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The First Amendment's Public Forum

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THE FIRST AMENDMENT'S PUBLIC FORUM

JOHN D. INAZU*

ABSTRACT

The quintessential city park symbolizes a core feature of a democratic polity: the freedom of all citizens to express their views in public spaces free from the constraints of government imposed orthodoxy. The city park finds an unlikely cousin in the federal tax code's recognition of deductions for contributions made to charitable, religious, and educational organizations. Together, these three categories of tax-exempt organizations encompass a vast array of groups in civil society.

The city park is a traditional public forum under First Amendment doctrine, and the charitable, educational, and religious deductions under the federal tax code function much like a limited public forum. Numerous other governmental arrangements reflect similar purposes and functions: sidewalks, parking lots, public schools, websites, public libraries, vanity license plates, and student activity funds, to name a few. In each of these cases, private groups and individuals rely on government resources (financial or otherwise) to inculcate and express their ideas and their ways of life. The ideal of the public forum represents one of the most important aspects of a

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healthy democracy. It signifies a willingness to tolerate dissent, discomfort, and even instability. The distortion of that ideal represents one of the greatest challenges to First Amendment jurisprudence today. That distortion is partially attributable to two important doctrinal developments. The first is increased judicial reliance on purportedly "content-neutral" time, place, and manner restrictions. The second is the relationship between the public forum and the evolving government speech doctrine, under which the government characterizes messages advanced under the auspices of its financial and other resources as distinctively its own and not subject to First Amendment review. This Article suggests that one factor facilitating these developments is a gradual but unmistakable shift in the moorings of the public forum doctrine from the Assembly Clause to the Speech Clause. The public forum is a First Amendment doctrine, not a free speech doctrine, and we will comprehend its purposes and its possibilities only when we rediscover the values underlying the rights of the First Amendment.

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INTRODUCTION

The quintessential city park boasts fields, benches, sidewalks, and playgrounds. It also reflects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”¹ The city government owns and manages the land and the physical structures built upon it. But within this space, anyone can say almost anything.² Skaters, vagabonds, hipsters, Klansmen, lesbians, Christians, and cowboys—the city park accommodates them all. The city park thus symbolizes a core feature of a democratic polity: the freedom of all citizens to express their views in public spaces free from the constraints of government-imposed orthodoxy.

The city park finds an unlikely cousin in the federal tax code’s recognition of deductions for contributions made to charitable, religious, and educational organizations.³ The deductions effectively allow individual taxpayers to direct federal dollars to nonprofits of their choosing.⁴ The meanings of “charitable” and “educational” are

1. *Boos v. Barry*, 485 U.S. 312, 318 (1988) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (internal quotation marks omitted); *see also Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (referring to streets and parks as “quintessential public forums”).

2. Speech that advocates imminent lawless action is prohibited. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that a state may not proscribe advocacy of the use of force “except where such advocacy is directed to inciting or producing imminent lawless action”). Certain “unprotected” categories of speech can also be restricted. *See, e.g., Roth v. United States*, 354 U.S. 476, 484 (1957) (holding that obscenity does not receive First Amendment protection because it is “utterly without redeeming social importance”). But the limits on discourse in the public forum are otherwise minimal.

3. *See* I.R.C. § 170(c) (2012) (authorizing deductions); *Id.* § 501(c)(3) (specifying which tax-exempt organizations are eligible to receive deductions). The § 501(c)(3) designation conveys tax-exempt status, but it is the § 170(c) deduction that provides tangible financial benefits to tax-exempt organizations because “nonprofit organizations, as their name suggests, do not ordinarily generate the profits that are the base of the corporate income tax.” RICHARD SCHMALBECK & LAWRENCE ZELENAK, *FEDERAL INCOME TAXATION* 443 (2d ed. 2007).

4. Each qualifying deduction claimed by taxpayers provides an indirect government subsidy to the organization receiving the donation. A taxpayer who itemizes her deductions sees her tax liability reduced at the amount equal to her donation multiplied by her income tax rate. That forgone tax revenue can be viewed as an indirect government subsidy of the organization, and the amount and direction of the subsidy is largely a function of the individual taxpayer. As an example, suppose that Sally donates \$100 to the Girl Scouts and itemizes her deduction on her federal income taxes. Suppose further that her income is taxed

deliberately broad, and the code does not define “religious” organizations.⁵ Together, these three categories of tax-exempt organizations encompass a vast array of groups in civil society—so vast that every one of us could find groups we think belong and also groups we find morally repugnant and harmful to society. And, of course, our lists of reprehensible groups would differ—the pro-choice group and the pro-life group, religious groups of all stripes (or no stripe), hunting organizations and animal rights groups—the tax deductions benefits them all. The resulting mosaic enacts the aspirations of a democratic polity. Organizations and ideas wither or thrive not by government fiat, but rather based on the “values and the choices of private givers.”⁶

by the federal government at a 30 percent rate. Under § 170(c), and because the Girl Scouts are a § 501(c)(3) tax-exempt organization, Sally pays \$30 less in income tax based on her \$100 donation. In effect, that means the government paid (or subsidized) \$30 of Sally's \$100 donation. Sally is out-of-pocket only \$70 for the \$100 that the Girl Scouts received.

5. I.R.C. § 501(c)(3) (listing “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes” as “exempt organizations”). According to IRS regulations, the term “charitable” is used “in its generally accepted legal sense” and is not limited by the other tax-exempt purposes listed in § 501(c)(3). 26 C.F.R. § 1.501(c)(3)-1(d)(2) (2014). The regulation states that the term “charitable” includes:

“[r]elief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.”

Id. An educational organization under the code is one that relates to: “(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or (b) The instruction of the public on subjects useful to the individual and beneficial to the community.” *Id.* § 1.501(c)(3)-1(d)(3). Over 1.1 million organizations qualify as exempt under § 501(c)(3). *Scope of the Nonprofit Sector*, INDEP. SECTOR, http://www.independentsector.org/scope_of_the_sector [<http://perma.cc/V87B-Y7FA>] (last visited Mar. 20, 2015). That figure excludes 327,000 religious congregations. *Id.* Section 508(c) creates the legal presumption that religious congregations qualify for tax-exemption without having to apply for recognition of § 501(c)(3) status. I.R.C. § 508(c). Section 6033(a)(3)(A)(i) exempts churches from having to file a Form 990. *Id.* § 6033(a)(3)(A)(i).

6. JOHN D. COLOMBO & MARK A. HALL, *THE CHARITABLE TAX EXEMPTION* 155 (1995). Colombo and Hall argue that allowing each individual “to pursue his own notion of the good” is an “elemental freedom [that] constitutes a basic constraint on the political sphere.” *Id.* at 154. The charitable exemption is “born out of the spirit of classic liberalism, whose dominant tenets ... were distrust of government and faith that the progress and well-being of mankind could best be achieved by natural forces, harmonizing the individual actions of men who were

The city park is a traditional public forum under First Amendment doctrine, and the charitable, educational, and religious deductions under the federal tax code function much like a limited public forum.⁷ Numerous other governmental arrangements reflect similar purposes and functions, such as sidewalks, parking lots, public schools, websites, public libraries, vanity license plates, and student activity funds.⁸ In each of these cases, private groups and individuals rely on government resources (financial or otherwise) to inculcate and express their ideas and their ways of life.⁹ In some cases,

left untrammelled.” *Id.* (internal quotation marks omitted).

7. Streets and parks are “quintessential public forums.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). In limited public forums, by contrast, “the State is not required to and does not allow persons to engage in every type of speech,” and “[t]he State may be justified in ‘reserving [its forum] for certain groups or for the discussion of certain topics.’” *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). Nevertheless, speech restrictions in limited public forums “must not discriminate against speech on the basis of viewpoint [and] the restriction must be ‘reasonable in light of the purpose served by the forum.’” *Id.* at 106-07 (citations omitted). The Supreme Court also acknowledged that “the same principles are applicable” to a limited public forum that is “a forum more in a metaphysical than in a spatial or geographic sense.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995). The scheme of tax deductions is not formally recognized as a limited public forum, but like the metaphysical forum at issue in *Rosenberger*, its current function reflects similar goals and uses. See COLOMBO & HALL, *supra* note 6, at 154-55; Johnny Rex Buckles, *Reforming the Public Policy Doctrine*, 53 U. KAN. L. REV. 397, 397-99 (2005).

8. See, e.g., *Good News Club*, 533 U.S. 98 (discussing schools); *United States v. Grace*, 461 U.S. 171 (1983) (discussing sidewalks); *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (discussing books comprising a public school library); *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008) (discussing vanity license plates); *Husain v. Springer*, 494 F.3d 108 (2d Cir. 2007) (discussing student activity funds); *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834 (6th Cir. 2000) (discussing a government website); *Bolbol v. City of Daly City*, 754 F. Supp. 2d 1095 (N.D. Cal. 2010) (discussing parking lots). *But see* *Locke v. Davey*, 540 U.S. 712 (2004) (holding that a state-run scholarship program is not a public forum); *United States v. Kokinda*, 497 U.S. 720 (1990) (holding that a postal sidewalk is not a traditional public forum); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (holding that a federal workplace charitable fundraising campaign is a nonpublic forum). For a helpful overview of some of these governmental arrangements, see Kelly Sarabyn, *Prescribing Orthodoxy*, 8 CARDOZO PUB. L., POL’Y & ETHICS J. 367, 367-71 (2010).

9. Importantly, both monetary and nonmonetary contributions can be construed as government subsidies. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 199-200 (1991) (referring to “the existence of a Government ‘subsidy,’ in the form of Government-owned property”); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (“Every tax exemption constitutes a subsidy that affects non-qualifying taxpayers, forcing them to become ‘indirect and vicarious donors.’” (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983))); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983) (“A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its

the government offers these arrangements with the express purpose of facilitating a diversity of private viewpoints. But government's purpose should not be the only relevant inquiry. Sometimes, the historical or ongoing uses of a government-provided arrangement make it the functional equivalent of a public forum.¹⁰ For example, whatever its original purpose, the current federal tax code supports a diverse range of private groups free from government-imposed orthodoxy.¹¹

The *ideal* of the public forum represents one of the most important aspects of a healthy democracy. It signifies a willingness to tolerate dissent, discomfort, and even instability. The *distortion* of that ideal represents one of the greatest challenges to First Amendment jurisprudence today. Under current law, political protestors are relegated to physically distant and ironically named "free speech zones."¹² Anti-abortion demonstrators are prohibited from public

income.”).

