

# **The Right to Peacefully Assemble**

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Research Paper

...That it is the right of the subjects to petition the king  
and all commitments and prosecutions for such petitioning are illegal...<sup>1</sup>

The English Declaration of Rights was an agreement between the Parliament of Great Britain and the King to protect the **natural** rights of Englishmen. One year later, John Locke in the *Two Treatises on Government* went further and stated that if the government infringed on the rights of the people of life, liberty and property, then the people under the government had the right to remove that government. Locke went on to define the rights of Englishmen, which included the right to speak freely, practice the religion of their choice, peacefully assemble in protest of government abuse and to write freely about these abuses.<sup>2</sup> Of course, any student of the history of the early American republic knows the impact that Locke had on the revolutionary movement of the Americans in the mid-1700s.

Reading Thomas Jefferson's *Declaration of Independence* one can see the obvious impact Locke had on the Americans. However, after receiving their independence from Britain, the Americans, knowing no other example of government, drew upon the philosophy of Britain and its laws. At first fearing an overpowering central government, the early American republic was governed by the "Articles of Confederation," which kept large amount of powers, especially in the area of taxation, in the control of the local governments, but this government soon became ineffective for the infant nation. The leaders of the country met and devised a new government in 1787, which gave larger powers to a central government. Despite some of the setbacks of the Confederation government, many people in America feared a return to an oppressive

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<sup>1</sup> "The English Declaration of Rights (1689)," Sources of the Western Tradition, edited by Marvin Perry, (Boston: Houghton Mifflin Company, 1991), Page 29.

central government like the one the country had rebelled from in the late 1770s. During the debates for ratification, leaders asked for a Bill of Rights to be added to the Constitution in order to protect the rights of the Americans and prevent the frequent rebellions that Locke had predicted in an oppressive government. Patrick Henry was the most outspoken leader in favor of a Bill of Rights.

All nations have adopted this construction – That all rights not expressly and unequivocally reserved to the people, are impliedly and incidentally relinquished to rulers; as necessarily inseparable from the delegated powers. It is so in Great Britain: For every possible right which is not reserved to the people by some express provision or compact, is within the King’s prerogative. It is so in that country which is said to be in such full possession of freedom.<sup>3</sup>

After the Constitution was ratified in 1788, James Madison went to work on getting the amendments that leaders such as Henry were calling for, and on December 15, 1791, ten amendments were added to the new constitution. The first amendment read, “Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the Government for a redress of grievances.” As if reading directly from the English philosophers, the liberty of the American people was protected from a Congress infringing upon the *natural* rights of the people of the republic.

The clause of the right of the American people to peacefully assemble is a right that many Americans take for granted. On April 25, 2000 Cuban-Americans held many protest rallies over the central government’s forceful recovering of Elian Gonzalez. Most Americans did not even question whether or not the people in Miami had the right to do

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<sup>2</sup> Locke, John “Two Treatises on Government (1690),” *Ibid.*, 59-61.

<sup>3</sup> Henry, Patrick, “A Bill of Rights is Necessary for Ratification, 16 June 1788,” *The Creation of the Constitution*, edited by Bruno Leone, (San Diego: Greenhaven Press, 1995), page 236.

this. In fact, the only problem in Miami was when the protests turned, at times, not peaceful.

Even though a majority of Americans agree with the Justice Departments move against the Miami family, many Americans also believe that the opposing point of view had the right to express their opinions and protest. Actions such as those in Miami are unheard of in many countries like Cuba, China, and Libya. However, the question of the right to peacefully assemble becomes cloudier when the issue is the right of the Ku Klux Klan to assemble and clean a section of highway under Missouri's Adopt-A-Highway program. The issue becomes even cloudier when the rights of people to protest abortion at clinics around the country is raised. Even though the people of the United States now turn to the central government, especially the Supreme Court, for defining the rights of Americans, it was not always the case. This paper will give an overview of the history of the right to peacefully assemble, focusing on the decision of the Supreme Court, in an attempt to give an educated opinion of the future of the right.

As Madison submitted his proposals for the addition of a Bill of Rights to the new Constitution, he included an amendment that would make the new amendments also apply to the states. Madison believed that any restrictions placed on the central government to not infringe on the rights of the people should also be placed on the states. However, this amendment never received the necessary two-thirds vote in Congress and the Bill of Rights became a check on the central government, but not on the various state governments.<sup>4</sup> People then began to question if the states were required to uphold the basic protections on personal liberty found in the Bill of Rights.

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<sup>4</sup> Rakove, Jack N., Original Meanings, (New York: Alfred A. Knopf, Inc., 1997), pages 197-8.

