

Law Article Review

The Assembly Clause is the ugly duckling of the First Amendment. Brooding in the shadow of the heralded Free Speech Clause and the venerated Religion Clauses, the “right of the people peaceably to assemble” has been described even by its friends as “forgotten,”¹ “dormant,” “neglected,” and “ignored. Not once over the past thirty years has the Clause been the subject of the Supreme Court’s attention. Instead, like a sleep-deprived parent of quadruplets, the Court has consistently muddled the right to assemble with “the First Amendment’s other guarantees of free expression. In one typical case involving an ordinance that literally restricted certain “assemblies,” the Court called the law a “restraint on speech.”

The Court has not been alone in treating the Assembly Clause as redundant. From the day that Congress first debated putting the right to assemble into the Constitution, critics have asked why, if the Constitution protects the freedom of speech, anyone would “think it necessary, at the same time, to allow the right of assembling?” This question has persisted through the years. Early reviewers of the Constitution called the Assembly Clause so “unnecessary” in light of the First Amendment’s other protections that it smacked of “condescension.” Later reviewers suggested that the Clause was intended to protect marches and crowds from being dispersed. When the Supreme Court weighed in, it initially embraced this latter view, interpreting the Assembly Clause to protect picket lines and civil-rights demonstrations. But the Court eventually vindicated the Assembly Clause’s early critics by treating these public gatherings as just another form of expression already protected by the Free Speech Clause.

The continued mystery of why anyone would want an Assembly Clause in the Constitution has recently sparked an “explosion” of scholarly reinterpretations of the clause. These scholars have tried “to bring the Assembly Clause in from the cold” by offering close readings of its eight words; making normative arguments about the relationship between assembly and expression; and describing the histories of the protest movements that have sought the First Amendment’s protection. The emerging consensus from this scholarship—drafted in the wake of Occupy and Black Lives Matter—is that the Assembly Clause should be understood as an irreplaceable protector of the in-person gathering of dissidents, regardless of how they express themselves.

Endorsing the right to protest is, of course, a valuable role for the modern Assembly Clause, even if that role is only symbolic. But recent scholarship infusing the Clause with new meaning has featured only limited attempts to investigate why the Clause’s initial supporters thought it was important. And there is more to explain than just what is in the First Amendment: forty-seven state constitutions also have assembly clauses, four of which predate the 1789 federal version. Moreover, when the Continental Congress drafted a declaration of the colonists’

fundamental rights in 1774, it included among them a right “peaceably to assemble” but not a right to speak freely.

A handful of scholars and judges over the years have appreciated that understanding the context behind these earlier declarations of rights is critical to understanding their meaning. Investigating the parallel rights to petition and to instruct representatives—which almost universally accompany state assembly clauses—scholars like Maggie Blackhawk and James Gray Pope have described how early constitutions were drafted not only to protect individual rights, but also “to justify exercises of popular power.” The right to petition—to send a formal proposal or bill for a town meeting or general assembly to enact—“originated more bills in pre-constitutional America than any other source of legislation.” The right to instruct—to issue directions to a representative in a regional or central government—was “derived from a belief that the towns of Massachusetts were sovereign political units whose autonomy carried political and even moral force.” To the extent that these judges and scholars have noticed the right to assemble, they have inferred that this right also took the notion of “actual popular sovereignty . . . literally.” But the one judicial opinion that has recently interpreted the right to assemble in light of its historical context, by an appellate judge in Oregon, offers at most a fleeting glimpse of why Americans cared so much about assembly clauses during an era when colonists governed themselves through “town assemblies,” “county assemblies,” and “general assemblies.”

This Article attempts to explain the significance of the right to assemble by uncovering the origin story behind these earlier assembly clauses. The results are surprising: for over one hundred years before the First Amendment was drafted, American activists advanced what they called their right to “assemble” in order to defend their right to govern themselves. This rhetorical right first emerged to combat a seventeenth-century attempt by the British Crown to eliminate the town meetings and provincial assemblies by which the colonists had long legislated on their own behalf. Decades later, when the British government again attempted to restrict the powers of America’s local and provincial assemblies, colonial activists again responded by invoking their right to assemble their own governments and to use those governments’ powers to redress their grievances. By the time the American colonists drafted their first assembly clauses in the 1770s, the right to assemble had been invoked not merely to defend the act of assembling, but also the assemblies themselves, such that they could exercise coercive legal powers to solve their constituents’ problems. In other words, the state and federal assembly clauses were designed to protect a constitutional right of self-government.

