DePaul University
UNIVERSITY LIBRARIES

DePaul Law Review

Volume 15
Issue 2 *Spring-Summer 1966*

Article 6

Freedom of Assembly

Melvin Rishe

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation

Melvin Rishe, *Freedom of Assembly*, 15 DePaul L. Rev. 317 (1966)
Available at: https://via.library.depaul.edu/law-review/vol15/iss2/6

This Comments is brought to you for free and open access by the College of Law at Digital Commons@DePaul. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Digital Commons@DePaul. For more information, please contact digitalservices@depaul.edu.

COMMENTS

FREEDOM OF ASSEMBLY*

In the annals of the Supreme Court, 1961 marks a milestone. Once again, the highest court of the land was called upon to delve into the essence of the first amendment. The suit before the court was that of the *Communist Party of the United States v. The Subversive Activities Control Board.*[1] The question raised was whether the Communist Party could, consistent with the first amendment, be compelled to register as required by the Subversive Activities Control Act.[2] In an exhaustive opinion, Justice Frankfurter, speaking for the court, stated that, though "compulsory disclosure of the names of an organization's members may in certain instances infringe constitutionally protected rights of association,"[3] "[a]gainst the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve."[4] With a majority of one the court boldly announced its position on the first amendment freedom of association.[5]

Fifty years ago only the familiar four freedoms were recognized. Today, a fifth is being litigated into prominence, the right of association. Fifty years ago, the validity of such a right might have been questioned. Today, it is recognized as an integral part of the freedoms guaranteed by the Bill of Rights. To refer to it as a new freedom would be amiss for it is only a further development of the freedom of assembly so plainly stated in the first amendment. It is a progression in the evolutionary

---

* This paper has been submitted to the Illinois Constitutional Study Commission, created by the Illinois Legislature in 1965.

[1] 367 U.S. 1 (1961).

[2] Subversive Activities Control Act § 7, Internal Security Act, 64 Stat. 987, 50 U.S.C. § 781 (1950).

[3] *Supra* note 1 at 90.

[4] *Id.* at 91.

[5] Also included in the two hundred and two pages of opinion were the dissenting opinions of Chief Justice Warren, Justice Black, Justice Douglas and Justice Brennan. In Communist Party v. United States, 331 F.2d 807 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 968 (1964), the court of appeals set aside the conviction and ordered a new trial. The case was not reversed on the constitutional principles enunciated; however, to sustain a criminal charge for failure to comply with registration requirements, it must appear that someone was available who was either legally bound or willing to sign. As this qualification was not met, the conviction was set aside. In connection with this, see *infra* note 89.

process of the right of assembly. As in every evolutionary process, external factors adjust the internal structure in order to adapt it to new conditions. So the right of assembly has been adjusted to adapt it to the complex problems of the times.

Freedom of assembly became a fundamental right in the United States when it was incorporated into the first amendment. At the Constitutional Convention of 1787 there were many delegates who felt that the Constitution itself should guaranty the right of assembly.[6] The majority, however, considered such an inclusion inappropriate since such a right was inalienable and its pronouncement therefore redundant.[7] In order to satisfy all factions, it was agreed that the Constitution would not contain a guaranty of essential freedoms, but shortly thereafter such rights as free speech, press, etc., would be guaranteed by amendment.

In formulating the first amendment, it was a forgone conclusion that the right of assembly would be included. Historically it was announced as early as the Magna Carta,[8] being a natural by-product of the right of petition. Freedom of assembly thus became one of the natural rights of Englishmen, and by the time of the American Revolution, the colonies considered this right inviolable. As such, it was succinctly incorporated into the first amendment by stating that "Congress shall make no law abridging the right of the people peaceably, to assemble, and to petition the Government for a redress of grievances."

The brevity of this clause in the first amendment left room for interpretations which could have either expanded or limited the right of assembly. Its terminology opened the door to a barrage of questions such as: what constituted a peaceable assembly and at what point did such an assembly become an unlawful one, to what extent were the States constrained from abridging this right and was the purpose of the assembly to be considered? These and other questions have been the bases of many decisions through which the right to assemble has been clarified and developed.

[6] See DUMBAULD, THE BILL OF RIGHTS 173–205 (1957), wherein he sets forth the texts of the state proposals for amending the Constitution. Before ratification, four states, Virginia, New York, North Carolina and Maryland, submitted amendments expressly enunciating the freedom to assemble and petition.

[7] A record of the discussions of the delegates on this issue is set forth in I Annals of Congress 731–47 (1798).

[8] Ch. 61 of the Magna Carta states, "[t]hat if, we, our justiciary, our bailiffs, or any of our officers, shall in any circumstances have failed in the performance of them toward any person, or shall have broken through any of these articles of peace and security, and the offence be notified to four barons chosen out of the five-and-twenty before mentioned, the said four barons shall repair to us, or our justiciary, if we are out of the realm and laying open the grievance, shall petition to have it redressed without delay." MCKECHNIE, MAGNA CARTA, 465–77 (1914).

The Court first had to clarify how literally the words of the first amendment were to be taken. Certainly, legally protected peaceable assembly did not only mean a group of people praying in church, nor could it include a demogague inciting an audience to riot. What was a legally protected peaceable assembly was left to the courts to answer. The most prominent nineteenth century case answering this qustion was *United States v. Cruikshank*.[9] *Cruikshank* and others were indicted for conspiracy under the Enforcement Act of 1870.[10] They were charged with,

> . . . banding together, with intent unlawfully and feloniously to injure, oppress, threaten, and intimidate two citizens of the United States of African descent and persons of color . . . to hinder and prevent in their respective free exercise and enjoyment of their lawful right and privilege to peaceably assemble.[11]

The Supreme Court reversed the convictions of the lower court by strictly construing the rights granted in the first amendment. They recognized the inalienable freedom of assembly but also declared that assembly, as the other freedoms granted, was not absolutely vested in the people.

