

# Three Concepts of Freedom of Assembly: Liberal, Associative, Radical

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## Abstract

Political struggles are entwined with the freedom of assembly, yet the latter is construed in entirely incompatible ways in both theory and practice. This article reconstructs three distinct concepts of freedom of assembly, their content and complex interrelations. This typology integrates these diverging perspectives on the freedom of assembly into a single coherent theoretical framework. The three concepts of the freedom of assembly are liberal, associative, and radical. In the liberal understanding, freedom of assembly is one right among others in the catalog of individual rights such as freedom of speech, religion, and association, guaranteed by the state. In the associative understanding, freedom of assembly is the precondition for the establishment of civil society organizations and interest group representation. Freedom of assembly in the associative understanding is the precondition for creating associations capable of negotiating and compromising with the state. In the radical understanding, freedom of assembly names a form of action able to destabilize existing regimes and institute new political constitutions. In this radical understanding, freedom of assembly is neither a *constituted power* (as in the liberal understanding) nor a *negotiating power* (as in the associative understanding), but a *constituent power* capable of creating new political forms.

## Keywords

assembly, freedom of assembly, liberal democracy, associative democracy, constituent power, the people, representative government

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Contemporary political struggles are inherently entwined with the freedom of assembly. Whether we consider the recent protests against ICE (Immigration and Customs Enforcement) raids in Los Angeles and US President Donald Trump's deployment of troops to quell them, the policing of demonstrations held in solidarity with Gaza, pro-choice demonstrations outside the home of an American Supreme Court justice, the occupation of university campuses, antiwar demonstrations in St. Petersburg, attempts to unionize workers at megacorporations like Amazon and Starbucks, the January 6 attack on the US Capitol, demonstrations against pandemic lockdowns, or the police crackdown on Black Lives Matter and Extinction Rebellion, these events implicitly—or very explicitly—pose the questions of *who* can assemble in public and for *what* purposes as well as *how* authorities justify limitations on the freedom of assembly in addition to the question of *why* assemblies are so often conceived as a potential threat to the public order. Moreover, while events like those mentioned here all legitimize their practices with reference to the freedom of assembly, the practices are markedly different, and entail—as we will argue in this article—substantially different conceptions of freedom of assembly.

The concept of freedom of assembly refers to a host of different social and political activities. It ranges from meetings and petitions to public marches, demonstrations, blockades, and a whole array of other forms of protest. It has affinities with social movements as well as civil disobedience and riots. It names a practice more complex and visible than the individual act of deliberation or defiance, yet something more fleeting and elusive than formal organization and interest group representation. Freedom of assembly simultaneously protects quotidian practices of “apolitical” group meetings and invokes the tremendous power of the people “out of doors.”<sup>1</sup> The comparative constitutional scholar Orsolya Salát summarizes the scope and significance of activities covered by the freedom of assembly: “Revolutions and pogroms start with assemblies, and end—or so we hope—with the establishment of other assemblies, allegedly deliberative and representative ones. What remains in between is freedom of assembly.”<sup>2</sup> Assemblies are at the very heart of politics. Normal, day-to-day politics takes place in representative, delegated, or consultative assemblies. Social transformation, political regime-change, and revolutions begin with assemblies; gain impetus through a growing network of assemblies; and culminate in new, more formal, and less transitory assemblies. Whereas some practices of freedom of assembly *appeal* to existing representative institutions, other practices of freedom of assembly create new representative organs for groups with the object of *negotiating* with existing representative institutions, whereas a third cluster of practices create new assemblies in an attempt to radically *transform or abolish* existing representative institutions. While the multiple political practices that legitimize themselves with reference to the freedom of assembly often mix elements of *appeal*, *negotiation*, and *transformation*, or go through each of them as progressive stages, we want to analytically distinguish between the three of them as ideal typical concepts of freedom of assembly and demonstrate their diverging implications for how we think about the relation between representative institutions and radical, social, and political change.<sup>3</sup>

To get an initial impression of the variety of political practices, political goals, and modes of politics, which are legitimized with reference to freedom of assembly, we offer three exemplary quotes, starting with one taken from the English Bill of Rights

(1689), which concluded the English Glorious Revolution. The English Bill of Rights enlists the “ancient rights and liberties” of the Englishmen, among them the subjects’ right to physically gather to petition King and/or Parliament for grievances:

That it is the right of the subjects to petition the king and all commitments and prosecutions for such petitioning are illegal.<sup>4</sup>

The right to petition included in the English Bill of Rights partakes in a long English tradition that reaches as far back as the Magna Carta (1215).<sup>5</sup> We argue that the right to petition is exemplary of a distinctively *liberal* concept of freedom of assembly that regulates the relation between the state and the individual citizen—the central political relation in liberalism—and where the aim of freedom of assembly is to ensure the individual’s possibility of *appealing* to the government to redress certain grievances. It is important to highlight that when we refer to the liberal concept of the freedom of assembly throughout the article, it is in this restricted, narrow, and “pure” sense of the term; it is an ideal type constructed to denote the concept of freedom of assembly based on the historical liberal tradition, concerned exclusively with the relationship between the state and individuals, in contradistinction to the associative and radical conceptions of the freedom of assembly, which we also discuss throughout the article. This also entails that the concept diverges from the practices of contemporary liberal democracies, which commonly recognize groups in accordance with the associative concept of the freedom of assembly. This distinctly narrow conceptualization of the liberal conception of the freedom of assembly is constructed for analytical purposes as outlined in the following section.

In line with the liberal concept of assembly as an individual right to petition is the statement by the Lord Chief Justice of England and Wales, Lord Hewett, from 1936: “English law does not recognize any special right of public meeting for political and other purposes. The right of assembly . . . is nothing more than a view taken by the Court of the individual liberty of the subject.”<sup>6</sup> Liberal freedom of assembly is a *constituted power*; it is one right among others in the catalogue of civil and political rights, and which—despite being formulated as a right of the citizen against the state—is only guaranteed and often strongly regulated by the very same state. However, it is simultaneously also uniquely related to constituent power and is therefore treated in a distinctly ambiguous manner in liberal constitutions, restrained and regulated in a manner that sets it apart from these other rights.

That brings us to the second, *associative* concept of freedom of assembly, exemplified by the Danish September Agreement between the Danish Employers’ Confederation and the Federation of Danish Trade Unions from 1899. The agreement was the first of its kind on a global scale and laid the cornerstone for the Danish or Nordic model of labour market governance.<sup>7</sup> The agreement begins the following way:

The Danish Employers’ Confederation and Federation of Danish Trade Unions hereby recognize each other’s right to decree or approve a work stoppage, respectively.

The agreement thereby recognized the Danish Employers’ Confederation and the Federation of Danish Trade Unions as legitimate representative *associations* with

the ability to enter into valid agreements on behalf of their members. This confirmed the workers' fundamental right to freedom of assembly, making associations such as unions and employer organizations an integral part of industrial society. The September Agreement thus regulated industrial struggle by codifying the procedures for future industrial struggle, regulating the legitimate use of strikes and lockouts to specific periods, and providing the procedural norms of fair warning and the "duty of peace."<sup>8</sup> The agreement was immediately ratified by the Danish state, and was succinctly summarized by the state's special legal adviser on labor law Carl Ussing the following way: "From being an individual question, working conditions have now become a collective one, and this is reflected in the fact that the *main basis for working conditions is no longer the individual contract concluded between man and man, but the collective agreement, concluded between labor market organizations.*"<sup>9</sup> The September Agreement thus inaugurated a kind associatively embedded structure of labor market governance that regulated substantial rules and procedural norms regarding negotiation and conflict. We argue that the Danish September Agreement is exemplary of an *associative* concept of freedom of assembly, where individuals organize around a particular interest in order to build social power and pursue specific interests. This associative concept of freedom of assembly is conceptually different from the right to petition, as it has *social groups* with distinctly *particular interests* as its basic political actor, and it inaugurates a politics of *negotiation* between civil society actors and the state that allows particular interests a vital role in the process of political will formation.

