

RELIANCE ON FREEDOM OF ASSEMBLY: COMPARATIVE PERSPECTIVES

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ABSTRACT: This essay provides an overview of the right of freedom of assembly and a brief historic panorama of this fundamental right internationally, and its development in Italy and the U.S. It examines the constitutionally imposed requirements as mandated through Italian legislation for citizens to give advance notice of any meeting held in public places, and compares them to notice requirements in other European countries and the U.S. It refers to a grassroots movement in Italy, Retake Roma, to exemplify citizens' reliance on the right of Freedom of Assembly to stimulate democratic values, effect change and motivate all sectors of society.

SUMMARY: 1. Introduction. 2. Retake Roma as a Model of Innovation Resulting from Freedom of Assembly. 2.1. *Retake's Relevance to this Article*. 3. The Historical Development of the Right of Peaceable Assembly. 3.1. *International Perspectives*. 3.2. *The Italian Constitution*. 3.2.1. *The Statuto Albertino*. 3.2.2. *The 1948 Constitution*. 4. The Requirement of Prior Notice in Italy and Elsewhere. 5. The US Constitution and the Right to Peaceable Assembly. 6. Conclusions.

1. Introduction.

In an era of growing threats to peace, security and prosperity that jeopardize stability around the globe, especially in large metropolitan areas, innovators worldwide are struggling to cobble together new solutions. Politically, economically and socially, ours are turbulent and divisive times. Pressures as diverse as terrorism, petty lawlessness, violent crime, unemployment, poverty and scarce governmental funds team up to menace our cities. This onslaught of challenges has led to increasing resignation and despair in many facets of society, which in turn result in a general neglect of our

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REBECCA SPITZMILLER

urban centers, further compromising their safety and upkeep. To tackle such a broad range of complex issues, we must invent effective new approaches and paradigms aimed at combatting and counteracting their intricate and intertwined mechanisms. We must increase our cities' resilience while leveraging their resources, especially human capital. The current crises facing modern cities call for nothing less than collaborative, intense and efficient problem-solving innovation.

Increasingly however, some governmental officials and even fellow citizens tend to view innovators themselves as potential threats, rather than as a crucial part of the solution required to instill the very resilience needed to overcome the daunting challenges facing us. Meanwhile, dramatic advances in technology – especially communications technology – have assured that continuous change is the only constant. On the one hand, this condition provides countless new opportunities for problem solving; on the other, it further destabilizes the precarious situations cities already face, and increases a feeling of inadequacy to overcome even the simplest obstacles. Skepticism and fear can stifle the optimism, intellectual curiosity and potential synergies needed to create solutions. Decisive actions must be taken, but by whom? And how? Think tanks and educators from every field struggle to formulate answers, gain consensus and inspire action. At the same time, governments fear that too much novelty resulting from groundbreaking ideas may provoke even more instability and unrest.

From a legal point of view, as also evidenced by the press and international organizations in recent years, basic freedoms are increasingly at risk around the world, even freedom of assembly and association.¹ It is true that many instances of political

¹ Consider the following examples:

- In the US, a myriad of lawsuits were filed by protesters who were arrested in the Occupy Wall Street movement, claiming their constitutional rights to free speech and assembly were violated. See ERIKA NIEDOWSKI, "Occupy Wall Street Sue Over Free Speech, Use of Force," The Huffington Post, 22 November 2011, available at http://www.huffingtonpost.com/2011/12/22/occupy-wall-street-protesters-sue-free-speech_n_1166372.html#liveblog. In Baltimore, a curfew was issued to contain protests over the death of Freddie Gray while in police custody. "Deborah Jeon, legal director of the American Civil Liberties Union of Maryland, issued a statement which said: 'At this point, [the curfew] is being used to restrict the first-amendment rights of protestors, legal observers, and the

Peace Processes OnLine Review

www.peaceprocesses.it

Vol. 2, N. 1

Winter-Spring 2016

RELIANCE ON FREEDOM OF ASSEMBLY

repression of these freedoms occur where these rights are exercised in a way that is perceived as a potential menace to public order and safety. But it is important to note that these are the very freedoms that are essential to coalesce the positive energy and new ideas capable of lifting urban centers out of decay. In fact, appropriate exercise of

media, and is engendering needless tension and hostility.” See RAYA JALABI, “Freddie Gray: legal volunteers among those arrested after defying Baltimore curfew,” *The Guardian*, 2 May 2015, available at: <http://www.theguardian.com/us-news/2015/may/03/freddie-gray-legal-volunteers-arrested-after-defying-baltimore-curfew>.

- In Russia, authorities have outlawed spontaneous protest and criminalized repeated breaches of regulations on public assemblies, in an effort to deter the growing support for rights-seekers, “while simultaneously giving a veneer of legitimacy to repressive moves that are steadily stripping all Russians of their fundamental rights.” The requirement of prior approval to exercise assembly rights has been a key tool in the crackdown. Russia’s Federal Law no. 54-FZ “On assemblies, meetings, demonstrations, rallies and pickets” came into force in 2004, was amended in 2012, and since then has been applied even more aggressively than before. Amnesty International Ltd, “A Right, Not a Crime, Violations of the Right to Freedom of Assembly in Russia,” (London 2014), 4.