10. The Supreme Court's current doctrinal approach is drawn more narrowly than my functionalist argument. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992) (“The decision to create a public forum must ... be made ‘by intentionally opening a nontraditional forum for public discourse.’” (quoting *Cornelius*, 473 U.S. at 802)); *cf. id.* at 693 (Kennedy, J., concurring) (“[I]f our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the status of the property.” (quoting *Kokinda*, 497 U.S. at 737 (Kennedy, J., concurring))).

11. The nature of the tax exemption under § 501(c)(3) is traceable to the traditional law of charitable trusts. See JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS* 28-38 (1995). It stands in contrast to a “managerial domain” of government. See Robert C. Post, *Subsidized Speech*, 106 *YALE L.J.* 151, 164 (1996) [hereinafter Post, *Subsidized Speech*] (“Within managerial domains, the state organizes its resources so as to achieve specified ends. The constitutional value of managerial domains is that of instrumental rationality, a value that conceptualizes persons as means to an end rather than as autonomous agents. Within managerial domains, therefore, ends may be imposed upon persons. Managerial domains are necessary so that a democratic state can actually achieve objectives that have been democratically agreed upon. Yet managerial domains are organized along lines that contradict the premises of democratic self-governance. For this reason, First Amendment doctrine within managerial domains differs fundamentally from First Amendment doctrine within public discourse.”); see also Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 *UCLA L. REV.* 1713, 1784 (1986) [hereinafter Post, *Between Governance*] (“[P]ublic and nonpublic forums should be distinguished according to whether government authority over a resource is ‘like’ that characteristic of the internal management of a state institution, or instead ‘like’ that characteristic of the governance of the general public.”).

12. See TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* 223-38, 277-81 (2009).

sidewalks outside of abortion clinics.¹³ Labor picketers confront onerous restrictions against their practices in public areas.¹⁴ Churches are prohibited from renting generally available public facilities.¹⁵ Groups with certain membership requirements are banned from public school campuses.¹⁶ And groups that are deemed contrary to “public policy” are denied tax-exempt status.¹⁷ The public forum in practice is quite unrecognizable from its theory, and that departure should give us great pause.

The problems with today’s public forum are partially attributable to two important doctrinal developments. The first is increased judicial reliance on purportedly “content-neutral” time, place, and manner restrictions.¹⁸ The second is the relationship between the public forum and the evolving government speech doctrine, under which the government characterizes messages advanced under the auspices of its financial and other resources as distinctively its own and not subject to First Amendment review.¹⁹ This Article suggests

13. *Hill v. Colorado*, 530 U.S. 703, 707 (2000). *But see* *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014) (striking down a Massachusetts restriction on anti-abortion sidewalk counselors and questioning but not overruling *Hill*).

14. *See* Marion Crain & John D. Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. (forthcoming 2015) (discussing restrictions on labor protests).

15. *Bronx Household of Faith v. Bd. of Educ. of N.Y.C.*, 650 F.3d 30, 32-33 (2d Cir. 2011) (upholding a public school board policy prohibiting use of school property for “religious worship services”).

16. *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2978-79 (2010); *see also* *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 795-96 (9th Cir. 2011) (suggesting that a public university might deny official recognition to Christian student groups that limit “their members and officers [to those who] profess a specific religious belief, namely, Christianity”); *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 644-45 (9th Cir. 2008) (concluding that a high school Bible club violated a school district’s nondiscrimination policies because of the club’s requirement that its members “possess a ‘true desire to ... grow in a relationship with Jesus Christ’ inherently excludes non-Christians”) (alteration in original).

17. *Bob Jones Univ. v. United States*, 461 U.S. 574, 612 (1983).

18. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

19. *See* *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (holding that the government speech doctrine barred a First Amendment challenge to the city’s decisions pertaining to monuments in a public park). A related question arises when the government simply declares a particular place or funding mechanism not to be a public forum. *See, e.g.*, *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004) (dismissing the respondent’s free speech argument in a footnote, declaring that the state scholarship program was “not a forum for speech”). And there is, of course, a line to be drawn between the lack of a public forum and a nonpublic forum. *See, e.g.*, *Greer v. Spock*, 424 U.S. 828, 838 (1976) (holding that respondents had “no generalized constitutional right to make political speeches or distribute leaflets” at

that one factor facilitating these developments is a gradual but unmistakable shift in the moorings of the public forum doctrine from the Assembly Clause to the Speech Clause. The public forum is a First Amendment doctrine, not a free speech doctrine. And we will only comprehend its purposes and its possibilities when we re-discover the values underlying the *rights* of the First Amendment.²⁰

Part I describes the roots of the right of assembly, the evolution of the public forum out of that right, and the gradual shift of the public forum to the speech right. Part II highlights two problems that emerge from a speech-centered focus of the doctrine. Part III considers ways to reclaim a more robust concept of the public forum through renewed focus on the right of assembly and the values that underlie it.²¹

I. THE RIGHT OF ASSEMBLY AND THE ROOTS OF THE PUBLIC FORUM

A. *The Right of Assembly*

One of the goals of this Article is to reestablish the historical and doctrinal connections between the public forum and the right of assembly. These connections are traceable to the Framers' recognition that the rights of speech and assembly are distinct and serve different purposes and values.²² During the House debates over the language of the Bill of Rights, Theodore Sedgwick of Massachusetts criticized the proposed right of assembly as redundant in light of the freedom of speech: "If people freely converse together, they must

a military base).

20. See generally John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 787-88 (2014) (describing the importance of recognizing the distinct rights under the First Amendment).

21. My prior work has insufficiently accounted for the connections between the right of assembly and the decline of the public forum doctrine. See JOHN D. INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012) (noting but not exploring the relationship). I am grateful to Michael McConnell and Timothy Zick for pushing me on this connection. See Timothy Zick, *Recovering the Assembly Clause*, 91 TEX. L. REV. 375, 396-97 (2012); Michael McConnell, *Freedom by Association*, FIRST THINGS, Aug./Sept. 2012, at 39, 43. This important link between assembly and the public forum takes on even greater significance when combined with the broader shift away from assembly to the rights of speech and expressive association. See *infra* notes 88-100 and accompanying text (discussing *Martinez*, 130 S. Ct. 2971).

22. See INAZU, *supra* note 21. The discussion that follows draws from *id.* at 21-25.

assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minutiae.”²³ John Page of Virginia responded with a reference to William Penn’s trial for unlawful assembly.²⁴ Historian Irving Brant notes that “[t]he mere reference to it was equivalent to half an hour of oratory.”²⁵ After Page spoke, the House defeated Sedgwick’s motion to strike assembly from the draft amendment by a “considerable majority.”²⁶

At another point in the debates over the text of the assembly clause, the drafters removed a reference that would have limited assembly to those purposes that served “the common good.”²⁷ We do not know the reason for the textual change, but we know its consequences: if the right of assembly had encompassed only the common good (as defined by the state), then assembly as a means of protest or dissent would have been greatly curtailed.²⁸ Congress decided otherwise. On September 24, 1789, the Senate approved the amendment in its final form, without reference to the common good, and the subsequent ratification of the Bill of Rights in 1791 enacted “the right of the people peaceably to assemble.”²⁹ The final wording, with the qualification that assembly must be “peaceable,” suggests an

23. 1 ANNALS OF CONG. 759 (1789) (Joseph Gales ed., 1834).

24. *Id.* On August 14, 1670, Penn delivered a sermon to Quakers gathered on Gracechurch Street in London. IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 56 (1965). He and a fellow Quaker, William Mead, were promptly arrested. *Id.* After one of the most celebrated trials in history, a jury acquitted the two men on the charge that their public worship constituted an unlawful assembly. *Id.* at 59.

25. BRANT, *supra* note 24, at 55.

26. 1 ANNALS OF CONG. 761.

27. See INAZU, *supra* note 21, at 22-23 (describing textual changes in various drafts).

28. The point was not lost during the House debates. When Thomas Hartley of Pennsylvania contended that with respect to assembly, “every thing that was not incompatible with the general good, ought to be granted,” Elbridge Gerry of Massachusetts replied that if Hartley “supposed that the people had a right to consult for the common good” but “could not consult unless they met for the purpose,” he was in fact “contend[ing] for nothing.” 1 ANNALS OF CONG. 732-33; *cf.* Melvin Rische, Comment, *Freedom of Assembly*, 15 DEPAUL L. REV. 317, 337 (1965) (“Were the courts truly bound to delve into whether or not an assembly served the common good, it is likely that many assemblies that have been held to be protected by the constitution would lose this protection.”).

29. U.S. CONST. amend. I.

important distinction between the constraints of peaceability and the constraints of the common good.³⁰

The right of assembly thus emerged as distinct from the free speech right.³¹ It reflected different goals and purposes than those underlying the speech right. One of the most important differences is that the assembly right necessarily invokes a relational context: one can speak alone; one cannot assemble alone. A second unique role of assembly is that it allows multiple actors to engage not only with an external audience but also with one another *within* a group to foster ideas and identities in the “pre-political” and “pre-expressive” moments of group formation.³² These aspects of assembly have manifested in some of the most significant social movements in our history and, as importantly, in the informal networks and gatherings that preceded them.³³

30. *See id.* Stated differently, the peaceability limitation might reflect a very thin notion of a common good, but one that excludes only assemblies that engage in violent activity.