Lastly, a third concept can be distilled from the following interpretation of the assembly-making processes of the so-called Movements of the Squares that emerged in 2010–11:

Rarely has one seen, as we have these past few years, in such a densely-packed timespan, so many seats of power taken by storm, from Greece to Iceland. Occupying plazas in the very heart of cities, pitching tents there, erecting barricades, kitchens, or makeshift shelters, and holding assemblies will soon be part of the political reflex, like the strike used to be.<sup>10</sup>

This is a statement from the French anarchist group The Invisible Committee from 2014, reflecting on the experiences of Square Movements like Occupy Wall Street, the Spanish Indignados, Greek Aganaktismenoi, and many other similar movements across the world. We suggest that this statement is exemplary of a *radical* concept of freedom of assembly that conceives assemblies as initiating transgression and transformation of the existing political order. It is not concerned with *appealing* to the state or *negotiating* with it, nor does it have individuals or particular social groups as its main actors. Instead, it is a conscious *transformatory* power exercised by "the people," or more precisely, some assembly functioning as a symbolic iteration of the people.<sup>11</sup> As such, it is also a *constituent power*—a form of action that constitutes new political institutions, rules, and relationships.<sup>12</sup>

This article contributes to the emerging literature on assembly in radical political and democratic theory, which has recently seen works dedicated to the topic by

Judith Butler, Jason Frank, Antonio Negri, and Michael Hardt, as well as the parallel, but otherwise unrelated, brilliant legal studies on the freedom of assembly by scholars such as Orsolya Salát and John Inazu.<sup>13</sup> Whereas the former focuses almost exclusively on the radical conception of the freedom of assembly, the latter literature is predominantly concerned with the liberal conception of the freedom of assembly. They entirely miss each other as well as the associative conception of freedom of assembly and do not engage with each other's contributions insofar as they rely on different and seemingly incompatible conceptions of the freedom of assembly. This article provides a reconstruction of the three concepts of freedom of assembly, their content and complex interrelations, which can account for the divergences in the literature and facilitate further debate and the integration of their diverging but complementary insights into a single coherent theoretical perspective. This reconstruction is our primary contribution to the literature.

We start with a short introduction to Weberian ideal types in order to explicate how we understand the tripartite distinction between liberal, associative, and radical concepts of freedom of assembly that we are developing. Afterward follows a brief overview of the historical formation and contemporary formulations of the freedom of assembly, highlighting the distinct conditionalities commonly imposed on this specific right. This serves as the basis for the analysis in the following three sections, where we reconstruct and analyze the liberal, associative, and radical concepts of the freedom of assembly, highlighting their different conceptions of politics, political actors, views on the relation between existing representative institutions and radical change, and the nature of assemblies.

## **Reconstructing the Ideal Types of Freedom of Assembly**

In discussing the three concepts of freedom of assembly, we stress, first, that they do not exhaust all possible conceptions of freedom of assembly, but merely that they constitute three central conceptions of the freedom of assembly in widespread use across the world today. Second, we stress that the concepts are reconstructed from a number of different sources. No single political thinker formulates either one of these concepts of freedom of assembly or speaks directly of them, and no social movement legitimizes its actions with explicit reference to one of them (while they may very well mobilize or rely on them implicitly). Instead, the concepts are reconstructed through a combination of analyses of political language and arguments drawn from constitutions, constitutional commentaries, court rulings, statements by social movements, and texts by political thinkers. Hence, we are engaged in a historical-theoretical reconstruction aimed at providing tools for understanding the internal conceptual variety of concepts of the freedom of assembly and their complex interrelations.<sup>14</sup> Third, although the liberal, associative, and radical concepts of freedom of assembly can be found in political discourses and practices across the world, our focus is on Western political thinkers, constitutions, politics, and social movements. We deliberately maintain this focus because the Western political tradition, broadly conceived, has been uniquely influential and has thematized the freedom of assembly frequently and exhaustively. Moreover, the central and highly paradoxical relationship between the modern state and the

fundamental right to freedom of assembly, which the state also regulates, is most directly observable in contemporary Western liberal democratic regimes, which are normatively committed to both liberal rights and popular self-determination (even if the influence of this Western tradition can also be traced in constitutions and political discourses across the world).

In developing the tripartite conceptual distinction between different concepts of freedom of assembly, we draw on Max Weber's notion of *ideal type* (*idealtypus*), which denotes a conceptual construct devised to understand and analyze social phenomena. It is formed by selecting and accentuating certain characteristics from real-world instances but is meant to neither match particular instances nor describe an average but, rather, to help us understand their most central features. According to Weber, "This conceptual pattern brings together certain relationships and events of historical life into a complex, which is conceived as an internally consistent system. Substantively, this construct in itself is like a utopia which has been arrived at by the analytical accentuation of certain elements of reality" and proceeds to explain how "an ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct."<sup>15</sup> An ideal type is hence a conceptual tool conceived to organize observations and facilitate the analyses of complex social and political phenomena; it emphasizes central aspects of a given phenomenon in order to facilitate a better understanding and analysis of them. This means that ideal types focus on particular aspects of a phenomenon, blending various concrete examples into a coherent framework for analysis, which can be continuously refined as part of the analytical process.

We construct not only an ideal type but what we might call an ideal typology that aims to capture variation in the motivations that actors have when engaging in practices of freedom of assembly. The criterion of success of this ideal typology is not a perfect description of the research object. Rather, such typology is to be judged on its analytical utility: Can it help us to grasp central features of the phenomenon under scrutiny, that is, different concepts of freedom of assembly? Is it useful in opening our eyes to otherwise neglected variations, or, indeed, lines of conflict between them? Does it allow us to widen our understanding of the past and present, and, hence, our imagination of what justifiable practices of freedom of assembly could look like?

An illustrative and relevant example of the usefulness of the ideal typology is with regard to the difference between what we call the liberal and the associative concept of freedom of assembly. In the First Amendment to the United States Constitution, specifying the boundaries of state power by enumerating the civil liberties, which US Congress cannot limit, the "*the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*" is included.<sup>16</sup> According to Inazu, "There has been some debate as to whether 'the right of the people peaceably to assemble, and to petition the government for the redress of grievances' in the First Amendment recognizes a single right to assemble for the purposes of petitioning government or establishes both an unencumbered right of assembly and a separate right of petition."<sup>17</sup> Similarly, Salát argues that it could be considered unclear "whether the

people are entitled to assemble in order to consult for the common good and to petition or whether these are separate rights.”<sup>18</sup> While the amendment recognizes both petition and peaceful assembly, with our ideal typology we can *conceptually distinguish* between a *liberal, petition-based* and an *associative, civil society-based* concept of freedom of assembly (as well as a third, *radical* concept) based on the different ideal typical motivations and intentions of those involved in practices of freedom of assembly. This notion of an ideal typology of concepts of freedom of assembly will guide our construction of the three concepts of the freedom of assembly in this article.

## Historical and Contemporary Constitution of the Freedom of Assembly

Assemblies in the form of public demonstrations did not become a normal part of the political repertoire until modernity, and for that reason there are no prior protections of the freedom of assembly. Popular assemblies have played a central role in politics throughout human history but have assumed widely divergent forms and significance. Classical assemblies such as the Athenian *ekklesia* (ἐκκλησία) and the various Roman *comitia* were considered the highest organs of collective decision making and often identified with politics as such.<sup>19</sup> They were eventually supplanted by doctrines of popular authorization of government, which relied on virtual conceptualizations of the assembled people in medieval European political doctrines.<sup>20</sup> It was not until the American Revolution and, especially, the French Revolution that the practical politics of assembly reasserted themselves and subsequently became enshrined in the resulting constitutions.

The Second Continental Congress of the thirteen British colonies in North America drew on preceding doctrines of popular authorization in formulating the Declaration of Independence. It started by outlining how individuals had assembled to institute government to protect their freedom and insisted that they were, collectively as a people, entitled to “alter and abolish” government if it infringed on these freedoms.<sup>21</sup> The governmental form that was founded with the US Constitution of 1787 was representative and explicitly aimed to ensure “the total exclusion of the people in their collective capacity” from political decision making.<sup>22</sup> But whereas the revolutionaries did not mean for the people to assemble in or as an alternative to government, the freedom of assembly had already been affirmed by the First Continental Congress, as a sort of logical precondition of the(ir) right to petition the Crown in (their distinct interpretation of) English law.<sup>23</sup> This expansive conception of the right to petition government was subsequently reasserted in the First amendment to the US Constitution, which insisted that “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances,” a liberty that was widely employed in the early days of the republic.<sup>24</sup> Here, the freedom of assembly was considered as part of the freedom of expression, that is, as a means of petitioning one’s representatives and the government more generally, rather than as an alternative to it.