In reaching the decision in *Cruikshank*, the Court explored whether the States' laws of assembly were encompassed in the scope of the Enforcement Act,[12] and whether the assembly prevented by *Cruikshank* was one which the Act protected. As to the first query, the Court stated,

> [t]he first amendment of the Constitution prohibits Congress from "abridging the right of the people to assemble and to petition the government for a redress of grievances." This like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State government in respect to their own citizens, but to operate upon the National government alone.[13]

Having so limited the sphere of the first amendment, it naturally followed that any act of Congress protecting the guarantees of that amendment would also be so limited. Thus, the Enforcement Act only applied to the federal freedom of assembly. The court then decided that the assembly prevented by the *Cruikshank* decision was not federally protected. "If it had been alleged [that] the object of the defendants was to prevent a meeting [for the purpose of petitioning the government for a redress of grievances, then] the case would have been within the statute, and within the scope of the sovereignty of the United States."[14] Since no allegation had been made, *Cruikshank* could not be considered to have violated a federally protected right.

[9] 92 U.S. 542 (1876).

[10] 16 Stat. 140 (1870).

[11] *Supra* note 9 at 544.

[12] *Supra* note 10.

[13] United States v. Cruikshank, *supra* note 9 at 552.

[14] *Ibid.*

The *Cruikshank* case represents the early conservative view of the freedom of assembly, which subsequent decisions have modified. Today, it is still recognized that an assembly can be prevented but only in a few instances. In the words of the Illinois Supreme Court, "the [first amendment] does not confer an absolute right, [without] responsibility, [or] an unrestricted and unbridled license that gives immunity for every possible use. . ."[15] but it is not a right to be so shackled as in the *Cruikshank* case. What is necessary is an examination of the purpose of a gathering before declaring it to be a legally protected assembly.

> [the] First Amendment [freedoms] are fundamental rights. But though fundamental, they are not in their nature absolute. . . . Their exercise is subject to reasonable restriction required in order to protect the Government from destruction or serious injury.[16]

These statements, however, can be misleading. To test an assembly by its purpose or reasonableness alone may lead to the denial of the privilege of assembly merely because its purpose, in the eyes of society, is unreasonable. This would, in effect, be reverting to the conservatism of the *Cruikshank* decision–limiting free assembly to a well defined purpose. Yet, the Court on many occasions has found the "purpose test" to be the most practical in determining whether an assembly is protected by the first amendment.

This test was firmly established in *DeJonge v. Oregon*,[17] where DeJonge was convicted of violating Oregon's Criminal Syndicalism Act.[18] The Act defined criminal syndicalism as, "the doctrine which advocates crime, physical violence, sabotage, or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution."[19] DeJonge was charged because of his assistance in conducting a meeting called under the auspices of the Communist Party. His conviction was upheld in the state's highest court,[20] though no evidence was introduced to show that at the meeting criminal syndicalism was advocated or that it was, in any way, disorderly. He was found guilty merely because he assisted in the meeting of an organization that advocated criminal syndicalism.

In a unanimous decision, the Supreme Court reversed De Jonge's conviction. Chief Justice Hughes, in expressing the Court's decision, wrote,

[15] People v. Beauharnais, 408 Ill. 512, 516, 97 N.E.2d 343, 346 (1951).

[16] Kiyoshi Okamoto v. United States, 152 F.2d 905, 907 (10th Cir. 1946).

[17] 299 U.S. 353 (1937).

[18] 14 OREGON CODE 3110–3112 (1930), as amended by ch. 459, Oregon Laws (1933).

[19] *Ibid.*

[20] State v. De Jonge, 152 Ore. 315, 51 P.2d 674 (1935).

[t]he question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects.[21]

The Court not only affirmed the "purpose test" as a basis for free assembly, but also established guidelines for its application. It was considered a "right cognate to those of free speech and free press [and] equally fundamental."[22] As such, the "clear and present danger" doctrine, heretofore applied only to free speech, was officially recognized as the guideline in free assembly cases.

The adoption of the clear and present danger doctrine represented a significant step towards clarifying the continuing question of what assembly was protected by the Constitution. Still, it did not provide a mathematical formula for such determination, because which assemblies constituted clear and present danger to the public depended on the view taken by the individual members of the court in each particular case. This was vividly shown by *Terminiello v. City of Chicago*,[23] a case brought to the Supreme Court after a conviction for disorderly conduct was upheld in Illinois' highest court.[24] The Supreme Court reversed the decision, but only by the barest majority.[25] At issue was the constitutionality of Chicago's disorderly conduct ordinance, as interpreted by the Illinois court.[26]

Terminiello was brought to Chicago by General L. K. Smith to address a meeting held under the auspices of the Christian Veterans of America. About eight hundred people attended the meeting and over a thousand people gathered outside the hall to protest his speaking. Terminiello's speech criticized various racial and political groups and condemned the crowd outside. The incensed crowd could hardly be contained. Rocks and bottles were thrown, and many windows were broken. Afterwards, Terminiello was arrested and charged with disorderly conduct, under an ordinance which provided that, "[a]ll persons who shall make, aid, countenance, or assist in making improper noise, riot, disturbance, breach of the peace, within the limits of the city . . . shall be deemed guilty of disorderly

[21] De Jonge v. Oregon, *supra* note 17 at 365.

[22] *Id* at 364.

[23] 337 U.S. 1 (1949).

[24] City of Chicago v. Terminiello, 396 Ill. 41, 71 N.E.2d 2 (1947), *rehearing denied*, 400 Ill 23, 79 N.E.2d 39 (1948).

[25] Terminiello v. City of Chicago, *supra* note 23. Dissenting opinions were written by Chief Justice Vinsen, Justice Frankfurter and Justice Jackson, who was joined by Justice Burton.

[26] CHICAGO, ILL., MUNICIPAL CODE ch. 193, § 1(1) (1939). The interpretation of this section of the Code is found in City of Chicago v. Terminiello, *supra* note 24.

conduct . . ."[27] In the trial court, the jury was instructed that "misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."[28]

This interpretation of Chicago's ordinance was unacceptable to the majority of the Supreme Court because

> 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.*[29]

Thus, to deprive an individual of his constitutional rights of speech and assembly merely because a crowd does not like what he has to say is repugnant to the Constitution. It would appear that the court has made a fine distinction in the application of the clear and present danger doctrine to the right of assembly. When one directs a riot, encourages acts of violence, he has brought immediate danger to the public and therefore has lost his constitutional guarantee of assembly. Contrarily, merely because a riot results from his words is not sufficient to remove the protection of the first amendment.

