“The Constitutional Right of Local Self-Government”

Abstract: The assembly clause is the ugly duckling of the First Amendment. Sitting at the kids’ table behind the heralded free speech clause and the venerated religion clauses, the assembly clause has been described even by its advocates as “forgotten,” a “historical footnote in American political theory and law.” The clause protects “the right of the people peaceably to assemble”—a phrase the Supreme Court has interpreted only once over the past fifty years despite issuing hundreds of opinions interpreting its First Amendment siblings. From the moment it was included in the proposed federal bill of rights, observers have questioned who would bother turning to the assembly clause for assistance given the First Amendment’s other protections of free expression.

This paper offers a surprising answer: local governments. After describing the historical context in which the “right to assemble” was first expressed, it argues that the right should be interpreted not as a narrow right of self-expression but rather as a broad right of self-government.

In the decade preceding the American Revolution, advocates of “the right to assemble” used the phrase in response to attempts by royal and parliamentary officials to subordinate their town meetings and colonial legislatures—or, in the language of the day, to subordinate their local and general “assemblies.” This subordination came in various forms: Parliament passed laws disempowering New York’s general assembly until it enacted certain legislation; Parliament censured and then banned town meetings in Massachusetts from debating international affairs; and governors up and down the continent dissolved, changed the location of, and otherwise coerced general and local assemblies into repealing legislation they regarded as seditious. In response, town officials and colonial representatives complained that all local governments have the inherent right to consult their constituents and seek a redress of their grievances, whether by enacting laws with their constituents’ consent or by petitioning other governments for their assistance. For example, in response to Parliament’s ban on town meetings in Massachusetts, a convention of town representatives resolved that “every people have an absolute right of meeting together to consult upon common grievances, and to petition, remonstrate, and use every legal method for their removal.” A representative of Pennsylvania’s general assembly proposed that the Continental Congress resolve “[t]hat for Redress of all Grievances, and for the amending, strengthening, and preserving of the Laws, Assemblies ought to be held in each of these Colonies frequently . . . And, that every Dissolution of an Assembly within these Colonies, during the present Reign, on Pretence of Misbehaviour in the Representatives of the People, has been arbitrary, and oppressive.”

Perhaps unsurprisingly, two of the first three states to adopt assembly clauses in their state constitutions were Pennsylvania in 1776 and Massachusetts in 1780. Today, 47 states have a similar clause—and only four follow the First Amendment in putting their assembly clause alongside the general right to free speech.

The historical context of the assembly clause’s origins suggest that the clause has been interpreted far too narrowly. Once the clause is understood as protecting not only the informal expressions of conventions, marches, and gatherings but also the formal decisions of local governments, the state and federal assembly clauses look like an important, “forgotten" limit on one government’s power to subordinate another. In exploring the implications of this interpretation, this paper offers suggestions for how state and federal courts should mediate between different governments to prevent colonialism on one hand and parochialism on the other. Examples of contexts in which this interpretation would apply include federal and state preemption of local governments’ power to act; local governments’

power to lobby legislatures and spend money on political campaigns; and state laws that draw representative districts without regard to local government boundaries.