INTRODUCTION

There is no mysticism in the American concept of the State – or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent.

Justice Robert H. Jackson, 1943[1]

Constitutional rights lie at the heart of how modern Americans define themselves. And no rights are more significant in this regard than the rights protected by the First Amendment to the United States Constitution, especially freedom of speech and free exercise of religion. That is as it should be – the First Amendment is and always has been a key structural pillar supporting our society and form of government. In recent decades, however, we as a people have largely forgotten key portions of the First Amendment. More fundamentally, we have forgotten *why* First Amendment rights are as important as they are. The purposes of this book are first, to rediscover those lost rights and their history, and second, to show why the real First Amendment remains entirely relevant to modern American society.

CONSIDER THE FOLLOWING INCIDENTS

– In February of 2016, then presidential candidate Donald J. Trump stated that if elected president, he would "open up our libel laws" in order to make it easier for politicians to sue news media organizations for

[1] West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 641 (1943).

libel.[2] He made no reference in his comments to the fact that the Supreme Court in 1964 interpreted the First Amendment to require the current, highly speech-protective libel rules.

- In February of 2017, Senator Elizabeth Warren was silenced and rebuked by the Republican majority in the Senate during debates over the nomination of Senator Jeff Sessions to be Attorney General, on the grounds that she impugned the character of a peer by reading a letter regarding Senator Sessions written by Coretta Scott King.[3]
- Also in February of 2017, at the direction of the Democratic leadership of the Senate California state Senator Janet Nguyen was removed from the floor of the California Senate and prevented from completing a speech she was delivering critical of the late state Senator Tom Hayden, on the grounds that she was violating parliamentary rules.[4]
- Also in February of 2017, the Arizona Senate passed a bill providing that if during a protest any violence occurs, anyone involved in planning the protest or who attended the protest would become subject to criminal prosecution.[5] No attention appears to have been paid in the debates over this bill to the Assembly Clause of the First Amendment, despite its obvious relevance.
- Also in February of 2017, protestors at the University of California, Berkeley, resorted to violence in order to prevent "right-wing provocateur" Milo Yiannopoulos from speaking on campus. They succeeded.[6]
- Also in February of 2017, then White House Press Secretary Sean Spicer held a press briefing from which he excluded journalists from several media outlets, including the *New York Times*, Buzzfeed News, CNN, and the *Los Angeles Times*, who had been the target of criticism by

[2] Hadas Gold, *Donald Trump: We're Going to "Open Up" Libel Laws*, POLITICO (February 26, 2016), *available at* www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws–219866.

[3] Matt Flegenheimer, *Republican Senators Vote to Formally Silence Elizabeth Warren*, NEW YORK TIMES (February 7, 2017), *available at* www.nytimes.com/2017/02/07/us/politics/republican-senators-vote-to-formally-silence-elizabeth-warren.html.

[4] Katy Murphy, *GOP Senator, a Vietnamese Refugee, Removed from California Senate Floor After Criticizing Tom Hayden*, THE MERCURY NEWS (February 23, 2017), *available at* www.mercurynews.com/2017/02/23/gop-state-senator-a-vietnamese-refugee-removed-from-california-senate-floor-after-criticizing-late-senator/.

[5] Howard Fischer, *Arizona Senate Votes to Seize Assets of Those Who Plan, Participate in Protests That Turn Violent*, ARIZONA CAPITOL TIMES (February 22, 2017), *available at* http://azcapitoltimes.com/news/2017/02/22/arizona-senate-crackdown-on-protests/.

[6] Michael Bodley and Nanette Asimov, *UC Berkeley Cancels Right-Wing Provocateur's Talk Amid Violent Protest*, SFGATE (February 2, 2017), *available at* www.sfgate.com/bayarea/article/Protesters-storm-Milo-Yiannopoulos-event-at-UC-10901829.php.

President Trump. That same day, in a speech President Trump mocked media outlets for invoking the First Amendment.[7]
– In March of 2017, students at Middlebury College shouted down Dr. Charles Murray, a conservative writer, to prevent him from speaking on campus, and later violently attacked Murray and Allison Stanger, a liberal Middlebury professor who was scheduled to debate with Murray.[8]

Each of these events certainly violates the spirit, if not the substance, of the First Amendment. Yet they all occurred, and many of the actions enjoyed widespread support within the political left or right (though rarely both). Together they strongly suggest that Americans need to become reacquainted with this foundational part of our system of government.