Justice Jackson voiced the strongest dissent to the majority opinion, which was written by Justice Douglas. In sustaining the lower court decisions he stated,

> I am unable to see that the local authorities have transgressed the Federal Constitution. Illinois imposed no prior censorship or suppression upon Terminiello. On the contrary, its sufferance and protection was all that enabled him to speak.[30]

Jackson, too, applied the clear and present danger test to Terminiello's assembly, but arrived at an opposite result. "In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate."[31] He concluded by saying that

> [t]his court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the Constitutional Bill of Rights into a suicide pact.[32]

Although Justice Jackson dissents, he applies clear and present danger to the freedom of assembly as the majority did. He differs with Justice Doug-

[27] *Ibid.*
[28] *Supra* note 23 at 3.
[29] *Id* at 4.
[30] *Id* at 25.
[31] *Id* at 26.
[32] *Id* at 37.

las only to the extent of its application. No longer is it felt that the right to assemble was only granted to those petitioning for a redress of grievances. As one legal writer has put it, "[t]here is certainly no constitutional right to disturb a meeting, but there is a constitutional right to hold one."[33] Today, we begin with the assumption that there is an inherent right in the people to assemble for any purpose, but we qualify this assumption by the use of the clear and present danger doctrine.

Accordingly, there are those who would deny the right to assemble to an individual who, knowingly or unknowingly, directly or indirectly, precipitates others to act in a disorderly and conceivably dangerous manner. Others, however, feel that the right of assembly should only be denied to an individual who intentionally and directly rouses a group to dangerous actions. To date, the staunchest advocate of the latter position has been Justice Hugo L. Black. He has, on several occasions, found himself at complete odds with the other members of the Court,[34] because he views the first amendment as containing "the broadest scope that could be countenanced in an orderly society."[35] In his words,

> I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed in the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.[36]

EFFECT OF THE FOURTEENTH AMENDMENT

Change in the interpretation of the first amendment freedoms was not confined to the definition of peaceable assembly alone, for the general applicability of the amendment has also been broadened with the passage of time. The early view held that "the First Amendment was not intended to limit the powers of the State in respect to their own citizens, but to operate upon the National government alone."[37] It was this reasoning that led to the decision in *Davis v. Massachusetts*,[38] wherein the Court held constitutional an ordinance barring any public speaking on public property without a permit.[39] The Court did not see fit to construe the guarantees of the

[33] FELLMAN, THE CONSTITUTIONAL RIGHT OF ASSOCIATION 29 (1963).

[34] See Communist Party of the United States v. Subversive Activities Control Board, *supra* note 1 at 137. Justice Black's dissent, one of four, is the only opinion based on a broad interpretation of the first amendment's right of assembly. It is probably the most liberal interpretation to be given this amendment.

[35] Bridges v. California, 314 U.S. 252, 265 (1941).

[36] *Supra* note 1 at 137.

[37] United States v. Cruikshank, *supra* note 9 at 552.

[38] 167 U.S. 43 (1897).

[39] BOSTON, MASS., REV. ORDINANCES § 66 (1893).

first amendment as binding on the states despite the passage of the fourteenth amendment twenty-nine years earlier. The court, in fact, stated that

> [t]he Fourteenth Amendment to the Constitution of the United States does not destroy the power of the state to enact police regulations as to the subjects within their control . . . [f]or the [state] legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.[40]

In subsequent years, the *Davis* doctrine was diluted and circumvented by opinions advanced in support of the theory that the due process clause of the fourteenth amendment protected the guarantees of the first amendment from infringement by the State.[41] Gaining the most popularity were the incorporation and privilege theories. The incorporation theory was used in *Cantwell v. Connecticut*,[42] where a member of Jehovah's Witnesses alleged denial by the State of his rights under the first amendment. He had been arrested for violation of a Connecticut statute forbidding solicitation without special permission.[43] The Court, in reversing his conviction, stated:

> We hold that the statute, as construed and applied to the appellants deprives them of their *liberty* without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of *liberty* embodied in that Amendment embraces the *liberties* guaranteed by the First Amendment.[44]

Thus, when the fourteenth amendment stated, "nor shall any State deprive any person of liberty . . ." it was referring to the liberties guaranteed by the first amendment.

The privilege theory was the basis for the decision in *Hague v. Committee for Industrial Organization*.[45] Mayor Hague had refused to grant the C.I.O. a permit to hold a meeting, contending that the organization was infiltrated by Communists. In a suit to compel the Mayor to issue a permit, the lower courts found that the Mayor had unlawfully denied the members of the C.I.O. their constitutionally protected right of peaceable assembly. Affirming the lower courts, the Supreme Court stated that

[40] Davis v. Massachusetts, *supra* note 38 at 47.

[41] DRINKER, SOME OBSERVATIONS ON THE FOUR FREEDOMS OF THE FIRST AMENDMENT 20–26 (1957). Drinker discusses the four theories advanced to explain how the fourteenth amendment forbids the states from impairing the first amendment freedoms.

[42] 310 U.S. 296 (1940).

[43] CONN. GEN. STAT. § 6294, as amended by section 860d (1937 Supp.). "No person shall solicit money, services, subcsriptions or any valuable thing for any religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such persons or organization is located unless such cause shall have been approved by the secretary of the public welfare council."

[44] Cantwell v. Connecticut, *supra* note 42 at 303 (emphasis added).

[45] 307 U.S. 496 (1939).

[a]lthough it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured exising rights against state abridgment, it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them is *a privilege inherent in citizenship* of the United States which the Amendment protects.[46]

According to this theory, it was not necessary for the court to read a meaning into specific words. The purpose of the fourteenth amendment itself indicated its scope.

At this point, it is worthwhile to explore some of the underlying factors motivating change in the first amendment. This article has shown that the right of assembly has been expanded to afford the individual greater and greater leeway, as the interpretation given "the right of the people peaceably, to assemble," has changed with changing times. The Court has increasingly interpreted the provisions of the first amendment to allow the individual more freedom in line with the current libertarian trends.

[In viewing civil liberties,] it has become clear that the judges, especially those on the Supreme Court, play a significant role in enforcing constitutional guarantees. In fact, this combination of judicial enforcement and written guarantees of enumerated liberties is one of the basic features of the American system of government. The full significance of this combination has only recently been recognized.[47]

The emergence of the Court, as a protector of the individual's civil liberties, has only recently been recognized, because only recently have minority groups demanded that the Court assume this role. Certainly, these liberties originated in the Constitution and gained importance during the Civil War period, but the full import of these guarantees was not realized until the issues of contemporary society forced the courts to clarify them. Thus, a correlation may be drawn between the interpretation given the right of assembly at any one time in relation to the importance of the questions of civil rights at that time.