The French Revolution also started with an assembly: the assembly of the Estates General, which was convened at the behest of King Louis XVI. The assembled representatives of the third estate declared themselves to be the “National

Assembly,” representing the entire nation and thus entitled to give it a constitution. Meanwhile, popular assemblies and demonstrations (the so-called *journées*) propelled the revolution forward and radicalized it, from the Storming of the Bastille to the March on Versailles and the Insurrection of August 10, 1792.<sup>25</sup> Neither “The Declaration of the Rights of Man and the Citizen” nor the 1789 Constitution so much as mentioned the freedom of assembly. The Constitution of 1791 rectified this, explicitly guaranteeing “as natural and civil rights . . . the liberty to citizens to assemble peacefully and without arms in accordance with police regulations,” which was also reaffirmed in the constitution of 1793 that was never implemented.<sup>26</sup>

These two initial formulations of the freedom of assembly are both conditional. The First Amendment to the US Constitution insists that assemblies must be “peaceable” much like the French Constitution of 1791, which specified that citizens were only guaranteed the right to “assemble peacefully.” Furthermore, the French Constitution of 1791 specifies that the citizens must be “without arms” and assemble “in accordance with police regulations.” These early conditional formulations of the freedom of assembly have left an indelible mark on subsequent constitutions, with 155 (86.1 percent) of the 180 contemporary constitutions with provisions for the freedom of assembly stipulating some sort of conditions on the freedom of assembly as is shown in Table 1.<sup>27</sup>

Of the 180 constitutions currently in effect containing provisions for the freedom of assembly, 116 (64.4 percent) constitutions stipulate that assemblies must be peaceful; 93 (51.7 percent) assert that assemblies must be conducted in accordance with the law; and 64 (35.6 percent) state that assemblies must be unarmed. In addition to this, 17 (9.4 percent) require some sort of advance notice to the authorities. Similar (conditional) provisions for the freedom of assembly can also be found in central and influential documents such as the United Nations Universal Declaration of Human Rights, where Article 20 stipulates that “everyone has the right to freedom of *peaceful* assembly and association,” which is identical to the formulation found in Article 12 of the European Union’s Charter of Fundamental Rights.<sup>28</sup>

The consistently conditional formulation of the freedom of assembly is highly peculiar, even if it is so widespread today that we have almost come to take it for granted. The freedom of assembly is the only right that is normally thought to require the explanation that it is not to be carried out in a manner that contradicts other laws and regulations. It would seem obvious and entirely superfluous, for instance, to stipulate that the freedom of expression cannot and should not be used to issue threats. The consistently conditional formulation of the freedom of assembly reveals a fundamental ambivalence and perhaps even fear of assemblies as a particularly unruly and subversive political phenomenon.<sup>29</sup>

These conditional clauses are crucial because they reveal a fundamental tension in the recognition of the freedom of assembly: Even nondemocratic regimes, governed by dictatorial or authoritarian leaders that do not respect or allow freedom of assembly, feel obliged to pay lip service to it *and* maintain similar conditionalities. This formal recognition, even if its practical application is limited or disregarded, carries political weight, as it acknowledges the ideal of assembly as a legitimate form of collective action. This formal recognition, accompanied by the specific conditionalities, helps



to situate the freedom of assembly as a globalized political ideal first formulated in the transatlantic revolutionary tradition, which has since been disseminated across the globe to such an extent that it cannot be ignored, even in authoritarian contexts. This is also evident in the persistence of the constitutional conditionalities imposed upon the purely formal invocations of the freedom of assembly in a deeply authoritarian context, which, on the one hand, attests to the influence of the aforementioned tradition and, on the other hand, suggests the fundamental power attributed to even the idea of assemblies, as if even the purely formal invocation of the freedom of assembly was somehow potent enough that it needs to be contained and curtailed.

These conditional formulations of the freedom of assembly also implicitly acknowledge the potential legal void surrounding popular assemblies, which may always potentially turn into a constituent power that dispels existing laws and institutions in order to institute new ones: “When the people assemble, the laws go silent,” as the French revolutionary Jacques-Michel Coupé summarized this fundamental idea.<sup>30</sup> In France, it was the assembly of the representatives of the estates of the realm that declared itself the National Assembly and vowed to give the country a constitution, propelled by the assembled Parisian masses, who had taken the Bastille, the symbol of Louis XVI’s absolute power, a few days prior. The French Revolution amply illustrated how assemblies can develop from seemingly banal gatherings into a constituent power that voids the law and formulates a new one at will. And as such, assemblies enjoy a peculiar position simultaneously within and outside of the constituted legal order: As the origin of the constitutional order, it cannot be excluded from it, but neither can it be fully incorporated and contained within it. In this manner, the freedom of assembly marks the ultimate and irrepressible limit of the existing constitutional order.<sup>31</sup>

## The Liberal Concept of Freedom of Assembly

What we call the “liberal” concept of freedom of assembly pertains to one of the ways in which freedom of assembly is codified in the constitutions and legal frameworks of present-day constitutional democracies and practiced by multiple individuals and groups throughout Western democracies. Here, freedom of assembly is enumerated as one constitutional right among other basic rights given to the citizenry and protected by the state. However, as we have already pointed out, it is unique in almost always being delimited from the outset. It is most often specified that the citizenry’s freedom of assembly is limited to “peaceful” assembly. What precisely constitutes an “unpeaceful assembly” is not entirely clear and varies from country to country; most countries prohibit armed assemblies (sixty-four even explicate it in their constitutions), whereas the United States does not. Some constitutions further specify that the freedom of assembly must be exercised in accordance with “the law,” and without disturbing “the public order.” This would seem to exclude disorderly and disruptive behavior, civil disobedience, property damage, looting, sabotage, violence, and rioting.<sup>32</sup> Moreover, in practice (rather than in the constitutional provisions, although seventeen constitutions also stipulate it as such), the freedom of assembly is usually limited to prior restraint, requiring a permit, often implied in the duty to notify the



Table 1. (continued)

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	Peaceful			Peaceful			Peaceful			Peaceful		
	Lawful	Unarmed	Notice	Lawful	Unarmed	Notice	Lawful	Unarmed	Notice	Lawful	Unarmed	Notice
Fiji 2013	x	x	x			Netherlands 1814/2008*	x			United States of America 1789/1992		
Finland 1999/2011*						New Zealand 1852/2014*				Uruguay 1966/2004	x	x
Gambia 1996/2018	x					Nicaragua 1987/2014*	x			Vanuatu 1980/2013	x	
Georgia 1995/2018*		x	x		x	Niger 2010/2017		x		Venezuela 1999/2009	x	x
Germany 1949/2014*	x	x	x			Nigeria 1999/2011*				Viet Nam 1992/2013		x
Ghana 1992/1996						North Macedonia 1991/2011*	x			Zambia 1991/2016		
Greece 1975/2008*	x		x			Norway 1814/2016*	x			Zimbabwe 2013/2017	x	

**Note:** Asterisks indicate subsequent constitutional amendments that have yet to be incorporated in this database.

public authorities, and to negotiate route, date, and duration with the police. This duty of notification often results in changes in mode and function of the assembly and, in some cases, an outright prohibition. This is in effect a form of censorship insofar as the freedom of assembly is associated with the right to petition and the freedom of expression in the liberal tradition, which is widely frowned upon in relation to the exercise of the freedom of speech and the press, but rarely problematized when it comes to assemblies, efficiently illustrating the ambiguity that many liberal democracies exhibit toward assemblies.<sup>33</sup> The freedom of assembly is, in other words, firmly regulated and delimited by the state and the public authorities.<sup>34</sup> It is the authorities that decide whether a given assembly conforms to “public order,” whether its content and form of expression is subject to prior restraint or alteration, and whether its mode of functioning falls under the category “unpeaceful assembly.”<sup>35</sup> Moreover, the legal and practical conditions attached to the constitutional provisions of the freedom of assembly attests to a profound liberal unease with assemblies that seem to pertain to their capacity for unrest and fundamental political change. In spite of these reservations, the freedom of assembly is rarely, if ever, excluded from the constitutional bill of rights (see Table 1), since it is also conceived as the more or less mythological origin (constituent power) of the liberal democratic constitution and as such cannot be done away with entirely. This is evident in the preamble to the US Constitution, where the much discussed and highly paradoxical figure of “We, the People” is posited outside and prior to the constitution, and is, moreover, imbued with the constituent power to “ordain and establish this Constitution for the United States of America.”<sup>36</sup> While the constitutional setup and its intricate mechanisms of representation was meant to ensure that “We, the People” as a constituent actor was henceforth thoroughly contained within representative institutions, the constitution as such could not do without a reference to the constituent people as the ultimate legitimating subject.<sup>37</sup> As such, we might say that for liberals, freedom of assembly is simultaneously a right *against* the state and conditioned and *protected* by the state, which constitutes its paradoxical status in modern-day liberal constitutions.

