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Finding a Place for the Freedom of Assembly

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1. Introduction

"Those who make peaceful revolution impossible will make violent revolution inevitable."[1]

President John F. Kennedy

Throughout American history the freedom of assembly has played a distinct role in affecting social change and impacting public opinion. The freedom of assembly has facilitated some of the most important social movements in American history: "antebellum abolitionism, women's suffrage, the labor movement in the Progressive Era and after the New Deal, and the Civil Rights movement."[2] The power of assembly fought "the ideological tyranny that exploded during the first Red Scare in the years surrounding the World War I and the second Red Scare of 1950s' McCarthyism."[3] Abraham Lincoln once called "the right of peaceable assembly" part of "the Constitutional substitute for revolution."[4] In the 21st century, however, the freedom of assembly's power has waned when it is most needed. An erosion of the activities and capacities of citizenship has impoverished American civic life and left our democracy at risk.[5] Political participation has been consistently falling since the mid-1970s.[6] Recent events such as the Supreme Court's *Citizens United v. Federal Election Commission* decision have made it even harder to impact our political system. Ordinary citizens cannot afford a lobbyist or significant political contributions. The rapidly growing inequality in American political equality and the ability to impact political discourse is what makes a strong freedom of assembly so important.

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[1] President John F. Kennedy, Address on the First Anniversary of the Alliance for Progress (March 13, 1962).
[2] John D. Inazu, *The Forgotten Freedom of Assembly*, 84 Tul. L. Rev. 565, 566 (2010).
[3] *Id.*
[4] *Id.*
[5] STEPHEN MACEDO ET AL., DEMOCRACY AT RISK: HOW POLITICAL CHOICES UNDERMINE CITIZEN PARTICIPATION, AND WHAT WE CAN DO ABOUT IT 1 (The Brookings Institution, 2005).
[6] *Id.*

In the aftermath of September 11, 2011, increasing government regulation has neglected the freedom of assembly in the name of national security. In 2012, President Barack Obama signed H.R. 347: Federal Restricted Buildings and Grounds Improvement Act of 2011.[7] The bill, commonly referred to as the "trespass bill,"[8] passed through the House of Representatives with a vote of 388-3.[9] The bill updates an obscure law originally passed in 1971 by lowering the requisite criminal intent required to prosecute persons in restricted areas.[10] The trespass bill is part of a set of laws which regulate assembly and contribute to the institutionalization of political protest and dissent.[11] These laws create what have been referred to as "free speech zones."[12] They are commonly used by the government to displace protesters with dissenting viewpoints.[13] While the law does not regulate the content of people's speech, it regulates the location of speech and who hears the speech. However, the location of the assembly and protest is just as important as the content of the speech. The law diminishes the goal of assembly which is to influence public opinion. Despite small changes to the bill, the purpose of expanding the scope of the law is obvious. Similar to other free speech zones, the purpose of the amendment to the bill is to suppress political dissent and protest by regulating the location of assembly.

The Supreme Court's focus on the message of the protesters instead of the act of assembly has diluted the power of assembly. This misguided approach allows the Court to analyze assembly through the public forum doctrine. The doctrine chills protest because it allows

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[7] H.R. 347: Federal Restricted Buildings and Grounds Improvement Act of 2011 (On the Senate Amendment). Govtrack.us, (February 27, 2011), http://www.govtrack.us/congress/votes/112-2012/h73 (last visited Oct. 26, 2012).
[8] Molloff, Jeanine, *H.R. 347 'Trespass Bill' Criminalizes Protest*, HUFFINGTON POST, http://www.huffingtonpost.com/jeanine-molloff/trespass-bill_b_1328205.html (last visited Oct. 26, 2012).
[9] *Id.*
[10] Rottman, Gabe, *How Big a Deal is H.R. 347, That "Criminalizing Protest" Bill?*, AMERICAN CIVIL LIBERTIES UNION, (Oct. 26, 2012).
[11] *Id.*
[12] *Free Speech Under Fire: The ACLU Challenge to "Protest Zones"*, AMERICAN CIVIL LIBERTIES UNION, (Sept. 23, 2003), http://www.aclu.org/free-speech/free-speech-under-fire-aclu-challenge-protest-zones (last visited Jan. 31, 2013).
[13] Rottman, Gabe, *supra* note 10.

for the imposition of reasonable time, place, and manner restrictions.[14] The constitutional significance of assemblies lies not with the content of the speech, but instead with the act of assembly itself. The act of assembly presupposes that there is an actual place to assemble and be heard. Protests and assemblies will of course consist of speeches being made and signs being waved, but they are hardly the main objective of the exercise.[15] After all, most of the speeches are inaudible and the signs often illegible.[16] The significance of the exercise is the assembly itself.[17] A large public gathering forms a sense of solidarity, helps to influence public opinion, and sends a collective message to public officials.[18]

The Constitution recognizes assembly and speech as distinct rights. The application of the public forum doctrine has cast a shadow over the freedom of assembly. The doctrine needs to be re-conceptualized to accommodate the act of assembly and the importance of location. Laws such as H.R. 347 and other "free speech zones" contribute to the institutionalization of political which causes a significant erosion of the ability of the average citizen to influence public opinion. Analyzing political protest and assembly through the prism of free speech minimizes the importance of the act of assembly and the expressive message that it conveys. Assembly is a form of expressive speech that places larger emphasis on the symbolism of the assembly itself and its location than over the content of the message. The Supreme Court must draw a bright line between free speech and the expressive significance of location within assembly.