- In Canada: The Quebec Bar Association expressed ‘serious concerns’ about the constitutionality of a new Quebec law that set “multiple requirements on public demonstrations and threatens stiff penalties to people who disrupt college and university classes. ... ‘This bill, if adopted, is a breach to the fundamental, constitutional rights of the citizens,’ the bar association president, *bâtonnier* Louis Masson, said in a statement. [...] ‘Read it. Stunned. Can’t believe that a democratic government can adopt such a law,’ tweeted law professor Louis-Philippe Lampron, a Laval University expert in human rights.” TU THANH HA and LESS PERREAUX, “Student Protests: Anti-protest legislation passes in Quebec,” *The Globe and Mail*, 18 May 2012, Politics, available at: <http://www.theglobeandmail.com/news/politics/anti-protest-legislation-passes-in-quebec/article2436933/>. The bill was passed into law in May 2012, but, in a positive turn of events, its punitive portions were soon repealed, in September of the same year.

- In France: “The French government has backed a ban on protests against Israeli violence on the Gaza Strip, and thus been accused of ‘criminalising’ pro-Palestinian activists. Kashmiri Gander, “Israel-Gaza conflict: French minister Bernard Cazeneuve backs ban on pro-Palestinian protests in Paris,” *Independent*, 18 July 2014, available at <http://www.independent.co.uk/news/world/europe/israel-gaza-conflict-french-minister-bernard-cazeneuve-backs-ban-on-pro-palestinian-protests-in-9615919.html>.

Peace Processes Online Review
www.peaceprocesses.it

Vol. 2, N. 1

Winter-Spring 2016

REBECCA SPITZMILLER

freedom of assembly can even prevent the identical menaces to public order and safety that governmental officials and right-minded citizens fear from its abuse.

We depend on these liberties to be able to encourage citizens to reach greater levels of awareness and knowledge of the problems themselves, and to help citizens achieve heightened empowerment necessary to respect and take care of urban commons thus preventing further disorder. If we are to solve the problems facing our cities, innovators must know they can count on city administrators as partners rather than foes, and they must be ready, willing and able to convince their fellow citizens of this fact and get them to join in and contribute to the new synergies that can save our metropolitan areas.

Freedom of assembly acts as a glue that holds democratic society together. It serves critical functions that validate citizens' need on many levels to share and clarify ideas, form plans, take action and feel like part of something larger than themselves that they can identify with. One distinguished author writes that freedom of assembly "provides a degree of safety and comfort in numbers."² While allowing individuals to formulate and strengthen their own views, it "emboldens them to come forward, and to participate in social and political activities."³

This article will address several areas relevant to the constitutionally protected rights of assembly and association in the United States and Italy. First, it will provide an overview of the right of peaceable assembly and a brief historic panorama of this fundamental right internationally, and its development in Italy and the United States. It will also examine the constitutionally imposed requirements as mandated through Italian legislation for citizens to give advance notice of any meeting to be held in a public place, and compared to notice requirements generally in the United States.

² ZICK, T., "Recovering the Assembly Clause," (2012) *Faculty Publications*. Paper 1405, 375-402, at 394. Available at <http://scholarship.law.wm.edu/facpubs/1405>.

³ *Id.*

Peace Processes OnLine Review

www.peaceprocesses.it

Vol. 2, N. 1

Winter-Spring 2016

2. Retake Roma as a Model of Innovation Resulting from Freedom of Assembly.

Before beginning this legal analysis, it is useful to contextualize this discussion, by referring to a grassroots citizens' movement called "Retake Roma,"⁴ or simply "Retake," which originated in Rome and has caught on there and in several other large and small Italian cities.⁵ Retake is a non-profit, non-partisan movement aiming to eliminate vandalism and blight such as tagging, illegal advertising and litter, all of which plague Italy.⁶ While raising awareness about both the need to respect the rule of law (by citizens) and for increased law enforcement (by authorities), Retake stimulates local governments, through seeking their collaboration, to do the work they need to do, and to do it better, with citizens' help.

In reliance on freedom of assembly, Retaker volunteers, or "Retakers," exemplify what Zick has focused on in his work: the creation of "a sense of solidarity or

⁴ <http://www.retakeroma.com/>

⁵ Milan, Bari, Naples, Turin and Terni, to name a few.

⁶ Retakers believe that by maintaining urban areas – e.g., repairing damaged fixtures, removing tags, cleaning up litter, and creating art after acquiring the requisite permits in public places – these spaces will better resist further vandalism and decay. They have discovered that speaking up about the process and working together with fellow citizens to clean up urban neighborhoods inspire others to carry out further virtuous activity promoting the care of urban commons. They have developed this approach partly based on the "broken windows theory" coined by social scientists JAMES Q. WILSON and GEORGE L. KELLING in their landmark 1982 article entitled "Broken Windows: The police and neighborhood safety," published in *The Atlantic Monthly*. These authors had observed experiments conducted in 1969 by Stanford University psychologist Philip Zimbardo, involving abandoned cars in two very different neighborhoods: one in the heart of the Bronx NY, the other in affluent Palo Alto CA. The car in the first neighborhood was reduced to rubble within days; the latter remained perfectly intact until Zimbardo himself smashed one of its windows, triggering a barrage of vandalism that destroyed the car within hours. Wilson and Kelling claimed that "vandalism can occur anywhere once communal barriers—the sense of mutual regard and the obligations of civility—are lowered by actions that seem to signal that 'no one cares.'" Groups like Retake want to show that someone does care, knowing others will emulate their attitude.

common cause.” These volunteers and others like them personally experience what he describes when he writes that the act of assembly:

excites and energizes individuals. [...] It fosters personal and civic pride by providing outlets and venues for the pursuit of common causes. Freedom of assembly does not simply allow individuals to develop their own identities. It allows otherwise marginalized individuals to be present with others and to communicate specific identity claims to the state and to the general public. For many individuals, this is a critical aspect not only of self-governance but also of personal self-esteem. In sum, a robust freedom to peaceably assemble with others facilitates full participation in and enjoyment of communal life.⁷

Retake has played the role of allowing for fuller participation in Italians’ communal life. There are now over 70 active neighborhood groups in Rome alone, and nearly 30,000 social network users who follow and are thus able to participate in its activities, or create their own.⁸ This widespread participation continues to increase, and has had a significant effect on increasing interaction with local authorities, thus further verifying the relevance of Zick’s thesis regarding freedom of assembly to the dynamics and synergies at work in such grassroots groups.

