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LOST RIGHTS AND THE IMPORTANCE OF AUDIENCE

Emily Zackin *

GEORGE I. LOVELL, *THIS IS NOT CIVIL RIGHTS: DISCOVERING RIGHTS TALK IN 1939 AMERICA* (2012). Pp. 280. Hardcover \$85.00.

RONALD J. KROTOSZYNSKI, JR., *RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES* (2012). Pp. 336. Hardcover \$65.00.

Narratives of American constitutional development tend to treat old ways of thinking about constitutional meaning as if they are inevitably wrapped into new ones. In these accounts, even when one idea gives rise to its very opposite, the old idea lives on as a foil, reflecting the wisdom of our reformed approach. Yet some constitutional ideas simply die out. These lost ways of thinking about the Constitution reveal the contingency and limitations of the conceptions that did develop. For instance, Mark Graber's study of the transformation of the meaning of free speech,¹ Ken Kersch's account of discontinuities in American understandings of civil liberties,² and Risa Goluboff's description of the Civil Rights Movement's forsaken commitment to economic equality³ have all helped to demonstrate that the scope and nature of the rights we ended up with are only a small sliver of the constitutional rights of which Americans once conceived. They document that significant insights and important commitments have been lost along the way.

George Lovell and Ronald Krotoszynski have offered two recent and valuable additions to the scholarship on lost, or neglected constitutional rights. Krotoszynski looks at the history of the right to petition and to use public space for mass protests.⁴ He urges Americans to rediscover or "reclaim" the First Amendment's neglected right to petition so that the judiciary can better protect this form of political action.⁵ Lovell identifies a neglected rights tradition in popular petitions for civil rights created before the Civil Rights Movement, by mining the archives of the Department of Justice's Civil Rights

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1. MARK A. GRABER, *THE TRANSFORMATION OF FREE SPEECH* (1992).

2. KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW* (2004).

3. RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007).

4. RONALD J. KROTOSZYNSKI, JR., *RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES* (2012).

5. *Id.* at 14.

Section (“CRS”).⁶ Lovell examines 879 letters to the CRS, written in 1939 and 1940, and unearths remarkably poignant requests for federal government intervention and a surprising array of rights claims and expressions of political protest.⁷ Each work successfully complicates an established scholarly view of American rights.

Lovell approaches the letters at the core of his intriguing book from a position of respect for and sympathy with their authors. He explains in the acknowledgment section that he was drawn to these letters as soon as he discovered them,⁸ and that fascination is evident in his close reading and in-depth analysis of their content and their lessons for socio-legal scholars. Lovell devotes an early chapter to the legal and political context of the CRS, sketching its origins and the constraints under which it operated.⁹ The next three chapters describe the letters’ subject matter, the legal and constitutional arguments they contained, and the extralegal strategies they employed to enhance their persuasiveness.¹⁰ Throughout, his analysis highlights the sophisticated political and rhetorical moves of their authors.

Lovell frames his examination around the left-leaning critiques of “rights talk” that emerged (or perhaps re-emerged) in the 1990s.¹¹ One such critique, often associated with Mary Anne Glendon, is that legal claims are inherently atomizing, encouraging or even forcing people to pursue their own individual entitlements, pitting them against other individual rights holders, and eclipsing concerns about the common good.¹² *This is Not Civil Rights* does a masterful job of demonstrating that rights politics need not take this form. Lovell points out that the letter writers in his study were actually more likely to frame their claims in terms of shared harms and community responsibilities than they were to make claims solely about their own entitlements.¹³ In fact, they often attempted to bolster their requests for help from the CRS by arguing that attention to their case could also help the many others who were in a similar position.¹⁴ One man, who had been beaten by railroad police in Florida, urged the federal government to intervene by explaining that others had experienced similar treatment and that bringing the wrongdoers to justice would prevent further harms.¹⁵ Others, protesting the denial of their right to vote, explained that they were concerned with the functioning of the democratic system, not merely with their own individual ballots.¹⁶ The book offers many additional examples of letters that linked rights claims to concern for the common good, and makes it clear that their authors did not forsake majoritarian politics or community mindedness when they framed their concerns as rights or sought their protection.

