

# “Tavern Talk” and the Origins of the Assembly Clause: Tracing the First Amendment’s Assembly Clause Back to Its Roots in Colonial Taverns

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## Introduction

The First Amendment to the Constitution<sup>1</sup> is “a cluster of distinct but related rights.”<sup>2</sup> The freedom of assembly protected therein<sup>3</sup> is one right that Americans exercise every day.<sup>4</sup> With perhaps the exception of speech, assembly is the most widely and commonly practiced action that is enumerated in the Bill of Rights.<sup>5</sup>

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1. U.S. CONST., amend. I.
2. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 484 (1983).
3. U.S. CONST., amend I (“Congress shall make no law respecting . . . the right of the people peaceably to assemble[.]”).
4. James M. Jarrett & Vernon A. Mund, *The Right of Assembly*, 9 NYU L. Q. REV. 1, 2 (1932) (listing several places Americans assemble regularly, including homes, classrooms, offices, markets, eateries, dance halls, theaters, and churches).
5. The First Amendment also protects, among other freedoms, the freedom of the press. U.S. CONST., amend. I. While members of the press exercise this important right on a daily basis, most Americans are not members of the press and so do not exercise this right often or at all. Conversely, most Americans do speak daily and do assemble daily with others in schools, cafés, libraries, shopping centers, recreation centers, and elsewhere.

This freedom is also one of our least understood and least considered rights. Sometimes ignored<sup>6</sup> and other times grouped with other freedoms,<sup>7</sup> the right of those in America to come together peaceably deserves to be studied, respected, and celebrated.

Whether a court will consider a right as fundamental in nature often depends on the origins of that right.<sup>8</sup> Though the Assembly Clause no doubt enumerates the freedom of assembly in America, one may nevertheless better understand the right by exploring, identifying, and making explicit its origins.<sup>9</sup> Tracing the evolution of the freedom of assembly requires placing this freedom “within the context of *culture*.”<sup>10</sup> Exploring the origins of the freedom of assembly in the context of culture requires tracing the right—as practiced—back to its fundamental *situs*,<sup>11</sup> a term that can be used to ground rights in their proper place or places.

The proper situs of the Assembly Clause, research reveals, is in its birthplace: colonial America’s taverns. As I will demonstrate in this article, colonial taverns served not just as establishments for drinking alcohol but as vital centers where colonists of reputations great and small gathered to read printed tracts, speak with one another on important issues of the day, debate the news, organize boycotts, draft treatises and demands, plot the expulsion of their British overlords, and establish a new nation.

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6. Margaret M. Russell, *Editor’s Introduction*, in FREEDOM OF ASSEMBLY AND PETITION 21 (Margaret M. Russell ed., 2010) (hereinafter “FREEDOM”) (referring to the Assembly Clause as that portion of the First Amendment “least recognized by the bench, bar, academy, and public” and noting that “legal scholarship on the right to assembl[e] is sparse”); see also *infra* note 169 and accompanying text.

7. See Russell, *Editor’s Introduction*, in FREEDOM (combining her consideration of the freedom of assembly and the freedom to petition government for a redress of grievances).

8. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (noting that the Court considers fundamental those rights which can be shown to be “deeply rooted in this Nation’s history and tradition”).

9. See John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 577 (2010) (contending that “the larger vision of assembly can be found in the practices of people who have gathered throughout American history.”).

10. See George P. Smith II, *The Development of the Right of Assembly—A Current Socio-Logical Investigation*, 9 WM. & MARY L. REV. 359–60 (1968) (emphasis in original).

11. See BLACK’S LAW DICTIONARY 1155 (8th ed. 2005) (defining *situs* as “[t]he location . . . (of something) for legal purposes”); MERRIAM-WEBSTER, WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1102 (1983) (defining the word “situs” as “the place where something exists or originates[, specifically] the place where something (as a right) is held to be located in law”).

In Part I, I trace the early history of taverns in colonial America. In Part II, I discuss the role that colonists assembling in taverns played both in fostering the freedom of assembly and in combating growing British attacks on the rights of American colonists. In Part III, I analyze the brief but informative legislative history of the Assembly Clause. In Part IV, I describe how tavern talk places the situs of the freedom of assembly squarely in taverns. In Part V, I conclude that in taverns and tavern talk are the origins of the Assembly Clause.

## I. Background

Consuming alcohol was one of the most widespread practices in the American colonies.<sup>12</sup> Imbibing was an everyday activity for colonists, who drank either in the home or in commercial establishments. Taverns served as the most common drinking and gathering place for colonists.<sup>13</sup> These taverns,<sup>14</sup> though reflecting the British roots of their owners and clientele, were “institution[s] that would take on far more roles and have a much larger cultural and culinary impact than [they] did at home in Britain.”<sup>15</sup> The social position of colonial taverns was mainly due to the fact these establishments, which existed from the southernmost to the

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12. See CHARLES M. ANDREWS, *COLONIAL FOLKWAYS* 113 (1919) (listing smoking and gambling as other popular colonial activities). Just prior to Independence, the average colonial American drank the equivalent of nearly six ounces of strong liquor each day. See THADDEUS RUSSELL, *A RENEGADE HISTORY OF AMERICA* 6 (2010) (hereinafter “RENEGADE”). Colonists consumed beer at breakfast, lunch, and dinner. See, e.g., CHRISTINE SISMONDO, *AMERICA WALKS INTO A BAR* 7 (2011) (“[L]ocating a steady source of beer was the first thing on every colonist’s mind[.]”).

13. See JON BUTLER, *BECOMING AMERICA: THE REVOLUTION BEFORE 1776*, at 171 (2000). (“Informal tavern life involved the largest numbers of colonial men . . .”).

14. By “tavern” I mean to include the public (or *publick*) house, the ordinary, the punch house, and those establishments appearing in Peter Thompson’s definition, which includes “those licensed and unlicensed premises selling liquor variously, and inconsistently[] designated alehouse, beerhouse, beershop, coffeehouse, dramshop, inn, and tavern.” See PETER THOMPSON, *RUM, PUNCH, & REVOLUTION* 3 (1999). I also include restaurants in this definition for two reasons. First, the earliest restaurant in America—Julien’s Restorator—opened in Boston in 1793, during America’s infancy. See, e.g., Posting of Jan Whitaker, *Restaurant-ing Through History, America’s First Restaurant*, <http://victualling.wordpress.com/2008/07/19/americas-first-restaurant/> (July 19, 2008, 5:36 PM). Second, Julien’s and other early restaurants differed little from the taverns of the time, and served the same role. See *id.* (noting Julien’s was unique only insofar as proprietor Jean Baptiste Gilbert Payplat, a recent French immigrant, marketed Julien’s as an eatery, “presented diners with a written menu from which they could choose, and charged them only for what they ordered . . .”).

15. JAMES E. MCWILLIAMS, *A REVOLUTION IN EATING* 245 (2005).

northernmost colonies, were used for nearly every public purpose, including “council and assembly meetings, social gatherings, merchants’ associations, preaching, [and] the acting of plays; and their balconies proved convenient for the making of public speeches and announcements.”<sup>16</sup>

The “ordinary,” a predecessor of taverns, was a licensed (though largely unregulated) establishment in which a proprietor, often female, would serve beer in her home to paying customers.<sup>17</sup> In contrast to the ordinary, the tavern was a larger, regulated establishment separate from the home that also served food and usually offered overnight lodging.<sup>18</sup> Early colonial taverns served multiple purposes, in large part because drinking in the colonies was tied to almost any public purpose.<sup>19</sup> Taverns were watering holes, spaces for carrying out local civil-affairs activities like courts and town assemblies, and places where the colonists’ “most fundamental values . . . were exhibited and affirmed.”<sup>20</sup>

In Massachusetts the Puritans had sought to limit the number and scope of taverns, but those efforts failed miserably by the turn of the eighteenth century.<sup>21</sup> By 1700 there were more than two hundred taverns in Massachusetts.<sup>22</sup> Their numbers “increased by 81 percent” in Boston alone from 1719 to 1722.<sup>23</sup> Further south, Philadelphia boasted nearly one hundred taverns by 1774.<sup>24</sup>

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16. See ANDREWS, *supra* note 12, at 109. Taverns served so many purposes in colonial America for several reasons. For example, most private homes were not equipped as meeting places, and colonists spent much time outside the home. See TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* 26 (2009). Taverns also typically served as something akin to a community’s earliest infrastructure. See SISMONDO, *supra* note 12, at 5.

17. See MCWILLIAMS, *supra* note 15, at 253.

18. See *id.* at 258–59.

19. See DAVID W. CONROY, *IN PUBLIC HOUSES* 14 (1995) (noting the “close affinity between the provision of drink and public gatherings”).

20. See *id.* at 12.

21. See BUTLER, *supra* note 13, at 171. See also SISMONDO, *supra* note 12 at 26 (suggesting these efforts to limit taverns were undertaken for the purpose of limiting the free association of colonists).

22. See CONROY, *supra* note 19, at 25.

23. BUTLER, *supra* note 13, at 171.

24. See STEPHEN E. LUCAS, *PORTENTS OF REBELLION* 9 (1976). By 1777, the number of taverns in the city had increased to at least 160. See RUSSELL, *RENEGADE*, *supra* note 12, at 5. Based on that figure, Philadelphia in 1777 boasted nearly eleven times as many taverns, on a per capita basis, as it did in 2007. *Cf. id.* (noting that while the colonial city had one tavern for every one hundred residents, modern Philadelphia had only one per every 1,071 residents).

Taverns gained in popularity and number not just in the Northeast but throughout the colonies.<sup>25</sup> In his detailed diaries, colonist John Rowe of Boston describes having visited no fewer than sixty-five taverns in his travels—many more than once.<sup>26</sup> Together, these numbers reflect the indubitable popularity of colonial taverns.

Colonists had nearly as many drinks available to them as they did reasons for drinking them. Virginians often drank “a julep before breakfast” under the belief that doing so could ward off malaria, while “a toddy, or a glass of wine, punch, or beer at almost any time of the day or night [was thought] to be good for the body as well as cheering to the spirit and indispensable to the practice of hospitality.”<sup>27</sup> Rum predominated in Massachusetts so much that it and the surrounding New England area came to be the world’s great rum producer, to the tune of nearly 1.3 million gallons annually, by 1731.<sup>28</sup> Massachusetts boasted sixty-three rum distilleries by 1750.<sup>29</sup> Before long residents of most every colony came to drink rum—or punch containing rum—on nearly any occasion.<sup>30</sup> But alcohol in general and rum in particular would soon become a source of such great discord that they would drive a fatal wedge between the colonies and Britain.

## II. Colonial “Tavern Talk” Evidences & Fosters the Freedom of Assembly

Beginning in 1754, the British fought a nine-year war against both the French, who at the time controlled a large swath of North

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25. See BUTLER, *supra* note 13, at 171.

26. See JOHN ROWE, LETTERS AND DIARY OF JOHN ROWE 449–50 (Anne Rowe Cunningham ed., 1969). Like Dr. Alexander Hamilton, *infra* note 54, Rowe was a well-heeled colonist whose travels and experiences in colonial taverns likely differed in terms of their frequency (and perhaps gentility) from that of the everyday colonist. Still, even colonial diarists who likely could not afford to bed in taverns note them as landmarks and as places to share information during a journey. See, e.g., *Diary of a Journey of Moravians from Bethlehem, Pennsylvania to Bethabara in Wachovia, North Carolina, 1752*, in NATIONAL SOCIETY OF THE COLONIAL DAMES OF AMERICA, 3 TRAVELS IN THE AMERICAN COLONIES 327–56 (1916).