In political terms, the freedom of assembly encourages and facilitates forms of local engagement. It provides foundation and structure for social and political projects. The ability to join with like-minded others allows citizens to form political associations and encourages them to contemplate future endeavors and initiatives. This may lead to new and unique institutions, including new political organizations and parties. Further, freedom of assembly strengthens and amplifies individual voices. It forces officials and other members of the community to take notice by providing a rough depiction of individual preferences. In these representative and democratic senses, assembly acts as an informal method of voting or casting preferences—a way of marking or identifying oneself, often through public affiliations, as supportive of a particular position, cause, or side. Note that assembly serves this particular function whether individuals form a group at the fringes of societal norms or one situated within a majority consensus.⁹

⁷ ZICK, T., “Recovering the Assembly Clause,” 394.

⁸ See: <https://www.facebook.com/notes/retakeroma/gruppi-di-quartiere-divisi-per-municipio-e-relativi-referenti/945960405419626> Empowerment is another basic tenet of Retake’s philosophy. Everyone is encouraged to take initiatives, following a general set of guidelines.

⁹ ZICK, T., “Recovering the Assembly Clause”, 394.

RELIANCE ON FREEDOM OF ASSEMBLY

In Italy, Constitutional Article 118 paragraph 4 embodies “empowerment” in the concept of subsidiarity.¹⁰ In addition to freedom of assembly and association, this provision forms yet another constitutional basis of Retake’s activity, justifying citizens’ moves to take charge of the urban spaces where they live, and to seek and expect the support of the administration to do so. In implicit reliance on Article 118, and through social media,¹¹ Retakers organize dozens of neighborhood clean-ups, or “Retakes”, each month together with city bodies, law enforcement and local sanitation firms. Retake also works to build awareness and interest through school presentations, press coverage and collaboration with similarly oriented organizations.¹²

Grassroots movements such as Retake exemplify the type of innovative, dynamic undertaking that can help solve an array of problems facing our cities. It has created a resilient community that has “relied ... on *informal* networks, rooted in deep trust, to contend with and heal disruption.”¹³ It is indeed trust between citizens themselves that builds communities, and trust between citizens and government that leads to empowerment and progress.¹⁴ Together, active citizens, industry, the media and city administrators are creating collective awareness to ensure our cities’ protection, preservation and continual improvement. To be able to continue to do so, innovators

¹⁰ Italian Constitution, Article 118, paragraph 4 states: “The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity.”

¹¹ <https://www.facebook.com/retakeroma>

¹² The Italian and international press has enthusiastically followed Retake since its inception in 2009. Various private enterprises, such as Clear Channel, Confcommercio, Federalberghi, AkzoNobel, Agep, etc., also generously support and participate in Retake’s work, thus completing the dynamic quadrangle of individual, corporate, public and media players that contribute to Retake’s success.

¹³ “Resilience: Why Things Bounce Back,” ZOLLI, A. and HEALY, A.M., (New York 2012), 15. (Emphasis in the original.)

¹⁴ Article 3) a) of the *Regolamento sulla Collaborazione tra Cittadini e Amministrazione per la cura e la rigenerazione dei beni comuni urbani*, of Bologna, 2014, provides for the general principle of “Reciprocal Trust: without derogating from the public prerogatives in matters concerning vigilance, planning and verification, the Administration and active citizens shall base their relationships on reciprocal trust and shall assume that their respective desires to collaborate are aimed at pursuing aims of general interest.”

Peace Processes Online Review
www.peaceprocesses.it

Vol. 2, N. 1

Winter-Spring 2016

must remain free to promote peaceable assemblies, to meet, discuss and discover the possibilities we possess to solve our cities' problems. Regulation of peaceful assembly must not become so extensive as to inhibit its exercise even where its purpose is not to protest government policy, but rather to promote positive actions by fellow citizens in the interest of the common good, as per the principle of subsidiarity.

2.1. Retake's Relevance to this Article.

This article's focus on several comparative aspects of the legal systems and constitutional underpinnings of the rights of peaceable assembly and association in the United States and Italy is particularly relevant to Retake Roma, since the movement was begun by a small group of US and Italian citizens. Acting and interacting through a flurry of creative energy and meetings (yes, in public places!), these likeminded people innovated their way to creating a unique and unprecedented form of social change that is improving the complexion and social fabric of Italy's cities and towns today. Their implicit and natural reliance on the best aspects of their individual, shared and collective legal and cultural backgrounds¹⁵ surely shaped the free, empowerment-oriented approach they took that led to the phenomenon whose name is quickly becoming an important buzz word closely tied to "taking care of the urban commons" in Italy: "Retake."