Part I of this Note discusses the development of the U.S. Supreme Court's analysis of the freedom of assembly and the history of H.R. 347. Part II highlights the importance of assembly in American history. Part II-B examines the importance of location and ability to reach a target

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[14] *Perry Education Assn. v. Perry Local Educators' Assn.* 103 S.Ct. 948, 956 (1983).
[15] Ashutosh Bhagwat, *Associational Speech*, 120 Yale L.J. 978, 1016 (March, 2011).
[16] *Id.*
[17] *Id.*
[18] *Id.*

audience in assembly. Part II-C explores the public forum doctrine's impact on assembly. Part II-D looks at the impact of free speech zones and how they are created. Part II-E analyzes the delicate balance that must be drawn between competing security interests and an individual's right to assemble. And finally, Part II-F proposes a bright-line rule for the Supreme Court to consider when evaluating freedom of assembly claims.

Part I: Background

The freedom of assembly, like the right of petition, was originally considered central to securing democratic responsiveness and active democratic citizens.[19] We now view it instead as simply another facet of the individual's right of free expression, focusing almost exclusively on the question of whether the group's message will be heard.[20] This has happened because over time the Supreme Court has conflated the freedom of assembly with free speech.

A. History of Supreme Court Jurisprudence

One of the first freedom of assembly cases in Supreme Court jurisprudence is *Whitney v. California* (1972).[21] Even though *Whitney* is classified as a free speech case, it actually focuses on association and assembly.[22] Anita Whitney was convicted under California's 1919 Criminal Syndicalism Act for allegedly promoting the Communist Labor Party.[23] The organization she belonged to was accused of advocating the violent overthrow of the government.[24] The focus of her prosecution was not that Whitney's speech constituted criminal syndicalism, but merely that she belonged to an organization.[25] Speech could not have been the basis for her prosecution because Whitney herself had never advocated violence; to the contrary, she was on the record as

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[19] Inazu, *supra* note 2, at footnote 250.
[20] *Id.*
[21] Whitney v. California, 274 U.S. 357 (1927).
[22] Bhagwat, *supra* note 15, at 983.
[23] Whitney v. California, 274 U.S. 357, 366 (1927).
[24] *Id.*
[25] Bhagwat, *supra* note 15, at 984.

supporting peaceful, democratic activism.[26] What is significant about the majority's opinion is that they speak of the rights of free speech, assembly, and association as separate components of the First Amendment.[27] The case is most famous for Justice Brandeis' concurrence in which he describes the statute as being directed "not at the practice of criminal syndicalism … but at association with those who propose to preach it."[28] Justice Brandeis also refers to the right of free speech and the right of assembly as distinct and coequal fundamental rights.[29]

In 1937, the Supreme Court incorporated the freedom of assembly into the due process clause in *De Jonge v. Oregon* (1937).[30] The Court stated that "the right to peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."[31] The right to assemble is "one that cannot be denied without violating these fundamental principles which lie at the base of all civil and political institutions."[32] Again, in *Thomas v. Collins* (1945), the Court described, speech, press, assembly and petition as separate and distinct rights that, in combination constitute, "the indispensable democratic freedoms secured by the First Amendment."[33] The Court emphasized that restrictions of assembly could only be justified under the 'clear and present danger' standard that the Court had adopted in its free speech cases."[34] The Court in *Thomas* focuses on the content of the speech in the assembly. Despite referring to speech and assembly as distinct, the Court's application of the 'clear and present danger' test suggests it is primarily concerned with the speech itself.

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[26] *Id.*
[27] *Id.*
[28] *Whitney*, (Brandeis concurrence), at 372.
[29] *Id.* (concurrence), at 373.
[30] De Jonge v. State of Oregon, 299 U.S. 353 (1937).
[31] *Id.* at 364.
[32] *Id.*
[33] Thomas v. Collins, 323 U.S. 516, 530 (1945).
[34] Inazu, *supra* note 2, at 605.

The Supreme Court's increasing focus on the speech of assembly has enhanced its ability to regulate and displace assembly under the public forum doctrine. Laws such as H.R. 347 do not focus on actual speech as much as where they speech is made. In *Hague v. C.I.O.* (1939), the Court strongly emphasized the important role of public places in facilitating public discourse.[35] In *Hague*, the Court declared void on its face a city ordinance enacted to prevent labor meetings in public places and to prevent the distribution of literature pertaining to the organization's cause.[36] Justice Roberts, writing for the Court, declared that the "streets and parks … have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions."[37] That dictum represents the foundation for modern standards regarding access to public properties for purposes of speech and assembly.[38] Justice Roberts acknowledged the historical—"immemorial," "time out of mind," and "from ancient times"—intersection between expressive liberties and public places.[39] With this dictum, the Court implicitly recognized that people in public places have always depending upon their ability to assemble and express their views.[40]

The *Hague* Court downgraded government from "owner" to "trustee" of public land.[41] The government has a responsibility to ensure that public places are available for citizens to discuss matters of public concern.[42] As "trustee" of the public streets and parks, the government

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[35] Hague v. C.I.O., 307 U.S. 496, 515 (1939).
[36] *Id.*
[37] *Id.*
[38] Timothy Zick, *Property As/ And Constitutional Settlement*, 104 Nw. U. L. Rev. 1361, 1401 (Fall 2010).
[39] TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 184 (1st ed. 2008).
[40] *Id.*
[41] *Id.* at 185.
[42] *Id.*

is charged with maintaining such places and permitting access to them for expressive purposes.[43] *Hague* implied that the people had an enforceable right to be in particular places for expressive purposes.[44] Indeed, the legal scholar Harry Kalven, Jr. read *Hague* as establishing a democratic "easement" for the people in public parks and streets, one that even permitted people to "commandeer" certain public places for expressive purposes.[45] However, the Court also made clear that the privilege of a citizen to the "streets and parks for communication of views on national questions" is not absolute.[46] In short, the citizen's privilege to the streets and parks is just that, it is a privilege that cannot be abused.

