**Ep 67 - The 1st Amendment: Freedom of Assembly**

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***[Virginia Prescott] Our guest is John Inazu. He's author of Liberty's Refuge: The Forgotten Freedom of Assembly. John, welcome to Civics 101.***

[John Inazu] Thanks so much for having me Virginia.

***[VP] So what is the freedom of assembly?***

[JI] The First Amendment provides the right of the people peaceably to assemble. And so this is the idea that we can collectively be in groups and be in public in groups together to form and express groups that are of our own choosing and not of what the state tells us to do.

***[VP] Are there limitations to where and how people have the right to assemble?***

[JI] There are so that word peaceably in the First Amendment is important and assembly is only legal and constitutional when it's peaceable. And there are some practical limitations that have emerged over the years when government officials are trying to manage for example a city park or a protest space. One of the obligations they have is that everybody should have an opportunity to demonstrate or to protest and that means managing the space through what are called time place and manner restrictions that allow different people to come in at different times. But other than that it's kind of hands off from the government.

***[VP] Does it have to be public property to be OK to assemble?***

[JI] The First Amendment generally is it going to apply to public actors and public property. So when you're into private space there are a different set of calculations and rules that apply. Typically when someone's on private space unless it's by the consent of the owners then it's an unlawful trespass. And so when we see protests that go on to private property those are usually at the discretion of the property owner.

***[VP] What were the framers getting at when they set forth or sanction this right? And what are they trying to ensure or maybe avoid?***

[JI] Yes so this is a really interesting question and one of the things I've come to think about this is that assembly in the First Amendment is the only one of those five rights that you mentioned that requires more than one person to be enacted. It requires at least two people to assemble. It could be the press by myself. I could start a blog. I can speak by myself. I can petition the government. I can practice religion by myself. I cannot assemble alone. And so part of what I think the framers were getting at was the recognition that we live in society not just as individual isolated people but we live in society as groups and we come together and we express as groups and we form ideas within groups so there's something about the value set of these ideas from the right of some way that gives us a thicker sense of who we are in society.

***[VP] What might be an example maybe during the time of the founders of a group exercising their freedom to assemble?***

[JI] Well we don't have to speculate there so in the historical record during the debates in the first Congress, when Congress was debating whether we should even have a right to assemble there was an exchange on the House floor and the example that was invoked was the example of William Penn the Quaker who in England was charged with an unlawful assembly for engaging in an act of religious worship on the streets of London. And in that case which became a very famous case of the time well known to all of the lawyers and the Founders, a judge and a jury found Penn not guilty of unlawful assembly because he was exercising his right of assembly his right to be in a public space not for the sake of petitioning the government but for the sake of engaging in religious worship.

***[VP] Well that's the thing. These rights sometimes seem tied together like freedom of religion and freedom to gather, assemble… or you think of protesting as a First Amendment free speech right. So are they typically tied to other First Amendment rights or is freedom of assembly considered independently?***

[JI] Well this is a really important question in modern First Amendment law. I think one of the challenges of late has been that courts and scholars have increasingly seen most of what we do under the First Amendment through free speech lens. You're absolutely right to say that most protests are handled under free speech doctrine, but that should seem odd to us when we think about maybe the paradigmatic example of an assembly we think of the protest and not just the expressive words that come from the protest but the group itself, the act of solidarity. Maybe the act of no words at all. And so there's something intuitively important about the right of assembly governing the protest space it just doesn't do that anymore. These rights are all connected. We can we can have religious petitions for example or we can have a religious press and assemblies or can be forms of religious worship speech can be out of assemblies but I think it's very important to keep them distinct. And one of the reasons to keep them distinct is to focus on what the various rights are doing and how we actually interact with one another. So when we think of speech we think of the expression in the words sometimes the symbolic gestures that we make but those don't come out of the blue. They come from relationships with other people they come from discussions, and those discussions – the things that precede speech – happen in groups or assemblies.

***[VP] What are some landmark examples or cases where the freedom of assembly was tested, challenged, or changed even because of precedent in the courts?***

[JI] When we look historically some of the major cases in the Supreme Court and in lower courts around the right of assembly have involved the kinds of groups that at the time might have been at the political margins. But what we're trying to lead or initiate social movements so abolitionists and suffragettes, labor Unionists, for a time in our history these groups consistently invoked the right of assembly as protecting their ability to gather and to exist as different non-state actors who were trying to live out different sets of values and make different kinds of arguments the right of assembly was extremely important in the civil rights era and Dr. King was one of the last public figures to speak about the right of assembly in a very dramatic fashion.

***[VP] Well I'm thinking of the silent protests that took place in ‘whites only’ in spaces like restaurants. Those were not public spaces. Is that the grounds for combatting them?***

[JI] Well that's a that's an example of when it gets very complicated when the assembly itself takes place on private property so the First Amendment does not actually convey the right to assemble in those private spaces. But one of the very interesting and complicated challenges in the modern state in this country is that so many of what in an earlier era might have been public spaces have now become privatized. So think of the planned community that no longer has its own town square but has a town square that's actually a private space owned by a corporation. And yet that functions in a very public way and so the law I think is still trying to figure out the differences between public and private and perhaps areas where even privately owned space might need to allow for some kind of expressive protest or assembly.