27. See MARY NEWTON STANARD, COLONIAL VIRGINIA 126–27 (1917).

28. See GEORGE LOUIS BEER, THE COMMERCIAL POLICY OF BRITAIN TOWARD THE AMERICAN COLONIES 114 (P. Smith 1948) (1893).

29. See GARY M. WALTON & JAMES F. SHEPHERD, THE ECONOMIC RISE OF EARLY AMERICA 86 (1979).

30. See TOM STANDAGE, A HISTORY OF THE WORLD IN 6 GLASSES 115 (2006) (“The colonists consumed rum when drawing up a contract, selling a farm, signing a deed, buying goods, or settling a suit.”).

America, and French-allied Native American tribes. After the conflict known as the French and Indian War ended in 1763, Britain sought to recoup the cost of the war.<sup>31</sup> The British believed American colonists should retroactively finance the war,<sup>32</sup> and began to demand compliance and fealty.<sup>33</sup> In the British view, the homeland was merely asking prospering colonists to repay their protectors.<sup>34</sup>

British colonists in America and elsewhere had always enjoyed at least as much freedom as British subjects on the island.<sup>35</sup> Like most immigrants, American colonists and their forefathers had left their homelands in search of *more* freedoms—not fewer.<sup>36</sup> And in America, colonists had enjoyed at least as many freedoms as did their British peers of the time.<sup>37</sup> But British acts passed beginning in 1764 were increasingly harsh and impossible for colonists to ignore.<sup>38</sup> Many of these acts were taxes, an entirely new breed of British imposition on the colonies.<sup>39</sup>

In response to the tightening noose the British applied to the colonies after 1763, small groups of colonists began to assemble expressly to discuss their circumstances—and options. Early meetings were informal, and functioned as a means of discussing the impact of the various post-1763 Acts. As the years passed, informal discussions continued alongside more formal meetings as colonists began to explore the machinations of revolution. These colonists assembled to organize boycotts; share news orally; argue over politics;

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31. See WALTON & SHEPHERD, *supra* note 29, at 163.

32. See *id.*

33. See 16 THE PARLIAMENTARY DEBATES FROM THE EARLIEST PERIOD TO THE YEAR 1803, A.D. 1765–1771 at 759 (1813) (“[T]hat if the hand will not feed the belly, they must both perish together; and that they themselves are members of that very body which they would destroy.”). See also *infra* notes 37–40 and accompanying text.

34. See BEER, *supra* note 28, at 146.

35. See Stephen Hopkins, *Rights of the Colonies Examined*, in TRACTS OF THE REVOLUTION 1763–1776 41, 45 (Merrill Jensen ed., 1967).

36. See *id.*

37. See, e.g., WALTON & SHEPHERD, *supra* note 29 (noting that “until 1763 the only viable restrictions on colonial freedom were in matters of trade”).

38. These acts included the Sugar Act of 1764, Stamp Act of 1765, the (First) Quartering Act of 1765, the Townshend Acts of 1767, the Tea Act of 1773, the Intolerable Acts of 1774, and the Second Quartering Act of 1774. See, e.g., ROBERT A. FERGUSON, THE AMERICAN ENLIGHTENMENT, 1750–1820 7 (listing several acts the British piled on the American colonies beginning in 1764).

39. See BEER, *supra* note 28, at 146 (“Formerly trade had only been regulated, now it was to be regulated and taxed.”).

write and read printed tracts, prose, and poetry; form associations; sign agreements and petitions; and plot revolution.

By far the most common and important situs for building a consensus for American opposition to the British were the numerous taverns that dotted colonial cities and towns.<sup>40</sup> The singular role that taverns played in facilitating public speech, discourse, and assembly prior to, during, and after the Revolutionary War simply cannot be overstated.<sup>41</sup>

Apart from the drink and food they provided, taverns served three key roles in colonial life. First, all manner of *speech*—centered on everything from politics and trade to gossip and scandal—took place in taverns.<sup>42</sup> Scholars have invariably labeled this mishmash of vital discourse between and among colonists assembled in taverns “[i]nformal talk”<sup>43</sup> or “tavern talk.”<sup>44</sup> The tavern was a place where colonists “could express, and, if necessary, defend their complicated and contested notions of community and society in a new world environment.”<sup>45</sup>

The second key role played by taverns was as the primary *news* source in the colonies.<sup>46</sup> In fact, taverns were the most important place colonists could assemble to hear and debate the news<sup>47</sup> and to

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40. See BUTLER, *supra* note 13 (noting the British were unable to “check the deep political and social camaraderie that taverns created in the [middle 1700s nor curb] both the taverns and their politics in the 1760s and 1770s”).

41. See, e.g., LUCAS, *supra* note 24, at 9 (“Taverns were particularly vital centers of communication; they were places to discuss business, to read newspapers, and to exchange opinions and gossip.”).

42. See generally EDWARD FIELD, *THE COLONIAL TAVERN* (2006).

There is no more picturesque character in early Colonial life than the individual who presided over the tavern . . . . His house was the rendezvous for all the townspeople [and was where p]ublic questions, trade, theology, science, crops, politics, scandal, local gossip and discussion of private character, were all mixed together and washed down with flip, toddy, punch, and other seductive drinks of Colonial days.

*Id.* at 40–41.

43. LUCAS, *supra* note 24, at 9.

44. See THOMPSON, *supra* note 14, at 2. Since my thesis revolves around situs—the place where rights are located and, more specifically, taverns—I employ Thompson’s specific term throughout this article rather than Lucas’s more general term.

45. See *id.* at 4.

46. See FIELD, *supra* note 42, at 4 (“All news emanated from the tavern, the town meeting and the town council here assembled, the courts met in solemn dignity, the traveler full of news from his last stopping place was sometimes here found.”). See also CONROY, *supra* note 19, at 44.

47. See CONROY, *supra* note 19, at 236.

learn about the outside world.<sup>48</sup> News traveled not just from tavern-goer to tavern-goer but through the bartenders who served as disseminators<sup>49</sup> and persistent solicitors of news.<sup>50</sup>

The early role of the tavern as news purveyor made it the center of colonial oral culture.<sup>51</sup> An early Boston tavern, the Royal Exchange, which became a focal point in the city, boasted a “ground floor [that] was purposefully left open for the citizens to walk about, discuss the news, or bargain in.”<sup>52</sup> Another tavern, the King’s Arms Tavern, featured a room (the “Exchange”) that served a similar purpose.<sup>53</sup> *The Diary of Dr. Alexander Hamilton* presents several fine examples of this phenomenon:

We put up att a publick house kept by one Thomas where the landlady looked after everything herself, the landlord being drunk . . . . We were entertained with an elegant dispute between a young Quaker and the boatswain of a privateer concerning the lawfullness of using arms against an enemy . . . .<sup>54</sup>

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48. *See id.* at 45.

49. *See id.* at 45–46.

50. *See* HARRIET SILVESTER TAPLEY, 8 HISTORICAL COLLECTIONS OF THE DANVERS HISTORICAL SOCIETY 7 (1920). Though taverns provided unparalleled value as news-sharing and discourse-promoting situs, sometimes a person entering a tavern merely wanted a drink and a bite to eat—regardless of his fame or position. Benjamin Franklin, for one, was known to dispense at the earliest possible moment with the pleasantries frequently offered by inquisitive tavernkeepers. *Id.* “My name is Benjamin Franklin. I was born in Boston. I am a printer by profession, am traveling to Philadelphia, shall have to return at such and such a time, and have no news. Now, what can you give me for dinner?” *Id.* *See also* THEODORE SEDGWICK, HINTS TO MY COUNTRYMEN 149 (1828) (“The whole world, you know, in this country travels, except perhaps the tavern-keepers; who, if they have their eyes open, may in twenty-four hours, gain the advantage of a five hundred miles journey.”).

51. *See* BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT 137 (2001):

Public discourse lies at the heart of and actually predates formal American journalism. Before the printing press . . . ‘news’ was something exchanged over a pint of ale in ‘publick houses.’ News accounts weren’t static printed words, and they didn’t exist in a void; they were part of conversation. And though conversations obviously involved the exchange of information, much of the point was the exchange of ideas and opinions.

*Id.* *See also* CONROY, *supra* note 19 & *infra* note 60 and accompanying text.

52. *See* SAMUEL ADAMS DRAKE & WALTER KENDALL WATKINS, OLD BOSTON TAVERNS AND TAVERN CLUBS 24–25 (1917). The Royal Exchange was also popular with British soldiers. *See* ELISE LATHROP, EARLY AMERICAN INNS & TAVERNS 78 (2007).

53. *See* CONROY, *supra* note 19, at 48.

54. Alexander Hamilton, *The Itinerarium of Dr. Alexander Hamilton*, in COLONIAL AMERICAN TRAVEL NARRATIVES 173, 189 (Wendy Martin ed., 1994).



We put up att the house of one Case in Kingstown, who keeps a pritty good house, is a talkative prating man, and would have every body know that he keeps the best publick house in the country. We heard news . . . . The next day, I read a book I found in the publick house's library and had a rambling conversation with Case and a certain traveller upon certain subjects . . . .<sup>55</sup>

[G]oing to the coffee house, I met Dr. Keith and Captain Williams. We tossed the news about for some time.<sup>56</sup>

Augmenting their natural role as inns for travelers on horseback from throughout the colonies, port taverns also drew news from afar delivered by seamen. These visitors brought news not just from the immediate vicinity but also from neighboring colonies. America's "expanding coastal trade . . . not only offered an alternative system of distribution but also established a new form of communication linking Americans with other Americans."<sup>57</sup> Small merchant vessels running up and down the Eastern seaboard "opened the possibility for later discussions about resisting king and Parliament" in the years after tensions arose in 1764.<sup>58</sup>

Though the written word merely "supplemented a primarily oral culture" of taverns,<sup>59</sup> the widespread introduction of printed political tracts like pamphlets into taverns in the eighteenth century changed the popular culture of taverns, and broadened the scope of news available inside them.<sup>60</sup> Colonial authors also found that a new, tavern-going audience had arisen in the colonies: "the public."<sup>61</sup> Pamphleteers and other authors recognized this vast audience beyond the upper classes, and as a result no longer addressed their missives merely to the gentry.<sup>62</sup> This stark change in tavern culture resulting from the popularization of the printed word was part of a larger

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55. *Id.* at 250.

56. *Id.* at 291.

57. T.H. BREEN, *THE MARKETPLACE OF REVOLUTION* 126–127 (2004). *See also* SEDGWICK, *supra* note 51, and accompanying text.

58. *See* BREEN, *supra* note 57, at 127.

59. *See* CONROY, *supra* note 19, at 179. *See also* Noah Webster, *Address to the Public*, *AMERICAN MINERVA*, Dec. 9, 1793 ("[N]ewspapers . . . are the common instruments of social intercourse, by which the Citizens of this vast Republic constantly discourse and debate with each other on subjects of public concern.").

60. *See* CONROY, *supra* note 19, at 267.

61. *See* BREEN, *supra* note 57, at 247.

