

2015

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Recommended Citation

Saul Cornell, *“To Assemble Together for Their Common Good”: History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech*, 84 Fordham L. Rev. 915 (2015).

Available at: <https://ir.lawnet.fordham.edu/flr/vol84/iss3/2>

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“TO ASSEMBLE TOGETHER FOR THEIR COMMON GOOD”: HISTORY, ETHNOGRAPHY, AND THE ORIGINAL MEANINGS OF THE RIGHTS OF ASSEMBLY AND SPEECH

*Saul Cornell**

INTRODUCTION

The Whiskey Rebellion is not generally a major focus in constitutional histories or casebooks. Given this fact, it is hardly surprising that the 1795 case *Respublica v. Montgomery*¹ seldom figures as more than a minor footnote in scholarly writing about early American constitutional development, if it receives any attention at all.² The case has little precedential value for modern First Amendment doctrine and only obliquely implicates larger jurisprudential questions about the rights of assembly and freedom of expression.³ In strictly doctrinal terms, *Montgomery* is primarily about the obligation of a justice of the peace to put down a riot, not an extended judicial disquisition on the meaning of early American freedom of association or expression.⁴ *Montgomery* was one of several cases that resulted from popular protest during the Whiskey

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1. 1 Yeates 419 (Pa. 1795). The legal and constitutional history of the Whiskey Rebellion remains largely unwritten. The most important legal study of the Whiskey Rebellion is Wythe Holt, *The Whiskey Rebellion of 1794: A Democratic Working-Class Insurrection* (Jan. 23, 2004) (on file with the *Fordham Law Review*).

2. The standard narrative history does not discuss the case and devotes brief coverage to the Whiskey Rebellion. See MELVIN I. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 135–36 (2d ed. 2002). Nor does the case figure in the standard casebooks by leading scholars. See, e.g., GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* (3d ed. 2008); EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* (3d ed. 2008).

3. See *infra* Part III. *Contra* Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 *GEO. L.J.* 1057, 1071–75 (2009) (approaching *Montgomery* anachronistically and conflating the radically different visions of law at work in the case).

4. See *Montgomery*, 1 Yeates at 422. The modern scholarly literature on the right of assembly is relatively small when compared to the considerable literature on other aspects of core First Amendment doctrine. See, e.g., Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 *UCLA L. REV.* 543 (2009); John D. Inazu, *The Forgotten Freedom of Assembly*, 84 *TUL. L. REV.* 565 (2010); Jason Mazzone, *Freedom’s Associations*, 77 *WASH. L. REV.* 639 (2002).

Rebellion, specifically the raising of liberty poles in sympathy with Western opponents of the unpopular tax.⁵ Yet, from the perspective of a new constitutional historicism, an approach to the constitutional past that unites elements of a traditional top-down, court-centered narrative and the bottom-up perspective inspired by social history and cultural history, *Montgomery* is precisely the type of case that can be most illuminating.⁶ Indeed *Montgomery* provides a perfect occasion to engage in a form of historically grounded “constitutional ethnography.”⁷

The purpose of such an inquiry is to explore how contests over legal meaning in the American past shaped the emergence of modern law. Ethnographic inquiry is holistic in nature.⁸ Clifford Geertz notes that such a method invariably requires “[h]opping back and forth between the whole conceived through the parts that actualize it and the parts conceived through the whole that motivates them.”⁹ The consequences of such a holistic approach to intellectual history have been elaborated by historian and political theorist Mark Bevir, who argues that meanings derive from the networks of belief on which they are built.¹⁰

5. See *infra* Part II.

6. For a good sampling of recent work in the new constitutional historicism, see the essays in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* (Michael Grossberg & Christopher Tomlins eds., 2008).

7. In her explication of the goals of constitutional ethnography, Kim Lane Scheppele captures the essence of such inquiries:

[C]onstitutional ethnography does not ask about the big correlations between the specifics of constitutional design and the effectiveness of specific institutions but instead looks to the logics of particular contexts as a way of illuminating complex interrelationships among political, legal, historical, social, economic, and cultural elements. The goal of constitutional ethnography is to better understand how constitutional systems operate by identifying the *mechanisms* through which governance is accomplished and the *strategies* through which governance is attempted, experienced, resisted and revised, taken in historical depth and cultural context.

Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 L. & SOC’Y REV. 389, 390–91 (2004).

8. VINCENT DESCOMBES, *THE INSTITUTIONS OF MEANING: A DEFENSE OF ANTHROPOLOGICAL HOLISM* (Stephen Adam Schwartz trans., 2014); *Anthropological Holism*, BLACKWELL REFERENCE ONLINE, http://www.blackwellreference.com/subscriber/tocnode.html?id=g9781405106795_chunk_g97814051067952_ss1-152 (last visited Nov. 27, 2015) [<http://perma.cc/HV29-FALP>].

9. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 69 (1983); see also CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 9–10, 412–53 (1973) [hereinafter GEERTZ, *THE INTERPRETATION OF CULTURES*].

10. See generally MARK BEVIR, *THE LOGIC OF THE HISTORY OF IDEAS* (1999) (synthesizing elements of weak intentionalism, meaning holism, and anti-foundationalist historicism into a coherent theoretical foundation for historical inquiry). For a more recent and concise statement of his method, see Mark Bevir, *Contextualism: From Modernist Method to Post-Analytic Historicism*, 3 J. PHIL. HIST. 211 (2009). For a sympathetic comment on Bevir’s method that recasts his approach in terms of Grice’s intention-based semantics and pragmatics and expressly rejects strong holism in favor of moderate holism, see A. P. Martinich, *A Moderate Logic of the History of Ideas*, 73 J. HIST. IDEAS 609 (2012). Although American historians have not engaged with Bevir’s important work in a systematic fashion, most intellectual and cultural historians would likely find Martinich’s amended version of Bevir’s model congenial. One important exception to the general lack of attention

To understand the meaning of post-Revolutionary era constitutional thought and culture, including the rights of assembly and speech, one must locate these two concepts in the wider webs of legal and constitutional belief in place during the Founding era; this process requires a form of thick contextualism. One must move beyond matters of mere linguistic usage, speculations about ideal readers, and the thin notions of context associated with originalist inquiry.¹¹ Instead, one must engage in an archeological project to uncover the discursive foundations for Founding-era legal and political ideologies.¹² Finally, building on post-Geertzian ethnography and sociolinguistics, it is essential to start with the fact that post-Revolutionary era America was not a single homogenous speech community, particularly when it came to legal and political speech.¹³ Although English-speaking Americans may have been part of a single linguistic community, such commonalities did not obliterate the presence of distinctive political and legal speech communities shaped by categories such as race, class, gender, region, ethnicity, religion, and ideology.¹⁴ Thus, as *Montgomery* makes clear, the views of elite Federalists and Republicans in Pennsylvania were different in many key areas. Complicating matters further is the issue of popular constitutionalism. A distinctive plebeian form of popular

to holism is Jonathan Gienapp's important Essay in this forum, *Historicism and Holism: Failures of Originalist Translation*, 84 *FORDHAM L. REV.* 935 (2015).