The Supreme Court got an opportunity to define the issue of the states and the Bill of Rights in 1833 in *Barron v. Baltimore*. John Barron was a successful operator of a wharf in the harbor of Baltimore. As the city expanded it was forced to make improvements to the harbor area, which changed the flow of water coming into the harbor. Large amounts of sand began accumulating in the part of the harbor where Barron operated his business. Feeling the city of Baltimore had violated his Fifth Amendment right to not have his private property taken for public use without just compensation, Barron sued the city. In a 6-0 vote the Marshall court, which had granted large powers to the central government, found against Barron. In the opinion of the Court, Chief Justice Marshall wrote,

We are of opinion that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.<sup>5</sup>

In his opinion, Marshall firmly believed that the framers of the Constitution did not believe the state governments should be subject to the Bill of Rights, and attempts to nationalize the rights protected in the first ten amendments ended for a short time. Soon after the Civil War, Congress and the states ratified the fourteenth amendment to the Constitution, which read that no state could deprive any person life, liberty or property without due process of the law.

Those in support of nationalizing the Bill of Rights hoped the Court would use the new amendment to guarantee citizens protection from state governments infringing on the *natural* rights. However, in *The Slaughterhouse Cases* (1873) and in *Hurtado v. California* (1884), the Court refused to use the fourteenth amendment to nationalize the

Bill of Rights, especially the rights guaranteed in the first and fifth amendments.<sup>6</sup> As the United States entered into its second century, Madison's goal of making the states subject to the rights of the individual citizen had not been adopted by the country.

Finally, those that supported Madison's belief that the Bill of Rights should be applied to the states, and the Fourteenth Amendment was the vehicle to accomplish this, received an opportunity in 1925 when the Supreme Court heard the case *Gitlow v. New York*. Benjamin Gitlow was a socialist charged with distributing copies of the "Left Wing Manifesto." The document called for the establishment of socialism in the United States and the mass overthrow of capitalism to accomplish his goals. Gitlow was arrested under a New York statute that made speech that called for overthrow of the government by force illegal. Gitlow's lawyers argued that the law was a violation of the first amendment and the due process clause of the fourteenth amendment made it unconstitutional for New York to arrest Gitlow. In a 7-2 decision the Court ruled that the arrest of Gitlow was constitutional, however, by hearing the case, the Court gave credibility to the idea that the Bill of Rights was to be applied to the states. Writing for the majority, Justice Edward Sanford wrote, "...for present purposes we may and do assume that freedom of speech and of the press – which are protected by the First Amendment from abridgement by Congress – are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states." The Court did not define which of the rights included in the

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<sup>5</sup> Epstein, Lee and Thomas G. Walker, Constitutional Law for a Changing America, (Washington D.C.: CO Press, 1995), pages 44-6.

<sup>6</sup> Van Alstyne, William W., First Amendment: Cases and Materials, (New York: The Foundation Press, 1995), pages 30-33 and Epstein, 46-52.

first amendment were fundamental, and reserved the right to review on a case-by-case right-by-right basis on the application of the Bill of Rights to the states.<sup>7</sup>

The first amendment right to free and peaceful assembly and the fourteenth amendment was reviewed by the Court in 1937 in the case *DeJonge v. Oregon*. Dirk DeJonge was a member of the communist party in Portland and was distributing notices of a meeting of all members of the party to protest the police raids of members' homes. The meeting drew about 175 people, but violated an Oregon law prohibiting the organization of the Communist Party and DeJonge was arrested. His attorneys claimed that the Oregon law was a violation of the first amendment right to free assembly, even if the meeting was unpopular. In a unanimous decision, the Supreme Court ruled that Oregon had violated the rights of DeJonge and the freedom to peacefully assemble is as fundamental of a right in a free society as the right to free speech and a free press.

Writing for the Court, Chief Justice Charles Evans Hughes wrote,

...The right to peacefully assemble is a right cognate to those of free speech and free press and is equally fundamental...It follows that peaceable assembly for lawful discussion cannot be made a crime...The question is not the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution safeguards...The state law as applied to the particular charge as defined by the state court is repugnant to the Constitution.<sup>8</sup>

In the DeJonge case, the Supreme Court had expanded the due process clause of the fourteenth amendment to include the protection from state infringement on the right to peacefully assemble, but the discussion of the right to assemble did not end in 1937. The Supreme Court still needed to define the issues surrounding the right to peaceful

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<sup>7</sup> Epstein, 215-9.

<sup>8</sup> Konvitz, Milton R., Bill of Rights Reader, (Ithaca: Cornell University Press, 1968), pages 200-205.

assembly, including when the states can prohibit assembly when the safety of the larger public is in question.

In the 1945 case *Thomas v. Collins*, the court attempted to answer when the rights of the individual ends and the powers of the states begin. R.J. Thomas was president of the UAW and was in Houston to deliver a speech to a group of regional affiliates. Because of past violence at organized labor rallies, Texas law required that speakers at labor rallies to obtain a permit. The meeting and speech was described by attendees as peaceful and orderly, but Thomas was arrested and fined for violating the Texas law. Thomas's lawyers responded by claiming the Texas law was an unnecessary restriction on the first amendment rights of their client. In a 6-3 opinion, the Supreme Court agreed with Thomas's lawyers and overturned the Texas law. Writing for the majority, Justice Wiley Rutledge wrote,

...This case confronts us again with the duty our system places on this court to say where the individual's freedom ends and the State's power begins. Choice of that border, now as always delicate, is perhaps more so where the usual presumptive supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. For this reason any attempt to restrict those liberties must be justified by clear public interest, threatened not remotely, but by a *clear and present danger*.<sup>9</sup>

As the Supreme Court was broadening the definition and application of the right to peacefully assemble, the civil rights movement was also beginning. As the country began to undergo definite racial changes, there was consistent resistance to such change. As black men and women organized protest rallies against discrimination, many states, especially in the South, passed laws to prevent such demonstrations. The Court again was able to give further definition to the right to assemble peacefully in the 1963 case of *Edwards v. South Carolina*.