Let us start with the text. The First Amendment was added to the United States Constitution on December 15, 1791, and is the first of the ten amendments we together call the Bill of Rights. It reads in full as follows:

> Congress shall make no law 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 peaceably to assemble, and to petition the Government for a redress of grievances.

Note that the Amendment contains six separate provisions: the Establishment Clause, the Free Exercise Clause, the Speech Clause, the Press Clause, the Assembly Clause, and the Petition Clause. As we shall soon see, there is more to be said about the drafting history of the First Amendment and what it reveals about the relationships between its components. But for now note one crucial fact: aside from the Religion Clauses (the first two), essentially all of modern discourse and modern law focuses on only one of the remaining provisions, freedom of speech. The rest have been almost entirely forgotten.

[7] Michael M. Grynbaum, *White House Bars Times and Other News Outlets from Briefing*, New York Times (February 24, 2017), *available at* www.nytimes.com/2017/02/24/us/politics/white-house-sean-spicer-briefing.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news.

[8] Peter Beinart, *A Violent Attack on Free Speech at Middlebury*, The Atlantic (March 6, 2017), *available at* www.theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667/?utm_source=atlfb.

That is tragic because these forgotten provisions – freedom of the press, assembly, and petition – hold the key to understanding why the First Amendment matters.

How key portions of the First Amendment were forgotten is a long and complex story. But consider these facts. Even though people are generally aware that the First Amendment protects freedom of the press, few realize that the Press Clause does essentially *no* work in modern constitutional law not already done by the Speech Clause because the Supreme Court has not interpreted the Press Clause to give special rights to any specific group of people or entities called "the press."[9] The Assembly Clause is even more irrelevant – it has not been relied upon by the Supreme Court since at least 1983![10] Instead, when conflicts arise over public gatherings, courts typically address them based on interpretations of (yes, again) the Free Speech Clause.[11] As for the Petition Clause, few people even know it exists. In modern constitutional law, moreover, its primary significance relates to the highly peripheral issue of access to the courts, and even there it has been interpreted to largely duplicate the Free Speech Clause.[12] From the perspective of current law, it is as if the First Amendment ended with the word "speech," and the rest is unnecessary verbiage.

If we have lost sight of much of the "what" of the First Amendment, we have also forgotten much of the "why." Today, we think of rights in highly individualistic, libertarian terms. A right is an entitlement to do as one pleases simply because one wants to. And nowhere is this more

[9] Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 Ohio St. L. J. 249, 258 n.29 (2004) (citing David A. Anderson, *Freedom of the Press*, 80 Tex. L. Rev. 429, 430, 448–50 (2002)); 3 Rodney A. Smolla, Smolla and Nimmer on Freedom of Speech § 22:6, Westlaw (database updated 2014).

[10] John D. Inazu, Liberty's Refuge: The Forgotten Freedom of Assembly 62 (2012).

[11] *See*, e.g., Thomas v. Chicago Park District, 534 U.S. 316 (2002) (addressing constitutionality of a Chicago Park District requirement of a permit for public assemblies of over fifty people but discussing only the Free Speech Clause, not the Assembly Clause). Even when a court does invoke the Assembly Clause, as happened in litigation arising from the protests in Ferguson, Missouri, *see* Abdullah v. County of St. Louis, Missouri, 52 F. Supp.3d 936, 947 (E.D. Mo. 2014), the press tellingly tends to report the issue as one involving "freedom of speech." *See* Joy Y. Wang, *Judge Bars Ferguson Officers from Enforcing "Keep Moving" Rule*, MSNBC (October 6, 2014), *available at* www.msnbc.com/msnbc/judge-bars-ferguson-officers-enforcing-keep-moving-rule (last visited February 23, 2017).

[12] Borough of Duryea v. Guarnieri, 564 U.S. 379, 386–391 (2011).

true than with free speech, which is widely viewed as the right to say whatever the speaker pleases, on whatever topic, with a few narrow limits. In the Supreme Court, this attitude is reflected in cases upholding the right of a teenager to burn a cross on the lawn of his African American neighbors;[13] the right of a tobacco company to advertise its products when children are likely to be in the audience;[14] and the right of a politician to lie about having received the Congressional Medal of Honor.[15] It is not that these kinds of decisions are necessarily wrong – indeed, I have little doubt the cross burning case was correctly decided – but they miss an important point. Whatever our current understandings, during the Framing period rights were not understood primarily as guarantors of individual autonomy but rather in *collective* terms as belonging to the people as a whole. Their purpose, then, was not libertarian but rather political, to protect against distant and potentially tyrannical rulers.[16] As such, rights (in their collective capacity) were deeply tied to concepts of popular sovereignty. And First Amendment rights, as we shall see, contribute directly to that goal, in a specific way – by facilitating a particular, active form of democratic citizenship in which the people, as rulers, maintain preeminence over their elected representatives.