Another criticism of rights talk is that it reifies elite, lawyerly ideas, cabining the kinds of demands for change that people can make within it, and legitimating the status

6. GEORGE I. LOVELL, *THIS IS NOT CIVIL RIGHTS: DISCOVERING RIGHTS TALK IN 1939 AMERICA* (2012).

7. *Id.* at 6.

8. *Id.* at xv.

9. *Id.* at 30.

10. *Id.* at 31.

11. *Id.* at 10-13.

12. *Id.* at 10; see MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

13. LOVELL, *supra* note 6, at 11.

14. *Id.* at 135-37.

15. *Id.* at 137-38.

16. See *id.* at 103-05.

quo.¹⁷ Here again, the content of letters to the CRS complicates this critique.¹⁸ Although their authors typically lacked legal training and often lacked any formal education, they were undeterred from making novel rights claims and, with a few exceptions, not intimidated by the framework within which they were attempting to operate.¹⁹ On the contrary, they drew from phrases in both the Constitution and Declaration of Independence to make a wide variety of bold and creative rights claims.²⁰ While some grounded their arguments in particular points of legal knowledge, many drew on provisions that would have had narrower meanings for those with legal training.²¹ For instance, the Fourteenth Amendment's Privileges and Immunities Clause, which legal elites understand to have been largely emptied of content, struck many of the letter writers as a promising source for rights not otherwise specified in the text of the Constitution.²² One particularly poignant note is how many of the letter writers described the need for federal government intervention to address state-level rights violations.²³ Although this role for the federal government would come to be widely recognized as constitutionally permissible and even necessary, at the time of their writing, these arguments failed to sway federal officials.²⁴ As Lovell points out, the fact that these claims were ahead of their time demonstrates that the content of rights claims is not automatically restricted by calculations about what judges will find immediately persuasive.²⁵

Indeed, one of the many strengths of Lovell's study is that it separates out the forging of rights claims from the pursuit of litigation. In fact, this study of isolated letter writers fills a gap in the literature on rights-based mobilization, which tends to focus on movements rather than individuals, and in particular, movements centered on litigation.²⁶ It seems possible, however, that the standard critiques of rights rhetoric may really be applicable, not to the use of rights talk generally, but rather to the use of rights-based litigation. Could it be that the pursuit through litigation is what circumscribes rights-based claims and canalizes them into recognized channels? If so, rights-based litigation movements might well be subject to the limitations that the critics of rights politics describe.

It also seems possible that the Civil Rights Movement may have forged such a strong connection between the idea of rights and that of judicial enforcement that the critique has more power in the context of today's politics than it did in the period Lovell examined. Is one consequence of the Civil Rights Movement's successes that rights claims are now so strongly associated with litigation that they are crafted to appeal to judges in ways that earlier rights claims, claims never intended to be litigated, were not? Lovell's study points to these questions, but because it only examines letters written in 1939 and 1940, it must leave them for another to answer.

17. *See id.* at 33.

18. *See id.* at 34, 192-95.

19. *Id.* at 4.

20. *See id.* at 122-23.

21. *Id.* at 135.

22. *Id.* at 119.

23. *See id.* at 201.

24. *See id.* at 68, 201.

25. *Id.* at 112.

26. *Id.* at 17.

Through its close reading of individual letters, *This Is Not Civil Rights* does an unusually good job of addressing the “myth of rights,”²⁷ the idea that rights rhetoric so dazzles Americans that they believe in rights as an idealized fixative for injustice, or in Lovell’s words, the idea that people “mistake legal ideals for reality.”²⁸ At first blush, Lovell’s account seems to offer some support for this proposition. After all, those who wrote to the CRS expressed an implicit, and often explicit, faith in the law and constitutional rights as a vehicle through which wrongs would be righted. But the CRS rarely intervened on behalf of the letter writers. One might easily conclude that these letter writers exhibited faith in the existence of meaningful constitutional protections, which, when called upon, proved merely fictitious. Yet Lovell reads these letters not as evidence of people’s misguided faith in the myth of rights, but as evidence of their clear-eyed view of the political system and their competence at navigating it.²⁹ Lovell interprets the letter writers’ expressions of faith in the law as a strategic device, and highlights several other strategic devices that letter writers used in conjunction with it.³⁰ For instance, the letter writers made extra-legal claims alongside their legal ones, often emphasizing the worthiness of their cases or the extremity of their need.³¹ They did not seem to think a rights claim alone would garner a response or that legally acceptable outcomes were therefore morally legitimate.³² In fact, many explicitly critiqued the gap between official pronouncements of law and the guarantees of justice and equality contained in the Constitution and Declaration of Independence.³³ Their appeals to rights were not born of naiveté or deluded faith in the law: the individual letter writers had few options open to them for meaningful resistance.³⁴ They were lodging critiques of governments with formidable coercive power, and were often facing not merely abstract threats, but actual violence from governing officials.³⁵ They nonetheless denounced government’s actions and insisted that they were entitled to better.³⁶ Rather than confusing them into quiescence, Lovell argues that the idea of rights provided a conceptual framework through which people could construct demands for change, and emboldened the letter writers to make them.³⁷