In *Schneider v. State of New Jersey* (1939), the Supreme Court expanded upon *Hague* by declaring that a city must allow speech in public places even if doing so will impose costs on the city.[47] Justice Roberts, again writing for the Court, declared "The streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[48] Justice Roberts' dictum is so important because it clearly rejects the notion that a city can restrict assembly and distribution of leaflets because there are other locations available. In both *Hague* and *Schneider*, Justice Roberts mentions "appropriate" places for expressive activity.[49] This builds upon the idea that government's role with respect to public places is more of a caretaker than an owner.[50] The government's job was to be less about determining what types of expressive speech was acceptable in public places and more about

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[43] SPEECH OUT OF DOORS, at 184.
[44] *Id.* at 185.
[45] *Id.*
[46] *Hague*, at 516-517.
[47] *Schneider v. State of New Jersey*, 308 U.S. 147, at 151 (1939).
[48] *Id.*
[49] David S. Allen, *Spatial Frameworks and the Management of Dissent: From Parks to Free Speech Zones*, 16 Comm. L. & Pol'y 383, 406 (Autumn, 2011).
[50] *Id.*

ensuring that citizens have access to public places to allow them to fulfill their expressive needs.[51]

B. The Evolution of 18 U.S.C. § 1752

Recent history has seen a flurry of government regulation designed to manipulate the public forum for the purpose of displacing assembly and political protest. The most recent example is the "Federal Restricted Buildings and Grounds Improvement Act of 2011."[52] The law, signed by President Barack Obama in March 2012, expands an existing statute that criminalizes certain activity in and around areas that are restricted by the Secret Service.[53] The bill slightly rewrites a short trespass law, originally passed in 1971 and amended a few times since, that covers areas subject to heightened Secret Service security measures.[54] The bill was passed in the aftermath of a period of political violence in the 1960s, and lawmakers sought to enact legislation that would better protect American leaders.[55] The bill's purpose was to protect the physical safety of the President, and more broadly, to secure the Office of the President.[56] To achieve these goals, the bill extended federal protection to the President's specially designated "temporary residences and offices," and to "posted, cordoned off, or otherwise restricted areas where he is or will be visiting."[57] Importantly, when the Senate passed the bill, they were particularly mindful of achieving a proper balance between the protection of the President and America's strong protection of free speech.[58]

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[51] *Id.*
[52] H.R. 347, *supra* note 7.
[53] Rottman, Gabe, *Ready to Occupy? What You Need to Know about H.R. 347, the "Criminalizing Protest" Law*, AMERICAN CIVIL LIBERTIES UNION (Apr. 26, 2012), http://www.aclu.org/blog/free-speech/ready-occupy-what-you-need-know-about-hr-347-criminalizing-protest-law.
[54] Rottman, *supra* note 10.
[55] Elizabeth Craig, Note, *Protecting the President from Protest: Using the Secret Service's Zone of Protection to Prosecute Protesters*, 9 J. Gender Race & Just 665, 669 (2006).
[56] *Id.*
[57] *Id.*
[58] *Id.*

The recently amended bill restricts protest in three places: (1) the White House or the Vice President's residence; (2) a building or area where any individual under Secret Service protection is visiting; (3) a building or area at which a National Special Security Event (or "NSSE") is taking place.[59] These events can include anything from the Super Bowl to presidential nominating conventions.[60] The bill also grants the Department of Homeland Security significant discretion in designating what qualifies as one of these special events.[61] The updated bill makes one potentially significant change, which makes it easier for the Secret Service to abuse lawful protesters and assemblies. Under the original statute, a person had to act "willfully and knowingly" when committing a crime.[62] In short, you had to know your conduct was illegal.[63] The updated bill removes "willfully" and just requires a person to act "knowingly," which would mean that the person needs to know he or she is in a restricted area, but not necessarily that the person is committing a crime.[64] The lower intent requirement allows for greater prosecutorial discretion in punishing protesters in restricted areas.

The law has the effect of creating a "free speech zone" around Secret Service designated areas.[65] These "free speech zones" are often used by the government to target viewpoints or to displace protesters from the object of their protest.[66] While the law does not expressly address free speech zones, the ACLU cautions that the updated law should be viewed as part of a set of laws that make displacing dissent easier.[67] Even though the recent changes to 18 U.S.C. § 1752 are not groundbreaking, they signify an increasing ability of the government to control the

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[59] 18 U.S.C. § 1752.
[60] Rottman, *supra* note 10.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] Rottman, *supra* note 10.
[66] *Id.*
[67] *Id.*

location of political speech and assembly. Through regulations such as this, the government is using the public forum doctrine to institutionalize political protest and dissent.

Part II. Doctrinal and Theoretical Significance of the Distinction between Free Speech and Assembly

A. Importance of Assembly

Throughout American history, street corners[68], parks[69], and public squares[70] were the quintessential locales for average Americans to reach other citizens with their words. However, in the 21st century, partially due to the emergence of social media, the importance of location within the traditional public forum has diminished. For many Americans, their daily activity has shifted from publicly-owned to privately-owned spaces, like shopping malls, where the First Amendment does not apply.[71] It is becoming harder and harder for average citizens to interact with each other. This trend is augmented by governmental efforts to divest the public of the traditional public forum.[72] Increasing efforts by government officials to displace assemblies and protesters has created a need for a stronger emphasis on a freedom of assembly that is distinct from the First Amendment's protection of free speech.

Protesters on streets throughout the country are typically dismissed by many observers. However, during times of heightened national security, economic downturn, or civil rights struggles, the United States has seen larger demonstrations with more negative externalities.[73] In these instances, the media will take notice. It is precisely these more widespread expressive messages of dissent that are the most effective ways for ordinary citizens to voice their opinions.

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[68] Street v. New York, 394 U.S. 576 (1969).
[69] *Perry Education*, *supra* note 14, at 955.
[70] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995).
[71] Kevin Francis O'Neill, *Privatizing Public Forums to Eliminate Dissent*, 5 First Amend. L. Rev. 201, 203-204 2007).
[72] *Id.* at 206-207.
[73] Joseph D. Herrold, *Capturing the Dialogue: Free Speech Zones and the "Caging" of First Amendment Rights*, 54 Drake L. Rev. 949, 973 (2006).

