Student Scholarship

The Neglected Right of Assembly

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Tabatha Abu El-Haj noticed something peculiar in the protests leading up to the 2003 invasion of Iraq; unlike protestors in other parts of the world, American activists readily accepted the limitations placed on them by state authorities. With few exceptions, police lines remained uncrossed and pre-approved march routes were scrupulously followed. Abu El-Haj wondered whether such restrictions on public assembly, and the public's willingness to tolerate them, were always a part of American society. Her research led to "The Neglected Right of Assembly," an article published in the February 2009 UCLA Law Review *that is extracted below.*

Abu El-Haj graduated Phi Beta Kappa and magna cum laude with a major in philosophy from Haverford College in 1994. She earned a joint J.D./Ph.D. in Law and Society in 2008 from New York University. Abu El-Haj also received an LL.M. from Georgetown University Law Center in June 2008. In 2005, she clerked for Judge Harry T. Edwards of the U.S. Court of Appeals for the District of Columbia Circuit. She is Assistant Professor of Law at Drexel University Earle Mack School of Law, and studies the overlap between law and political practice, especially in areas where politics extend beyond the purely electoral realm. As this paper documents, the American experience of politics evolves over time, and Abu El-Haj looks to shed light on the causes behind and the effects of these changes.

THE '08 ELECTION HAS PROVED a high-water mark for democratic politics. For the first time in the nation's history, an African American has been elected president. Moreover, voters turned out in record numbers in both the party primaries and the general election, including young, African American, and first-time voters.

The right to vote is looking strong, but what of the right to assemble? The Democratic Party's National Convention in Boston in 2004 was a low point for the right of assembly. The City of Boston divided space near the convention center into two areas: one where gatherings and demonstrations would be permitted, and one where they would not. The city supplemented this scheme by creating a "designated demonstration zone," a confined area under railroad tracks, demarcated in some places by a chain-link fence and barbed wire. According to the district court reviewing the constitutionality of the plan, the overall impression the zone created was that of an internment camp. Discouragingly for the right of assembly, the federal courts upheld Boston's scheme on appeal.

St. Paul and Denver did not cage demonstrators to the same degree at the 2008 conventions, and Barack Obama accepted both the Democratic Party's nomination and his elected office in open-air settings before assemblies in the tens of thousands. Nevertheless, American cities—including those hosting the recent conventions—continue to rely on the same regulatory and legal framework that led to Boston's 2004 debacle. The results are similarly complex divisions of space and time that ensure protests are undertaken at a "safe distance" from official audiences.

The article considers the history that has led to our acceptance of extensive legal regulation of public demonstrations—focusing on changes in both our regulatory practices with respect to public assemblies and our understanding of the constitutional right of peaceable assembly. It shows, among other things, that the 19th-century right to assemble on the streets without needing to ask permission was replaced, in the 20th century, with a right to assemble on the streets so long as one obtains a permit (if required), abides by the conditions of the permit issued, and is peaceable. The definition of "peaceable," moreover, was itself narrowed: Even where no permits are required, an assembly may be dispersed for obstructing, or potentially obstructing, traffic (including pedestrian traffic). The new constitutional understanding

did come with one important safeguard: One is entitled not to have permission to assemble on the streets denied arbitrarily, capriciously, or based on viewpoint. Nevertheless, through this change we replaced the notion that the state can interfere only with gatherings that actually disturb the peace or create a public nuisance with a legal regime in which the state regulates all public assemblies, including those that are anticipated to be both peaceful and not inconvenient, in advance through permits.

Large gatherings on public streets were central to the democratic politics that emerged after the country's founding. For the first century of our nation's history, elections—themselves often public celebrations—were part of an array of political practices, which included public meetings, petitions, local and national festive holidays, and even juries and mobs. These practices provided opportunities for citizens (ordinary and elite, enfranchised and disenfranchised) to participate in politics. Many of these opportunities took place in public places, including public streets and squares.

The examples are abundant. In Centreville, Maryland, in the midst of the crisis over the Alien and Sedition acts, Republicans gathered for an open-air assembly, militia maneuvers, and an open-air feast at which they toasted Jefferson and the Declaration of Independence, thereby taking a jab at the Federalist administration. In Hackensack, New Jersey, people gathered to affirm their sympathies to the French Revolution and, by implication, their opposition to the Federalist government. Such street politics persisted well into the 1800s, and by the mid-19th century, workers, racial minorities, and social movements all used city streets to further their political goals.