Another change previously noted, was the expansion of the first amendment to include the states. Before the adoption of the fourteenth amendment, there was no thought to restrict the powers of the states with regard to first amendment questions. Today, there is no doubt that the fourteenth amendment prevents the states from impairing one's constitutional guarantees of freedom.[48] Yet, almost sixty years passed before the Court offi-

[46] *Id.* at 514 (emphasis added).

[47] BURNS AND PELTASON, GOVERNMENT BY THE PEOPLE 213 (1960).

[48] See Douglas v. City of Jeannette, 130 F.2d 652 (3rd Cir. 1942), *aff'd.*, 319 U.S. 157 (1942); State v. Barlow, 107 Utah 292, 153 P.2d 647 (1944). See also, Hughes v. Superior Court of California, 339 U.S. 460 (1950); Louisiana v. N.A.A.C.P., 366 U.S. 293, 1333 (1961).

cially affirmed this position.[49] It is puzzling why the court took so long to give this interpretation, when undoubtedly within those years, the opportunity to make such a pronouncement had often arisen.

This too, can be related to the times:

> [F]rom the day the colonists first set foot on the soil of the New World, Americans have been arguing about the proper division of powers between central and local governments.[50] At one time or another northerners, southerners, businessmen, farmers, workers, Federalists, Democrats, Whigs, and Republicans have thought it improper to vest a particular function in the national government. They opposed control by Washington in the name of maintaining the federal system. But underlying the debates were such issues as slavery, labor-management relations, government regulation of business, civil rights.[51]

The hesitance of the American people to place too much power in their national government was reflected by the courts. However, this attitude underwent a great change in the late twenties and early thirties for, "[a]s the American people struggled to extricate themselves from the disaster of depression . . . [t]hey entered the new era of reform full of nationalistic fervor . . ."[52] This attitude infiltrated the Court so that when an appropriate situation arose it was used to gain more control for the federal government. So it was that this control was extended by enlarging the previous understanding of the fourteenth amendment.

USE OF PUBLIC PROPERTY FOR ASSEMBLY

Once the court extended the guarantees of assembly to state activity through the fourteenth amendment, it was inundated by a myriad of suits involving the constitutionality of local statutes regulating the right to assemble on public propery. In *Coughlin v. Chicago Park District,*[53] the Illinois Supreme Court was asked to decide the constitutionality of a Chicago ordinance which gave the Park District Commissioner complete discretion in granting a permit to assemble in Park District facilities.[54] Father Coughlin, a member of the National Union for Social Justice, was to give a lecture in Chicago on "social justice." The National Union reasonably expected an audience of 100,000 people. No private facility in Chicago could accommodate them so Father Coughlin applied to the Park District for the use of Soldier Field, the only adequate facility in Chicago. When

[49] Gitlow v. New York, 268 U.S. 652 (1925), was one of the first cases extending the fourteenth amendment to cover the first.

[50] *Supra* note 47 at 113.

[51] *Id* at 114.

[52] WILLIAMS, CURRENT, FREIDEL, A HISTORY OF THE UNITED STATES, 527 (1960).

[53] 364 Ill. 90, 4 N.E.2d 1 (1936).

[54] CHICAGO, ILL., PARK DISTRICT ORDINANCES ch. 1, § 14 (1934).

the permit was refused, Father Coughlin brought an action for a writ of mandamus to compel the Commissioner to issue a permit.

The Illinois court refused to issue the writ on the grounds that "no citizen has a right to use at his pleasure, or on his own terms, public property belonging to and under the control of a municipality. . . ."[55] In arriving at this conclusion, the court found it necessary to elaborate on the history of Soldier Field, to explain why it was never intended to serve the function of a public meeting grounds. Tracing its history from the proposed architectural plans to completion and use in the ensuing years, the court concluded that it was predominantly a sports field. As such, "the [right] of peaceable assembly [was] not infringed by the refusal of a permit . . ."[56] If the nature of the public property in question had been such that it was normally designated for the use of public assemblies, then a complete discretionary power in the hands of the Commissioner would have probably been considered unconstitutional. Inasmuch as Soldier Field was not designated as a public forum, Father Coughlin could no more demand its use than he could demand the use of the City Council chambers.

A similar suit was brought to the California Supreme Court by the American Civil Liberties Union, which sought a writ of mandamus to compel the Los Angeles Board of Education to grant the use of its school building for a monthly meeting.[57] A permit for its use had been refused because the A.C.L.U. had refused to furnish a Statement of Information as required by the Education Code.[58] In order to use a school building for public meetings, the Code required a sworn statement disclaiming any intent to use the property to aid a movement to overthrow the government, advocacy of unlawful overthrow, and communistic character of the organization.[59] The A.C.L.U. refused to furnish such a statement on the grounds that this abridged its freedom of speech and assembly.

In this instance, the California court did issue a writ of mandamus, because while the right of assembly is subject to certain limitations, "[a] state

[55] *Supra* note 53 at 107, 4 N.E.2d at 9.

[56] *Id.* at 111. 4 N.E.2d at 10.

[57] American Civil Liberties Union of Southern California v. Board of Education of City of Los Angeles, 55 Cal. 2d 167, 359 P.2d 45 (1961).

[58] Los Angeles, Cal., Education Code § 16564-5 (1953).

[59] *Id.* at § 16564: "Any use, by an individual, society, or organization for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the government of the United States . . . shall not be permitted. . . ." *Id.* at § 16565: "No governing board of a school district shall grant the use of any school property to any person or organization for any use in violation of § 16564 . . . The school board may require the furnishing of such additional information as it deems necessary to make the determination that the use of school property for which application is made would not violate § 16564 of the Education Code."

is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property."[60] Once the city had authorized the use of its facilities for public forums, it could not limit that use through a means which in essence abridged one's constitutional right of free assembly.

From these cases, it may be concluded that under the first and fourteenth amendments there is not an inherent right in individual members of society to use public property to exercise the right of peaceable assembly. However, once authorities unlock the facilities and allow public assembly, they are bound to grant this privilege in accordance with the dictates of the first amendment. The Court will carefully scrutinize an ordinance regulating the use of public facilities to see that it does not infringe upon constitutionally guaranteed rights.