Throughout American history, these larger demonstrations have proven successful at impacting public discourse and affecting social progress.[74] Justice Brandeis stated that the protection of political protest and dissent is essential in a democratic society:

> Freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[75]

The freedom of assembly is a fundamental principle, distinct from the freedom of speech, which enables public discussion.

Political equality is a key principle in democratic government and the gross inequalities of political influence are dangerous to our democracy.[76] Political equality refers to the extent to which citizens have an equal voice over governmental decisions.[77] American political equality is expressed through one-person/one-vote, equality before the law, and equal rights of free speech.[78] Citizen participation is at the heart of political equality because political activity is the means by which citizens inform their government of their needs and preferences.[79] The freedom of assembly is perhaps the most effective way for citizens to induce political action. Growing political inequality makes it harder for citizens to influence government action and discourages political participation. Part of influencing the political system requires having a certain type of access to forums and locations.

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[74] Inazu, *supra* note 2, at 566 (referencing claims of assembly standing against the ideological tyranny that exploded during the first Red Scare in the years surrounding the First World War and the second Red Scare of 1950s' McCarthyism).
[75] *Whitney*, at 648.
[76] Sidney Verba, *Thoughts About Political Equality: What Is It? Why Do We Want It?*
[77] *Id.*
[78] *Id.*
[79] *Id.*

Expressive speech and political protest are most effective when made through the freedom of assembly. Indeed, the two are inextricably intertwined. The direct benefit to any particular person of expressing a dissenting political view is relatively slight.[80] Unless that person is a person of unusual power and influence, his or her individual voice is unlikely to have much of an impact on public opinion or government policy.[81] However, the cost of that person being imprisoned for his or her speech is potentially staggering.[82] Laws such as H.R. 347 increase the stakes for those expressing their opinions by making assembling in certain locations a federal offense. Protesters are often "chilled" in their willingness to sign a petition, march in a rally, or speak on soapbox if doing so risks criminal prosecution.[83] Moreover, this effect is multiplied across society.[84] Even though many Americans may share the same political and dissenting views, they all may be individually "chilled" in their willingness to express their opinion if they fear punishment for doing so.[85] The fragility of speech and assembly only further underscores the importance of enhancing the freedom of assembly as a means of promoting political equality.

B. The Importance of "Location" in Assembly

The current doctrinal approach to freedom of assembly and political protest is analyzed through a free speech lens. The two have been conflated over time where courts focus on the content of speech heard in an assembly.[86] This misguided approach minimizes assembly to being a mere vehicle for enhancing speech. While every assembly contains an element of speech, the Court's emphasis on speech underscores the true value of assembly in a democratic society.

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[80] GEOFF STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM, **(page)**, 1st ed. (2004).
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] Stone, at....
[86] Bhagwat, *supra* note 15, at 980.

Assembly is a collective expressive message that only functions when assemblies are allowed to gather in certain locations. The most important aspect of assembly is location.[87] However, because courts focus on the actual speech of the assembly, the public forum doctrine is applied to the freedom of assembly. The doctrine allows for government to displace assembly and political protest through reasonable, time, and manner restrictions.[88]

H.R. 347 is part of a series of laws that displace assembly and protesters away from a meaningful location. The law is not concerned with the content of speech; rather it focuses on the target the speech is directed toward. Under H.R. 347 and similar laws, it has become routine for the Secret Service to separate gatherers based on viewpoint. Protesters who refuse to confine their expressive speech to "free speech zones" are arrested.[89] In one instance, a "free speech zone" consisted of a large baseball field surrounded by a six-foot high chain-link fence and was located about three quarters of a mile from the presidential appearance.[90] Once inside the zone, protesters were not permitted to leave until the event ended.[91] Furthermore, reporters were generally not permitted to enter the zone.[92] While dissenters are segregated away, those who are not protesting are permitted to stand within eyeshot, earshot, and camera-shot of the President.[93] In another case, a protester at an airport where Air Force One landed was arrested under 18 U.S.C. § 1752 when he refused to go to a designated "speech zone" to display a sign that said "No War for Oil."[94] Although it was not clearly marked, the Secret Service maintained that a 100-yard area surrounding the airport constituted a "secured zone."[95] Despite the fact that pro-

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[87] Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 Geo. Wash. L. Rev. 439, 443 (2006).
[88] Perry Education, *supra* note 14, at 955.
[89] *Your right to say it...but over there*, CHICAGO TRIBUNE, September 28, 2003.
[90] SPEECH OUT OF DOORS, at 235.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*

administration individuals were allowed near this secured zone, the protester's conviction was upheld over a First Amendment challenge.[96]

Political protest and dissent are forms of expressive speech that are most effective in public spaces, especially in places where the object of the protest is present.[97] Specifically, free speech zones take away protesters' ability to reach their target audience. The goal of these protests is to gain attention and impact the status quo. Assemblies want to draw attention to their cause and convince others of their cause.[98] The Occupy Wall Street movement proves just how effective the location of an assembly can be in expressing a message. The location of the "encampment" in Zuccotti Park in the heart of Wall Street gave life to the Occupy movement. The media became fascinated with the movement and it lead to Occupy protests springing up all over the United States.[99] While impossible to prove, it seems unlikely that the Occupy movement would have spread so rapidly had it not been allowed to commandeer Zuccotti Park.