The liberal concept of freedom of assembly comes primarily from the Anglo-American tradition, where it historically developed out of the right to petition, that is, the right to appeal to the sovereign to redress grievances and injustices. The right to petition is mentioned already in the English Magna Carta from 1215, which codified and regulated the relations between the English King, the aristocracy, and the commoners, and it was reaffirmed in the English Bill of Rights from 1689, wherein the English Parliament, after the English Civil War (1642–51), defined and delimited the powers of the King and the Parliament and established a number of basic civil rights.<sup>38</sup> The latter established “that it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.”<sup>39</sup> Despite this constitutionally guaranteed right to petition, “tumultuous petitioning” (gatherings of over ten petitioners) was explicitly prohibited in England in 1649 in a law that was only repealed in 1986, demonstrating the ambiguous nature of the liberal, state-protected right to petition as a freedom of assembly. The right to petition became instrumental in the subsequent bid for American independence, where the American colonies asserted their claim for independence by reference to their lack

of the right to petition in spite of being British subjects.<sup>40</sup> Moreover, in the American Declaration of Independence, a central argument for independence was the continual neglect of the colonists' petitions:

In every stage of these oppressions we have petitioned for redress in the most humble terms: our repeated petitions have been answered only by repeated injury. A prince whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.<sup>41</sup>

After the ratification of the US Constitution, the First Amendment constitutionalized the right to petition and established its intrinsic relation to the freedom of assembly, insofar as the amendment determines that Congress shall uphold "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>42</sup> James Madison, who was part of drafting the amendment, likewise linked the freedom of assembly and the right to petition, arguing that "the people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions or remonstrances for redress of their grievances."<sup>43</sup>

This very brief reconstruction of the historical development of the right to petition and its translation into the right of freedom of assembly in the American revolutionary context leads to three important insights. First, the relatively limited practice and principle of the right to petition the sovereign, which we argue is the basis of the liberal concept of freedom of assembly, can be weaponized as a means to fundamental and radical political transformation (such as the American Revolution). Hence, the boundaries between the different concepts of freedom of assembly that we outline are, as we have argued, permeable, and political actors who set out to use their freedom of assembly, for instance to petition authorities to redress a specific grievance or protest a *specific* law, may find themselves inadvertently discovering or even pursuing the radical power of assembly in spite of themselves and their initial intentions. This does not mean, however, that the liberal concept of freedom of assembly is in reality no different from what we call the radical concept, as the American Revolution—and the shift from petition to assembly—only came about through extensive experimentation with local assemblies, townships, and self-government. Moreover, while the right to petition and freedom of assembly functioned as vehicles of *constituent power* in the Declaration of Independence,<sup>44</sup> their incorporation in the First Amendment made these rights *constituted powers* to be regulated by federal and state authorities.<sup>45</sup> However, the historical ambiguity of assemblies, which may potentially develop from an innocuous gathering into a constitutive assembly, fuels the inherent underlying liberal unease with the freedom of assembly and the consequent need to regulate and contain it, which can, for that same reason, never actually be realized. Even as a constitutionally guaranteed and delimited right, the freedom of assembly always remains in potential excess of the constitution.

Second, the liberal concept of the freedom of assembly offers a productive perspective on the relation between representative institutions and radical change. In the use of freedom of assembly under ordinary circumstances, that is, in accordance with the

constitutionally prescribed definition and delimitation of the right, it is directed at incremental changes through the existing representative institutions, as its usage is an attempt to bring certain political issues on the public agenda, to make visible some particular discontent, and to appeal to established representative institutions to address them. The moment when those assembled begin to create novel political institutions with claims to govern for themselves—whether they are participants of Occupy Wall Street in Zuccotti Park in Manhattan or the January 6 insurrectionists in Washington, DC—the relevant concept of freedom of assembly is no longer the liberal one.

Third, the close connection between the liberal concept of the freedom of assembly and the right to petition points toward a distinct form of politics where citizens appeal to the authorities for grievances individually or together as a collection of individuals. While the freedom of assembly only makes sense in relation to others, it is nonetheless defined as an *individual* right to assemble with other individuals in private or in public, to petition or protest injustices and appeal to the political authorities. This is distinctly liberal insofar as it concerns the relations between the state and the individual; it is liberal insofar as it concerns the power of former vis-à-vis the liberty of the latter, which the former formally defines and delimits, while being constantly aware of the possibility of this situation being inverted.

## The Associative Concept of Freedom of Assembly

The second concept of freedom of assembly is what we call the *associative* concept of freedom of assembly and is activated in group formation, where associations are founded to represent groups in and as civil society, between the individual and the state. This concept should not be considered in direct contradiction to the liberal concept but instead as an ideal typical concept of freedom of assembly that takes us to different social and political terrains, involving different political actors, types of struggles, and modes of politics and their relation to preexisting representative institutions.<sup>46</sup>

Not only does freedom of assembly initiate a state-individual relationship, where assembled individuals can petition their government, but the assembly of individuals also forms groups, and the constitutional freedom of assembly thus functions as the precondition for the formation of groups and associations, the “factions” that James Madison warned against.<sup>47</sup> Whereas the primary actors involved in the liberal concept of freedom of assembly are the state and individuals, the associative concept gives rise to social groups, intermediary bodies and particular interests that are neither individual nor common. Freedom of assembly in this associative modality is a way to build group identity and social power in civil society through the creation of local mechanisms of representation capable of negotiating with the state as well as with other interest groups. One might think of this concept as an essentially Hegelian one, where civil society’s associations are a “*mediating organ*,” standing “between the government at large on the one hand and the people in their division into particular spheres and individuals on the other,” thereby “ensuring on the one hand that the power of the sovereign does not appear as an isolated *extreme* . . . and on the other, that the particular

interest of communities, corporations, and individuals do not become isolated either.”<sup>48</sup> This associative concept of freedom of assembly creates associative forms and representative institutions, where societies’ particular collectivities interact with each other and with the state, and through which individuals transcend their status as individuals.

While this associative concept of freedom of assembly may appear quotidian, mainly supporting “apolitical” associations such as sports clubs and associations organized around leisurely activities, it has historically also underpinned the formation of unions and political parties. Wolfgang Streeck and Philippe Schmitter have argued that *associations*—in addition to community, market, and state—have become a distinct basis of social order in postwar industrialized democracies. According to Streeck and Schmitter, instead of viewing associations as a source of *disorder*, as much social and political thought had done, maybe most famously epitomized in Madison’s *Federalist* no. 10, associations by exercising a form of organizational concertation ought to be understood as a source of order and negotiated stability.<sup>49</sup> Some contemporary political theorists have proposed a major reformation of contemporary liberal democracy on the basis of an associative conception of assembly. Proponents of associative democracy such as Joshua Cohen, Joel Rogers, and Paul Hirst argue that the proliferation and multiplication of mediating associations and intermediary bodies between the state and the individual, and the devolution of certain public tasks to self-managing associations, is a way to recognize the value of social groups, group identity, and organized interests, and to make such social groups compatible with the overall constitutional framework of representative democracy. For Cohen and Rogers, for example, associative democracy can be understood as a “new strategy within the current constitutional order” through which the Madisonian challenge to liberal democratic politics—that is, suspicion toward special interests and factions—can be ameliorated through institutional design, where association-based governance can contribute to the goals of liberal democratic society.<sup>50</sup> For Hirst, the idea of associative “governance of social affairs through voluntary associations can enable groups to build their own social worlds in civil society,” whereby “associationalism makes a central normative claim,” namely, “that individual liberty and human welfare are both best served when as many of the affairs of society as possible are managed by voluntary and democratically self-governing associations.”<sup>51</sup> According to Hirst and other associative democrats, the program for associative reform ought to be implemented within and as a part of contemporary, Western liberal democracy. Hirst is quite clear that such an “associationalism extends and enhances liberalism and does not seek to supersede it.”<sup>52</sup>

We highlight these political and normative commitments of associative democracy, as they reveal essential elements of the associative concept of freedom of assembly. This ideal typical form of freedom of assembly gives rise to social groups and organized interests, and creates an organized civil society, where associations become the center of social life, thereby allowing groups to form and organize to represent their collective interests. The assemblies and associations it creates are *negotiating* organizational forms, which constitute a politics of interest representation, compromise, and institutionalized conflict, thereby creating new relations *in* civil society



and *between* civil society and the state. Crucially, the associative concept of freedom of assembly gives rise to associations that can put pressure on the state and the institutions of representative government and force them to negotiate, without therefore aiming to overthrow them as in the radical tradition or merely petition them as in the liberal tradition. Associative freedom of assembly aims at opening up more and *different* channels of representation beyond the (liberal) relationship between the individual's vote and elected representatives, not at creating a radical change beyond the existing representative institutions.

The form of neocorporatist, "negotiated order" that can emerge from the associative concept of freedom of assembly might be most easily detectable in relation to the labor market, and the role of the labor movement in the North European countries. Historically, the trade union movement gained impetus in Europe in the nineteenth century, as prior estate-based regulation of economic activity such as the guild system, journeymen associations, and market town privileges disappeared. This left laborers without the associative framework they had previously relied on both for work and protection. Europe's working classes were thrust into a labor market where they stood in an unmediated relationship to the pressures of the market and capitalist bosses. In short, whereas the European labor markets had previously been governed through tradition, custom, and oligarchic negotiation between public authorities and guild masters, the first decades of the second half of the nineteenth century saw the emergence of a new type of labor market governed solely by competition and individual contract.<sup>53</sup> The freedom of assembly, which began to feature in the European constitutions after the 1848 revolutions, provided the tools for ameliorating the incessant pressures of capital on workers after the dissolution of feudalism and the guild system.<sup>54</sup> The freedom of assembly, hence, initiated a process through which workers were able to create their own representative institutions and build a form of social power whereby it became possible to engage in negotiation, bargaining, and institutionalized conflict with the capitalist class.

