student protesters because they were minor, nonviolent offenses and likely protected under the First Amendment).

107. Id.

108. Id.

109. Sarah Huddleston & Maya Stahl, Inside Columbia's Surveillance and Disciplinary Operations for Student Protesters, Colum. Spectator (Sept. 12, 2024), https://www.columbiaspectator.com/news/2024/09/12/inside-columbias-surveillance-and-disciplinary-operation-for-student-protesters-3/ [https://perma.cc/7ZVL-G66M] (describing disciplinary processes levied, including evictions and indefinite suspensions for campus protest activity); see also Katherine Rosman, Trump Demands Major Changes in Columbia Discipline and Admissions Rules, N.Y. Times (Mar. 13, 2025), https://www.nytimes.com/2025/03/13/nyregion/columbia-university-students-disciplined-hamilton-hall.html?smid=nytcore-ios-share&referringSource=articleShare (on file with the *Columbia Law Review*) (reporting the University's announcement that it had completed its disciplinary proceedings against students who occupied Hamilton Hall, resulting in expulsions and suspensions).

account illuminates the scope of the discretion existing First Amendment doctrine affords authorities in their efforts to manage, regulate, disperse, and sanction those who gather together to engage in political protest and how that discretion renders the fact that the overwhelming majority of those sanctioned by universities were engaging in nonviolent forms of assembly immaterial to the constitutional analysis.

At the time of the first dispersal order for the Gaza Solidarity Encampment, there were no serious allegations of violence on the part of those encamped and arrested.[110] Indeed, until the occupation of Hamilton Hall, which involved property destruction and brought students into conflict with a janitor in the building, the encampment and other protests on campus were nonviolent.[111] Similarly, while there were a handful of incidents on campus that all sides would agree constituted hate speech,[112] there was very little evidence that the collective at the encampment was spewing undebatably hateful messages or engaging in threatening or intimidating behavior directed at individuals that would fall outside the scope of existing First Amendment protection.[113]

---

110. See supra notes 70–75 and accompanying text.

111. See Lily Forand, Opinion, A Young Reporter's Experience at the Columbia University Encampment, CT Mirror (May 9, 2024), https://ctmirror.org/2024/05/09/columbia-university-encampment-gaza/ [https://perma.cc/M2DL-Y49D] ("After visiting the encampment and speaking to students, I've come away with a much clearer picture of the goals and behavior I believe defined the majority of protesters at the Columbia encampment. Students spoke to me about the sense of community and love they felt among the tents."); Amira McKee, Tsehai Alfred & Surina Venkat, Forty-Six Who Occupied Hamilton Released, Charged With Criminal Trespassing, Colum. Spectator (May 4, 2024), https://www.columbiaspectator.com/city-news/2024/05/04/forty-six-who-occupied-hamilton-released-charged-with-criminal-trespassing/ [https://perma.cc/D8DA-VHCL] (describing charges of criminal trespass based on acts of vandalism). At UCLA, violence was initiated by the counterprotesters. See Neil Bedi, Bora Erden, Marco Hernandez, Ishaan Jhaveri, Arijeta Lajka, Natalie Reneau, Helmuth Rosales & Aric Toler, How Counterprotesters at U.C.L.A. Provoked Violence, Unchecked for Hours, N.Y. Times (May 3, 2024), https://www.nytimes.com/interactive/2024/05/03/us/ucla-protests-encampment-violence.html (on file with the *Columbia Law Review*) (noting that none of the video footage "show[s] any clear instance of encampment protesters initiating confrontations with counterprotesters beyond defending the barricades"). For a critical and detailed description of the violence at UCLA written by a member of its faculty, see Robin D. G. Kelley, UCLA's Unholy Alliance, Bos. Rev. (May 18, 2024), https://www.bostonreview.net/articles/uclas-unholy-alliance/ (on file with the *Columbia Law Review*).

112. See Forand, supra note 111 (noting "real instances of antisemitism that occurred in and around Columbia's campus," including one involving a protester targeting a pro-Israeli counterdemonstrator).

113. Certainly, there were those who viewed the encampment as a hotbed of antisemitism at the time and who have tried to discursively reframe the encampment in such terms since. See, e.g., Rebecca Massel, Rabbi Advises Jewish Students to 'Return Home as Soon as Possible' Following Reports of 'Extreme Antisemitism' on and Around Campus, Colum. Spectator (Apr. 21, 2024), https://www.columbiaspectator.com/news/2024/04/21/rabbi-advises-jewish-students-to-return-home-as-soon-as-possible-following-reports-of-extreme-antisemitism-on-and-around-campus/ [https://perma.cc/29ZG-85UL] (cataloging a

Instead, the vast majority of students were sanctioned for acts of assembly that were nonviolent.[114] This fact is itself noteworthy given that the First Amendment extends a "right . . . peaceably to assemble."[115]

But the above account is also valuable because it amply demonstrates the specific mechanism by which nonviolent protesters find themselves

---

range of complaints about rising antisemitism associated with the encampment); Donald J. Trump (@realDonaldTrump), Truth Soc. (Mar. 10, 2025), https://truthsocial.com/@realDonaldTrump/posts/114139222625284782 (on file with the *Columbia Law Review*) (boasting about ICE's detention of a student leader and characterizing him as one of many "students at Columbia and other Universities . . . who have engaged in pro-terrorist, anti-Semitic, anti-American activity"). Nevertheless, the contested boundary between criticism of Israel and antisemitism as well as the Court's narrow construction of harassment in the context of expression render such characterizations of the encampments legally impossible. See infra notes 189–201, 223–227 and accompanying text. It is also important to acknowledge that the methodology and objectivity of the Antisemitism Task Force at Columbia have been the subject of significant debate on campus. See, e.g., Letter from Columbia Jewish Faculty to Katrina Armstrong, Interim President, Columbia Univ. (Sept. 5, 2024), https://docs.google.com/document/u/0/d/1ROJM_N9TWe909sAK1sPkIkFJzboe60e8PlMKqvKhdCg/pub?pli=1 [https://perma.cc/6WZH-GZ9M] (criticizing the inclusion of "incidents of alleged antisemitism . . . as fact without in any way being investigated or verified" and offering an illustrative list of incidents misrepresented in the report). Meanwhile, the narrative about rampant antisemitism in the anti-war movement should be approached with caution given that many of its most prominent promoters in the Republican Party have either affirmatively expressed sympathy for, or refused to disavow associations with, self-proclaimed neo-Nazis. Just one year before Representative Elise Stefanik led the charge in questioning three university presidents about their handling of antisemitism on campus, she endorsed a Republican House candidate who had previously described Adolf Hitler as "the kind of leader we need today." Nicholas Fandos, Paladino Draws Backlash for Calling Hitler 'the Kind of Leader We Need', N.Y. Times (June 9, 2022), https://www.nytimes.com/2022/06/09/nyregion/carl-paladino-hitler.html (on file with the *Columbia Law Review*) (last updated June 10, 2022). President Donald Trump's ambivalent stance toward the white nationalist movement is well known, and his second Vice President has openly expressed support for the neo-Nazi party in Germany. See, e.g., Geir Moulson & Aamer Madhani, US Vice President JD Vance Meets German Far-Right Leader as He Criticizes 'Firewalls' in Europe, AP News (Feb. 14, 2025), https://apnews.com/article/germany-munich-vance-free-speech-election-33e720b820e61db9d5e478e63b4a4dc7 (on file with the *Columbia Law Review*) (reporting that Vice President JD Vance met with the leader of Germany's first far-right party since the Nazi party, Alternative for Germany, just nine days before the German election); Glenn Thrush & Maggie Haberman, Trump Gives White Supremacists an Unequivocal Boost, N.Y. Times (Aug. 15, 2017), https://www.nytimes.com/2017/08/15/us/politics/trump-charlottesville-white-nationalists.html (on file with the *Columbia Law Review*) (reporting that President Trump said there were "very fine people on both sides" when speaking in the wake of clashes with counterprotesters at the Unite the Right rally in Charlottesville (internal quotation marks omitted) (quoting President Trump)).

114. See Lois Beckett, Nearly All Gaza Campus Protests in the US Have Been Peaceful, Study Finds, The Guardian (May 10, 2024), https://www.theguardian.com/us-news/article/2024/may/10/peaceful-pro-palestinian-campus-protests [https://perma.cc/GKR6-K6VB] ("Among the 3% of US campus protests through 3 May . . . categorize[d] as violent, only a handful involved physical violence between pro-Palestinian protesters and counter-protesters or other bystanders, rather than property damage or confrontations with police.").

115. U.S. Const. amend. I.

sanctioned despite their nonviolence: It illustrates how seemingly reasonable rules for allocating access to public space—so-called time, place, and manner rules in First Amendment jargon—routinely justify sanctioning nonviolent protesters.[116] At Columbia, such rules grounded the University's most questionable decisions: to suspend recognition of SJP and JVP and to issue student suspensions in order to trigger forced dispersals and arrests by the NYPD in April. Moreover, the manner of their adoption and pressure for enforcement raises significant concerns that Columbia's management of the pro-Palestinian, antigenocide protests was not viewpoint neutral.[117] Indeed, many students and faculty at Columbia, and presumably elsewhere, experienced the adoption of the new policies, not just their harsh administration, as a form of viewpoint discrimination.[118]

It is also concerning that, even at the time of the arrests, it was understood that most charges were unlikely to be pursued.[119] And as anticipated, most of those arrested in the spring for their participation in student protests have had their charges dropped.[120] Certainly, one could

---

116. See Otterman & Saul, supra note 82 (interviewing a prominent First Amendment scholar at Columbia Law, who stated that "the university had articulated a 'reasonable' policy to govern protests and had every right to punish students who violate it" (quoting Vincent A. Blasi)); see also infra notes 159–167 and accompanying text.

117. See Alan Blinder, For Columbia and a Powerful Donor, Months of Talk and Millions at Risk, N.Y. Times (May 10, 2024), https://www.nytimes.com/2024/05/10/us/columbia-university-donor-angelica-berrie.html (on file with the *Columbia Law Review*) ("As the foundation prepared to transfer almost $613,000, Ms. Berrie told Dr. Shafik that future giving would partly hinge on 'evidence that you and leaders across the university are taking appropriate steps to create a tolerant and secure environment for Jewish members of the Columbia community.'" (quoting Email from Angelica Berrie, President, Russell Berrie Found., to Nemat Shafik, President, Columbia Univ. (Jan. 19, 2024))); Huddleston & Mendell, supra note 50 (noting that by the end of October, "[s]everal donors across the Ivy League, including at Columbia, ha[d] recently announced an end to their giving, citing pro-Palestinian activism and concerns regarding rising antisemitism on campuses").

118. See, e.g., Letter from Jameel Jaffer, Exec. Dir., Knight First Amend. Inst., to Minouche Shafik, President, Columbia Univ. (Apr. 22, 2024), https://knightcolumbia.org/blog/knight-institute-calls-for-urgent-course-correction-on-response-to-student-protests-at-columbia-university [https://perma.cc/6NSE-3JGD] (criticizing the University for its decision to bring law enforcement on campus and its "severe and seemingly viewpoint-discriminatory enforcement of rules relating to student demonstrations"). The Knight Institute's statement included no mention of the right of assembly. See id. ("In our view, the University's decisions and policies have become disconnected from the values that are central to the University's life and mission—including free speech, academic freedom, and equality—and we believe a course correction is urgently necessary.").

119. See Christopher Maag, What Charges Will the Protesters Occupying the Columbia Building Face? N.Y. Times (Apr. 30, 2024), https://www.nytimes.com/2024/04/30/nyregion/columbia-protests-hamilton-hall.html (on file with the *Columbia Law Review*) (noting that experts predicted, based on previous protests, that the misdemeanor charges would ultimately be dismissed after a series of continuances).

120. Taft et al., supra note 48. During times of mass protest, it is common for many protest-related charges to be dropped. See, e.g., MacFarquhar, supra note 6 (describing how

argue this is better than the alternative, where nonviolent protesters are both charged and convicted. This objection, however, misses a fundamental concern about First Amendment chill—a concern that is heightened when one learns that one reason charges are often dropped is because, as the prosecutor who dropped criminal trespass changes against those arrested at the University of Texas, Austin, frankly admitted, "jurors . . . would very likely determine that students protesting . . . were simply exercising First Amendment rights."[121]

In sum, this account of the Columbia protests cautions against complaisance about the breadth of discretion existing doctrine gives authorities in the name of order management. It is concerning how often time, place, and manner restrictions are invoked to sanction nonviolent protesters and how the chilling effect of such sanctions, even when they are only threatened, stifles speech; and it is troubling how often these restrictions enhance opportunities for viewpoint discrimination. These concerns, moreover, do not depend on accepting "peaceably" as the only constitutional constraint on the right of assembly or on ignoring legitimate interests in maintaining safety and order both in the public square and on college campuses.

That university administrators at Columbia and other schools around the country spent summer 2024 adopting new policies that more rigorously limit the space available for assembly and the terms of access is doubly concerning.[122] Several such policies designate the lawns and quads at the center of last spring's encampments as off-limits.[123] Columbia's new rules limit events to their hardscapes (not lawns) and permit events to be held only between 8:00 AM and 1:00 PM.[124] Butler Lawn and both sides of

---

prosecutors declined to pursue many protest-related charges following the George Floyd and Breonna Taylor murders).

121. Taft et al., supra note 48 (noting, further, that "charges were rarely a priority for prosecutors, since they are minor and nonviolent").

122. See Alan Blinder, New Training and Tougher Rules: How Colleges Are Trying to Tame Gaza Protests, N.Y. Times (Aug. 24, 2024), https://www.nytimes.com/2024/08/24/us/universities-campus-protests-rules.html (on file with the *Columbia Law Review*) [hereinafter Blinder, Colleges Taming Gaza Protests] (describing how "university officials nationwide are grasping for new approaches as they brace for renewed protests over the Israel-Hamas war," seeking ways to ensure that they can avoid the turmoil of the spring that left "[m]any administrators . . . shaken"); see also Bridget Conley & Jay Ulfelder, Tracking the Pro-Palestinian Protest Movement: Interview With Jay Ulfelder, World Peace Found. (Sept. 9, 2024), https://worldpeacefoundation.org/blog/studying-pro-palestine-protests/ [https://perma.cc/9EEQ-WTP5] ("As the Fall semester begins across the U.S., many universities and colleges have tightened the rules surrounding campus protests. The changes are the result of administrations' efforts to curb campus protests . . . .").

123. See Blinder, Colleges Taming Gaza Protests, supra note 122 (describing multiple college campuses' changes in policies following on-campus protests, including Columbia's changes to campus accessibility).

124. Outdoor Space Policy, Colum. U., https://universitypolicies.columbia.edu/outdoorspace (on file with the *Columbia Law Review*) (last visited Feb. 27, 2025).

the South Lawn are accessible for outdoor gatherings, but only for a short time during the semester and not in advance of commencement.[125] All events still require a University "sponsor," and each group is limited to no more than five consecutive days for an event.[126] Other universities have similarly beefed up their rules and explicitly banned encampments.[127] On several campuses, students are now subject to curfews for their political gatherings and nighttime vigils.[128] This proliferation of rules governing assemblies on campus will inevitably expand the justifications for sanctioning students, thereby shoring up not only administrators' managerial powers but also their informal discretionary powers.[129]

Before turning to exploring existing First Amendment doctrine in detail, it is worth underscoring that the Columbia case study also illustrates two ingrained assumptions about assembly in public discourse: first, that First Amendment protection attaches to expression; and second, that assembly is disruptive, and thus it is not just reasonable but essential to manage and contain the conduct of protests.[130] These assumptions were, in fact, enshrined in the most recent revisions to the University's policies as well the announcement of them. Consider how Interim President Katrina Armstrong's first message to the student body in September 2024 sets up an implicit contrast between expressive speech (protected) and disruptive conduct (sanctionable):

> I would like to make it clear, up front, that *I support the right to free expression* at Columbia. I believe deeply *in the values of free*

125. Id.

126. Id.

127. See Isabelle Taft, How Universities Cracked Down on Pro-Palestinian Activism, N.Y. Times (Nov. 25, 2024), https://www.nytimes.com/2024/11/25/us/university-crackdowns-protests-israel-hamas-war.html (on file with the *Columbia Law Review*) [hereinafter Taft, How Universities Cracked Down] (describing how, in the fall 2024 semester, "[c]olleges and universities . . . tightened rules around protests, locked campus gates and handed down stricter punishments"); see also Isabelle Taft, How Colleges Are Changing Their Rules on Protesting, N.Y. Times (Sept. 12, 2024), https://www.nytimes.com/2024/09/12/us/college-protest-rules.html (on file with the *Columbia Law Review*) (last updated Sept. 14, 2024) ("Across the country, some universities have enacted a wave of new rules and tightened restrictions around protest and speech in an effort to avoid a repeat of the spring semester, when thousands of people were arrested at protests and encampments prompted by the Israel-Hamas war.").

128. See Taft, How Universities Cracked Down, supra note 127 (describing a new prohibition on expressive activity after 11 p.m. at Indiana University Bloomington).

129. See id. (noting that "administrators have often enforced—to the letter—new rules created in response to last spring's unrest," clamping down on silent library sit-ins, candlelight vigils, and solidarity sukkahs).

130. See Timothy Zick, Managed Dissent: The Law of Public Protest 39 (2023) [hereinafter Zick, Managed Dissent] (noting that "one of the most consistent themes of the Court's First Amendment jurisprudence has been its wariness of public protest[s]," a "skepticism . . . rooted in a longstanding distinction . . . between speech and conduct" that is sometimes characterized as a distinction "between 'speech pure' and 'speech-plus'" (quoting Harry Kalven, Jr., The Concept of the Public Forum: *Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 22)).

> *speech, open inquiry, and rigorous debate*. But those rights cannot come at the expense of the rights of others to live, work, and learn here, free from discrimination and harassment.[131]

Columbia University's Rules of Conduct are even more explicit on this point: The University Rules of Conduct "guarantee a wide latitude *in the free expression of opinion* in protests and demonstrations, as long as these do not substantially disrupt the University's academic activities."[132]

No mention is made, in either document, of protection for peaceable assemblies (conduct) in the liberal democratic tradition.[133] Instead, students are placed on alert that disruptions to campus life and the educational mission will not be tolerated. When the rules turn to characterize protests on campus, the emphasis is on protecting them to the degree that they contribute to debate and ideas[134] while emphasizing "the University's function as an incubator of ideas and viewpoints."[135]

The new policies thus send a clear message: Protest actions on campus will only be tolerated if they stay within the bounds of the enhanced permission requirements, which are designed to manage their disruptiveness. An opinion piece in the *New York Times* makes the case even more clearly:

> If an administrator receives a complaint that is primarily related to the content or viewpoint of the speech ("I don't like what he said"), then in a vast majority of circumstances, the administrator has an obligation to protect the speech and to teach the student how to handle exposure to difficult or offensive ideas.
>
> If, however, the complaint is related to conduct—like blocking access to class or making loud noises that prevent study

131. Letter from Katrina A. Armstrong, Interim President, Columbia Univ., to the Columbia Community, (Sept. 5, 2024), https://president.columbia.edu/news/update-our-approach-protests-and-demonstrations (on file with the *Columbia Law Review*) (emphasis added).

132. Comm. on the Rules of Univ. Conduct, Columbia Univ. Senate, FAQs on the 2024 Revisions to the Guidelines to the Rules of University Conduct 2 (2024), https://senate.columbia.edu/sites/default/files/content/Images/Rules_The%20Guidelines%20FAQs_20241014.pdf (on file with the *Columbia Law Review*).

133. See id. (failing to mention peaceable assembly); see also Columbia Univ. Senate, The Guidelines to the Rules of University Conduct (effective Aug. 23, 2024), https://senate.columbia.edu/sites/default/files/content/Committee_Rules%20of%20University%20Conduct/US_The%20Guidelines%20to%20the%20Rules%20of%20University%20Conduct_Endorsed%2020240823.pdf (on file with the *Columbia Law Review*) (same).

134. See Columbia Charters and Statutes, supra note 33, at 137 (recognizing that "[e]very member of our community therefore retains the right to demonstrate, to rally, to picket, to circulate petitions and distribute ideas, to partake in debates, to invite outsiders to participate, and to retain the freedom to express opinions on any subject").

135. Id. (identifying this as the reason why "the principle of free expression must be jealously guarded"). Columbia's discourse tracks the student conduct rules adopted in summer 2024, which consistently emphasize this speech–conduct distinction, combining broad invocations of the importance of debate and free speech on campus with unforgiving rules limiting protests on campus. See Blinder, supra note 122.

> or sleep—or is related to the time, place or manner of the speech (you can chant in the quad but not in the dorm at 3 a.m., or you can protest in the quad, but you can't seize it so others are prevented from using the space), then universities often have to react . . . . [T]he schools have no legal choice.[136]

Regulation of protests, in other words, is not just reasonable but necessary because protest is conduct that is disruptive. Some will object, at this point, that Columbia and this opinion writer are surely right. Universities are not the proverbial public square. Disruptions to the educational mission of a university should not be tolerated. These are important concerns to which this Piece will return, but for now it is worth pointing out that it was Shafik's decision to call the NYPD onto campus, not the encampment or the actions of protesters, that prevented Columbia students from using the library during exam period or taking those exams in person while causing significant stress.

It is finally time to turn to an elaboration of existing First Amendment doctrine to explain how it broadly vindicates the policies and decisions that shaped how universities handled campus protests after October 7, 2023. Part II will reveal, inter alia, how existing doctrine endorses universities' recent invocation of a distinction between speech (protected) and conduct (unprotected), however problematic that distinction is given the First Amendment's explicit protection for peaceable assembly.

II. EXISTING FIRST AMENDMENT PROTECTIONS FOR ASSEMBLY

Protection for assemblies is not governed by the Assembly Clause.[137] Instead, those who gather with others for political ends are forced to seek constitutional protections under speech doctrines, designed to protect values orthogonal to those that underlie the right of assembly.[138] Unsurprisingly, protesters are often left holding a First Amendment shield riddled with exceptions and weak spots.[139]

In the mid-twentieth century, the Supreme Court "collapsed the repertoire of rights protected by the First Amendment's text into a single

---

136. David French, Opinion, Colleges Can't Say They Weren't Warned, N.Y. Times (Aug. 18, 2024), https://www.nytimes.com/2024/08/18/opinion/ucla-harvard-protests-rulings.html (on file with the *Columbia Law Review*).