Such gatherings were, moreover, often spontaneous or organized quickly. Permits were not required through most of the 19th century. As late as 1881, San Francisco, Chicago, Detroit, St. Paul, and Denver had no permit requirements for assemblies in their streets. While 19th-century cities were both congested and capable of regulating through permits, the law interfered only with public assemblies that became disorderly. Legal regulation of gatherings on public streets and squares was limited to the criminal law. That is, the law intervened only after the fact if a gathering could be charged with unlawful assembly, riot, or breach of the peace. Citizens were not required to ask permission prior to exercising their right of assembly, and the government was not considered entitled to regulate in anticipation of possible disorder.

Understandings of the right of assembly reinforced this degree of access. Government interference with peaceful public gatherings was understood to violate the right of assembly. An Englishman's right of assembly, as adopted by Americans, was understood to extend to the "peaceable." Thus, the government was considered justified in restricting public assemblies only when they created public disorder, on the theory that only then were such gatherings beyond the protection of the constitutional right.

As such, initial efforts by municipalities to regulate gatherings in public places through permits were highly controversial. In fact, all but one of the state supreme courts to review the first municipal ordinances requiring a permit to lawfully gather on the streets found them void. These courts balked at the suggestion that general permit requirements were reasonable efforts to regulate street gatherings, emphasizing that the ordinances infringed upon important democratic and constitutional traditions of assembling. The Supreme Court of Kansas's outrage in the 1888 case *Anderson v. City of Wellington* is typical:

> This ordinance prevents any number of the people of the state attached to one of the several political parties from marching together, with their party banners and inspiring music, up and down the principal streets, without the written consent of some municipal officer. The Masonic and Odd Fellows' organizations must first obtain consent before their charitable steps desecrate the sacred streets. Even the Sunday-school children cannot assemble at some central point in the city and keep step to the music of the band as they march to the grove, without permission first had and obtained. The Grand Army of the Republic must be preceded in its march by the written consent of his honor the mayor, or march without drums or fife, shouts or songs. It prevents a public address upon any subject being made on the streets. It prevents an unusual congregation of people on the streets under any circumstances without permission.

The risks of disorder and of interfering with the rights of others to pass were not considered sufficiently serious to justify the ordinances.

After the U.S. Supreme Court's decision in *Davis v. Massachusetts* (1897), the tide turned for litigation against permit requirements. The Court upheld municipal authority to prohibit speech and assembly on city property, and hence to allow it only with advance permission. After *Davis*, around the country, permit requirements for public assembly were accepted by state courts. Once judicial attitudes shifted, the new regulatory regime was established despite some continued political debate.

The result was a narrowing of the substance of the right of peaceable assembly. Moreover, the state's enhanced regulatory oversight came with an enhanced ability to shape the practice of public assembly in ways that undermined its meaningfulness for participants and its effectiveness as a check against government.

Today, both the requirement that citizens must ask for permission prior to assembling for political purposes and the conditions that the government may place on such assemblies can be used to undermine the effectiveness of public assembly as a mechanism to influence and check representative institutions. The very requirement of a permit creates a delay between the event triggering the desire to assemble and the assembling. Moreover, conditions can and have been used to distance assemblies from their target audiences through space and time.

Less appreciated, however, is the way that the very need to ask permission as well as the conditions placed on permits issued undermine the meaningfulness of political assemblies for participants. Through the former the people are rendered supplicant. While deprived of an actual (as opposed to virtual) audience, or forced to remain stationary, assemblies become a performatory ritual that bears little resemblance to the people outdoors as the agents and masters of American democracy. The lack of spontaneity and the forced ritualization of contemporary assemblies is the symptom of these tendencies of contemporary regulation.

Courts and academic commentators today fail to appreciate the significance both of the right of assembly itself and of the changes made to it. Major treatises on constitutional and First Amendment law barely mention the right of assembly. When they do, they do not question the Court's decision to consider it a mere facet of free expression.

The right of assembly protected social and political practices central to democratic government, not individual expression. It protected the people and their aspirations for collective public deliberation and action on issues of public importance. It also safeguarded a mechanism to influence and check government in particular circumstances. By emphasizing the political origins and collective functions of the right to assembly, this article begins to rectify the errors and omissions in the current understanding of this important right. □