Thus, the state, as well as the federal government, is restricted from infringing the right to assemble, and only in two instances may regulations be imposed: first, to direct how, when and by whom public property may be used to assemble, such directions being in themselves constitutional, and secondly, to make certain types of assemblies unlawful and therefore, criminal.[61] Of course, unlawful assemblies will, in fact, be the antithesis of the constitutionally protected peaceable assemblies heretofore discussed.

PICKETING AND DEMONSTRATIONS

There is no doubt that demonstrations and picketing are forms of assembly. Not until this century, however, was the right to picket and to demonstrate firmly established as constitutionally guaranteed under the first amendment right of assembly. This is understandable, because picketing and demonstrations are the basic tactics of labor unions and civil rights groups. Since these organizations were not often successful in using these tactics until this century, the courts were not confronted by such questions. The difference between these modes of expression, as opposed to pure speech, has caused a somewhat different conception of free assembly to develop regarding them.

Edwards v. South Carolina[62] is illustrative of many cases involving demonstrations by civil rights groups in the South. This case began with the conviction of one hundred and eighty seven Negro teenagers for the common law crime of breach of the peace. They had originally gathered together in front of a church and split up into small groups of about fif-

[60] *Supra* note 57 at 649, 359 P.2d at 47.

[61] For a complete discussion of what constitutes an unlawful assembly see, Note, 47 YALE L.J. 404 (1938); Note, 26 THE LEGAL OBSERVER 545 (1856); Brown, *What Constitutes Riot*, 18 ORE. L. REV. 254 (1939).

[62] 372 U.S. 229 (1963).

teen, marching separately to the State House carrying placards protesting discrimination. The placards contained such statements as, "I am proud to be a Negro" and "Down with segregation."[63] These groups were greeted at the State House grounds by about thirty police officers who warned them to remain peaceful. As the groups paraded in an orderly manner, approximately three hundred onlookers collected. Subsequently, the police ordered the machers to leave. Instead of leaving, they began singing freedom songs, stamping their feet and clapping, and they were immediately arrested.

The case was ultimately appealed to the United States Supreme Court on the sole contention that the state had infringed upon the marchers' right to assemble and petition for a redress of grievances. In agreeing with the position of the marchers, the court stated that "this case reflects an exercise of these basic constitutional rights in the most pristine and classic form, [they] peaceably assembled at the site of the State Government and there peaceably expressed their grievance . . ."[64] The Court did not differentiate between an assemblage which verbalized grievances from one which displayed them on placards. Both were entitled to the same constitutional protection which is qualified only by the clear and present danger doctrine.

The Court, however, was not in unanimity. There were those who felt that there were certain elements in demonstrations which made it necessary to broaden the concept of what constituted a clear and present danger. The presence of a group of demonstrators advocating an unpopular cause could instantaneously incite onlookers to act in defiance of the demonstrators. "[T]o say that the police may not intervene until the riot has occurred is like keeping out the doctor until the patient dies."[65] Because of this element of uncertainty it was felt that the police should be vested with a greater degree of discretion. Since in the Edwards case the police reasonably felt that the presence of the marchers and onlookers might erupt into a disorderly situation, it should have been within their power to terminate the demonstration.

In essence, the question of how to apply the clear and present danger doctrine to demonstrations divided the court. The majority felt that there must be substantial evidence of imminent danger before police restraint, while the dissenters felt that restraint, to be at all effective, must come before anything erupts. Thus, the dissenters felt that only the officials actually present at the demonstration were in a position to determine the necessity for restraint, and their decision should be conclusive.

[63] *Id.* at 231.

[64] *Id.* at 235.

[65] *Id.* at 244 (Clark, J., dissenting).

When a demonstration is obviously disorderly and chaotic, there is no doubt that it can be restrained. However, making noise or commotion does not automatically constitute grounds for restraint. In *Flores v. Denver*,[66] the Colorado Supreme Court reversed a conviction of breach of the peace against a group of demonstrators for this very reason. Fifty people had assembled in front of the Governor's home and began chanting complaints which could be heard for several blocks. The court did not consider this a breach of the peace because, "the noise involved was incidental to a legitimate right, protected by the Constitution, to appeal to those in authority for redress of grievances by remonstrance, and such right must be balanced against the right of the community to peace and quiet."[67]

It is apparent that a demonstration cannot be judged only by the cause it advocates or solely by the commotion it creates. Even a completely nonviolent demonstration can transcend the bounds of constitutionally protected assembly. For example, during the recent water shortage in New York, a group of civil rights workers proposed to bring attention to their cause by gathering together and squandering water.[68] Certainly, under the prevailing conditions, an assemblage for this purpose would not be constitutionally protected and restraint could justifiably be exercised. In the final analysis, however, it remains for the court, through hindsight, to determine whether the police used foresight in restraining an assembly from becoming a riot or trampled upon their right of peaceable assembly.

There is a slight difference between demonstrating and picketing, and the courts have taken cognizance of this. Whereas demonstrations seek to call attention to an alleged problem, picketing seeks directly to restrain the public from contributing to the alleged problem.

> It is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.[69]

In *Hughes v. Superior Court of California*,[70] Justice Frankfurter found it necessary to explain the uniqueness of picketing, to justify an injunction of the Superior Court of California restraining it. The injunction had been issued against the Progressive Citizens of America, to restrain them from picketing in front of a local store. The pickets demanded that the store owners hire more Negro clerks, in proportion to the predominantly Negro

[66] 122 Colo. 71, 220 P.2d 373 (1950).

[67] *Id.* at 77, 220 P.2d at 376.

[68] NEW REPUBLIC, May 9, 1964, p. 14.

[69] Bakery Drivers Local v. Wohl, 315 U.S. 769, 776 (1942).

[70] 339 U.S. 460 (1950).

neighborhood, where the store was located. Justice Frankfurter explained that,

> while picketing is a mode of communication . . . it is inseparably something more and different. . . It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its legal equivalent. Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance.[71]

The Court felt, in the *Hughes* case, that the reasons underlying the picketing were not justifiable, since the hiring of one's employees should not be determined by the proportion of the races in the community.