137. See John D. Inazu, The Forgotten Freedom of Assembly, 84 Tul. L. Rev. 565, 610 (2010) (describing the doctrinal trajectory and identifying 1983 as the year when "the Court swept the remnants of freedom of assembly within the ambit of free speech law").

138. See Abu El-Haj, Liberal First Amendment, supra note 9, at 546–47 (elaborating on how misconceptions of the processes of self-governance led "the New Deal and Warren Courts [to] collapse[] the repertoire of rights protected by the First Amendment's text into a single freedom of expression doctrine—assuming it would be costless").

139. See Zick, Managed Dissent, supra note 130, at 35 ("By the measure of a society that boasts of its 'uninhibited, wide-open, and robust' expressive freedoms, protest in the U.S. is over-managed.").

freedom of expression doctrine."[140] In *Thomas v. Collins*, the Court suggested that the separate clauses "though not identical, are inseparable" and should be understood as "cognate rights . . . united in the First Article's assurance."[141] Assembly is, therefore, protected by generic speech doctrines as a form of expressive conduct under a test originally designed to adjudicate when conduct, such as burning a draft card or defacing the American flag, constitutes expression worthy of First Amendment protection.[142] Once coverage has been established, the rights of those who seek to assemble are governed by two doctrines: the public forum doctrine and the time, place, and manner doctrine.[143] Public universities operate under variants of these doctrines, as do private universities, albeit largely by choice.[144] This Part reviews these doctrines and other legal considerations that shaped universities' responses to pro-Palestinian, antigenocide protests in the 2023 to 2024 academic year.

A. *The Public Forum Doctrine and the Availability of Space to Assemble*

The public forum doctrine secures the availability of the proverbial public square for speech and assembly, preventing the government from banning protests and other assemblies in public parks and public streets. This principle was first established in *Hague v. Committee for Industrial Organization*, in which the Supreme Court declared that the use of "streets and parks . . . for purposes of assembly, communicating thoughts between

---

140. Abu El-Haj, Liberal First Amendment, supra note 9, at 547; see also id. at 546 (explaining that the decision was driven by a mistaken "discursive conception of self-governance" shared by legal scholars "in which voice and ideas are considered the drivers of political change").

141. 323 U.S. 516, 530 (1945).

142. See Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969) (suggesting that while picketing and parading are conduct, "our decisions have also made clear that picketing and parading may nonetheless constitute methods of expression, entitled to First Amendment protection" (citing Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Thornhill v. Alabama, 310 U.S. 88 (1940))). While First Amendment doctrine is predicated on the assumption that the amendment protects speech, not conduct, it recognizes that some conduct may be sufficiently expressive as to fall within the First Amendment's protection for speech. See, e.g., Spence v. Washington, 418 U.S. 405, 408, 415 (1974) (per curiam) (reversing a college student's conviction for hanging a privately owned United States flag adorned with peace symbols in opposition to the invasion of Cambodia and the Kent State massacre without engaging in unlawful action or breaching the peace); United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (upholding the defendant's conviction for burning his draft card while establishing parameters for protecting symbolic speech).

143. For a succinct description of the development of these doctrines and the ways they cabin protest, see Zick, Managed Dissent, supra note 130, at 35–41.

144. In some states, state law requires private universities to abide by First Amendment principles. See, e.g., Cal. Educ. Code § 94367 (2025); Commonwealth v. Tate, 432 A.2d 1382, 1387 (Pa. 1981) (holding that "[i]n these circumstances, we are of the view that" the private college has violated "the Constitution of this Commonwealth[,] [which] protects appellants' invaluable right to freedom of expression").

citizens, and discussing public questions" was an essential "part of the privileges, immunities, rights, and liberties of citizens."[145]

The quintessential public forum is a place that has historically been available to the public for expressive purposes.[146] Public streets and parks that are adjacent or run through private universities are thus available for assembly.[147] Closure of a public forum must meet strict scrutiny.[148] Absent a compelling state interest and proof that the closure is narrowly tailored to vindicate that interest, a quintessential public forum may not be closed to expressive activity. The government is also prohibited from engaging in content or viewpoint discrimination in *any* expressive forum it operates.[149] It is, thus, prohibited from selectively banning gatherings based on their subject or viewpoint.[150]

The public forum doctrine, even in its current form, is significant, but it does not prevent the government from making most public properties unavailable for assembly.[151] Indeed, many places, including those imbued

---

145. 307 U.S. 496, 514–16 (1939) (rejecting the suggestion that the government, like any private actor, could ban speech on its property). The doctrine got its name from an article by Harry Kalven, Jr., The Concept of the Public Forum: *Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 13 (noting that *Hague* creates "a kind of First-Amendment easement" when it comes to the use of public streets and parks for expressive purposes).

146. See *Hague*, 307 U.S. at 515 (explaining that streets and parks are public forums because they "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"). There is no First Amendment right to assemble on private property. See Hudgens v. Nat'l Lab. Rels. Bd., 424 U.S. 507, 517–21 (1976) (affirming the principle established in *Lloyd Corp. v. Tanner* that First Amendment rights do not extend to private property); Lloyd Corp. v. Tanner, 407 U.S. 551, 568 (1972) ("[T]his Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned . . . .").

147. See United States v. Grace, 461 U.S. 171, 179–80 (1983) (striking down a ban on leafletting in front of the Supreme Court because the statute applied to a sidewalk that was contiguous to a public street).

148. Cornelius v. NAACP LDF, 473 U.S. 788, 800 (1985) ("Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."); see also *Grace*, 461 U.S. at 177 (reiterating that "[i]n [public forums], the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations").

149. See, e.g., Christian Legal Soc'y v. Martinez, 561 U.S. 661, 679 (2010) ("Any access barrier [to a public forum] must be reasonable and viewpoint neutral." (citation omitted)); see also Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." (citing Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972))).

150. See *Mosley*, 408 U.S. at 96 (holding that "[o]nce a forum is opened up to assembly or speaking by some groups," the First Amendment precludes the government from selecting who may participate in it based on content, defined as "what they intend to say," or viewpoint).

151. The public forum doctrine recognizes that certain public spaces can become public forums based on the government's behavior, in particular when the government has

with cultural significance, such as the Lincoln and Jefferson Memorials, and those near important centers of power, such as the plaza in front of the Supreme Court and the grounds in front of the Capitol, are off-limits for assembly.[152]

University administrators appear to operate as if they believe they are subject to the public forum doctrine under which the only places that must be made available on university campuses are the public streets and parks that adjoin them.[153] University policies that limit the places that are available for student gatherings on campus, including bans on sit-ins and occupations of classrooms and administrative buildings, are invoking this line of precedent. This precedent also explains why universities across the country spent summer 2024 further limiting the places that are available for student gatherings on campus. For a university general counsel, it is the path of least resistance. Where a forum is closed, a public university has no First Amendment obligations other than the generic prohibition on viewpoint discrimination.[154] A private university that does the same can in good faith maintain that its managerial approach abides by existing First Amendment doctrine.

While on the topic of access, one aside about the forced removal of the encampment on Columbia's campus is appropriate. Even though there is no constitutional right to gather on private property,[155] student protesters at Columbia had a legal right to be on Columbia's property. Yes, they were violating university rules, but they were otherwise on private property that they had been granted access to and, indeed, that they paid to access. Absent the late-night suspensions for violating student conduct policies, they were legally present on Columbia's campus, and the NYPD

---

allowed expressive activities in them. The doctrine also allows for a variety of more limited types of public forums. Most importantly, the government may designate certain spaces as limited public forums, available only for certain forms of expression. For a concise summary as it pertains to protest, see Zick, Managed Dissent, supra note 130, at 50–51 (explaining how the public forum doctrine "grants officials broad authority to determine where protest and other speech activities can take place"). Even in a limited public forum, however, viewpoint discrimination is unconstitutional. See *Martinez*, 561 U.S. at 679 (noting that any barriers to accessing a limited public forum must be viewpoint neutral).

152. Zick, Managed Dissent, supra note 130, at 50–51.

153. For an excellent account of both how the formal applicability of the public forum doctrine is untested when applied to universities and why universities should operate with "[a] presumption of access to campus common areas," see id. at 123–26 (noting that while "[t]he Supreme Court has not explicitly *required* lower courts to apply the public forum doctrine to university campuses," its own decisions involving "challenges to university free speech policies" default to that doctrine).

154. See Cornelius v. NAACP LDF, 473 U.S. 788, 811 (1985) (explaining that "[t]he existence of reasonable grounds for limiting access to a nonpublic forum" does not immunize "a regulation that is in reality a façade for viewpoint-based discrimination" from its constitutional fate).

155. See supra note 146.

would not have had a legal basis for arresting them.[156] The dark irony, then, is that Columbia suspended its students to create the legal violation of trespass, justifying the police action that led to many arrests, but few charges.[157]

B. *The Time, Place, and Manner Doctrine and Advanced Regulation of Assembly*

Even in a public forum, assemblies may be regulated. Under the time, place, and manner doctrine, authorities are permitted to manage assemblies through content-neutral rules designed specifically to limit the duration, location, and manner of gatherings.[158] Even as the Court established the foundations of the public forum doctrine, in *Hague*, it sanctioned such limitations:

> The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[159]

In *Cox v. Louisiana*, the Court went further, uncritically accepting that even violations of traffic regulations are a permissible basis on which to arrest individuals or disperse crowds.[160] The Court justified this position by

---

156. See supra notes 88–90 and accompanying text.

157. Even among the forty-six people arrested for occupying Hamilton Hall, thirty-one had their charges dismissed by a state judge. Erik Ortiz, Daniel Arkin & Melissa Chan, Manhattan DA Drops Charges Against Most of the Columbia University Protesters, NBC News (June 20, 2024), https://www.nbcnews.com/news/us-news/manhattan-da-drops-charges-columbia-university-protesters-hamilton-hal-rcna157976 [https://perma.cc/6LQU-9L2N] (noting that "[p]rosecutors told 14 others that their cases would be dropped if they avoid being arrested in the next six months," an offer the defendants refused).

158. See United States v. Grace, 461 U.S. 171, 177 (1983) (explaining that, in a public forum, "the government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication'" (quoting Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983))).

159. 307 U.S. 496, 515–16 (1939); see also Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (upholding municipal "authority to control the use of its public streets for parades or processions" and to regulate the "time, place and manner [of such activities] in relation to the other proper uses of the streets," so long as they do so "without unfair discrimination").

160. See 379 U.S. 536, 554–55 (1965) (indicating protesters could be arrested for violating traffic regulations because "[g]overnmental authorities have the duty and responsibility to keep their streets open and available for movement"). But see Committee, General Comment 37, supra note 23, ¶ 85 ("An assembly that remains peaceful while nevertheless causing a high level of disruption, such as the extended blocking of traffic, may be dispersed, as a rule, only if the disruption is 'serious and sustained.'" (quoting Hum. Rts.

asserting that the First Amendment does not "afford the same kind of freedom to those who would *communicate ideas by conduct* such as patrolling, marching, and picketing on streets and highways, as [it] . . . afford[s] to those who *communicate ideas by pure speech*."[161]

The invocation of the foundational speech–conduct distinction to justify a lesser level of protection for assembly as conduct is only possible if one ignores, as the Warren Court did, the First Amendment's explicit protection of assembly.[162] The consequences have been great.

By suggesting that assembly is a lesser form of expression, the *Cox* principle underwrites the doctrine's permissive attitude to regulations that govern assembly in advance without regard to the level of disorder.[163] The Court has explicitly rejected the notion that requiring individuals to obtain permission in advance of gathering constitutes a prior restraint.[164] Instead, under existing doctrine, a content-neutral regulation of the time, place, and manner of gathering will be upheld where the government can show that its rule is narrowly tailored to a significant government interest and leaves open ample alternative channels for communication.[165] Courts have accepted a wide range of governmental interests as significant[166] and emphasized that the government need not demonstrate that its requirement is the least restrictive means of serving the statutory goal to meet the

---

Council, Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies, ¶ 62, U.N. Doc. A/HRC/31/66 (Feb. 4, 2016))).

161. *Cox*, 379 U.S. at 555 (emphasis added).

162. See Zick, Managed Dissent, supra note 130, at 39 (noting that that "one of the most consistent themes of the Court's First Amendment jurisprudence has been its wariness of public protest" and explaining "that skepticism is rooted in a longstanding distinction the Court has tried to draw between speech and conduct").

163. See id. at 41 (demonstrating that "[t]he law of public protest reflects managerial biases against protest and in favor of the maintenance of public order"); see also id. at 68–75 (describing the implications of time, place, and management doctrine for assembling).

164. See Thomas v. Chi. Park Dist., 534 U.S. 316, 322 (2002) (holding that an advance permit requirement for large-scale events is not a prior restraint subject to the procedural safeguards of *Freedman v. Maryland*, a movie licensing case).

165. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989); see also Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.").

166. See, e.g., Hill v. Colorado, 530 U.S. 703, 716 (2000) (recognizing governmental interests in both facilitating ingress and egress from medical facilities and in permitting "[t]he unwilling listener[] . . . [to] avoid[] unwanted communication"). But see id. at 750–51 (Scalia, J., dissenting) (rejecting the proposition that the caselaw supports a right of "the 'unwilling listener[] . . . "to be let alone"'" (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))); *Clark*, 468 U.S. at 299 (accepting that "there is a substantial Government interest in conserving park property"); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969) (asserting that municipalities have a right to "exercise a great deal of control" over the use of its public spaces "in the interest of traffic regulation and public safety").

narrow tailoring standard.[167] Moreover, a regulation will be accepted as content neutral as long as the government has not "adopted a regulation of speech because of disagreement with the message it conveys."[168] There are only two strict limitations: Rules governing access to public places must be sufficiently precise to prevent arbitrary exercises of administrative discretion,[169] and authorities may not engage in viewpoint discrimination in enforcing their rules.[170]

The doctrine, in practice, permits authorities to regulate and restrict the time, place, and manner of gatherings in advance rather freely. Those seeking to gather in public, including for political ends, are commonly required to pay application fees and purchase liability insurance to get a permit.[171] Permits are often time-limited or restricted to daylight hours, and groups are also often told that certain forms of assembling are prohibited.[172]

---

167. See *Ward*, 491 U.S. at 791 (holding that the government does not need to prove its regulation is the least restrictive means of furthering its legitimate ends).

168. See id. (noting that, with respect to content neutrality, "[t]he principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys" (citing *Clark*, 468 U.S. at 295)); see also *Hill*, 530 U.S. at 719, 724 (citing *Ward*'s language with approval and further clarifying that a law restricting speech does not become content based simply because it targets a location associated with a particular viewpoint or group like lunchrooms, airports, or abortion clinics). One might have thought courts would look askance at regulations specifically adopted in the face of unpopular protests, but when the issue arose during Occupy, the lower courts divided on the question. Compare Watters v. Otter, 955 F. Supp. 2d 1178, 1183, 1187 (D. Idaho 2013) (upholding a ban on camping on state grounds despite evidence that it was passed in response to Occupy Boise's tent city and emphasizing that the state has a substantial interest in maintaining its grounds in an attractive and intact condition), with Occupy Columbia v. Haley, 922 F. Supp. 2d 524, 532 (D.S.C. 2013) (finding that the plaintiffs were wrongfully arrested for trespass under a time and place rule adopted in response to their protest). And the Court has arguably implied that the fact a restriction's adoption is a response to a particular issue does not jeopardize viewpoint neutrality. See McCullen v. Coakley, 573 U.S. 464, 482 (2014) (arguing that the fact that a state adopts a restriction "in response to a problem that was, in its experience, limited to abortion clinics" did not render it viewpoint discriminatory).

169. See *Shuttlesworth*, 394 U.S. at 150, 159 (vacating the conviction of a protester who was sentenced to nearly 140 days of hard labor for marching without a permit on the grounds that the ordinance was unconstitutionally vague because it left the Commission with "unbridled and absolute power" to deny access to public streets).

170. See Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (stressing that permit restrictions and other reasonable regulations must be enforced "without unfair discrimination"). Proving this as a factual matter, however, is often difficult, as the Columbia case study illustrates.

171. See Zick, Managed Dissent, supra note 130, at 51–54 (offering a comprehensive description of requirements to gather on Lee Circle in Richmond); see also Abu El-Haj, Neglected Right of Assembly, supra note 28, at 548 (describing permit requirements in various municipalities).

172. See Abu El-Haj, Neglected Right of Assembly, supra note 28, 553–54 (explaining that cities specify the conditions under which assembling is permitted).

Advanced regulation is not just understood to be constitutional but also championed as eminently reasonable.[173] It is thus not surprising that universities, including private universities, were quick to pass time, place, and manner restrictions in response to activism after October 7, 2023.[174] The doctrine is highly amenable to such regulation. It also supports sanctioning individuals for failing to abide by such restrictions, absent evidence of inconsistent application of the rules, a sign of viewpoint discrimination.[175] *Cox* specifically endorses the arrest of student protesters for trespass after they have been suspended.[176] The doctrine would have thus supported Columbia's decision to suspend students for noncompliance with the new University rules and their subsequent arrests had it been a public university.[177]

The adoption of bans on encampments on campus is on particularly strong footing. In *Clark v. Community for Creative Non-Violence*, the Supreme Court upheld a National Park Service regulation prohibiting camping in any park not designated a camping ground as a reasonable regulation of the manner of assembly.[178] In doing so, the Court explicitly affirmed that authorities can regulate assemblies in the interest of maintaining the aesthetics of their grounds.[179] One can easily see general counsel making an

---

173. See, e.g., Whittington, supra note 11, at 95–96 (praising "time, place, and manner regulations" as efforts to "channel free speech in productive ways and coordinate the many activities in which citizens are engaged in the shared public space").

174. See supra notes 48–49 and accompanying text.

175. See Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 (1984) ("All those who would resort to the parks must abide by otherwise valid rules for their use, just as they must observe the traffic laws, sanitation regulations, and laws to preserve the public peace.").

176. See Cox v. Louisiana, 379 U.S. 536, 554–55 (1965) (suggesting that protesters can constitutionally be arrested when their actions interfere with the government's "duty and responsibility" to maintain order, including "keep[ing] their streets open and available for movement").

177. Columbia's actions would not be consistent with First Amendment doctrine if it could be proven that the university engaged in selective enforcement based on viewpoint. See supra notes 150–151, 154, 168 and accompanying text. The law also does not sanction excessive use of force during arrest. See Stuart M. Speiser, Charles F. Krause & Alfred W. Gans, Use of Force; Excessive Force, 8 American Law of Torts § 26:25 (2025) (noting that, under the law, "police or other peace officers . . . may use force so long as it is not excessive").

178. See 468 U.S. at 289–90, 294–96 (upholding the ban on camping as applied to the National Mall and Lafayette Park, which is adjacent to the White House, for "a demonstration intended to call attention to the plight of the homeless"). The facts of *Clark*, to be sure, were arguably more favorable to the group's First Amendment interests than the outright ban at Columbia, insofar as the National Park Service had issued a renewable permit that allowed for the erection of two symbolic tent cities containing a total of 60 tents capable of accommodating 150 people during the daytime. Id. at 293. The only restriction was on overnight sleeping. Id.

179. See id. at 296 (accepting that the National Park Service has a "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"); see also Students Against Apartheid Coal. v. O'Neil, 838 F.2d 735, 736 (4th Cir. 1988)

analogous argument: The University has a "substantial interest" in maintaining its quads and other public spaces "in an attractive and intact condition" for students' enjoyment and graduation events.[180]

In sum, even at public universities, students and faculty will struggle to find a foothold from which to challenge university administrators' actions since October 7, 2023. The nonviolence of those engaged in the protests, their desire to seek redress, and the peacefulness of the encampments are all immaterial under existing First Amendment analysis.

C. *Complexity of Pro-Palestinian Campus Protests*

From the start, one thread in the argument for limiting or ending student protests of Israel's execution of the war in Gaza, including at Columbia, has been that certain slogans and chants criticizing Israel constitute antisemitic hate speech.[181] Assemblies that espouse hateful speech are disruptive (arguably even "unpeaceable"), providing an independent justification for ending the protests and sanctioning those involved.[182] The reasonableness of taking such action is enhanced when one considers that the fraught political context significantly elevates the likelihood of counterprotests and tumult.[183] Or so the argument goes.

(upholding a university's removal of symbolic shanties protesting its investment in South African corporations for violating a revised lawn-use policy designed to preserve the integrity of the upper lawn).

180. *Clark*, 468 U.S. at 296.

181. The concern was most acute around the phrases "From the River to the Sea" and "Long Live the Intifada." See Bernstein et al., supra note 76 (stating Shafik's answer that such phrases are antisemitic and deserve reprimand). But for some, the very naming of Israel as a settler-colonial state and its actions in Gaza a genocide against the Palestinians constitutes antisemitic hate speech. For a nuanced discussion of the argument in favor of viewing such words as hateful, see Noah Feldman, The New Antisemitism, Time (Feb. 27, 2024), https://time.com/6763293/antisemitism/ [https://perma.cc/GZ2H-X8UE]. But see Ethan Fraenkel, Noam Chen-Zion, Caitlin Liss & Charlie Steinman, Opinion, Task Force on Antisemitism, Can You Hear Us Now?, Colum. Spectator (June 11, 2024), https://www.columbiaspectator.com/opinion/2024/06/11/task-force-on-antisemitism-can-you-hear-us-now/ [https://perma.cc/E5XP-WLYQ] (criticizing the University's Task Force on Antisemitism for conflating criticism of Israel with antisemitism and noting that ostracization for one's political beliefs, while painful, "does not constitute discrimination" nor are all feelings of endangerment the same as "*being* endangered").

182. In some constitutional traditions, such assemblies are considered regulable because they disrupt liberal democratic values and thus threaten public order. Orsolya Salát, Peaceful Intentions, Peaceful Conduct, *in* The Oxford Handbook of Peaceful Assembly, supra note 10, at 219, 230–31 [hereinafter Salát, Peaceful Intentions].