62. *See id.*

movement in which members of every social class were increasingly “making choices and voicing opinions in the new consumer marketplace of the eighteenth century.”<sup>63</sup>

Printed news and discourse related to the printed word quickly became central to tavern life. Taverns provided customers with both political pamphlets and opportunities for discussing the ideas therein.<sup>64</sup> Newspapers enhanced the importance of taverns as “center[s] of communication.”<sup>65</sup> Most taverns kept political pamphlets on hand by the early 1700s.<sup>66</sup> A 1770 advertisement for a new Boston tavern, the Hat and Helmet, notes the house will “be supplied with the News-Papers for the Amusement of [its] Customers.”<sup>67</sup> In taverns, the literate read pamphlets both by themselves and aloud to the illiterate.<sup>68</sup> Taverns also held book sales and book swaps that included political tracts.<sup>69</sup> The quality of a tavern’s news—rather than of its spirits—could be the main selling point in convincing potential customers to frequent an establishment.<sup>70</sup> Because taverns came to appeal to potential customers on philosophical and intellectual grounds—rather than mere victual ones—tavern patronage and the news and critical discourse they promoted became co-legitimizing forces.<sup>71</sup>

While some criticized taverns and their “tavern talk” as idle, drunken chatter, taverns served as a chief venue for distributing the printed word—and for influencing what was printed.<sup>72</sup> Though

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63. BREEN, *supra* note 57, at 248.

64. See CONROY, *supra* note 19, at 177.

65. See *id.* at 235.

66. See *id.* at 90.

67. *Boston News-Letter*, Feb. 15, 1770, reprinted in DRAKE & WATKINS, *supra* note 52, at 39–40.

68. See CONROY, *supra* note 19, at 232.

69. See *id.* at 233–34.

70. See EUGENE P. LINK, *DEMOCRATIC-REPUBLICAN SOCIETIES, 1790–1800*, at 57 (1973) (likening colonial innkeepers and tavern owners to “contemporary news broadcaster[s]” in terms of their societal roles, and noting the former were “as effective, within the range of [their] voice, as the modern prototype”).

71. Cf. Smith II, *supra* note 10, at 376 (noting that “[d]iscipline of some form must be exerted in the regulation of collective behavior”). This phenomenon can be compared to the restraint colonists exercised in not buying British goods under boycott. Cf. BREEN, *supra* note 57, at 264 (“[T]he virtuous colonists exercised self-control for the common good.”).

72. See THOMPSON, *supra* note 14, at 10 (“[M]any pamphlets and newspaper features mirrored tavern speech precisely in order to sway a readership that continued to hold oral discourse in high regard.” (internal citation omitted)). In many ways this tension parallels the present one between newspapers and Internet media. Many print newspapers and

temperance was by no means the norm, the printed word—and the expectation of discourse around it—was a moderating force that encouraged at least some tavern-goers to consume less alcohol.<sup>73</sup>

The *third* vital role that colonial taverns played was as hubs of colonial assembly. Taverns were the only colonial space outside the home that permitted participants in all social classes<sup>74</sup> the opportunity to decide whether, how, and to what extent they would participate and shape their interactions with others.<sup>75</sup> It was in these “informal community cells”<sup>76</sup> that colonists found the “most egalitarian context[]

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their subscribers criticize the veracity of the content that appears on the Internet. Yet nearly every newspaper makes its content available on the Internet, many readers read newspaper content only on the Internet, and many newspapers tailor both print and Internet content to the preferences of their Internet readers by, for example, excerpting Internet blog posts in printed newspapers.

73. See CONROY, *supra* note 19, at 179.

74. See RUSSELL, RENEGADE, *supra* note 12 & *infra* note 79 and accompanying text.

75. See ZICK, *supra* note 16, at 27 (“[I]f one wished to communicate with those in the community, public places were the only forums in which this could regularly and effectively be accomplished.”). Furthermore, the extent to which the everyday person could command an outdoor public space was limited at best. See *id.* at 183 (“Until nearly the nearly the middle of the twentieth century, the people had no recognized and enforceable constitutional right of access to public places like streets, sidewalks, parks, and squares.”). Access to these spaces was controlled by elites. *Id.* If an outdoor assembly troubled elites—including those with arrest powers—then the assembly could be deemed “unlawful” and arrest might follow. See, e.g., DAVID FELLMAN, *THE CONSTITUTIONAL RIGHT OF ASSOCIATION* 18 (1963) (“Meetings in . . . streets, parks, and other public places . . . often create serious problems of disorder and breach of the peace.”). Houses of worship, another place of frequent assembly, were no more a place of freewheeling, participatory assembly than they are today. See, e.g., COTTON MATHER, *5 MAGNALIA CHRISTI AMERICANA: OR, THE ECCLESIASTICAL HISTORY OF NEW ENGLAND FROM 1620–1698*, at 30 (1702) (recounting that parishioners may “no[t] speak in the Church, before they have leave from the Elders . . . nor may they oppose or contradict the[m]”). Colonists were free to assemble in markets, but as conflict with the British became more likely, purchases in the marketplace invited scrutiny that was absent in taverns. Cf. BREEN, *supra* note 57 at 235 (noting that by the late 1760s “private decisions in the consumer marketplace came to be widely reinterpreted as acts meriting close public scrutiny”). Consequently, the tavern was the only space where everyday colonists could assemble freely to rub elbows with one another—and with those in positions of power—and to listen, learn, speak, and be heard.

76. See LUCAS, *supra* note 24, at 9. Tavern assembly is therefore a sort of “participatory assembly” without the lawmaking (or even, necessarily, consensus-building) function that Rousseau deemed his ideal. Cf. generally JEAN-JACQUES ROUSSEAU & EDWARD LORRAINE WALTER, *THE SOCIAL CONTRACT* (1893). Participatory assembly as I use the term means that people are free to gather with others and to participate in sharing information in ways they see fit. Law, policy, or consensus need not emerge from that assembly. Participatory assembly is therefore a beacon of civil society in a constitutional republic, rather than an Orwellian wart of majoritarian democracy. Cf. 4 *THE SOCIAL CONTRACT* 166 (stating perversely that when a vote is taken and an “opinion contrary to mine prevails, it shows only that I was mistaken”).

for gatherings.”<sup>77</sup> Long communal tables in taverns promoted interaction and discussion between disparate groups.<sup>78</sup> Some taverns even catered to a racially integrated clientele.<sup>79</sup> Taverns “fostered a deep sense of community” and offered the perfect milieu for political debate.<sup>80</sup> In this way, taverns served as “political spaces where citizens could participate in civic life.”<sup>81</sup>

Groups that comprised colonial civil society—including some agitating for independence—often held their regular meetings in taverns so as to avoid the appearance their groups were some sort of secret society.<sup>82</sup> Taverns became the place where Whig assemblymen informed their constituents of “opposition politics” against the British.<sup>83</sup> Colonist John Rowe writes in his diaries of March 5, 1772 and March 5, 1773 of the mass of Bostonians gathered in the streets and more still “assembled” at Mrs. Clappams, a popular tavern, to commemorate the anniversary of the Boston Massacre.<sup>84</sup>

The movement by colonial associations to boycott various British goods arose in the middle part of the 1760s and early 1770s not out of thin air, but rather from the vibrant civil society already in place in the colonies.<sup>85</sup> Again, taverns played the central role in shaping, launching, sustaining, and sometimes amending or diluting boycotts. For example, the Sugar Act—which directly impacted rum and other drinks sold by taverns in every colony—was so “deeply unpopular

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77. See CONROY, *supra* note 19, at 205 n.26.

78. See *id.* at 87–88.

79. See RUSSELL, RENEGADE, *supra* note 12, at 9 (referring to “[l]ower-class taverns” as “the first racially integrated public spaces in America”).

80. See MCWILLIAMS, *supra* note 15, at 245.

81. See RICHARD HENRY BROWN, FORBIDDEN SUBSTANCES 34 (2003), available at <http://richardharveybrown.com/3coffee.pdf>.

82. See THOMPSON, *supra* note 14, at 9. See also *infra* notes 85–97 and accompanying text.

83. See CONROY, *supra* note 19, at 231. The Whig party was a British political party that worked to lessen the authority of the monarchy both before and after the colonies broke from Britain. See generally CLYVE JONES, BRITAIN IN THE FIRST AGE OF PARTY, 1680–1750 (1987). Colonial American Whigs mimicked “their radical English forebears” by meeting in taverns. See ZICK, *supra* note 16, at 27.

84. See ROWE, *supra* note 26, at 240 (“A Great Concourse of People in King’s St of all sorts & a large Number to remember the 5th of March 1770 assembled at Mrs. Clap[p]ams[.]”). Taverns outside major cities also “became important sites of political legitimization,” and townsfolk met on a more regular basis “to create and expand neighborhood and town interests.” See BUTLER, *supra* note 13, at 171.

85. See BREEN, *supra* note 57, at 222–23 (“The colonists regularly formed associations to discuss new scientific ideas, to raise money for libraries . . . . None of these communal efforts received support from local governments.”).

with the colonists”<sup>86</sup> that it forced their hand. Rather than switching from imported rum and wine to British-manufactured liquors—as the British hoped would be the impact of the Sugar Act—“the colonists boycotted both.”<sup>87</sup>

Perhaps the most famous boycott adopted in a tavern happened in 1765 in Virginia, and involved not just several Founding Fathers but nearly every member of Virginia’s colonial assembly:

George Washington, Patrick Henry, Thomas Jefferson, Peyton Randolph, were members of that Assembly . . . . [T]hey asserted that the right of laying taxes on Virginia was exclusively vested in its own Legislature . . . . The [British-appointed] governor, without waiting for an official communication, dissolved the Assembly. On the next day the members assembled at the Raleigh tavern; and in a room called “The Apollo” . . . eighty-eight pledged themselves not to import or purchase certain articles of British merchandise, whilst the Revenue Act was unrepealed, and signed Resolutions to that effect. The example spread. Pennsylvania approved the Resolutions. Delaware adopted them.<sup>88</sup>

That same year a swirl of colonial protest against the Stamp Act of 1765<sup>89</sup> led to numerous boycotts of British goods throughout the colonies.<sup>90</sup> In one instance, approximately two hundred New York merchants congregated in a city tavern, shortly after news of the Stamp Act reached America, and agreed to cancel all orders for British goods until the Act was repealed.<sup>91</sup>

The *Connecticut Courant*, forerunner of today’s *Hartford Courant* newspaper, published an account of a 1770 vote on non-importation that took place in a Philadelphia tavern.<sup>92</sup> According to the account, published two weeks after the vote, subscribers to a Philadelphia agreement had met at Josiah Davenport’s Tavern on

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86. Cf. TOM STANDAGE, AN EDIBLE HISTORY OF HUMANITY 115 (2009).

87. See, e.g., MARK KURLANSKY, COD 95 (1998).

88. CHARLES KNIGHT, A HISTORY OF ENGLAND: 1717–1775, at 310 (1775). Heated colonial opposition to the Sugar Act spurred passage of the Stamp Act, a revenue act that attached duties to numerous colonial goods. The latter required merchants to purchase stamps for everything from newspapers to liquor licenses—both of which were important to tavern owners. See OLIVER M. DICKERSON, THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION 191 (1951).

89. 5 George III, c. 12.

90. See WALTON & SHEPHERD, *supra* note 29, at 165.

91. See BREEN, *supra* note 57, at 223.

92. See *Philadelphia, Sept. 24*, CONN. COURANT, October 2, 1770, at 2.

September 24, 1770 to discuss modifying their existing non-importation agreement.<sup>93</sup> After a vote, they decided:

First . . . that the non-import . . . agreement, as it now stands, should be altered[.]