The symbol and power of a location can serve as an important mouthpiece for an organization's message. Zuccotti Park, located in the center of the target of the Occupy protests, provided the perfect vehicle for the Occupy message. The first month of the Occupy Wall Street protest marked an obvious shift in the way the media covered the economic crisis in 2011.[100] Due to Occupy Wall Street, the media focused more on unemployment and jobs instead of the debt in the weeks following the debt ceiling negotiations on Capitol Hill.[101] In the last week of July, 2011 the word "debt" was mentioned more than 7,000 times on MSNBC, CNN, and Fox

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[96] SPEECH OUT OF DOORS, at 235.
[97] Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First American Jurisprudence*, 75 Fordham L. Rev. 2587, 2588 (2007).
[98] Herrold, *supra* note 73, at 971.
[99] Andrew Grossman, *Spreading Protests Yet to Jell*, WALL STREET JOURNAL, (October 17, 2011). http://online.wsj.com/article/SB10001424052970204479504576635050542416050.html.
[100] *How the 99 Percent are Changing America One News Story at a Time*, THINK PROGRESS (Oct. 19, 2011), http://thinkprogress.org/progress-report/the-99-percent-effect-on-the-media/.
[101] *Id.*

News, and "unemployed" was mentioned only 75 times.[102] A review of the same three networks between October 10 and October 16, 2011 during the Occupy movement, the word "debt" received just 398 mentions while "jobs" received 2,738 and "Wall Street" netted 2,378.[103] The assembly was able to impact public discourse and the marketplace of ideas in the way that corporate spending is now able to in the aftermath of the *Citizens United v. Federal Election Commission* decision. That the Supreme Court has strengthened corporate speech makes it more paramount than ever to strengthen assembly.

In *Abrams v. United States*, Justice Holmes' first spoke of the "marketplace of ideas."[104] A marketplace of ideas presupposes an actual place in the public forum for ordinary citizens to gather and share their ideas. At a time when billions of dollars were being poured into the 2012 Presidential Election,[105] the voice of ordinary Americans seems drowned out in the marketplace of ideas. Increasing government restrictions and the expansion of corporate speech threatens to fill the marketplace and drown out opposing viewpoints. Unable to form their own political lobbying group, Occupy Wall Street formed their own movement to spread their message. They just needed the right location.

Restrictions on the location of assembly and speech are justified under the public forum doctrine due to their "secondary effects."[106] Particularly with free speech zones, regulations are designed to prevent crime and other harmful effects that may arise from assembly.[107] However, it seems that by merely zoning speech to another location, speech is not viewed as being

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[102] *Id.*
[103] *Id.*
[104] *Abrams v. United States*, 250 U.S. 616, 630 (1919).
[105] Patricia Zengerle, *U.S. Vote in 2012 Will Be Record, $6 Billion Election*, REUTERS (Aug. 30, 2011), http://www.reuters.com/article/2011/08/30/us-usa-campaign-spending-idUSTRE77T3ZX20110830.
[106] Crocker, *supra* note 96, at 2596.
[107] David L. Hudson, Jr. *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms"*, 37 Washburn L.J. 55 (1997) (secondary effects include: noise, security problems, residential privacy, traffic congestion, increased criminal activity).

suppressed but merely relocated so as to prevent potential criminal activity.[108] While the prevention of crime and other negative "secondary effects" is an important consideration, the Supreme Court must draw a bright line rule which recognizes the importance of location within the freedom of assembly.

C. The Public Forum Doctrine's Impact on Assembly

The public forum doctrine's focus on the content of speech neglects the importance that location plays in the freedom of assembly. Part of the rationale behind the public forum doctrine is that because there are so many other places or venues for speech, the government can reasonably restrict access to those places it designates as non-public.[109] However, the real query for the freedom of assembly should be whether there are adequate places to assemble. Assembly is not speech. Assembly is entirely dependent upon having a place in public to gather and assemble. While the content of the assembly's verbal communication is undoubtedly part of every assembly, the larger expressive message of assembly is dependent upon location and access to the public.

A significant number of public forum cases in the Supreme Court have not involved individual speakers seeking access to government properties.[110] Instead, they have involved groups wanting to use government property and public land to assemble, recruit, and send a collective, expressive message to the public or government officials.[111] *Hague* and *Schneider* both involved groups gathering on public land for the purpose of reaching other people. The passing of literature in *Schneider* would not be effective if the assembly was designed to a less populated area of the city. Assembly is dependent upon location and access to specific audiences.

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[108] Crocker, *supra* note 96, at 2596.
[109] Patrick M. Garry, *The First Amendment and Non-Political Speech: Exploring a Constitutional Model that Focuses on the Existence of Alternative Channels of Communication*, 72 Mo. L. Rev. 477, 495 (2007).
[110] Bhagwat, *supra* note 15, at 1016.
[111] *Id.*

Initially, the concept of the public forum was intended to be speech protective.[112] Whether the concept was intended to establish a system of categorizing public property in order to define access rights for expressive purposes is less certain.[113] However, over the past fifty years, the Court has traveled a winding course that has ultimately led to its current articulation of a doctrine that has attracted widespread criticism and concern among legal commentators and among various Justices.[114] The Court's application of the public forum doctrine to assembly allows it to displace political protest and take away its effectiveness.

Part of the rationale behind the public forum doctrine holds that, because there are so many other places for speech, the government can restrict access to certain places it designates as "non-public."[115] The Supreme Court's focus on the content of speech instead of the actual location of the assembly has led to a weaker freedom of assembly. To express a message of political protest or dissent is to attempt to reach new audiences and the object of the protest. No expressive message is made when the object of the protest cannot see or hear the assembly. Recent regulation has targeted the elimination of the dissenters' ability to appear *as* dissent to specific audiences.[116] Preventing groups from appearing as dissent has led to the increasing reliance on free speech zones as a way of protecting public order and promoting security.