***[VP] Yeah I'm thinking of Zuccotti Park, right?***

[JI] Exactly. One of the strange ironies about the Occupy Wall Street protests in Zuccotti Park was that because of a historical anomaly in the land use regulations in New York City, the public parks were all subject to curfews, and the private parks did not have curfews. So if you're going to pitch a tent city you need to be in a place without a curfew. So the public parks were out of bounds so they ended up in Zuccotti Park in private spaces for their protest and assemblies which then created this public/private challenge.

***[VP] And of course nobody who is planning to an assembly or a protest or a convention can guarantee that they're going to be ‘peaceable’. Where does that right run into trouble?***

[JI] This is a real challenge. You know I think the best forms of protest even protest for social change are the ones that are planned carefully that are actually planned often in partnership with city officials and with law enforcement. And so that people know in advance the parameters and what's going to happen. We're seeing that less than less though and we're seeing either spontaneous protests, or protests where the actors are not talking with law enforcement in advance and these things can evolve very quickly. The shift from a totally lawful, peaceable assembly to a completely unlawful assembly or riot can happen in a matter of seconds. And this puts a tremendous stress and challenge on law enforcement both to protect the expressive rights to the maximum extent possible and then to maintain public order when those rights are transcended.

***[VP] Does freedom of assembly allow for groups to exclude others on the basis of their First Amendment freedoms for example?***

[JI] Well this question I think is tied to what is more commonly referred to today as the right of association although that right is not in the First Amendment the Supreme Court recognized it in 1958. I think actually the right of association is best understood as derivative of the right of assembly and that assembly itself protects groups, which also means protecting the boundaries of groups. So any group to have a coherent message your sense of self is going to run into limits and boundaries and that includes exclusion. I know that my dinner table is the group of my family because I exclude lots of people from my dinner table who aren't invited to be there. In a protest situation the group of protesters sometimes has to say to people counter-protesters or others you're not part of us we're trying to convey a message with who the group is that we want and we can think of lots of examples then when groups themselves exclude for the sake of their their own expressive message and identity, and that creates a challenge in society because there are costs to exclusion. But it also seems to be the only way move forward with authentic groups.

***[VP] Well you do write about freedom of assembly turning into a freedom of ‘expressive association’. Now what do you mean by that?***

[JI] Well this is something the Supreme Court has done so I'm actually not a big fan of this but after recognizing the right of association in 1958 in another case the Supreme Court in 1984 said what we're really talking about here are what we call expressive associations and this is the idea that we protect groups and we value them to the extent that they have an outwardly expressive message. So think about you know the words on a poster or the speech of someone during a protest, and that is an expressive form. But I think that's problematic because a lot of the kinds of values and concerns we have about groups happen what we might think of as non-expressive contexts. The informal moments of building friendships or relationships or figuring out ideas or talking to each other just within the group. None of these are outwardly expressive but they're deeply important to how groups actually form. And then there's a there's a really interesting related challenge when courts declare categories like ‘expressive association’ and create other categories like ‘non-expressive association’ then they have to figure out what fits those categories. And so we have cases where courts have said certain kinds of groups are deemed not expressive: fraternities or motorcycle clubs, in one case somewhat oddly even a nudist colony was deemed to be not expressive. And so we're left with a lot of confusion in the law in this area.

***[VP] Protests do require permits sometimes they are also contained or sequestered to specific zones. That's in the physical world. Meanwhile it is the Wild West on the internet. Places like Reddit are 4Chan. So what does assembly mean now in the 21st century?***

Well this is a great question in the online space really with the first amendment writ large. We are trying to figure out how doctrine's built around off line problems apply to the online world, and assembly is no different. It raises a number of complex questions what does it mean for example to exclude from an online community when the alternative is not really a space limitation, you could create a different web site or something to that effect. Or how do we conceive of massively relevance online providers Facebook or Twitter or Instagram that are themselves private companies that can do what they want and yet they control so much of the communications space and are those assemblies themselves? Or do they allow for subassemblies within them? And how do we think about this layering of groups from a governmental regulatory perspective or from just a normative cultural perspective.

***[VP] What do you think John as who is the thing that people most misunderstand about the freedom of assembly?***

Well I think for starters would be better if people just knew it was there and so I'm delighted to know about this program and others. Right now according to some of the national stories about one in 10 Americans can name the right of assembly as one of our First Amendment rights so we need to start with a basic education. I think the related challenge is that many people even many highly educated people when they think of assembly think of assembly as narrowly limited to the right of petition. But in fact for historical and other reasons we know it's something much bigger. So I actually think there's a lot of sort of unrealized value and legal potential within this right. That we have a Supreme Court that has not addressed a case, a single case on the right of assembly in 40 years, and that should strike all of us is somewhat odd given what we've seen in our history.