3. The Historical Development of the Right of Peaceable Assembly.

¹⁵ "Keep America Beautiful," a US based non-profit organization, figured largely in this background for Retake's American founders. Keep America Beautiful has launched massive communication efforts across the United States ever since its founding in 1953 "when a group of corporate and civic leaders met in New York City to discuss a revolutionary idea — bringing the public and private sectors together to develop and promote a national cleanliness ethic." Keep America Beautiful website: http://www.kab.org/site/PageServer?pagename=about_history. This campaign has helped shape the individual and collective culture of Americans spanning three generations, engraining the values of living in clean neighborhoods into the very essence of what Americans perceive as "certain unalienable Rights, [such as] Life, Liberty and the pursuit of Happiness," as enshrined in the US Declaration of Independence.

3.1. International Perspectives.

Few freedoms are as basic and indispensable to democratic society than the right of peaceful assembly. Its rise began during the great revolutions of the 18th century and it emerged in the liberal constitutions of the next. However, as we will see, soon after Freedom of Assembly had consolidated its power among the middle classes, its strength began to wane due to steady limits imposed on its exercise by the new ruling classes.¹⁶

The Organization for Security and Co-Operation in Europe (OSCE) has articulated three guiding principles as those that “should be clearly articulated in legislation governing freedom of assembly”: the presumption in favor of holding assemblies, the state’s duty to protect peaceful assembly and proportionality. These and other guiding principles “must inform all aspects of the drafting, interpretation and application of legislation relating to freedom of assembly” and “those tasked with interpreting and applying the law must have a clear understanding of these principles.” Regarding the presumption in favour of holding assemblies, this report states that:

“As a basic and fundamental right, freedom of assembly should be enjoyed without regulation insofar as is possible. Anything not expressly forbidden in law should, therefore, be presumed to be permissible, and those wishing to assemble should not be required to obtain permission to do so. A presumption in favour of the freedom should be clearly and explicitly established in law.”¹⁷

¹⁶ PULVIRENTI, M. G., “Riunioni e Assembramenti”, in *Le autorizzazioni di polizia*, Milano, 2013, p. 41.

¹⁷ “Guidelines on Freedom of Peaceful Assembly,” OSCE Office for Democratic Institutions and Human Rights, 2d ed. (Warsaw Strasbourg 2010), p. 35. Available at <http://www.osce.org/baku/105947?download=true>

The right of peaceable assembly resides many modern Constitutions,¹⁸ but only as the result of relatively recent historical developments. Up until the middle of the nineteenth century, only the US Constitution contained this essential freedom.¹⁹ Not surprisingly, since then, many international conventions have also embraced freedom of assembly,²⁰ which is often coupled with the freedom of association. The difference between these two rights is difficult to clearly define and has long been the subject of discussion among legal scholars; a full analysis of these distinctions and a thorough examination of the development of Freedom of Assembly and Freedom of Association in the United States is beyond the scope of this article, which will provide only preliminary notes on each of these topics.

In Italy, for example, two separate constitutional provisions, Articles 17²¹ and 18,²² guarantee these two related but distinct rights. Instead, in the United States, right

¹⁸ Austria, Article 10; Belgium, Articles 20 and 26; Canada, Part 1, Article 2(c); Cyprus, Article 21; Denmark, Articles 79 and 80; c, Article 47; Finland, Article 13; Germany, Article 8; Greece, Article 11; Holland, Article 9; Ireland, Articles 40.6. 1.ii; Latvia, Article 103; Lithuania, Article 36; Luxembourg, Article 25; Malta, Article 42; Poland, Article 57; Portugal, Article 45; Slovakia, Article 28; Slovenia, Article 42; Spain, Article 21; Sweden, Chapter II Article 1, n. 3, Articles 2, 12, 13; United States, Amendment I.

¹⁹ ORSOLYA SALÁT, *The Right to Freedom of Assembly: A comparative Study* (Oxford, Hart Publishing, 2015) 10.

²⁰ Universal Declaration of Human Rights, Article 20; European Convention on Human Rights, Article 11; Charter of the Fundamental Rights of the European Union, Article 12; International Convention on the Elimination of All Forms of Racial Discrimination, Article 5, (d) (ix), adopted and opened for signature and ratification by General Assembly resolution 2106 of 21 December 1965, rendered executive in Italy by Article 5 of Law 654/1975; International Covenant on Civil and Political Rights, Article 21, Adopted by the General Assembly of the United Nations on 19 December 1966, rendered executive in Italy with Article 21 of Law 881/1977; Framework Convention for the Protection of National Minorities, opened for signature in Strasbourg on 1 February 1995, rendered executive in Italy with Article 7 of Law 302/1997; American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States (1948), Article 21; American Convention on Human Rights, Article 15; African Charter on Human and People's Rights, Article 12.

²¹ Article 17: "Citizens have the right to assemble peaceably and unarmed. No previous notice is required for meetings, including those held in places open to the public. In case of meetings held in public places, previous notice shall be given to the authorities, who may prohibit them only for proven reason of security or public safety."

²² Article 18: "Citizens have the right to form associations freely and without authorization for those ends that are not forbidden by criminal law. Secret associations and associations that, even indirectly, pursue political aims by means of organisations having a military character shall be forbidden."

of peaceable assembly is explicitly stated in the US Constitution's First Amendment,²³ but a right to "association" is not mentioned anywhere in the founding document. Somewhat surprisingly however, reliance on "the right of the people peaceably to assemble," as guaranteed in the US Constitution's First Amendment, has faded from US case law in recent years. Courts have largely replaced it with the non-textual right of freedom of association – developed solely through case law.

The vastly different historic development of the US and Italian constitutions, especially in light of the dramatically dissimilar temporal, social and political settings in which such development has unfolded, adds further convolutions and variations to the specific rights guaranteed and their repercussions within the relevant legal systems.