One important implication of Lovell’s impressive study is that the significance or political value of rights talk should be judged in part by the degree to which it enhances and legitimates the act of making demands, not only the degree to which those demands are ultimately met. Lovell insists that the capacity of relatively powerless people to make demands for change is itself valuable.³⁸ “The people do not always get what they need

27. *Id.* at 20 (quoting STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 5-6 (2d ed. 2004)).

28. LOVELL, *supra* note 6, at 20.

29. *See id.* at 32-33, 140-41.

30. *See id.* at 32-33.

31. *Id.* at 145.

32. *Id.* at 20.

33. *See id.* at 122-23.

34. *See id.* at 195-98.

35. *Id.*

36. *See id.* at 198.

37. *Id.* at 32.

38. LOVELL, *supra* note 6, at 205.

the first time they ask, but they would never get anything if they stopped looking for resonant ways of articulating novel demands.”³⁹ This insight is, as Lovell notes, an extension of the work of critical race theorists who have defended antidiscrimination law as a limited, but nonetheless valuable, mechanism of resistance for those who had few others at their disposal.⁴⁰ It is also a relative of Michael McCann’s work on the way that the pay equity movement mobilized its members around legal claims and rights-based rhetoric, making effective use of rights talk even in the absence of robust judicial support.⁴¹ Of course, it is very difficult to demonstrate that rights talk enables people to make claims they would not otherwise make using a different linguistic or ideational framework, yet the study of rights as claim-enabling will surely benefit from *This is Not Civil Rights* and from further work in the direction it indicates.

People’s ability to make demands on government is also at the core of Ronald Krotoszynski’s book *Reclaiming the Petition Clause*.⁴² It calls our attention to the difficulties of demanding things from a government willing to exercise its coercive power, particularly, Krotoszynski notes, for the purpose of quelling dissent.⁴³ Krotoszynski focuses on government’s ability to suppress mass protest by limiting the physical spaces to which protestors have access, thereby shielding public officials and high-profile events from their message and blunting their impact.⁴⁴ Krotoszynski argues that it is now standard practice for American officials, citing security concerns, to relegate protestors to such remote locations that they are effectively blocked from access to public figures and the journalists covering them.⁴⁵ While Lovell studies the content and context of novel rights claims from a forgotten period in the history of American civil rights, Krotoszynski advances a novel rights claim of his own, drawing from a neglected historical tradition for the purpose of bolstering his claim that his is the correct interpretation of the First Amendment.

Krotoszynski’s central argument is that the First Amendment contains a yet-to-be recognized right of access to one’s governing officials, and that, notwithstanding the Supreme Court’s approval, the practice of confining protestors in low-visibility locations allows governments to hold free speech “hostage to security concerns”⁴⁶ and violates the Constitution.⁴⁷ What makes this rights claim novel is that Krotoszynski grounds it in the First Amendment, which protects “the right of the people . . . to petition the Government for a redress of grievances.”⁴⁸ Though the Supreme Court’s doctrine has typically declined to endow this mention of petitioning with a legal significance distinct from the rest of the First Amendment’s guarantees, Krotoszynski argues that this clause should be

39. *Id.*

40. *Id.* at 195 (citing Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1335 (1988)).

41. MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 4 (1994).

42. See generally KROTOSZYNSKI, *supra* note 4.

43. See *id.* at 23.

44. See *id.* at 213-15.

45. See *id.* at x-xii, 31-33.

46. *Id.* at 31.

47. *Id.* at 208-09.

