

FREEDOM OF ASSEMBLY: The Least Understood of the Five Freedoms

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Origins:

Despite the fact that it is one of the least discussed of the five freedoms in the First Amendment, rights such as freedom of speech and petition would often be meaningless without this protection. The importance of the **Freedom of Assembly** to the Founding Fathers stretched back into pre-revolutionary American history. During the time preceding the Revolutionary War, the British army began to try to restrict colonists from assembling to protest the various Acts which Parliament had passed to tax and control the colonial population. In the 1770s, the English Parliament disbanded colonial assemblies and limited the size of meetings unless a representative of the monarchy was present. British troops were used to enforce the regulations.

These limits enraged British subjects in the North American colonies. The English Petition of Right of 1628 and the English Bill of Rights, passed in 1689, confirmed the right of subjects to petition the king for a redress of their grievances.

As a result, the delegates to the First Continental Congress added a statement to the document they sent to King George III outlining their complaints and grievances, that said the people "***have a right to peaceably assemble, consider of their grievances, and petition the king.***" (Declaration and Resolves of October 14, 1774 , emphasis added.) When the First Congress under the U.S. Constitution debated a bill of rights in 1789, protection of the right of assembly was viewed as paramount to the protection of liberty. Representative John Page of Virginia stated that in depriving people "of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege . . ." contained in the First Amendment.

Limitations:

The right to assemble is, of course, not an absolute right. The right to assemble is not as strongly protected by the government as other rights, such as freedom of speech, and is subject to what is called the **strict scrutiny test**. This is because assemblies often involve not just speech, but some type of conduct, such as picketing, protesting, marching or gathering in

a park, which may disrupt the peace.

The courts have ruled that, while it is the responsibility of the government to protect the people's right to assemble, it is also the government's responsibility to keep the peace. Because of this, the courts have allowed governments to make reasonable restrictions on the time, place and manner of these assemblies. The government may place restrictions on the right to assemble that will maintain law and order, facilitate traffic, protect private property and reduce noise congestion.

Reasonable restrictions would include such things as requiring permits to hold a large public gathering in a park or to hold a parade downtown, making local curfews for teenagers or preventing protesters from holding up traffic. The key on restrictions is that they cannot be used to block groups from meeting because the group may hold unpopular views.

Important Supreme Court Cases:

DeJonge v. Oregon (1937): Dirk DeJonge was arrested under Oregon's criminal syndicalism law that outlawed organizations advocating the violent overthrow of the American government. DeJonge had spoken at a Communist Party rally that was peaceful and did not advocate any anti-government positions. The state of Oregon convicted DeJonge for merely helping with a meeting in which some members of the organization stood for violence against the government. In a unanimous reversal of the state's decision, Chief Justice Charles Evans Hughes stated, "Peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score."

Hague v. Congress of Industrial Organizations (1939): Economic problems during the Great Depression fostered massive protests against both industry and the government. In response, police and city authorities across the nation moved to limit the ability of people to meet or demonstrate in public. In an important case involving Jersey City, however, the courts struck down city measures and upheld freedom of assembly. The mayor and city council had rejected a labor union's request to meet in town and had then created a permit plan that in practice would ban all labor meetings. The Supreme Court struck down the permit plan, ruling that public officials cannot exercise the power to limit freedom of assembly in cases where the political content of the protest is objectionable to city leaders.

Edwards v. South Carolina (1963): The Court threw out the convictions of 187 African-American students who had marched to the South Carolina Statehouse to protest racism. After a sizable

crowd had gathered, the police told the students to leave and then arrested those who refused. In the majority ruling of the Court, Justice Potter Stewart stated that a state may not "make criminal the peaceful expression of unpopular views."

Cox v. Louisiana (1965): Police arrested several students in Baton Rouge who were part of a protest march against the arrest of other students for picketing segregated lunch counters. The Court ruled that police are not entitled to use breach-of-the-peace laws to stop mass assemblies or use the possibility of violence to close down the event if the marchers are peaceful.

Gregory v. City of Chicago (1969): One of Chicago's most famous freedom of assembly cases involved Dick Gregory and other protestors at the 1968 Democratic Convention. Gregory and his group were peaceful, but gathering crowds began jeering and yelling racial threats and epithets. The police, to prevent what they regarded as an impending civil disorder, demanded that the demonstrators, upon pain of arrest, disperse. When this command was not obeyed, petitioners were arrested for disorderly conduct. The Supreme Court reversed the convictions, emphasizing that a peaceful protest could not be stopped.

Police Department of Chicago v. Mosley (1972): the Court negated a Chicago statute that prohibited anyone from picketing within 150 feet of a school but did allow the peaceful picketing of any school involved in a labor dispute. The Court declared that Chicago could ban all picketing near schools, but could not arbitrarily designate certain forms of messages to receive official endorsement. Peaceful picketing could not be barred on the basis of message. tends to bring the foreign government into 'public odium' or 'public disrepute.'" that protesting the national policies of foreign governments by signs near their embassies is "classically political speech" and cannot be banned outright.