There is in fact a close relationship between our loss of memory regarding the "what" and "why" of the First Amendment. If one looks at the "forgotten" First Amendment rights, it turns out that they are profoundly, and obviously collective rather than libertarian. Nobody believes we protect the press because we care about the "freedom" of journalists or printers; as we shall see later, the clear and undisputed purpose of a free press is to keep the *people* informed about the actions and misdeeds of their government. Assembly is by its very nature a collective activity; one person is not an assembly. And while

[13] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
[14] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).
[15] United States v. Alvarez, 567 U.S. 709 (2012).
[16] For a more detailed discussion of the collective nature of rights during the Framing era, *see* Ashutosh Bhagwat, The Myth of Rights: The Purposes and Limits of Constitutional Rights 30–36 (2010). It is noteworthy that two of the most prominent modern historians of the Framing era, Gordon Wood and Jack Rakove, both support a collective understanding of rights during that period. Gordon S. Wood, The Creation of the American Republic, 1776–1787 61 (1969); Jack Rakove, Declaring Rights: A Brief History with Documents 22 (1998).

petitioning *can* be done by an individual, its purpose is again to permit communication between citizens and their representatives. Moreover, by the Framing era most significant petitioning was, as we shall see, collective. Free speech is no different, and we miss its fundamentally collective nature only because today, we read the Speech Clause in isolation from its close neighbors. In the pages that follow, I will develop the close ties and common purposes of the free speech clause and its neighbors, by examining each of them in turn.

Before we begin, however, it is useful to start with a bit of historical background about the adoption of the First Amendment. The basic story is familiar. The Constitutional Convention met in Philadelphia in the summer of 1787, and although their charge had been to merely propose amendments to the existing Articles of Confederation, the Framers (in an act of revolution) quickly proceeded to draft an entirely new Constitution. What is noteworthy is that despite extended debates over the content of the new Constitution, the question of adding a Bill of Rights to the document came up only once, on a motion from George Mason of Virginia. It was quickly rejected, and that was seemingly the end of the matter.[17]

Of course, it was not. For the Constitution to come into effect, by its own terms, it had to be ratified by popularly elected conventions in nine of the then-thirteen states.[18] In those conventions the Constitution faced strong opposition, and one of the primary grounds for opposition was the lack of a Bill of Rights in the Constitution.[19] In response, George Mason – who had refused to sign the original Constitution because it lacked a Bill of Rights – prepared and circulated among his friends in the various states a set of proposed amendments to the Constitution. Many of his proposals were in turn based on the Virginia Declaration of Rights of 1776, the primary author of which had been … George Mason.[20] Mason's proposals, later called his

[17] Rakove, *supra* note 16, at 113–114.
[18] U.S. Const., Art. VII.
[19] For a detailed discussion of the ratification battles in the various states, *see* Pauline Maier, Ratification: The People Debate the Constitution 1787–1788 (2010).
[20] *See* Stephen A. Schwartz, *George Mason: Forgotten Founder, He Conceived the Bill of Rights*, Smithsonian.com (April 30, 2000), *available at* www.smithsonianmag.com/history/george-mason-forgotten-founder-he-conceived-the-bill-of-rights–64408583/ (last visited February 24, 2017).

"Master Draft of the Bill of Rights," became the primary basis for constitutional amendments proposed by a number of state ratifying conventions, including Virginia and New York.[21] The dispute ended when supporters of the Constitution agreed to add a Bill of Rights to the Constitution after ratification, which in due course followed. Fulfilling this promise, on June 8, 1789, Representative (as well as Framer and future President) James Madison of Virginia proposed a set of constitutional amendments to the first Congress, most of which were taken almost word-for-word from Mason's Master Draft.[22] These eventually (after changes made during congressional debates) become the Bill of Rights.

This history will play an important role in our examination of the specific provisions of the First Amendment. It also sheds light on an important demarcation within the First Amendment. My focus until now, and the focus of this book, is on the freedom of speech and the rights that follow it in the First Amendment: freedom of the press, assembly, and petition. But what about the Religion Clauses, which after all are also part of the First Amendment? Look back at the text of the First Amendment. There is an important clue there: the two Religion Clauses (Establishment and Free Exercise) are separated from each other by a comma, as are the Speech, Press, Assembly, and Petition Clauses from each other. However, separating these two groups of rights is a semicolon, suggesting a more significant distinction between these groups than within them.