In *Thornhill v. Alabama*,[72] the Court made it abundantly clear that though picketing had special characteristics subjecting it to governmental regulation, it was still a form of assembly and thus, could not be restrained entirely. At issue was the constitutionality of an Alabama statute labeled, "Loitering or picketing forbidden."[73] Thornhill was convicted under this statute for participating in a union picket line during a strike. In reversing his conviction the court held that,

> [t]he power and the duty of the state to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter.[74]

In light of the *Thornhill* decision, statutes which place a blanket restriction on picketing have been held to be repugnant to the constitutional right of assembly. The courts will sanction restraint of picketing only when it is not peaceable or when it is for an unlawful purpose.[75]

FREEDOM OF ASSOCIATION

The right of assembly has thus far been viewed in its classical form: a group of individuals gathering together to discuss, debate, picket or demonstrate in order to further a lawful purpose. But freedom of assembly has still another facet. In the process of its evolution, it has come to include the right to belong, that is, to associate. It has often been said of Americans

[71] *Id.* at 464.

[72] 310 U.S. 88 (1940).

[73] ALA. CODE, § 3448 (1923): "Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, or be employed by such persons, . . shall be guilty of a misdemeanor."

[74] *Supra* note 72 at 105.

[75] See Note, 17 U. FLA. L. REV. 453, 461 (1964).

that they are, "chronic joiners."[76] No one would contest an individual's right to join a church group, bridge club, health club or a union. Were these and other groups like them the only ones in our society, the right of association, most likely, would never have emerged. However, Americans join other types of groups which are controversial in nature and arouse the hostility of many. Because of these groups, the courts have had to expand constitutional freedoms in some instances and limit them in others.

Two groups especially have been instrumental in creating and clarifying the right of association, the National Association For The Advancement of Colored People (N.A.A.C.P.) and the Communist Party. These groups have, in one way or another, been involved in the majority of litigation questioning the rights of association. This cannot be attributed to any similarity of purpose. Certainly the aim of furthering the rights of American citizens cannot be compared with the advocacy of abolishing the American way of life. Yet, in actuality, a basic similarity exists, in that members have been prejudiced against, restrained, restricted and condemned because they belonged.

De Jonge v. Oregon,[77] which was discussed earlier, is said to be the forerunner of the association cases. De Jonge, an alleged communist, was convicted of criminal syndicalism[78] on the basis of his association rather than his actions. Nowhere in the Supreme Court's decision, reversing the conviction, was reference made to the freedom of association. It was indicated, however, that the right of assembly could not be infringed because of the "auspices under which the meeting is held."[79] This indication planted the seeds from which the new right was to grow, but not until the Fifties did the court openly announce it in connection with the Communist cases.

The critical test for American Communists came after the passage of the Smith Act in 1940.[80] This was the first sedition law applicable in peacetime since 1798,[81] and it made it a crime to advocate the violent overthrow of the government. This was followed in 1950 by the McCarran Act,[82] which attempted to "strip the veil of secrecy from communist political activity and to impose certain disabilities on communists.[83] In testing the

[76] ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 171 (1961).

[77] 299 U.S. 353 (1937).

[78] 14 OREGON CODE 3110–3112 (1930), as amended by ch. 459, OREGON LAWS (1933).

[79] *Supra* note 77 at 365.

[80] 18 U.S.C. § 2385 (1940).

[81] *Supra* note 47 at 154.

[82] Internal Security Act, 50 U.S.C. § 781 (1950).

[83] *Supra* note 47 at 156.

constitutionality of these statutes the court clarified what exactly freedom of association entailed.

The McCarran Act created the Subversive Activities Control Board to determine whether a particular organization was a communist action, front, or infiltrated group.[84] Under section seven of the Act, an organization found to be a communist action group was required to register with the Attorney General and file a list of its members. Failure to file was to result in a fine of up to $10,000 a day. In extensive hearings, the Board concluded that the American Communist Party was a communist action group, but the Party refused to register in accordance with section seven. Ironically enough, this group, intent on the destruction of the Constitution and the American form of government, stood on their constitutional rights in refusing to comply with the McCarran Act.

The Court in *Communist Party v. Subversive Activities Control Board*,[85] a case previously discussed, rejected their arguments. By the narrowest margin it held that constitutionally protected rights were not infringed by the registration and list requirements imposed by the McCarran Act. Justice Frankfurter, writing the majority opinion felt that the evidence produced, as to the intentions of the Party, was sufficient to exclude them from the general protection afforded by the first amendment.

> Congress has found that these action organizations employ methods of infiltration and secretive and coercive tactics; that by operating in concealment and through Communist-front organizations they are able to obtain the support of persons who would not extend such support knowing of their true nature; that a Communist network exists in the United States; and that the agents of communism have devised methods of sabotage and espionage carried out in successful evasion of existing law. The purpose of the Subversive Activities Control Act is said to be to prevent the world-wide Communist conspiracy from accomplishing its purpose.[86]

The basis for the majority opinion is the balancing test, balancing the harm to the public in general against the infringement of an individual's rights.

[84] *Supra* note 82. When a determination is made by the Board certain disabilities are imposed. An action group is one substantially directed by the U.S.S.R., or whose principle objective is to advance world communism. It must register annually with the Attorney General, report the names of all members, inform the Attorney General of all printing equipment and propaganda publications, cannot hold a passport or hold an elective office, cannot serve as an officer of a union, and cannot work in any defense plant. A front group is one which is dominated by a communist action organization and is subject to the same restrictions as an action group except that it need not report the names of every individual member and members may work in defense plants if they make known their membership. An infiltrated organization is one which is substantially dominated by persons giving aid to communist action groups. It is subject to the restrictions on publications, loses all rights accorded to unions under national laws and cannot hold passports or elective office.

[85] 367 U.S. 1 (1961).

[86] *Id.* at 94.

When the public's welfare is at stake, the Court felt the denial of personal rights is justifiable.

Among the dissenters, there were varied opinions. Chief Justice Warren felt that the Party should not be required to register since the evidence produced against the Party only proved advocacy of unlawful overthrow, but did not show an immediate attempt to incite action.[87] Justices Douglas and Brennan were of the opinion that the registration and list requirements were inconsistent with the self-incrimination clause of the fifth amendment.

The strongest dissent, however, came from Justice Black, who not only disclaimed the balancing test as contrary to the intent of the first amendment, but considered its application in the present case an insult to the American people.