183. Indeed, pro-Palestinian, antigenocide protests drew counterprotests, enhancing the risk of violence. See, e.g., Wolfe & Royer, supra note 44 (reporting on tensions between pro-Palestinian and pro-Israeli protesters at UCLA). At UCLA, for example, counterprotesters infiltrated campus, clashing with those in the encampment as the counterprotesters began to dismantle the camp. Bedi et al., supra note 111. While universities certainly have a legitimate interest in preventing their faculty and students from getting hurt, bringing in the police—even in situations in which their presence is justifiable—does not necessarily

Existing First Amendment doctrine, however, is clear: There is no hate speech exception to the freedom of speech.[184] Hate speech is protected speech.[185] This principle was articulated by the Seventh Circuit in a seminal case that arose when the Village of Skokie, a suburb of Chicago and home to thousands of Holocaust survivors, sought to prevent a proposed march through the village by the National Socialist Party of America.[186] In rejecting that bid, the Seventh Circuit proclaimed, "It is perfectly clear that a state [may] not 'make criminal the peaceful expression of unpopular views.'"[187] That calculus, it emphasized, does not change because the proposed march would "seriously disturb, emotionally and mentally" many residents and "inflict[] . . . psychic trauma on resident [H]olocaust survivors and other Jewish residents."[188]

Hate speech that constitutes a "true threat"[189] or "hate crime"[190] can be sanctioned without running afoul of the First Amendment. But these

---

help, as the accounts from UCLA show. See id. ("Throughout the intermittent violence, officers were captured on video standing about 300 feet away from the area for roughly an hour, without stepping in."); see also Abu El-Haj, All Assemble, supra note 7, at 1027–28 (highlighting evidence that assemblies frequently escalate into violence at the hands of government officials).

184. It should be acknowledged that, even on the Court, many find this doctrinal absolutism deeply unsatisfying and worry its justifications ignore interests in equality and inclusion on the other side of the ledger. *R.A.V. v. City of St. Paul* drew three concurrences, one of which expressed concern that the Court had paid insufficient attention to the interest in criminalizing hate speech. See 505 U.S. 377, 402 (1992) (White, J., concurring in the judgment) (specifically criticizing "the majority [for] legitimat[ing] hate speech as a form of public discussion").

185. See Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting))).

186. See Collin v. Smith, 578 F.2d 1197, 1199 (7th Cir. 1978).

187. Id. at 1199, 1203, 1206 (quoting Edwards v. South Carolina, 372 U.S. 229, 237 (1963)). The Seventh Circuit characterizes this as a basic First Amendment principle while noting that "[u]nder the First Amendment there is no such thing as a false idea." Id. at 1203 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974)).

188. See id. at 1205–06 (striking down a content-based ordinance that would have restricted the Nazi Party's march).

189. See Counterman v. Colorado, 143 S. Ct. 2106, 2111 (2023) ("True threats of violence are outside the bounds of First Amendment protection and punishable as crimes."); Watts v. United States, 394 U.S. 705, 707–08 (1969) (per curiam) (holding that a statute may "criminal[ize] a form of pure speech" when there is "a true 'threat'" without running afoul of the First Amendment).

190. See Wisconsin v. Mitchell, 508 U.S. 476, 489–90 (1993) (upholding the constitutionality of sentencing enhancements for hate crimes on the grounds that they are routinely imposed in relation to a defendant's motivation and that penalizing motivation is distinct from penalizing expression).

exceptions are defined narrowly.[191] A true threat is defined as a "serious expression of an intent to commit an act of unlawful violence to a *particular* individual or group of individuals."[192] The Court has underscored that while the true threats doctrine vindicates a state's legitimate interest in "'protect[ing] individuals from the fear of violence' and 'from the disruption that fear engenders,'"[193] it is not constitutional for the government to criminalize "political hyperbole" or crack down on "vehement, caustic, and sometimes unpleasantly sharp attacks" on others.[194] Emotional harm to others is also not sufficient to eject speech from constitutional protection: "The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected."[195]

The cases draw fine lines.[196] Not all hate speech is a true threat, and not all statutes prohibiting hate crimes are constitutional. A cross may be burned "to announce a rally or to express [participants'] views about racial supremacy," but the constitutional shield dissolves when the burning of the cross is "so threatening and so directed at an individual as to 'by its very [execution] inflict injury.'"[197] Thus, in *R.A.V. v. City of St. Paul*, the Court struck down an ordinance that proscribed symbols, objects, and graffiti that "arouse 'anger, alarm, or resentment in others on the basis of

---

191. See *Counterman*, 143 S. Ct. at 2114 (clarifying that "[t]rue threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence'" (second alteration in original) (quoting Virginia v. Black, 538 U.S. 343, 359 (2003))); R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (striking down an ordinance that prohibited hate speech as facially unconstitutional).

192. *Black*, 538 U.S. at 359 (emphasis added); see also *Counterman*, 143 S. Ct. at 2137 (Barrett, J., dissenting) (reiterating that a statement must threaten violence "to a particular individual or group of individuals" to fall outside the First Amendment's scope (internal quotation marks omitted) (quoting *Black*, 538 U.S. at 359)).

193. *Black*, 538 U.S. at 359–60 (quoting *R.A.V.*, 505 U.S. at 388) (clarifying that the true threats doctrine does not require that "[t]he speaker . . . actually intend[s] to carry out the threat"); see also *Counterman*, 143 S. Ct. at 2114 ("Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat . . . . The existence of a threat depends . . . on 'what the statement conveys' to the person on the other end." (quoting Elonis v. United States, 575 U.S. 723, 733 (2015))).

194. *Watts*, 394 U.S. at 708 (internal quotation marks omitted) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

195. *R.A.V.*, 505 U.S. at 414 (White, J., concurring in the judgment).

196. One driver of this fine line is that the relevant precedent only occasionally straddles the line between "incitement to disorder . . . [and] political 'advocacy.'" See *Counterman*, 143 S. Ct. at 2118 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)) (recognizing that "[f]or the most part, the speech on the other side of the true-threats boundary line" does not involve political advocacy or speech "central to the theory of the First Amendment").

197. *R.A.V.*, 505 U.S. at 436 (Stevens, J., concurring in the judgment) (second alteration in original) (stressing that "[s]uch a limited proscription scarcely offends the First Amendment").

race, color, creed, religion or gender.'"[198] But no Justice suggested that "burn[ing] [a] cross inside the fenced yard of a black family" is protected by the First Amendment.[199] Similarly, in *Virginia v. Black*, the Court struck down the statute's treatment of "cross burning as prima facie evidence of intent to intimidate."[200] Still, a majority on the Court agreed that Virginia could criminalize the burning of a cross "with the intent to intimidate" any person or groups of persons.[201]

Thus, even if one were to accept for purposes of argument that many of the chants, assertions, and slogans at the campus protests did constitute hate speech, state universities could not have banned or punished students for such speech. Indeed, the doctrine creates an affirmative obligation to prevent hecklers from canceling hateful speech.[202] As the Sixth Circuit

198. Id. at 386, 393, 395 (majority opinion) (indicating that the critical flaw in the content-based distinction was that it evidenced a government "regulat[ing] . . . based on hostility towards its protected ideological content"). St. Paul understood itself to be regulating "fighting words," defined as words "directed against individuals to provoke violence or to inflict injury" rather than to "exchang[e] views, rally[] supporters, or register[] a protest." Id. at 401 (White, J., concurring in the judgment) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)); see also *Black*, 538 U.S. at 359 (defining "fighting words" as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction" (internal quotation marks omitted) (quoting Cohen v. California, 403 U.S. 15, 20 (1971))).

199. *R.A.V.*, 505 U.S. at 379–80, 380 n.1 (acknowledging that "this conduct could have been punished under any of a number of laws," including a statute criminalizing "terroristic threats"); id. at 411–14 (White, J., concurring in the judgment) (concurring on the grounds that the ordinance was overbroad rather than unconstitutional as applied to the defendants); id. at 416 (Blackmun, J., concurring in the judgment) ("I see no First Amendment values . . . compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing . . . Saint Paul from specifically punishing the race-based fighting words that so prejudice their community.").

200. 538 U.S. at 347–48; see also id. at 385–86 (Souter, J., concurring in the judgment in part and dissenting in part) (arguing that the Virginia statute is unconstitutional and cannot be saved by any exception under *R.A.V.*).

201. Id. at 363 (plurality opinion) (O'Connor, J.); see also id. at 356–57 (distinguishing between situations in which cross burning is a "potent symbol[] of shared group identity and ideology" and those in which it "is *directed at a particular person* . . . as a message of intimidation, designed to inspire in the victim a fear of bodily harm" (emphasis added)); id. at 368 (Stevens, J., concurring) ("Cross burning with 'an intent to intimidate' . . . unquestionably qualifies as the kind of threat that is unprotected by the First Amendment." (quoting Va. Code. Ann. § 18.2-423 (1996))); id. at 367 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) (agreeing that a state may ban cross burning with the intent to intimidate while dissenting from other portions of the Court's invalidation of the prima facie evidence provision).

202. See Bible Believers v. Wayne County, 805 F.3d 228, 233, 243 (6th Cir. 2015) (en banc) (holding that the police department had clearly violated the First Amendment when it "effectuated a heckler's veto by cutting off the Bible Believers' protected speech in response to a hostile crowd's reaction"). In the case, the Bible Believers, "a group of self-described Christian evangelists," paraded through an annual celebration of "Arab heritage and culture" in Dearborn, Michigan, "preaching hate and denigration" while "one . . . carried a severed pig's head on a spike, because . . . it would 'ke[ep] [the Muslims] at bay.'" Id.

recently explained, this rule arises from "the First Amendment['s] demand[] that we tolerate the viewpoints of others with whom we may disagree."[203] The First Amendment tells us that speech must be protected even if it "is loathsome in its intolerance, designed to cause offense" and succeeds in that aim because "[r]obust discourse" is the path to "a better understanding (or even an appreciation) of the people whose views we once feared simply because they appeared foreign to our own exposure."[204]

Unbound by the First Amendment, private universities could have tried to create daylight between their policies and existing First Amendment doctrine, pointing, for instance, to the unique importance of inclusion to universities as educational institutions. In the end, however, rather than reopening the campus speech battle directly,[205] the question that ultimately played an outsized role in the debates, at both public and private institutions, was whether the presence and persistence of criticism of Israel in pro-Palestinian protests created grounds for Title VI liability.[206]

Title VI protects students from discrimination based on race, color, or national origin, including their actual or perceived shared ancestry or ethnic characteristics, citizenship, or residency in a nation with a distinct religious identity.[207] It further mandates that universities "take immediate and appropriate action to respond to harassment that creates a hostile environment" for students in a protected class.[208] A hostile environment is defined as the existence of "harassing conduct that is sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from" the educational experience

---

at 234–36, 238 (third and fourth alteratons in original) (quoting Record 28–A, Raw Festival Footage, at 00:49:45). The physical altercation began after the Bible Believers taunted "a group . . . of approximately thirty teenagers" with messages such as "[y]our religion will send you to hell" and "[y]ou believe in a prophet who is a pervert." Id at 238–39 (second alteration in original) (internal quotation marks omitted) (quoting Record 28–A, Raw Festival Footage, at 00:03:30, 00:03:56, 00:04:38).

203. Id. at 233.

204. Id. at 233–34.

205. See Whittington, supra note 11, at 78, 82, 88–92 (summarizing the hate speech debate on college campuses and related litigation).

206. See Jason Brownlee, Efforts to Weaponize Title VI Against Pro-Palestine Speech on University Campuses, 30 Tex. J. on C.L. & C.R. 52, 55 (2024) (tracing "how opponents of the Palestinian solidarity movement have attempted to use Title VI since 2004 to constrain pro-Palestine advocacy" on college campuses, despite the profound problems with the legal argument).

207. 42 U.S.C. § 2000d (2018); 34 C.F.R. § 100.3(b)(1)(v) (2025).

208. Catherine E. Lhamon, Assistant Sec'y for C.R., U.S. Dep't of Educ., Dear Colleague Letter: Addressing Discrimination Against Jewish Students 1 (May 25, 2023), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/antisemitism-dcl.pdf [https://perma.cc/SM9A-UCRP] [hereinafter Lhamon, May 25, 2023, Dear Colleague Letter].

being provided.[209] Case law further clarifies that the harassment must be objectively offensive.[210]

The precise scope of a university's legal obligations under Title VI in the context of campus protests, however, is unclear and contested.[211] The boundary between constitutionally protected speech and discriminatory conduct is disputed.[212] Meanwhile, at least one district court has already identified First Amendment limitations to Title VI's applicability.[213]

The lack of clarity on the constitutional boundary around Title VI liability has been fueled by the recent actions of the Department of Education. Before October 7, 2023, the Department's guidance spoke only to discrete examples of speech targeted at an individual (e.g., describing a Muslim student who is repeatedly told "you started 9/11" and called a "terrorist") or of educators refusing to address similarly specific unwanted speech targeted at a particular individual (e.g., describing a teacher who advises a Jewish student to "just ignore" the repeated placement of notes

---

209. Id. at 1–2.

210. See, e.g., Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 666 (2d Cir. 2012) (upholding a jury verdict against a school district for its deliberate indifference to the targeted and escalating racist harassment of a biracial student by fellow students for three-and-a-half years); see also Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (recognizing educational institutions' liability for hostile environment in the context of Title IX when an institution "acts with deliberate indifference" to harassment that is "so severe, pervasive, and *objectively* offensive that it effectively bars the victim's access to an educational opportunity or benefit" (emphasis added)).

211. See Evelyn Douek & Genevieve Lakier, Title VI as a Jawbone, Knight First Amend. Inst. at Colum. U. (Sept. 26, 2024), https://knightcolumbia.org/blog/title-vi-as-a-jawbone [https://perma.cc/HY67-RFHA] (recognizing that "[e]xactly what Title VI requires of university administrators in response to . . . protests that make political claims that can be translated into claims about ethnic or religious identity [] is a difficult and contested question").

212. See., e.g., Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1125 (11th Cir. 2022) ("The [discriminatory-harassment] policy, in short, is staggeringly broad, and any number of statements—some of which are undoubtedly protected by the First Amendment—could qualify for prohibition under its sweeping standards."); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 215, 217 (3d Cir. 2001) (finding that the anti-harassment policy was unconstitutionally overbroad because a school cannot ban "'any unwelcome verbal . . . conduct which offends . . . an individual because of' some enumerated personal characteristics" (alterations in original) (quoting State College Area School District's 1999 Anti-Harassment Policy)). But see Eugene Volokh, Comment, Freedom of Speech and Workplace Harassment, 39 UCLA L. Rev. 1791, 1796 (1992) ("Much of harassment law—specifically, the restrictions on offensive speech directed at a particular employee—is, this Comment argues, indeed constitutional.").

213. See Felber v. Yudof, 851 F. Supp. 2d 1182, 1188 (N.D. Cal. 2011) (dismissing a Title VI claim because "a very substantial portion of the conduct to which plaintiffs object represents pure political speech and expressive conduct, in a public setting, regarding matters of public concern, which is entitled to special protection under the First Amendment" (citing Snyder v. Phelps, 562 U.S. 443, 457–59 (2011))); see also Brownlee, supra note 206, at 63–66 (describing how previous efforts "to use Title VI to call out Israel-critical and Palestine-solidarity events" have failed in courts and agencies).

with swastikas on their backpack).[214] Since October 7, 2023, however, the Department has taken a more expansive view. Initially, it shared this perspective informally.[215] Then, in May 2024, the Department issued a new "Dear Colleague" letter formalizing its capacious understanding of Title VI liability.[216]

Despite boilerplate assurances that Title VI does not "require[] or authorize[] a school to restrict any rights otherwise protected by the First Amendment," the new letter introduces highly questionable characterizations of the law.[217] First, it indicates that a hostile environment may be established by the existence of conduct that is "*subjectively* and objectively offensive" within "the totality of circumstances."[218] Second, it asserts that "[h]arassing conduct need not always be targeted at a particular person in order to create a hostile environment for a student or group of students."[219]

This capacious understanding of Title VI likely runs afoul of the First Amendment.[220] The letter's lengthy and ambiguous examples of when tolerance of campus protests might give rise to hostile environment liability reinforce the concern.[221] For one, it is hard to reconcile the two specific

---

214. See Off. of C.R., U.S. Dep't of Educ., Fact Sheet: Protecting Students From Discrimination Based on Shared Ancestry or Ethnic Characteristics 2 (2023), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-shared-ancestry-202301.pdf [https://perma.cc/9RZK-KH9J] (internal quotation marks omitted).

215. See Erwin Chemerinsky & Howard Gillman, Federal Attempt to Combat Anti-Semitism Puts Universities in an Untenable Position, Opinion, Sacramento Bee (Dec. 12, 2023), https://www.sacbee.com/opinion/op-ed/article282921393.html (on file with the *Columbia Law Review*) (criticizing the Department of Education's informal efforts to brief universities given its expansive view of when speech can create a hostile environment).

216. Catherine E. Lhamon, Assistant Sec'y for C.R., U.S. Dep't of Educ., Dear Colleague Letter: Title VI and Shared Ancestry or Ethnic Characteristics Discrimination (May 7, 2024), https://bidenwhitehouse.archives.gov/wp-content/uploads/2024/05/colleague-202405-shared-ancestry.pdf [https://perma.cc/F588-4JBC] [hereinafter Lhamon, May 7, 2024, Dear Colleague Letter].

217. See id. at 2.

218. Id. at 4 (emphasis added).

219. Id.

220. See Chemerinsky & Gillman, supra note 215 (expressing concern that, by suggesting "speech that would not meet the definition of harassment[] can create a hostile environment," the Department's approach "seem[s] to mandate that universities act in ways that have already been ruled unconstitutional"); Douek & Lakier, supra note 211 (arguing that the new Title VI enforcement strategy is leveraging the threat of investigation "to get universities to crack down on protected . . . speech"); see also Yaman Salahi & Nasrina Bargzie, Talking Israel and Palestine on Campus: How the U.S. Department of Education Can Uphold the Civil Rights Act and the First Amendment, 12 Hastings Race & Poverty L.J. 155, 169–73 (2015) (raising concerns about the pervasive chilling effect of Title VI allegations in the context of criticism of Israel).

221. See Lhamon, May 7, 2024, Dear Colleague Letter, supra note 216, at 4, 8–14 (providing examples of incidents that could give rise to a Title VI investigation, including three examples that combine targeted harassment with political speech, without clarifying which elements are necessary for a violation).

expansions of the definition of a hostile environment in the 2024 Department of Education guidance with existing First Amendment law. The assertion that "[h]arassing conduct need not always be targeted at a particular person in order to create a hostile environment for a student or group of students" flies in the face of existing doctrine.[222] The Supreme Court has said that harassment is not protected speech, but it has also narrowly defined the scope of the exception to situations in which an individual is targeted.[223] It is similarly unclear how Title VI liability can be based on a subjective standard of offensiveness given that causing emotional distress is insufficient under existing First Amendment doctrine to eject offensive speech from constitutional protection.[224]

Additionally, the already uncertain boundary between constitutionally protected speech and discriminatory conduct in the context of hostile-environment claims is rendered exponentially more uncertain when the question turns to criticism of Israel.[225] Given the significant debate about the border between criticism of Israel or Zionism and antisemitism,[226] it is extremely hard to see how the use of phrases, like "Long Live the Intifada" or "From the River to the Sea"—let alone calling Israel a settler-colonial state or naming its actions in Gaza a genocide—could possibly be constitutionally permissible grounds for finding universities liable for tolerating

222. Id. at 4 (relying on circuit court opinions from the 1980s).

223. See Frisby v. Schultz, 487 U.S. 474, 486 (1988) (upholding the constitutionality of an anti-picketing ordinance as applied to anti-abortion protesters because targeting the residence of an individual doctor and his family constituted harassment outside the scope of First Amendment protection).

224. See supra note 195 and accompanying text; see also Matal v. Tam, 137 S. Ct. 1744, 1751 (2017) (identifying a "bedrock First Amendment principle" that "[s]peech may not be banned on the grounds that it expresses ideas that offend").

225. See David Pozen, Seeing the University More Clearly, Balkinization (May 6, 2024), https://balkin.blogspot.com/2024/05/seeing-university-more-clearly.html [https://perma.cc/HF4N-W9NL] (observing that the distinction is complicated by "the absence of any consensus on the meaning or morality of core slogans and symbols" and because in this context "one group's asserted experience of discriminatory harassment corresponds so closely with another group's asserted expression of political protest").

226. Compare Int'l Holocaust Remembrance All., IHRA Non-Legally Binding Working Definition of Antisemitism (May 26, 2016), https://holocaustremembrance.com/wp-content/uploads/2024/01/IHRA-non-legally-binding-working-definition-of-antisemitism-1.pdf [https://perma.cc/4P46-YV4C] (offering "the targeting of the state of Israel, conceived as a Jewish collectivity" as its first illustration of a manifestation of antisemitism), with Jerusalem Declaration on Antisemitism, https://www.jerusalemdeclaration.org/wp-content/uploads/JDA-English.pdf [https://perma.cc/WHB2-MG44] (last visited Feb. 15, 2025) (articulating itself as a response to "the IHRA Definition," which is "unclear in key respects and . . . has caused confusion and generated controversy, hence weakening the fight against antisemitism"). At least one of the IHRA definition's drafters "has since become a critic of the definition's use in academic settings, saying it could stifle open debate on the Middle East." Vimal Patel, Harvard Adopts a Definition of Antisemitism for Disciplinary Cases, N.Y. Times (Jan. 21, 2025), https://www.nytimes.com/2025/01/21/us/harvard-antisemitism-definition-discipline.html (on file with the *Columbia Law Review*).

a hostile educational environment.[227] The prospect would violate two bedrock principles of First Amendment doctrine: that authorities are not permitted to adjudicate truth in the marketplace of ideas[228] and that vagaries that enhance opportunities for censorship of unorthodox ideas should be eliminated.[229] Indeed, *the* principle justification for protecting hate speech is the very real concern that any hate speech exemption to First Amendment protection would become a vehicle for censorship.[230]

Despite these significant constitutional concerns, a handful of district courts appear open to the Department of Education's broad interpretation of this right.[231] Indeed, the only argument cutting in favor of the constitutionality of finding liability would appear to be that campus protests that violate university rules, such as by being unauthorized, fall outside constitutional protection because they violate time, place, and manner restrictions.