Second . . . that the alteration proposed should be to open the importation of goods from G. Britain, and other parts of Europe, except teas, and such other articles as are, or may be subject to duties for the purpose of raising revenue in America[.]

Third . . . [not] to consult the other colonies, before any breach is made to the present [non-importation] agreement[.]

Fourth . . . [that] the agreement is deemed [not] broke [but] altered . . . .<sup>94</sup>

The Philadelphia vote effectively renouncing non-importation as a policy was by no means unanimous—colonists were hardly monolithic in supporting or opposing boycotts and non-importation agreements<sup>95</sup>—and the report indicates the decision caused eleven subscribers, who “consider[ed] the non-importation agreement to be broke by the resolves now passed, [to] no longer deem themselves of the committee.”<sup>96</sup> The remaining subscribers, the report notes, would meet the following Saturday at the same tavern to choose new members to replace those who had left on account of the vote.<sup>97</sup>

The news, speech, and assembly that the tavern situs could provide and facilitate were key in fostering the burgeoning colonial movement toward independence.<sup>98</sup> Taverns were “nurseries of freedom . . . [and] where British tyranny was condemned, militiamen

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93. *See id.* Generally, “subscribers” to a non-importation agreement were people who agreed, in signing the agreement, to abide by its terms.

94. *See id.*

95. *See, e.g., Revolutionary Songs and Ballads, in PROSE AND POETRY OF THE REVOLUTION* 32–33 (Frederick C. Prescott & John H. Nelson, eds., 1925) (“When a trading people carelessly neglect, or wilfully [sic] give up any branch of their trade, it is seldom in their power to recover it.”).

96. *See Philadelphia, supra* note 92, at 2.

97. *See id.*

98. *See, e.g., WILLIAM HARRISON UKERS, ALL ABOUT COFFEE* 125 (1922) (“As the outbreak of the Revolution drew near, fiery colonials, many in Quaker garb, congregated [in Philadelphia coffeehouses] to argue against British oppression of the colonies.”).

organized, and independence plotted.”<sup>99</sup> In this same vein, the “Revolution was born and raised in taverns.”<sup>100</sup>

Founding Fathers from James Madison to Thomas Jefferson and John Adams assembled in taverns alongside other colonists. Jefferson may have authored the Declaration of Independence at a Philadelphia tavern,<sup>101</sup> and “many stirring meetings were held before the outbreak of the War of the Revolution in taverns whose landlords were in sympathy with the cause of the patriots.”<sup>102</sup> In his diary for October 20, 1774, John Adams writes of dining in Philadelphia’s City Tavern with fellow representatives to the Continental Congress (which would soon adjourn) and members of the Pennsylvania state legislature.<sup>103</sup> After the Congress came to a close on October 26, Adams writes that its members again “[s]pent the evening together at the City Tavern; all the Congress, and several gentlemen of the town.”<sup>104</sup> An account of James Madison’s time in Philadelphia during the Congress likewise notes that “[t]he days in Philadelphia, from the burning of [British] effigies to the meeting at City Tavern, must have been some of the most memorable in Madison’s life.”<sup>105</sup> On an earlier journey by Madison and fellow travelers to “the London Coffee House . . . the center of Philadelphia for news, travelers, and anti-British conniving, they heard excited news about actions in Charleston, Williamsburg, and Boston to oppose the Townshend duties . . . .”<sup>106</sup>

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99. BARBARA HOLLAND, *THE JOY OF DRINKING* 63–64 (2007) (internal citation omitted).

100. *Id.* at 63–64.

101. DAVE DEWITT, *FOUNDING FOODIES* 50 (2011) (noting credible claims that Jefferson wrote the draft of the Declaration in the City Tavern).

102. LATHROP, *supra* note 53, at viii. Similar meetings continued to occur in taverns during the Revolutionary War. *See, e.g.*, J. ALMON, *THE REMEMBRANCER, OR IMPARTIAL REPOSITORY OF PUBLIC EVENTS FOR THE YEAR 1780*, at 59 (1780). For example, a number of military men “assembled at the New Tavern” in Philadelphia on April 6, 1780, during the height of the American Revolution. *Id.* There, the men—who included a brigadier general, a colonel, a lieutenant colonel, and a major—pledged “not [to] associate, or hold communication with any person or persons who have exhibited by their conduct an inimical disposition, or even lukewarmness, to the independence of America . . . .” *Id.*

103. *See* CHARLES FRANCIS ADAMS, 2 *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 400 (1856) (“A sentiment was given: ‘May the sword of the parent never be stained with the blood of her children.’”).

104. *Id.* at 402.

105. RALPH LOUIS KETCHAM, *JAMES MADISON: A BIOGRAPHY* 60 (1990).

106. *Id.* at 27.

Daniel Webster heralded Boston's Green Dragon coffeehouse as "the headquarters of the Revolution,"<sup>107</sup> while in New York the Merchants Coffee House has been called "the true cradle of American liberty and the birth-place of the Union."<sup>108</sup> One important Boston coffeehouse, the British Coffee-House, threw off its British shackles at least five years before Independence—changing its name to the *American* Coffee-House.<sup>109</sup> This coffeehouse was a veritable Petri dish of revolutionary assembly:

[T]he best room in this house held almost nightly assemblage of a group of patriotic men, who were actively consolidating all the elements of opposition into a single force. Not inaptly they might be called the Old Guard of the Revolution. The principals were [James] Otis . . . [and] . . . John Adams . . . . Probably no minutes of their proceedings were kept, for the excellent reason that they verged upon, if they did not overstep, the treasonable.<sup>110</sup>

While John Adams obviously spent a good deal of time in taverns just prior to the dawn of the Revolution, his earlier opinion of them as unsavory bastions of drunken, lower-class colonists is worth noting.<sup>111</sup> In his diary of May 29, 1760, Adams derides taverns as singularly representing "destructive evils [and] so needful of a speedy regulation."<sup>112</sup> Later, Adams also called for public virtue to replace tavern-going as a means of combating the Sugar Act and Stamp Act.<sup>113</sup> Yet Adams was also a political thinker, and the growing audience for the independence movement he favored was most often found—drinking and discussing revolutionary philosophy and actions against the crown—in taverns.<sup>114</sup>

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107. See UKERS, *supra* note 98, at 110. The Green Dragon was known as the gathering place of "many notable American revolutionaries, including Paul Revere and John Adams." See BROWN, *supra* note 81, at 34.

108. UKERS *supra* note 98, at 728.

109. See DRAKE & WATKINS, *supra* note 52, at 39.

110. *Id.* at 39–40.

111. See ADAMS, *supra* note 103, at 84–85.

112. See *id.* at 84 ("The accommodation of strangers, and, perhaps, of town inhabitants on public occasions, are the only warrantable intentions of a tavern; and the supply of the neighborhood with necessary liquors in small quantities, and at the cheapest rates, are the only excusable designs of a retailer . . .").

113. See CONROY, *supra* note 19, at 243.

114. See *id.*



Even taking into account Adams's claimed aversion to cavorting with drunks, it would be an enormous mistake to paint the Founders as temperate gentlemen. Just the opposite is apparently true. For example, *one evening* in 1787 during the Constitutional Convention the fifty-five delegates there finished "fifty-four bottles of Madeira, sixty bottles of claret, eight of whiskey, twenty-two of port, eight of hard cider, and seven bowls of punch so large that, it was said, ducks could swim around in them. Then they went back to work on founding the new republic and drafting its Constitution."<sup>115</sup> Drafting a Bill of Rights that guaranteed the freedom of assembly would not follow until 1791.

### III. The Search for Meaning in the Legislative History of the First Amendment

Scholars are divided over the historical right of British citizens to assemble.<sup>116</sup> American assertions of a right to assemble predate the Nation's founding.<sup>117</sup> The "Declaration and Resolves" drafted by the First Continental Congress in 1774, for example, stipulated the right of colonists "peaceably to assemble."<sup>118</sup> Several states also protected assembly rights in their respective constitutions.<sup>119</sup>

Beginning in 1788, state ratifying conventions met to consider the new federal Constitution. The state conventions offered little in the

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115. See HOLLAND, *supra* note 99, at 64. Benjamin Franklin, who was among the delegates, would not write his thirteen "virtues"—including the first, temperance, "Eat not to dullness; drink not to elevation"—for several more years. See Benjamin Franklin, *The Autobiography of Benjamin Franklin, as reprinted in EARLY AMERICAN WRITING* 364, 367 (Giles Gunn ed., 1994) (1784, 1788).

116. See Smith II, *supra* note 10, at 361–63 (citing scholarly debates over the meaning and importance of numerous prohibitions on unlawful assembly, the failure of English law to enumerate a specific right of assembly, and English common law granting assembly rights).

117. See *United States v. Cruikshank*, 92 U.S. 542, 551 (1876) (per curiam) ("The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States . . . . The Government of the United States, when established, found it in existence[.]"); W. GLENN ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* 12 (1981, 1961) ("The history of the incorporation of the Bill of Rights into the Constitution would not appear to justify a contention that any new freedom of assembly was thereby granted or that any expansion of the right of assembly generally was intended.").

118. See NEIL H. COGAN ed., *THE COMPLETE BILL OF RIGHTS* 143 (1997). The Articles of Confederation, adopted in 1781, contained no mention of a right of assembly. See Jarrett & Mund, *supra* note 4, at 10.

119. See COGAN, *supra* note 118.

way of new thinking about rights.<sup>120</sup> Perhaps most noteworthy was the New York ratifying convention, which was the first to propose language linking freedoms of the press and of assembly.<sup>121</sup>

After the state ratifying conventions adopted the Constitution, thus bringing it into force in 1789, the newly formed federal Congress took up its role of legislating for the nation. The most enduring legislation the First Congress debated is, undoubtedly, what became the amendments comprising the Bill of Rights.

Congress debated the Bill of Rights much like any other piece of legislation.<sup>122</sup> James Madison first proposed amendments to the Constitution in the House of Representatives on June 8, 1789.<sup>123</sup> In his proposed fourth amendment, Madison included protection for the rights of speech, writing, publishing, the press, assembly, and petition.<sup>124</sup>

The House of Representatives established a subcommittee, consisting of one member from each of the founding states, to consider Madison's proposed amendments.<sup>125</sup> On July 28, 1789 the Committee of the Whole suggested edits to Madison's speech, press, assembly, and petition clauses.<sup>126</sup>

120. See Anderson, *supra* note 2, at 474 (“[R]atifying conventions . . . generated few new ideas.”).

121. See *id.* (noting the state proposal “grouped freedom of the press in the same paragraph with the rights to assemble” and other rights).

122. See *id.* at 475.

123. See HELEN E. VEIT, KENNETH R. BOWLING, & CHARLENE BANGS BICKFORD EDS., *CREATING THE BILL OF RIGHTS* 12 (1991).

124. See *id.* at 12:

The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable. The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petition, or remonstrances for redress of their grievances.

*Id.* The proposed amendment also protected numerous other rights, including the right to bear arms. *Id.* The right of the people to assemble for “their” common good, part of the text Madison introduced, presents a stronger defense of individual rights than would have “the” common good. See Inazu, *supra* note 9, at 572 (noting the former would protect “the common good of the people,” while the latter would protect “the common good of the state”).