> It is plain that there are Governments in the world today that desperately need to suppress such protests for they probably could not survive a week or even a day if they were deprived of the power to use their informers to intimidate, their jails to imprison and their firing squads to shoot their critics. In countries of that kind, repressive measures like the Smith Act and the Subversive Activities Control Act are absolutely necessary to protect the ruling tyrants from the spread of information about their misdeeds. But in a democracy like ours, such laws are not only unnecessary but also constitute a baseless insult to the patriotism of our people.[88]

Though the provision of the McCarran Act which requires the Communist Party to register as a communist-action group, has been held constitutional, the court held it unconstitutional to require an individual to register.[89] The Act provides that if the official party does not register each individual member must do so.[90] This requirement was felt to be contrary to the fifth amendment since, "mere association with the Communist Party presents sufficient threat of prosecution to support a claim of privilege."[91]

The Communist cases have brought the right of association into prominence, as have the N.A.A.C.P. cases, wherein the right to associate was also jeopardized. *N.A.A.C.P. v. Alabama*,[92] arose out of that state's attempt to compel the Alabama N.A.A.C.P. to furnish a list of all members within the state, under a statute requiring foreign corporations conducting business within the state to register with the state. The Supreme Court, in holding the statute inapplicable to the N.A.A.C.P. stated that, "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group

[87] *Id.* at 131.

[88] *Id.* at 167.

[89] Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965).

[90] *Supra* note 82, § 786(d) (4) (1964).

[91] *Supra* note 89 at 77.

[92] 357 U.S. 449 (1958).

espouses dissident beliefs."[93] Similarly, an Arkansas statute was held unconstitutional because, "[t]he municipalities have failed to demonstrate a controlling justification for the deterrence of free association which compulsory disclosure of the membership lists would cause."[94] In *Louisiana v. N.A.A.C.P.*,[95] the Supreme Court struck down a statute which required non-trading associations, such as the N.A.A.C.P., to file an affidavit listing their officers and attesting that none were affiliated with any communist organizations. Justice Douglas, speaking for the Court, stated, "[w]e deal with a constitutional right, since freedom of association is included in the bundle of First Amendment rights made applicable to the States by the Due Process Clause of the Fourteenth Amendment."[96] And since, he went on to say, under present conditions, "disclosure of membership lists results in reprisals against and hostility to the members, disclosure is not required."[97]

In dealing with the N.A.A.C.P. cases, the Court did not balance the right to associate with the organization against the group's effect on the public, as it did in the communist cases. The Communist Party was singled out for such treatment because

> the particular character of the Communist Party and its objectives outweigh the right of individual Communists to conceal party membership or affiliations . . . other groups [do not] automatically forfeit their rights to privacy of association [because] the general subject matter of the legislative inquiry is Communist subversion or infiltration [of that group].[98]

In light of the holdings in the Communist and N.A.A.C.P. cases, it is clear that, "the Supreme Court [is] recognizing an independent right of association,"[99] which has been merged into the guarantees of the first amendment. The Court's majority, however, despite criticism, has seen fit to qualify it by applying the balancing test.[100] The right of association is, in fact, an extension of the right to assemble but due to its contemporary importance it is categorized independently, and the Supreme Court has thus, "affirmed the right 'to engage in association for the advancement of

[93] *Id.* at 462.

[94] Bates v. City of Little Rock Ark., 361 U.S. 516, 527 (1960).

[95] 366 U.S. 293 (1961). [96] *Id* at 296. [97] *Ibid.*

[98] Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963).

[99] Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 13 (1964).

[100] See Justice Black's opinion in Gibson v. Florida Legislative Investigation Committee, *supra* note 98; Meiklejohn, *The Balancing of Self Preservation against Political Freedom*, 49 CAL. L. REV. 4 (1961); Frantz, The *First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

beliefs and ideas,' "[101] regardless of the acceptability of those beliefs to the community in which they are preached. Only in certain Communist cases have the fears of the people exerted enough pressure to cause the denial of freedom of association, for as in the past, the court has not escaped the apprehensions of the public.

FREEDOM OF ASSEMBLY IN THE STATE CONSTITUTIONS

Abraham Lincoln once wrote that, "the right of peaceable assembly and of petition and by article Fifth of the Constitution, the right of amendment, is the Constitutional substitute for revolution. Here is our Magna Carta, not wrested by Barons from King John, but the free gift of states to the nation they create . . ."[102] All but two states constitutionally guarantee the right of assembly.[103] Most of the state "assembly" clauses are similar to the provision of the first amendment of the United States Constitution. However, certain differences are noteworthy.

Thirty nine states, including Illinois, have qualified the *right of the people, peaceably to assemble,* by inserting the phrase "for the common good."[104] It is somewhat strange that this clause should have found its way into so many of the states' constitutions and not into the federal constitution. At the Constitutional Convention of 1787, the delegates, contending that the Constitution should contain a declaration of freedoms, proposed amendments for this purpose and most of the clauses pertinent to the right of assembly contained the phrase "for the common good."[105] Yet, when the Bill of Rights was adopted by the Convention, this phrase was deleted from the guarantee of assembly. Although a few contend that this exclusion was inadvertent, it is generally conceded that the framers of the

[101] N.A.A.C.P. v. Button, 371 U.S. 415, 430 (1963).

[102] A letter to Alexander H. Stephens, January 19, 1860, in UNCOLLECTED LETTERS OF ABRAHAM LINCOLN 127 (Gilbert Tracy ed. 1917).

[103] The Virginia and New Mexico Constitutions do not specifically guarantee the Right to assemble.

[104] The following State constitutional assembly provisions contain the words "for the common good." ALA. CONST. art. I, § 25; ARIZ. CONST., art. II, § 5; ARK. CONST. art. II, § 4; CALIF. CONST. art. I, § 10; COLO. CONST. art. II, § 24; CONN. CONST. art. I, § 16; DEL. CONST. art I, § 16; FLA. CONST., art. I, § 15: GA. CONST. art. I, § 1, par. 24; ILL. CONST. art II, § 17; IOWA CONST. art I, § 20; MASS. CONST., art. XIX; ME. CONST. art. I, § 15; MICH. CONST. art II, § 2; MO. CONST. art. I, § 9; MONT. CONST. art. III, § 26; NEB. CONST. art I, § 19; NEW H. CONST., art. 32; N.J. CONST. art. I, § 18; NEV. CONST. art I, § 10; N.D. CONST. art I, § 10; PA. CONST. art I, § 20; S.D. CONST. art III, § 4; WASH. CONST. art I, § 4; W. VA. CONST. art III, § 16; WIS. CONST. art I, § 4; WYO. CONST. art I, § 21. Twelve states insert the phrase "for their common good." IDAHO CONST. art I, § 10; IND. CONST. art I, § 31; KAN. CONST., § 3; KY. CONST., § 1 par. 6; N.C. CONST. art I, § 25; OHIO CONST. art. I, § 3; OKLA. CONST. art II, § 3; ORE. CONST. art. I, § 26; R.I. CONST. art I, § 21; TENN. CONST. art. I, § 23; TEX. CONST. art I, § 27; VT. CONST. ch. 1, art. 20.

