

**The Breakfast Club**  
**Constitutional Minute for 21 February 2023**  
**Right #5: Freedom of Assembly<sup>i</sup>**

“Whenever three or more persons assembled share the common intent to advance some lawful or unlawful purpose by the commission of an act or acts of unlawful force or violence likely to jeopardize seriously public safety, peace or order, and the assembly actually tends to inspire persons of ordinary courage with well-grounded fear of serious and immediate breaches of public safety, peace or order, then such assembly is an unlawful assembly. Every person who participates in any unlawful assembly shall be guilty of a Class 1 misdemeanor. If any such person carried, at the time of his participation in an unlawful assembly, any firearm or other deadly or dangerous weapon, he shall be guilty of a Class 5 felony.”

So states Virginia Code § 18.2-406

Freedom of assembly is a cherished natural right, but the right has been abused, often. As I mentioned not long ago (Constitutional Minute, 13 September 22), there is no right of protest secured by the Constitution, there is a right to *peaceably* assemble, a right to free speech and a right to petition the government for a redress of grievances. Often these separate rights get combined to become a right to protest. So when a group of protestors assembles on Interstate -95 in Richmond with the intent to stop traffic,<sup>ii</sup> their action was quickly deemed to constitute an unlawful assembly (public safety was threatened) which resulted in Class 1 misdemeanors for thirteen of the participants who refused State Police orders to leave (note: six of the thirteen arrested were not from Virginia; one apparently coming all the way from California just to be arrested in Virginia). A Class 1 misdemeanor carries a penalty of “confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both.” (§ 18.2-11). After pleading guilty, all thirteen were sentenced to spend a mere 5 days in jail.

As an aside, the “three or more persons assembled” can be traced back to at least 1614 in English law. I’m sure you were anxious to know that.

On the night of August 26, 1765, some Boston residents began to “assemble” around a bonfire on King Street, drinking and discussing what to do next. They were quite upset about the tax that was about to go into effect as a result of the Stamp Act. They first went to the home of Charles Paxton, marshal of the court of admiralty. Paxton calmed the crowd and invited them to a nearby tavern for a barrel of punch. While saving his own home, he fueled the growing crowd for their next stop. After two more stops at the homes of government officials which resulted in the mob entering the homes uninvited and rummaging through their official papers their final stop of the evening was the home of Lieutenant Governor Thomas Hutchinson. Hutchinson, having been warned of the mob’s itinerary, had time to gather up his family and flee. Upon arrival, the rioters smashed through the front door with an ax and poured into the house through all available doors and windows. Once inside, they destroyed every piece of furniture in the house plus some partition walls, and took everything they could move: clothes, silver,

paintings. They were at it literally all night. Only the approaching daylight prevented them from totally demolishing the building.

The right of assembly, like all rights, must be exercised responsibly. For instance, you cannot assemble in such a way that it infringes on the rights of others (the Left has yet to embrace this principle). Laws result when rights are not exercised properly. In 1937, Oregon had a law which made it a crime to "assist in conducting any assemblage of persons ... which teaches or advocates ... the doctrine which advocates crime, physical violence, sabotage, or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution." I'm sure there's a story behind that law. But regardless, a Mr. Dirk De Jonge decided to address a chapter meeting of the local Communist party; he was arrested and convicted under the statute. In [\*De Jonge v. Oregon\*, 299 U.S. 353](#) the Supreme Court incorporated the right of assembly against the states while at the same time overturning Mr. De Jonge's conviction (rendering the statute void).

The right of assembly is closely connected with the right of association,<sup>iii</sup> which is a natural right not mentioned in the Constitution, but which the Supreme Court has nevertheless recognized (See 9<sup>th</sup> Amendment). In [\*NAACP v. Alabama\*, 357 U.S. 449](#) (1958) the Court found that: "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."<sup>iv</sup> You have a right to associate with individuals and groups (particularly Breakfast Clubs) to pursue common lawful goals.

As a parting note, take notice of the wording of the Virginia statute at the beginning of this essay, especially the final sentence. If someone is carrying a firearm, even lawfully, and gets swept up in what becomes identified as an unlawful assembly, a felony conviction can be the result, with resultant loss of the right to continue to carry a firearm.

Let's all continue to peaceably assemble and then use that time wisely to discuss how we might engage in the political process and save this great republic. Are you with me?

For further reading:

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

[The Bill of Rights; Original Meaning and Current Understanding, Eugene W. Hickok, Jr, ed. 1991.](#)

Next week: Right #6: Freedom to Petition.

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<sup>i</sup> Not to be confused with the jazz trio by the same name. See <https://www.allmusic.com/album/freedom-of-assembly-mw0000051750>.

<sup>ii</sup> <https://www.wric.com/news/arrested-black-lives-matter-protesters-who-shut-down-i-95-in-richmond-monday-identified/>

<sup>iii</sup> [https://en.wikipedia.org/wiki/Freedom\\_of\\_association](https://en.wikipedia.org/wiki/Freedom_of_association)

<sup>iv</sup> <https://supreme.justia.com/cases/federal/us/360/240/>