31. The right of assembly is also distinct from the right of petition. *See generally* INAZU, *supra* note 21, at 21-25 (tracing textual history). We know this in part from Congressman Page’s reference during the House debates: “Penn’s gathering had nothing to do with petition; it was an act of religious worship.” *Id.* at 25. The Supreme Court has on one occasion suggested otherwise. *See* *Presser v. Illinois*, 116 U.S. 252, 267 (1886) (indicating that the First Amendment protected the right of assembly only if “the purpose of the assembly was to petition the government for a redress of grievances”). That erroneous interpretation has been followed in decades of scholarship, but it has never been reinforced by the Court. *See* *McDonald v. City of Chicago*, 561 U.S. 742, 759 (2010) (referring to “the general ‘right of the people peaceably to assemble for lawful purposes’” (quoting *United States v. Cruikshank*, 92 U.S. 542, 551 (1875))); *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (referring to “the *rights* of the people peaceably to assemble and to petition for redress of grievances”) (emphasis added); *cf.* *Chisom v. Roemer*, 501 U.S. 380, 409 (1991) (Scalia, J., dissenting) (explaining that the First Amendment “has not generally been thought to protect the right peaceably to assemble only when the purpose of the assembly is to petition the Government for a redress of grievances”).

32. *See* INAZU, *supra* note 21, at 20-62.

33. *See, e.g.*, Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae Supporting of Petitioner at 11, *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971 (2010) (No. 08-1371) (describing “gay social and activity clubs, retreats, vacations, and professional organizations” that fostered “exclusively gay environments in which to feel safe, to build relationships, and to develop political strategy”); *see also* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 376-77 (7th ed. 1994) (describing “moments of informality” spread across clubs, literary parties, and other events that created “a cohesive force” among the leaders of the Harlem Renaissance); LINDA LUMSDEN, *RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT OF ASSEMBLY* 17-19 (1997) (describing suffragist gatherings organized around banner meetings, balls, swimming races, potato sack races, baby shows, meals, pageants, and teatimes).

The right of assembly also helps to anchor expressive meaning in nonverbal as well as verbal communication (including the message that is conveyed by the very existence of a group). It reinforces the significance of collective expression and the value of nonexpression. And it highlights, perhaps to an even greater degree than the free speech right, “the importance of protecting dissent and social conflict.”³⁴

Finally, although assembly fosters solidarity, it also provides individual benefits. As Timothy Zick has observed, “The ability to freely assemble or join with others fortifies individuals” and “emboldens them to come forward, and to participate in social and political activities.”³⁵ Thus, as Zick notes, “In addition to creating space for group activities and group autonomy, the freedom of assembly facilitates a variety of *individual* acts of defiance, contention, and expression.”³⁶ These sociological insights are reinforced from examples ranging from “coming out” experiences³⁷ to religious rebirths.³⁸

B. The Public Forum (and Its Demise)

The concept of the public forum emerged at the height of cultural and legal attention to the right of assembly. As the United States entered World War II and celebrated the sesquicentennial anniversary of the Bill of Rights, assembly was featured in patriotic tributes across the nation.³⁹ It headlined the 1939 World’s Fair and anchored speeches and opinion pieces across the country.⁴⁰ At a time when civil liberties were at the forefront of public consciousness, assembly

34. Zick, *supra* note 21, at 385.

35. *Id.* at 394.

36. *Id.* Zick emphasizes that “[m]any of these functions are nonexpressive.” *Id.* at 395; *cf. id.* at 398 (“The First Amendment does not protect assembly solely for the purpose of communicating some identifiable, coherent message. Assembly is protected in its own right; it stands on its own bottom.”).

37. See MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 3-47 (2013) (describing importance of groups to early gay rights movement); Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1171-72 (2000) (describing “emotional shelter” available to gays and lesbians who form virtual assemblies through online connections).

38. See, e.g., JASON C. BIVINS, THE FRACTURE OF GOOD ORDER: CHRISTIAN ANTILIBERALISM AND THE CHALLENGE TO AMERICAN POLITICS (2003).

39. Inazu, *supra* note 20, at 805-06.

40. *Id.*

figured prominently as one of the original “Four Freedoms” (along with speech, press, and religion).⁴¹

A 1938 comment in the *Yale Law Journal* offered one of the first explicit links between assembly and the public forum: “Without the right of assembly, guaranties of free speech are empty gestures; for if no public forum is available, the right to speak freely is of little value.”⁴² The comment continued:

The greatest obstacle facing minority groups in holding indoor meetings in the United States is the difficulty of securing a meeting-hall. Municipal authorities employ numerous techniques to thwart indoor meetings of this sort. Most direct and blunt is Mayor Hague's ordinance which, in effect, forbids the owner of a meeting hall to rent it for Communist meetings unless police permission is first secured.⁴³

The reference to Jersey City Mayor Frank Hague's treatment of the Committee for Industrial Organization (CIO) was at the time well-known. Hague's repeated denials of a permit for the CIO to hold a public meeting had gained such notoriety that when a CIO delegation met with members of Congress, Representative Knute Hill “inquired whether Mayor Hague would prevent a group of Congressmen from hiring a hall in Jersey City to speak on the Bill of Rights.”⁴⁴

In 1938, the CIO sued in federal district court to enjoin Hague from interfering with their First Amendment rights of speech and assembly.⁴⁵ The district court granted the injunction solely on free speech grounds.⁴⁶ The opinion relied on “the history and philosophy of free speech” because of “the comparative paucity of material on free assembly.”⁴⁷ From that premise, the court concluded that

41. *Id.* at 804-07 (describing the legal and cultural significance of the “Four Freedoms”).

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

43. *Id.* at 421.

44. *Congressmen Aid C.I.O. in Hague Fight*, *N.Y. TIMES*, Dec. 10, 1937, at 1.

45. *Comm. for Indus. Org. v. Hague*, 25 *F. Supp.* 127, 128 (D.N.J. 1938).

46. *Id.* at 137.

47. *Id.*

“[i]nasmuch as free assembly is a special form of free speech, the philosophy of the latter applies.”⁴⁸

The exclusively speech-based rationale did not last. On appeal to the Third Circuit, the American Bar Association’s Committee on the Bill of Rights submitted an amicus brief principally authored by Zechariah Chafee.⁴⁹ The lengthy brief placed the right of assembly at the core of its argument.⁵⁰ It emphasized that “the integrity of the right ‘peaceably to assemble’ is an essential element of the American democratic system” and that public officials had the “duty to make the right of free assembly prevail over the forces of disorder if by any reasonable effort or means they can possibly do so.”⁵¹

Chafee’s brief had immediate influence. The Third Circuit’s opinion affirmed the district court, but relied more squarely on the union of “speech and assembly” without suggesting a subordinate or derivative role of the latter.⁵² When Mayor Hague appealed to the Supreme Court, Chafee resubmitted his brief.

The Supreme Court’s 1939 *Hague* decision drew heavily from Chafee’s brief.⁵³ Justice Roberts’s plurality opinion interspersed references to “speech and assembly” with more focused commentary on the right of assembly.⁵⁴ And penning one of the more memorable phrases in First Amendment jurisprudence, Justice Roberts wrote: “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating

48. *Id.* at 138.

49. Brief of the Committee on the Bill of Rights, of the American Bar Association, as Friends of the Court, *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) (No. 651) [hereinafter ABA Amicus Brief].

50. The brief’s first argument was captioned: “Freedom of assembly is an essential element of the American democratic system.” *Id.* at 7.

51. *Id.* at 4, 19. When Chafee published *Free Speech in the United States* two years later, his thirty-page discussion of the freedom of assembly largely reprised the brief. See ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 409-38 (1941). The American Bar Association later wrote: “Hardly any action in the name of the [Association] in many years, if ever, has attracted as wide and immediate attention and as general acclaim, as the preparation and filing of this brief.” *Association’s Committee Intervenes to Defend Right of Public Assembly*, 25 A.B.A. J. 7, 7 (1939).

52. *Hague v. Comm. for Indus. Org.*, 101 F.2d 774 (3d Cir. 1939).

53. Compare *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 514-16 (1939), with ABA Amicus Brief, *supra* note 49, at 37-40.

54. *Hague*, 307 U.S. at 514-16.

thoughts between citizens, and discussing public questions.”⁵⁵ The *New York Times* lauded the decision, with the headline, “With [the] Right of Assembly Reasserted, All ‘Four Freedoms’ of [the] Constitution Are Well Established.”⁵⁶

Neither assembly nor the public forum saw much doctrinal clarity in the wake of *Hague*.⁵⁷ The shift away from *Hague*'s assembly focus began the following term, with the Court's decision in *Thornhill v. Alabama*.⁵⁸ The case involved a challenge to an anti-picketing ordinance by labor protesters.⁵⁹ The protesters had argued that the statute as interpreted by the lower courts “den[ie]d workers the right to peaceably assemble and peaceably discuss their working conditions with their fellow workers in the vicinity of their employer's plant.”⁶⁰ Oddly, the Court's opinion appeared to latch on to the brief's reference to a “right of discussion” but made no mention of the assembly right asserted in the same sentence.⁶¹

Thornhill and subsequent cases limited the influence of an assembly-based public forum doctrine. But a generation later, Harry Kalven reaffirmed the assembly roots of *Hague* by highlighting the influence of Chafee's brief:

55. *Id.* at 515.

56. Dean Dinwoodey, *A Fundamental Liberty Upheld in Hague Case*, N.Y. TIMES, June 11, 1939, at E7; see Lewis Wood, *Hague Ban on C.I.O. Voided by the Supreme Court, 5-2, on Free Assemblage Right*, N.Y. TIMES, June 6, 1939, at 1. Within months of *Hague*, the Court underscored that “the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). The Court recognized the right of assembly as “fundamental” and insisted that it “cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions.” *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). “[I]t is, and always has been, one of the attributes of citizenship under a free government.” *United States v. Cruikshank*, 92 U.S. 542, 551 (1876).

57. See INAZU, *supra* note 21 (tracing decline of assembly).

58. 310 U.S. 88, 89 (1940).

59. *Id.* at 90-91.