125. See VEIT, BOWLING, & BICKFORD, *supra* note 123, at 29–30.

126. See *id.* at 30 (“The freedom of speech, and of the press, and of the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of their grievances, shall not be infringed.”).

### A. The “assemble and” Debate

Little is known today of the House debate over any of the amendments, including the First Amendment.<sup>127</sup> However, what legislative history does survive greatly informs the meaning of what became the Assembly Clause. This is true because on August 19, 1789, Representative Theodore Sedgwick of Massachusetts, who generally opposed a Bill of Rights, objected to enumerating the right of assembly on the grounds that doing so would be too obvious as to warrant mention.<sup>128</sup> Sedgwick proposed striking “assemble and” in the proposed clause that included “the right of the people peaceably to assemble and consult for their common good . . . .”<sup>129</sup> Sedgwick described the right of assembly as “a self-evident, unalienable right which the people possess.”<sup>130</sup> His argument against enumerating an assembly right was twofold: the right of assembly was concomitant with the right to speak, and the power to infringe on this right fell outside the powers of Congress.<sup>131</sup> One report of the House debate describes Sedgwick’s argument:

[S]hall we secure the freedom of speech, and think it necessary at the same time to allow the right of assembling? If people freely converse together, they must assemble for that purpose; it is a self-evident unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the house to descend to such minutiae . . . .<sup>132</sup>

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127. See Anderson, *supra* note 2, at 478. (“[W]e know almost nothing about the [House] committee’s thoughts.”). The Senate debated the Bill of Rights behind closed doors, and so no substantial records of the debates and legislative history exist. *Id.* at 480.

128. See VEIT, BOWLING, & BICKFORD, *supra* note 123, at 154.

129. *Id.*

130. 1 ANNALS OF CONGRESS 759 (1791).

131. See David P. Currie, *Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 855 (1994).

132. See VEIT, BOWLING, & BICKFORD, *supra* note 123, at 159. Shays’s Rebellion was an uprising led by a group of debtor farmers which helped emphasize to many the need for a stronger federal government. See DAVID P. SZATMARY, SHAYS’ REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION 127 (1980) (noting that Shays’s Rebellion in 1786–87 “did not *cause*” Constitutional Convention but did “help[] to ensure . . . [the] presence at the Constitutional Convention” of George Washington (emphasis in original)). James Madison also connected the events of Shays’s Rebellion to need for a Constitutional Convention, saying it established “new proofs of the necessity of such a vigor in the general government as will be able to restore health to any diseased part of the Federal body.” *Id.* at 128. A series of food riots over the issue of paper money also helped convince the various colonies loosely associated under the Articles of Confederation of the need for a functioning central government. See *id.* at 44, 57 (1980).

Along with others, Representative Elbridge Gerry spoke against Sedgwick and in favor of enumerating a right of assembly, in spite of what Gerry painted as abuses of such a right during Shays's Rebellion in 1786.<sup>133</sup> Ultimately Gerry overcame Sedgwick's opposition to enumerating the right of assembly.<sup>134</sup> The House put Sedgwick's motion to a vote, and it failed "by a considerable majority."<sup>135</sup> Though Sedgwick's motion to strike "assembly and" fell short, all who spoke on the matter agreed about the fundamental nature of the assembly right.<sup>136</sup>

### B. Purposive Limitations: Petition and "their common good"

The debate over Sedgwick's proposal highlights the belief among those quoted representatives of a broad application of the right to assemble.<sup>137</sup> It might come as no surprise, then, that the finished product of the debate—the Assembly Clause that appears in the Bill of Rights—imposes exactly one limitation upon the manner the people may assemble ("peaceably") and no limitation whatsoever on the purpose or purposes of such assembly.<sup>138</sup> However, such might not have been the case. Noted Anti-Federalist author Richard Henry

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(noting that American merchants often refused to accept paper money in the 1780s, and that food riots erupted after urban food sellers in Rhode Island refused to accept paper money). Scrapping the Articles of Confederation was one of the goals of rebellion leader Daniel Shays. See LEONARD L. RICHARDS, SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE 30 (2003) (seeking to "overthrow the present constitution" (internal citation omitted)).

133. See VEIT, BOWLING, & BICKFORD, *supra* note 123, at 160.

134. See *id.* at 161 (suggesting that the right of assembly and the right of speaking are intertwined).

135. See *id.*

136. See generally *id.* at 159–71. See also Jarrett & Mund, *supra* note 4, at 12:

No one in the House threw the slightest doubt upon the idea that the right of assembly and consultation was inherent in a republican form of government. The whole difference of opinion was whether or not, at any future time, this right might by any remote chance, be called into question.

*Id.* Scholars have embraced Rep. Sedgwick's contention that the rights to speak and assemble give each other meaning. See, e.g., *id.* at 5 ("[A]n assembly of two or more people is a necessary basis for the exercise of the right of freedom of speech and a multitude of other privileges."). Technological advances like the conference call and social media like Twitter have, in many cases, likely transformed the *necessary* link between physical assembly and speech to merely one of *sufficiency*.

137. See Inazu, *supra* note 9, at 576 (noting that discussion of the right to assemble included situations where the right was applicable in cases that "had nothing to do with petition").

138. Cf. *id.* (noting the constitutional right of assembly contains neither a requirement that an assembly take place for "the common good" nor for "the purpose[] of petitioning government").

Lee of Virginia had earlier suggested including an amendment granting the right of assembly, but he wished to limit its purpose to that of petitioning elected officials.<sup>139</sup> Similar proposals that would have limited the right of assembly beyond the requirement that such assemblies take place “peaceably” ultimately failed.<sup>140</sup>

While American pundits and others considered these proposals outside Congress, the limiting language that was introduced by James Madison in the House<sup>141</sup> and that was debated in both the House and Senate concerned the right of the people to assemble “for their common good.”<sup>142</sup> How did that language emerge? Along with New York, three other constitutional ratifying conventions that voted to adopt the federal Constitution had also recommended amendments that would pair the assembly rights of the people with purposive language linking that right to their (or “the”) common good.<sup>143</sup> At least eight state constitutions in place at the time of the meeting of the First Congress employed similar language.<sup>144</sup>

We have no record why the words “their common good” disappeared from what became the First Amendment.<sup>145</sup> Had the Framers limited the right of assembly to only those gatherings that fostered “*their* common good” or, worse, “*the* common good,” the “dissenting, public, and expressive” characteristics Inazu describes<sup>146</sup> as the key roles assembly has played over the past two centuries in

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139. See RICHARD E. LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* 38 (2006).

140. See Richard Henry Lee, *Proposed Amendments*, VIRGINIA GAZETTE, Dec. 22, 1787 (suggesting the right of assembly be protected so long as it was both peaceable and “for the purpose of petitioning the legislature”); *Centinel II*, Philadelphia FREEMAN’S JOURNAL, Oct. 24, 1787 (seeking to protect a “right of the people peaceably to assemble for the purpose of consulting about public matters”).

141. See VEIT, BOWLING, & BICKFORD, *supra* note 123 (“for their common good”).

142. See *id.* at 159–71. See also Inazu, *supra* note 9, at 571 (contending that “[t]he most important aspect” of the Assembly Clause “may be the three words missing from its final formulation: *the common good*” (emphasis in original)). Inazu refers here to “*the* common good,” though Madison proposed and the House committee and the Senate both considered the people’s right to assemble peaceably “for *their* common good” only. Compare *id.*, with VEIT, BOWLING, & BICKFORD, *supra* note 123, at 38 & n.12 (emphasis added).

143. See COGAN, *supra* note 118, at 140 (reporting that the Virginia (June 1788), New York (July 1788), North Carolina (August 1788), and Rhode Island (May 1790) state ratifying conventions each recommended such language).

144. See *id.* at 141–42 (1997).

145. See, e.g., Inazu, *supra* note 9, at 573 (noting “the text inexplicably dropped out”).

146. See *id.* at 570 n.16.

America would likely never have existed.<sup>147</sup> Protecting the common good of the state *vis à vis* the state itself, rather than of the people *vis à vis* the state, would make the state the arbiter of what is a public good and effectively remove the “right” from the right of people to assemble.<sup>148</sup>

Similarly, had the Framers limited the people’s right to assemble only for the purpose of petitioning government, the right would have been made essentially worthless.<sup>149</sup> Furthermore, because assembly is so innately tied to speech—as Representative Sedgwick famously noted<sup>150</sup>—handcuffing the rights of assembly and petition to one another might have served to gut a large portion of our most basic First Amendment freedoms.

### C. The Debate over Instructing Representatives and the True Meaning of the Assembly Clause Revealed

At the conclusion of the debate over “assemble and,” and after a very brief mention of “their common good,” Representative Thomas Tucker of South Carolina, who supported enumerating the right of assembly<sup>151</sup> by noting both Virginia and North Carolina had proposed the assembly language, also suggested adopting those states’ separate

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147. See *id.* at 571 (describing how “the kinds of marginalized and disfavored groups that have sought refuge in” the Assembly Clause would likely have been suppressed by majority interpretations of the common good).

148. See *id.* at 572 (“[I]f the right of assembly encompassed only the common good from the perspective of the state, then its use as a means of protest or dissent would be eviscerated.”). Interestingly, at least thirty-three state constitutions expressly limit the right of the people to assemble to those assemblies organized for “the” or “their” common good. See Smith II, *supra* note 10, at 377–82 (listing the relevant language that protects the right of assembly in all fifty state constitutions). California, for example, protects the right of the people “to freely assemble together to consult *for the common good.*” CAL. CONST. Art. I, § 3 (emphasis added). State constitutions may offer more protection for individual rights than does the federal constitution—but never less. See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1974) (holding that a state may, if it so chooses, “adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution”). At least one state constitution—that of Utah—appears to enumerate an additional protection than does the First Amendment by enshrining a right to “protest.” UTAH CONST. Art. I, § 1. Because language that limits the assembly right to “the” or “their” common good narrows the right as described in the federal Constitution, it may be the case that the language meant to protect the freedom of assembly in at least thirty-three state constitutions instead places a prior restraint on the right of people to assemble in those states that is in direct conflict with the federal Constitution. Such limiting language in any state constitution may be unconstitutional.

149. See Inazu, *supra* note 9, at 572.

150. See Part IV a–b.

151. See VEIT, BOWLING, & BICKFORD, *supra* note 123, at 160.

and—he felt—more “material” proposals to include an individual right “to instruct their representatives.”<sup>152</sup> The proposal gathered only modest support, and Madison referred to it as a vague and dubious one not worthy of inclusion in a Bill of Rights.<sup>153</sup>

While some scholars have conflated the debate over “assemble and” with the debate over instructions,<sup>154</sup> the debates and the issues they raised were, for the most part, completely separate.<sup>155</sup> The one area of overlap concerns the comments of Representative James Jackson of Georgia. While commenting during the instruction debate, Jackson offered perhaps the clearest statement uttered in the First Congress on the true meaning of the Assembly Clause. Reports note that Jackson declared he

[w]as in favor of the right of the people, to assemble and consult for the common good, it had been used in this country as one of the best checks on the British legislature in their unjustifiable attempts to tax the colonies without their consent. America had no representatives in the British parliament . . . yet they exercised the power of consultation to good effect.<sup>156</sup>

The instruction language failed. In the end, with debate over the matter inside the House complete, the body’s vote to affirm the final language of what became the First Amendment was “anticlimactic.”<sup>157</sup>

Rep. Jackson’s statement—that colonists wielded the right of assembly as a tool against British oppression—seems to be a clear reference to the vital role of taverns in facilitating and establishing the assembly right.<sup>158</sup> Additional support for the contention that Rep. Jackson was referring to the elemental role of tavern assembly

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152. *See id.*

153. *See id.*

154. *See* ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 138 (1997) (claiming that Anti-Federalists in Congress “sought to use the protection of the ‘right of the people peaceably to assemble’ as the means to subject representatives to binding ‘instructions’”).