3.2. *The Italian Constitution.*

The Italian Constitution can be considered a "long" founding document, with 139 Articles (some of which were abrogated by the Constitutional Law 3/2001) and 18 "Transitory and Final Provisions." Its first twelve articles sets forth the "Fundamental Principles of the Republic," and the remainder of the document is comprised of two parts: the "Rights and Duties of Citizens," and the "Organization of the Republic." Its very length reveals its tendency to lay out provisions in detail. The analysis of the guarantee of Freedom of Assembly found in Italy's Constitution, *infra*, will demonstrate its tendency to be more meticulous and thorough than is generally the case in shorter founding instruments, such as that of the United States.²⁴

²³ First Amendment, U.S. Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

²⁴ See section 5. *infra*.

Italy's constitution is "rigid," i.e., it cannot be modified through ordinary legislation but only through legislative procedures that involve majorities that are vaster and implicate a broader consensus than that of a simple majority.²⁵ The minimum percentage required for an amendment to be passed is an "absolute majority," meaning "50% plus one" of all the members of each house of the legislature – not a simple majority, which would require only "50% plus one" of those who present at the actual vote. If an absolute majority of each house is achieved, a three-month period begins to run during which an appositive referendum can be called. Again, an absolute majority (50% plus one of all eligible voters) is required to defeat the amendment through such a referendum. In the US, there are several methods of Amendment, and each requires a "super majority."²⁶ The two Constitutions' shared characteristic of "rigidity" helps explain why neither of them has been amended to clarify or modify the guarantee of Freedom of Assembly. In both countries, legislation, local rulemaking and jurisprudence have been relied upon to set the limits of this right.

Italy's current Constitution entered into force on 1 January 1948, and, as noted above, guarantees the Freedom of Assembly in Article 17. Given the importance of the political and historical background and the continuity of the legislative enactments that were promulgated *before* its adoption, under Italy's previous constitution, it is important to start this discussion with that document.

²⁵ Art. 138 Italian Constitution: "Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting.

Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes.

A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members."

²⁶ Article V, US Constitution: "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that [...] no state, without its consent, shall be deprived of its equal suffrage in the Senate."

3.2.1. *The Statuto Albertino.*

The former Italian constitution was called the *Statuto Albertino*, and dated from exactly 100 years earlier than the current one: 1848. It was named after King Charles Albert of Piedmont-Sardinia, and was the constitution he granted to his subjects. When Italy was unified in 1861 under Piedmontese leadership, it became the constitution of the Kingdom of Italy.²⁷

This early constitution was the first to grant a limited Freedom of Assembly, which was the only collective freedom it protected.²⁸ Under its Article 32, it provided that such right must be exercised in compliance “with laws that may regulate its exercise in the interest of the common good.” It limited the right to “assemble peacefully and without arms” to meetings not held in public places or places open to the public. Furthermore, such “meetings in public places or in places that were open to the public” were “entirely subject to the laws of the police.” Thus, Article 32 excluded the most important and delicate types of assembly, thereby practically relegating freedom of assembly to become a sort of “‘appendix’ to freedom of domicile.”²⁹

²⁷ The *Statuto Albertino* was originally a conservative document that established a strong constitutional monarchy, granting voting rights to less than 3% of the population. These scarce rights gradually expanded so that by 1913 universal male suffrage had been attained. Under Fascism the *Statuto Albertino* was modified to give the Fascist party effective control of the government.

²⁸ *Statuto Albertino*, Article 32: The right to peaceably assemble, without arms, in compliance with the laws that may regulate the exercise of this right in the interest of the common good is recognized. This provision is not applicable to assemblies in public places, or places open to the public, which remain entirely subject to the laws of the police.

²⁹ This right was protected in the *Statuto Albertino* by Article 27, and is granted in Italy’s current Constitution by Article 14, paragraph 1. Article 14, Italian Constitution: “The home is inviolable. Personal domicile shall be inviolable.”

The first legislation enacted pursuant to Article 32 of the *Statuto Albertino* was “Attachment B (Public Security)” of Law 2248 of 1865, which authorized police to break up a meeting in a public place or a place open to the public “in the interest of public order.” Disbanding a public gathering was allowed even though there was no legal obligation for the event’s promoters to notify authorities about it, nor (naturally, therefore) any possibility of a prior prohibition of events planned to be held in public places.

A later and even more restrictive law was passed under the auspices of Article 32 through Royal Decree 6144 of 1889 on public security. This law introduced the obligation of notifying authorities in advance for meetings in public places, and allowed authorities to impede the meeting from taking place in case of lack of notice. Moreover, this law extended the possibility of banning meetings in public places or in places open to the public if “seditious manifestations or cries that constitute crimes against the Powers of the State or against Foreign Heads of State and their representatives or if other offenses provided for in the Penal Code occur.”

This law also introduced the notion of the “public meeting,” placing it on equal footing with that of the meeting in a public place, by defining its “public” quality by the following criteria: “1) the place designated for the meeting; 2) the number of persons invited; 3) the purpose of the meeting and the theme to be discussed in the conference” in Ministerial Circular 3751 of 1896.³⁰ Thus, even meetings held in private places could be deemed to be “public meetings” – and therefore disbanded – thereby even impinging on the right of domicile.³¹

Home inspections, searches, or seizures shall not be admissible save in the cases and manners complying with measures to safeguard personal liberty. Controls and inspections for reason of public health and safety, or for economic and fiscal purposes, shall be regulated by appropriate laws.”

See BARBIERI, G. T., *Commento all’articolo 17 della Costituzione*, in *Commentario alla Costituzione*, vol. I, ed. BIFULCO, R., CELOTTO, A., and OLIVETTI, M., Torino, 2006, pp. 384-385.