11. See Randy E. Barnett, *Interpretation and Construction*, 34 *HARV. J.L. & PUB. POL'Y* 65, 66 (2011). See generally John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *NW. U. L. REV.* 751 (2009); Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 *YALE L.J.* 2037 (2006); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 *MICH. L. REV.* 1539 (2005); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 *NOTRE DAME L. REV.* (forthcoming 2015). For a sample of some of the emerging critiques of originalism's theoretical flaws, see Gregory Bassham & Ian Oakley, *New Textualism: The Potholes Ahead*, 28 *RATIO JURIS* 127 (2015); Saul Cornell, *Originalism As Thin Description: An Interdisciplinary Critique*, 84 *FORDHAM L. REV. RES GESTAE* 1 (2015), <http://fordhamlawreview.org/assets/res-gestae/volume/84/Cornell.pdf> [<http://perma.cc/4E5Z-PTSN>]; Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 *B.Y.U. J. PUB. L.* 283, 304 (2014).

12. The notion of archeology here draws on Foucault and his analysis of the relationship between power and discourse. See generally MICHEL FOUCAULT, *THE ARCHEOLOGY OF KNOWLEDGE* (A.M. Sheridan Smith trans., Pantheon Books 1972) (1969). The secondary literature on Foucault is enormous; good starting points are Gary Gutting, *Michel Foucault*, *STAN. ENCYCLOPEDIA OF PHIL. ARCHIVE* (May 22, 2013), <http://plato.stanford.edu/archives/win2014/entries/foucault/> [<http://perma.cc/N4JB-TPLL>] and *THE CAMBRIDGE COMPANION TO MICHEL FOUCAULT* (Gary Gutting ed., 2d ed. 2005).

13. For an overview of this literature and its relevance to constitutional history, see generally Cornell, *supra* note 11. For a useful introduction to this literature, see Alessandro Duranti, *Ethnography of Speaking: Toward a Linguistics of the Praxis*, in 4 *LINGUISTICS: THE CAMBRIDGE SURVEY* 210, 217 (Frederick J. Newmeyer ed., 1988); Elizabeth Keating, *The Ethnography of Communication*, in *HANDBOOK OF ETHNOGRAPHY* 285, 290–92 (Paul Atkinson et al. eds., 2007); John J. Gumperz & Jenny Cook-Gumperz, *Studying Language, Culture, and Society: Sociolinguistics or Linguistic Anthropology?*, 12 *J. SOCIOLINGUISTICS* 532 (2008).

14. See Cornell, *supra* note 11, at 7.

constitutionalism represented a third constitutional culture and discourse in play during the Whiskey Rebellion.¹⁵

The potential for such a new constitutional historicism to illuminate Founding-era patterns of thought and belief, including legal ideas, is enormous. The work of an earlier generation of cultural historians armed with similar methodological tools radically transformed conventional intellectual history. Historians such as Rhys Isaac and Robert Darnton analyzed events at the margin of traditional historical narratives and transformed them into rich texts for unraveling the cultural history of Revolutionary-era America and eighteenth-century France.¹⁶ The goal of a new constitutional historicism is analogous: to approach familiar and unfamiliar legal texts with an appreciation for the complexity and contingency that defined post-Revolutionary American constitutional development.¹⁷

Montgomery not only demonstrates the contested nature of early American constitutionalism, it also serves as a reminder that Founding-era ideas about law, liberty, rights, and even language itself were radically different than their modern counterparts. This insight has become all the more valuable given the revival of interest in originalism.¹⁸ Rather than recognize the diversity of Founding-era constitutionalism, most originalist scholarship approaches the Founding era with a model of consensus history that was discredited more than a generation ago.¹⁹ Originalists have ignored the diversity and contestation that marked this period and instead have sought out a fixed original meaning for various provisions of the Constitution.²⁰ Flux, not fixation, was the defining feature of post-

15. See generally Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883 (2006).

16. See generally ROBERT DARNTON, *THE GREAT CAT MASSACRE AND OTHER EPISODES IN FRENCH CULTURAL HISTORY* (1984); RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA 1740–1790* (1982). On the impact of Geertz on cultural history, see William H. Sewell, Jr., *Geertz, Cultural Systems, and History: From Synchrony to Transformation*, 59 REPRESENTATIONS 35 (1997).

17. Saul Cornell, *Conflict, Consensus & Constitutional Meaning: The Enduring Legacy of Charles Beard*, 29 CONST. COMMENT. 383, 385 (2014). As Jack Rakove's important contribution to this forum makes clear, one need not embrace any of Beard's materialistic assumptions to recognize the revolutionary ferment in the period between the American Revolution and the framing of the Constitution. See Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism*, 84 FORDHAM L. REV. 969 (2015). Moreover, Rakove wisely notes that constitutional communication in a revolutionary age shares very few features with ordinary conversation, a fact which makes the turn to ordinary language philosophy models by some originalists all the more puzzling and problematic. See Solum, *supra* note 11.

18. For an overview of recent debates over originalist methodology, see generally Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

19. See generally Cornell, *supra* note 11. On consensus history, see John Higham, *Changing Paradigms: The Collapse of Consensus History*, 76 J. AM. HIST. 460 (1989) and Michael Kammen, *The Problem of American Exceptionalism: A Reconsideration*, 45 AM. Q. 1 (1993).

20. Virtually all forms of the so-called new originalism begin with an unexamined set of assumptions about language, history, and meaning that rest on a vision of consensus history that is untenable. See *supra* note 11 and accompanying text.

Revolutionary era legal and political discourse. To the degree that ideas were fixed, this process was remarkably short-lived and dependent on political and ideological forces. As political times changed and new theoretical insights emerged, alternative readings of the Constitution proliferated with them.²¹

One key aspect of the new constitutional historicism is its emphasis on exploring popular constitutionalism as a vital force in the early Republic.²² Restoring a voice to individuals and groups that have been drowned out or silenced in standard accounts serves several purposes.²³ The most obvious advantage of including such voices is that it serves as a reminder that early American constitutionalism was a contentious and sometimes raucous debate.²⁴ The new constitutionalism does not seek to substitute a new heroic counternarrative in place of traditional accounts.²⁵ The point of recovering neglected voices is not to substitute their vision of law for the more familiar ones of James Madison or John Marshall, but rather to show how early American constitutional development was contested and contingent from the beginning and did not unfold in an inexorable manner.²⁶ Although the focus on a minor case may seem odd, it is important to recall that discussions of Balinese cockfights²⁷ and tales about angry apprentices massacring cats in eighteenth-century France²⁸ did not seem all that important in the grand scheme of things prior to the work of ethnographically oriented scholars.²⁹ Applying this approach to seemingly minor texts has helped historians unearth the underlying structures of power that have shaped culture and politics.³⁰ An understanding of these forgotten

21. Madison's evolving constitutional thought provides the most obvious example of how changed circumstances and new theoretical insights transform constitutional meaning over time. On Madison's evolving thought, see generally DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* (1989).

22. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

23. See generally Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 *FORDHAM L. REV.* 721 (2013) (analyzing the flaws in originalist approaches to the past and suggesting the promise of intellectual history as a method for discovering the meanings of historical legal texts); Elizabeth Mertz, *Legal Language: Pragmatics, Poetics, and Social Power*, 23 *ANN. REV. ANTHROPOLOGY* 435 (1994) (exploring the potential of the methods of linguistic anthropology and the ethnography of speaking to illuminate the connections among law, discourse, and power); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 *SAN DIEGO L. REV.* 575 (2011) (discussing the need to recover the Founding era's very different views about language in general and constitutional communication in particular).

24. See generally Saul Cornell, *The People's Constitution Vs. the Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 *YALE J.L. & HUMAN.* 295 (2011).

25. See generally Cornell, *supra* note 17.

26. See generally *id.*

27. See GEERTZ, *THE INTERPRETATION OF CULTURES*, *supra* note 9, at 412–53.

28. See DARNTON, *supra* note 16.

29. On the contribution of these scholars and others influenced by Geertz, see generally Sewell, Jr., *supra* note 16.

30. For two critiques of Darnton's method that underscore the centrality of his approach to recent cultural history, see generally Dominick LaCapra, *Chartier, Darnton, and the*

pasts is a necessary first step toward making sense of the present and charting a course for the future.

I. CONSTITUTIONAL DRAMAS OUT OF DOORS

Federalist policies in the years after ratification were shaped by Alexander Hamilton's bold economic agenda.³¹ The ambitious Secretary of the Treasury believed that America's future depended on creating a powerful military and fiscal state based on the British model.³² To accomplish this goal, America needed sources of revenue, which meant imposing new taxes.³³ In 1791, the Federalist-dominated Congress adopted a tax on distilled grain ("the whiskey tax"), triggering protests across a broad swath of the backcountry running from Pennsylvania through Virginia to Kentucky.³⁴ The whiskey tax fell hardest on the farmers in these regions who distilled their grains into hard spirits, which not only fetched a higher price at market, but also were far cheaper to transport to eastern consumers.³⁵ In Kentucky, opposition to the tax was so pervasive it was virtually impossible to collect any revenue or prosecute tax resistance.³⁶ Opposition to the excise in western Pennsylvania was also intense, but resistance in this region did not achieve the same level of cohesion as it did in Kentucky.³⁷ One important difference between the two regions was the role played by local elites. In Kentucky, opposition to the tax enjoyed considerable support from the local elites.³⁸ The middling yeoman elite who dominated politics in western Pennsylvania opposed Federalist policy, but their sympathy with the grievances of the protestors stopped short of support for extralegal action or armed resistance.³⁹

Protest in western Pennsylvania had begun peacefully, but hardly deferentially. Opposition to the excise drew on a rich tradition of plebeian

Great Symbol Massacre, 60 J. MOD. HIST. 95 (1988) and Harold Mah, *Suppressing the Text: The Metaphysics of Ethnographic History in Darnton's Great Cat Massacre*, 31 HIST. WORKSHOP J. 1 (1991). On the impact of cultural history on American history, see Casey Nelson Blake, *Culturalist Approaches to Intellectual History*, in A COMPANION TO AMERICAN CULTURAL HISTORY 383 (Karen Halttunen ed., 2008).

31. See generally STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* (1993); JAMES ROGER SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* (1993).

32. See generally MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* (2003).

33. See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815* 141 (2009).

34. TERRY BOUTON, *TAMING DEMOCRACY: "THE PEOPLE," THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION* 221 (2007).

35. THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* 46–60 (1986).

36. See Mary K. Bonsteel Tachau, *A New Look at the Whiskey Rebellion*, in *THE WHISKEY REBELLION: PAST AND PRESENT PERSPECTIVES* 97, 110–11 (Steven R. Boyd ed., 1985).

37. See *id.*

38. See *id.* at 110.

39. WILLIAM HOGELAND, *THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA'S NEWFOUND SOVEREIGNTY* (2006); SLAUGHTER, *supra* note 35.

rituals of protest and communal justice.⁴⁰ Threatening pseudonymous notes appeared in the press and on public placards with the signature of “Tom the Tinker,” who threatened to “mend” the stills of whiskey producers with lead from his musket.⁴¹ Tax collectors were burned in effigy and in some instances subjected to the painful and humiliating process of being tarred and feathered.⁴² By 1794, anger and frustration over the excise reached a crisis point.

No local figure was more despised in western Pennsylvania than excise officer John Neville.⁴³ Born into an affluent planter family in Virginia, Neville was a Federalist in politics and an aristocrat by bearing.⁴⁴ A rich land speculator, he had made huge profits in western Pennsylvania land transactions.⁴⁵ Neville’s country estate, Bower Hill, was situated atop a hill with a commanding view of the countryside in what is now Allegheny County.⁴⁶ While most western Pennsylvanians lived in simple cabins of rough-hewn logs, hovels by comparison with Bower Hill, Neville’s mansion was lavishly appointed with fine furniture and carpets in every room.⁴⁷ The walls of his home were adorned with over two dozen paintings, and he boasted a fine gentleman’s library that contained richly bound leather volumes and finely illustrated maps.⁴⁸ Bower Hill was among the grandest structures in all of western Pennsylvania.⁴⁹ In short, in an area in which most families lived close to subsistence, Neville lived in high aristocratic style.⁵⁰

On July 17, 1794, a crowd of over five hundred armed tax protestors marched on Bower Hill.⁵¹ Aware of the rising levels of violence in the region and fearing the wrath of the mob, Neville requested a detachment of federal soldiers to guard his house, and he even took the unusual precaution of arming his slaves.⁵² When the protestors arrived, shots were exchanged, and in the resulting melee, two protestors, including a popular

40. See generally HUGH H. BRACKENRIDGE, INCIDENTS OF THE INSURRECTION IN THE WESTERN PARTS OF PENNSYLVANIA (1795); WILLIAM FINDLEY, HISTORY OF THE INSURRECTION IN THE FOUR WESTERN COUNTIES OF PENNSYLVANIA (1796). On plebeian traditions of protest, see generally SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA 1788–1828 (1999); RIOT AND REVELRY IN EARLY AMERICA (William Pencak et al. eds., 2002); Alfred F. Young, *English Plebeian Culture and Eighteenth-Century American Radicalism*, in THE ORIGINS OF ANGLO-AMERICAN RADICALISM 185 (Margaret Jacob & James Jacob eds., 1984); Peter Linebaugh, *All the Atlantic Mountains Shook*, 10 LABOR/LE TRAVAILLEUR 87 (1982).

41. HOGELAND, *supra* note 39, at 130.

42. BOUTON, *supra* note 34, at 224.

43. SLAUGHTER, *supra* note 35, at 115, 179.

44. *Id.* at 152.

45. *Id.*

46. See *id.* On the material culture of Neville’s estate, see RONALD C. CARLISLE, THE STORY OF “WOODVILLE”: THE HISTORY, ARCHITECTURE, AND ARCHAEOLOGY OF A WESTERN PENNSYLVANIA FARM 70–77 (1998).

47. SLAUGHTER, *supra* note 35, at 152.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 179.

52. *Id.* at 180.