155. *See, e.g.*, Anderson, *supra* note 2, at 478–79.

156. *See* ANNALS, *supra* note 130, at 139–40 (emphasis added). Jackson here links the meaning and power of the freedom of assembly to non-legislative efforts against the Crown’s “unjustifiable attempts to tax the colonies” in the years preceding the Founding. *Id.* The assemblies Jackson refers to as checks on the Crown were centered squarely in taverns. *See supra* Parts I–IV. The legislative history of the Assembly Clause therefore supports the fundamental link between the Clause, tavern assembly, and tavern talk.

157. *See e.g.*, Anderson, *supra* note 2, at 479.

158. *See id.*

appears in later remarks by Rep. Jackson during debate in Congress over a bill that would initiate a federal excise tax on liquor.<sup>159</sup> Rep. Jackson was the first and most forceful and frequent opponent of the bill, blasting it as an “unequal, unpopular, and oppressive” tax<sup>160</sup> reminiscent of “odious” British acts,<sup>161</sup> and warning it would put out of the reach of many southerners “the only luxury they enjoy, that of distilled spirits.”<sup>162</sup> Jackson then cited the writings of Rev. Jedidiah Morse, a Massachusetts clergyman and author,<sup>163</sup> who Jackson said had written that “grog is a necessary article of drink in the Southern States.”<sup>164</sup> Morse’s actual words to this effect are that in South Carolina the “principal drink is punch, or grog.”<sup>165</sup> Unlike beer or wine (which were served in individual portions), punch was a communal drink served out of large bowls.<sup>166</sup> In fact, punch was often served in the South in establishments known as “punch houses”—a term that served as a cognate for taverns.<sup>167</sup> As with taverns, punch houses had served as centers of anti-British assembly and revolutionary action.<sup>168</sup> Hence, Rep. Jackson’s defense in Congress of

159. *Duties on Spirits*, in 2 GALES & SEATON’S HISTORY OF DEBATES IN CONGRESS 1890 (Gales & Seaton, eds.1834).

160. *Id.*

161. *Id.*

162. *Id.* at 1891. Rep. Jackson also attacked the College of Physicians, a group that included Founding Father Benjamin Rush and which had sought to limit consumption of ardent spirits. *Id.* at 1890, 1921 (deriding the College as “gentlemen of the squirt[] who . . . had attempted to squirt morality and instruction into the minds of members” of Congress).

163. *Id.* at 1890. *See also e.g.*, WILLIAM O. FOSTER, JAMES JACKSON: DUELIST AND MILITANT STATESMAN, 1757–1806, at 78 (2009) (noting the “Mr. Morse” that Jackson refers to in his remarks in Congress is Rev. Jedidiah Morse).

164. *Id.* at 1890.

165. *See* WILLIAM GUTHRIE, A NEW SYSTEM OF MODERN GEOGRAPHY 539 (1795). Rev. Morse wrote the portions of the book covering the United States. *See id.* at iii (“The [U]nited [S]tates of America occupy [more than 300 pages] in the present volume . . . . The [R]ev. Jedidiah Morse, author of the *Universal Geography*, has furnished the principle part of it.”).

166. *Accord* HOLLAND, note 99 and accompanying text.

167. *See, e.g.*, *An Act for Regulating Taverns and Punch Houses*, No. 203, in 2 THE STATUTES AT LARGE OF SOUTH CAROLINA: ACTS, 1685–1716, at 198 (Thomas Cooper ed. 1703); *An Act to Amend and Continue “An Act for the Establishing and Regulating Patrols,”* No. 187, in DIGEST OF THE LAWS OF GEORGIA 153 (1768).

168. *See, e.g.*, THOMAS BRADBURY CHANDLER, A FRIENDLY ADDRESS TO ALL REASONABLE AMERICANS, ON THE SUBJECT OF OUR POLITICAL CONFUSIONS 34 (1774) (discounting the decision by some in Georgia to call for the colony to join other American colonies in protesting against unjust British taxation because, the loyalist writer claimed, the action was the result of “a company of hot-headed fellows, met together in a tavern”). That tavern may have been Tondee’s Long Room—which in any event was the place where a year later, in 1775, Georgians did assemble and adopt the recommendations of the



punch as a *necessary* drink of the southerner is in no uncertain terms a defense of the rights of southerners to assemble in the place where they consume punch: taverns (punch houses).

#### IV. From “Tavern Talk” to “the right of the people peaceably to assemble”

Too often modern scholars ignore the freedom of assembly.<sup>169</sup> Those who do consider it tend to envision it as a means of protecting groupthink—“where individuality itself is superseded”—rather than considering it as a valuable protection for individuals choosing to gather in communities “where the company of other people serves primarily as a source of moral examples, and morally helpful approval and disapproval, to each individual . . . .”<sup>170</sup> Enlightenment thinkers who influenced the Founders, including Adam Smith, embraced this latter definition of community, “one with bonds weak enough to preserve freedom but strong enough to allow for morally fruitful interaction . . . .”<sup>171</sup>

Even modern scholars who *do* focus on the origins of the right of assembly nevertheless tend to overlook the pre-Revolutionary, Revolutionary, and pre-ratification American origins of the right.<sup>172</sup> It

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so-called “hot-headed fellows.” See SPENCER BIDWELL KING JR. & SPENCER BIDWELL KING, *GEORGIA VOICES* 59 (reprint 2010) (1966).

169. See Tabatha El-Haj, *The Neglected Right of Assembly* 56 U.C.L.A. L. REV. 543, 565 (2009) (noting that precious little scholarship discusses the First Amendment right of assembly); Inazu, *supra* note 9, at 566 (lamenting that the freedom of assembly “has been reduced to a historical footnote”).

170. See Sam Fleischaker, *Insignificant Communities*, in *FREEDOM OF ASSOCIATION* 273, 275 (Amy Gutmann ed., 1998). The former category includes “crowds . . . rallies and demonstrations,” while the latter includes “several people making dinner, perhaps chatting now and then, or . . . the experiences ‘shared’ by people in a bar, a small social lounge, a cocktail party or a public square.” *Id.* at 273. The argument that the right to assemble exists merely to support an attendant right to petition has thankfully also been discounted. See Jarrett & Mund, *supra* note 4, at 10 (“[T]he right of assembly is a distinct, separate[,] and independent right.”); El-Haj, *supra* note 169, at 560 n.73 (“For, it cannot be supposed that [the people] have a right to assemble for the purpose of petitioning only. . . .” (internal citation omitted)).

171. See Fleischaker, *supra* note 170, at 279. *Contra* ROUSSEAU & WALTER, *supra* note 76.

172. See, e.g., El-Haj, *supra* note 169, at 554 (focusing on the period “*from the founding through the nineteenth century*” (emphasis added)); Inazu, *supra* note 9, at 570 (“I begin by examining the constitutional grounding of assembly in the Bill of Rights.”). *But see generally* ZICK, *supra* note 16 (grounding his argument in American colonial times, but largely ignoring the role of taverns and instead ascribing development of “the revolutionary spirit and cause” to assemblies which took place in “rudimentary streets and town squares”).

is perhaps for this reason that the freedom of assembly is so often misconceived or given short shrift. Among jurists, freedom of assembly today means little more than freedom of speech or freedom of association, and refers most often to an “occasional gathering of temporary duration that often takes the form of a protest, parade, or demonstration.”<sup>173</sup> But assembly is its own protected act, and is neither merely speech (a “moment of expression”) nor association (“an expressionless group”).<sup>174</sup>

Conversely, many modern commentators have noted the absolutely essential nature of taverns in fostering and advancing the cause of the Revolution, and have described in great detail and reverential tones the fundamental nature of such assemblies.<sup>175</sup> None so far, however, have seen fit to make the connection between the First Amendment’s Assembly Clause and the situs of such pre-Revolutionary and Revolutionary-era assembly: in the everyday “semi-public” gatherings that took place in taverns in nearly every colonial American city and town.<sup>176</sup>

Assembling is both an act and a natural human tendency.<sup>177</sup> On a biological level, colonial taverns served as the best place to practice

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173. See Inazu, *supra* note 9, at 566 (noting that courts consider these to be the “most pristine and classic form” of assembly) (internal citation omitted)).

174. See *id.* at 567.

175. See Patrick M. Garry, *Confronting the Changed Circumstances of Free Speech in a Media Society*, 33 CAP. U. L. REV. 551, 561 (2005) (describing taverns, public squares, and “how speech operated during the constitutional period”); DAVID WALDSTREICHER, IN THE MIDST OF PERPETUAL FETES 26 (1997) (“[T]averns were far more than places to imbibe. Men repaired there to read the newspapers and discuss politics: they were ideal sites for these public acts of affiliation.”).

176. Ignoring taverns as situs of the First Amendment is akin to enumerating in the Bill of Rights an individual right “to go to where everybody knows your name”—a place where everyone’s “troubles are all the same”—without acknowledging that the situs of that right is *Cheers* or, more generally, a tavern. See Gary Portnoy, *Theme from Cheers (Where Everybody Knows Your Name)* (1982). Many of the rights enumerated in the Bill of Rights have an implicit or explicit situs. For example, the First Amendment’s implicit situs (and corresponding rights) include the home (religion, speech, assembly), houses of worship (religion, speech, assembly), and the public square (religion, speech, assembly, press). The situs of the Third Amendment is explicit: the “house.” U.S. CONST. amend III. The situs of the Fourth Amendment, meanwhile, are one’s “person, house, papers, and effects.” U.S. CONST. amend IV. I use the term “situs” here to mean much the same as what Thompson refers to as the “topographical” nature of the tavern as a public space. See THOMPSON, *supra* note 14, at 392.

177. See Jarrett & Mund, *supra* note 4, at 4 (“Man is a gregarious animal. Since earliest times men have assembled together[.]”).

this inclination<sup>178</sup>—permitting people to assemble with other members of the species. The concept of *place* is a fundamental aspect of the freedom of assembly.<sup>179</sup> And the tavern was *the* place in colonial America that equalized assembly rights more than any other.<sup>180</sup> Taverns were, after all, the “most egalitarian contexts for gatherings”<sup>181</sup> and served as “the most enduring, most easily identifiable, and most contested body of public space in eighteenth-century America.”<sup>182</sup> Furthermore, they “promoted political argument and distributed political literature in ways unmatched by any other mainland colonial institution beyond government institutions themselves.”<sup>183</sup> The implications of the fact Revolutionary War-era taverns served as the period’s most essential, vital, and important space simply cannot be overstated.

The setting, context, and place in which informal institutions reside—what Alan Ryan labels “localness”—together represent the means by which society can reach certain important but unintended ends.<sup>184</sup> Each component—the localness, the informal institution, the means, and the organic nature of the ends—is crucial to the whole.<sup>185</sup> And the tavern, Ryan contends, is the finest embodiment of the whole.<sup>186</sup>

178. See THOMPSON, *supra* note 14, at 16 (“Almost all human communities have some body of public space.”). See also notes 81–82 and accompanying text.