* * *

A few points are worth emphasizing before proceeding. As sections II.A and II.B demonstrate, existing First Amendment doctrine is essentially silent as to the right of assembly. In the doctrine, as in public discourse, assembly is construed as a form of expressive conduct that is afforded discounted constitutional protection as an inarticulate, inconvenient, and

---

227. See Douek & Lakier, supra note 211 (observing that while "[t]here may be instances in which the slogan ['from the river to the sea, Palestine will be free'] is used in a way that renders it harassment, not speech," when it is "used in the context of a protest" it "is almost certainly constitutionally protected speech"); see also Students for Just. in Palestine, at the Univ. of Hous. v. Abbott, 756 F. Supp. 3d 410, 425 (W.D. Tex. 2024) (raising concerns that the adoption of the IHRA definition constitutes viewpoint discrimination insofar as it "do[es] not leave 'antisemitism' open to constitutional definitions and interpretations" or public debate on campus).

228. See Post, supra note 32, at 108 (identifying the principle that "[t]he First Amendment recognizes no such thing as a 'false' idea" as one of three axioms of First Amendment law).

229. See Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs., 457 F.3d 376, 387 (4th Cir. 2006) (explaining that "a policy . . . that does not provide sufficient criteria to prevent viewpoint discrimination[] generally will not survive constitutional scrutiny").

230. See Whittington, supra note 11, at 87–88 (observing that "[t]he idea that a hate speech exception would be applied strictly and stay limited flies in the face of our historical experience" given that "[t]he very category of 'hate speech' has no clear definition and no obvious boundaries").

231. See, e.g., Kestenbaum v. President & Fellows of Harvard Coll., 743 F. Supp. 3d 297, 309 (D. Mass. 2024) (denying Harvard's motion to dismiss in a Title VI case while casting doubts on whether a private institution "can hide behind the First Amendment to justify avoidance of its Title VI obligations"). But see Michael C. Dorf, Does Title VI Require Private Universities to Restrict Student Speech?, Knight First Amend. Inst. at Colum. U. (Oct. 3, 2024), https://knightcolumbia.org/blog/does-title-vi-require-private-universities-to-restrict-student-speech-1 [https://perma.cc/W3SH-ARW9] (doubting that "Harvard's status as a private university weakens its First Amendment defense against Title VI liability").

disruptive form of speech. First Amendment doctrines designed to protect speech and its value to our constitutional order permit a plethora of regulations aimed at containing assembly's disorder without any attention to its independent contribution to our form of government. Meanwhile, the peacefulness of those gathered is immaterial to the constitutional analysis.

The consequences for those who organize and participate in public assemblies are tangible. As Professor Timothy Zick has also concluded, "In important respects, the law of public protest fails to adequately protect Americans' exercise of fundamental First Amendment Rights."[232] Indeed, given the extent of permissible regulation, it is only slight hyperbole to say that authorities can sanction, even arrest, peaceful political protesters—whether on the public streets or on college campuses—whenever they wish.

Thus existing First Amendment doctrine largely vindicates Columbia's choices in handling the protests on its campus, and the similar decisions at other universities. By contrast, for those who are disturbed by the general state of First Amendment law but want to make an exception for these particular campus protests in light of their charged political character, the First Amendment's longstanding commitment to viewpoint neutrality and refusal to countenance a hate speech exception pose a significant barrier—a barrier that Title VI is unlikely to dispel. With this assessment of existing First Amendment doctrine, it is time to consider the ways that the coverage and scope of the constitutional rights for political assemblies would change if the Assembly Clause were reintroduced into the analysis.

III. AN INDEPENDENT RIGHT OF ASSEMBLY

The absence of the Assembly Clause in First Amendment law and constitutional discourse fundamentally distorts our analysis of the proper scope of constitutional protection for political assemblies. An independent Assembly Clause doctrine would not just be consistent with the text and the Founders' original understanding but would allow for the development of a coherent jurisprudence capable of distinguishing between protected and unprotected assemblies in relation to assembly's distinct contribution to self-governance. The fact is that the First Amendment does protect a certain form of conduct (peaceable assembly), and it does so for good reasons (assemblies further liberal democracy in both instrumental and noninstrumental ways).

---

232. Zick, Managed Dissent, supra note 130, at xiv; see also id. at 1 ("Clearly, governments must enforce some rules to maintain public order and keep the public peace. But as this book will show, the law of public protest manages public contention and dissent far beyond such rudimentary requirements.").

Any development of an Assembly Clause doctrine must build from first principles. The text of the First Amendment provides a crucial starting point. Still, constitutional interpretation is a multifaceted practice in which text is not the sole interpretive tool.[233] With respect to the right of assembly, traditional historical and judicial resources are, unfortunately, limited. The right was not debated in any depth when it was adopted into the Bill of Rights, and between Congress's limited power to regulate assemblies[234] and the infrequency of rights-adjudication prior to the twentieth century, there is little early federal precedent.[235] In a world before incorporation and in which exercises of judicial review were limited,[236] the contours of the right of peaceable assembly were, therefore, defined by state courts, but also through broader constitutional discourse.[237] Nineteenth-century state court opinions, legal treatises, and constitutional

233. This Piece's methodological approach aligns with Philip Bobbitt's: What makes a constitutional interpretation sound is its comportment with the conventions of interpretation identified by Bobbitt. See Philip Bobbitt, Constitutional Interpretation 12–13, 24 (1991) (offering as part of his normative account of law a "study [of] the grammar of law," articulated as a set of six modalities of constitutional interpretation that descriptively limit the range of interpretive moves available in constitutional interpretation). Thus, despite significant reliance on historical materials, the argument is *not* that contemporary law should track the original conception of the right. Still, a judge committed to enforcing the Constitution's original public meaning would be hard-pressed to deny the independent significance of the right of assembly, its central political function, its importance to the Founders, or their commitment to its broad sweep.

234. See 1 John W. Burgess, Political Science and Comparative Constitutional Law 193 (Boston & London, Ginn & Co. 1898) (noting that, as a government of enumerated powers, "[t]he general government can exercise no powers whatsoever in regard to the assembling of persons within a commonwealth, unless the assembling be for a treasonable purpose, simply because the constitution does not confer upon the government any such powers").

235. See 2 John Randolph Tucker, The Constitution of the United States: A Critical Discussion of Its Genesis, Development, and Interpretation § 326 (Henry St. George Tucker ed., Chicago, Callaghan & Co. 1899) [hereinafter Tucker, The Constitution of the United States] (noting that the federal assembly right "has not been the subject of adjudication").

236. See Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that the First Amendment's restraints are part of the concept of liberty encompassed by the Due Process Clause of the Fourteenth Amendment and thus bind states); Post, supra note 32, at 106 (noting that "[federal] courts played virtually no role in protecting free speech rights before the 1930s"). An additional (often forgotten) factor was the lack of general federal question jurisdiction until 1875. See Richard D. Freer, Federal Question Jurisdiction, *in* 13D Federal Practice and Procedure § 3561 (Charles Alan Wright & Arthur R. Miller eds., 3d ed. 2024) (noting that "with one short-lived exception it was not until 1875 that Congress gave the federal courts general original jurisdiction over federal question cases" (footnote omitted)).

237. See, e.g., Margaret A. Blanchard, Filling in the Void: Speech and Press in State Courts Prior to *Gitlow*, *in* The First Amendment Reconsidered: New Perspectives on the Meaning of Freedom of Speech and Press 14, 14–22 (Bill F. Chamberlin & Charlene J. Brown eds., 1982) (discussing the role of nineteenth-century state courts in developing doctrine for the freedoms of speech and press).

discourse thus provide critical evidence of how the right was understood in American law.[238]

A. *An Independent Right of Assembly*

The First Amendment explicitly guarantees "the right of the people peaceably to assemble."[239] Every indication supports the conclusion that, at the time of its inclusion in the Bill of Rights and throughout the nineteenth century, the right of assembly was considered an independent right. It was not simply an extension of the freedom of speech, nor did it indicate a general commitment to free expression.[240]

When James Madison introduced his proposed Bill of Rights on June 8, 1789, the right of peaceable assembly appeared separately in a paragraph that followed one addressing the people's "right to speak, to write, or to publish their sentiments."[241] Madison's proposed text read, "The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances."[242] This segmentation is unsurprising given that early state constitutions generally included the right of assembly in a separate provision.[243]

---

238. While the relevance of historical practice has long been accepted as a means for settling the meaning of structural features of the Constitution, the Court increasingly recognizes its value when it comes to rights. See United States v. Rahimi, 144 S. Ct. 1889, 1912 (2024) (Kavanaugh, J., concurring) ("[A]bsent precedent, there are really only two potential answers to the question of how to determine exceptions to broadly worded constitutional rights: history or policy. . . . History, not policy, is the proper guide.").

239. U.S. Const. amend. I.

240. See Ashutosh Bhagwat, Our Democratic First Amendment 26 (2020) (observing that "the concept of free speech as such essentially did not exist" at the time of the Founding or "even during the period during and immediately following the ratification of the First Amendment"); see also id. at 14–31 (reviewing relevant historical materials).

241. 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1026 (1971). This provision continued, "and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." Id.

242. Id. Madison based his proposals on the Declaration of Rights developed at Virginia's ratifying convention. See id. at 765 (noting that "when the time came for [Madison] to draft his amendments in the first Congress, he naturally chose as his model the Bill of Rights recommended by the Convention of which he had been an active member"). That declaration also separated the rights of peaceable assembly, instruction, and petition from the freedom of speech, writing, and the press. Id. at 842. The amendments proposed by the North Carolina convention were identical. Id. at 968.

243. At the time, the constitutions of five states—Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Vermont—provided a right of assembly in provisions separate from their protections for freedom of speech. See Mass. Const. art. XIX; N.H. Const. art. 32; N.C. Const. art. I, § 12; Pa. Const. art. I, § 20; Vt. Const. art. 20; see also Nikolas Bowie, The Constitutional Right of Self-Government, 130 Yale L.J. 1652, 1727 (2021) (observing that "in the two centuries after Congress proposed the First Amendment, nearly every state also adopted its own assembly clause, and only five followed the First Amendment's structure by coupling the right to assemble with a right of speech or of the press").

Ultimately, the right of assembly would be combined with the other First Amendment rights. There is no evidence, however, that this choice was substantive. The decision to combine the right of assembly with the freedom of speech, for example, appears to have been the result of a stylistic change by the select committee.[244] By the time of the floor debate on August 15, 1789, the text had been further consolidated to include three rights (speech, press, and assembly).[245] There is, similarly, no indication that this change was intended to collapse the rights into a single protection for expression. The subsequent debate in the House is unilluminating.[246] The decision to "fuse[]" the House's protections for speech, press, and assembly with its protection for religious freedom was taken in the Senate, as was the decision to introduce a right of petition and language indicating the amendment limited congressional power.[247] Unfortunately, proceedings in the Senate were not public until February 1974, leaving us "no report of the Senate debates on the Bill of Rights" that led to the text of the First Amendment as we know it.[248]

What we do know is that the right of assembly codified a customary constitutional right—a privilege and immunity of English freemen arising from the British customary constitution[249]—and that American colonists interpreted that right expansively, drawing on the Whiggish tradition in

---

244. See Schwartz, supra note 241, at 1050 (suggesting that the change was a stylistic one made by the select committee established to consider Madison's slate of amendments).

245. See id. at 1089, 1122, 1125 ("The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed." (internal quotation marks omitted)).

246. The bulk of the House debate concerned the select committee's decision to exclude a right of instruction, with a handful of congressmen objecting to the need to include these self-evident rights at all. Id. at 1089–1105. The words of Representative Theodore Sedgwick could be taken to support the view that the right of assembly is subsidiary to the right of speech. See id. at 1090 ("If people freely converse together, they must assemble for that purpose . . . ."). But in context, Sedwick's primary aim was to suggest that it was not "necessary to enter these trifles in a declaration of rights," just as one would not "declare[] that a man should have a right to wear his hat if he pleased." Id.

247. Id. at 1146.

248. See id. at 1145–49 (noting that the language "and consult for their common good" was dropped in the Senate and the word petition was introduced); see also id. at 1149, 1153 (tracking changes to language during Senate proceedings); id. at 1160, 1168 (noting the Senate's agreement to the final compromise language proposed by the House). For an alternative account of proceedings in the Senate, see generally Creating the Bill of Rights: The Documentary Record From the First Federal Congress 41–53 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991).

249. See United States v. Cruikshank, 92 U.S. 542, 551–52 (1875) ("The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government.").

England.[250] That privilege, moreover, was understood to reinforce the possibilities for self-governance and the commitment to a republican form of government.

"The right of peaceable assembly," as the Supreme Court has observed, "was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry."[251] During the limited debate in the House, Georgia Congressman James Jackson stressed that the freedom "to assemble and consult for the common good . . . had been used in this country as one of the best checks on the British Legislature in their unjustifiable attempts to tax the colonies without their consent."[252] As Professor Nikolas Bowie has noted, "the first *state* assembly clauses[] coupl[ed] the right to assemble with other provisions 'declaratory of the general principles of republican government.'"[253] In 1875, the Supreme Court, in the infamous decision of *United States v. Cruikshank*, would summarize, "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."[254]

The critical point then is this: Despite sharing with other First Amendment rights the goal of furthering self-governance, the right of peaceable assembly was, nevertheless, a distinct right. Closely associated with ideas of popular sovereignty and the rights of revolutionary crowds,

---

250. On the concept of the right of assembly as part of the liberty of freeborn Englishmen in the British customary constitution, see Adrian Randall, 'Riotous Assemblies': Protest in Eighteenth-Century England, *in* The Oxford Handbook of Peaceful Assembly, supra note 10, at 23, 28–31 (explaining how English crowds, disrupting markets for fairer food prices, evinced a deep-rooted belief that the liberties and rights of "ordinary people," encompassed in "the concept of 'the freeborn Englishman,'" included an "ineffable right to resist oppression, by force if necessary"). On the important role this customary constitution played in early American constitutionalism, see Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 13 (2004) (explicating the "customary constitution [as] a framework for argument" in which the "immutable principles of English liberty . . . were derived from 'custom immemorial'").

251. Bates v. City of Little Rock, 361 U.S. 516, 522–23 (1960).

252. Schwartz, supra note 241, at 1094.

253. Bowie, supra note 243, at 1727 (quoting Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon Legislative Power of the States of the American Union 35 (Bos., Little, Brown & Co. 1868)).

254. 92 U.S. at 552 (holding that the federal right restricted only burdens preventing citizens from meeting peaceably with respect to national public affairs or to the federal government for a redress of grievances). The decision is infamous because the Court's decision to overturn the convictions of the only three members of the white crowd to be successfully prosecuted for their actions at the Colfax Massacre of 1873 ensured no one would be held accountable for the murder of dozens of unarmed Black men and women that day. See McDonald v. City of Chicago, 561 U.S. 742, 757 (2010) (recounting the facts of *Cruikshank*).

there is even evidence that assembly was considered the primary political right.[255]

B. *First Amendment Protection for Conduct*

The most significant consequence of recognizing assembly as an independent right is that it troubles the speech–conduct distinction, which is so central to First Amendment jurisprudence. The text of the First Amendment, with its explicit protection for a form of conduct (assembly), renders the Warren Court's suggestion (and current orthodoxy) that "the First and Fourteenth Amendments [do not] afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as . . . to those who communicate ideas by pure speech" absurd.[256]

Once we recognize that First Amendment protection attaches to assembly, the first analytic question becomes—as it is in the jurisdictions that analyze the right independently—whether the gathering constitutes an "assembly." The ordinary meaning of "assembly"—now and at the time of the Founding—covers gatherings, demonstrations, protests, public meetings, and parades.[257] Assemblies are forms of collective action that

---

255. See Frederic Jesup Stimson, The Law of the Federal and State Constitutions of the United States 43 (1908) ("The important political right of assembly and petition is rather the original than a derivation from freedom of speech, and is also related to the general political rights of the English subject.").

256. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969) (alteration in original) (internal quotation marks omitted) (quoting Cox v. Louisiana, 379 U.S. 536, 555 (1965)). The analysis above does not impact the expressive conduct doctrine as applied to individual actions, such as burning draft cards, disrespecting the flag, or wearing black armbands.

257. The 1880 edition of *Webster's Complete Dictionary of the English Language* defines "assemble" as: "To meet or come together; to convene, as a number of individuals." Assemble, Webster's Complete Dictionary of the English Language (London, George Bell & Sons 1880) [hereinafter Webster's 1880 Complete Dictionary]. "Assembly" is defined as "[a] company of persons collected together in one place, and usually for some common purpose; as, religious, political, and social *assemblies*." Assembly, Webster's 1880 Complete Dictionary, supra; see also Brod, supra note 28, at 163 (arguing, based on contemporaneous dictionary definitions, that "[t]he founding-era meaning of the verb 'assemble' largely resembles our common understanding of the word today"). A recent influential interpretation of the right in the International Covenant on Civil and Political Rights states that the right protects "non-violent gathering[s] by persons for specific purposes, principally expressive ones." Committee, General Comment 37, supra note 23, ¶¶ 4, 13 (noting that the right of expression, not assembly, covers a single individual's protest actions). For a useful summary of the definition of the right and the key points of contention, see Yuval Shany, The Definition of Peaceful Assembly, *in* The Oxford Handbook of Peaceful Assembly, supra note 10, at 201, 201 (noting that the chapter offers a summary of two official efforts to define "the term 'peaceful assembly' and thus the scope of protection afforded by the right to peacefully assembly" under international law).

occur in public.[258] Historically, crowds and parades were both a mainstay of the democratic politics of the revolution and early republic[259] and recognized as exercises of the customary right of peaceable assembly.[260]

The textual proximity of the rights of assembly and petition has led some to the view that the right protects only those gathered for purposes of petitioning.[261] During the Symposium, Professor Eugene Volokh suggested that this supports the modern Court's emphasis on assembly's expressive qualities.[262] Professor John Inazu, however, has shown that this is an untenable read of the right given the drafting history and debate in the House of Representatives.[263] Moreover, even Professor Jason Mazzone, the most prominent advocate for the single right theory, was of the view that "the right of the people peaceably to assemble[] and to petition" was a right associated with popular sovereignty rather than expression.[264]

---

258. See Michael Hamilton, The Meaning and Scope of 'Assembly' in International Human Rights Law, 69 Int'l & Compar. L.Q. 521, 550–52 (2020) (arguing that the critical question is not whether the space is publicly owned but whether it is publicly accessible regardless of ownership).

259. See Abu El-Haj, Neglected Right of Assembly, supra note 28, at 554–561 (describing how "large gatherings in streets and public places played a central role in American politics through much of the nineteenth century" while emphasizing that "it was not uncommon for a political event to trigger parades and the rituals of popular politics").

260. The absence of federal court decisions during this period is foremost a product of the decision in *Barron v. City of Baltimore*, which held that the Bill of Rights only restrained Congress, but it is also a product of the federal courts' limited jurisdiction before Reconstruction. See 32 U.S. (7 Peters) 243, 247 (1833) (holding that "the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states"); see also supra note 236.

261. See U.S. Const. amend. I. (providing for "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"); Presser v. Illinois, 116 U.S. 252, 267 (1886) (implying that the right to peaceably assemble is limited to those assemblies whose purpose is to petition the government for redress); Jason Mazzone, Freedom's Associations, 77 Wash. L. Rev. 639, 712–13 (2002) (arguing that the First Amendment's syntax indicates a singular right to assembly for petitioning the government and vindicating popular sovereignty).

262. Eugene Volokh, Thomas M. Siebel Senior Fellow, Hoover Inst., Address at the *Columbia Law Review* Symposium: The Law of Protest (Nov. 15, 2024) (author's notes on file with the *Columbia Law Review*).

263. See Inazu, Liberty's Refuge, supra note 28, at 23–24 (persuasively refuting this view in light of the drafting history and the references made during the House debate emphasizing the abrogation of William Penn's right through a prosecution for unlawful assembly for delivering a religious sermon).

264. See Mazzone, supra note 261, at 712–13 (arguing that the phrase "the right of the people" in the First Amendment "reflects a populist notion, a commitment to popular sovereignty" and that the right of assembly and petition is "a right belonging to the same 'We the People' that established the Constitution" (internal quotation marks omitted) (quoting U.S. Const. amend. I)). Volokh's position is also fundamentally anachronistic, as, at the Founding, the expressive qualities of petitioning were largely overshadowed by its importance as a mechanism for initiating a legislative process to obtain individual or public relief. See Stephen A. Higginson, Note, A Short History of the Right to Petition Government for the Redress of Grievances, 96 Yale L.J. 142, 143 n.2, 145, 160 (1986) (explaining that

Assembly is not without an expressive element, and certainly one can find members of the First Congress, legal treatises, and nineteenth-century courts recognizing its expressive purposes.[265] But this was not the only, or even primary, conception of the right. The views of the Kansas Supreme Court in 1888 are representative of the ways that nineteenth-century state courts understood assembly as a right that facilitated political organizing to influence government:

> 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 . . . .[266]

Importantly, these nineteenth-century judges stressed assembly's contribution to social solidarity, civic engagement, and democratic pluralism, not just public discourse. The Kansas Supreme Court, as seen above, noted "the usual accompaniments of bands, banners, transparencies, [and] glee clubs."[267] Later, in explaining its concern about requiring advance permission to parade on the public streets, the court objected that the ordinance would unreasonably "prevent[] any number of the people of the state attached to one of the several political parties from marching together with their party banners, and inspiring music, up and down the principal streets" and worried that Sunday school children and the Grand Army of the Republic would now be prevented from assembling "at some central point in the city, [to] keep step to the music of the band as they march to the grove" or be forced to "march without drums or fife, shouts or songs."[268]

The Michigan Supreme Court in a similar case struck a comparable tone:

> It 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. These processions for political,

---

petitioning was primarily a legislative mechanism for obtaining relief rather than a form of expression and that colonial assemblies used petitions to "initiate legislation" and for the "settlement of private disputes" as part of their judicial and legislative functions).