60. Brief for Petitioner at 27, *Thornhill*, 310 U.S. 88 (No. 514), 1939 WL 48828, at *27.

61. *Thornhill*, 310 U.S. at 97 (“It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.”); *id.* at 101-02 (“The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.”). Although a “right of discussion” is not unknown to American political thought, see, for example, JOHN STUART MILL, ON LIBERTY 11-12 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859), it seems odd for the Court to embrace an extra-constitutional principle over an express provision of the Constitution.

[T]he Court was aided, and obviously made use of a major amicus curiae brief filed by the Bill of Rights Committee of the American Bar Association, among whose members were Zechariah Chafee and Grenville Clark. The brief said in part: "There are many different kinds of benefits to be derived from parks, and one of the most important is the constitutional right of assembly therein. The parks are held by the city subject to this right."⁶²

Kalven lamented that *Hague's* framework was "not enshrined as the starting point for judicial analysis in cases of speech in public places."⁶³ He hinted at "subtle but definite transformations" in subsequent decisions and worried about "[t]he Court's neat dichotomy of 'speech pure' and 'speech plus.'"⁶⁴ That distinction protected expression that was reducible to verbal or written speech but disfavored "parades, pickets, and protests" that were deemed to be "speech plus."⁶⁵ Kalven took particular aim at two of the Court's recent decisions pertaining to civil rights protests in public places, noting that the opinions "bristled with cautions and with a lack of sympathy for such forms of protest."⁶⁶ And in a line that would itself become famous, he insisted:

[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.⁶⁷

Kalven's commentary on the public forum laid the groundwork for a renewed doctrinal focus by the Supreme Court.⁶⁸ He clearly envis-

62. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 14 (footnotes omitted).

63. *Id.*

64. *Id.* at 14, 23.

65. *Id.* at 22.

66. *Id.* at 8 (referring to *Cox v. Louisiana*, 379 U.S. 536 (1965); and *Edwards v. South Carolina*, 372 U.S. 229 (1963)).

67. *Id.* at 11-12. Robert Post suggests that "[t]he phrase 'public forum' is traditionally attributed to Harry Kalven's classic 1965 article." Post, *Between Governance*, *supra* note 11, at 1718.

68. See Post, *Between Governance*, *supra* note 11, at 1714-15 (describing rise of the doctrinal framework surrounding the public forum).

ioned a minimalist approach to government regulation of the public forum, focusing on the need for “some commitment to order and etiquette.”⁶⁹ As Kalven concluded his article: “Among the many hallmarks of an open society, surely one must be that not every group of people on the streets is ‘a mob.’”⁷⁰

The Court lost sight of Kalven’s warnings as it moved forward with a *speech*-based focus for public forum analysis. It focused instead on time, place, and manner restrictions in a line of cases culminating in *Perry Education Ass’n v. Perry Local Educators’ Ass’n*.⁷¹ That framework transformed Kalven’s minimalist approach (which would have been highly protective of civil liberties) to a presumption that a government regulation was legitimate as long as it satisfied a formalistic threshold of “content neutrality.”

A law that lacks content neutrality because it expressly targets a particular viewpoint or form of expression will likely violate any number of constitutional principles, including equal protection.⁷² Those are the easy cases. And notwithstanding the city council of Hialeah, Florida, they are few and far between.⁷³ The harder cases are laws that satisfy all of the threshold inquiries: they are content-neutral; they do not target a particular class or viewpoint; they are, to paraphrase a famous free exercise decision, neutral laws of general applicability.⁷⁴ The speech-based public forum framework will not adequately protect against these laws. It elevates form over substance and establishes what Justice Kennedy has decried as a

69. Kalven, Jr., *supra* note 62, at 23. Endorsing one particularly narrowly drawn ordinance, he wrote: “All that the ordinance required was that the parade not be, in [Alexander] Meiklejohn’s phrase, ‘out of order.’” *Id.* at 26.

70. *Id.* at 32.

71. 460 U.S. 37, 45 (1983).

72. *See, e.g.,* Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (noting that “the equal protection claim in this case is closely intertwined with First Amendment interests” and concluding that “[t]he central problem with Chicago’s ordinance is that it describes permissible picketing in terms of its subject matter”). Kenneth Karst observed that *Mosley* marked the Supreme Court’s first acknowledgment that a content-based regulation violated “the principle of equal liberty of expression ... inherent in the first amendment.” Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 26 (1975). Karst suggests that “[t]he absence of a clear articulation of the principle of equal liberty of expression in Supreme Court decisions before *Mosley* may be attributable to a belief that the principle is so obviously central among first amendment values that it requires no explanation.” *Id.* at 29.

73. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 521-22 (1993).

74. *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990).

“jurisprudence of categories.”⁷⁵ As Robert Post has argued, “*Perry* imposes no first amendment constraints whatever on the government’s ability to build discriminatory criteria into the very definition or purpose of the limited public forum.”⁷⁶

The speech-based focus of the *Perry* doctrine is evident in the Court’s 1988 opinion in *Boos v. Barry*.⁷⁷ The case involved a challenge to a District of Columbia law that prohibited, among other things, congregating “within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes.”⁷⁸ The petitioners challenged the “deprivation of First Amendment speech and assembly rights” and argued that “[t]he right to congregate is a component part of the ‘right of the people peaceably to assemble’ guaranteed by the First Amendment.”⁷⁹ Justice O’Connor’s opinion for the Court cited *Perry* three times and resolved the case under a free speech analysis without mentioning the right of assembly.⁸⁰

Meanwhile, the Court expanded the notion of the public forum to less traditional settings. In 1972, it noted in *Healy v. James* that the generally available facilities of public educational institutions were public forums, and stressed that “[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’”⁸¹ The

75. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 693-94 (1992) (Kennedy, J., concurring) (“Our public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat.”).

76. Post, *Between Governance*, *supra* note 11, at 1753. Post argues that “as a practical matter the government remains as free to limit public access to a limited public forum as to a nonpublic forum.” *Id.*

77. 485 U.S. 312, 312-13 (1988).

78. *Id.* at 316.

79. Brief for Petitioners, *Boos*, 485 U.S. 312 (No. 86-803), 1987 WL 881333, at *36, *42.

80. *Boos*, 485 U.S. at 312-13, 317, 321, 324.

81. 408 U.S. 169, 180-82 (1972). The Court elaborated:

If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization’s ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by the denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial.

Id.

Court reinforced these ideas in its 1995 decision in *Rosenberger v. Rector & Visitors of the University of Virginia*.⁸² Citing *Perry*, the Court noted that although the Student Activities Fund was “a forum more in a metaphysical than in a spatial or geographic sense ... the same [public forum] principles are applicable.”⁸³ Both *Healy* and *Rosenberger* followed *Perry* in anchoring their doctrinal framework solely in free speech principles.⁸⁴ The public forum, in its physical and nonphysical versions, had all but forgotten its assembly roots.⁸⁵

C. *The Right of Association*

As the theoretical framing of the public forum shifted from assembly to speech, a parallel development emerged in the displacement of the assembly right by the judicially recognized right of association. I have elsewhere argued at length about the problems with the theory and doctrine underlying the right of association and its component parts of intimacy and expressiveness.⁸⁶ Among other things, the shift to association obscures important values and historical connections related to the right of assembly.⁸⁷ But the shift to association has even starker consequences in the context of the public forum.

These consequences became clear in the Court's 2010 decision in *Christian Legal Society Chapter of the University of California*,

82. 515 U.S. 819, 819-20 (1995).

83. *Id.* at 830; cf. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 802-03 (1996) (Kennedy, J., concurring in part and dissenting in part) (“Minds are not changed in streets and parks as they once were.”).

84. See *Rosenberger*, 515 U.S. at 819-20; *Healy*, 408 U.S. at 169-70.

85. In *International Society for Krishna Consciousness, Inc. v. Lee*, Justice Kennedy provided one of the rare links to assembly in his concurrence, which was joined by Justices Blackmun, Stevens, and Souter. 505 U.S. 672, 696 (1992) (Kennedy, J., concurring) (“The Court's approach is contrary to the underlying purposes of the public forum doctrine. The liberties protected by our doctrine derive from the Assembly, as well as the Speech and Press Clauses of the First Amendment, and are essential to a functioning democracy.” (citing *Kalven*, *supra* note 62, at 14, 19)).

86. See generally INAZU, *supra* note 21. The Court recognized the categories of intimate and expressive association in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984). The constraints of intimate and expressive association effectively remove constitutional protections for “pre-expressive” and “pre-political” groups in civil society that would fail to meet the definitions of intimacy or expressiveness. INAZU, *supra* note 21, at 4.

87. INAZU, *supra* note 21, at 4; see also *supra* Part I.A (describing values and purposes of assembly right).

Hastings College of the Law v. Martinez.⁸⁸ The government action at issue in *Martinez* was an “all-comers” policy at Hastings College of the Law that required any student group to accept any student as a member.⁸⁹ Hastings denied official recognition to a student chapter of the Christian Legal Society (CLS) because the group excluded on the basis of sexual conduct and religious belief in violation of the school’s policy.⁹⁰ In addition to withholding modest funding and the use of its logo, Hastings denied CLS the opportunity to send mass e-mails to the student body, to participate in the annual student organizations fair, and to reserve meeting spaces on campus.⁹¹ CLS filed suit in federal district court asserting violations of expressive association and free speech.⁹²

When the case reached the Supreme Court, Justice Ginsburg’s opinion for a five-justice majority collapsed the distinction between the speech right and the association right: the rights “merged,” with the clear implication that association added *nothing* to speech.⁹³ Quoting from CLS’s brief, Justice Ginsburg wrote that “expressive association in this case is ‘the functional equivalent of speech itself’” to set up the idea that expressive association is entitled to no more constitutional protection than speech.⁹⁴ But CLS had asserted that “where one of the central purposes of a noncommercial expressive association is the communication of a moral teaching, its choice

88. 130 S. Ct. 2971 (2010). The discussion in this section draws from Inazu, *supra* note 20, at 821-23.

89. *Martinez*, 130 S. Ct. at 2979.

90. *Id.* at 2980.

91. *See id.* at 2979.