179. See ZICK, *supra* note 16, at 8–9 (arguing that courts should consider “place” to be a “fundamental aspect of assembly” (emphasis in original)).

180. See, e.g., THOMPSON, *supra* note 14, at 17. (“In social and cultural terms, Philadelphia’s public space, above all the tavern, brought together rich, poor, and middling, Quaker, Presbyterian, and Anglican.”).

181. See CONROY, *supra* note 19, at 205 n.26.

182. See THOMPSON, *supra* note 14, at 16.

183. See BUTLER, *supra* note 13, at 172.

184. See Alan Ryan, *The City as Site for Free Association*, in FREEDOM OF ASSOCIATION 322–23 (Amy Gutmann ed., 1998).

185. See *id.* at 323.

186. See *id.* As Ryan writes, assembling must be organic to be effective and meaningful, as in a tavern:

Telling people to go to such and such a café in order to promote political cohesion and political activity is like telling people to be happy; there are many things they can do that will make them happy, but aiming directly at being happy is not one of them. Have a pub or café in the middle of shops that people have to use in order to get the food for dinner is an infinitely more plausible route. People who meet in the café are then likely to be drawn into conversation, and to discover that they do (or do not) have shared interests, shared political opinions, or whatever else.

*Id.* Helpfully, Fleischaker also applies his low-level/high-level analysis, *supra* note 170, to a hypothetical tavern scene:

Though privately owned, colonial American taverns were licensed by the state and were used by public and private actors to carry out many state functions.<sup>187</sup> Looked at by a court today,<sup>188</sup> colonial taverns might be considered something between quasi-public or public spaces that performed “quasi-public function[s].”<sup>189</sup> These spaces were neither wholly public nor private,<sup>190</sup> but represented “a distinctive setting”<sup>191</sup> that was much more like the former than the latter. A tavern space was, therefore, a private one shared with the public; and a “[p]ublic space was shared space.”<sup>192</sup> That taverns were “composed of private individuals who chose to assemble [there] as

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As far as its owner is concerned, an English pub has a clear high-level purpose: alcohol consumption. But the owner's purpose usually fails to dominate what people actually do there. *If* the people coming to a pub pursue alcoholic consumption with . . . single-mindedness . . . eventually only very hard drinkers show up. Where this is not the case, the owner's high-level purpose is furthered but not necessarily shared by the customers, who often indeed have no high-level interest in coming to the pub at all. They may regard their investments in their family or job . . . as of much greater importance. *Precisely for this reason*, they may find a kind of relief in coming to the pub. Stripped of what they regard as their really important concerns, they can talk to people . . . without the pressure of wondering whether or how all this fits into their higher-level ends. Sociability under such circumstances is often the most pleasant kind of sociability, and also a sociability where people are willing to open up, temporarily at least, to hearing about other ways of living, to receiving criticism of their political, moral, or religious positions, to playing with other ends they might take on, ends they might adopt but have so far resisted adopting, ways of life they might regard as reasonable alternatives to their own.

*Id.* at 293 (emphasis in original).

187. *See, e.g.*, FIELD, *supra* notes 42 and 46 and accompanying text.

188. *See generally* ZICK, *supra* note 16. Taverns were “public places” in colonial times. *Id.* at 27. Like colonial taverns, today's shopping malls sometimes offer both bar and restaurant space and space dedicated to government functions (like postal services). *See generally id.*

189. *See* THOMPSON, *supra* note 14, at 15. Thompson notes the need “to develop an understanding of the peculiarities of the space enclosed within public houses [taverns].” *Id.* Certainly any discussion of “public” or “semi-public” space must begin with a description of what makes that space so. *Id.* Taverns were not publicly “plan[ned] in the same way as public squares” but were, rather, private establishments licensed and “strictly regulated” by the local government. *Id.* These regulations sometimes included beverage price controls and prohibitions on prostitution and habitual drunkenness. *Id.* *But see* RUSSELL, RENEGADE, *supra* note 12, at 5–11 (painting colonial America as a booze-soaked, orgiastic society).

190. El-Haj, *supra* note 169, at 555–56 & n.54 (2009) (referring to “semipublic tavern gatherings” (internal citation omitted)).

191. THOMPSON, *supra* note 14, at 16.

192. *See id.* at 17.

self-consciously ‘public’ figures”<sup>193</sup> meant that tavern talk came to evidence a scrupulously constitutional situs of the right to assembly.

Thompson discusses the “topographical” nature of the tavern as public space, comparing taverns favorably to a city’s “unapportioned lands, including the banks and waters of its rivers, the town’s squares, public landing stages [like docks], and the city’s roads, bridges, and streets.”<sup>194</sup> Such areas comprise what are traditionally known as the “commons” of society. But while a public square like Boston Common, for example, was one place where colonists tested their freedom to assemble, taverns were where people assembled on a much more regular basis to discuss political and other matters on the most egalitarian level<sup>195</sup>—and where the Founding Fathers and everyday colonists alike assembled to argue over and consider the ideas that gave birth to the nation.

The “speech and action” that dominated colonial taverns “were shaped by an awareness of the tavern as public space.”<sup>196</sup> Colonists’ beliefs about the tavern as a public or semi-public space informed their speech and behavior therein.<sup>197</sup> A person opting “to drink in a public house, in preference to the home, workplace, or the city’s streets [chose] to make particular statements and to enact and assess values that seemed distinctive to them.”<sup>198</sup> The colonial tavern was a “public stage”<sup>199</sup> in which colonists “cast themselves . . . as performers and judges of public speech and behavior.”<sup>200</sup> The ultimate draw of the tavern was using this unique situs to assemble for the purpose of debating and discussing important social, political, economic, and

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193. *See id.* at 115.

194. *Id.* at 16. Timothy Zick, though he largely does not consider the role or place of taverns in the development of the freedom of assembly, does explore what he calls an “expressive topography [that] has been forged by a variety of forces and events from Revolution to the present day.” *See ZICK, supra* note 16, at 25.

195. Pennsylvania taverns, for example, were known for their “egalitarian” atmosphere. *See THOMPSON, supra* note 14, at 17.

196. *See id.* at 16–17.

197. *See id.* at 16. (“Public spaces were those, like taverns, in which colonial Americans believed that neither the laws and usages of private property, private meetings, and private societies nor those of public property, public gatherings, and public associations fully applied.” (internal citation omitted)).

198. *See THOMPSON, supra* note 14, at 17. *See also* Smith II, *supra* note 10, at 375 (noting that value- and norm-oriented movements are two prominent categories of assembly).

199. *See CONROY, supra* note 19, at 158 (“[T]averns became a public stage upon which the colonists resisted, initiated, and addressed changes in their society. Indeed, in these houses men gradually redefined their relationships with figures of authority.”).

200. *See THOMPSON, supra* note 14, at 17.

cultural matters.<sup>201</sup> As a result, booze-filled gatherings in taverns were where shared American values were forged and affirmed.<sup>202</sup>

This dual role played by colonial taverns—as a place to assemble for the purpose of drinking and as a place to assemble for the purpose of debating revolutionary politics—evinces two distinct levels of “ends.” Fleischaker calls lesser hierarchical priorities “low-level ends.”<sup>203</sup> He notes that ends are individualistic and subjective: an Englishman might “eat to live while the French live to eat,” and in this way eating is a low-level end for the Englishman and a high-level end for the Frenchman.<sup>204</sup> In this same way, tavern-going in colonial times was probably as much about drinking for some as it was about assembling to discuss political issues for others. But for all, drinking was a low- or high-level end, and for all, assembling to discuss political issues was either a low- or high-level end.<sup>205</sup>

Compared to speech exercised throughout general society, constraints on speech were relaxed in taverns.<sup>206</sup> This fact is dramatic because it shows that tavern speech—perhaps with the exception of speech uttered in the home—was colonial speech at its most free. Speaking freely under lax authority in taverns led to “open and unguarded expression” of opinions and allowed colonists of various classes to interact more freely.<sup>207</sup> The “relatively free public expression” within taverns fostered “a realm of discourse that existed outside the effective cultural control of both government and private or domestic authority.”<sup>208</sup> Since movements, to succeed, require open assembly,<sup>209</sup> the thoroughly constitutional vision of open assembly that tavern talk evidenced helped lead to “political as well as social change” in the colonies.<sup>210</sup>

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201. *Id.*

202. *See* CONROY, *supra* note 19, at 6.

203. *See* Fleischaker, *supra* note 170, at 291.

204. *See id.*

205. *See id.* By analogy, consider the eponymous bar in the hit 1980s NBC series *Cheers*. *See supra* note 176 and accompanying text. George Wendt’s character, Norm, was portrayed as a drink-first patron (his high-level end), and friend Cliff Claven (portrayed by John Ratzenberger) was portrayed as frequenting the bar chiefly for the camaraderie and conversation he found there (his high-level end). For Norm, conversation was a low-level end, while for Cliff drinking was a low-level end.

206. *See* CONROY, *supra* note 19, at 51. *See also* notes 217–291 and accompanying text.

207. CONROY, *supra* note 19, at 2.

208. THOMPSON, *supra* note 14, at 115.

209. *See* Smith II, *supra* note 10, at 376 (1968).

210. *See* THOMPSON, *supra* note 14, at 19.

The limits of free speech in colonial taverns seem most often to have been put to the test by men drunk on politics and on rum or ale. Vitriol, never in short supply in colonial taverns,<sup>211</sup> combined with alcohol to ensure tavern talk often pushed limits.<sup>212</sup> And tavern talk did in fact *have* limits—at least in terms of what authorities would permit.<sup>213</sup> (Speech outside taverns also sometimes reflected both the spirit—and spirits—of the tavern.<sup>214</sup>)

The British knew exactly what sort of scheming was taking place among those assembled in America's taverns, as these remarks made in Parliament just prior to the Revolutionary War make clear:

Shall the public creditors be unpaid, and the army and navy want clothes and bread, because the drunken and the ignorant . . . mechanics and rustics have been treated in one place with beer . . . [and] have been made dupes to the crafty and the factious, signed papers that they have never read, and determined questions that they do not know; roared against oppression and tyranny, with licentiousness that makes liberty

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211. See LARRY D. ELDRIDGE, *DISTANT HERITAGE* 70 (1994) (“Taverns offered a fertile environment for vilifying authority.”).