Revolutionary War veteran and a federal soldier, were slain.⁵³ The incensed crowd set Bower Hill ablaze, and by the following morning Neville's grand estate was reduced to ashes.⁵⁴ House attacks were also part of plebeian culture and generally did not result in the kind of violence and devastation visited on Bower Hill. Typically, angry crowds targeted luxury goods; such actions were a direct assault on some of the most ostentatious symbols of status and wealth.⁵⁵ In the cases of more serious attacks, a home might literally be disassembled and torn down.⁵⁶ Such actions served as a powerful reminder to elites that homes erected with the labor of ordinary folk could literally be brought low by the awesome power of the people. The exchange of gunfire at Neville's home changed the nature of this traditional script. Rather than follow the customary pattern of ritual house assault, events at Bower Hill spun out of control. Instead of "deconstructing" Neville's home, the incensed mob utterly destroyed it, leaving little to salvage.

Although the state of Pennsylvania initially rejected offers of federal assistance to deal with western unrest, the intensification of violence, including the events at Bower Hill, impelled the Washington Administration to take decisive action to end the protests—by force if necessary.⁵⁷ After consulting with his Cabinet, which was divided over the appropriate course of action, Washington adopted a two-prong strategy to end the insurrection.⁵⁸ A group of federal commissioners was appointed to meet with rebels and protesters.⁵⁹ The commission would offer amnesty for an immediate cessation of hostilities and all acts of lawlessness, but it would not assent to any political concessions.⁶⁰ In the likely event that protestors refused to stand down, Washington also prepared to mobilize over 12,000 militia members from the neighboring states of Pennsylvania, Maryland, New Jersey, and Virginia.⁶¹ The Pennsylvania liberty pole cases emerged in the midst of this tumult.

II. LIBERTY POLES: NATIONALIST ICON OR PLEBEIAN STANDARD?

Few political symbols were as powerful and as malleable as the liberty pole. In the iconography of early American political culture, the image of the classical Goddess of Liberty nestling under her arm a pole topped by a cap drew on a symbolic tradition stretching back to ancient Rome.⁶² In the

53. *Id.*

54. *Id.*

55. *See, e.g.*, PETER SHAW, AMERICAN PATRIOTS AND THE RITUALS OF REVOLUTION 197–200 (1981); ROBERT BLAIR ST. GEORGE, CONVERSING BY SIGNS: POETICS OF IMPLICATION IN COLONIAL NEW ENGLAND CULTURE 205–97 (1998).

56. ST. GEORGE, *supra* note 55, at 205–97.

57. *See generally* Richard H. Kohn, *The Washington Administration's Decision to Crush the Whiskey Rebellion*, 59 J. AM. HIST. 567 (1972).

58. *Id.*

59. *Id.* at 575.

60. *Id.* at 575–76.

61. *Id.* at 578–79.

62. *See generally* E. McClung Fleming, *From Indian Princess to Greek Goddess: The American Image, 1783–1815*, 3 WINTERTHUR PORTFOLIO 37 (1967).

Roman Republic, the ritual of freeing a slave included placing a cap on the emancipated slave's head.⁶³ The revival and rediscovery of the liberty pole and cap in the modern era occurred in the seventeenth-century Dutch struggle for independence from Spain.⁶⁴ To appeal to their countrymen, Dutch artists modernized the ancient cap, replacing it with the broad-brimmed hat more typical of contemporary Dutch fashion.⁶⁵ During the English Glorious Revolution of the seventeenth century, the supporters of the Dutch prince William of Orange brought over this symbol of the liberty pole and cap.⁶⁶ Eventually, artists dropped the Dutch-style hat in favor of a more traditional Roman-style cap.⁶⁷ During the eighteenth century, the Whig supporters of parliamentary power adopted this image as their own.⁶⁸

The American Revolution popularized the image of the liberty pole, which was widely used as a symbol in political cartoons and was reborn and brought to life as a popular political symbol in the maritime community of New York.⁶⁹ After the repeal of the Stamp Act, New Yorkers, led by workers from the maritime trades, known as the "Jack Tars," set up a mast or flagpole near the British army barracks in the city.⁷⁰ The location of the pole, in the backyard of British troops, only underscored the provocative nature of raising the pole.⁷¹ The pole flew flags with a variety of messages, including the word "LIBERTY" for all to see.⁷² British troops viewed the pole as an insult and attacked it on multiple occasions.⁷³ In this escalating conflict between New Yorkers and British forces, multiple efforts were made to buttress the pole, which became known as "the Liberty Pole."⁷⁴ As violence between the opposing sides escalated, the pole came to resemble an armed ship's mast, encased in metal plates and studded with nails to impede efforts to chop it down.⁷⁵ New Yorkers also posted a guard around their new standard to prevent future attacks.⁷⁶

In the period after the Revolution, the icon of the liberty pole proliferated along with images of the Goddess of Liberty, a fitting symbol for the new American Republic.⁷⁷ The classical image of the Goddess of Liberty had been domesticated and Americanized. In some cases, Columbia, an Americanized version of Britannia, stood in for the Goddess of Liberty.⁷⁸

63. See generally J. David Harden, *Liberty Caps and Liberty Trees*, 146 PAST & PRESENT 66 (1995).

64. *Id.*

65. *Id.* at 73.

66. *Id.* at 74.

67. *Id.* at 91–102.

68. DAVID HACKETT FISCHER, LIBERTY AND FREEDOM 41–42, 48–49 (2005).

69. *Id.* at 38–41.

70. *Id.* at 43.

71. *Id.* at 44.

72. *Id.* at 46.

73. *Id.* at 43–47.

74. *Id.* at 46.

75. *Id.* at 46–47.

76. ALFRED F. YOUNG, LIBERTY TREE: ORDINARY PEOPLE AND THE AMERICAN REVOLUTION 351 (2006).

77. BARBARA GROSECLOSE, NINETEENTH-CENTURY AMERICAN ART 64–65 (2000).

78. *Id.* at 64.

Columbia typically sported some element of stylized “native” clothing to signal America’s hybrid nature as a product of both the old world and the new.⁷⁹ Columbia also was often portrayed with a liberty pole and cap.⁸⁰ Images of Columbia and Liberty could be found emblazoned on pottery, adorning the covers of magazines, and even used as a model for women’s samplers and other forms of needlework.⁸¹

The intensity of ideological conflict and rising partisanship in the 1790s tested the limits of America’s commitment to the ideals of liberty. It is easy to forget how fraught American politics was in the years immediately following the adoption of the Constitution.⁸² Not only did the ratification of the Constitution not alleviate the profound divisions in American politics, if anything, the outbreak of the French Revolution exacerbated these tensions.⁸³ There was a brief period when Federalists and Republicans each rallied around the cause of the French Revolution, but this harmony collapsed as events in France moved in an increasingly radical direction.⁸⁴ By the middle of the 1790s, loyalty to France or her opponent, Great Britain, was a defining feature of American politics.⁸⁵ For Federalists, the Jacobin ideas of the French Revolution were a cautionary reminder that radical ideas, including homegrown ones spouted by Jefferson and other Republicans, threatened the core values of the American Revolution and the future of America’s constitutional experiment.⁸⁶ Republicans were no less ardently convinced that Federalists sought to refashion America in the image of Great Britain and destroy the democratic and egalitarian achievements of the American Revolution.⁸⁷ By the end of the decade, political animosities had reached such a level of partisan fervor that President John Adams requested that his home residence be fortified with weaponry borrowed from the Department of War to prevent mob actions against him for being pro-British.⁸⁸

Given the increasingly tense atmosphere of the 1790s, it is remarkable that America could find any common political images or icons to rally around. One of the images that was sorely tested during this period was the liberty pole. Although the feminized Goddess of Liberty holding a pole continued to adorn a range of objects and figures in paintings and popular

79. *Id.* at 62–63.