48. *Id.* at 5 (quoting U.S. CONST. amend. I).

read as independent protection of protestors' rights to be seen and heard directly by the officials at whom they target their protests.⁴⁹ The book proceeds by first describing the gravity of the deprivation,⁵⁰ the growing marginalization of dissent,⁵¹ and the disappearance of public space for its collective expression.⁵² The next section of the book sketches the history of the Anglo-American right of petition and offers New Zealand's political system as an example of the way that political petitioning can be meaningfully incorporated into the functioning of a contemporary political system.⁵³ In the final sections of the book, Krotoszynski proposes a new American constitutional doctrine to protect petitioning and describes a jurisprudential approach judges might use in the enforcement of this new First Amendment doctrine.⁵⁴

The book begins by calling attention to the severe consequences of the existing First Amendment doctrine for protestors who attempt to maintain a physical presence in American political life.⁵⁵ Chapter Two opens with a physical description of the designated protest zone, or "DZ," that the City of Boston erected in preparation for the 2004 Democratic National Convention.⁵⁶ A federal district judge and the First Circuit Court of Appeals both deemed this DZ system a constitutionally permissible restriction on speech, finding that the restriction was neutral with respect to the content of the speech, and regulated only its time, place, and manner.⁵⁷ Krotoszynski successfully problematizes this understanding by juxtaposing it with a physical description of the DZ.⁵⁸ This zone, the only lawful site near the convention where groups of over twenty people could engage in protest activities, was concealed beneath unused railroad tracks, which were looped with razor wire.⁵⁹ It was patrolled by armed police and national guardsmen, and surrounded by concrete barriers topped by an eight-foot high chain link fence, complete with a mesh wall, which obscured the view of protesters and passersby.⁶⁰ Even independent of other evidence, the prison-like enclosure into which protesters were corralled suggests that this regulation of the physical space available for protest was not a benign security restriction that evenhandedly balanced dissenters' speech rights with concerns about public safety.

Krotoszynski further condemns such restrictions on protest activity by likening these modern-day restrictions to the thoroughly discredited practice of banning seditious libel and thereby criminalizing the criticism of the government.⁶¹ He points out that, in both cases, the government officials who regulated dissenting speech insisted that security concerns necessitated these regulations.⁶² Of course, the advocates of bans on sedi-

49. *Id.* at 6.

50. *See id.* at ix-xiii.

51. *Id.* at 1.

52. *Id.* at 20.

53. *Id.* at 81-82.

54. *Id.* at 182-84.

55. *Id.* at 1-4.

56. *Id.* at 20-21.

57. *Coal. to Protest the Democratic Nat'l Convention v. City of Boston*, 327 F. Supp. 2d 61, 69-71 (D. Mass. 2004), *aff'd sub nom. Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 12, 15 (1st Cir. 2004).

58. *See* KROTOSZYNSKI, *supra* note 4, at 20-21.

59. *Id.* at 21.

60. *Id.* at 20-21.

61. *Id.* at 6-8.

62. *Id.* at 7.

tious libel argued that it was criticism of government that endangered national security, while advocates of restrictions on protestors are, purportedly, attempting to regulate only the time, place, and manner of protest activities, and not attempting to exclude the dissenting ideas from broader circulation. Yet Krotoszynski argues that security concerns are a convenient cloak under which governing officials can hide their desire to quash dissenting speech.⁶³ He points out that when large groups gather for activities that governments condone, they adopt a very different set of responses to potential security threats.⁶⁴ In addition, restrictions on protests in particular places may be facially content-neutral, but the large groups of people likely to gather outside these events are likely to be dissenters.⁶⁵ Thus, Krotoszynski argues, in the context of real-life politics, restrictions on the time, place, and manner of protest can hardly be disentangled from the content-based restrictions that characterized the law of seditious libel.⁶⁶ This may all be true, but the analogy remains an imperfect one. Criminalizing one particular (albeit powerful) form of an idea's expression is surely less oppressive than criminalizing the expression of that idea in any form. Krotoszynski does not even need to equate modern restrictions on protest with laws banning seditious libel, however, because his analysis of the shortcomings of the time, place, and manner doctrine are so thoroughly convincing.