D. Creation of Free Speech Zones

The Supreme Court's application of the public forum doctrine to the freedom of assembly enables government officials to create "free speech zones" around important locations and audiences. The primary aim of a free speech zone is to control the location of public expression

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[112] Zick, *supra* note 39, at 196-7.
[113] *Id.*
[114] *Id.*
[115] Patrick M. Garry, *supra* note 106, at 495.
[116] Crocker, *supra* note 96, at 2588

of opinion.[117] These regulations are routinely permitted if they are reasonable time, place, and manner restrictions.[118] A government regulation is permitted if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction of alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.[119] Free speech zones are difficult to challenge because the concept of a free speech zone is too amorphous for a court to rule on in the abstract.[120] Regardless of their motives, most assemblies confined to free speech zones are there to express their viewpoints with the intention of changing the minds of others.[121] Denying these individuals access to their target audience denies them the ability to participate in public discourse.[122] These protesters are forced to find less conducive locations and methods to express their message.

The rationale behind the acceptance of reasonable time, place, and manner restrictions is that courts assume there are other places for people to express their message.[123] However, that is not always the case. Courts have classified "spatial restrictions are unrelated to expressive content."[124] These restrictions are "treated as inarguably rational means of serving governmental interests such as maintaining order and security."[125] Free speech zones render protest ineffective by forcing protesters away from their target audience. The restrictions on the location of assembly contribute to the institutionalization of political protest and dissent.

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[117] Herrold, *supra* note 73, at 250.
[118] R.A.V. v. City of St. Paul, 505 U.S. 377, 385 (1992).
[119] Perry Education, *supra* note 14, at 955.
[120] Herrold, *supra* note 73, at 971.
[121] *Id.*
[122] *Id.*
[123] Patrick M. Garry, *supra* note 106, at 495.
[124] Zick, *Speech and Spatial Tactics*, at 583.
[125] *Id.*

The main problem posed by free speech zones is that the way in which they are enforced can effectively censor those wishing to exercise their liberty. The public forum doctrine's allowance of reasonable content-neutral time, place, and manner restrictions is problematic when entire mediums of communication are prohibited by government regulatory action.[126] Even if such zones are applied to all persons regardless of the nature of their expressive activity, if the zone effectively silences communication, it should be found unconstitutional.[127] These protesters are barred from entering the marketplace of ideas. While audiences cannot be forced to listen to assemblies, to be a valid time, place, and manner restriction, the regulation of assemblies should provide the assembly with an opportunity to reach their intended audience, irrespective of whether the audience actually listens.[128] Free speech zones can effectively censor dissenting viewpoints and limit public debate and restrict the spread of ideas.[129]

Institutionalization refers to the methods that are used to police and regulate political protest and dissent. Fear of police crackdowns on demonstrations and protests has led to entire public events being stage-managed from their inception, with protesters willingly negotiating every detail with officials except, of course, the actual content of their message.[130] This type of control over assemblies and protests defeats the entire purpose. The goal of the assembly is to influence public debate and interact with others.[131] The goals and objectives of assembly cannot be achieved when assemblies are forced to negotiate ahead of time with the very same people they are protesting.[132] When the Secret Service is allowed to designate protesters into "free speech zones" and regulate them away from political conventions or politicians then they are

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[126] Herrold, *supra* note 73, at 984.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] Zick, *supra* note 39, at 199.
[131] Herrold, *supra* note 73, at 987.
[132] Zick, *supra* note 39, at 199.

unable to enter the marketplace.[133] The *Hague* dictum purported to reject the ownership principle and to place the public streets and parks under the protection of a public trust.[134] Layer upon layer of permit and other time, place, and manner regulations has resulted in a system in which government officials can use their discretion to filter what information enters the marketplace.[135]

Whether an assembly seeks to gather outside a political convention, near a presidential speech, or in the heart of Wall Street, it is likely to be restricted by expressive zoning. Today speakers must navigate a gauntlet of official "demonstration zones," "free speech zones," "buffers," "bubbles," "cages," and "pens."[136] These types of free speech zones fundamentally alter the relationship between the traditional public forum and dissent.[137] The concept of place was built on the importance of protecting individual speech, but also on the ability of citizens to gain access to different ideas within the marketplace.[138] It was for that reason that Justice Roberts claimed in *Schneider* that it was unconstitutional to prohibit speech simply because it could be exercised in some other location.[139] In every free speech zone or demonstration zone there is the suppression of political speech through allegedly content-neutral regulation of the public forum.[140] The goal is being able to strike the proper balance between the negative secondary effects of speech and our First Amendment protections.

Many laws, including H.R. 347, contribute to the institutionalization of assembly through the significant discretion offered to government officials. They allow allegedly content-neutral restrictions to have a selective effect on the speech of political protest.[141] For instance, the "free

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[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.* at 61.
[137] *Id.*
[138] David S. Allen, *supra* note 49, at 420.
[139] *Id.*
[140] *Id.*
[141] Garry, *supra* note 106, at 479.

speech" zones set up by the Secret Service to shield the President are not directed toward supporters, who are often granted closer access to the President, but instead to protesters who are kept at a significant distance.[142] Legal scholar Timothy Zick has lamented the negative impact free speech zones and other "spatial tactics" have on political dissent.[143] Insofar as the success of political and social movements depends on things like freedom of movement, ease of assembly, and spontaneous expression, these tactics present substantial obstacles.[144] They separate speakers and listeners in public spaces and they facilitate listener avoidance of expression that is presumptively offensive or dangerous, a presumption arising from official displacement.[145] Listeners are "protected" not only from speakers, but from their message as well.[146] In the course of protecting itself and its officials, the government is driving protest into corners and placing it, quite literally, in pens and cages.[147] This type of displacement will continue to be upheld by the courts so long as the government can identify a credible and content-neutral interest in maintaining this separation.