92. Christian Legal Soc’y Chapter of Univ. of Cal., *Hastings Coll. of the Law v. Kane*, No. C 04-04484 JSW, 2006 WL 997217, at *4 (N.D. Cal. May 19, 2006). CLS also raised free exercise and equal protection challenges, but the society’s primary arguments relied on speech and expressive association. *See id.* I have elsewhere engaged in an extended critique of the judicially recognized right of association and its component parts of intimate and expressive association. INAZU, *supra* note 21, at 63-149. For purposes of the present argument, I consider the *Martinez* Court’s focus on and rejection of the association claim.

93. *Martinez*, 130 S. Ct. at 2985. Professor McConnell recently observed how far the reasoning in *Martinez* strays from the First Amendment, writing that “the drafters of the First Amendment made one thing clear: [Its] freedoms are separate and warrant individual enumeration and protection. In the past thirty years, without offering any reason and without considering this history, the Supreme Court has committed the one error the drafters most clearly tried to prevent.” McConnell, *supra* note 21, at 40.

94. *Martinez*, 130 S. Ct. at 2985.

of who will formulate and articulate that message is treated as the functional equivalent of speech itself.”⁹⁵

CLS was not arguing that association is nothing more than speech, but rather that association is itself a form of expression—whom it selects as its members and leaders communicates a message. Justice Ginsburg’s interpretation obscures the connection between a group’s message and its composition (think, for example, of a women’s college, a black fraternity, or a Jewish day school).⁹⁶ As importantly, a group’s ability to control its choice of members and leaders is an indispensable predicate to being able to formulate its messages and values.⁹⁷ Moreover, limits on membership and leadership permit a group’s members to develop stronger internal bonds with one another. The Court’s failure to recognize these implications ignores the significance of multiple protections in the text of the First Amendment.⁹⁸

Having dispensed with the right of association, Justice Ginsburg proceeded with a speech-based public forum analysis. She concluded that the all-comers policy was “a reasonable, viewpoint-neutral

95. Brief for Petitioner at 35, *Martinez*, 130 S. Ct. 2971 (No. 08-1371).

96. See INAZU, *supra* note 21, at 4 (discussing expressive dimensions of group composition).

97. The inability to see the connections between membership and message formation is one of the most glaring weaknesses of the Court’s decision in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). See AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 40 (1995) (“Surely the Jaycees ... will be a different organization. Surely that difference will be felt throughout an intricate web of relationships and different voices in immeasurable but nonetheless significant ways.”); George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION 55 (Amy Gutmann ed., 1998) (“Brennan’s claim that young women may, after their compulsory admission, contribute to the allowable purpose of ‘promoting the interests of young men’ is absurd.”).

98. Harkening back to the debate between Congressman Page and Congressman Sedgwick at the framing of the First Amendment, Professor McConnell observes:

Theodore Sedgwick would be horrified. He thought that freedom of speech was broad enough to protect the right of groups to organize and meet. It turns out, though, that according to the Supreme Court, freedom of speech protects only the message itself and not the process of organizing the message through the association of like-minded individuals. John Page and the First Congress were prescient in seeing that separate protection for assembly (as well as religion, press, and petition) would be necessary to prevent the government from using various pretexts to suppress assemblies that are contrary to the views of those in power. In Washington’s day, the unpopular meetings were of the Democratic-Republican clubs. In Alabama in 1958, they were of the NAACP. In San Francisco and New York today, the unpopular meetings are of religious citizens.

McConnell, *supra* note 21, at 44.

condition on access to the student-organization forum.”⁹⁹ In fact, according to Justice Ginsburg, the policy was “textbook viewpoint neutral” because it applied equally to all groups.¹⁰⁰ The minimalist content-neutrality inquiry under a speech-based analysis was easily satisfied. But the fundamental purpose of the public forum was wholly obscured.

II. THE LIMITATIONS OF SPEECH

The limitations of a speech-based public forum doctrine do not make speech the boogeyman. Speech-focused doctrines play a critical role in conserving public forums as spaces for public discussion, debate, and dissent. One of the most important principles arising out of these cases is that “the government may not prohibit all communicative activity” in traditional public forums like streets and sidewalks.¹⁰¹ At the same time, more flexible standards for time, place, and manner restrictions acknowledge and accommodate important governmental interests in maintaining order and safety within the public forum. But the speech-oriented aspects of *Perry* and other cases complement the original contours of the public forum doctrine; they do not replace or obviate them.¹⁰² In this Part, I suggest that contemporary free speech doctrine has muted the significance of the public forum in two ways: (1) by relying too much on the purported neutrality of time, place, and manner restrictions; and (2) by failing to limit the scope of the government speech doctrine.

A. *The Limits of Time, Place, and Manner*

The doctrinal contours of the modern public forum revolve around what the Court has referred to as content-neutral time, place, and manner restrictions.¹⁰³ The doctrine is far from clear—as Steven

99. *Martinez*, 130 S. Ct. at 2978.

100. *Id.* at 2993.

101. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

102. *See De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (“The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.”).

103. *See 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.”); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648

Shiffrin has suggested, “if content neutrality is the First Amendment emperor, the emperor has no clothes.”¹⁰⁴ One of the problems with the content-neutrality inquiry is that it misses the expressive connection between speech and the time, place, and manner in which it occurs. Indeed, content-neutral laws can still devastate expressive content.

Content-neutral *time* restrictions can sever the link between message and moment. For example, consider the consequences for political dissent of a content-neutral time restriction that closed a public forum on symbolic days of the year like September 11th, August 6th (the day the United States detonated an atomic bomb on the city of Hiroshima), or June 28th (the anniversary of the Stonewall Riots). Content-neutral time restrictions that closed the public sidewalks outside of prisons on days of executions, outside of legislative buildings on days of votes, or outside of courthouses on days that decisions are announced would raise similar concerns. And yet all of these formally satisfy the content-neutrality inquiry.

Content-neutral *place* restrictions that preclude access to symbolic settings can be similarly distorting. As Professor Zick has noted, “[s]peakers like abortion clinic sidewalk counselors, petition gatherers, solicitors, and beggars seek the critical expressive benefits of proximity and immediacy that inhere in such places.”¹⁰⁵ Instead, “individuals who wish to engage in speech, assembly, and petition activities are too often displaced by a variety of regulatory mechanisms, including the construction of ‘speech zones.’”¹⁰⁶

Content-neutral *manner* restrictions can have similar effects by draining an expressive message of its emotive content or even eliminating certain classes of people from the forum altogether. A handbilling requirement can preclude some of the most effective

(1981) (“A major criterion for a valid time, place, and manner restriction is that the restriction ‘may not be based upon either the content or subject matter of speech.’” (quoting *Consol. Edison Co. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 536 (1980))).

104. STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 66 (1999); cf. Steven J. Heyman, *Spheres of Autonomy: Reforming the Content-Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 653 (2002) (“[T]he courts’ increasing reliance upon the content discrimination doctrine to resolve difficult First Amendment problems only obscures the crucial issues, and leads to hypertechnical decisions that are inaccessible to the public.”).

105. ZICK, *supra* note 12, at 21.

106. Zick, *supra* note 21, at 396.

forms of communication by labor protesters or others. And in some cases, that requirement may even be cost prohibitive.¹⁰⁷

The state's regulation of public spaces through time, place, and manner restrictions is too easily justified apart from expressive content. In many cases involving curfews, zones, or buffers, a city council can come up with *some* rationale to regulate expressive activity that is unrelated to expression. But the First Amendment requires more than just *some* reason to overcome its presumptive constraint against government action.¹⁰⁸

B. Government Speech

A second challenge to the modern public forum anchored in the free speech right lies in the undertheorized realm of government speech. When the government characterizes expression in a physical or metaphysical forum as its own speech, it can sometimes avoid the content-neutrality inquiry altogether and thereby impose content or even viewpoint-based expressive restrictions. Government speech often unfolds in situations involving government funding of private

107. See *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 820 (1984) (Brennan, J., dissenting) (“The average cost of communicating by handbill is therefore likely to be far higher than the average cost of communicating by poster. For that reason, signs posted on public property are doubtless ‘essential to the poorly financed causes of little people,’ and their prohibition constitutes a total ban on an important medium of communication.” (quoting *Martin v. Struthers*, 319 U.S. 141, 146 (1943))).

108. The Supreme Court has suggested that content-neutral regulations must “leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). But the Court has rarely addressed the meaning of that requirement. See *Hill v. Colorado*, 530 U.S. 703, 726-27 (2000) (concluding that the floating buffer zone left open “ample alternative channels for communication” by abortion protesters). Justice Kennedy’s dissent in *Hill* critiqued the majority’s application of the requirement, contending that “[i]t is for the speaker, not the government, to choose the best means of expressing a message.” *Id.* at 781 (Kennedy, J., dissenting); see also *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988) (“[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.”). Lower courts have held that alternative channels are insufficient “if the speaker is not permitted to reach the ‘intended audience.’” *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990). The same holds true even when the regulation allows the speaker to reach another large group. *Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago*, 419 F. Supp. 667, 674 (N.D. Ill. 1976).

activity, when the government insists that it may limit expressive uses of its money.¹⁰⁹

The intersection of government speech with the public forum raises unique First Amendment concerns that are not applicable to all instances of government speech. Consider government speech in a *nonpublic* forum. We may have serious concerns over the government's authority to declare a forum to be "nonpublic."¹¹⁰ But many if not most of those situations are analytically distinct from circumstances in which the government expressly or implicitly recognizes a forum for the purposes of facilitating a diversity of viewpoints and ideas.

A more controversial case of government speech is when the government attaches conditions to its discretionary spending *outside* of the public forum.¹¹¹ The paradigmatic example is the withholding of governmental grants or contracts to organizations that conduct abortion referrals or abortion advocacy.¹¹² The Supreme Court has asserted that the First Amendment does not require the neutral dispersal of discretionary grants and contracts to these groups.¹¹³ The Court has insisted that at some point the coercive power of

109. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.").

110. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (holding that monuments in city park are government speech); *Locke v. Davey*, 540 U.S. 712, 715 (2004) (holding that a state-run scholarship program is not a public forum); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 790 (1985) (holding that a federal workplace charitable fundraising campaign is a nonpublic forum); see also Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 697 (2011) (noting that *Summum* "blessed a government action that was for all intents and purposes indistinguishable from viewpoint discrimination in a public park—the prototypical example of impermissible speech regulation").

111. Joseph Blocher's contribution to this Symposium explores some of the issues raised in this context. See Joseph Blocher, *New Problems for Subsidized Speech*, 56 WM. & MARY L. REV. 1083 (2015).

112. See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1990); *Harris v. McRae*, 448 U.S. 297 (1980).

113. *Rust*, 500 U.S. at 197; see also *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 572-73 (1998) (striking down artists' claims of First Amendment violations when the National Endowment for the Arts denied them funding). But see *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2330 (2013) ("By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects 'protected conduct outside the scope of the federally funded program' [and is thus unconstitutional]." (quoting *Rust*, 500 U.S. at 197)).

discretionary funding is constitutionally impermissible.¹¹⁴ It has been spectacularly unclear as to where that line should be drawn.¹¹⁵

But whatever doctrinal problems these cases present, they do not implicate the particular concern of the relationship between government speech and a public forum with a purpose or function to facilitate a diversity of viewpoints and ideas. And that distinction might prove constitutionally significant.¹¹⁶ Consider, for example, why withholding discretionary grants or contracts to an organization that engages in abortion counseling does not lead inexorably to the conclusion that the government could pull the tax-exempt status of that same organization. In both cases, the government would be making a spending decision about its money and a normative judgment about the viewpoint of an organization. But there is a conceptual difference between conditioning the award of discretionary grants and contracts on the one hand, and precluding access to a forum whose purpose or function is to facilitate a diversity of viewpoints and ideas.¹¹⁷

114. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) (“[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit.” (quoting *United States v. Am. Library Ass’n*, 539 U.S. 194, 210 (2003))); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536-40 (2001) (holding that conditioning funding on an agreement not to challenge the constitutionality of statutes places unconstitutional conditions on speech). The Court has also specified that the government may not condition discretionary funding on loyalty oaths or political affiliation. See *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714-15 (1996) (holding that the government may not require recipients of government contracts to hold certain beliefs); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (holding that a state may not withhold property tax exemption from citizens who engage in anti-American speech); see also *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (“Under the well-settled doctrine of ‘unconstitutional conditions,’ the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.” (citations omitted)).

115. Some of the more well-known critiques include Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6-8 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1428-41 (1989).

116. See Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 39-40 (2000) (“[L]et us consider the government’s power to tax and spend. In this situation, the great dangers arise from the government’s discretion to engage in selective subsidy: the power to create incentives for individuals to alter their conduct by providing financial support to one choice and not to a substitute. If this discretionary power is the danger, it makes sense to distinguish between two types of governmental spending programs: discretionary grants, and grants made pursuant to neutral, objective formulas.”).

117. Not everyone shares these intuitions. For example, Justice Scalia has asserted that

These insights are best illustrated by *Rosenberger*.¹¹⁸ In that case, the University of Virginia provided funding for student-run publications but withheld funds to a particular publication on the basis that it “primarily promote[d] or manifeste[d] a particular belie[f] in or about a deity or an ultimate reality.”¹¹⁹ The Supreme Court rejected this viewpoint discrimination on the basis that the purpose of the university’s funding scheme was “to encourage a diversity of views from private speakers.”¹²⁰

These principles are in some ways contingent on the nature of the forum. The government could, in some circumstances, close the forum altogether. In the context of the charitable tax deduction, it could eliminate the benefit altogether, and then reallocate the money saved to discretionary grants and contracts for groups that endorse its normative commitments. That fiscal maneuvering might allow the government to realize the full potential of the government speech doctrine in the context of its spending decisions.¹²¹ But such a drastic reordering of government funding of civil society would likely encounter fierce resistance in the political process. And the political costs of eliminating that public forum suggest one reason that the theory underlying the public forum retains intuitive appeal: most of us do not want the government to have complete discretion in all of its spending decisions, and we think that the benefits of tax deductions are worth the costs.

A robust First Amendment would minimize the government’s ability to proclaim its own orthodoxy. But at the very least, we might expect the government to be explicit when it engineers social

tax exemption is a subsidy that should not be subject to strict scrutiny First Amendment review. *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231-32 (1987) (Scalia, J., dissenting). Justice Scalia elaborated: “The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily ‘infringe’ a fundamental right is that—unlike direct restriction or prohibition—such a denial does not, as a general rule, have any significant coercive effect.” *Id.* at 237. But Justice Scalia’s characterization of a tax exemption as a subsidy gets us only to the broad recognition that the government’s money is implicated when the government elects not to collect a tax or fee. It tells us nothing about whether the denial of those benefits undermines core First Amendment concerns.

118. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

119. *Id.* at 823 (internal quotation marks omitted).

120. *Id.* at 834.

121. Of course, we might also have other independent First Amendment concerns over the government’s speech limitations. See Post, *Subsidized Speech*, *supra* note 11, at 164 (discussing unconstitutional conditions).

policy around its own normative commitments. Robert Cover had it right: the government should fully own its normative commitments, particularly when the consequences of doing so are marginalizing or even eradicating dissenting views.¹²² Justice Ginsburg's *Martinez* opinion falls short on exactly this point. She noted approvingly that Hastings' all-comers policy "encourages tolerance, cooperation, and learning among students"¹²³ and "conveys the Law School's decision 'to decline to subsidize with public monies and benefits conduct of which the people of California disapprove.'"¹²⁴ These normative assertions sound like Justice Ginsburg is attempting to justify Hastings' policy under a government speech rationale. But they are not "textbook viewpoint neutral."¹²⁵ And they are deeply at odds with "Hastings' proclaimed policy of fostering a diversity of viewpoints among registered student groups."¹²⁶

III. RECLAIMING THE PUBLIC FORUM

The current dimensions of the public forum doctrine, in both its traditional and limited forms, would be unrecognizable to those who envisioned a robust public square for citizens to voice and symbolize their genuine differences and exercise their role in a government of the people. They would be unrecognizable to the author of the *Hague* opinion, and they would be unrecognizable to Harry Kalven. Restoring a richer vision of the public forum poses a difficult, but not impossible, task. In this last Part, I offer four suggestions that might guide our efforts toward that goal. First, we can identify practical and administrable limits to the public forum. Second, within those limits, we should tolerate a great deal of discomfort, uneasiness, and instability. Third, we should include assembly-based

122. See generally Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 13 (1983).

123. Christian Legal Soc'y Chapter of the Univ. of Cal., *Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2990 (2010).

124. *Id.* (quoting Brief of Hastings College of Law Respondents at 35, *Martinez*, 130 S. Ct. 2971 (No. 08-1371)).

125. *Id.* at 2993.

126. *Id.* at 3001 (Alito, J., dissenting); see also *id.* at 3013 ("The RSO forum 'seeks to promote a diversity of viewpoints among registered student organizations, including viewpoints on religion and human sexuality.'" (quoting Joint Appendix at 216, *Martinez*, 130 S. Ct. 2971 (No. 08-1371), 2010 WL 372139)).

values in public forum analysis. Finally, we ought to embrace a diverse plurality of groups in the public forums that purport to facilitate a diverse plurality of ideas.

A. The Necessary Limits of the Public Forum

The state is not without any recourse for regulating the public forum. For example, the Assembly Clause from which the public forum is derived protects only *peaceable* assembly.¹²⁷ Long-standing First Amendment doctrine allows the state to regulate speech and expression that cross the threshold of violence, but the state bears a high burden of drawing the constitutionally appropriate line. The Supreme Court emphasized this burden in its seminal decision *Brandenburg v. Ohio*, announcing a standard as applicable to assembly as it is to speech: “Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action.”¹²⁸ The precise line drawing is not self-evident, but it is workable in assembly as it is in speech.¹²⁹

127. For discussions about the peaceability requirement, see Ashutosh Bhagwat, *Liberty's Refuge, or the Refuge of Scoundrels? The Limits of the Right of Assembly*, 89 WASH. U. L. REV. 1381, 1388-99 (2012) [hereinafter Bhagwat, *Refuge of Scoundrels*]; Ashutosh Bhagwat, *Terrorism and Associations*, 63 EMORY L.J. 581 (2014) [hereinafter Bhagwat, *Terrorism and Associations*]; John D. Inazu, *Factions for the Rest of Us*, 89 WASH. U. L. REV. 1435, 1438-40 (2012); Zick, *supra* note 21, at 385-89.

128. 395 U.S. 444, 449 n.4 (1969); *cf.* *De Jonge v. Oregon*, 229 U.S. 353, 364-65 (1937) (“These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.”).

129. Professor Bhagwat observes that the Supreme Court has held that “membership in an organization with violent goals may be punished, consistent with the First Amendment, so long as the prosecuted individual’s membership is ‘active and purposive membership, purposive that is as to the organization’s criminal ends.’” Bhagwat, *Terrorism and Associations*, *supra* note 127, at 624 (quoting *Scales v. United States*, 367 U.S. 203 (1961)). Although acknowledging that *Brandenburg* “suggested in a footnote that prosecution for assembly must satisfy the same requirements as prosecution for speech,” Bhagwat notes that the Court cited *Scales* approvingly in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718 (2010), “without any hint that it was inconsistent with *Brandenburg*.” Bhagwat, *Terrorism and Associations*, *supra* note 127, at 624 n.266. I have argued elsewhere that “[i]n the context of Professor Bhagwat’s concern about violent assemblies, there may well be differences between groups and individuals.” Inazu, *supra* note 127, at 1440. But I also suggested that “these differences [might not] doom a *Brandenburg*-like standard for assembly.” *Id.* On my account:

Conspiracy law aims at an agreement to commit an illegal act, and it is gener-

Limitations on the public forum might also be permissible when the restrictions are responsive to exigent circumstances or narrowly tailored to ensure access to public spaces. A municipality might, for example, limit protests on public streets on mornings when street cleaning occurs. Firefighters could disperse even a peaceful assembly if necessary to reach a burning building, and as stated in *Cox v. Louisiana*:

Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.¹³⁰

B. The Risk of Instability

The limits outlined in the preceding Section are *minimal* limits.¹³¹ They tolerate a substantial amount of risk to the democratic project for the sake of the democratic project. We may rightly worry at the margins when speech or assembly risks too much violence or threatens to undermine democratic theory.¹³² But our tolerance for potentially disruptive or harmful expression in the public forum ought to be exceedingly high. Even injuries to dignity and self-respect seldom trump the First Amendment. As the Court recently observed in

ally the agreement itself (and some overt act) that triggers liability, not the imminence of the target offense. This focus leaves criminal conspiracy outside of *Brandenburg* even under a free speech analysis. Assemblies that are not criminal conspiracies may thus still be governable under a *Brandenburg*-like standard.