The core of this First Amendment construction is the marketplace of ideas metaphor, which holds that the freedom of speech is so important because truth emerges over time through the unrestricted competition between opposing ideas.⁶⁷ When all ideas are allowed to enter the marketplace, they battle one another for adherents, falsities are toppled in these battles or sheared off of otherwise sound conceptions, and the best arguments emerge victorious. As American jurists have envisioned it, this marketplace is really just a metaphor for a conversation conducted over extended time-spans, predominantly in writing. The exchange of scientific articles is a quintessential example of such a marketplace, and the metaphor entered Supreme Court doctrine primarily in defense of pamphleteers. Thus, Americans' metaphorical marketplace of ideas can be entered through many different channels (or places to write about one's ideas). As a result, restrictions on gathering in particular places to protest do not appear to threaten the core of American free speech, since the metaphorical marketplace remains so easily accessible.

Krotoszynski highlights the limitations of the marketplace of ideas metaphor by drawing our attention to the physical element of political protest, and the neglected significance of where and to whom political ideas get expressed.⁶⁸ He points out that public protest is not simply about ideas, but about the strength and urgency of opposition.⁶⁹ Mass protests create an emotional experience that has the capacity to change the minds of both governing officials and private spectators who witness these protests either in person or through media coverage. Being forced to confront large gatherings of dissent-

63. *Id.*

64. *Id.* at 55-57.

65. *Id.* at 27-31.

66. *Id.* at 31.

67. *Id.* at 50-51.

68. *Id.* at 18.

69. *Id.* at 170-71.

ers, he insists, is different from simply reading about their objections.⁷⁰ Restrictions on visible public protests, therefore, may well hamper dissenters' ability to convey their message, even if their disembodied ideas can still compete in an abstract marketplace. Yet the marketplace of ideas metaphor exerts such a hold on free speech doctrine that courts have generally not recognized protesters' physical access to high-profile events and political actors as protected by the First Amendment.

Convinced that existing doctrine holds little promise of protection for protesters, Krotoszynski turns to a neglected Anglo-American rights tradition, the right to petition, and argues that "[t]he Petition Clause represents the most logical textual basis for securing a right of citizen access to government"⁷¹ Direct access to one's government, Krotoszynski argues, was central to the English practice of petitioning.⁷² By 1377, petitioning at the foot of the throne was a well-accepted means of seeking redress from the King and, as Parliament gained independence, people increasingly directed petitions to Parliament.⁷³ "By the early 1700s, petitioning had come to be viewed as the birthright of the English subject,"⁷⁴ and Krotoszynski argues that the right to petition the King and Parliament was even more robust in the American Colonies, and remained fundamental following independence.⁷⁵ Quaker abolitionists employed petitions particularly vigorously, leading the antebellum Congress to debate the nature of the right to petition, and whether it required Congress to entertain or even respond to all of the petitions it received.⁷⁶ The nineteenth century women's suffrage and temperance movements also employed large-scale drives to collect signatures as a staple of their successful efforts to move policy.⁷⁷ Krotoszynski reminds us of these prominent uses of legislative petitioning in American history, and in the same chapter, turns to New Zealand, where the legislature still regularly entertains citizens' petitions.⁷⁸ He offers New Zealand as a demonstration that the practice of petitioning can be successfully incorporated into modern-day governance as well.⁷⁹

Krotoszynski's central focus is not the written communications with the legislature that characterize New Zealand's right to petition, but the in-person protest of high-profile institutions or events. He seeks to convince his readers to see these protests as petitions that should be protected under the First Amendment. He argues that his view of protests as petitions is consistent with historical practice in the United States (at least from the 1830s onward), since the collection of petition signatures was widely coupled with other forms of expression, particularly mass demonstrations and parades.⁸⁰ He characterizes this form of political participation as a "hybrid activity that married multiple forms of expressive freedom into a single whole. . . . [T]his hybrid activity involved petitioning,

70. *See id.* at 174-75.

71. *Id.* at 208.

72. *See id.* at 83-90.

73. *Id.* at 85.

74. *Id.* at 87.

75. *Id.* at 104, 108.

76. *Id.* at 114-20.

77. *Id.* at 121-23.

78. *Id.* at 137, 139.

79. *Id.* at 149-52.