National Socialist Party v. Skokie (1977): This ruling by the Court continued to uphold the right of people to assemble, even if the content of the assembly promoted racism. In 1977, American Nazis attempted to hold a march in Skokie, Illinois, the home of many Jewish survivors of the Holocaust. In response to the impending march, city authorities passed several laws designed to keep the Nazis from marching. After the lower courts invalidated the statutes, which required insurance, permits, disallowed the dissemination of hate literature, and banned the wearing of military uniforms, the Supreme Court refused to review a ruling by the U.S. Court of Appeals for the Seventh Circuit that all the ordinances were unconstitutional. (Note that despite the victory, the march was never held, the group meeting instead in Chicago at Marquette Park, the racially changing area that had been their target in the first place.)

Recent Controversies

Protests and picketing at abortion clinics in the 1990s resulted in several legal challenges to the right of freedom of assembly. Because protests at abortion clinics often escalated into violence, police and city officials sought to decrease the chance for violence by restricting the right to protest. In ***Madsen v. Women's Health Center (1994)***, the Court struck a balance by upholding a Florida court's injunction against abortion clinic protesters but also struck down other provisions that went too far in limiting their right of assembly. The protestors belonged to Operation Rescue and were protesting at an abortion clinic near Melbourne, Florida. Protest activities had escalated to the point of members picketing the homes of workers and confronting their minor children while they were away from home. The Court ruling mandated a 36-foot buffer zone surrounding the clinic to allow protesters to voice their concerns while enabling clinic visitors to secure needed services.

In a second case involving abortion protests, the questioned law had set up "buffer zones" around not only the clinics, but also "floating zones" around clinic personnel and patients so that they could not be harassed at home or outside the clinic itself. The Supreme Court ruled that "fixed buffer zones" around abortion clinics were constitutional, while "floating buffer zones" around individuals entering the clinics were not. ***Shcenck v. Pro-Choice Network of Western NY (1996)***.

Exclusion/Inclusion cases: Interpretation of the freedom of assembly clause also includes the idea of who belongs or is banned from a group. In the following cases, the Court reviewed issues of choices and privacy.

NAACP v. Alabama (1958) In this case, the Supreme Court ruled that the state could not force the NAACP to turn over its membership list under a statute that required the membership lists of out-of-state corporations be turned in to the government. The Court's reason was that forcing this action would seriously endanger the group's ability to get out its message. This was a time of high racial tension and members, if publicly exposed, would likely suffer retribution. In addition to the First Amendment, the Court relied on the 14th Amendment equal protection clause because making the list public would limit the group in getting out its message of racial equality.

Hurley vs. Irish-American Gay, Lesbian & Bisexual Group (1995) The Court ruled that the South Boston Allied War Veterans Council could not be forced to allow openly homosexual marchers in its St. Patrick's Day parade under that state's public-accommodation law. The Court said this

would undermine the group's own religious agenda and force association.

Boy Scouts of America vs. Dale (2000). In this case, the Supreme Court said that the Boy Scouts could not be forced to include an openly homosexual scoutmaster who had argued that the Scouts' policy violated a New Jersey public-accommodation law. The public-accommodation law required equal treatment of heterosexuals and homosexuals. The court ruled that this would force the organization to repudiate its own belief system.

In general, the court does not allow organizations to be forced into advocating something they oppose. This could be considered the Freedom *not* to Assemble with people one does not want to assemble with. However, the Court will look at the group's stated purpose and may in fact "force" association with someone. For example, in ***Roberts vs. United States Jaycees(1984)***, the Supreme Court ruled that a Minnesota law outlawing gender discrimination could be used to force the local Jaycees to admit women into its membership, a privilege that was traditionally only allowed to men. The Court said that the group's openly stated educational and charitable mission was not undermined by the inclusion of women. The Court reached the same conclusion in ***Board of Directors of Rotary International vs. Rotary Club of Duarte (1987)***, a case that forced the Rotary Club of Duarte, California to include women in its membership.

In these cases, the Court has determined that the government may restrict a group's right to freely assemble only if there is a larger compelling interest by the government, such as prohibiting discrimination against women, and the action of the government would not somehow sabotage the group's message.

Gangs and Curfews:

Students are particularly interested in cases involving their rights. The U.S. Supreme Court has recognized that the rights of minors are not as wide-ranging as those of adults. (For example, see the 1944 ruling in ***Prince v. Massachusetts*** and the 1979 ruling in ***Bellotti v. Baird.***) Minors enjoy the same constitutional protections as adults, but due to "their unique vulnerability, immaturity, and need for parental guidance," the state is within its bounds to exercise greater control over their activities. Due to inconsistencies and disagreements within the federal courts, the standards for what is an acceptable curfew law and what is unacceptable are not clear. Many courts, including 7th Circuit here in Chicago, have used intermediate scrutiny to review curfew laws. Intermediate scrutiny requires the government to show that a law is substantially related to an important government interest.