Many black citizens had organized a march to the South Carolina State House grounds in which small groups of fifteen would walk in open public areas protesting the segregation policies of the state of South Carolina. The march was peaceful, and did not block pedestrian traffic along the sidewalks. However, a group of thirty police officers ordered the marchers to disperse or be arrested. Instead of dispersing, the marchers began singing religious and patriotic songs and were arrested. Later the marchers were convicted of breach of the peace. In an 8-1 decision, the Supreme Court overturned the arrests of the marchers. The Court found that even though the civil rights movement was unpopular amongst the majority of South Carolinians, the right to protest can not be held to a popularity contest. Therefore, South Carolina cannot “make criminal the peaceful expression of unpopular views.”<sup>10</sup>

By 1963, the right to peaceful assembly had been broadly defined to include almost every kind of speech and rally. However, in the latter half of the twentieth century, the Supreme Court ruled on two cases and placed some limits on the right to peacefully assembly. The first case was *Adderly v. Florida* (1966). A group of student protesters had organized in front of a jail to protest the arrests of some of their Florida A&M classmates. The sheriff told the protesters to disperse or be arrested for trespassing. When the students’ were arrested, their lawyers claimed the first amendment had been violated. In a 5-4 decision, the Court reversed its trend of liberalizing the right to peaceful assembly by upholding the arrests of the students. According to Justice Hugo Black, who wrote the majority opinion, a jail is not a reasonable place to hold a protest.

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<sup>9</sup> Epstein, 223-224.

<sup>10</sup> *Edwards v. South Carolina* (1963), [www.oyez.nwu.edu](http://www.oyez.nwu.edu), current as of 30 April 2000.

Since the main priority of a jail is to maintain security, the protesters might easily compromise the security of the jail.<sup>11</sup>

The second case in which the Court limited the right to peaceful assembly was the 1984 case *Clark v. Community for Creative Non-Violence*. The CCNV had petitioned the National Park Service for a permit to hold a demonstration in Lafayette Park and the Mall. The CCNV hoped to erect two tent cities to symbolize the plight of the homeless and to house the protesters. The Park Service denied the overnight request. The CCNV filed suit claiming the Park Service had denied the group their first amendment rights. Writing for the court, Justice Byron White upheld the Park Service's judgement.

Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.<sup>12</sup>

The CCNV case brings the debate over peaceful assembly to current issues. Recently, many states have begun to regulate anti-abortion protests around abortion clinics. The state of Florida had imposed a 36-foot buffer zone around the property line of the clinic. The purpose of the zone was to allow people needing or wanting to enter the clinic access to the clinic without being harassed by protesters outside the clinic. The protesters sued and argued this was an infringement on their first amendment rights. However in a 6-3 decision in the case *Madsen v. Women's Health Center, Inc* (1994), the court ruled that the buffer zone were reasonable restraints and did not actually hinder the protesters right to assembly. The Court reasoned that the buffer zone was needed to

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<sup>11</sup> Epstein, 262-5.

<sup>12</sup> Ibid., 265-6.

allow people who needed access to the clinic to be able to access the clinic without harassment.<sup>13</sup>

As we begin the twenty-first century, the right to peaceful assembly is as a part of the American political arena as presidential elections. As long as the group is acting in a reasonable and peaceful manner, neither the federal government nor the state governments can interfere with such behavior. But as is the Court's long tradition, its past rulings can only give us a clue on its future rulings. It is easy to define peaceful, however, it is more difficult to define reasonable. The courts must define if it is reasonable to allow a group of people, such as the KKK, to assemble along a major interstate highway, despite the groups long history of violence during its assemblies. The courts must also decide if the history of the KKK means that the "clear and present" danger doctrine applies whenever its representatives meet. Currently, the lower federal courts have ruled that the Missouri Department of Transportation must allow the group the right to clean a one-mile stretch of Highway 55 in South St. Louis County. MoDOT has appealed the lower court's decision.<sup>14</sup> However, current interpretation of the first amendment seems to be in the KKK's favor, unless Missouri can somehow convince the high court that the KKK's presence will present a clear and present danger to citizens on Highway 55. Whatever the high court rules in the KKK case, or in any other peaceful assembly case, the definition and application of this **natural** right will continue to evolve as the American Revolution continues on.

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<sup>13</sup> Ibid., 272-80.

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<sup>14</sup> Tuft, Carolyn, "KKK 'Adopt-A-Highway' signs go up along I-55," St. Louis Post-Dispatch, 1 December 1999, page A1.