While practices related to the associative concept of freedom of assembly have been utilized by civil society actors to build social power and influence public policy, they have also served to extend the reach and power of the state in and through forms of associative governance. Scholars like William J. Novak and Theda Skocpol have shown that for instance the US state maintains a high degree of regulatory capacity precisely because of its elaborate state-civil society partnerships (contrary to widespread prejudice about its weakness compared to its European counterparts). According to Novak, the US state maintains collaborative relationship with civil society associations that enhance its regulatory and administrative capacities while maintaining a decentralized form of governance. This interplay helps explain how the US state exercises significant state power, even without the traditional European-style centralized bureaucracy.<sup>55</sup> In a similar manner, Skocpol has emphasized not only how civil society associations, particularly women's voluntary organizations, played a pivotal role in shaping the development of US social policies during the late nineteenth and early twentieth centuries but also how civil society associations still function as critical intermediaries linking social demands to political action. Civil society associations thereby provide the state with organizational capacity in an otherwise fragmented political system.<sup>56</sup> The historical-

empirical analyses such as those provided by Novak and Skocpol complement the normative claims made by Rogers, Cohen, and Hirst in relation to the political theory of associative democracy discussed above. One central precondition for this form of governance, we argue, is the associative concept of freedom of assembly. Interestingly, recent research indicates that states' partnerships with civil society associations to increase their regulatory and administrative capacities is not limited to a traditionally "weak" or "small state" cases. The universal welfare states of Nordic countries also rely heavily on civil society associations in welfare provision and public policy development.<sup>57</sup> Consequently, the well-known distinction between *pluralist* and *corporatist* systems of interest representation can be thought of as *subdivisions* of the associative concept of freedom of assembly, thereby specifying the varying effects of the manner in which freedom of assembly is practiced and institutionalized across political systems. While corporatist forms of interest representation give voice to government-recognized groups, corporatism also privileges these groups over other, unrecognized groups, giving them monopoly rights and perhaps even excluding other groups. In contrast, in pluralist systems the associative concept of freedom of assembly requires social groups to partake in an open-ended competition for power and influence.<sup>58</sup> In sum, the associative concept of freedom of assembly is simultaneously the precondition for civil society actors' representative claims *toward* the state as well as a way through which the state *governs civil society*.

So far, we have stressed the stabilizing character of the associative concept of freedom of assembly, and how it can serve to create associations in civil society with the ability to represent and negotiate with existing representative institutions in order to achieve incremental improvements and transformations. However, the formation and representation of specific groups and their particular interest was viewed with great suspicion during the modern Age of Revolutions. We have already mentioned Madison's fear of factions, but the fear of factions and the freedom of assembly that enables their emergence was also prominent in the French Revolution, as evidenced by the "Chapelier Law" of 1791, whereby the National Assembly, fearful of strikes, labor protests, and radical workers' meetings, made all associations of professionals, artisans, and workers illegal.<sup>59</sup> This amounted to an outright rejection and suppression of any and all intermediary associations between the individual and the state, revealing modern liberalism's reservations and occasional intolerance toward associative forms of assembly, which were considered fundamentally subversive.<sup>60</sup>

This suggests that the three distinct concepts of freedom of assembly that we propose in the article are indeed constructed ideal types, and that conceptions of freedom of assembly are often mixed and intertwined in actual political practice and in historical events. The associative concept and practice of freedom of assembly, whereby social groups are formed and pursue their particular interests, were viewed as potentially revolutionary during and after the modern revolutions, which (both in America and in France) were preoccupied with depoliticizing intermediary bodies—whether these were estates, guilds, or federal states—in the name of the general will and sovereignty of the state. Today, the associative concept of freedom of assembly is—primarily—used either for "apolitical" activities or as a way to influence public

policy, negotiate with other organized interests in civil society, and form connections with the institutions of representative government. In this regard, and this is also the argument of Streeck and Schmitter, associative freedom of assembly is a way for *social groups* to influence politics in a political system that has *individual voters* as its basic unit. However, as any observer of politics can bear witness to, what *begins* as an associative practice of freedom of assembly—that is, the formation of organizational structures for distinct social groups to pursue their particular interests and get recognition as such by public authorities—might, by the very dynamic of political action itself, be transformed into a radical practice, which aims not only at influencing existing representative institutions but at *transforming* them altogether or by inscribing new groups into the *demos*. In this regard, and as implied throughout this section's analysis of the relation between associative freedom of assembly and civil society, associative freedom of assembly also involves key features of *deliberative democracy*. For many deliberative democrats, most forcefully developed by Jean Cohen and Andrew Arato, civil society is the primary locus of communicative rationality, where voluntary associations and organized groups can interact and foster democratic values outside the orbit of state power.<sup>61</sup> Such an understanding of the role of civil society in modern democratic states is clearly predicated on our notion of an associative form of freedom of assembly, insofar as it is this political right and concrete practice that enables society to function as a counterweight to state and economic power.

## The Radical Concept of Freedom of Assembly

The third, and final, concept of freedom of assembly is a *radical* form of the freedom of assembly. One way to begin this reconstruction of the radical concept of freedom of assembly is to note the fact that revolutions, uprisings, and resistances almost always begin with the physical gathering of people in public spaces and squares and that revolutionary periods are generally characterized—along with many other things—by increased frequency and activity of assemblies, clubs, committees, and associations.<sup>62</sup> Whether we think of recent events like the Arab Spring and the Occupy Movement, or pivotal years of historical transformation like 1989, 1968, 1917, 1871, or 1789, they are all characterized by the massive assembling of people in public to attain major political changes. As aptly phrased by the Greek-French political thinker Cornelius Castoriadis, revolutions are

accompanied by the general mobilization of all categories and strata and the breaking up of all established barriers. It is this character that makes understandable the extraordinary liberation and multiplication of the creative potential of society during revolutionary periods, the breaking up of the repetitious cycles of social life.<sup>63</sup>

The distinctly *radical* conception of the freedom of assembly conceives assemblies as means of manifesting and representing the people and/as the foundation of any and all collective political associations.<sup>64</sup> Freedom of assembly thus takes precedence over any preexisting political institutions and laws. In this sense, the “freedom” in the freedom of assembly is not a right guaranteed and regulated by the state, its laws,

and institutions; it is a freedom established by the people assembling independently or, more precisely, *free from the state*, its laws and institutions. As such, and in contrast to the liberal and associative conception of freedom of assembly, the radical conception of freedom of assembly is a constituent power rather than a constituted power, by which we mean a form of power existing and exercised outside any given constitution. As demonstrated in Table 1, the vast majority of constitutions in effect stipulates limitations and restrictions on the freedom of assembly, thereby making it a *constituted* power—a political right, whose exercising is granted and delimited in and by the constitution, that is, a liberal (an associative for that matter) form of freedom of assembly. In contrast, the radical practice of freedom of assembly cannot be constitutionally codified, because it exists prior to, and outside of, the constitution, and is a potential threat to any existing order. Popular assembly is both the fundamental form of association and highest political authority within it, and it may, as such, legitimately depose, overthrow, and/or replace any element of the constituted order at will and create a new one. As such, assembly is not a right that can be granted or regulated by the state (contrary to the liberal conception of assembly), nor is it necessarily oriented toward negotiations with the state (although associative forms of assembly can be the starting point of radical forms of assembly).

Assembly is the foundation of the legal and political order and therefore always takes precedence over it. Such radical forms of assembly historically preceded and founded liberal democracy in the form of a constituent assembly, constitutional convention, or the like. But, in what Martin Loughlin and Neil Walker have called “the juridical containment thesis,” legal positivists, liberals, and proponents of representative government frequently argue that, although representative assemblies like parliaments draw their legitimacy from constitutions created through radical, revolutionary, or constituent assemblies, the constituent power of such assemblies must be entirely exhausted in the institution of representative government.<sup>65</sup> That is, the founding assemblies cannot be revisited, as their power is too volatile, unstable, potentially even violent, to be allowed to persist in any form outside of this founding moment. This unease with the founding people can be traced all the way back to Thomas Hobbes, who insisted that the people was merely a dangerous mob or multitude in constant conflict with itself outside of its covenant to be represented by and subordinated to a sovereign and that any attempt to reclaim or reassert popular sovereignty would inevitably reduce it to a disorganized multitude once again.<sup>66</sup> However, Jean-Jacques Rousseau pointed out that Hobbes’s argument presupposed that the initial multitudes was able to assemble and collectively enter into a reciprocal contract independently of the sovereign. The people, in other words, did not need a sovereign in order to assemble and act in concert as a coherent political collectivity. The people, according to Rousseau, is always already sovereign and inherently superior to any and all governments, laws, and institutions and may change or depose them at will.<sup>67</sup>