80. *Id.* at 127.

annexed to speech, assembly, and association, with the goal of engaging the government, through public protest, and also the media”⁸¹ He concludes that public protests that intend to engage government and the media in order to call attention to a particular grievance and seek policy change deserve protection under the Petition Clause.⁸² The Selma to Montgomery March of 1965, to which Krotoszynski devotes an entire chapter, is for him, a paradigmatic example of a modern-day protest/petition.⁸³ The four-day, fifty-two mile march⁸⁴ culminated on the capitol steps with an attempt to meet with the state’s segregationist governor, George Wallace.⁸⁵ This protest framed both a direct entreaty to the Governor and the larger conversation about violations of African Americans’ civil rights.⁸⁶

Krotoszynski also notes that this quintessential and substantively important protest would not have been able to proceed without the protection of the federal judiciary, and uses Federal District Judge Frank Johnson’s decision in *Williams v. Wallace*,⁸⁷ which granted an injunction authorizing the march, as an example of the way that judges should enforce the right to petition.⁸⁸ The part of Judge Johnson’s opinion in *Williams* that Krotoszynski finds so useful as a model for protection of the right to petition is Johnson’s “proportionality principle,” which is a balancing test used to determine when a public protest is protected under the First Amendment.⁸⁹ Using this principle, the right to petition is commensurate with the particular grievances for which the petitioners in question seek redress.⁹⁰

Of course, this kind of balancing test relies on judges to determine the extent of the harms inflicted by government on each group of would-be protestors, but Krotoszynski seeks to reassure us that such determinations do not rely too heavily on judges’ subjective assessments.⁹¹ He acknowledges that judges will necessarily have discretionary power when determining what amount of access is proportional to the wrongdoing that petitioners have suffered, but points out quite rightly that existing First Amendment doctrine already hinges on subjective distinctions, such as the difference between conduct and expressive activity.⁹² Instead of continuing to emphasize the subjectivity inherent in constitutional doctrines, however, Krotoszynski insists that the proportionality principle can occupy a legal space in which subjective determinations about which groups deserve protection will be minimized by a rigorous examination of the merits of their claims.⁹³ Thus, he argues that “it is difficult to see how [the proportionality principle] could serve as a vehicle for permitting judges to implement their arbitrary or narrow ideological poli-

81. *Id.* at 165-66.

82. *Id.* at 182-83.

83. *Id.* at 185.

84. *Id.* at 186.

85. *Id.* at 12.

86. *See id.* at 12-13.

87. *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965).

88. KROTOSZYNSKI, *supra* note 4, at 193-95, 206.

89. *See id.* at 206.

90. *Id.*

91. *Id.* at 205.

92. *Id.* at 204-05.

93. *Id.* at 204.

cy preferences.”⁹⁴ This conclusion is particularly surprising in light of Krotoszynski’s repeated references to the criminalization of seditious libel, a practice that has fallen into disrepute in large part because its history so clearly highlights the difficulty, if not impossibility, of disentangling legal judgment from the partisan and ideological lenses through which people, including judges, perceive the world. At times, Krotoszynski seems to acknowledge that what he is really proposing is a trade-off: the introduction of a First Amendment doctrine that will give judges the opportunity to intervene on behalf of those protestors that they recognize as genuinely aggrieved with the cost that such recognition will hinge on necessarily subjective and prejudiced choices. He seems to suggest that because it would provide increased protections for at least some protestors, this solution would certainly be no worse than the current jurisprudential model, under which no protestors are granted direct access to governing officials and the media outlets that follow them. The claim that enhanced access for some protest groups is normatively preferable to extremely limited access for all such groups requires careful justification, which seems to be beyond the scope of this wide-ranging and provocative proposal for a new judicially enforced right to petition through mass protest.

Krotoszynski crafts a creative and persuasive rights claim for members of the legal elite to employ, while Lovell documents the capacity of isolated and often marginalized laypeople to respond to injustice with similarly new and expansive rights claims. Both do this by revisiting lost sites of rights-claiming. Although these books study rights claims of very different kinds, in very different contexts, they both highlight the centrality of people’s intended audience to their choice of how to express their demands. Lovell argues that people employ rights language and insist on the moral adequacy of law because they are attempting to persuade governing officials to act, not necessarily because their thinking is trapped within this conceptual framework.⁹⁵ Similarly, Krotoszynski argues that mass protests are as much about confronting an intended audience as they are about the expression of particular ideas.⁹⁶ Read together, these works suggest that to fully understand political action, it may be necessary to identify the audience it is intended to reach.

94. *Id.* at 205.

95. See LOVELL, *supra* note 6, at x-xii.

96. See KROTOSZYNSKI, *supra* note 4, at 12.