265. See, e.g., Anderson v. City of Wellington, 19 P. 719, 722 (Kan. 1888) (striking down an ordinance preventing public assemblies on the grounds that it precluded traditional uses of public property that did not cause a nuisance).

266. Id.

267. Id. at 721.

268. Id.

> 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.[269]

Nineteenth-century American judges, in other words, understood the social solidarity functions of assembly, recognizing music and noise to be part of the merriment that reinforces social solidarity, rather than evidence of public nuisance. Above all, as these decisions show, assembly was understood throughout the nineteenth century to be constitutionally protected because of its role in furthering self-governance and popular sovereignty.

The Assembly Clause guarantees "the right *of the people* peaceably to assemble"[270]—a phrase that is consistently used in the Constitution when the right in question is directly tied to the constitutional commitment to popular sovereignty and self-government.[271] Indeed, writing in 1803, St. George Tucker would point to the Virginian origins of the federal right to reinforce the right's role in protecting "a free people" and their ability to govern themselves:

> The convention of Virginia proposed an article expressed in terms more consonant with the nature of our representative democracy, declaring, that the people have a right, peaceably to assemble together to consult for their common good, or to instruct their representatives: that every freeman has a right to petition, or apply to the legislature, for the redress of grievances. This is the language of a free people asserting their rights . . . .[272]

It is thus unsurprising that Bowie has found evidence, including in the writings of Samuel Adams, that beyond disruptive and inconvenient crowds, like the Boston Tea Party, the right as originally conceived also protected extraconstitutional assemblies seeking redress or exercising self-government.[273]

The text of the First Amendment protects assembly as a form of political conduct.[274] The privileging of speech over assembly in existing

---

269. In re Frazee, 30 N.W. 72, 75 (Mich. 1886) (emphasis added).

270. U.S. Const. amend. I. (emphasis added).

271. See Mazzone, supra note 261, at 713 (arguing that, by referencing "a right of 'the people,'" the Amendment is aligned with other rights associated with popular sovereignty (quoting U.S. Const. amend. I)).

272. 1 St. George Tucker, Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia 299–300 (Philadelphia, William Young Birch & Abraham Small 1803).

273. See Bowie, supra note 243, at 1661 ("This historical context reveals that the right to assemble at its inception was more than a claim to dissent—it was also a claim to govern.").

274. See U.S. Const. amend. I. ("Congress shall make no law . . . abridging . . . the right of the people *peaceably to assemble* . . . ." (emphasis added)).

doctrine cannot be squared with either the text or the original understanding and historical practice, which recognize assembly's distinct contribution to representative government. The classic speech–conduct distinction as applied to assemblies (parades, protests, or encampments) simply makes no sense. Occupy's nightly general assembly[275] falls squarely within the core protection of the right, while nineteenth-century legal commentators would have been confounded by the Supreme Court's full four-paragraph defense in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* of its conclusion that the parade was covered by the First Amendment as a form of expressive conduct.[276]

C. *The Democratic Value of Assembly*

Acknowledging the independence of the right of assembly forces a reconsideration of assembly's contribution to self-governance. Just as free speech jurisprudence and scholarship have articulated the value of the freedom of speech to inform the doctrine, so too an Assembly Clause jurisprudence must define assembly's distinct contribution to the constitutional promise of self-government.

Assembly's primary contribution to self-governance is neither expressive nor instrumental.[277] As Professor Ashutosh Bhagwat has observed, "In the typical modern protest or assembly . . . 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."[278] Similarly, the problem with gauging the value of assembly in terms of its instrumental political potential is that such returns are highly contingent and frequently negligible.[279] While assemblies can provide a warning to the government that its policies are unpopular, such as with the anti-Vietnam War protests, or air concerns that have otherwise gone ignored, such as racialized police violence, a jurisprudence of assembly struggles to justify protection solely on this basis.

---

275. For an example of what Occupy general assemblies were like, see Caroline Pepper, The Ritual of General Assembly—Occupy Wall Street (October 2011), YouTube (Apr. 9, 2013), https://www.youtube.com/watch?v=Du004P5MdpI [https://perma.cc/6ACS-797Z].

276. 515 U.S. 557, 568–570 (1995) (struggling to justify how the parade met the expressive conduct requirement of communicating a "particularized message" while noting that "[t]he protected expression that inheres in a parade is not limited to its banners and songs" (internal quotation marks omitted)).

277. The account of assembly's value offered here is a précis of a longer account in Abu El-Haj, Assembly as Political Practice, supra note 10.

278. Ashutosh Bhagwat, Associational Speech, 120 Yale L.J. 978, 1016 (2011) [hereinafter Bhagwat, Associational Speech].

279. But see Allison M. Freedman, Arresting Assembly: An Argument Against Expanding Criminally Punishable Protest, 68 Vill. L. Rev. 171, 175 (2023) (noting that in the months after the 2020 BLM protests "many states began implementing measures to address issues such as chokeholds, lack of officer intervention in the face of excessive force or misconduct, no-knock warrants, and qualified immunity").

An Assembly Clause jurisprudence must acknowledge, but not overemphasize, assembly's expressive or instrumental political value. Instead, its starting place should be Bhagwat's observation that "[t]he point, rather, is the assembly itself."[280] An independent jurisprudence of the right of assembly would be organized around the understanding that being together physically and socially as citizens contributes to democracy, and it contributes to democracy differently from talking and arguing with one another. But how? There are three ways in which being together matters—each of which underwrites our collective capacity for self-governance and provides a basis for informing how the right ought to be delineated.[281]

Assembly is a social politics. As Inazu has explained, assembly is a "relational" right.[282] Indeed, "[a]ssembly is inherently social."[283] It is social in the sense that the capacity to gather arises out of social ties but also because gathering itself reinforces those bonds and may even generate new social connections.[284] Assembly is also social insofar as the act of gathering fosters social solidarity, a recognition that we are both individuals and part of a collective and, further, that there is power to being part of a group.[285] Assembling not only fortifies insular groups but also can bridge axes of social division in society.[286] The "solidarity protest" organized by Columbia's "unsuspended" groups illustrates how protests can build bridges, in this case bringing together students across axes of difference, including race, ethnicity, national origin, and religion, to build a political movement.[287]

---

280. Bhagwat, Associational Speech, supra note 278, at 1016.

281. For a more developed version of this argument, see generally Abu El-Haj, Assembly as Political Practice, supra note 10 (discussing the intrinsic and constitutive value of assembly).

282. See John Inazu, Assembly, Pluralism, and Identity, *in* The Oxford Handbook of Peaceful Assembly, supra note 10, at 101, 102 [hereinafter Inazu, Assembly, Pluralism, and Identity] ("Assembly is the only right in the First Amendment that requires more than one person to be exercised.").

283. Abu El-Haj, Assembly as Political Practice, supra note 10, at 85.

284. See Tabatha Abu El-Haj, Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government, 118 Colum. L. Rev. 1225, 1232 (2018) ("A vast body of sociological and political scientific research demonstrates that relationships, far more than ideological commitments, drive political mobilization, organization, and information transmission.").

285. See Inazu, Assembly, Pluralism, and Identity, supra note 282, at 103–04 (arguing that "[a] key aspect of the right of assembly is that it facilitates the formation of collective identity and belief within a social practice," manifesting in "claims like 'Our team won'!").

286. See Mazzone, supra note 261, at 755 (explaining that "[s]ocial capital theorists distinguish between two overall varieties of social capital: 'bonding' social capital, which is 'inward looking and tend[s] to reinforce exclusive identities and homogeneous groups,' and 'bridging' social capital, which is 'outward looking and encompass[es] people across diverse social cleavages'" (second and third alterations in original)).

287. See supra notes 69–73 and accompanying text.

Why does any of this matter for understanding the boundaries of the right? It matters because "sustain[ing] the civic and political capacity for politics" depends on social ties—strong and weak—but also on citizens developing a sense of agency.[288] As a social politics, assembly has democratic value because it reinforces the social ties and social solidarity that "grease the wheels of political participation."[289] Seemingly insignificant assemblies—like vigils, apple pie brigades, annual pride parades, or community dances—lay the social foundations for politics.[290] These democratic returns point clearly to the need for constitutional protections to prevent authorities from undermining the social foundations of politics, even unintentionally.

Assembly is a politics of disruption. Outdoor assemblies are an irritation, an inconvenience, and can be, at times, a nuisance, disrupting ordinary routines even when they comply with limitations placed on their timing, location, and noise level. Of course, speech too can be disruptive: Consider the disruption caused by misinformation and disinformation to public health during the COVID-19 pandemic or to the orderly functioning of electoral politics.[291] Yet, this is not the important sense in which assembly is a politics of disruption.

Assembly as a form of social and political action is disruptive of public narratives, political and social orthodoxies, and, in certain circumstances, public policies and political regimes.[292] The Civil Rights Movement's persistent marches and demonstrations cracked the political realism that justified permitting southern states to violate the Fourteenth and Fifteenth

---

288. Abu El-Haj, Assembly as Political Practice, supra note 10, at 82.

289. Tabatha Abu El-Haj, Friends, Associates and Associations: Theoretically and Empirically Grounding the Freedom of Association, 56 Ariz. L. Rev. 53, 77 (2014).

290. It would thus be a mistake to limit the right to assemblies for political or expressive ends. But see City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989) ("We think the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment."); Lahmann v. Grand Aerie of Fraternal Ord. of Eagles, 121 P.3d 671, 685 (Or. Ct. App. 2005) (holding that the state's constitutional right of assembly was not violated by requiring social organizations to admit women because doing so would "not require the Eagles to send a message contrary to one of the organization's core values").

291. See, e.g., Michael A Gisondi, Rachel Barber, Jemery Samuel Faust, Ali Raja, Matthew C Strehlow, Lauren M Westafer & Michael Gottlieb, A Deadly Infodemic: Social Media and the Power of COVID-19 Misinformation, J. Med. Internet Rsch., Feb. 2022, at 1, 1–3 ("[S]ocial media platforms fuel hoaxes and misinformation about the etiology and origins of COVID-19, its treatment, and its prevention through vaccines." (citation omitted)); Darrell M. West, How Disinformation Defined the 2024 Election Narrative, Brookings Inst. (Nov. 7, 2024), https://www.brookings.edu/articles/how-disinformation-defined-the-2024-election-narrative/ [https://perma.cc/ET23-KZR9] ("Polling data suggest that false claims affected how people saw the candidates, their views about leading issues such as the economy, immigration, and crime, and the way the news media covered the campaign.").

292. Abu El-Haj, Assembly as Political Practice, supra note 10, at 89.

Amendments with impunity for over fifty years.[293] The Occupy movement drew attention to how modern neoliberalism's emphasis on growth caused income inequality to skyrocket.[294] Pro-Palestinian, antigenocide campus protests both revealed and fueled cracks in long-standing orthodoxies about Americans' views of Israel.[295] Certainly, not all assemblies attempt or succeed in doing these things. Still, this is one of assembly's contributions to democracy.

Now one might object that this is merely a different facet of assembly's expressive character. But this would miss the key point. It is not the clarity of the message that enables this disruptive power: It is the bodies manifested.[296] Even the expressive and instrumental value of assembly, in other words, is deeply tied to the act of gathering. Indeed, size, persistence, and spontaneity—the very targets of the managerial regimes that regulate gatherings on and off campus—are critical to assembly's capacity to exercise this form of political power. The point, to be clear, is not that it should be unconstitutional to limit assemblies to mitigate disruption. It is rather to observe that constitutional rules should account for the fact that assemblies' substantive disruptive potential depends on the freedom to express their true size and authenticity.

There will certainly be some who, at this point, wish to argue that power exercised through "might" is illegitimate: Assembly as an extraconstitutional form of politics is illegitimate.[297] Elections, they will argue, are the opportunities provided in liberal democracy for the exercise of political power. But this is just factually incorrect. First, as a right explicitly protected by the First Amendment, assembly is clearly not extraconstitutional.[298] Second, there are all sorts of ways in which citizens

---

293. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2159 (2023) (acknowledging that for nearly a century, "this Court—alongside the country— . . . failed to live up to the . . . core commitments" of the Reconstruction Amendments, permitting "state-mandated segregation" to become a "regrettable norm" "in many parts of the Nation").

294. See Sarah Gaby & Neal Caren, The Rise of Inequality: How Social Movements Shape Discursive Fields, 21 Mobilization 413, 416–17 (2016) (demonstrating that Occupy measurably increased media attention to economic inequality).

295. See supra note 19.

296. See Judith Butler, Notes Toward a Performative Theory of Assembly 7–8 (2015) (explaining that "it matters that bodies assemble" because "the political meanings enacted by demonstrations are not only those that are enacted by discourse").

297. See, e.g., Richard Thompson Ford, Protest Fatigue, *in* Nomos LXII, supra note 1, at 161, 172–75 ("Citizens in mass democracies can encourage change in public policy through the political process."); see also Susan Stokes, Are Protests Good or Bad for Democracy?, *in* Nomos LXII, supra note 1, at 269, 273–81 (discussing the ways in which protests can be "democracy-detracting").

298. For more elaboration of this point, see Abu El-Haj, Defining Nonviolence, supra note 1, at 203–04 (emphasizing that, by definition, that which is protected by the Constitution cannot be extraconstitutional).

exercise political power outside of the voting booth: petitioning, lobbying, and litigating.

Assembly is a politics of presence. Presence is an essential characteristic of assembly as a political practice. The decision to appear in public is a claim to civic inclusion and recognition.[299] The Stonewall Uprising—though not ultimately peaceable—was an assembly in which gay men made their presence felt.[300] Present first in private "queer watering holes" known only to those in the community, gay men emerged more visibly in private underground gay bars that declared themselves "unambiguously gay."[301] Stonewall, however, was the first public presence of the gay community in New York. The following year marked the first pride parades to commemorate the tragedy with thousands showing up to march in San Francisco and New York City.[302] Pro-Palestinian protests critical of Israel both on and off campuses are similarly exercises of assembly as a politics of presence, demonstrating that Palestinian Americans, Arab Americans, and Muslim Americans are also part of this polity.[303]

All three democratic returns of assembly are directly tied to the act of gathering. It is gathering with others that fosters social ties, social solidarity, and a sense of civic and political agency. It is the act of gathering that grants recognition and civic inclusion, and it is the act of gathering that is disruptive. Indeed, the act of gathering in great numbers is ultimately what fuels the political power of assembly. Why does the act of gathering matter so much? Because it turns out political participation is more social and relational than the deliberative account of democracy that prevails in law. The sociality of assembly allows it to serve as a "bridge . . . between civic and political life" not only in the present moment but in the future.[304]

---

299. Abu El-Haj, Assembly as Political Practice, supra note 10, at 87–88.

300. See Garance Franke-Ruta, An Amazing 1969 Account of the Stonewall Uprising, The Atlantic (Jan. 24, 2013), https://www.theatlantic.com/politics/archive/2013/01/an-amazing-1969-account-of-the-stonewall-uprising/272467/ (on file with the *Columbia Law Review*) (noting that "Stonewall operated as a sort of de facto community center for gay youth rendered homeless by familial and institutional rejection, who had taken refuge in New York City in hopes of finding a place where they could be in the world").

301. Hari Nef, How I Learned to Stop Worrying and Love the Gay Bar, N.Y. Times (Nov. 24, 2023), https://www.nytimes.com/2023/11/24/books/review/how-i-learned-to-stop-worrying-and-love-the-gay-bar.html (on file with the *Columbia Law Review*) (last updated Nov. 30, 2023) (internal quotation marks omitted).

302. Meg Metcalf, The History of Pride, Libr. of Cong., https://www.loc.gov/ghe/cascade/index.html?appid=90dcc35abb714a24914c68c9654adb67 [https://perma.cc/3LYB-TQHB?type=image] (last visited Feb. 3, 2025).

303. University administrators, in my view, appeared distressingly oblivious to the ways their actions in the 2023 to 2024 academic year undermined Palestinian students' claims for civic inclusion and recognition.

304. Abu El-Haj, Assembly as Political Practice, supra note 10, at 85.

There is one final quality of assembly that is worth recognizing: *Assembly is a politics of place*. The place of gathering is often critical to vindicating the values described above. For one, to the degree that assembly has expressive value, that expressive value is as much about the things said as the places in which they are said.[305] Similarly, assembly as a claim for civic and political recognition may well depend on the place of appearance. Put differently, the spaces available to those gathering, especially for political reasons, may significantly shape their power.[306]

An Assembly Clause jurisprudence would be attentive to the ways assembly lays the social foundations for political action, thereby making self-governance and popular sovereignty possible. Courts would delineate the boundaries of constitutional protection to facilitate the many ways the act of gathering makes democratic politics possible, while recognizing that place is often entwined with the capacity to vindicate these other values. Existing First Amendment doctrine fails in this regard when it comes to assembly because, as a practical matter, it is entirely preoccupied with assembly's costs.[307]

Once again, the claim here is not that all instances of assembly are valuable, or that assemblies have no costs and can never be regulated or dispersed. Assemblies are disruptive of ordinary routines, and there may even be times when in-group solidarity (us vs. them) is destructive and antidemocratic. The claim is rather that just as we accept that free speech doctrine should be structured to vindicate the known values of free speech from promoting democratic self-governance to preserving spaces for individual autonomy and a robust marketplace of ideas, so too should constitutional protection for the freedom of assembly be structured to vindicate its values.

D. *The Meaning of "Peaceably"*

Having established that the First Amendment covers assembly (a social, relational form of *conduct*) and discussed the reasons why, it is time to turn to how an independent Assembly Clause doctrine would determine the limits of the right. The text provides for "the right of the people *peaceably* to assemble."[308] But how should "peaceably" be construed? And

---

305. See Timothy Zick, Assembly Within 'Sight and Sound', *in* The Oxford Handbook of Peaceful Assembly, supra note 10, at 255, 262–63 [hereinafter Zick, Assembly Within] (defining the "vocality of place" and importance of sight and sound access for the right to assembly).

306. See Jan-Werner Müller, On the Square, Phil. & Soc. Criticism, Apr. 8, 2024, at 1, 9–12 (arguing that some "spatial configurations" are more and less likely to foster democratic and egalitarian values).

307. See supra notes 173–180 and accompanying text.

308. U.S. Const. amend. I (emphasis added).

what constitutes "unpeaceable" assembling, thereby ejecting an assembly from constitutional protection?

1. *Peaceably = Lawfully.* — One could argue that an assembly ceases to be peaceable when it acts unlawfully.[309] This is de facto the rule under existing law: Assemblies are only constitutionally protected to the degree they abide by all generally applicable laws and also comply with regulations that specifically govern access to public space.[310] Indeed, this has been university administrators' basic position and the basis for their renewed commitment to fully enforcing breaches of newly revised campus rules.[311] On this view, gatherings that fail to obtain required permissions or abide by university rules are unlawful, and, therefore, sanctioning them does not breach the commitment to free expression on campus.[312]

While not implausible, this is not the most natural reading of the text. No one, in common parlance, would describe those who gather past curfew, engage in trespass, or block the streets as not peaceful. A loud and disorganized crowd that gathers after dark might be characterized as unpeaceful, but it would be because of its rowdiness and disorganization—the noise being an indication that things might get out of hand—not because of any lawbreaking per se, such as being on the street or out past curfew.

It is, thus, not clear that this is a reasonable construction of the First Amendment. Certainly, if the First Amendment had expressed protection for "peaceful" assembly, it would be a stretch to maintain this construction: The opposite of peaceful is violent or with commotion, not unlawful. An examination of nineteenth-century dictionaries provides no indication that the word "peaceably" connoted something different. In the original 1806 Webster's *A Compendious Dictionary of the English Language*, "peaceably" is defined as "without disturbance, quietly, easily" while "peacefully"

---

309. See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (recognizing that "a State [may not] forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"). But see Abu El-Haj, Liberal First Amendment, supra note 9, at 586 n.240 ("Despite the use of the term 'lawlessness' in *Brandenburg*, it is clear that the Court meant violent lawlessness." (quoting *Brandenburg*, 395 U.S. at 447–48)).

310. See supra notes 171–177 and accompanying text.

311. See supra notes 122–129 and accompanying text.

312. Throughout summer 2020, cities dispersed BLM protests for a variety of nonviolent, illegal activities, most often for marching on highways or breaking curfews. See Roudabeh Kishi & Sam Jones, Demonstrations and Political Violence in America: New Data for Summer 2020, ACLED (Sept. 3, 2020), https://acleddata.com/2020/09/03/demonstrations-political-violence-in-america-new-data-for-summer-2020/ [https://perma.cc/7LYK-5BBU]. Their legal right to do so was essentially unquestioned, as evidenced by the fact that the only constitutional questions raised in challenges to these orders were to the level of force used to acquit the dispersals. See Abu El-Haj, Breathing Room, supra note 7, at 38–39 (discussing the Detroit Police Department's Fourth Amendment violations and retaliatory measures that prompted a First Amendment challenge).

is defined to mean "quietly, calmly, mildly, gently."[313] The 1880 edition offers more elaboration, but essentially the same content: "In a peaceable manner; without war; without tumult or commotion; quietly."[314] Indeed, to the degree the two definitions differ, the term peaceably implies its opposite is war, tumult and commotion.