³⁰ The so-called “*Circolare Di Rudini*.”

³¹ BARBIERI, *Commento all’articolo 17*, 385. See also PULVIRENTI, M. G., *Le autorizzazioni di polizia*, Milano, 2013, p. 48.

Peace Processes OnLine Review

www.peaceprocesses.it

Vol. 2, N. 1

Winter-Spring 2016

3.2.2. *The 1948 Constitution.*

After the fall of Fascism, a new Constitution had to be drafted. Based on a proportional system, elections were held to form the Constituent Assembly assigned with this task. This Assembly's 556 members comprised of a multitude of political and social views, including Christian Democrats, Roman Catholics, socialists, communists and others. These members elected a Constitutional Commission, comprised of 75 deputies, mandated with setting forth the general layout of the new Constitution. This Commission was in turn subdivided into three sub-commissions: "Rights and Obligations of the Citizens," "Constitutional Organization of the State," and "Economical and Social Relationships." A smaller Committee, called the "Committee of the Eighteen," had the duty to draft the constitution based on the work of these three sub-commissions.³²

One aim of the Constituent Assembly was to restore the rights and freedoms dating from the Albertine era. General comments on civil liberties can be gleaned from the 1st Sub-Commission's work and in the plenary session. Some of these comments manifested doubts about the "risks of extensive interpretations of the limits of public security and safety" as expressed in the proposal approved by the "Commission of 75" for Article 17, which, as mentioned above, would contain the new Constitution's Freedom of Assembly.³³ The debates of the Constituent Assembly do not offer any

³²

See:
http://archivio.camera.it/patrimonio/archivi_della_transizione_costituzionale_1944_1948/atc04/documento/CD1700000360

The online site "Historic Archives of the Chamber of Deputies" contains a vast collection of the original documents that trace the history of the elections, the committees' debates and other related works.

³³ See BARBIERI, *Commento all'articolo 17*, 385.

particular insights regarding its drafting, because its broad strokes were already present in the “Report to the Constituent Assembly,” drafted by the Ministry for the Constituent’s Commission for research pertaining to the reorganization of the State.³⁴ This draft was based on examples from several other constitutions.³⁵

Even though Article 17 was significantly different from the former Constitution’s Article 32, the provisions that the latter had ushered in through the Royal Decree 6144 of 1889 and Ministerial Circular 3751 of 1896 described above were essentially left intact. They had been transposed into the Consolidated Act on Public Safety³⁶ (hereinafter T.U.L.P.S.) of 1926, and then in that of 1931, with a strongly authoritarian posture typical of fascist legislation. These laws are in part still in force today.

Thus, T.U.L.P.S. is still the legislation that regulates freedom of assembly in Italy. It provides a relatively onerous, nationwide, blanket obligation of providing notice

³⁴ This ministry was instituted with a decree n. 45 of 31 July 1945, to “prepare the convocation of the Constituent Assembly and to predispose the elements for the study of the new Constitution that should determine the political aspect of the State and the directive lines of its economic and social action.” *Sistema Informativo Unificato per le Soprintendenze Archivistiche*, available at <http://siusa.archivi.beniculturali.it/cgi-bin/pagina.pl?TipoPag=prodente&Chiave=54615&RicLin=en>

³⁵ Ministry for the Constituent. Commission for research pertaining to the reorganization of the State, “Report to the Constituent Assembly, Constitutional Problems – Organization of the State,” Rome, 1946, section 114.

³⁶ T.U.L.P.S., *Testo Unico delle Leggi di Pubblica Sicurezza*, Royal Decree n. 773 of 18 June, 1931. Title II: Provisions relevant to public order and public safety. Chapter I. Regarding public meetings and gatherings in public places. Article 18: “The promoters of a meeting in a public place or in a place that is open to the public must give notice of it, at least three days in advance, to the police commissioner.

Even if a meeting is called through private means, it is to be considered public in any case if – either due to the place where it is to be held, or because of the number of persons who are to speak, or by virtue of its purpose or objective – it has the character of a non-private meeting.

Violators shall be punished with arrest of up to six months and with fines from €103.00 to €113.00. Those who speak in such meetings shall be punished with the same penalties. The police commissioner, in case of a lack of notification or for reasons of public order, morality or public health, may impede that the meeting takes place and may, for the same reasons, prescribe the modalities of time and place of the meeting. Violators of the authority’s prohibition shall be punished with arrest of up to one year and with fines of €206.00 to €113.00. Those who speak at said meetings shall be punished with the same penalties. Whoever withdraws from the meeting before the injunction by the authority is not punishable. The provisions of this article do not apply to electoral meetings.

of any meeting in a public place *or one that is open to the public* to the local police headquarters at least three days in advance. This requirement raises many questions, which have long been the subject of study and debate by legal scholars and in jurisprudence. In fact, there is a discrepancy between the text of T.U.L.P.S. Article 18, paragraph 2, and that of the Constitution, Article 17. One eminent scholar writes: "...paragraph 2 of Article 18 T.U.L.P.S., which distinguishes between private and public meetings, but includes in the former category even those that 'despite having been called through private means, in any case, either due to the place where it is to be held, or because of the number of persons who are to speak, or by virtue of its purpose or objective it has the character of a non-private meeting' is therefore by now to be considered unconstitutional where it requires prior notice also for meetings open to the public."³⁷