80. *Id.* at 63.

81. *Id.*

82. ANDREW BURSTEIN & NANCY ISENBERG, *MADISON AND JEFFERSON* (2010); JOHN FERLING, *A LEAP IN THE DARK: THE STRUGGLE TO CREATE THE AMERICAN REPUBLIC* (2003); WOOD, *supra* note 33.

83. *See generally* Matthew Rainbow Hale, *American Hercules: Militant Sovereignty and Violence in the Democratic-Republican Imagination, 1793–1795*, in *BETWEEN SOVEREIGNTY AND ANARCHY: THE POLITICS OF VIOLENCE IN THE AMERICAN REVOLUTIONARY ERA* 243 (Patrick Griffin et al. eds., 2015).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

prints, the physical act of raising a liberty pole became more vexed.⁸⁹ There was a brief period in the early 1790s when liberty poles did play a role in public culture that transcended the growing partisan divisions agitating the nation, but this period did not last long.⁹⁰ From the outset, there were always some important differences between the way liberty poles were deployed in Federalist events and the way they were used in more spontaneous protests by plebeian crowds.⁹¹ Federalist liberty pole raisings were generally staged in a way that underscored the value of hierarchy and a vision of well-regulated or ordered liberty.⁹² Events such as Washington's birthday were perfect occasions to make use of the powerful symbolism of the liberty pole because the ceremonies of the day effectively contained its potentially radical message.⁹³ These occasions were designed to promote consensus and evoke themes of nationalism and unity. Militia units often participated in these events, but they acted in an official capacity and adhered to the hierarchies of rank.⁹⁴ The signs, banners, placards, and toasts offered up on these occasions also served the ideological goal of promoting deference to a virtuous elite, with Washington himself serving as the best expression of this idea.⁹⁵ Specific toasts lauded the actions of other leading Federalists such as Adams, Jay, and Hamilton.⁹⁶ By the time of the Whiskey Rebellion, the use of liberty poles as a prop in public rituals by Federalists was waning.⁹⁷ Indeed, the emergence of a radical plebeian street culture, in which liberty poles played a vital role during the Whiskey Rebellion, led many Republicans to distance themselves from this potent symbol.⁹⁸

Although one must approach accounts of liberty pole raisings in the Federalist press with some caution, these descriptions characterize such events as "disorderly" and "riotous."⁹⁹ Additionally, the composition of the crowds associated with them was often disparaged. One writer described them as composed of men of "low birth" who were "without property."¹⁰⁰

89. *Id.*

90. *See generally* SIMON P. NEWMAN, *PARADES AND THE POLITICS OF THE STREET: FESTIVE CULTURE IN THE EARLY AMERICAN REPUBLIC* (1997) (exploring the way public political culture was colored by partisan divisions).

91. DAVID WALDSTREICHER, *IN THE MIDST OF PERPETUAL FETES: THE MAKING OF AMERICAN NATIONALISM, 1776–1820* (1997) (analyzing the tensions between rituals of nationalism and political dissent).

92. NEWMAN, *supra* note 90, at 172–76.

93. *Id.* at 61.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 173.

98. Republican rituals stood somewhere between the elite vision of Federalists and the more rough and tumble majoritarian rituals favored by plebeians. Moreover, Republicans, at least in the midst of the Whiskey Rebellion, were forced to distance themselves from such events in response to Federalist criticism. *See* FINDLEY, *supra* note 40, at 213. During the crisis associated with the Sedition Act, Republicans rehabilitated the ritual of raising the liberty pole. *See* NEWMAN, *supra* note 90, at 174.

99. *Extract of a Letter from a Gentleman in Hagerstown*, *GAZETTE OF THE UNITED STATES*, Oct. 4, 1794, at 2.

100. *Id.*

Nor is it surprising that Federalists would denounce the liberty poles as “false” standards of liberty and deride them as “anarchy poles.”¹⁰¹

The slogans favored by the plebeian crowds associated with the use of liberty poles were more aggressive and egalitarian than those that had been deployed in the nationalist rituals of unity staged by Federalists.¹⁰² Signs on plebeian poles proclaimed, “Liberty or Death,”¹⁰³ or voiced the ideal of “Equal Taxation.”¹⁰⁴ Instead of honoring the hierarchies of rank, plebeian rituals such as these were infused with a more egalitarian spirit and boasted a more carnival-like atmosphere.¹⁰⁵

III. REPUBLICAN LIBERTY AND POPULAR CONSTITUTIONALISM IN THE STREETS

It was in the midst of this tense, politically volatile setting that Justice of the Peace Daniel Montgomery found himself having to make a difficult choice about the raising of a liberty pole in the public streets of Northumberland, Pennsylvania.¹⁰⁶ The basic facts in *Respublica v. Montgomery* were not disputed by either side. Judge William Wilson and Magistrate William Cooke sought Montgomery’s assistance to disperse a crowd of pro-Whiskey Rebellion protestors and tear down their “liberty pole (falsely so called).”¹⁰⁷ Rather than assist them, Montgomery expressed his sympathy with the protestors, declaring that the assembled crowd “were determined to have their grievances redressed,” and they “would erect the pole.”¹⁰⁸ Not only were the actions of the protestors legitimate, Montgomery confessed that “for his part he would put to his shoulder to lift or pull at the rope, if required by the ‘people.’”¹⁰⁹

Wilson subsequently charged him with failing to uphold his office as a conservator of the peace.¹¹⁰ The only legal justification and plausible defense Montgomery might have mounted was that his actions had been motivated by simple prudence and a desire to avoid further violence, which is precisely what he ended up arguing in his defense.¹¹¹ The court rejected his defense and concluded that his actions were not simply expedient, not a calculated attempt to avoid possible death or injury at the hands of the angry crowd and avoid a bad situation becoming worse:

If his conduct arose from weak nerves, or an imperious necessity, he would fairly have declared so upon oath; but his expressions shew that his errors were not confined to his head; they reached his heart; and, at the

101. KLINE’S CARLISLE WEEKLY GAZETTE, Sept. 17, 1794, at 2.

102. NEWMAN, *supra* note 90, at 174–76.

103. INDEPENDENT GAZETTEER, Sept. 17, 1794, at 2.

104. BALTIMORE DAILY INTELLIGENCER, Sep. 10, 1794, at 3.

105. YOUNG, *supra* note 40, at 349.

106. *See Respublica v. Montgomery*, 1 Yeates 419 (Pa. 1795).