Parts I and II of this Article tell the story of where the right to assemble came from. Their main character is Samuel Adams, a man today remembered more for his minor contributions to craft

beer than for his major contributions to American constitutionalism. In the 1760s, Adams was America's most successful community organizer—a prolific writer who coordinated an enormous amount of power from his twin roles as frequent moderator of Boston's town meeting and as clerk of Massachusetts's House of Representatives. In the decade before the First Amendment was proposed, Adams and three of his most frequent correspondents—John Dickinson of Pennsylvania, Richard Henry Lee of Virginia, and his cousin John Adams of Massachusetts—deployed the “right peaceably to assemble” in public debates criticizing British attempts to subordinate their governments.³⁴ The Adams correspondents wielded this right to explain why an unrepresentative Parliament could not order New York's General Assembly to pass certain legislation; why a royal governor could not dissolve Massachusetts's General Assembly for failing to repeal a prior resolution and why neither Parliament nor the Crown could take away powers previously granted to Boston's town meeting.

The Adams correspondents explained that all people have a right to assemble in local or representative governments and to freely use those governments' powers to redress their own grievances. They demanded not only that their town and provincial assemblies have the power to meet, but also, more importantly, that they have the power to pass laws on their own initiative or to threaten coercive measures to back up their petitions to Great Britain.

Of course, the four Adams correspondents were only a fraction of the crowds, protestors, and marchers who collectively gave these assembly clauses their weight and meaning. And initially, these crowds invoked the right to assemble to defend not only their town and county governments but also their constitutional conventions, provincial congresses, and informal assemblies, which all claimed the right, derived from the people who composed them, to exercise governmental power. Relying on the strength of these popular assemblies, the Adams correspondents participated in drafting assembly clauses into the first constitutions of Pennsylvania, North Carolina, Massachusetts, and New Hampshire. But in the decade after 1776, the various formal and informal assemblies invoked the assembly clauses to compete with one another for local supremacy—notably in Massachusetts.

This wave of competition crested with Shays's Rebellion, when informal assemblies in western Massachusetts argued that the state's assembly clause protected their right to govern themselves independently of the General Assembly in Boston. In its wake, the Adams correspondents refined their interpretation of the right to assemble for a post-Revolutionary era. They continued to defend the right of people to use assemblies to remedy their grievances effectively. But Adams and his allies argued that this right to assemble was satisfied so long as states had popularly ratified constitutions and genuinely representative governments in which residents could meaningfully

participate in enacting needed legislation. The Adams correspondents carried this understanding with them during the debate over the ratification of the U.S. Constitution, where they demanded a federal assembly clause. But Adams himself narrowly lost his election to the First Congress, and he was therefore not in the room when the House debated and passed the amendment he and his allies had proposed.

This historical context reveals that the right to assemble at its inception was more than a claim to dissent—it was also a claim to govern. For over a century before 1789, the right to assemble had been invoked to protect the power of people to meaningfully participate in enacting needed legislation, whether directly, by representative, or by exercising coercive leverage. Although interpreters of the first assembly clauses could disagree about what constituted meaningful participation—with defenders of state governments claiming that protestors could participate in formal assemblies and protestors responding that the assemblies were as unrepresentative and difficult to influence as Parliament had been—there was consensus that the right to assemble was a fundamental attribute of popular sovereignty. The cry of no taxation without representation was not a call for lower taxes, but for all taxes to be issued by assemblies in which the taxed could participate in deciding what should be done.

Part III of this Article analyzes the origin story of the right to assemble and offers suggestions for how it might influence our current understanding of the nearly fifty state and federal assembly clauses. Although this Article does not adopt the originalist position that the original intent or public meaning of the right to assemble has been permanently fixed into constitutional law, it does argue that uncovering the historical context surrounding the early assembly clauses reveals untapped possibilities for how the federal and state assembly clauses could be interpreted and applied in the present.

The present-day implications of reinterpreting the state and federal assembly clauses as protections of the right of self-government could be enormous. Today, millions of people with criminal records or without citizenship are formally or effectively disenfranchised from the governments that legislate on their behalf. The local governments of federal territories, the District of Columbia, and Indian tribes are subject to the plenary control of a supreme legislature in which, as in the Revolutionary era, they have no formal representation. Many American citizens find it impossible to meaningfully participate in their governments due to disproportional representation. And for the past 150 years, jurists and scholars of local-government law have operated under the assumption that no provision of early state constitutions or the Federal Constitution specifically empowered local governments to legislate without express authority from a state legislature, making it difficult for local governments today to enact redistributive legislation,

to raise revenue with progressive forms of taxation instead of fines and fees, and to expand their constituencies to include marginalized communities.

But if the state and federal assembly clauses are interpreted in light of their historical context, the fundamental assumptions underlying this state of affairs look deeply vulnerable. A constitutional right of self-government has the potential not only to provide disenfranchised individuals and communities with a constitutional interest in participating in government, but also to provide local governments with authority to pursue broader initiatives without the explicit permission of central governments.