Nineteenth-century legal treatises are largely unhelpful in explaining the contours of the right, but the few that do delve into the question confirm that the relevant juxtaposition was not "lawfulness." A.O. Wright's 1888 *An Exposition of the Constitution of the State of Wisconsin*, for example, explains that under the right of assembly, "any number of people may come together in any sort of societies, religious, social or political, or even in treasonous conspiracies, and, so long as they behave themselves and do not hurt anybody or make any great disturbance, they may express themselves in public meetings by speeches and resolutions as they choose."[315] The clear implication is that unpeaceable assemblies are those that make "great disturbance," not those that break the law as apparently even treasonous conspiracies can be protected by the right.[316] Leon Whipple's 1927 treatise on the U.S. Constitution similarly explains: "In the formal guarantee the single limitation is that assemblies be peaceable. This meant primarily without arms . . . . [and] implied no breach of the peace by riot or assault or any resistance to authority."[317]

There is also a certain circularity to defining peaceable as lawful in the context of a constitutional right established to set limits on the law. Whatever the best interpretation, one thing should now be clear: In the

---

313. Peaceably, Noah Webster, A Compendious Dictionary of the English Language (Conn., Sidney's Press 1806); see also Peaceable, Webster, supra (further defining "peaceable" as "free from war, quiet, good natured"). The inclusion of "quiet" in the definition can be set aside because there is no indication that the Assembly Clause's "peaceably" limitation demands the people assemble quietly to be protected. Even if we concede that noisy assemblies should be dispersed or regulated, it is because the noise has triggered some concern, rather than that an assembly must be quiet.

314. Peaceably, Webster's 1880 Complete Dictionary, supra note 257.

315. A.O. Wright, An Exposition of the Constitution of the State of Wisconsin 20 (Madison, Midland Publ'g Co. 1897) (interpreting the state constitution, which provided that "[t]he right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged" (quoting Wis. Const. art. I, § 4)).

316. See id.

317. Leon Whipple, Our Ancient Liberties: The Story of the Origin and Meaning of Civil and Religious Liberty in the United States 102–04 (1927). Whipple offered a further limitation: "Individuals in Public Assembly [']must not invade the rights of private property—i.e., commit a trespass[']; they [']must not interfere with the convenience of the public—i.e., create a nuisance.[']" Id. (quoting A.V. Dicey, Introduction to the Study of the Law of the Constitution 499 (8th ed. 1915)). Other legal academics at the time, however, questioned Professor A.V. Dicey's account of the right of assembly as unduly limited. See James M. Jarrett & Vernon A. Mund, The Right of Assembly, 9 N.Y.U. L.Q. Rev. 1, 3–4 (1931) (arguing other English authorities "clearly indicate an opinion antithetical to that of Dr. Dicey" that "an independent right of assembly is not *known* in the English Constitution").

absence of attention to the Assembly Clause's language, existing First Amendment doctrine has, without serious consideration, accepted the proposition that the constitutional right to assembly is limited to assemblies that lawfully abide by all applicable laws and regulations.[318]

2. *Peaceably = Nonviolently vs. Nondisruptively.* — The most natural reading of the First Amendment's text is that it protects those who assemble "peaceably," defined, as it was throughout the nineteenth century, to mean "without war; without tumult or commotion."[319] In other words, the critical doctrinal question is whether only violent assemblies lack constitutional protection or whether "tumult or commotion" (in modern parlance, disorderliness) can eject an assembly from constitutional protection. The former construction would require a credible and imminent risk of actual violence to persons or property before an assembly fell outside of constitutional protection. The latter would construe the text of the First Amendment to exclude disorder and disruption short of violence, leaving courts to set the threshold.

Peaceable as Nonviolent. Early American legal sources support interpreting "peaceably" to mean "nonviolently."[320] Indeed, there is strong evidence that the American view, through the nineteenth century, was that outdoor gatherings were subject to a single constitutional constraint: They could not engage in violence to people or destruction of property.[321] Nineteenth-century legal treatises emphasize that the constitutional shield disappeared only when an assembly descended into violence, becoming a "riot" or "unlawful assembly" as defined by the common law. An 1844 *American Law Magazine* entry on the topic of "Riots, Routs, and Unlawful Assemblies," for instance, explains that gatherings "which look to violence and not to reason and the influence of a strong expression of public opinion, do not fall within the protection of the constitutional guarantees."[322]

---

318. While the Warren Court occasionally struck down efforts to repress peaceful civil rights marches and protests, it avoided a systematic analysis of the text, opting instead to rely on concerns about vagueness, overbreadth, and impartial exercises of discretion. See Abu El-Haj, Liberal First Amendment, supra note 9, at 547–49 (reviewing the Warren Court's decisions involving civil rights and anti-war protesters).

319. See Peaceably, Webster's 1880 Complete Dictionary, supra note 257.

320. See supra notes 236–239 and accompanying text; see also supra notes 244–248 and accompanying text (on the limited debate in the first Congress).

321. For a more extensive account of the historical evidence, see Abu El-Haj, All Assemble, supra note 7 (contrasting the legal response to Occupy with nineteenth-century public attitudes toward public assembly as evidenced in law and public discourse); Abu El-Haj, Neglected Right of Assembly, supra note 28 (drawing out the significance of the right of assembly, its political origins and functions, and changes in its contours over time).

322. See Riots, Routs, and Unlawful Assemblies, Am. L. Mag., Apr. & July 1844, at 350, 351, 357 (Philadelphia, T. & J. W. Johnson); see also Anna Laurens Dawes, How We Are Governed: An Explanation of the Constitution and Government of the United States 309 (Boston, Ginn & Co. 1896) (explaining that before any "riotous assemblies can be dispersed," it "must be evident (on account of this constitutional provision) that it is not a peaceable assembly, before any such course can be adopted").

The 1898 edition of John Burgess's *Political Science and Comparative Constitutional Law* similarly explains that the government is "allow[ed] . . . to limit the immunity in question . . . by laws distinguishing between a peaceable and a riotous assembly, forbidding the latter and permitting only the former."[323]

To be unpeaceable meant to be violent. American courts, moreover, construed the crimes of "riot" and "unlawful assembly" narrowly, requiring "a threat of force or violence."[324] As the 1846 edition of Francis Wharton's *A Treatise on the Criminal Law of the United States* explained, a gathering could only be dispersed if it was shown "that the assembling was accompanied with . . . either . . . actual force or violence, or at least of an apparent tendency thereto, as were calculated to inspire people with terror, such as being armed, using threatening speeches, turbulent gestures, or the like."[325]

Nineteenth-century governments certainly sought opportunities to expand the definition of riot and unlawful assembly. But state courts held firm.[326] In 1863, the New Hampshire Supreme Court agreed with counsel that "the common law in respect to riots is 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."[327]

In sum, it would be squarely within the American tradition for courts to define the scope of protection under the First Amendment's Assembly Clause to extend to all nonviolent assemblies. As Professor John Randolph Tucker, grandson of Professor Henry St. George Tucker, would summarize in his 1899 treatise *The Constitution of the United States: A Critical Discussion of Its Genesis, Development, and Interpretation*, although the right of the people peaceably to assemble "does not prevent interference with the riotous assemblages of the people; *where there is no riotous conduct the government*

323. Burgess, supra note 234, at 193.

324. See John Inazu, Unlawful Assembly as Social Control, 64 UCLA L. Rev. 2, 10–13 (2017) (noting that early American law defined unlawful assemblies as those that posed "significant threats to the public order" and contrasting that with Blackstone's narrower approach); see also A. V. Dicey, Introduction to the Study of the Law of the Constitution 502 (8th ed. 1915) ("A meeting for an unlawful purpose is not . . . necessarily an unlawful assembly. The test of the character of the assembly is whether the meeting . . . contemplate[s] the use of unlawful force, or does or does not inspire . . . reasonable fear that unlawful force will be used . . . .").

325. 1 Francis Wharton, A Treatise on the Criminal Law of the United States 524 (Philadelphia, James Kay, Jun. & Brother 1846) (footnote omitted).

326. See Abu El-Haj, All Assemble, supra note 7, at 975–77 (reviewing cases from the period).

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

cannot interfere."[328] This approach would also be consistent with international law and the jurisprudence of the European Court of Human Rights.[329]

Were this definition to prevail, the First Amendment would proscribe the dispersal of an assembly on public property absent a credible and imminent risk of violence to persons or destruction of property (physical violence), and it would prevent the arrest and removal of individuals for nonviolent lawbreaking during an otherwise nonviolent assembly. On the other hand, protesters or counterprotesters whose behavior constituted a true threat to another person could justifiably be removed without offending the First Amendment. Courts would need to decide whether there is a threshold for violence—e.g., the severity of violence (graffiti?), scale and prevalence of violence, and so forth. But this framework would provide significantly more protection and clarity about the scope of the right.

Peaceable as Nondisruptive. That said, given the dramatic expansion of constitutional protection that would be effected by such an interpretation of "peaceably," it might be more palatable to construe the text of the Assembly Clause to exclude disorder and disruption short of violence.[330] "Peaceably" would be defined as "without tumult or commotion."[331] As the Illinois Supreme Court stated in 1891, "Citizens [would] have the constitutional right 'of pursuing their own happiness[,]'" including by gathering in a "peaceable manner . . . together in street parades and processions . . . provided they do not disturb or threaten the public peace, or substantially interfere with the rights of others."[332]

Were the limits of "peaceably" to be set at disruption or disorderliness, the threshold would, however, need to be much higher than mere inconvenience to vindicate the right's contribution to democratic politics.[333] As the Illinois Appellate Court in that same case emphasized, "Under a popular government like ours, the law allows great latitude to

328. Tucker, The Constitution of the United States, supra note 235, § 326 (emphasis added).

329. See, e.g., Knežević v. Montenegro, App. No. 54228/18, ¶ 70 (Mar. 11, 2021), https://hudoc.echr.coe.int/eng?i=001-208792 [https://perma.cc/C8CD-ER7U] (holding that the right of assembly in Article 11 of the European Convention on Human Rights "does not cover a demonstration where the organisers and participants have violent intentions," but that "[a]n assembly tarnished with isolated acts of violence is not automatically considered non-peaceful so as to forfeit . . . protection").

330. See Inazu, Assembly, Pluralism, and Identity, supra note 282, at 104 (suggesting that the "textual constraint" of the Assembly Clause "still leaves open questions about the nature and limits of peaceability, which may go beyond violence-based limitations, especially in the context of groups").

331. Peaceably, Webster's 1880 Complete Dictionary, supra note 257.

332. City of Chicago v. Trotter, 26 N.E. 359, 359 (Ill. 1891).

333. See Abu El-Haj, Neglected Right of Assembly, supra note 28, at 569–77 (discussing early court cases finding similarly).

public demonstrations, whether religious, political or social" because to do otherwise would be "against the genius of our institutions."[334]

Indeed, it would be critical not to set the level of disorder too low given that assembly's power to function as a politics of disruption depends on elements that tend toward disorderliness: size, persistence, and authenticity (often reflected in spontaneity and autonomy). Mere inconvenience and the disruption of vehicular or pedestrian traffic, like aesthetic harms of parks and lawns, should *not* be enough to eject an assembly from First Amendment protection.[335] As the European Court of Human Rights has recently affirmed, "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 its substance."[336] While conceding that tolerance is not without limits, the Court advised that authorities should only take measures when an assembly engages in disruption to "a degree exceeding that which is inevitable" and their measures must be proportional.[337]

On this view, an assembly would only cease to be peaceable when it was sufficiently disorderly, disruptive, or obstructive.[338] Such an interpretation would provide less protection, likely permitting the removal of an ongoing assembly that monopolizes public space or obstructs streets for an extended period of time on the grounds that it materially limits the freedom of movement of nonparticipants and the possibilities for others to assemble.[339]

Still, the value of setting the threshold of "unpeaceably" at a level short of violence or physical destruction of property is precisely that it

---

334. Trotter v. City of Chicago, 33 Ill. App. 206, 208 (1889) (conceding that "a procession may become disorderly or riotous, and degenerate into a mob, or a parade may be so conducted . . . as to invite a breach of the peace, . . . but this would be under exceptional circumstances, and the individuals . . . would be subject to punishment"), aff'd, 26 N.E. 359.

335. See Committee, General Comment 37, supra note 23, ¶ 7 ("[D]isruption, for example of vehicular or pedestrian movement or economic activity . . . do[es] not call into question the protection such assemblies enjoy.").

336. Knežević v. Montenegro, App. No. 54228/18, ¶ 77 (Mar. 11, 2021), https://hudoc.echr.coe.int/eng?i=001-208792 [https://perma.cc/C8CD-ER7U]; see also Kudrevičius v. Lithuania, App. No. 37553/05, ¶¶ 140–141, 182–183 (Oct. 15, 2015), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-158200%22] [https://perma.cc/TW2J-RZUK] (holding that while a blockade did not render the assembly unpeaceful, the convictions were proportionate, pursued "legitimate aims," and "[were] 'necessary in a democratic society'").

337. Knežević, App. No. 54228/18, ¶ 84.

338. See id. ¶ 79 (noting further that "the duration and the extent" are factors in determining when authorities may interfere).

339. It would also likely permit the arrest of individuals for a range of catch-all public order offenses, such as disorderly conduct and breach of the peace, but presumably not for mere technical legal violations. That is, individuals could be arrested for being rowdy and disturbing the peace after dark or for being confrontational with police, but not for merely loitering or breaking curfew.

builds in a way to accommodate tradeoffs between assembly rights and the rights of the public. It thus arguably provides a more workable legal framework given modern realities by providing a way to consider when an encampment that monopolizes the use of public space to the exclusion of others can be removed, without having the constitutional analysis turn on either extreme (violence or legality). Instead, the analysis would turn on the encampment's extended presence in public space and the actual (not merely hypothetical) impediments it posed for others. It would further balance those costs against the value of the encampment as a site for self-governance and for building social solidarity (e.g., Occupy)—a balancing that might lead to accommodation (such as relocating) rather than forced dispersal and penalties.

* * *

Whichever approach is taken, one thing should now be clear: Direct engagement with defining the "peaceably" limit would significantly advance the First Amendment rights of those who gather together for political ends in the United States today. Either strategy would provide a more defensible approach to protection and more serious engagement with the reasons assembly is protected. And this is true even when we acknowledge that courts will, ultimately, have to wrestle with a variety of subquestions such as: *How much* unpeaceable behavior is sufficient to warrant dispersal? Are isolated actions enough? Or must there be evidence of widespread and systematic unpeaceableness? And *whose* unpeaceableness matters? Organizers'? Participants'? Counterprotesters'? And so on.[340]

E. *Advance Regulation of Assemblies*

An independent Assembly Clause doctrine would not obviate the need to address tradeoffs or engage in balancing. The state has both a legitimate interest in public order in the public square and an obligation to protect the rights of others (including their property, dignity, and equality). The same is true for university administrators, who must consider the impact of assembly on the orderly functioning of the university as an institution of learning, ensuring that all students continue to be educated and accepted on an equal footing. Advanced regulation of assembly also can

340. See Committee, General Comment 37, supra note 23, ¶¶ 14–20 ("There is not always a clear dividing line between assemblies that are peaceful and those that are not, but there is a presumption in favour of considering assemblies to be peaceful."); see also Salát, Peaceful Intentions, supra note 182, at 223 (discussing legal complications caused by the fact that "[p]eace is an interpretive concept, which then needs a special construction in relation to freedom of assembly").

help manage competing demands on public space.[341] It is thus unlikely that "peaceably" could be the only limit on the right. In textual terms, not all burdens amount to an "abridge[ment] [of] . . . the right of the people peaceably to assemble."[342]

A jurisprudence of assembly, however, would employ a better-calibrated scale in designing constitutional rules to permit the management of the social costs of the right. Constitutional protection would no longer be discounted simply because assembly is not "pure speech."[343] Instead, First Amendment doctrine would develop a set of weights and measures that account for assembly's distinct contributions to our republican form of government. A jurisprudence of assembly would, in other words, closely track the approach of existing free speech jurisprudence and scholarship, which offer robust defenses of the value of the freedom of speech—and, in turn, justify a great deal of social harm.

1. *Time, Place, and Manner Revisited.* — An independent Assembly Clause jurisprudence would approach the constitutionality of time, place, and manner regulations with an attentiveness to the ways that assembly furthers the social foundation of political action and democratic politics. It would delineate the boundaries of constitutional protection to facilitate those democratic returns while recognizing that choice of place is often critical to the capacity to achieve them.

University administrators know these values of assembly. Consider the times when tents are built on campus to raise banners and distribute paraphernalia along with food, drink, speeches, and songs—freshman orientation, homecoming, end-of-semester festivals, alumni weekends, and graduation celebrations. Universities understand that socializing builds solidarity; that helping first-years adjust to college is about helping them make friends and build a community. They know that there are social preconditions to a successful educational experience. They understand that graduation, homecoming, and alumni weekend—and the acts of gathering they involve—are critical to building the school spirit that generates

---

341. This is the case even though, historically, such regulations were adopted to crack down on unpopular groups—first the Salvation Army, and then the Wobblies—and their use of public streets. See, e.g., David M. Rabban, Free Speech in Its Forgotten Years 64–76 (1997) (describing the work of the Free Speech League, an organization that fought restrictions placed on politically unpopular groups, including anarchists and labor); Laura Weinrib, The Taming of Free Speech: America's Civil Liberties Compromise 26–28 (2016) (recounting the free speech fights of the Industrial Workers of the World and Wobblies); Abu El-Haj, All Assemble, supra note 7, at 982–89 (discussing ordinances adopted to repress the Salvation Army).

342. U.S. Const. amend. I.

343. See supra note 256 and accompanying text.

future returns in the form of not only donations but also professional and political networks for current students and alumni alike.[344]

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

Realistically, on college campuses these rules impact almost entirely political (not social) gatherings. In fall 2024, armed with clearer and more expansive rules, universities dispersed candlelight vigils (for breaking rules that prohibit protests after 11 PM)[345] and took down solidarity sukkahs (for violating rules that prohibit the installation of structures on campus lawns).[346] At Harvard, students, and subsequently faculty, were punished for silently working in the library with signs on their laptops that read, for example, "Israel Bombs Harvard Pays" (a political sit-in).[347]

Certainly, there is constitutional space for adopting rules that ban disruptive protests in spaces used for academic purposes or in private spaces such as dorms. A jurisprudence of assembly would recognize this. Indeed, courts could easily determine that classrooms, like dormitories, are not public in the relevant sense.[348] What courts would change is the default

---

344. Cf. Adam Bonica, Why Are There So Many Lawyers in Congress?, 45 Legis. Stud. Q. 253, 273 (2020) (finding that "[m]oney raised from fellow lawyers accounts for about half of lawyers' early fundraising premium," helping explain why lawyers are overrepresented in Congress).

345. See Taft, How Universities Cracked Down on Pro-Palestinian Activism, supra note 127 (describing how universities are handling the enforcement of new student demonstration policies on U.S. college campuses).

346. Id. (describing the removal of student-built structures that do not comply with updated university policies).

347. Josh Moody, Harvard Faculty Suspended From Library Over Protest, Inside Higher Ed (Oct. 25, 2024), https://www.insidehighered.com/news/faculty-issues/academic-freedom/2024/10/25/harvard-faculty-suspended-library-over-protest (on file with the *Columbia Law Review*) (internal quotation marks omitted).

348. Universities already suspend students who disrupt classrooms. See, e.g., Rebecca Massel & Isha Banerjee, Columbia Suspends Affiliate for Participation in Disruption of History of Modern Israel Class, Colum. Spectator (Jan. 23, 2025), https://www.columbiaspectator.com/news/2025/01/23/columbia-suspends-affiliate-involved-in-disruption-of-history-of-modern-israel-class/ [https://perma.cc/UXM5-TEZT] (describing Columbia's disciplinary measures following a student disruption of the first day of a graduate-level course).

assumption that any and all time, place, and manner restrictions are constitutional so long as they are viewpoint neutral, regardless of the timing of their implementation.

Courts would also be unlikely to apply the same level of scrutiny to rules that impact the volume at which music can be played at a rock concert as to rules that limit the ability to protest after dark.[349] This would not be because the rock concert was not an assembly but because the regulation at issue places significantly fewer burdens on the act of gathering or its social returns.

The problem with existing doctrine, in other words, is that it routinely and unthinkingly endorses regulations that target the very qualities of assembly that sustain self-governance. Bans on encampments in public and on college campuses are particularly interesting in this regard. From the perspective of an expressive conception of assembly, an encampment is a particularly low-value iteration of protest insofar as its goal is to interfere with the university's normal functioning.[350] They are ugly and inconvenient, hog public space, and are typically designed "to impede university life and to impose costs on members of the community in the hopes that they will concede to demands in order to alleviate the pressure."[351] Their duration is just an extension of attention-getting.

The constitutional analysis of encampments changes significantly with a recognition of assembly as a social form of politics. Occupy, the Dakota Access Pipeline protests, and the student encampment at Columbia are now "assemblies"—not just "encampments." As assemblies, they can be recognized as enhanced opportunities for sociality, social solidarity, and civic inclusion. Moreover, from the perspective of assembly as a politics of disruption, limits on their duration target their capacity to build power by demonstrating size, momentum, or persistence. Most importantly, now, the burdens on these values must be balanced against the public's interest in order, regularity, and aesthetics.

2. *Public Forum Doctrine Revisited.* — While it would be unreasonable to insist that all governmental property should be open to the public for purposes of assembling, limiting the places that are available can and does undermine First Amendment interests. The existing public forum doctrine takes a historical approach to what forums must be open.[352] An Assembly Clause doctrine would take a different approach: focusing on

---

349. *Ward v. Rock Against Racism*, the case that cemented the permissiveness of the time, place, and manner doctrine, involved a constitutional challenge to a New York City park regulation governing the volume at which music could be played in Central Park. 491 U.S. 781, 789–92 (1989).

350. See Whittington, supra note 11, at 100 ("Disruption takes many forms, but they all aim to impede the normal functioning of the university.").