Statutes which apply regardless of age will generally be held up to strict scrutiny standards. In ***City of Chicago v. Morales***, for example, the Supreme Court in 1999 struck down a municipal code that criminalized loitering, which was defined as "to remain in any one place with no apparent purpose." Though the law was enacted to fight gang activity, it improperly penalized much harmless activity and granted officers immense discretion in assessing which kinds of behavior violated the ordinance.

Classroom Activities:

Examples of "Where do I stand?" thought provokers:

- A white student should be allowed to join the school's African-American or Asian-American Club.
- I have the right to hang out with ten friends in a mall.
- I have the right to hang out with twenty friends in the park.
- I have the right to hang out with ten friends on the street corner.
- Curfews should be set by parents, not the city.
- Curfews are okay, but only for those under 14.
- Groups should not be able to hold marches against gay rights.
- Anti-war groups should be able to protest at soldier's funerals.
- Racist groups like the KKK should not be allowed to have public parades.
- White supremacy groups should be banned.
- A religious group should be able to set up a neighborhood where only members are their religion can live.
- The government should be able to ban groups that promote communism because it is anti-democratic.
- Membership in gangs should be illegal.
- Boy Scouts should admit girls if they want to join.

Deliberation Question: Should the government be allowed to prevent unauthorized public demonstrations?

This activity works well with groups of any size. Explain to the class that this is a deliberation, not a debate, and that their goal is to reach a consensus rather than to "win". The teacher may opt to either give the students handouts (attached) for their assigned side, or have each side meet to come up with their own arguments before the full group deliberation.

An effective alternative to "two sides" is to split the class into fours. One group will prepare the "pro" arguments and one the "anti". The other two groups will prepare questions for each side and are called "neutrals". After the groups have had time to discuss the question, assign groups of four so that two "neutral" students are placed with one person from each position group. Allow sufficient time so that the small groups can consider the issue.

The "neutrals" from the quartets will have to take a position and explain to the class as a whole what arguments they found to be most persuasive and why. After sharing, explain to the class that they have just experienced the democratic process in a free society!

Extension: Have the class create a local ordinance for their city that balances the right of freedom of assembly with legitimate government concerns about public safety.

NEWSPAPER ACTIVITY:

Middle and Junior High levels: This may be assigned as an anticipatory prep before the class work, done during class, or as reinforcement homework. Students should find at least two pictures or articles portraying group meetings. Articles may be from standard papers, or from the internet if assigned outside the class period, but must be current (within the last six months). Students should be prepared to identify the group, the forum (public or private), the purpose of the assembly, and any groups which might oppose the views or positions of the group. Debrief in class as to findings.

High School: Using the same general parameters, students should focus on groups that are controversial or where there has actually been opposition. Upper level students can be required to research situations in non-democratic countries (the current "Arab Spring" is an excellent example), and be prepared to compare freedom of assembly in the U.S. with other parts of the world.

Deliberation Question: Should the government be allowed to prevent unauthorized public demonstrations?

Student handout "A": Sample Arguments to Oppose the Deliberation Question

1. People who gather peacefully to discuss or oppose an issue should not have to get permission from the very government against which they may have a complaint.
2. The decision whether to allow or prohibit a public demonstration is inherently political. People whose views are unconventional or disliked by the society as a whole may not be given the same right of access to public space as those who agree with the majority.
3. Access to public forums such as newspapers, advertising medium, television, and even major internet forums may be limited by cost. The poor, the radical, and the marginal may not have the access of mainstream groups. Public demonstrations allow unpopular views to be brought directly to the wider community.
4. Marching and picketing are useless to draw attention to issues if they do not take place where the public can see them. To require government permission for these activities to take place in a public forum, even where peace and order are maintained, is an unreasonable restriction of a fundamental right.
5. Parks and public places have always been used by Americans to assemble, share ideas, and discuss public issues of the day. Their use is part of the rights and privileges of citizens.
6. Important political issues may arise quickly and groups need to be seen and heard promptly if they are to have any voice at all. Requiring government authorization such as permits for unanticipated events effectively stops demonstrations at the time when they are most needed.

Adapted from materials created by the Constitutional Rights Foundation Chicago (2006)

Deliberation Question: Should the government be allowed to prevent unauthorized public demonstrations?

Student handout "B": Sample Arguments to Support the Deliberation Question

1. People need an ordered society. Requiring government authorization for public demonstrations strikes a reasonable balance between the right to exercise freedom of assembly and the need for peace and order in a democratic society.
2. Requiring permits or other authorization does not mean that the government can arbitrarily decide who can or cannot hold an assembly. If everyone has to follow the same rules in the authorization process, there is no infringement of basic rights.
3. Crowds are unstable by nature, and prior authorization allows police and government officials to prepare ahead of time to keep order among both the demonstrators and those who might oppose the demonstrated views.
4. No person's free expression rights are absolute. The privilege of a group to use public places to assemble or communicate their views must be regulated to preserve the general comfort, convenience, and safety of all citizens.
5. Public space does not mean completely free space. Requiring authorization for public demonstrations is similar to laws which prohibit walking in streets or other traffic violations.
6. Political events may arise quickly, but government can also respond rapidly to meet the legitimate free expression needs of citizens. Authorization does not have to be a lengthy process.

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