The implications of punctuation are fully supported by the drafting history of the First Amendment. In the original proposed Bill of Rights introduced to Congress by James Madison, the various provisions of the First Amendment were *not* part of a single proposed amendment. Rather, they were listed as three separate proposals in three separate sentences: the first protecting religious rights (including "full and equal rights of conscience"), a second protecting speech and the press, and the third protecting assembly and petition.[23] Even more tellingly, "George

[21] George Mason's Master Draft of the Bill of Rights, *available at* www.constitution.org/gmason/amd_gmas.htm (last visited February 24, 2017).
[22] Amendments Offered in Congress by James Madison June 8, 1789, *available at* www.constitution.org/bor/amd_jmad.htm (last visited February 24, 2017).
[23] *Id.*

Mason's Master Draft," which as we have seen provided the template both for many of the proposed amendments that emerged from state ratifying conventions *and* for Madison's own proposals to Congress, did not even list the precursors to the Religion Clauses contiguously to the other rights protected by the First Amendment.[24] Instead, the rights of assembly and petition, as well as a rejected right to instruct representatives, constituted proposal number fifteen in the Master Draft. Speech and the press are number sixteen, immediately following. But the precursors of the Religion Clauses do not appear until proposal twenty (the last of the proposed amendments).[25] Furthermore, the Religion Clauses did not become joined with the rest of the First Amendment until very late in the congressional deliberations, emerging (without explanation) in this form from the Senate on September 9, 1789, just a few weeks before the Amendment was adopted by Congress and sent to the states for ratification.[26] Speech, Press, Assembly, and Petition, on the other hand, were combined into one amendment quite early in the drafting process.[27] These uncontested facts provide an important clue that the Religion Clauses are *different* from the rest of the First Amendment.

The Religion Clauses not only have different historical roots from other First Amendment rights, they also address a different topic and have different purposes. Their topic, of course, is religion. As for purpose, there is no serious doubt that the core purpose of at least the Free Exercise Clause was to protect individual dignity and conscience, in particular by minimizing the occasions when individuals would face a conflict between the requirements of the law and their religion.[28] In other words, the Free Exercise Clause *did* aim to protect individual

[24] George Mason's Master Draft of the Bill of Rights, *supra* note 21, at ¶¶ 15–16, 20.

[25] *Id.* Similarly, in the 1776 Virginia Declaration of Rights, which, as we saw had a deep influence on the shaping of the Bill of Rights, religious liberty does not appear till the sixteenth clause, while the press is protected in clause twelve. Speech, assembly, and petition do not appear at all. *See Virginia Declaration of Rights* (1776), Avalon Project, *available at* http://avalon.law. yale.edu/18th_century/virginia.asp (last visited February 24, 2017).

[26] *See* The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins 133, 139 (Neil H. Cogan ed., 2nd ed. 2015).

[27] *Id.* at 130

[28] Ashutosh Bhagwat, *Religious Associations*: Hosanna-Tabor *and the Instrumental Values of Religious Groups*, 92 Wash. U. L. Rev. 73, 83–84 (2014); Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. Chi. L. Rev. 1351, 1365–1366 (2012).

autonomy. (The Establishment Clause is different and does not directly apply to individuals as such at all, it is instead a direct, structural restraint on government, creating what Jefferson called "a wall of separation between Church & State.")[29] But again, none of this has much relevance to the provisions that follow the Religion Clauses, which as we have seen have quite distinct origins.

It is now time to return to those "other" provisions. If the topic of the Religion Clauses is religion, what is the topic of the post-semicolon First Amendment? The answer, in short, is democracy. Specifically, the Speech, Press, Assembly, and Petition Clauses together enable a form of active, participatory citizenship that I call democratic citizenship. This is why we can call "the rest" of the First Amendment the Democratic First Amendment. (It is also a more elegant name than "post-semicolon First Amendment.") The first part of this book explains how each of these different provisions (and the rights derived from them) separately and in combination advance a specific model of citizenship and democracy. The second part then relates that model to modern American democracy, with a particular focus on modern technological developments such as social media and other online forms of communication.

[29] Thomas Jefferson, *Letter to the Danbury Baptists* (January 1, 1802), *available at* www.loc.gov/loc/lcib/9806/danpre.html.