Courts, such as the First Circuit in *Bl(a)ck Tea Society v. City of Boston*,[148] have routinely upheld free speech zones in the name of security. Despite the district judge likening the demonstration zone to an "internment camp,"[149] the First Circuit upheld the prison-like zone.[150] In its defense of the zone, the Secret Service presented information ex parte concerning "specific

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[142] *Id.*
[143] Zick, *Speech and Spatial Tactics*, at 601.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004).
[149] *Coal. to Protest Democratic Nat. Convention v. City of Boston*, 327 F. Supp. 2d 61, 74 (D. Mass. 2004) *aff'd sub nom. Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004).
[150] James J. Knicely and John W. Whitehead, *The Caging of Free Speech in America*, 14 Temp. Pol. & Civ. Rts. L. Rev. 455, 476 (2005).

intelligence concerning security threats."[151] The Judge's decision was based solely on "past experience at comparable events, including the 2000 DNC in Los Angeles."[152] On appeal, the First Circuit found that the security measures imposed "a substantial burden on free expression," noting lack of physical interaction with delegates, direct limitations on aural communications, and impaired visual communication with signs or other media by the cramped space and meshed screening.[153] In upholding the demonstration zone, the court reasoned that "the quantum of 'threat' evidence was sufficient to allow the trier to weigh it in the balance."[154] The deferential standard employed by the First Circuit in upholding the monstrous demonstration zone further highlights the necessity of a bright line rule to protect the freedom of assembly.

E. Balancing the Competing Security Interest Versus Assembly

The displacement of dissent and political protest at presidential appearances and national conventions provides the greatest contrast of the competing interests of the government's security interest and the freedom of assembly's expressive messaging. While such laws intend to protect the President and others under Secret Service protest, they also separate protesters based on their dissenting viewpoints. Such regulations would be presumptively unconstitutional as content-based discrimination on speech.[155] However, these free speech zones are consistently upheld because the security interests trump the First Amendment in these instances. There is a long history of free speech zones being used to discriminate against those expressing dissenting views.[156] It does not take much to draw the attention of the Secret Service. There are widely reported instances of protesters being removed for wearing opposing shirts and buttons, holding

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[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
[156] Herrold, *supra* note 73, at 951 (describing a man arrested and charged with disorderly conduct for refusing to move to a free speech zone behind a fence during an appearance by the President, even though supporters were allowed outside the free speech zone "cage" and closer to the rally).

up signs, and even silent protesting.[157] The recent amendments increasing prosecutorial discretion through H.R. 347 make the application of these laws even more troublesome.

H.R. 347 gives the Secret Service discretion in developing restricted areas around certain specially designated events. The Secret Service can declare an event a "National Special Security Event" which enables them to increase security and use greater discretion. However, courts must evaluate both the government's security interest and the method used to further that interest in order to determine its constitutionality.[158] The increased power granted to the Secret Service also means there is a greater possibility for abuse of that power at the expense of the First Amendment.

Courts have overlooked restrictions in the form of "demonstration zones" or "cages" at political conventions such as the Democratic National Convention in 2004.[159] The Demonstration Zone ("DZ") was a cage which barricaded and fenced in protesters outside of the Fleet Center in Boston.[160] To keep anyone from climbing out, there were two layers of thick mesh added to the fences and coiled razor wire at its apex.[161] With National Guardsmen closely watching the pen, protesters were not allowed to leave, would have no meaningful access to the delegates, and were forbidden from passing out leaflets or other materials.[162] A federal judge described the DZ as an "internment camp" which was "a symbolic affront to the First Amendment."[163] Despite the federal judge's strong criticism, both the trial and appellate courts

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[157] *Id.* (referencing different examples of protesters being removed by Secret Service during presidential visits).
[158] *Id.* at 978.
[159] Crocker, *supra* note 96, at 2598.
[160] Zick, *supra* note 39, at 1.
[161] *Id.*
[162] *Id.*
[163] *Id.* at 1-2.

upheld the use of the DZ due to "security" concerns.[164] Not a single protester ever decided to enter the DZ.[165]

Events like the DZ at the 2004 Democratic National Convention demonstrate the delicate balance that needs to be struck between assembly and security concerns. The security precautions were so intense that protesters expressive message was muted because they refused to enter the DZ. The obvious goal of the protesters was to influence the discussion that was going on inside of the Convention. Troublingly, the First Circuit reasoned that, "although the opportunity to interact directly with the body of delegates by, say, moving among them and distributing literature, would doubtless have facilitated the demonstrators' ability to reach their intended audience, there is no constitutional requirement that demonstrators be granted that sort of particularized access."[166] The court dismissed the importance of the assembly's location by stating the "messages expressed beyond the first-hand sight and sound of the delegates nonetheless have a propensity to reach the delegates through television, radio, the press, the internet, and other outlets."[167] The court completely ignored the significance of location.[168] Location creates a more effective medium for expressing a message, but the court failed to consider that not all locations are interchangeable.[169] The protesters would have no chance of influencing the media's coverage of the Convention from inside the "internment camp."

Part of maintaining order around these events also includes protecting those who wish to exercise their First Amendment liberties. The government should be just as concerned with protecting the individuals within free speech zones as they are with protecting the group,

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[164] *Id.*
[165] *Id.*
[166] Crocker, *supra* note 96, at 2599.
[167] *Id.*
[168] *Id.*
[169] *Id.*

location, or important official that justified the zone in the first place.[170] Those exercising their First Amendment liberties are exposed to the same threats and dangers as those outside the free speech zone but they lack the same ability to act to ensure their own safety.[171] If the alleged security interests are enough to warrant the creation of free speech zones, then surely they are enough of a threat to ensure the protection of those Americans seeking to express their views.