107. *Id.* at 419.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 419–20.

time of the riot, he could not have been considered as even a neutral character.¹¹²

The court determined that he had not acted out of prudence, but out of political sympathy with the protest.¹¹³ The facts of the case do seem to warrant this conclusion about Montgomery's state of mind and intentions. Montgomery's own statements and the affidavits produced certainly support such a conclusion.¹¹⁴ Montgomery had not simply refused to disperse the crowd; he had admitted that he gladly would have assisted them in raising the pole. Montgomery's subsequent actions also confirm that he supported the crowd's actions. Following the first confrontation, Wilson returned armed to the scene to break up the illegal assembly. As the court record makes clear:

An affray took place between one of the rioters and a friend to good order, and some blows passed. Mr. Wilson read what he called the riot act, to induce the multitude to disperse, but they refused. One of them presented a musket at him, and he presented his pistol also.¹¹⁵

In response to this turn of events, Montgomery proceeded against Wilson for drawing his weapon, not against the members of the crowd and its leaders.¹¹⁶ Thus, Montgomery viewed Wilson, not the rioters, as the aggressor in this situation and the one responsible for committing the affray.¹¹⁷

If the assembly were a riot, or even a tumultuous assembly, the obligations of a peace officer were clear. Montgomery would have been duty bound to assist Wilson in putting down the riot and would have been justified in using force, including armed force, if necessary.¹¹⁸ Indeed, under such circumstances it would have been the legal obligation of every citizen to assist the justice of the peace and restore order.¹¹⁹ If the protest was a riot, then Wilson was legally justified in brandishing his weapon. The fact that Montgomery charged Wilson, not the protestors, with an

112. *Id.* at 420.

113. Volokh, *supra* note 3, at 1073–74 (approaching *Montgomery* from an anachronistic point of view). Volokh misconstrues Judge Addison's views on liberty poles, failing to note that Addison believed they were a public nuisance regardless of any seditious intent. Thus, in contrast to other examples of speech and the press, simply raising a pole was a crime. To establish the equivalence central to Volokh's argument, one would have to conclude that publishing a blank newspaper and distributing it in public was itself a crime, a conclusion that is hard to credit. Moreover, Volokh tends to blur together the views of Federalists and Republicans, ignores plebeian thought, and conflates attitudes expressed in 1794 during the Whiskey Rebellion with subsequent views articulated later during the Sedition crisis. *Id.* at 1072–74.

114. *Montgomery*, 1 Yeates at 419–20.

115. *Id.* at 419.

116. *Id.*

117. *Id.*

118. For a discussion of Pennsylvania law regarding affray, riot, and the duties of peace officers in such circumstances, see THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF THE JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GAOLERS, JURY-MEN, AND OVERSEERS OF THE POOR 300–09 (1794).

119. *Id.* at 11.

affray further underscores the fact that Montgomery believed the protestors' actions were legal and constitutionally protected.¹²⁰

IV. FEDERALISTS, REPUBLICANS, AND PLEBEIANS:
THE CONTESTED MEANING OF RIGHTS IN THE WHISKEY REBELLION

The legal issues raised by *Montgomery* demonstrate a deep divide over the meaning and scope of the rights of assembly and speech.¹²¹ The Federalist view was captured by Judge Alexander Addison in a case originating in Pittsburgh, closer to the center of the protest. Addison explained that the raising of a liberty pole was, at a very minimum, a public nuisance if it were done on public property without legal sanction.¹²² Raising a pole might also, depending on the circumstances and the intent of the parties, be riotous or seditious even if it were done on private land.¹²³ In short, for Addison and most Federalists, the only time in which the raising of a liberty pole was legal was when the action was undertaken as part of a public celebration, sanctioned by law.

Addison's legal position was clearly spelled out in his decision in *Pennsylvania v. Morrison*.¹²⁴ In that case, Addison averred that "the act of raising a pole in the street is itself unlawful, independent of any other ill intention."¹²⁵ In the case of the pole at issue in *Morrison*, and similar acts across western Pennsylvania during the Whiskey Rebellion, it was beyond dispute "that the intention was unlawful opposition to the government."¹²⁶ In short, Addison did not believe that individuals or groups of individuals had a constitutionally protected right of assembly or speech that included such actions.¹²⁷ The notion that groups of individuals might set themselves up as intermediaries between the people and their government was, in Addison's view, the very worst form of factionalism.¹²⁸ Addison and other Federalists had used the same logic to denounce the Democratic-Republican societies that had emerged across the United States in the previous year. Although not officially linked to the Republican movement in any formal or systematic fashion, most of the societies had close ties to local Republicans.

120. *Montgomery*, 1 Yeates at 419–20.

121. Obviously protestors in Northumberland and in other parts of western Pennsylvania believed that the use of liberty poles was constitutionally protected. *See Holt, supra* note 1, at 18–21.

As Holt notes, Federal Attorney William Rawle instigated twenty-six misdemeanor charges for speech-related infractions arising from the Whiskey Rebellion, the most common type of prosecution involving liberty poles. *Id.* at 75. Federal grand juries were exceedingly reluctant to indict defendants, and in those instances in which Rawle was able to move to trial, he encountered even greater resistance. *Id.* at 75.

122. *See Pennsylvania v. Morrison*, 1 Add. 274 (1795).

123. ALEXANDER ADDISON, REPORTS OF CASES IN THE COUNTY COURTS OF THE FIFTH CIRCUIT, AND IN THE HIGH COURT OF ERRORS & APPEALS, OF THE STATE OF PENNSYLVANIA AND CHARGES TO GRAND JURIES OF THOSE COUNTY COURTS 2:268 (1800).

124. 1 Add. 274 (1795); *see also*, ADDISON, *supra* note 123, at 1:274–76.

125. ADDISON, *supra* note 123, at 1:276.

126. *Id.*

127. *Id.* at 1:275–76.

128. *Id.* at 2:268.

Their goal was to influence public opinion. In addition to publishing their sentiments about political issues, the societies staged celebrations, gave festive dinners, and sponsored public orations. Republicans viewed the societies as a way to improve understanding of political issues and refine public opinion. Federalists, including Addison, denounced them for encouraging disharmony and suspicion. For Federalists, such “self-created societies” were little more than factions whose activities sowed discord and corrupted politics.¹²⁹ Given this view, it made perfect sense that Federalists denounced them and blamed the Democratic-Republican societies for paving the way for the Whiskey Rebellion.¹³⁰

Republican attitudes toward the Democratic-Republican societies and their views of liberty poles were a mirror image of their Federalist opponents’ views. Republicans believed that the societies served a vital role by diffusing information and providing an institutional site for public debate and reasoned discussions.¹³¹ The logic of this argument also applied to the use of liberty poles. If groups of citizens were legally entitled to gather together on matters of public concern, the use of a liberty pole as a rallying point could hardly be illegal.¹³² Instead of viewing them as “anarchy poles,” as Federalists did, Republicans embraced them as part of America’s revolutionary heritage and a potent reminder of the hard-won liberties gained by independence.¹³³ William Findley, one of the most prominent Republican politicians in western Pennsylvania, defended both of these positions at the outset, but as violence spread and Federalists intensified their attacks on pole raisings, he was forced to concede that the use of them in the current context of the western Pennsylvania insurrection had become so closely identified with armed resistance as to be indisputably seditious.¹³⁴ Still, Findley refused to accept that the liberty pole could not again serve as a symbol of freedom or tool of legitimate protest. The legality of raising a pole, he argued, depended entirely on the intent of those raising the pole and the circumstances in which they acted.¹³⁵ Despite his best efforts to assert a more expansive vision of freedom of assembly and the right of symbolic speech (one far closer in

129. ALBRECHT KOSCHNIK, LET A COMMON INTEREST BIND US TOGETHER: ASSOCIATIONS, PARTISANSHIP, AND CULTURE IN PHILADELPHIA, 1775–1840, at 24–40 (Jan Ellen Lewis et al. eds., 2007). See generally Albrecht Koschnik, *The Democratic Societies of Philadelphia and the Limits of the American Public Sphere, Circa 1793–1795*, 58 WM. & MARY Q. 615 (2001).