The practical possibility of assembling and representing the people outside of the institutions of representative government is at the heart of the radical concept of freedom of assembly. It highlights the ever-present possibility of contesting the democratic legitimacy of the institutions of representative government, insofar as it asserts a different and, in some ways, more fundamental, practical conception “the people”

than that which is represented in and through representative assemblies; this is the people as a constituent actor assembled “outside” of the constituted order and its institutions, which functions as the ultimate repository of political legitimacy for political institutions and associations. In *Notes Toward a Performative Theory of Assembly*, Judith Butler discusses the role of what we call the radical concept of freedom of assembly in relation to these two notions of the people. According to Butler,

If and when political orders deemed democratic are brought into crisis by an assembled or orchestrated collective that claims to be the popular will, to represent the people along with a prospect of a more real and substantive democracy, then an open battle ensues on the meaning of democracy.<sup>68</sup>

For Butler, representative and parliamentary assemblies can be “brought into crisis” by “an assembled collective,” here by commencing an “open battle” on the meaning and practice of democracy and/as the people’s rule, because radical “freedom of assembly has to precede and exceed any form of government that confers and protects that right of assembly.”<sup>69</sup>

Radical freedom of assembly thus involves other actors, displays other forms of politics, and offers alternative views of representative institutions and political change than the liberal and associative concepts of assembly. Radical assemblies do not claim to consist of individuals with rights against the state nor of social groups aiming to influence the state, but are inhabited by “the people,” “the many,” “the 99%,” and so on, aiming at the creation of new political institutions. Although they do not use the concepts of liberal, associative, and radical freedom of assembly, Antonio Negri and Michael Hardt provide a somewhat similar typology in the final installment of their *Empire* trilogy, the book *Assembly*:

Freedom of assembly is thus no longer only a defense of individual liberty, or a protection against government abuse, or even a counterweight to state power. It is not a right conceded by the sovereign or the work of representatives but the achievement of the constituents themselves. Assembly is becoming a constitutive right, that is, a mechanism for composing a social alternative, for taking power differently.<sup>70</sup>

Whereas the liberal and associative concept of freedom of assemblies implicitly conceive the representative institutions as something to appeal to or negotiate with in order to achieve incremental change and/or political recognition and integration, the radical concept of the freedom of assembly is “a constitutive right,” “a mechanism for composing a social alternative”—or what we have called a constituent power: the fundamental power that underlies and legitimizes the constituted political order and may alter and abolish it at will in order to institute a novel political system. Insofar as this constitutive power is also the foundation of the constituted order, it remains inscribed within it, often in the form of liberal constitutional guarantees of the freedom of assembly (as a constituted power). However, these constitutional guarantees generally reveal a certain ambivalence, if not fear, of the inherent potential of assemblies to undermine the constituted order at any given juncture, which finds

expression in the consistently conditional formulations of the freedom of assembly, stipulating that assemblies must be peaceful, lawful, etc. (i.e., form part of the constituted order) as well as multiple other restrictions imposed on them in practice.

From the radical perspective, the freedom of assembly is a fundamental and irrepressible constituent capacity for profound societal and political transformation. This radical perspective on the freedom of assembly differs from the liberal and associative interpretations, which regard assembly as a constitutional right and basis for petitioning representative government or a platform for organization, negotiation, and compromise. The radical perspective instead conceives assembly as a constitutive power that can constitute new political systems and forms. Some assemblies explicitly embrace and assert this radical concept of assembly from the outset while others start from liberal or associative conceptions of assembly and, through collective protests and/or negotiations with representative institutions, come to recognize their collective power and authority as the basis of the institutions that they are confronting, which reveals the possibility of changing or entirely moving beyond them once and for all. The potential for individuals and groups to challenge the legitimacy of existing institutions of representative government when they come together in assembly and as “the people” is what underlies liberal reservations about the freedom of assembly (even while liberal democracy remains historically and theoretically entwined with it and thus cannot do away with it). In the words of Butler,

An elected regime can be brought to a halt or overcome by that assembly of people who speak “in the name of the people,” enacting the very “we” that holds final legitimating power under conditions of democratic rule. . . . This is an extra-parliamentary power without which no parliament can function legitimately, and that threatens every parliament with dysfunction or even dissolution. We may again want to call it an “anarchist” interval or a permanent principle of revolution that resides within democratic orders, one that shows up more or less both at moments of founding and moments of dissolution, but is also operative in the freedom of assembly itself.<sup>71</sup>

Following Butler, we might say, in conclusion, that freedom of assembly and the dynamics it sets in motion disclose the fact that representative democracy cannot be self-reliant or self-referential, and that its formal legality rests on the more fundamental legitimacy of the people’s often unruly and disruptive action. Representative democracy can either delete any reference to its symbolic, legitimizing actor—the assembled, constituent people—by outlawing freedom of assembly, or it can regulate and police the population’s right to assembly, as is done in every liberal democratic constitution, thereby also opening for the possibility that the legal, quotidian, and apolitical use of freedom of assembly might turn into fundamental, radical, and potentially revolutionary transformations.

### **Three Concepts of Freedom of Assembly and Contemporary Politics**

We have shown the central role of the freedom of assembly across various political traditions, while highlighting the differing conceptions of its meaning and function. We have reconstructed three distinct albeit interrelated conceptions of the freedom of

**Table 2.** Three Concepts of Freedom of Assembly.

	Liberal Concept	Associative Concept	Radical Concept
What is an assembly?	A means of petitioning to representative government	A way of creating and representing groups in negotiation with representative government	Potentially a constituent power with capacity to alter and abolish existing institutions
Acting subject	Individuals	Social groups	"The people"
Form of politics	Appeal	Negotiation	Transformation
Relation to representative politics	Acceptance of existing representative government	Creation and representation of groups in negotiation with representative government	Creation of new political forms in opposition to and beyond existing institutions
View on political change	Incremental	Incremental	Radical/fundamental

assembly: liberal, associative, and radical. These three conceptions of the freedom of assembly also illustrate fundamentally different ways of doing and thinking politics including diverging practices and concepts of representation and radical change. We summarize our analysis in Table 2.

The liberal conception of the freedom of assembly identifies it as one among several individual rights, particularly closely related to the freedom of speech and the right to petition, which is guaranteed, regulated, and delimited by state authorities. The liberal perspective emphasizes the possibility of individuals *appealing* to state authorities in order to make them address their grievances; thus, the individual and the liberal democratic institutions of representative government are seen as the primary agents of political change. Many of the actions often intuitively associated with freedom of assembly in the form of protests and demonstrations in public parks, squares, and streets or in front of public buildings can be regarded as expressing the liberal concept of freedom of assembly. Such actions aim at displaying the dissatisfaction of the assembled individuals with particular policies or issues, and actions are directed at the existing institutions, thereby implicitly accepting the established constitutional order as an adequate framework of (incremental) political change and the realization of justice.

The associative perspective conceives freedom of assembly as crucial for social groups in civil society to form and express their particular interests in negotiations with the state and each other. Again, the associative concept covers many activities and forms of interaction, which we intuitively associate with the freedom of assembly. The formation of social, economic, and political groups, civil society associations and semiformal organizations for leisurely activities are all expressions of associative freedom of assembly. In addition, the associative concept has a distinct political dimension, insofar as this approach promotes a politics of group formation and representation as intermediary institutions that can negotiate with the government and form more or less formal relations with the state. It fosters a politics of negotiation on the basis of

social power in civil society. Although the associative conception of the freedom of assembly is distinct from the liberal view, it still aligns with liberal representative democracy, insofar as it aims to incorporate social groups into this system and to push for incremental changes and social recognition within it.

Lastly, the radical concept of freedom of assembly conceives freedom of assembly as a potential catalyst for radical social and political change, capable of challenging existing political structures and establishing new ones. Unlike the liberal and associative perspectives, which view assembly as a right enshrined in the constitution or a means of appeal or negotiation, the radical perspective sees it as a constituent power, capable of instituting entirely novel political paradigms. Some events, actions, and social movements directly allude to radical freedom of assembly and are conscious of the power of assembly and its ability to bring existing political institutions into crisis. We might think of the Occupy Movement as a case in point. But more often, we suspect, assembled individuals and organized collectivities come to realize in the course of their protest, negotiation, and organization that the legitimacy of the existing framework of representative institutions always rests on—in the ultimate case—the power of the people, and hence that these can be “altered and abolished” by the assembled people. Whether individuals and organized collectivities are able to question, over time, the legitimacy of existing institutions by assembling together is always an empirical question resting on the specific constellations of forces among various actors. But when individuals assemble in public or when social groups begin to build power and legitimacy in civil society, a nascent, germinal dynamic is set in motion by the very act of assembling, which might, in due course, threaten the established order. It is this fact that accounts for the persistent liberal fear of assembly, factions, and intermediary bodies.