[105] See DUMBAULD, THE BILL OF RIGHTS 173–205 (1957).

Constitution and Bill of Rights were extremely careful in their choice of words so that there is reason to believe that there was a purpose in drafting the first amendment without the proposed phrase *for the common good.*

The historical setting of the constitutional Convention and the court's interpretation of the right of assembly point out that,

> [n]o purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that [the] restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing. . . . Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give [the liberties enumerated] the broadest scope that could be countenanced in an orderly society.[106]

The clause, for the common good, qualifies an otherwise unqualified provision: it is ambiguous and undefined. Few Americans will consider a meeting to advocate fascism for the common good. Yet, the New Jersey Supreme Court has declared such a meeting protected by the guarantee of assembly,[107] though the New Jersey Constitution itself contains a common good clause. A meeting condemning Negroes and Jews does not serve the common good, but the United States Supreme Court has held such an assembly guaranteed by the constitution.[108] 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.

Besides the common good clause, other variations have crept into the States' assembly clauses. North Carolina, for example, concludes the usual provision with, "[b]ut secret political societies are dangerous to the liberties of a free people and should not be tolerated."[109] This is certainly a strong admonition, but of what it is difficult to say. Apparently, freedom of assembly is denied to secret political groups, and it is up to the courts to decide which groups fall into that category. This provision is certainly unique in constitutional grants of freedom and, unfortunately, leaves room for wide discretion in limiting the right to assemble.

Six states have limited the right to assemble by inserting the phrase, "for

[106] Bridges v. California, 314 U.S. 252, 265 (1914).

[107] American League of the Friends of the New Germany of Hudson County v. Eastmead, 116 N.J. Eq. 487, 174 Atl. 156 (1934).

[108] Terminiello v. City of Chicago, 337 U.S. 1 (1949).

[109] N.J. CONST. art. I, § 25.

proper purposes."[110] These same states also have the common good clause, but seek to define further what is for the common good by including the phrase "proper purpose." In fact, they pose another ambiguity to be wrestled with. Few will consider a communist cell meeting serving a proper purpose in American society, yet, such a meeting is not unlawful per se.

THE ILLINOIS PROVISION FOR FREEDOM OF ASSEMBLY

In one short sentence the Illinois Constitution guarantees its citizens freedom of assembly:

> The people have the right to assemble in a peaceable manner to consult for the common good, to make known their opinions to their representatives, and to apply for redress of grievances.[111]

It differs substantively from the federal constitution only in the insertion of the "common good" clause. This is a limitation on the general right and presents a problem of interpretation. Throughout the history of the right of assembly there has been a continuous trend toward broadening our concept of free assembly. Any seeming limitation is contrary to this trend. Of course, it is impossible to put into words the entire scope of the assembly provision. This is the problem that confronts the drafters of any constitution. Any qualification creates the possibility of infringement contrary to the intent of the framers. Thus, we saw in the *Cruikshank* case[112] where the words of the first amendment, "to petition the Government for a redress of grievances," were taken literally to mean that an assembly was *only* protected if it gathered for that purpose. Many people were denied their right to assemble because of this interpretation. Many people today would be denied their right to assemble because their assembly does not meet the standard of the common good.

The evolution of the right of assembly since the *Cruikshank* case has shown that the redress of grievances clause was not to be taken literally. It may reasonably be said, then, that it is an unnecessary clause asserting nothing and, in view of the interpretation given it by the court, limiting nothing. A constitution drafted today would, undoubtedly, not contain such a clause, for it would be wary of the history enriching the freedom. In the same way, no government vests in its citizens an absolute right, and a provision seemingly absolute in its terms is understood to contain inherent qualifications. Hence, there are different philosophies in framing a constitutional provision of freedom: that the guarantee should be absolute,

[110] *Supra* note 104. The phrase "for proper purposes," or "for other proper purposes," is found in the Constitutions of Connecticut, Delaware, Kentucky, North Dakota, Pennsylvania and Tennessee.

[111] ILL. CONST. art. II, § 17.

[112] United States v. Cruikshank, 92 U.S. 542 (1876).

leaving room for restriction only in extreme cases; or secondly, that the provision should start out as a qualified right, granting freedom in most cases but restricting it when it endangers the constitution itself. The former philosophy is the only one acceptable to contemporary America for, if we deny freedom, "to the ideas we hate . . . sooner or later [it] will be denied to the ideas we cherish."[113]

The framers of the federal and state constitutions did not enumerate, as part of the rights given, the freedom to associate. This was not due to any inadvertance on their parts, but simply because the right of association was not questioned. Only in this century has condemnation by association become such a critical problem. At that juncture, it became necessary for the courts to herald this right, one which had been implied in the freedom to assemble. Had such problems been foreseen by the framers of the federal and state Constitutions, they probably would not have left its declaration to the courts but would have included it as one of the classic freedoms. It properly belongs in a constitution. The courts have adopted it as part of the right of assembly, for not only is one guaranteed the right to assemble, but one is not restricted in his choice of associates with whom to exercise this right.

CONCLUSION

A myriad of decisions has brought us to our present understanding of the freedom of assembly. We now look on it as a right of limitless scope. From the guarantee in the first amendment, the courts have been directed as to the rights of pickets and demonstrators, the states have been cautioned as to its regulation of assembly and citizens have been apprised of the right of minorities. No single clause can ever seek to encompass with clarity the detailed facet of this right. It can only attempt not to infringe it. Thus, it must be stated in such a way that it merely recognizes the existence of an inalienable right. In its simplicity must lie its strength. Accordingly, the freedom of assembly and of association should be guaranteed by a constitutional provision stating that,

The right of the people peaceably to assemble and associate shall never be abridged.

Melvin Rishe

[113] *Supra* note 85 at 137.