Id. My sense is that Professor Bhagwat and I may be gesturing toward a similar conclusion insofar as conspiracy, like assembly, usually involves more than one individual. (I leave to one side jurisdictions that recognize unilateral conspiracy liability).

130. 379 U.S. 536, 554-55 (1965).

131. *Cf. Post*, *Between Governance*, *supra* note 11, at 1730 (suggesting that the proper starting point is that “the right to use a public place for expressive activity may be restricted only for weighty reasons” (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972))). *Post* suggests that the *Grayned* framework “invites courts to focus precisely on the relationship between speech and the reasons for its regulation.” *Id.* at 1766. The “crucial question” is “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.” *Id.* at 1730 (quoting *Grayned*, 408 U.S. at 116).

132. On the latter point, see, for example, OWEN M. FISS, *THE IRONY OF FREE SPEECH* 16 (1996) (expressing concern for private expression that would “make it impossible for ... disadvantaged groups even to participate in the discussion”).

Snyder v. Phelps (a case involving assembly as much as speech), “[a]s a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”¹³³ *Snyder’s* words reflect long-standing First Amendment principles:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.¹³⁴

These commitments are not cost free, but they are costs that we as a nation committed to long ago. And they are costs and commitments that become more understandable when we expand our gaze beyond speech to assembly.

C. Preserving the Public Forum

I suggested earlier that the principles and values underlying the right of assembly complement and enhance the speech-based rationales that have come to dominate public forum analysis. Assembly reminds us that some forms of expression and dissent require more than the individual, and that the expression of two or more people can transcend the sum of its parts. Assembly also fosters political and pre-political participation by citizens who might otherwise be inhibited from coming together for a shared purpose. And perhaps most powerfully of all, assembly, unlike speech, shows why political dissent need not itself be expressive.

133. 131 S. Ct. 1207, 1220 (2011).

134. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (internal citations omitted); *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670 (2011) (“Speech remains protected even when it may ‘stir people to action,’ ‘move them to tears,’ or inflict great pain.” (quoting *Snyder*, 131 S. Ct. at 1220)); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (holding that speech may not be restricted “because [it] may have an adverse emotional impact on the audience”); *Village of Skokie v. Nat’l Socialist Party of Am.*, 373 N.E.2d 21, 24 (Ill. 1978) (permitting the wearing of swastikas in a parade through a village with high concentration of Holocaust survivors).

Consider the implications of these assembly-based values for the Court's decision in *Frisby v. Schultz*.¹³⁵ The case involved abortion protesters who sought to enjoin enforcement of a municipal ordinance that prohibited them from picketing in front of a private residence.¹³⁶ The protesters had picketed on a public street outside the residence of a doctor who performed abortions at two local clinics.¹³⁷ As the Court noted, "The picketing was generally orderly and peaceful; the town never had occasion to invoke any of its various ordinances prohibiting obstruction of the streets, loud and unnecessary noises, or disorderly conduct."¹³⁸

The Court began its analysis by recognizing that the protesters were using a traditional public forum: "Our prior holdings make clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood."¹³⁹ But it then turned to *Perry's* speech-based time, place, and manner restrictions, and concluded that the ordinance left open ample alternatives for a "general dissemination of a message."¹⁴⁰

Frisby is a hard case and highlights one of the potential limits of an assembly-based rationale. Perhaps, as the majority argued, the home occupies such a distinctive place in our constitutional jurisprudence that the interest in residential privacy trumps other important First Amendment values.¹⁴¹ But if the Court is going to reach that conclusion, it ought to do so with a full consideration of First Amendment values, not just speech-based time, place, and manner analysis. Consider, for example, Justice O'Connor's description of the ordinance in *Frisby*:

The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public,

135. 487 U.S. 474 (1988).

136. *Id.* at 476.

137. *Id.*

138. *Id.* *But see id.* at 487 (asserting that "[t]he target of the focused picketing banned by the Brookfield ordinance ... is figuratively, and perhaps literally, trapped within the home" (emphasis added)); *id.* at 494 (Brennan, J., dissenting) (contending that "the throng repeatedly trespassed onto the Victorias' property and at least once blocked the exits to their home").

139. *Id.* at 480 (majority opinion); *see also id.* at 481 ("No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.").

140. *Id.* at 481-83.

141. *Id.* at 483.

but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy.¹⁴²

Justice O'Connor's characterization assumes that these kinds of picketers "generally" do not intend to communicate to the general public and also that communication to the "general public" is inherently more valuable than communication within a group or the solidarity that public protest may foster for its own sake. Justice Brennan's dissent makes a similar mistake: "Once size, time, volume, and the like have been controlled to ensure that the picket is no longer intrusive or coercive, only the speech itself remains."¹⁴³ That is not quite right: when the assembly remains, more than "the speech itself" remains. The reasoning that Justices O'Connor and Brennan advance suggests that the First Amendment protections of public protest hinge on a "communicative purpose." That is a circumscribed understanding of the First Amendment that flows from a narrow focus on speech values to the exclusion of assembly.¹⁴⁴

D. The Marketplace of (Good and Bad) Ideas (and Groups)

Finally, we might discover new insights by reconnecting the right of assembly with nonphysical forums that foster a diversity of private viewpoints and ideas. Here, the link to assembly-based values is less intuitive. After all, what does a *nonphysical* forum for *money* have in common with William Penn's street protest?

Although the possibility of a nonphysical forum rooted in the right of assembly may seem counterintuitive, just as "speech,"

142. *Id.* at 486; *see also id.* at 487 ("The offensive and disturbing nature of the form of the communication banned by the Brookfield ordinance ... can scarcely be questioned.").

143. *Id.* at 494 (Brennan, J., dissenting).

144. The Court's recent decision in *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014), will be viewed by some as an important limit on the government's authority to regulate anti-abortion expression, as recognized in cases like *Frisby*, 487 U.S. 484, and *Hill v. Colorado*, 530 U.S. 703 (2000). Indeed, in *McCullen*, a unanimous Court struck down the Massachusetts law that restricted the activity of peaceful anti-abortion counselors on public sidewalks outside of abortion facilities. *McCullen*, 134 S. Ct. at 2541. But as Justice Scalia noted in a sharp concurrence, Chief Justice Roberts's majority opinion obscured the underlying doctrinal flaws of *Hill*'s analysis. *Id.* (Scalia, J., concurring). Scalia insisted that the Court should have explicitly overruled *Hill*. *Id.* at 2545.

“press,” and “religion” have evolved to encompass forms of expression unimaginable to the founders, so too can assembly and its public forum implications.¹⁴⁵ Just as actual speech is not a necessary condition for the protections of speech, a physical gathering is not a necessary condition for the protections of assembly. One reason that we can intuit this result is that the right of assembly operates even when groups never physically assemble in full: many groups rarely if ever gather all of their members in one location, but subsets of members of these groups gather for myriad purposes in ever-changing compositions. The right of assembly protects the metaphysical group as well as the physical group.

The second complication of applying assembly-based values to nonphysical forums is that many of those forums involve dollars rather than people. The “coming together” facilitated by the incentive structure of a tax deduction does not involve a literal conversation or exchange of ideas. But here is precisely why the relational aspects of assembly enrich a purely speech-based understanding of financial expression. The expressiveness, the politics, and the way of life reflected in a monetary contribution to a tax-exempt group are almost always dependent upon people acting in concert with one another. Most tax-exempt groups are not individual ventures but are cobbled together and sustained by people who identify with something larger than their own selves.

Consider the Supreme Court’s 1983 decision in *Bob Jones University v. United States* in light of these observations.¹⁴⁶ In 1971, the IRS issued Revenue Ruling 71-447, which declared that “a school not having a racially nondiscriminatory policy as to students ... does not qualify as an organization exempt from Federal income tax.”¹⁴⁷ Shortly thereafter, the IRS denied an exemption to a number of racially discriminatory religious schools, including Bob Jones University in South Carolina and Goldsboro Christian Schools in North Carolina.¹⁴⁸

145. See generally John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093 (2013) (discussing conceptual framework for the right of assembly in a virtual context).

146. 461 U.S. 574, 600-05 (1983). The discussion of *Bob Jones* draws from Inazu, *supra* note 20, at 811-13.

147. Rev. Rul. 71-447, 1971-2 C.B. 230.

148. *Bob Jones Univ. v. United States*, 468 F. Supp. 890, 892-93 (D.S.C. 1978). Both schools maintained racially discriminatory policies based on their interpretations of the Bible. *Id.*

Both schools challenged the application of Revenue Ruling 71-447, and the case reached the Supreme Court.¹⁴⁹ The schools lost eight to one.¹⁵⁰ Chief Justice Burger's opinion for the majority located the source of the tax exemption in the "public benefit" and contended that an "institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred."¹⁵¹ He concluded that "racial discrimination in education is contrary to public policy."¹⁵² The *New York Times* ran the headline "Tax-Exempt Hate, Undone."¹⁵³ The *Washington Post* raved that Bob Jones had been "trounced" at the Court.¹⁵⁴ Despite popular reaction to the decision, commentators warned that "it is a mistake to think *Bob Jones University* an easy case."¹⁵⁵ In fact, *Bob Jones University*, although normatively attractive to almost everyone, is conceptually wrong.¹⁵⁶

149. *Bob Jones Univ.*, 461 U.S. at 577.