This typology of concepts of freedom of assembly, on the one hand, demonstrates that different contemporary political events and movements, as well as popular mobilizations and official responses to them, can be understood by reference to divergent concepts of freedom of assembly. Black Lives Matter, for example, does appeal to authorities to change specific, existing laws (in accordance with the liberal concept of the freedom of assembly), and while the movement could not have gained momentum without constructing a network of associations and informal groups in civil society (in accordance with the associative concept of freedom of assembly), the most central aim of the movement is to overthrow the racially oppressive structures of American political life as such (corresponding to the radical concept of freedom of assembly). The widespread student and faculty occupations taking place in universities across the United States in spring 2024, on the other hand, can hardly be seen as an expression of the radical concept of freedom of assembly, as the occupations’ primary objectives, in line with the liberal concept, was to appeal to university leadership to divest in Israeli companies, not to transform the structures of university investment in general and relocate investment decisions from the board to new students’ or faculty assemblies. Other contemporary and important expressions of freedom of assembly, for instance the recent pro-choice demonstrations—although advancing the potentially radical argument that women can only be free and equal citizens once they attain the full control over their own bodies and reproductive capabilities—are in many ways



liberal insofar as they are specifically aimed at overturning the US Supreme Court's recent *Dobbs v. Jackson Women's Health Organization* (2022) and restore the reproductive rights enshrined in *Roe v. Wade* (1973). Hence, the typology can be conceived as an *analytical tool* for understanding and systematizing empirical expressions of freedom of assembly, their inherent principles and normative commitments, as well as a way to trace their temporal development in cases—such as for example the Civil Rights Movement of the 1960s—which begin with protest against concrete laws, proceed to build a network of power in civil society and, ultimately, fundamentally alter the fabric of the political community and its constitution.

On the other hand, this typology also provides general insights into the relation between representative institutions and radical change. While this relation is complex and multifaceted, from the perspective of freedom of assembly we argue that the liberal concept codified in contemporary constitutions worldwide (see Table 1) illustrates how radical change via popular assembly is in a sense always already precluded, as the state firmly regulates the use of the freedom of assembly. Moreover, we have argued that the very fact that so many modern constitutions find it necessary to assert that the freedom of assembly (unlike most other fundamental rights) must be exercised in accordance with the law, testifies to a fundamental anxiety about the potentially radical and transformational nature of freedom of assembly. Radical change, we argue on the basis of this analysis, originates outside and in opposition to the institutions of representative democracy, which may be changed through radical deployment of the freedom of assembly.

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## Notes

1. Gordon Wood, *The Creation of the American Republic, 1776–1787* (University of North Carolina Press, 1969), 319–28.
2. Orsolya Sálát, *The Right to Freedom of Assembly: A Comparative Study* (Bloomsbury, 2015), 2.
3. We deploy the term *ideal type* here to denote a heuristic “analytical construct” that is “formed by the one-sided *accentuation* of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena, which are arranged according to those one-sidedly emphasized view-points into a unified *analytical* construct (*Gedankenbild*),” whose adequacy and validity consists in their utility to a concrete analysis. See Max Weber, “‘Objectivity’ in Social Science and Social Policy,” in *Max Weber: Methodology of the Social Sciences*, ed. Edward Shils and Henry Finch (Free Press, [1904] 1949), 90.
4. Parliament, “The Bill of Rights (1689),” in *Documents in English History: Early Times to the Present*, ed. Brian Blakeley and Jacquelin Collins (Alfred Knopf, 1975), 219.
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6. *Duncan v. Jones*, 1936, 1 KB 218, cited in Sálát, *Right to Freedom of Assembly*, 40.
7. Benjamin Ask Popp-Madsen, “Governing Labour: Transformations of Collective Bargaining, Law, and Governance in Denmark,” in *Associative Governance in Scandinavia: Organizing Societies by “Combining Together,”* ed. Anker Brink Lund et al. (Routledge, 2024), 90–119.
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9. Carl Ussing as cited in Jens Kristiansen, “Den danske model: Er det historiske fundament ved at smuldre?,” in *Den danske model set udefra*, ed. T. P. Larsen and A. Ilsøe (DJØF Forlag, 2016), 181, italics added, our translation.
10. The Invisible Committee, 2014, *To Our Friends* (Semiotext(e), 2015), 12.
11. On the necessarily performative aspect of “the people” in and as popular assembly, see for instance Jason Frank, *The Democratic Sublime: On Aesthetics and Popular Assembly* (Oxford University Press, 2021); Judith Butler, *Notes Towards a Performative Theory of Assembly* (Harvard University Press, 2018); see also Peter Hallward, “Concentration or Representation: The Struggle for Popular Sovereignty,” *Cogent Arts & Humanities* 4, no. 1 (2017), 1–16.
12. Butler, *Performative Theory of Assembly*, 154–92; see also Andreas Kalyvas, “Democracy, Popular Sovereignty and the Constituent Power,” *Constellations* 12, no. 2 (2005): 223–44; Andreas Kalyvas, “Constituent Power,” in *Political Concepts: A Critical Lexicon*, ed. J. M. Bernstein et al. (Fordham University Press, 2018), 87–117; Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press, 1999); Lucia Rubinelli, *Constituent Power: A History* (Cambridge University Press, 2020).
13. Butler, *Performative Theory of Assembly*; Jason Frank, *Constituent Moments: Enacting the People in Postrevolutionary America* (Duke University Press, 2010); Frank, *The Democratic Sublime*; Antonio Negri and Michael Hardt, *Assembly* (Oxford University Press, 2017); Sálát, *Freedom of Assembly*; John Inazu, “The Forgotten Freedom of Assembly,” *Tulane Law Review* 84 (2010): 565–612; John Inazu, *Liberty’s Refuge: The Forgotten Freedom of Assembly* (Yale University Press, 2012).
14. In this regard, we draw inspiration from Alex Gourevitch, “The Right to Strike: A Radical View,” *American Political Science Review* 112, no. 2 (2018): 905–17; and, without any

- comparison, Jürgen Habermas, "Three Normative Models of Democracy," *Constellations* 1, no. 1 (1994): 1–10.
15. Max Weber, *The Methodology of the Social Sciences* (Free Press, 1949), 90.
  16. Samuel Eliot Morison, ed., "Amendments to the Constitution of the United States, with Dates of Adoption," in *Sources and Documents Illustrating the American Revolution, 1764–1788, and the Formation of the Federal Constitution* (Oxford University Press, 1965), 363 (article 1) [italics added].
  17. John Inazu, *Liberty's Refuge*, 6.
  18. Sálát, *Right to Freedom of Assembly*, 14.
  19. Mogens Herman Hansen, *The Athenian Assembly in the Age of Demosthenes* (Basil Blackwell, 1987); Andrew Lintott, *The Constitution of the Roman Republic* (Oxford University Press, 2009), 3; Mouritsen, *Politics in the Roman Republic*, 15–29.
  20. Margaret Canovan, *The People* (Polity Press, 2005), 16f; see also Otto Gierke, *Political Theories of the Middle Age* (Cambridge University Press, 1987).
  21. Samuel Eliot Morison, ed., "Declaration of Independence," in *Sources and Documents Illustrating the American Revolution, 1764–1788*, 157, 160. They solved the paradox of seceding on this basis by insisting on the existence of two different people from the outset.
  22. Samuel Eliot Morison, ed., "The Constitution of the United States," in *Sources and Documents Illustrating the American Revolution, 1764–1788*, 292–304; James Madison, "The Federalist No. 63," in *The Federalist with Letters of "Brutus,"* ed. Terence Ball (Cambridge University Press, 2003), 309.
  23. Samuel Eliot Morison, ed., "Declaration and Resolves of the Continental Congress, 1774," in *Sources and Documents Illustrating the American Revolution, 1764–1788*, 120.
  24. Samuel Eliot Morison, ed., "Amendments to the Constitution of the United States, with Dates of Adoption," in *Sources and Documents Illustrating the American Revolution, 1764–1788*, 363 (article 1); Inazu, "Forgotten Freedom of Assembly," 577ff; Wood, *Creation of the American Republic*, 319–28.
  25. Micah Alpaugh, *Non-Violence and the French Revolution: Political Demonstrations in Paris, 1787–1795* (Cambridge University Press, 2014), 48–63, 70–74, 109–27; Georges Lefebvre, *The French Revolution: From Its Origins to 1793* (Routledge, 2001), 118–30; Sophie Wahnich, *In Defense of the Terror: Liberty or Death in The French Revolution* (Verso, 2012).
  26. John Hall Stewart, ed., "The Constitution of 1791, 3 September, 1791," in *A Documentary Survey of the French Revolution* (Macmillan, 1951), 232; see also John Hall Stewart, ed., "The Constitution of 1793, 24 June 1793," in *Documentary Survey of the French Revolution*, 468.

Curiously, the French Constitution of the Fifth Republic from 1958, which is currently in effect, does not contain any explicit provisions for the freedom of assembly, but it is nonetheless guaranteed by international treaties including the 1966 International Covenant on Civil and Political Rights as well as the 1950 European Convention on Human Rights. There is a relatively short list of UN member states that do not have constitutional provisions for the freedom of assembly, which includes Argentina, Australia, Brunei Darussalam, Djibouti, Gabon, Israel, San Marino, Saudi Arabia, the United Kingdom, and Yemen. The authors would like to thank Stuart Maslen for help compiling this list.