130. See generally Johann N. Neem, *Freedom of Association in the Early Republic: The Republican Party, The Whiskey Rebellion, and the Philadelphia and New York Cordwainers’ Cases*, 127 PA. MAG. HIST. & BIOGRAPHY 259 (2003).

131. See KOSCHNIK, *supra* note 129, at 37–40.

132. For a good sampling of recent work on the early American public sphere, particularly the role of counter publics and contestation in the public sphere, see *Forum: Alternative Histories of the Public Sphere*, 62 WM. & MARY Q. 1 (2005).

133. NEWMAN, *supra* note 90, at 174.

134. FINDLEY, *supra* note 40, at 213.

135. *Id.*

spirit to modern First Amendment doctrine), Findley's views remained a minority point of view, and he was forced to accept defeat in 1794.¹³⁶

The views of Montgomery and the plebeian protestors in Northumberland were also decisively defeated for the moment. Federalists employed the well-regulated militia protected by the Second Amendment as an agent of repression, not a final check on federal tyranny as some Anti-Federalists had hoped.¹³⁷ The Whiskey Rebellion quickly collapsed in the face of federal power.

To understand what freedom of assembly and speech meant to the parties in *Montgomery*, one must connect them to the wider web of beliefs shaping the way Federalists and plebeians approached law and politics. Neither side supported the type of modern, liberal rights-based vision of assembly or speech that is central to First Amendment doctrine.¹³⁸

The plebeian conception of the rights of assembly and speech was closely connected to a communitarian understanding of liberty. It was not a progenitor for a modern-style theory of expressive rights or associational rights. The language used by Montgomery to defend his actions underscores this point: he defended the raising of a liberty pole because it expressed the will of the local community, not because there was a broad individual right to express one's views, even when those views were unpopular.¹³⁹ It is doubtful that Montgomery or any members of the liberty pole crowds in western Pennsylvania would have defended the rights of unpopular minority voices to speak. In Carlisle, Pennsylvania, a scene of vibrant protests during the insurrection, pro-Whiskey Rebellion protestors shouted down their opponents, hardly the type of actions one would expect from protestors driven by a libertarian ideal.¹⁴⁰ A close look at the actions of the Whiskey Rebellion rebels themselves dispels any lingering doubts about the collective nature of their protests, which shared little with libertarian theories of rights. The rebels drew on a variety of plebeian practices and rituals designed to intimidate and silence those who opposed their cause.¹⁴¹ Harassment sometimes took the form of burning individuals in effigy, a symbolic humiliation, but there were also cases of brutal physical harassment, including the use of tar and feathers.¹⁴² Thus, the plebeian conception of freedom of assembly and speech evidenced in *Montgomery* showed little, if any, tolerance for views at odds with those of

136. *Id.*

137. SAUL CORNELL, A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 114 (2006).

138. See generally Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353 (2000) (tracing the development of the current understanding of the Free Speech Clause). On assembly, see the works cited *supra* note 4.

139. See *supra* notes 107–09, 114–17 and accompanying text.

140. DUNLAP'S AM. DAILY ADVERTISER, Sept. 20, 1794, at 2.

141. See *supra* notes 40–42 and accompanying text.

142. See *supra* notes 40–42 and accompanying text.

the local community. The goal of the protest was to promote and affirm community solidarity, not to encourage a robust marketplace of ideas.¹⁴³

Modern “rights talk” generally is cast in liberal individualistic terms.¹⁴⁴ By contrast, the text of the Pennsylvania Constitution of 1790 makes it exceedingly clear that the right to assemble and speak was still framed in a republican idiom.¹⁴⁵ Both the language and substance of “rights talk” in post-Revolutionary America was steeped in ideas and beliefs quite alien to modern legal discourse.¹⁴⁶ Rights in the Founding era were generally derived from an eclectic set of sources, including Enlightenment thought, common law, civic humanism, republicanism, and American experience both during the Revolution and the Confederation Period.¹⁴⁷ Indeed, the text of the Pennsylvania Constitution expressly framed both assembly and speech in terms of the common good, not in terms of a right of individual expression or the right of individuals to associate:

That the citizens have a right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by petition, address, or remonstrance.¹⁴⁸

The language of Pennsylvania’s 1790 provision asserted that the exercise of this right was shaped by the purpose of furthering the “common good.”¹⁴⁹ It is hard to think of any modern rights provision that qualifies its purpose in such terms. Yet, such language was common in many of the first state

143. For explorations of plebeian constitutionalism in this era, see generally CORNELL, *supra* note 40. See also Cornell, *supra* note 24, at 324.

144. Similar republican language was used in a number of other state constitutions from the period. See NEIL H. COGAN, *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 140–41 (1997). For a good introduction to modern rights theory, see Leif Wenar, *Rights*, STAN. ENCYCLOPEDIA OF PHIL. (Sep. 9, 2015), <http://plato.stanford.edu/archives/fall2015/entries/rights/> [<http://perma.cc/55QK-KWXM>] and Kenneth Campbell, *Legal Rights*, STAN. ENCYCLOPEDIA OF PHIL. (Mar. 20, 2013), <http://plato.stanford.edu/entries/legal-rights/> [<http://perma.cc/F2N7-HHBM>].

145. Frank Lovett, *Republicanism*, STAN. ENCYCLOPEDIA OF PHIL. (Apr. 15, 2014), <http://plato.stanford.edu/archives/win2014/entries/republicanism/> [<http://perma.cc/N2BF-PCPA>] is particularly helpful in distinguishing republicanism from the related tradition of civic humanism and the alternative tradition of rights-based liberalism. Although useful as analytical tools, one must apply these philosophical categories with a good deal of caution. The state constitutions from this period, including Pennsylvania’s, were not the products of a deliberative process involving philosophers, but were the outcome of contentious political processes that involved a multitude of individuals whose constitutional ideas were often inchoate. The bodies drafting these constitutions reflected a broad range of beliefs, experiences, and levels of erudition. See Rakove, *supra* note 17.

146. On the contrast between modern rights theory and the language of rights in the Founding era, see RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* (1999). On early modern conceptions of rights, see KNUD HAAKONSSON, *NATURAL LAW AND MORAL PHILOSOPHY: FROM GROTIUS TO THE SCOTTISH ENLIGHTENMENT* (1996); Victoria Kahn, *Early Modern Rights Talk*, 13 *YALE J.L. & HUMAN.* 391 (2001).