4. The Requirement of Prior Notice in Italy and Elsewhere

Perhaps this is one of the most important distinctions between the right to peaceable assembly in the US and Italian Constitutions, for the purposes of this study: the inclusion in the Italian Constitution's Article 17 of a requirement of "previous notice...to the authorities" in "meetings held in public places." It is true that many countries that guarantee freedom of assembly require advance notice, permits and/or licenses for publicly held gatherings. However, most of them – including the United States – mandate such permission through legislation, not by stating such a specific requirement in their constitutions. Italy stands among only a few, at least among those

³⁷ BARBIERI, *Commento all'articolo 17*, 385. See also MASCIA, A., *Diritti della personalità*, in *Famiglia e persone*, Volume I of *Il diritto privato nella giurisprudenza*, Milano, 2008, p.136, citing the Italian Constitutional Court in its decision of 8.4.1958, n. 27; and PULVIRENTI, *Le autorizzazioni di polizia*, p. 50.

countries cited in footnote 18, *supra*, to explicitly require advance notice of public meetings in its founding document.

Only four of the European countries cited above have constitutional provisions that either explicitly require or permit authorities to require prior notice of certain assemblies in public places: Spain, Germany, Belgium and Luxembourg. Spain's right of assembly requires prior notification for meetings and demonstrations in public places, but specifies that authorities "may only forbid them when there are well founded grounds to expect a breach of public order, involving danger to persons or property." Germany's Constitution does not mandate prior notice for assemblies but does explicitly authorize lawmakers to make restrictions regarding the right to assemble in the case of open-air meetings, without limiting, as does Spain's Constitution, any criteria for forbidding them. The bordering countries of Belgium and Luxembourg have constitutional provisions that entirely exclude their citizens' right to freedom of peaceable assembly for open-air meetings. Article 25 of the Luxembourg Constitution goes even further, specifying that such right is suspended even in the case of assemblies of a political, religious or any other nature.

On the other hand, two of those European countries named in the note above provide an additional protection to this right, by specifying in their Constitutions that no permission is required for assemblies. Portugal's Article 45 goes so far as to explicitly state that even meetings held in places that are "open to the public" do not require authorization. Admittedly, a meeting that is "open to the public" is arguably distinguishable from meetings in "public places," as provided in Italy's Constitution, (theoretically exemplifying – though not very clearly – a sort of step between "meetings in private places" and those "in public places"). In any case this explicit prohibition on a previous authorization still constitutes an extra measure of protection for freedom of assembly. Slovakia's Constitution goes even further. In Article 28 paragraph 2 it allows for provisions of law for "assemblies held in public places" [...] "regarding measures necessary in a democratic society for the protection of the rights and freedoms of others, for the protection of public order, health and morals, property or of national security."

Then it adds the broad prohibition: “An assembly shall not be subject to a permission of a body of public administration.”

5. The US Constitution and the Right to Peaceable Assembly

We have seen two distinctions between the US and Italian Constitutions: the absence of the explicit advance-notice requirement for meetings held in public places in the US Constitution, and its lack of an explicit right to association. Another distinction lies in the explicit references that limit the Italian guarantees to only “citizens,” absent in the US counterpart, which is phrased as a general mandate to Congress to “make no law” abridging such right.

Unlike the Italian Constitution, the US Constitution, instead, has a shorter structure, with only seven Articles and 27 Amendments. Its organization, besides being more concise than its Italian counterpart, is roughly its reverse. The Articles in the main body of the document delineate the national government’s structure based on three branches in a federal system and constitutional ratification and amendment procedures; the Amendments, comprised of the Bill of Rights – or the first ten Amendments – and seventeen other Amendments, establish specific protections of fundamental rights and limits on national and state governments’ power. The US Constitution’s broad, sweeping language requires a great deal of legislation – and indeed, judicial interpretation – to implement its provisions and to guarantee the protections afforded citizens through the fundamental liberties established in the Bill of Rights and the other Amendments.

As noted above, the First Amendment's protection of peaceable assembly has suffered, particularly over the last 30 years:³⁸ today local authorities regulate virtually all large gatherings in public places, through permit requirements and "time, place and manner" restrictions generally applicable to freedom of speech, which have been deemed by the Courts to be compatible with constitutionally guaranteed rights.³⁹ The sweeping thesis of one distinguished author, John D. Inazu, holds in part that freedom of assembly has blurred into a non-textual right of expressive association, one created wholly by the courts, which have also confused it at times with the doctrine of freedom of speech. One of Inazu's overriding concerns is that the jurisprudence has "converted the right of association into an instrument of control rather than a protection for the people. In doing so, they have lost sight of the dissenting, public and expressive groups that once sought refuge under the right of assembly."⁴⁰

6. Conclusions.

Despite the signals of ambiguities in European and US legislation and judicial rulings and their potential to weaken protections of freedom of assembly – citizens in Italy, Europe and in the United States generally do not face the serious legal impediments encountered in other international contexts to exercise their rights.

In Italy, groups like Retake Roma and other community activists have been able to speak out, organize and meet to combat urban squalor. They are starting to make

³⁸ For this view, and a full examination of the evolution of the Right to Peaceable Assembly, see, JOHN D. INAZU, "The Forgotten Freedom of Assembly," *Tulane Law Review* 84 (2010): 565. See also JOHN D. INAZU's seminal book, *Liberty's Refuge: The Forgotten Freedom of Assembly* (New Haven, Yale University Press) 2012 and ASHUTOSH A. BHAGWAT's review of it, entitled "Assembly Resurrected," *Texas Law Review* 91 (2012) 351. For a look at the issues involved in the right to peacefully assemble in the United States through a feminist lens, see SUSAN FRELICH APPLETON, "Commentary—Liberty's Forgotten Refugees? Engendering Assembly," *Washington University Law Review*, 89, no. 6 (2012): 1423.