150. *Id.* at 576.

151. *Id.* at 592. Burger insisted that "[h]istory buttresses logic to make clear that, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest." *Id.* at 591-92.

152. *Id.* at 595.

153. Olatunde Johnson, *The Story of Bob Jones University v. United States (1983): Race, Religion, and Congress' Extraordinary Acquiescence*, in *STATUTORY INTERPRETATION STORIES* 155 (William N. Eskridge, Jr. et al. eds., 2011).

154. *Id.* at 155 n.177.

155. Mayer G. Freed & Daniel D. Polsby, *Race, Religion, and Public Policy: Bob Jones University v. United States*, 1983 S. CT. REV. 1, 2.

156. It is important to emphasize that my critique is conceptual and doctrinal. My argument is that *Bob Jones University* cannot be justified on a principled understanding of the system of tax deductions operative in 1983 and continuing today. It may well be that the holding of *Bob Jones University* was a political necessity in 1983. The decision came within a generation of *Brown v. Board of Education*, and its holding extended to private secondary schools (including "segregationist academies") that resisted racial integration. Cf. Jeff Spinner-Halev, *A Restrained View of Transformation*, 39 POL. THEORY 777, 782 (2011) ("The *Bob Jones* case was a matter of invidious discrimination because of the time and place in which it took place.... This case emerges out of the 1960s, with the U.S. Government's attempts to outlaw school segregation, and its worries about the common Southern response of establishing private schools in order to preserve de facto segregation."). The "political necessity" argument is an even more compelling rationale for earlier and more substantial restrictions on nonreligious racially discriminatory private schools that were closer in time to the initial desegregation effort. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 178-79 (1976) (prohibiting nonreligious racially discriminatory private schools); cf. Douglas Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259, 276 (1982) ("[W]hen private schools drain off most of the whites in a school system, as has happened in some cities, they preclude any meaningful public school desegregation. Moreover, they can no

Setting aside the procedural and separation of powers issues that complicated the Supreme Court's resolution of the case, *Bob Jones University* is doctrinally mistaken because the government cannot coherently engage in viewpoint discrimination in a subsidy structure whose function is broadly pluralistic.¹⁵⁷ These pluralistic goals underlie the reasoning in *Rosenberger*, and the theoretical framework of that case suggests some tension with *Bob Jones University*.¹⁵⁸ An underlying commitment to pluralism is also illustrated in the D.C. Circuit's decision in *Big Mama Rag, Inc. v. United States*, which reversed the IRS's denial of tax-exempt status to a feminist publication.¹⁵⁹ The IRS and the district court had both concluded that the magazine failed to qualify as a tax-exempt educational organization because of its "political and legislative commentary" and its "articles, lectures, editorials, etc., promoting lesbianism."¹⁶⁰ Judge Mikva's reversal rightly rejected "the discriminatory denial of tax exemptions."¹⁶¹

Bob Jones University pronounced that racially discriminatory policies are "contrary to public policy" and placed the school outside of the "public benefit."¹⁶² To be sure, the charitable deduction (and the law of charitable trust that preceded it) has always included a

longer be described as enclaves; they have largely replaced the public school system. In that circumstance, even if they are pervasively religious, they should lose their right to discriminate against blacks, because they are imposing substantial harm on persons who have made no effort to affiliate themselves with the church.").

157. See *Bob Jones Univ.*, 461 U.S. at 612 (Rehnquist, J., dissenting).

158. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-32 (1995); cf. Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditure?*, 112 HARV. L. REV. 379, 382 (1998) ("[F]or First Amendment purposes, there is no workable, bright-line distinction between tax benefits as a broad category and direct spending programs defined in similarly generic terms. *Rosenberger* was decided correctly because the entitlement-type spending at issue in that case was similar, though not identical, to the classic tax benefits upheld in *Walz*").

159. 631 F.2d 1030, 1032 (D.C. Cir. 1980).

160. *Id.* at 1033.

161. *Id.* at 1034. The holding of *Big Mama Rag, Inc.* rests on the vagueness of the IRS's definition of "educational," but the underlying pluralist implications are also evident in the opinion. See *id.* at 1040 ("IRS officials earlier advised appellant's counsel that an exemption could be approved only if the organization 'agree[d] to abstain from advocating that homosexuality is a mere preference, orientation, or propensity on par with heterosexuality and which should otherwise be regarded as normal."); *id.* ("Objective standards are especially essential in cases such as this involving those espousing nonmajoritarian philosophies.").

162. *Bob Jones Univ.*, 461 U.S. at 595.

vague notion of public benefit.¹⁶³ But that limitation is a long way from the “common community conscience” asserted in *Bob Jones University*.¹⁶⁴ Indeed, it is hard to think of how such a standard might apply in practice. Why, for example, does racial discrimination in education violate a “common community conscience” but not gender discrimination, even though the Supreme Court has found both forms of discrimination to violate the Equal Protection Clause?¹⁶⁵ And if the Internal Revenue Service—a regulatory agency of unelected government workers—could define this standard once, what limiting principle prevents it from doing so again? As John Colombo and Mark Hall have argued, the public-policy constraint on tax exemption “relegate[s] it to merely another mechanism for the government to, in effect, make direct spending decisions by selecting which nonprofit activities confer a sufficient benefit to the community to deserve tax relief.”¹⁶⁶ Instead, the long-standing charitable exemption is best justified through a theory of pluralism that allows donors to determine which charities they will fund.¹⁶⁷ Unless we fundamentally restructure the charitable deduction, we are confronted with something akin to a limited public forum premised on promoting a wide range of viewpoints and ideas.¹⁶⁸

163. FISHMAN & SCHWARZ, *supra* note 11, at 69-70.

164. *Bob Jones Univ.*, 461 U.S. at 592.

165. *United States v. Virginia*, 518 U.S. 515, 519 (1996) (holding that Virginia’s all-male military academy violated the Equal Protection Clause); see Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407, 411, 434-35, 445-46 (1999) (discussing the constitutional issues surrounding the IRS’s disparate treatment of racially discriminatory and single-sex colleges); see also *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827, 829 (9th Cir. 2006) (en banc) (upholding a private school’s Hawaiian-only admissions policy against a § 1981 challenge).

166. COLOMBO & HALL, *supra* note 6, at 155. Justice Powell expressed similar concerns in his *Bob Jones University* concurrence. *Bob Jones Univ.*, 461 U.S. at 609 (Powell, J., concurring) (“Far from representing an effort to reinforce any perceived ‘common community conscience,’ the provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life.”).

167. COLOMBO & HALL, *supra* note 6, at 155. Justice Rehnquist’s dissent emphasized a separate reason for upholding the tax exemption to Bob Jones: the disjunction between “charitable” and “educational” in the Internal Revenue Code. *Bob Jones Univ.*, 461 U.S. at 623 (Rehnquist, J., dissenting). According to Justice Rehnquist, because the university clearly qualified as an “educational” organization, its tax-exempt status should have been upheld even if it were found to fall outside the definition of “charitable.” *Id.*

168. This observation also highlights a problem with the Court’s reasoning about the limited public forum in *Martinez*. Justice Ginsburg argued that CLS is “seeking what is effectively a state subsidy.” Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll.

Turning to the assembly right rather than a speech-only analysis might introduce additional values and ideas for the Court to consider in a case like *Bob Jones University*, including the way in which collective voice (financial or otherwise) emerges from individual contributions to a common enterprise.¹⁶⁹ At the very least, the assembly right suggests that the government ought to tolerate broadly pluralistic views in government arrangements like the current framework of tax deductions for charitable, educational, and religious organizations.

CONCLUSION

The preceding discussion may not tell us where or how the precise line drawing should unfold, but it does suggest a number of cases in which both the reasoning and the outcome may be wrong. In particular, greater clarity about the origins and purposes of the public forum may cast doubt on decisions like *Frisby v. Schultz* that restrict individuals and groups from traditional public forums. The assembly-based analysis also calls into question the reasoning underlying decisions like *Christian Legal Society v. Martinez* and *Bob Jones University v. United States*, which undercuts the diversity rationale underlying certain limited public forums. Conversely, the significance of the public forum suggests that some First Amendment decisions may be even more important than previously recognized. Chief among them are *Rosenberger v. Rectors of Virginia* and (a properly understood) *Hague v. Committee for Industrial Organization*.

of the Law v. Martinez, 130 S. Ct. 2971, 2986 (2010). Even if that were the case (which is contestable in light of the underlying facts), the “subsidy” in question takes the form of a generally available resource in a pluralistically oriented limited public forum. Citing *Bob Jones University*, Justice Ginsburg argued that the Court’s “decisions have distinguished between policies that require action and those that withhold benefits” and asserted that “Hastings, through its [student organizations] program, is dangling the carrot of subsidy, not wielding the stick of prohibition.” *Id.* That distinction has no relevance within the confines of the kind of forum that *Hastings* established, which, like the federal tax code, provides generally available resources to groups representing diverse viewpoints and ideas.

169. The principle may not hold across all of First Amendment jurisprudence—we might, for example, have a different approach to, or different government interests in, campaign contributions. Some of these issues are considered in the various opinions in, and commentary about, *Citizens United v. FEC*, 558 U.S. 310, 318 (2010).

In one of the most heralded First Amendment decisions in our nation's history, the Supreme Court affirmed that "[w]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization."¹⁷⁰ The Court emphasized that "freedom to differ is not limited to things that do not matter much" and the test of freedom is "the right to differ as to things that touch the heart of the existing order."¹⁷¹ The public forum is one of the mechanisms that we have to ensure this "right to differ." But its successful execution places a heavy burden on the state to distinguish between a "common good" that reinforces government orthodoxy and a "peaceability" that allows for genuine difference. The right of assembly directs us to the latter. We will need to honor that right in practice if we are to realize the full vision of the First Amendment's public forum.

170. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

171. *Id.* at 642.