351. Id. at 106.

352. See supra notes 146–147 and accompanying text.

whether closing certain public spaces to assembly would undermine assembly's contribution to self-governance. Places, it would recognize, are imbued with political and cultural significance, and thus the location of an assembly can be integral to achieving social solidarity, civic inclusion, and even size and political significance.[353]

As Zick has long argued, places have "*vocality*"; that is, a place can have its own "expressive qualities."[354] A place, like the National Mall, is "inscribed with broader national memories—for example of prior movements, contests, and triumphs."[355] Columbia University's Hamilton Hall, like Sproul Plaza on the UC Berkeley campus, is a "repositor[y] of . . . memories"; like the Edmund Pettus Bridge or the Sixteenth Street Baptist Church, such places are "connected with specific political and social conflicts."[356]

Indeed, once we recognize the vocality of place, it becomes clear that the existing public forum doctrine fails even by the narrowly expressive measure of assembly's value that undergirds existing First Amendment doctrine. Still, the importance of place to assembly is not limited to this relationship to message. The political and cultural significance of places can also be integral to achieving social solidarity, civic recognition, and even political power.[357] Setting up pro-Palestinian, antigenocide encampments in prime spots on campus was at least as much a demand for recognition by Palestinians, Arabs, and Muslims—"See that we are part of this community and our presence is shifting the orthodoxies, including among our young Jewish friends."—as it was an effort to secure divestment from Israel or influence U.S. policies in the Middle East. The encampments' prominent presence was a manifestation of how the decision to diversify universities taken in earlier decades had changed the community and its values.

An independent Assembly Clause doctrine would similarly appreciate that Hamilton Hall was more than just any administrative building; Hamilton Hall was an important site of student protests in 1968 and is part

---

353. See Zick, Assembly Within, supra note 305, at 262 (observing, inter alia, the ways "[a]ssemblies use place or location to strengthen group solidarity").

354. Id.

355. Id.

356. Id.; see also Richard Fausset, From Free Speech to Free Palestine: Six Decades of Student Protest, N.Y. Times (May 4, 2024), https://www.nytimes.com/2024/05/04/us/college-protests-free-speech.html (on file with the *Columbia Law Review*) (describing six major student protest movements and naming various places that were important sites during some of them, including Columbia's Hamilton Hall during the anti–Vietnam War protests); Brian Clement Rainville, Walk to Freedom: How a Violent Response to the Civil Rights Protest at Alabama's Pettus Bridge Unwillingly Created the Voting Rights Act of 1965, at 12 (2009) (M.A. thesis, William & Mary) (on file with the *Columbia Law Review*) (explaining the significance of the Edmund Pettus Bridge).

357. See Zick, Assembly Within, supra note 305, at 262.

of Columbia's proud tradition of student activism.[358] As the site of two previous powerful and prescient student occupations,[359] Hamilton Hall had spatial vocality in spades at least within Columbia's culture. In that regard, the students may well have had a better First Amendment claim to occupy (not destroy) Hamilton Hall than most observers recognized. Indeed, the choice of Hamilton Hall suggests a subgroup's embrace of confrontational tactics to connect with the now-idealized student protests of the 1960s. Certainly, the decision to occupy Hamilton Hall was not a calculation that Shafik and other University administrators would be better able to *hear* them if they were in an administrative building.

In sum, a jurisprudence dedicated to vindicating the right of peaceable assembly would reject the default closing of spaces with cultural and political significance.[360] It would require places with vocality—places like the plaza in front of the Supreme Court—to be generally available for public assembly, just as existing doctrine requires public streets and squares to be available. It would also recognize that some assemblies have unique connections to particular locations and are critical to building social solidarity and power.

University administrators, like the public and courts, will no doubt balk at the direction a jurisprudence of assembly would likely take the public forum doctrine. Once the interest in the vocality of places is added into the calculation, will one be able to justify closing any spaces (Congress, the Supreme Court, the Lincoln Memorial, classrooms, or dorms)? The answer in many cases will be yes. But this is the question, the hard question, that the doctrine should be asking. Before sanctioning the authority to close vast swaths of public space, courts should consider what makes a space "public" and balance the interest in closing specific spaces against both the interest in expressive vocality and the social–civic value of assembly.[361]

---

358. See, e.g., Vimal Patel, A Protest 56 Years Ago Became an Important Part of Columbia's Culture, N.Y. Times (Apr. 18, 2024), https://www.nytimes.com/2024/04/18/nyregion/columbia-protest-1968-vietnam.html (on file with the *Columbia Law Review*) (describing the key moment of the anti–Vietnam War student movement on Columbia's campus and the role of Hamilton Hall in it).

359. See Jocelyn Wilk, 1968: Columbia in Crisis, Colum. U. Librs., https://exhibitions.library.columbia.edu/exhibits/show/1968 [https://perma.cc/J56C-VGCL] (last visited Feb. 5, 2025) (providing a narrative and archive of the mid-century student protests and the ways they reshaped the University's culture).

360. See Müller, supra note 306, at 3 (arguing that one should be concerned when spaces are modified so as to render them inhospitable to protests).

361. Interestingly, the original public meaning of the word "public" did not tie the word to government or its property in any way. As late as 1880, *Webster's Complete Dictionary of the English Language*'s definitions of "public" were bound by the theme of popular sovereignty: "Pertaining to, or belonging to, the people; relating to a nation, state, or community." Public, Webster's 1880 Complete Dictionary, supra note 257; see also id. (giving "[o]pen to common use; as, a *public* road; a *public* house" as another definition).

IV. A RIGHT OF ASSEMBLY: IMPLICATIONS AND APPLICATIONS

It is finally time to consider some of the implications and applications of an independent right to assembly, especially in the university context.

A. *Constitutionality of the Federal Anti-Riot Act and the January 6 Riot*

An independent Assembly Clause doctrine would provide much-needed clarity on why collective political violence can be criminalized. Specifically, it would clarify why the federal Anti-Riot Act, which defines a riot as a public disturbance or threat of public disturbance that involves an act or acts of violence by one or more people participating in an assembly of three or more persons, is both constitutional and should have been the basis for charging those who stormed the Capitol on January 6, 2021.[362]

Instead, two circuits have raised questions about the constitutionality of the federal Anti-Riot Act on the grounds that it criminalizes organizers' speech.[363] In *United States v. Miselis*, the Fourth Circuit found that certain applications of the Anti-Riot Act "tread[] too far upon constitutionally protected speech."[364] Even as it upheld the statute's application to the particular defendants given their violent conduct during the Unite the Right rally in Charlottesville, Virginia, the court raised doubts about the constitutionality of criminalizing speech that "encourage[s]," "promote[s]," or "'urg[es]' others to riot."[365] More specifically, it found the Anti-Riot Act constitutionally overbroad in "sweep[ing] up a substantial amount of speech that retains the status of protected advocacy."[366] The Ninth Circuit Court of Appeals reached a similar conclusion in *United States v. Rundo*, upholding the Act only on the grounds that the portions prohibiting

362. See 18 U.S.C. §§ 2101–2102 (2018). Although there is no federal law against unlawful assemblage, under the Assimilative Crimes Act federal courts can apply state laws to crimes committed on federal property when there is no applicable federal statute. 18 U.S.C. § 13. Unlawful assembly is a crime in many states. For example, in New York, "[a] person is guilty of unlawful assembly when he assembles with four or more other persons for the purpose of engaging or preparing to engage with them in tumultuous and violent conduct likely to cause public alarm." N.Y. Penal Law § 240.10 (McKinney 2025).

363. The ostensibly offending provisions of the Anti-Riot Act are its imposition of criminal sanctions on those who "travel[] in interstate or foreign commerce . . . to organize, promote, encourage, participate in, or carry on a riot." 18 U.S.C. § 2101(a)(2).

364. 972 F.3d 518, 525 (4th Cir. 2020); see also United States v. Gillen, No. 19-4553, 2022 WL 4395695, at *1–2 (4th Cir. Sept. 23, 2022) (per curiam) (holding the Anti-Riot Act constitutional as applied to the defendant's violent conduct after severing the elements of the Act *Miselis* found to offend the First Amendment).

365. See *Miselis*, 972 F.3d at 530 (internal quotation marks omitted) (quoting 18 U.S.C. § 2101(a)(2)–(b)).

366. Id.; accord United States v. Grider, 617 F. Supp. 3d 42, 51–52 (D.D.C. 2022) (rejecting a January 6 participant's claim that the federal civil disorder statute was facially overbroad by distinguishing, and thus implicitly accepting, *Miselis*'s analysis that the Anti-Riot Act was unconstitutionally overbroad because it improperly criminalized *speech* promoting or encouraging a riot).

speech were severable.[367] The result: Although the participants in violence at the Capitol on January 6, 2021, are commonly referred to as "rioters," none have been charged with "riot" or "unlawful assembly."[368] Instead, federal prosecutors have been forced into the error of charging those who engaged in violence on January 6 with a slew of other crimes, sometimes obscure and ill-suited ones.[369]

The history provided above makes evident just how fundamentally misguided this analysis is. The one clear limit to the right of assembly (textually and at the time of the Founding) is that it does not protect violent assemblies such as riots.[370] The federal Anti-Riot Act is, unquestionably, constitutional: It sanctions individuals who, through their actions (including words) have taken steps to orchestrate a riot, defined narrowly as "a public disturbance involving . . . an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury" to persons or property.[371] Neither its criminalization of words nor the ideological or political valence of the violence it captures should produce constitutional handwringing.[372] When we take the First

---

367. 990 F.3d 709, 720 (9th Cir. 2021) (per curiam); see also United States v. Betts, 99 F.4th 1048, 1056 (7th Cir. 2024) (upholding the constitutionality of the Anti-Riot Act because the defendant's "conduct falls within the Anti-Riot Act" while "acknowledg[ing], as we did . . . nearly 50 years ago, that the Anti-Riot Act presents some First Amendment problems").

368. As of September 4, 2024, 1,472 people had been criminally charged for their participation in the January 6 attack on the U.S. Capitol. The Jan. 6 Attack: The Cases Behind the Biggest Criminal Investigation in U.S. History, NPR (Feb. 9, 2021), https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories (on file with the *Columbia Law Review*) (last updated Mar. 14, 2025). Few, however, were charged with "riot" or "unlawful assembly." See, e.g., Indictment at 1, United States v. Fischer, No. 21-CR-234-CJN (D.D.C. filed Nov. 10, 2021) (charging Joseph Fischer with seven counts, including civil disorder, assaulting, resisting, or impeding certain officers, disorderly and disruptive conduct in a restricted building, obstruction of an official proceeding, and demonstrating in a Capitol building, but not unlawful assembly or riot); Indictment at 1, United States v. Sparks, No. 21-CR-087 (D.D.C. filed Nov. 10, 2021) (charging Michael Sparks with nine counts, none of which were unlawful assembly or riot). The U.S. Attorney's Office website at the time provided a 115-page document with all the sentences handed down in the Capitol breach cases; no individual on that document was convicted under the Anti-Riot Act or an unlawful assembly law. See Sentences Imposed in Cases Arising out of the Events of January 6, 2021, DOJ (Sept. 11, 2024), https://web.archive.org/web/20241006174136/https://www.justice.gov/usao-dc/media/1331746/dl?inline (on file with the *Columbia Law Review*).

369. See *Fischer*, 144 S. Ct. at 2182 (explaining that the charges against Fischer were varied, including obstructing an official proceeding).

370. See supra notes 322–328 and accompanying text.

371. 18 U.S.C. § 2102(a)(2) (2018) (extending also to "a threat or threats of the commission of an act or acts of violence" to persons or property under the same conditions).

372. The history of its passage, as an effort by at least some to target so-called "outside agitators," on the other hand, is another matter. See Recent Case, United States v. Miselis, 972 F.3d 518 (4th Cir. 2020), 134 Harv. L. Rev. 2614, 2619 (2021) (highlighting legislative

Amendment's language seriously, the fact that, in limited circumstances, words spoken at a peaceful assembly might fall outside of constitutional protection for the freedom of speech (as calls to imminent acts of violence) does not entail that words used to orchestrate collective violence are constitutionally protected merely because there is a delay between the organizing and the lawless violence.[373]

The Assembly Clause lens provides a critical reminder that violence (whether effected by words or actions) is not protected by the Constitution. It puts an end, once and for all, to the bitter irony that existing First Amendment doctrine permits the routine sanctioning of peaceful protesters, while those gathered with the purpose of obstructing the counting of Electoral College votes through violence at the Capitol on January 6, 2021, were not charged with riot, as courts and legal commentators fret over the constitutionality of the federal Anti-Riot Act on freedom of speech grounds.[374]

B. *Permit and Permission Regimes Revisited*

Recognition of assembly as an independent First Amendment right strongly suggests—as argued above—the need to fundamentally reconsider the ubiquity of time, place, and manner restrictions.[375] The habit of extensively regulating assembly in advance is driven by the exclusive focus on the social costs of assembly and a resulting disregard of the manifold burdens of such regulation. These include not only regulations' impact on the power and value of assembly to our democracy but also, given the sheer scale, more foundational concerns about discretion, viewpoint discrimination, and First Amendment chill.

While the suggestion that permit requirements are constitutionally problematic is foreign—possibly even frightening—to contemporary American legal sensibilities, it is not without precedent. Jurisdictions that provide independent recognition of a right of peaceful assembly generally disfavor legal regimes that require people to apply for permission to gather

---

history indicating that "the Act's primary targets" were "Communists and Black political leaders," who "were characterized as 'outside agitators' traveling across the country to foment unrest").

373. See United States v. Rundo, 990 F.3d 709, 716–17 (9th Cir. 2021) (per curiam) (analyzing the Anti-Riot Act's verbiage to assess whether it unconstitutionally criminalizes words).

374. See, e.g., Margot E. Kaminski, Incitement to Riot in the Age of Flash Mobs, 81 U. Cin. L. Rev. 1, 62–66 (2012) (concluding that "the federal Anti-Riot Act remains a problematic means to prosecute speakers who call for a group to assemble"); Nancy C. Marcus, When "Riot" Is in the Eye of the Beholder: The Critical Need for Constitutional Clarity in Riot Laws, 60 Am. Crim. L. Rev. 281, 286 (2023) (arguing that, absent limiting constructions, many riot provisions "harm those exercising their rights to free speech and assembly[] [and are] open . . . to constitutional challenge").

375. See supra section III.E.1.

in public spaces.[376] Under international law, voluntary notification regimes are considered sufficient to address the public's competing interests.[377] This perspective is also not without precedent in the First Amendment literature. In the 1980s, Professor C. Edwin Baker argued that even an expressive conception of assembly's value warranted replacing permit requirements with a voluntary notification system in order to vindicate "values of self-realization and self-determination."[378] In previous work, I have argued that existing requirements are inconsistent with how the first generation of Americans understood the contours of the political rights they had inherited as English citizens.[379]

Indeed, there is particularly good evidence that requiring permission from authorities as a precondition to exercising the right of peaceable assembly is not "objectively, deeply rooted in this Nation's history and tradition."[380] Despite state capacity, "[p]ermit requirements [for assembling] were unheard of through most of the nineteenth century."[381] Major American cities such as Chicago, Denver, Detroit, San Francisco, and St. Paul did not require advance permission to gather on the public streets until the 1880s.[382] More importantly, this reluctance to regulate arose out of a commitment to assembly as a customary constitutional right.[383] An 1873 treatise by John Alexander Jameson referred to "wholly unofficial" gatherings and "[s]pontaneous [c]onvention[s]" as protected by the right of peaceable assembly.[384] This constitutional tradition was so strong that,

---

376. See, e.g., Committee, General Comment 37, supra note 23, ¶ 70 ("Having to apply for permission from the authorities undercuts the idea that peaceful assembly is a basic right.").

377. See id. ¶¶ 70–73 (describing the appropriate contours of a notification system).

378. Baker, supra note 13, at 133–34, 138–60 (arguing, in particular, that "[t]he normal and legitimate function of traffic laws should not lead to their being applied to restrict assemblies or parades").

379. See Abu El-Haj, Neglected Right of Assembly, supra note 28, at 547–48, 579 (arguing that "the very need to ask permission as well as the conditions that can be placed on permits issued undermine the meaningfulness of political assemblies for participants" in ways that are at odds with our constitutional history and that render "the people . . . supplicant").

380. Cf. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246–47 (2022) (internal quotation marks omitted) (quoting Timbs v. Indiana, 139 S. Ct. 682, 686 (2019)) (noting that the Court's approach to recognizing rights—here, in the substantive due process context—turns on "whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty'" (alteration in original) (quoting *Timbs*, 139 S. Ct. at 686)).

381. Abu El-Haj, Neglected Right of Assembly, supra note 28, at 545.

382. Id.

383. See id. at 573 (providing In re Frazee, 30 N.W. 72 (Mich. 1886), as an example of the emphasis placed "on the fact that . . . public assemblies were 'customary, from time immemorial, in all free countries'—a fundamental right inherited from England" (quoting *Frazee*, 30 N.W. at 75)).

384. 3 John Alexander Jameson, The Constitutional Convention: Its History, Powers, and Modes of Proceeding 5 (New York, Charles Scribner & Co. 1867).

even after two consecutive years of Orangemen riots in the 1870s, New York City eschewed the adoption of a permit requirement as un-American.[385] The state legislature would ultimately preempt this decision with its preferred regulatory choice: a notification requirement.[386] Not until 1914 would New York City require a permit to parade or process on its public streets, and even then it opted to grandfather in annual parades with long histories in the city.[387]

Nineteenth-century state judges considered the first ordinances requiring permits to gather in public an affront to American constitutional traditions[388]—in modern legal terms, an affront to "this Nation's history and tradition" and "the concept of ordered liberty."[389] Not unlike what happened on college campuses after October 7, 2023, the first ordinances requiring permission to parade or gather in public streets and public parks were adopted in response to unpopular assemblies—the unwanted outdoor proselytizing of the Salvation Army and other evangelical groups.[390] These municipal efforts were, however, largely struck down, with nineteenth-century state courts soundly rejecting the ordinances as a reasonable means to control disorder and inconvenience.[391]

The views of the Kansas Supreme Court are typical of the judicial response at the time.[392] Writing in 1888, the court objected to the suggestion "that an unusual crowd or congregation of people upon one of the public streets of a city is either of itself a disturbance of the public peace . . . [or] threatens the good order of the community" and thus must be managed in advance.[393] The court expressed outrage that, under the ordinance, "the people of the state" would not be able to assemble "without permission first had and obtained."[394] The Kansas court ultimately declared the ordinance void because "it is not a fair estimate of the character and habits of the American people to assume that the public

385. Abu El-Haj, All Assemble, supra note 7, at 973–78.

386. Id. at 980.

387. See Abu El-Haj, Neglected Right of Assembly, supra note 28, at 545 (noting, further, that New York City did not extend the permit requirement to street meetings until 1931).

388. See supra notes 379–395 and accompanying text.

389. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal quotation marks omitted) (first quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); then quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

390. See Abu El-Haj, All Assemble, supra note 7, at 982 (explaining that state courts first "wrestle[d] with the constitutional implications [of permit requirements] in the context of ordinances passed to suppress the Salvation Army's outdoor religious missionary work").

391. See Abu El-Haj, Neglected Right of Assembly, supra note 28, at 570 ("All but one of the first state supreme courts asked to review ordinances that required advance permission to gather in public places found them void.").

392. Id. at 571–77.

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

394. Id.

peace is threatened when numbers of them congregate," while highlighting the social solidarity that emerges from people "marching together *with their party banners, and inspiring music, up and down the principal streets*."[395]

Neither legislatures nor courts are likely to throw out time, place, and manner regulations wholesale simply because they are reminded of this history. Still, given the burdens these regulations place on assembly's contribution to democratic politics,[396] broader knowledge of this history, far more than the practices of international jurisdictions, is critical to breaking down contemporary First Amendment orthodoxies and generating more skepticism about the reasonableness of ubiquitous time, place, and manner regulations. Universities, moreover, are a great place to begin given the lower stakes (especially to public order). University administrators should be brave and scale back the amount of space they close off from assembly and the numerous regulations of its form that have emerged, and their lawyers should reconsider asserting maximalist interpretations of existing First Amendment doctrine. Municipalities should eventually do likewise.

C. *Assembly and the University*

Many are likely to push back at this point. Whatever the merits of a broader conception of the right of assembly in the actual public square, the educational context militates in favor of fewer protections for student protesters. Universities are, first and foremost, places of knowledge creation and learning.[397] Their purposes are "limited to instruction and the advancement of knowledge in the humanities, social sciences, physical sciences and computer sciences."[398] Uninhibited speech is not the basis of either education or knowledge production.[399] "Our job is to introduce students to the materials and histories of various academic disciplines,"[400] we are told; and universities must ensure "appropriate expressions of dissent

---

395. Id. (emphasis added).

396. See supra section III.E.1.

397. See Whittington, supra note 11, at 15 (asserting "universities are dedicated to the task of accumulating and sharing our collective knowledge of the world and fostering an environment of constant learning"); see also Post, supra note 32, at 114 (arguing that universities' missions include both education and the expansion of knowledge through "*expert knowledge* produced by . . . *disciplines*").

398. Fish, supra note 30; see also Whittington, supra note 11, at 17 (characterizing universities as "incubators of ideas" and producers of research and innovation).

399. See Whittington, supra note 11, at 7, 95 (noting that "[s]cholarly speech is not 'free' in the sense of anything goes"); see also Post, supra note 32, at 118 (defining the concept of "academic freedom" and arguing that the university's educational mission demands the application of academic freedom principles over those of free expression); Fish, supra note 30 (underscoring that, at universities, "speech [is consistently] constrained by the norms and protocols that define and monitor the profession").

400. Fish, supra note 30.

[do not] cross a line and become damaging to the ability of others to enjoy their own freedoms in the campus community."[401]

As a matter of law, advocates of this perspective emphasize Supreme Court dicta implying that universities should receive *some* consideration—short of deference—of their judgment about the impact of uninhibited expression on their educational mission.[402] The origin of this principle is a footnote in *Widmar v. Vincent*, a case involving a challenge to a secular university's decision to pull recognition from a religious student group in which the Court stated:

> A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.[403]

Thus, Professor Robert Post insists that "[w]e must begin our analysis from the premise that universities are not Hyde Parks."[404] Universities, he argues, cannot operate with a commitment to viewpoint neutrality in their educational or scholarly missions, nor should they.[405]

Professor Keith Whittington has argued more specifically that protests are a lesser form of speech on campus, maintaining that, while protests do further the university's "truth-seeking function . . . by calling attention to a neglected set of concerns and ideas[,] [o]nce you have my attention, . . . protester[s] ha[ve] a responsibility to transition from action[] . . . to the development and *articulation of arguments to be evaluated*."[406] Indeed, he writes, "If protests never make that turn, if they never get to the point of entering into reasoned debate, then they contribute little to the intellectual life and ultimate mission of a university."[407]

Protests on campus, in other words, run up against the university's mission in two important ways. First, and at the most basic level, protests

---

401. Whittington, supra note 11, at 95.

402. See Christian Legal Soc'y v. Martinez, 561 U.S. 661, 685–86 (2010) ("Our inquiry is shaped by the educational context in which it arises: 'First Amendment rights . . . must be analyzed in light of the special characteristics of the school environment.'" (quoting Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981))).