³⁹ See LIND, N. S., and RANKIN, E., "First Amendment Rights: An Encyclopaedia," ABC-CLIO, 2013, Vol. I, pp. 240 et seq.

⁴⁰ INAZU, "The Forgotten Freedom of Assembly," p. 612.

RELIANCE ON FREEDOM OF ASSEMBLY

headway against the ignorance, apathy and utter resignation that have plagued city dwellers for decades, by educating them through learning-by-doing activities that show immediate, tangible results. They have increased citizen empowerment by coupling purposeful enthusiasm for achievable outcomes with a modicum of cooperation from institutions to grant permissions, coordinate clean-up efforts and provide assistance from sanitation services and related security forces.

Retake's real challenge, at least for now, lies within one particular area freedom of assembly's panoply of potential: mobilizing officials to enforce existing laws that set minimal levels of civic behavior. Unlike the cases cited in footnote 1, *supra*, and in something of a reversal of some of the concerns expressed by Prof. Inazu and other civil liberties scholars, Retake is not a voice of dissent protesting overzealous police action in enforcing laws of questionable fairness and merit. On the contrary, one of Retake's main aims is to stimulate and muster the political will to motivate and authorize police forces to actually apply the law where its violation is so commonplace as to have become completely accepted and even ignored. Countless mini-infractions consisting of tags, littering, illegal signage and outright vandalism have become the norm, not the exception, across Italy. Retake and other community and grassroots groups are trying to wake up the citizenry and the institutions so that this downward spiral be stopped. Somewhat ironically, they are using freedom of assembly to cry out for more law enforcement, not less.

The virtuous cycle of progress in caring for urban commons in Italy risks collapse because of the nearly total lack of enforcement of existing rules against petty lawlessness. A growing culture of indifference and acquiescence persists among law enforcement bodies, not keeping pace with the growth in citizens' awareness, desire for lawfulness and empowerment, as engendered by the principle of subsidiarity of Article 118 of the Italian Constitution. The political powers must demonstrate the will to

Peace Processes Online Review
www.peaceprocesses.it

Vol. 2, N. 1

Winter-Spring 2016

complete the cycle of empowerment its citizens have begun to pull their neighborhoods out of further degradation by mandating effective law enforcement.

Remaining within the comparative approach used here, we can cite a US legislative example dealing with this issue. The “Safe and Clean Neighborhoods Act,” was approved by New Jersey in 1979 and financed through state block aids, i.e., “matching” grants, which allocate state funds to “eligible municipalities for the express purpose of placing more patrol officers on the streets.”⁴¹ It was based in part on the “zero tolerance” approach to petty crime, which later became popularized in the “broken windows theory” discussed above. The aim of the Act’s increased police presence was synthesized in the “Broken Windows” article.⁴²

Without apprehending offenders and issuing fines for blatant and repeated violations of laws that prohibit simple littering, trash dumping, abusive signage and vandalism, a certain level of illicit and criminal behavior will persist and tend to increase. Citizens cannot combat crime on their own. We need the active, focused and sustained collaboration with the institutions to fully implement the principle of subsidiarity, and to effectuate real care for the urban commons. To truly exercise our right to assemble peacefully, and to restore its importance in our democracies, it must be a real instrument of change, one that involves and motivates all sectors of society, including the administration, imitating bottom-up management in the commercial sector.

Frederick Schauer has written eloquently on the boundaries of First Amendment protection and refers to constitutional saliency as “the often mysterious political, social, cultural, historical, psychological, rhetorical, and economic forces that

⁴¹ New Jersey “Safe and Clean Neighborhoods Act of 1979,” P.L.1979, c.118.

⁴² “[T]he police ought to protect communities as well as individuals. Our crime statistics and victimization surveys measure individual losses, but they do not measure communal losses. ...[S]o the police—and the rest of us—ought to recognize the importance of maintaining, intact, communities without broken windows.” JAMES Q. WILSON, and GEORGE L. KELLING, “Broken Windows: The police and neighborhood safety,” *The Atlantic Monthly*, 127, March 1982, p. 38.

RELIANCE ON FREEDOM OF ASSEMBLY

influence which policy questions surface as constitutional issues and which do not.”⁴³ Indeed, the aims of members of groups like Retake Roma, in exercising their individual and collective freedom of assembly through their encounters in public places, both result from and intend to change these “mysterious political, social, cultural, historical, psychological, rhetorical, and economic forces” that bear on important policies regarding our cities. The constitutional saliency of their actions is therefore beyond doubt. If Abraham Lincoln was correct when he said that the “right of peaceable assembly” was part of “the Constitutional substitute for revolution,”⁴⁴ the goals of grassroots groups such as Retake Roma fall nothing short of revolutionary. If we are to rally to restore our urban commons, we must honor the hard won battles over freedom of assembly by exercising it to its fullest extent.

⁴³ SCHAUER, F., “The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience,” 117 *Harv. L. Rev.* 1765, 1768 (2004).

⁴⁴ Letter from Abraham Lincoln to Alexander H. Stephens (Jan. 19, 1860) in *Uncollected Letters of Abraham Lincoln* 127 (GILBERT A. TRACY ed., 1917) cited in INAZU, “The Forgotten Freedom of Assembly,” p. 569.

Peace Processes Online Review
www.peaceprocesses.it

Vol. 2, N. 1

Winter-Spring 2016

REBECCA SPITZMILLER

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Vol. 2, N. 1

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