212. One colonial official in Georgia referred to the effect taverns had in loosening curbs on speech that might appear elsewhere—or in mixed company—as “that Liberty of invective Speech.” See William Stephens, *A Journal of the Proceedings in Georgia*, in 4 *Supp. THE COLONIAL RECORDS OF THE STATE OF GEORGIA* 5, 34 (1908). Thinking his presence might result in the exercise of some “[r]estraint,” that same colonial official sent a “trusty Observer” to Penrose’s tavern to spy on tavern-goers there. *Id.*

213. In 1683 Colonial governor William Penn presided over a hearing for Nicholas Moore, “President to ye society of free Traders in” Pennsylvania, who was charged with having uttered words in a tavern accusing Penn and others of treason. See SAMUEL HAZARD, 1 *PENNSYLVANIA PROVINCIAL COUNCIL, COLONIAL RECORDS OF PENNSYLVANIA* 58–59 (1852). Moore escaped with a warning (“[H]is Discourse being unreasonable and imprudent, he was exhorted to prevent the like for the future.”). *Id.* at 59. Other examples of the limits of tavern talk abound. In 1666 a “bisket baker of Boston” who was serving as a constable tested the limits of tavern speech, invoking his power to arrest “the King himself” if the need should arise. ELDRIDGE, *supra* note 211, at 12. A court found his speech merely libelous (a misdemeanor) rather than treasonous (a felony punishable by death). *Id.* at 12–13. That same year, a Massachusetts court revoked the license of a tavern owner who was known to be a “chronic malcontent . . . and speaker of seditious words.” *Id.* at 105. The court found the man, Abraham Corbett, guilty of sedition “and of ‘entertaining in his [tavern] house such persons as are his accomplices in these his proceedings.’” *Id.*

214. In 1666 the Maryland legislature heard the case of one William Erbery on charges of sedition. ELDRIDGE, *supra* note 211, at 92. While before the legislature, a drunken Erbery saw fit to label the “whole house a turdy shitten assembly”—a brilliant sentiment no doubt just as applicable to many of America’s elected bodies today—which drew him several dozen lashes. *Id.*

blush, and staggered home with impunity, swearing they were in danger of slavery . . . ?<sup>215</sup>

Even knowing this, the British were nonetheless powerless to stop the so-called drunken rustics from waging war and winning independence.<sup>216</sup>

Colonial taverns served the classic First Amendment role of breeding an “alert, active citizenry.”<sup>217</sup> They not only shaped discourse but “were *central to the formation of public opinion.*”<sup>218</sup> They competed with one another based on the quantity and quality of news they provided to customers who might not be able to afford pamphlets and books.<sup>219</sup> In doing so, taverns expanded the audience for information and, consequently, enriched the minds of the everyday colonist.<sup>220</sup> By the 1770s, taverns had become the institutional base for disseminating ideas, which encouraged the ordinary colonists who frequented them to seize greater political roles.<sup>221</sup> The political debate these colonial taverns facilitated elevated their importance as the situs of the freedom of assembly.<sup>222</sup>

215. 16 THE PARLIAMENTARY DEBATES FROM THE EARLIEST PERIOD TO THE YEAR 1803, A.D. 1765–1771, *supra* note 33, at 759.

216. See BUTLER, *supra* note 13, at note 40 and accompanying text.

217. See CONROY, *supra* note 19, at 254 (“[T]averns were where republican concepts gripped men’s imaginations and unleashed new levels of participation.”). The notion of taverns as breeding grounds for an active and alert citizenry echoes scholarly analyses of the purposes behind the First Amendment’s speech and assembly clauses. See Unsigned, *Developments in the Law—State Action and the Public/Private Distinction V. Specialty License Plates and the First Amendment*, 123 HARVARD L. REV 1291, 1301 (2010) (noting the First Amendment “is vital to a functioning democracy because citizens must be informed of the state’s proposed practices and policies and free to debate their merits in order to participate rationally in the political process”); El-Haj, *supra* note 169, at 566 (“[T]he right of assembly was meant to enable forums for collective consideration of government action—forums for the formation, reconsideration, and consolidation of preferences, not just their expression.”). Such is also the purpose of the free press. See, e.g., *New York Times v. United States*, 403 U.S. 713, 728 (1971) (“[T]he only effective restraint upon executive policy and power . . . may lie in an enlightened citizenry . . . . For this reason . . . a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.”).

218. See CONROY, *supra* note 19, at 255 (emphasis added).

219. See *id.* at 176.

220. See *id.*

221. See CONROY, *supra* note 19, at 308–09.

222. See, e.g., GARY B. NASH, *THE URBAN CRUCIBLE* 86–87 (1979) (describing how a wealthy Bostonian, Elisha Cooke, Jr., was able to launch the Boston Caucus, the country’s “first urban political ‘machine,’” in the early eighteenth century in large part due to his tenacious drinking and because he “us[ed] the town’s taverns as political nodal points, and disseminate[d] political literature that would politicize the community”).



Tavern owners “were active in leading the resistance from the outset.”<sup>223</sup> As the Revolution loomed, those agitating for liberty chose to hold meetings in taverns for the express purpose that others might listen to and be influenced by their speech.<sup>224</sup> Their speech, they hoped, was speech that wanted to be heard. They knew, though, that it was speech that needed to be heard for it to have effect.

Even after the Revolution, colonial governments “did not act to suppress consumption [of alcohol], because it was still entwined with political discourse.”<sup>225</sup> Consequently, the role of taverns in promoting the freedom of assembly by no means ended with the birth of the nation. The extent to which taverns were entwined with this right—even at the very moment of America’s conception—is apparent in a 1788 report on the ratification of the federal Constitution. When news reached Albany, New York that Virginia had ratified the Constitution in 1788, both federalists and anti-federalists (naturally) assembled in taverns for the purpose of expressing their sentiments:

On Friday morning the antifederalists assembled at Hilton’s tavern, and at nine o’clock A.M. formed in procession . . . and marched to the fort, where the publicly burnt the new Constitution, gave three cheers, and returned to Hilton’s . . . .

A number of the most respectable federalists of the city and strangers dined at the city tavern, where it was agreed that they would that afternoon testify their joy, on the important news received from Virginia—for this purpose a beautiful Tree was procured . . . . At 6 o’clock it moved from the city tavern (the principal federalists bearing the constitution and the federal tree) . . . to the fort; immediately on their arrival the federal tree was erected on the spot where the constitution had been burnt, ten cannons were fired and the air echoed with the loud huzzas and acclamations of the populace . . . . [T]he procession again began their march, when they received a volley of stones from the Antifederalists . . . . [A]nd then (if we may be allowed the expression) the action began, and continued for the space of 15 to 20 minutes, when the Antifederalists were driven from the ground . . . .<sup>226</sup>

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223. See CONROY, *supra* note 19, at 256.

224. See THOMPSON, *supra* note 14, at 183 (“By choosing to stage a public meeting in such a private setting, they sought to legitimate the political views of one view of [the] population by reference to the appearance of fully public discussion.”).

225. See CONROY, *supra* note 19, at 314.

226. CONNECTICUT COURANT & WEEKLY INTELLIGENCER, July 14, 1788, at 3.

While these battles do not present a placid or stylized view of tavern assemblies, and demonstrate elements of riotous assembly of the sort that would not find protection in the Bill of Rights, neither do many of our most celebrated Supreme Court cases dealing with First Amendment issues.<sup>227</sup> Speech among the assembled—in a tavern or public square—can be ugly, combative, partisan, tedious, and hateful. Because it was often bold and impudent and risky, tavern talk helped lay the framework for establishing and testing the outer boundaries of speech under what would become the First Amendment.

After the Bill of Rights was ratified, tavern assemblies became part of a larger legal and political struggle in the early 1790s, when Republican groups opposed to President George Washington and the Federalists challenged the administration's policies.<sup>228</sup> The opposition groups, who counted among their members some of the most outstanding Americans,<sup>229</sup> came to be known as Democratic-Republican societies.<sup>230</sup> These societies convened not only to learn about<sup>231</sup> and challenge the president's policies,<sup>232</sup> but also to defend their members' very rights to assemble peaceably.<sup>233</sup>

The largest of these societies, the Democratic Society of Pennsylvania,<sup>234</sup> met regularly in Philadelphia at Leshner's Tavern.<sup>235</sup>

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227. See, e.g., *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977) (upholding the right of neo-Nazis to assemble on and march through the streets of Skokie, Illinois, which has a large Jewish population).

228. See Inazu, *supra* note 9, at 577.

229. See, e.g., LINK, *supra* note 70, at 32 (describing prominent Founding Fathers who joined and led the societies, including James Monroe, George Mason, and Patrick Henry).

230. See *id.*

231. See DONALD H. STEWART, *THE OPPOSITION PRESS OF THE FEDERALIST PERIOD 17* (1969) (“[A] Federalist complaint was that many Republicans derived their political views from newspapers they read in taverns.”).

232. See *Papers of the Republican Society of Portland, 1794–1796*, 16 *NEW ENGLAND Q.*, 299, 300 (Eugene P. Link ed., 1943) (hereinafter “*Papers*”) (“The societies did much to inform the people through town meetings, debates, and political discussions in the taverns.”), available at <http://www.jstor.org/stable/361644>.

233. See Inazu, *supra* note 9, at 577–78. Inazu's focus on what he calls three key characteristics of the role of assembly in America is particularly illustrative in light of his example here. Inazu writes that 1) those who have most needed and relied on the right have assembled in opposition to government; 2) those who traditionally invoke assembly rights have done so in the context of establishing or defending a public “space separate from government”; and 3) assembly is itself an expressive act. See *id.* at 570. See also JOHN D. INAZU, *LIBERTY'S REFUGE* 21 (2012) (noting what he calls “three themes of assembly: the dissenting, the political, and the expressive”). This new book by Inazu, which expands on his earlier writings on the freedom of assembly, is a rich addition to the literature. See generally *id.*

234. See *id.* at 577.

This was the norm, as both other Democratic-Republican societies and the many who rose to oppose their ranks also formed<sup>236</sup> and met<sup>237</sup> in taverns—albeit separate ones.<sup>238</sup> Ultimately, in the face of wilting criticism from President Washington and other Federalists, the societies faded from the public sphere.<sup>239</sup>

### Conclusion

The freedom of assembly is the bulwark against “incursions” by the state on the rights of individuals to gather in groups.<sup>240</sup> In this manner the freedom of assembly is what checks government attacks on the right itself.

Taverns were the fundamental centers of colonial assembly, where colonists read and shared printed tracts, debated news and action, organized boycotts, and planned rebellion. The First Amendment’s protection of the freedom of assembly is the direct result of this tavern talk—a thoroughly constitutional mishmash of both mundane and vital discourse between and among Americans in taverns in the period immediately before, during, and after the Revolutionary War and the nation’s founding.

The origin and key situs of the freedom of assembly, therefore, is colonial taverns. In taverns and tavern talk lie the origins of the Assembly Clause.

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235. See CHARLES BROCKDEN BROWN, PHILIP BARNARD, & STEPHEN SHAPIRO, *supra* note 81, 23–24 & n.8 (2008).

236. See PHILIP SHELDON FONER, *THE DEMOCRATIC-REPUBLICAN SOCIETIES, 1790–1800: A DOCUMENTARY SOURCEBOOK OF CONSTITUTIONS, DECLARATIONS, ADDRESSES, RESOLUTIONS, AND TOASTS* 143 (1976) (reprinting the details of a meeting that took place at Mr. Seabury’s Tavern in Newark, New Jersey for the purpose of forming a society).

237. See, e.g., LINK, *supra* note 70, at 57 (describing how one savvy and well-informed “tavern owner attracted the news-hungry to stop frequently for ‘a drap’ of whisky and made his quarters the ideal spot for democratic societies”).

238. See *Papers*, *supra* note 232, at 302 (“Usually the rendezvous was a special room in or adjoining a tavern. The Federalists met at one tavern in a town, the Republicans at another.”). *But see* FONER, *supra* note 236 at 145–44 (describing the meeting to form a society as a contentious one in which Federalist opponents not only greatly outnumbered Republican sympathizers but also managed to defeat the Republican move to form a society).

239. See Inazu, *supra* note 9, at 578–81.

240. See *id.* at 568.

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