403. 454 U.S. at 268 n.5. The footnote proceeds to offer two examples: "We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings." Id. These examples do not necessarily support an expansive interpretation of this caveat.

404. Post, supra note 32, at 118.

405. See id. at 116 (emphasizing the various ways that "universities regularly and routinely exercise content and viewpoint discrimination" as they pursue "their mission to advance knowledge").

406. Whittington, supra note 11, at 99 (emphasis added).

407. Id.

are loud and disruptive to educational life; they physically interfere with getting to class and interrupt other students' ability to study in the library, take their exams, celebrate graduation—even get a quiet night's sleep.[408] Second, and more critically, protests speak "the language of coercion, not persuasion" and are thus fundamentally incompatible with the university's commitment to reasoned discourse.[409] Each of these concerns, it is argued, amply justify the extensive regulation of protests on campus given their incompatibility with the university's mission—quite apart from their consistency with First Amendment law.[410]

With due respect to these giants in the field, the normative question turns on the persuasiveness of their descriptions of what universities are and what full inclusion means.[411] Universities do much more than "the academic thing."[412] Universities do, as Whittington suggests, "embrace[] those who enter [their] campus[es], saying, 'Come now, let us reason together[,]'"[413] but at least the elite institutions to which Whittington is accustomed equally say, "Let us live together." Universities, in fact, differentiate themselves based on the promises they make about the experience of college life they will offer. All universities, even those that

---

408. This perspective is evident in the discourse about the Columbia protests in Part I, and it has been a common objection to campus protests. See, e.g., Fish, supra note 30 (explaining that university administrators ought to focus their efforts on fulfilling their duty to students "to maintain a secure and safe campus").

409. See Whittington, supra note 11, at 102 (explaining that the coerciveness of protests contravenes the principles of a "free and equal community of scholars"); see also id. at 7–8 (insisting that while "dissenting voices must be tolerated[,] . . . disagreements must be resolved through the exercise of reason rather than the exercise of force"). Post, by contrast, argues that "[t]raditional principles of academic freedom do not tell us much about how to handle . . . [offensive] demonstration[s]" because the connection between protest and the university's mission is attenuated. See Post, supra note 32, at 121 (encouraging universities to consider "whether student demonstrations of this nature seriously interfere with the educational mission of a public university").

410. See, e.g., Whittington, supra note 11, at 95–96 (praising "time, place, and manner regulations" as efforts to "channel free speech in productive ways and coordinate the many activities in which citizens are engaged in the shared public space"); see also Letter from Jenny S. Martinez, Dean, Stanford L. Sch., to Stanford Law School Community (Mar. 22, 2023) (on file with the *Columbia Law Review*) ("[S]ettled First Amendment law allows many governmental restrictions on heckling to preserve the countervailing interest in free speech.").

411. It is worth noting that, under existing First Amendment doctrine, a university's invocation of its mission does not get deference. See Christian Legal Soc'y v. Martinez, 561 U.S. 661, 686 (2010) ("This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question.").

412. Contra Fish, supra note 30 (arguing that universities "don't do everything"). This Piece rejects the argument that universities are purely academic institutions.

413. Whittington, supra note 11, at 19; see also Post, supra note 32, at 113 ("The function of higher education is ordinarily said to be the inculcation of what Cardinal Newman called 'real cultivation of mind.'" (quoting John Henry Cardinal Newman, The Idea of a University Defined and Illustrated, at xvi (London, Longmans, Green 1888))).

are not residential, thus make a second promise: Join our community and you will get not only an education but an important social and professional network. Indeed, the vast majority of students are paying as much for the education as for this second promise: a "college experience" and its economic, social, and professional returns.[414]

Universities, moreover, know that realizing that second promise depends on bringing students and other members of the university together: in classrooms, to some degree, but much more importantly at social gatherings (freshman orientation, homecoming, and regattas). They know that the social ties and social solidarity built from gathering with others is critical to making good on those promises. Just consider the number of traditions that involve gatherings associated with the "Oxbridge"[415] experience, from formal halls and May balls to the tradition of gathering at a particular place to find posted exam results.[416] It is, similarly, not an accident that freshman orientation, with its focus on numerous social gatherings, is such a big deal at many residential colleges. Colleges know that freshmen have to connect with their peers and to the

414. This is not to say that college applicants necessarily understand their choice in this way. It is rather an implication of the important work of Raj Chetty and his research group at Opportunity Insight. Their research demonstrates that social networks are the vital link to the very economic returns college students seek. See Richard V. Reeves & Coura Fall, Seven Key Takeaways From Chetty's New Research on Friendship and Economic Mobility, Brookings Inst. (Aug. 2, 2022), https://www.brookings.edu/articles/7-key-takeaways-from-chettys-new-research-on-friendship-and-economic-mobility/ [https://perma.cc/3VMX-NDPP] (reporting that Chetty's group's most recent study indicates that "one ingredient that may trump all the others" in "[i]mproving economic mobility" is "friends"). Critically, this research highlights the role colleges play as important sites for building friendships and networks. See id. It is, of course, well known that for many the decision to attend college is about future economic earnings. See also Raj Chetty, John N. Friedman, Emmanuel Saez, Nicholas Turner & Danny Yagan, Mobility Report Cards: The Role of Colleges in Intergenerational Mobility 1–6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23618, 2017), https://www.nber.org/system/files/working_papers/w23618/w23618.pdf [https://perma.cc/NQ8Z-76HY] (developing "mobility report cards—statistics on students' earnings outcomes and their parents' incomes—for each college in America" to assess how well higher education performs as the "pathway to upward income mobility" that it is "widely viewed" to be (emphasis omitted)); Christopher L. Eisgruber, Bending the Socioeconomic Curve in Selective College Admissions, Princeton Univ. (Nov. 29, 2023), https://president.princeton.edu/blogs/bending-socioeconomic-curve-selective-college-admissions [https://perma.cc/TR36-B64Y] (recognizing "economic outcomes[] and access for students from less privileged backgrounds" as important bases for assessing universities and outlining Princeton's efforts to ensure those returns are available to students from all income brackets).

415. "Oxbridge" is a portmanteau of the Universities of Oxford and Cambridge. Oxbridge, Merriam-Webster, https://www.merriam-webster.com/dictionary/Oxbridge [https://perma.cc/DP42-GXL2] (last visited Feb. 27, 2025).

416. See, e.g., Emily Cooper, Gowns, Latin and Getting Married: The Weirdest Cambridge Traditions You Didn't Know About, The Tab, https://archive.thetab.com/uk/2022/09/01/cambridge-university-students-weirdest-traditions-formals-rules-uni-explained-271279 [https://perma.cc/L5KG-HSET] (last visited Feb. 27, 2025).

university not only to be able to learn but also to stick it out through graduation.

Universities are at least as much in the business of forging social capital and identities through assembly as they are in the business of training for "independence of mind" through speech.[417] American colleges and universities know that all of these group rituals are foundational to building social solidarity, university spirit, and a powerful alumni network based on weak social ties. There is a reason that, around the country, colleges structure the academic year with ritual social gatherings and encourage students to create their own social clubs by funding their gatherings.

Universities are also, as Justice Sandra Day O'Connor recognized, important "training ground[s] for a large number of the Nation's leaders."[418] From the Ivy League to state flagship institutions, universities are the educators of the next generation of citizens and our future democratic leaders.[419] Thus, creating "democratic citizens" is *not* merely a "by-product of universities['] . . . primary mission."[420]

It is a mistake, therefore, to suggest that protests are somehow in tension with the modern university's mission. Campus protests are just a different, political form of assembly. And they resonate with different aspects of the university mission.

The problem, some may argue, is that these particular campus protests threaten a third commitment: to inclusion.[421] Pro-Palestinian, antigenocide protests threaten the university's core commitment to inclusiveness because the protests' hostility to the actions of the state of Israel—"the Jewish state"—is an affront to those Jewish students whose religious identity is entwined with their conception of the state of Israel.[422] Protests

---

417. Post, supra note 32, at 113.

418. Grutter v. Bollinger, 539 U.S. 306, 308 (2003); see also Suzanne Mettler, Soldiers to Citizens: The G.I. Bill and the Making of the Greatest Generation 11, 119 (2005) (noting that many of the first generation of African American civil rights activists were the beneficiaries of a college education through the G.I. Bill).

419. See, e.g., Michael S. Roth, Opinion, I'm a College President, and I Hope My Campus Is Even More Political This Year, N.Y. Times (Sept. 2, 2024), https://www.nytimes.com/2024/09/02/opinion/college-president-campus-political.html (on file with the *Columbia Law Review*) ("Education can prepare people for this kind of true political engagement, and true political engagement can prepare people for the highest goals of education.").

420. Contra Whittington, supra note 11, at 18.

421. See, e.g., Lhamon, May 7, 2024, Dear Colleague Letter, supra note 216, at 8–10 (including hypotheticals loosely based on some campus events related to pro-Palestinian protests). This perspective was evident in Shafik's announcement of the decision to remove the encampment by force, in which she wrote, "To those students and their families, I want to say to you clearly: You are a valued part of the Columbia community. This is your campus too. We are committed to making Columbia safe for everyone, and to ensuring that you feel welcome and valued." Shafik, April 29 Statement, supra note 85.

422. See Tzach Yoked, Noah Feldman: 'Many Jewish Families Will Prefer Not to Talk About Israel This Passover', Haaretz (Apr. 11, 2024), https://www.haaretz.com/life/2024-

that undermine the university's commitment to an inclusive educational mission—a commitment enshrined in Title VI's obligation that universities "take immediate and appropriate action" to prevent the emergence of "a hostile [educational] environment" for students—must be sanctioned.[423]

There is no question that all students deserve to feel fully included in the university. Nevertheless, the conception of full inclusion that undergirds the debate is too narrow. As Inazu has long argued, pluralism does not mean that everyone has to feel welcome everywhere so long as "everyone belongs somewhere."[424] Universities surely recognize that some LGBTQ students will not feel welcome at Federalist Society events and some young Republicans may be marginalized at meetings of the Young Communist League of the United States.[425] In fact, as universities have diversified their student bodies, they have understood the importance of creating spaces and affinity groups to support the newcomers' sense of belonging.

Indeed, most college campuses permit gatherings that are at least as problematic from the perspective of inclusion as the pro-Palestinian, antigenocide encampments that have been at the center of this controversy: fraternities and sororities.[426] For all the handwringing in public

---

04-11/ty-article-magazine/.premium/noah-feldman-many-jewish-families-will-prefer-not-to-talk-about-israel-this-passover/0000018e-ccf9-d5ed-adcf-fffb20b70000 (on file with the *Columbia Law Review*) (describing from personal experience the way that, for many Jewish people, their religious identity is tied to their understanding of the legitimacy of the state of Israel); see also U.S. Jews' Connections With and Attitudes Toward Israel, Pew Rsch. Ctr. (May 11, 2021), https://www.pewresearch.org/religion/2021/05/11/u-s-jews-connections-with-and-attitudes-toward-israel/ [https://perma.cc/M29U-3S7D] (finding that "[e]ight-in-ten U.S. Jews say caring about Israel is an essential or important part of what being Jewish means to them," while "[n]early six-in-ten" report "feel[ing] an emotional attachment to Israel").

423. See Lhamon, May 25, 2023, Dear Colleague Letter, supra note 208, at 1–2 (defining a hostile educational environment as conduct that "is sufficiently, severe, pervasive, or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from" the educational experience being provided).

424. Inazu, Assembly, Pluralism, and Identity, supra note 282, at 105.

425. See, e.g., Martinez, supra note 410, at 4–6 (affirming that "our LGBTQ+ students, faculty, and staff are valued members of our community" while asserting the law school will not "exclude or condemn speakers who hold [unpopular] views on social and political issues," thereby implicitly acknowledging the tension between commitments to "diversity, equity, and inclusion" and "academic freedom").

426. See Kevin Woodson, Diversity Without Integration, 120 Penn St. L. Rev. 807, 837–38 (2016) (noting that "Greek-letter organizations . . . remain bastions of segregation" and that "[i]n these segregated communities, white students all too often engage in racially offensive, polarizing behavior"); Christine Scherer, Comment, Rushing to Get Rid of Greek Life and Social Clubs: The Impact of *Bostock* on Single-Sex College Organizations, 71 Case W. Rsrv. L. Rev. 1165, 1174 (2021) (recounting the history of racism and homophobia in many Greek organizations).

discourse about liberal indoctrination and "wokeness" on college campuses, most still tolerate significant sites of illiberalism in their Greek chapters. To call them sites of illiberalism is provocative, to be sure, but few can seriously deny that many of the traditions and practices of Greek life are in tension with the broad vision of equality embodied in Title VI or that many women, LGBTQ, and Black students experience them as hostile environments.[427]

But fraternities and sororities are tolerated for good reasons. Like varsity sports, they are much more than their traditionalism, sexism, or rape cultures.[428] They are also undeniably meaningful sites of social solidarity on campus that provide networks for future professional opportunities, and even latent networks for political organizing. Consider that just hours after Vice President Kamala Harris announced her candidacy for president, the Divine Nine—a coalition of historically Black fraternities and sororities, including Alpha Kappa Alpha, of which Harris is a member—drew forty-four thousand attendees to its weekly Zoom meeting, raising $1.5 million for the Harris campaign.[429]

Pro-Palestinian, antigenocide encampments have had similar social and political returns: creating a sense of fraternity and social solidarity. Equally importantly, they have demanded visibility for the students involved, many of whom are members of otherwise marginalized groups—visibility that has long been available to Jewish students, including those who identify with Israel, through Hillel and Chabad.

Attention to assembly's centrality to the university offers a new way into the Title VI debate. First and foremost, it suggests that Title VI obligations on universities should be construed narrowly, only requiring universities to address situations involving individualized harassment or true threats. The harassment that subjects an assembly and the university

---

427. See Cara McClellan, Discrimination as Disruption: Addressing Hostile Environments Without Violating the Constitution, 34 Yale L. & Pol'y Rev. Inter Alia 1, 5 (2015), https://yalelawandpolicy.org/sites/default/files/IA/discrimination_as_disruption_0.pdf [https://perma.cc/48ME-QYGD] (providing examples of sexist and misogynist behavior at fraternities).

428. Here, this Piece uses the term rape culture to indicate not just the existence of sexual violence but the normalization and minimization of sexualized violence. See, e.g., Rape Culture, Brandon Univ., https://www.brandonu.ca/sexualviolence/education-prevention/rape-culture/ [https://perma.cc/G2ET-ZQXD] (last visited Feb. 5, 2025).

429. C.A. Bridges, Alex Perry & Nicquel Terry Ellis, 44,000-Woman Zoom Call Raises $1.5 Million for Kamala Harris, 'Divine Nine' Gets out the Vote, Tallahassee Democrat (July 23, 2024), https://www.tallahassee.com/story/news/politics/elections/2024/07/23/kamala-harris-alpha-kappa-alpha-divine-nine/74510956007/ [https://perma.cc/H9D2-KABP] (last updated July 25, 2024). Originally founded at Howard University, Alpha Kappa Alpha is "the oldest Greek-letter organization established by African American college-educated women." About, Alpha Kappa Alpha Sorority, Inc., https://aka1908.com/about/ [https://perma.cc/E59V-NGSH] (last visited Feb. 5, 2025).

to legal liability should be limited to harassment directly targeting individuals on the basis of a protected status. Indeed, a fair read of Columbia's own definitions of harassment and discrimination is that the prohibitions are only intended to reach the harassment of particular individuals.[430] This approach would be generally consistent with universities' approaches to fraternities.[431] Fraternities are banned or suspended when there is evidence of an actual pattern and practice of sexual violence or of pledge rituals that harm individuals, including subjecting them to racism.[432] Second, but equally importantly, an Assembly Clause frame would put to rest any illusion that these cases involve balancing individual statutory rights grounded in constitutional nondiscrimination norms against unprotected conduct.

A narrow construction of Title VI's hostile environment liability, in other words, would affirm the value of assemblies (including those that make some members of the community uncomfortable) while protecting individuals from actual harm. It would also have the virtue of being consistent with existing First Amendment doctrine. Under existing doctrine, true threats and harassment are not protected, but only when they are

---

430. See Ctr. for Student Success & Innovation, Columbia Univ., Standards and Discipline 5, 7 (Aug. 28, 2023), https://cssi.columbia.edu/sites/default/files/content/StandardsandDiscipline_0.pdf [https://perma.cc/JSY4-TAZX] ("Discriminatory Harassment . . . is defined as 'subjecting an individual to unwelcome conduct, whether verbal or physical, that creates an intimidating, hostile, or abusive working, learning or campus living environment . . . .'" (quoting Glossary, Off. of Institutional Equity, https://institutionalequity.columbia.edu/content/glossary (on file with the *Columbia Law Review*) (last visited Apr. 7, 2025))).

431. This norm is reflected in the controversy that emerged when Oklahoma University President David L. Boren expelled two leaders of a fraternity for facilitating racist chants. Compare Manny Fernandez & Erik Eckholm, Expulsion of Two Oklahoma Students Over Video Leads to Free Speech Debate, N.Y. Times (Mar. 11, 2015), https://www.nytimes.com/2015/03/12/us/expulsion-of-two-oklahoma-students-leads-to-free-speech-debate.html (on file with the *Columbia Law Review*) (describing arguments suggesting the expulsion violated constitutional protection for free speech), with Noah Feldman, Opinion, Oklahoma's Right to Expel Frat Boys, Bloomberg (Mar. 11, 2015), https://www.bloomberg.com/view/articles/2015-03-11/oklahoma-s-right-to-expel-frat-boys (on file with the *Columbia Law Review*) (arguing that the university could, consistent with the First Amendment, expel the fraternity members).

432. See, e.g., Scott Gordon, TCU Fraternity Members Were Hazed, Burned: Police, NBCDFW (Jan. 4, 2018), https://www.nbcdfw.com/news/local/tcu-fraternity-members-were-hazed-burned-police/261522/ [https://perma.cc/E4AX-L2F6] (last updated Jan. 5, 2018) (describing how a TCU fraternity was ordered to close after evidence that new members were forced to perform acts with sex toys in a culture of "rampant racism" (internal quotation marks omitted)); Christina Maxouris & Rob Frehse, Swarthmore College Bans Fraternities and Sororities After Allegations of Racist, Homophobic and Misogynistic Behavior, CNN (May 11, 2019), https://www.cnn.com/2019/05/11/us/swarthmore-college-bans-fraternities/ [https://perma.cc/8PHJ-BLJ4] (reporting the decision to ban all Greek life following allegations of a "'rape attic' and 'rape tunnel'" in one of the fraternities along with an archive of "rape jokes, racist tropes and crude descriptions of hazing").

directed at individuals. Thus, in *Frisby v. Schultz*, the Supreme Court upheld an ordinance that banned picketing around an individual's residence.[433] But it also carefully limited the harassment exception, construing the ordinance to apply only to picketing targeting an individual residence.[434] Moreover, the Court has clearly indicated that the exercise of First Amendment rights cannot be restricted because the expression of distasteful ideas causes discomfort or emotional distress.[435] It, therefore, remains unclear how chanting "We don't want no Zionists here" or "Israel is a racist state" could be used as evidence of tolerance of a hostile educational environment, even though the chants may distress some students.

In sum, protests—even those that make some in the community uncomfortable—are not in tension with the modern university's mission. Campus protests are just aligned with a different aspect of the university mission. Once we have understood assembly's distinct contribution to democratic politics, it becomes easier to recognize its contributions to universities and appreciate the constitutional stakes in a narrower construction of Title VI's hostile environment liability.

CONCLUSION

The development of an independent Assembly Clause doctrine is essential. It may once have been possible to dismiss the consequences of ignoring the textual right of assembly. This is no longer true. Neglect of the right has significant contemporary consequences for political protests. It has enabled police to brutally and indiscriminately disperse the most significant political protests of our time. It empowers line officers to arrest nonviolent protesters for minor public order offenses and university

433. 487 U.S. 474, 486 (1988).

434. See id. (holding that although the pro-life protesters were in a traditional public forum, their activity was not protected insofar as it targeted the residence of an individual doctor and his family). The Supreme Court's buffer zone cases, while all over the place, generally support the position that a viewpoint-neutral policy that is narrowly tailored to prevent harassment of an individual does not violate the First Amendment. See, e.g., Hill v. Colorado, 530 U.S. 703, 707 (2000) (upholding a buffer zone that made it illegal, in the vicinity of a healthcare facility, "for any person to 'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill . . . or [to] engag[e] in oral protest'" (quoting Colo. Rev. Stat. § 18-9-122(3) (2000))). But see McCullen v. Coakley, 573 U.S. 464, 497 (2014) (unanimously striking down a fixed thirty-five-foot buffer zone even as Justices fractured in their reasoning).

435. See R.A.V. v. City of St. Paul, 505 U.S. 377, 436 (Stevens, J., concurring in the judgment) (clarifying that a cross-burning falls outside First Amendment protection only when it is "threatening and . . . directed at an individual"); see also Collin v. Smith, 578 F.2d 1197, 1205–06 (7th Cir. 1978) (striking down a content-based ordinance that would have restricted the Nazi Party's march despite recognizing that the proposed march would "inflict[] . . . psychic trauma on resident [H]olocaust survivors and other Jewish residents" and "seriously disturb, emotionally and mentally" many residents).

administrators to adopt stringent rules limiting protest on campus in response to a politically and ideologically fraught conflict; and, although not legal, it creates opportunities for those restrictions to be applied in new and seemingly selective ways. Vindicating the First Amendment's core promise of protecting democratic self-governance demands that the right of assembly be afforded independent significance.