- 27 See Table 1, which has been completed based on the database of current constitutions *The Comparative Constitutions Project*, which have been compiled and coded manually by the authors. Asterisks indicate subsequent constitutional amendments that have yet to be incorporated in this database. Afghanistan's 2004 constitution has been excluded because it is no longer in effect. See "Constitute," Comparative Constitutions Project, accessed August 20, 2023, <https://www.constituteproject.org/>.

- 28 “Universal Declaration of Human Rights,” United Nations, accessed August 21, 2023, <https://www.ohchr.org/en/human-rights/universal-declaration/translations/english> (emphasis added); “Charter of Fundamental Rights of the European Union,” European Union, accessed August 21, 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.
- 29 Sálát, *Freedom of Assembly*, 1–5. The suspicion that individuals in groups are somehow more irrational and dangerous has also been pursued at length in psychology and sociology; see Gustave le Bon, *The Crowd: A Study of the Popular Mind* (Macmillan, 1896); William McDougall, *The Group Mind* (Cambridge University Press, 1920); Sigmund Freud, *Group Psychology and the Analysis of the Ego* (W. W. Norton, 1959); Christian Borch, *The Politics of Crowds: An Alternative History of Sociology* (Cambridge University Press, 2012).
- 30 Cited and analyzed in Nicolai von Eggers, “When the People Assemble, The Laws Go Silent: Radical Democracy and the French Revolution,” *Constellations* 23, no. 2 (2016): 255.
- 31 Butler, *Performative Theory of Assembly*, 154–92. On the history and development of the concept of constituent power, see the references in note 14.
- 32 Sálát, *Freedom of Assembly*, 107–8.
- 33 Sálát, *Freedom of Assembly*, 55.
- 34 The prominence of the role of state in this discussion of the liberal concept of freedom of assembly might be confusing, as liberalism is often perceived as an ideology centered on the individual, its freedom, and inalienable rights. But as argued by Benjamin Barber, parts of the liberal tradition have a strong focus on the state as the guarantor of individual liberty, thereby granting the state extensive political power. Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press, 1984), 11–15.
- 35 For an insightful case study and analysis of the meaning of the “public” and “public order” in British law frequently invoked against demonstrations and other assemblies by the police, see Nina Power, “Who Is the Public of ‘Public Order’? Sovereignty, Citizenship and the Commons” (PhD diss., Birkbeck University of London, 2016).
- 36 Morison, “Constitution of the United States,” 292.
- 37 For a highly influential analysis and critique of the notion of a preexisting people as a constituent power outside and prior to the constitution, see Jacques Derrida, “Declarations of Independence,” *New Political Science* 15 (1986): 7–15.
- 38 Sálát, *Freedom of Assembly*, 10–12; King John of England, “Magna Carta (1215),” 60–64; Parliament, “Bill of Rights (1689),” 217–21.
- 39 Parliament, “The Bill of Rights (1689),” 219.
- 40 Sálát, *Freedom of Assembly*, 12–13; Stephen Higginson, “A Short History of the Right to Petition Government for the Redress of Grievances,” *Yale Law Journal* 96, no. 1 (1986): 142–66.
- 41 Morison, “Declaration of Independence,” 160.
- 42 Morison, “Amendments to the Constitution,” 363 (article 1).
- 43 Cited in Inazu, *Liberty’s Refuge*, 22.
- 44 Kalyvas, “Constituent Power.”
- 45 It was in this context Hannah Arendt argued that “the revolutionary spirit in America began to wither away, and it was the Constitution itself, this greatest achievement of the American people, which eventually cheated them of their proudest possession.” Arendt, *On Revolution* (Penguin Classics, 2006), 231.
- 46 The complementarity of liberal and the associative concepts of freedom of assembly is neatly illustrated by the frequent combination of constitutional clauses pertaining to the (liberal) freedom of assembly and the freedom of association (although the latter is frequently combined with a parallel insistence on the right to freedom *from* association).

- 47 James Madison, "The Federalist No. 10," in Ball, ed., *The Federalist with Letters of "Brutus"*, 40–46. Madison explains (p. 41) that "by a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."
- 48 G. W. F. Hegel, *Elements of the Philosophy of Right* (Cambridge University Press, 1991), 342 (§ 302) (italics in original).
- 49 Wolfgang Streeck and Philippe Schmitter, "Community, Market, State and Associations? The Prospective Contribution of Interest Governance to Social Order," *European Sociological Review* 1, no. 2 (1985): 119–38.
- 50 Joshua Cohen and Joel Rogers, "Solidary, Democracy, Association," in *Associations and Democracy*, ed. Erik Olin Wright (Verso, 1995), 236; Joshua Cohen and Joel Rogers, "Secondary Associations and Democracy," in Wright, *Associations and Democracy*, 44–46; Veit Bader, "Associative Democracy: From 'the Real Third Way' Back to Utopianism or Towards a Colourful Socialism for the 21st Century?" *Thesis Eleven* 167, no. 1 (2021): 12–41.
- 51 Paul Hirst, *Associative Democracy: New Forms of Economic and Social Governance* (University of Massachusetts Press, 1994), 19.
- 52 Hirst, *Associative Democracy*, 19.
- 53 Popp-Madsen, "Governing Labour," 90–119.
- 54 On this topic, see also Søren Mau, *Mute Compulsion: A Marxist Theory of Economic Power* (Verso, 2023), 123–34.
- 55 William J. Novak, "The Myth of the 'Weak' American State," *American Historical Review* 113, no. 3 (2008): 765–67.
- 56 Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Belknap Press of Harvard University Press, 1992), 1–62.
- 57 Søren Christensen et al., "Introduction: Scandinavian Perspectives on Associative Governance," in Lund et al., *Associative Governance in Scandinavia*, 1–20; Søren Christensen et al., "Premises and Promises of Associative Governance," in Lund et al., *Associative Governance in Scandinavia*, 255–89.
- 58 Suzanne Berger, ed., *Organizing Interests in Western Europe: Pluralism, Corporatism, and the Transformation of Politics* (Cambridge University Press, 1981).
- 59 Gaston V. Rimlinger, "Labor and the Government: A Comparative Historical Perspective," *Journal of Economic History* 37, no. 1 (1977): 210–25, 211–12; Massimiliano Tomba, *Insurgent Universality: An Alternative Legacy of Modernity* (Oxford University Press, 2019), 59–60; "The Le Chapelier Law (1791): art. 2," French Revolution, Alpha History, accessed September 28, 2023 <https://alphahistory.com/frenchrevolution/le-chapelier-law-1791/>.
- 60 Rimlinger, "Labor and Government," 212; William H. Sewell, *Work and Revolution in France: The Language of Labor from the Old Regime to 1848* (Cambridge University Press, 1980), 91.
- 61 Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (MIT Press, 1992).
- 62 Wood, *Creation of the American Republic*, 306–44; Martin P. Thompson, *Paradise of Association: Political Culture and Popular Organizations in the Paris Commune of 1871* (University of Michigan Press, 1996); Oskar Anweiler, *The Soviets: The Russian Workers, Peasants, and Soldiers Councils, 1905–1921* (Pantheon Books, 1971); Hannah Arendt, *On Revolution*, 207–73.
- 63 Cornelius Castoriadis, "The Hungarian Source," in *Political and Social Writings*, vol. 3 (University of Minnesota Press, 1993), 254.

- 64 Here it is illustrative to note that “radical” is derived from the Latin concept of *radix*, which means “root” and can thus be understood to refer to what is fundamental or the foundations of the political community. Peter Osborne, “Radicalism and Philosophy,” *Radical Philosophy* 103 (2000): 7; see also Karl Marx, “Critique of Hegel’s Philosophy of Right: Introduction,” in *Early Writings* (Penguin, 1975), 251.
- 65 Martin Loughlin and Neil Walker, introduction to *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford University Press, 2007), 6.
- 66 Thomas Hobbes, *Leviathan: With Selected Variants from the Latin Edition of 1668* (Hackett, 1994), 75–86, 116–17, 213; see also Quentin Skinner, *Visions of Politics III: Hobbes and Civil Science* (Cambridge University Press, 2014).
- 67 Jean-Jacques Rousseau, “The Social Contract,” in *Basic Political Writings of Jean-Jacques Rousseau*, ed. Donald Cress (Hackett, 1987), 147; see also Mikkel Flohr, “The Use and Abuse of Rousseau’s *The Social Contract* in Modern Political Thought: Toward a Reinterpretation,” *Telos* 210 (2025): 8–28.
- 68 Butler, *Performative Theory of Assembly*, 2.
- 69 Butler, *Performative Theory of Assembly*, 160.
- 70 Negri and Hardt, *Assembly*, 295.
- 71 Butler, *Performative Theory of Assembly*, 162–63.

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