147. See generally JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996).

148. PA. CONST. of 1790, art. IX, § 20.

149. *Id.*

constitutions.¹⁵⁰ Pennsylvania's provision further specified the manner in which these lawful goals might be legitimately pursued: "by petition, address, or remonstrance."¹⁵¹ Although individuals were the holders of these rights, their exercise was framed as a civic enterprise.¹⁵²

It is easy to see why Judge Addison and other Federalists might conclude that assembling to raise a liberty pole was neither a protected form of assembly nor speech. Rather than serve the common good, Federalists such as Addison were likely to see such actions as divisive and the very antithesis of the goal of promoting the common good.¹⁵³ In contrast to legitimate forms of political expression, such as petition, addresses, or remonstrance, the use of a liberty pole was calculated to inflame passions, not promote reasoned discourse. The type of street theater associated with plebeian political culture was simply outside the scope of constitutional protection for Addison.¹⁵⁴

150. Similar language on the "common good" appeared in the constitutions of Pennsylvania (1776), Vermont (1777), North Carolina (1776), Massachusetts (1780), and New Hampshire (1783). See COGAN, *supra* note 144.

151. PA. CONST. of 1790, art. IX, § 20.

152. See PRIMUS, *supra* note 146.

153. Cf. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998) (concluding that this type of language demonstrates that Founding-era texts routinely employed language that was often both overinclusive and, in some cases, underinclusive). While this claim may accurately describe how modern lawyers and judges, including Volokh, typically read such statements, Addison's interpretation of this language suggests that judges in the Founding era did not read such provisions in the way Volokh describes. See ADDISON, *supra* note 123. For Addison and others, the scope of the right was understood to be shaped by the purpose of promoting the common good. Indeed, Volokh makes no effort to try to understand how Founding-era readers, including judges, would have construed such language. Moreover, Volokh shows no awareness at all that reading texts historically requires abandoning the very modern models of legal reasoning he employs to make sense of Founding-era texts. In short, Volokh's entire approach rests on an anachronistic model of textual exegesis. Compare Volokh's approach with the holistic model discussed *supra* notes 22–30 and accompanying text, as well as the model elaborated in Gienapp, *supra* note 10.

154. The original draft of the Assembly Clause of the First Amendment also contained similar language about the common good, but this clause was deleted. See COGAN, *supra* note 144. The omission of references to the common good in the final version of the First Amendment does not, however, mean that this conception vanished from American constitutionalism. During the contentious debate over the meaning of the First Amendment during the Alien and Sedition Crisis, many Federalists, including Addison, continued to think about rights in a similar fashion. See NORMAN L. ROSENBERG, *PROTECTING THE BEST MAN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* 56–99 (1990). See generally LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985); JEFFERY A. SMITH, *PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM* (1988). For an interesting critique of Levy's historical scholarship on this topic, see David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985). On the incompatibility of most modern First Amendment doctrine and the original meanings and practices of the Founding generation, see Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1 (2011).

V. HISTORICISM, ETHNOGRAPHY, AND CONSTITUTIONAL MEANINGS

The analysis of *Montgomery* sketched in this Essay illustrates how a new constitutional historicism, one influenced by a historically informed constitutional ethnography, can help scholars make sense of the complexity of constitutional ideas from the Founding without resorting to the reductionist and anachronistic methods typical of most forms of constitutional originalism.¹⁵⁵ There was a range of different understandings of the meaning of the rights to speak and assemble at play in Pennsylvania during the Whiskey Rebellion. Two of those visions of law, a Federalist ideology and a plebeian one, came directly into conflict in *Montgomery*. Neither of these approaches to law resembles the modern rights-based theories that define First Amendment theory in contemporary law.¹⁵⁶ Federalists and plebeians each saw these rights as tied to an underlying obligation to participate in public life and rally the public and its political representatives when the common good required such interventions. Federalists and plebeians parted ways when it came to interpreting and applying this constitutional ideal. Making sense of the two opposing legal cultures that came into conflict in *Montgomery* requires the type of holistic, anthropological model of analysis elaborated in this Essay. The past really is “a foreign country,” and many familiar legal concepts were understood in radically different terms by members of the Founding generation.¹⁵⁷ Recognizing this fact does not mean that judges, lawyers, and scholars should abandon their interest in Founding-era constitutionalism.¹⁵⁸ Given the traditions of American constitutional law, particularly its favored modalities of interpretation, some attention to history is almost

155. For an elaboration of the methodological flaws in contemporary originalist theory, see Cornell, *supra* note 11.

156. See *supra* note 146 and accompanying text.

157. DAVID LOWENTHAL, THE PAST IS A FOREIGN COUNTRY 105–24 (1985). The application of originalist insights to contemporary law, if done in an historically rigorous fashion (assuming such a practice is even possible), would also undermine many other well-established features of modern constitutional law. See Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 392–93 (2007). The claim of John McGinnis and Michael Rappaport that originalism produces desirable outcomes is therefore hard to credit. See generally JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013) (assuming that the Constitution has a firm supermajoritarian foundation). See also *id.* at 11 (asserting “that good consequences are produced by a constitution that incorporates the core principles of the liberal tradition and has the support of the people”). For a critique of the anachronistic and simplistic assumptions that mar their approach to originalism, see Cornell, *supra* note 23. For jurisprudential critiques, see Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1771 (2015) and James E. Fleming, *Fidelity, Change, and the Good Constitution*, 62 AM. J. COMP. L. 515 (2014).

158. In this regard, the notion of holism discussed above points in the direction of a translation model of constitutional interpretation. See Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993). For an elaboration of this connection, see Gienapp, *supra* note 10.

inevitable.¹⁵⁹ Yet, it is important when reading texts from the Founding era to read them historically, not anachronistically.¹⁶⁰ The goal of such inquiries ought to be to understand the richness of the American constitutional tradition and its evolving nature. The methods discussed above provide one set of tools to help judges, lawyers, and scholars accomplish that goal. Whatever role history comes to play in the future of constitutional adjudication, it is important to get that history right before engaging in the complex and separate task of judging how such insights might or might not be applied to contemporary legal problems.

159. Text and history are two of the basic modalities of American constitutional interpretation identified by Philip Bobbitt. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982). For a thoughtful gloss on these, see Ian C. Bartrum, *Metaphors and Modalities: Meditations on Bobbitt's Theory of the Constitution*, 17 WM. & MARY BILL RTS. J. 157 (2008). For another useful typology of constitutional interpretation, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987). Although textual arguments are not always dispositive, it is hard to think of a mainstream constitutional theory that does not deal with text in some manner. See, e.g., RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 47 (2001). Similarly, even scholars opposed to originalism generally accord some role to history in interpreting the Constitution. See Laurence H. Tribe, *Foreword to IT IS A CONSTITUTION WE ARE EXPOUNDING: COLLECTED WRITINGS ON INTERPRETING OUR FOUNDING DOCUMENT* 8 (2009), https://www.acslaw.org/pdf/ACS_Expounding_FNL.pdf [http://perma.cc/Y757-HBGE]; Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 (2013).

160. For two different views of how judges ought to deal with history, see Martin S. Flaherty, *Foreword: Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning*, 84 FORDHAM L. REV. 905 (2015) and Helen Irving, *Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning*, 84 FORDHAM L. REV. 957 (2015).