In the 21st century and the age of terrorism, there is clearly a strong need to protect American leaders and public officials. However, that interest must be balanced against the goal of giving a voice to the minority in a democratic society. These expressions of political protest through assembly have always served as a check on political power in American history. Regulations designed to restrict dissenters away from their audience are well-intentioned. However, displacement can and often does immobilize protest, mute-speakers, and distort their messages.[172] The architecture of free speech zones does those things. They prevent movement, facilitate surveillance, and prohibit certain forms of expression.[173] Restrictions on assembly and political protest literally capture dissenting and sometimes unpopular views in cages. In the coming years it will be increasingly important to liberate the freedom of assembly from the backdrop of free speech within the First Amendment.

F. The Supreme Court Must Create a Bright Line Rule

In order to rescue the freedom of assembly from being captured by the public forum doctrine, the Supreme Court must place greater emphasis on the act of assembly and the location in which assembly takes place. The Court's focus on the speech of an assembly allows for the government to create free speech zones and prevent assemblies from reaching their target

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[170] Herrold, *supra* note 73, at 980.
[171] *Id.*
[172] Zick, *supra* note 39, at 2.
[173] *Id.*

audience. There's no question that the primary rationale behind expressive zoning is to maintain security and public order.[174] A government imposed free speech zone is unnecessary in most events because authorities can adequately maintain crowd control and detain anyone who becomes violent or disruptive.[175] The government should take great care to make certain that free speech zones are used only when warranted by the circumstances so that free speech zones are the exception, and not the rule, for regulating First Amendment expression in public.[176]

Free speech zones constraint the only method ordinary Americans have at making their voices heard. In the wake of *Citizens United*, unprecedented corporate spending is now allowed to fill the void left by a weakened freedom of assembly. These Americans cannot afford lobbyists or Super PACs. There is a strong associational expression that comes when protesters join other likeminded protesters in expressing their message en masse.[177] These are people who, individually, are without sufficient means to impact the public discourse. The importance is growing to provide greater assembly protection to allow the minority a voice in to compete with expanding influence that corporations and special interests have on speech. Not only can government restrictions create free speech zones to constrain minority viewpoints, cash-heavy lobbyists can also drown out opposing viewpoints. A stronger freedom of assembly is needed in order for dissenting viewpoints to combat increasing government restrictions and corporate spending.

The Supreme Court must liberate the public forum in order to allow for ordinary citizens to occupy traditional places to express their messages. Instead of being preoccupied with alternate areas to speak, the Supreme Court should ask itself whether there are alternate places to

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[174] Herrold, *supra* note 73, at 983.
[175] *Id.* at 983.
[176] *Id.*
[177] Bhagwat, *supra* note 15, at 978.

assemble and reach the target audience. This type of bright line rule creates a distinction between two different and coequal fundamental rights. Displacement of protesters far out of sight from their audience takes away the incentive for dissenters to speak their voice. In a democratic society it is critical that citizens be allowed to express their views, especially when those vies are in the minority.

The Supreme Court must acknowledge the important role that location plays in the expressive message of an assembly. While it is impossible for the Court to create a bright line boundary restriction due to the fact-intensive nature of each inquiry, the Court must ensure that the communication of the assembly is not curtailed.[178] When assemblies cannot be seen, heard, or otherwise exchanged the free speech zone's restriction on speech violates the First Amendment.[179] The freedom of assembly needs a rule which protects expressive messages of assemblies and allows that message to reach its target audience. The ability for the target audience to see speakers in order to ascertain that efforts are being made to communicate with them should be a requirement for the imposition of a free speech zone.[180] Segregating an assembly away from the object of their protest is effectively filtering what information and ideas are allowed to enter the marketplace. Deciding which ideas are appropriate is not the job of the government but is a decision for those individuals in the marketplace.

The Court should require a heavy burden on the government to justify such restrictions. The government must present evidence that alternate areas near the target audience were contemplated. The government must not be able to blindly rely on the broad shield of national security. Having protesters file into demonstration zones and cages under the vague threat of national security and public order suppresses the freedom of assembly and dilutes the

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[178] Herrold, *supra* note 73, at 989.
[179] *Id.*
[180] Herrold, *supra* note 73, at 989.

marketplace of ideas. The Court should require that actual locations for protest were accounted for but that they ultimately proved unworkable.

Conclusion

The time has come for the Supreme Court to liberate the freedom of assembly from the shadows of free speech doctrine. In today's society, it is becoming increasingly important for ordinary Americans to express their feelings. Movements and political protests around the country and throughout history prove that assembly is the most effective method of expressive communication. The Supreme Court's focus on the content of an assembly's message instead of the expressive act of assembly has weakened this fundamental First Amendment right. This focus on the speech aspect of assembly confuses the freedom of assembly with freedom of speech. This allows for the government to impose reasonable content-neutral restrictions on assemblies. Government officials are permitted to displace assemblies while not regulating their actual speech. This displacement weakens the significance of location within the freedom of assembly.

Freedom of assembly doctrine must acknowledge the importance of location. The expressive significance of assembling in a certain location is what makes assembly so effective. Courts have allowed the government to regulate assembly far away from its target audience so long as there is another place for the assembly to speak its message. This approach distorts the actual purpose behind the assembly. Individuals who join in an assembly are there for the purpose of expressing their viewpoints with the intent to change the minds of others.[181] Regulations which confine assemblies into free speech zones filter the assembly out of the marketplace of ideas. Assemblies must be afforded the ability to reach their target audience. Without access to its intended audience, the assembly is without a purpose.

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[181] Herrold, *supra* note 73, at 971.

The main purpose of assembly is not the content of its speech but the assembly itself. Analyzing the freedom of assembly through the public forum doctrine ignores the key distinction between assembly and speech. The deferential standard granted by the courts allows reasonable time, place, and manner restrictions to displace assembly from its target and weakens this First Amendment liberty. Without access to its target audience, the members of the assembly are dissuaded from expressing their opinions and the marketplace of ideas is diluted. The location of the assembly allows for a strong connection to form between the members of the assembly and helps influence public opinion. The Supreme Court must draw a bright line distinction between the freedom of assembly and free speech.