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The Constitutional Right of Self-Government

ABSTRACT. 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,” a “historical footnote in American political theory and law.” 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.”

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 goes well beyond the First Amendment: forty-seven state constitutions also have assembly clauses, four of which predate the 1789 version.

This Article offers a surprising answer. For over one hundred years before the First Amendment was drafted, American activists advanced what they called their right to “assemble” 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 was thus invoked to defend not merely the act of assembling, but also the assemblies that could exercise coercive legal powers to solve their constituents’ problems. In other words, the state and federal assembly clauses were interpreted to protect not a redundant right of expression but a novel right of self-government.



This Article describes the history of how American colonists first developed and constitutionalized the right to assemble. It argues that the right to assemble was invoked as a right to meaningfully participate in enacting needed legislation, whether directly, by representative, or by the threat of coercive behavior. Although the Article does not adopt the originalist position that the original intent or public meaning of this right has been permanently fixed into the constitutional order, it does argue that the historical context surrounding the early assembly clauses uncovers untapped possibilities for how the federal and state assembly clauses could be interpreted in the present. In an era when politicians choose their voters, millions of taxpayers are formally or effectively disenfranchised, and countless representative governments are inhibited from redressing their constituents' grievances, revitalizing a constitutional protection of self-government seems invaluable.

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INTRODUCTION

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,”² “neglected,”³ and “ignored.”⁴ Not once over the past thirty years has the Clause been the subject of the Supreme Court’s attention.⁵ 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.”⁶ In one typical case involving an ordinance that literally restricted certain “assemblies,” the Court called the law a “restraint on speech.”⁷

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?”⁸ This question has persisted through the years. Early reviewers of the Constitution called the Assembly Clause so “unnecessary”⁹ in light of the First Amendment’s other protections that it smacked of “conde-

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1. John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 570 (2010).
 2. Nicholas S. Brod, Note, *Rethinking a Reinigorated Right to Assemble*, 63 DUKE L.J. 155, 158 (2013).
 3. Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 547 n.10 (2009); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 980 (2011).
 4. Bhagwat, *supra* note 3, at 980.
 5. See JOHN D. INAZU, LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 7, 191 n.15 (2012) (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), as “[t]he last time the Court applied the constitutional right of assembly”).
 6. McDonald v. Smith, 472 U.S. 479, 489-90 (1985) (Brennan, J., concurring) (citing *Claiborne Hardware Co.*, 458 U.S. at 909-12, 915; *United Mine Workers of Am. v. Ill. State Bar Ass’n*, 389 U.S. 217, 221-22 (1967); *Adderley v. Florida*, 385 U.S. 39, 40-42 (1966); *Edwards v. South Carolina*, 372 U.S. 229, 234-35 (1963); *NAACP v. Button*, 371 U.S. 415, 429-31 (1963)).
 7. *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 126, 130 (1992).
 8. 1 ANNALS OF CONG. 731 (1789) (Joseph Gales ed., 1834) (statement of Rep. Sedgwick).
 9. See, e.g., THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 349 (Bos., Little, Brown & Co. 1868); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION §§ 1886-87, at 745 (Bos., Hilliard, Gray & Co. 1833).

scension.”¹⁰ Later reviewers suggested that the Clause was intended to protect marches and crowds from being dispersed.¹¹ When the Supreme Court weighed in, it initially embraced this latter view, interpreting the Assembly Clause to protect picket lines and civil-rights demonstrations.¹² 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.¹³

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.¹⁴ These scholars have tried “to bring the Assembly Clause in from the cold” by offering close readings of its eight words;¹⁵ making normative arguments about the relationship between assembly and expression;¹⁶ and describing the histories of the protest movements that have sought the First Amendment’s protection.¹⁷ 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.¹⁸

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 in-

10. 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 299-300 (Phila., William Young Birch & Abraham Small 1803).

11. See, e.g., James M. Jarrett & Vernon A. Mund, *The Right of Assembly*, 9 N.Y.U. L.Q. REV. 1, 9-16 (1931) (citing *United States v. Cruikshank*, 92 U.S. 542 (1876)).

12. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (civil-rights march); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 512 (1939) (union meeting); *De Jonge v. Oregon*, 299 U.S. 353, 364-65 (1937) (Communist meeting).

13. See generally INAZU, *supra* note 5, at 20-117 (tracing the rise and fall of the freedom of assembly throughout American history).

14. Bhagwat, *supra* note 3, at 990.

15. See, e.g., Brod, *supra* note 2, at 161, 163-66.

16. See, e.g., Bhagwat, *supra* note 3, at 981-90; Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 646-48 (2002); Kevin McGravey, *Reimagining the First Amendment: The Assembly Clause as a Substantive Right*, 53 FIRST AMEND. STUD. 67, 69-73 (2019); Hiram Emmanuel Arnaud, Note, *The Dismantling of Dissent: Militarization and the Right to Peaceably Assemble*, 101 CORNELL L. REV. 777, 785-87 (2016).

17. See, e.g., Abu El-Haj, *supra* note 3, at 583-84; Inazu, *supra* note 1, at 579-610.

18. See, e.g., Brod, *supra* note 2, at 184-90; Inazu, *supra* note 1, at 611-12.

investigate why the Clause's initial supporters thought it was important.¹⁹ 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.²⁰ 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.²¹

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.²² 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."²³ The right to petition—

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19. See, e.g., Brod, *supra* note 2, at 176; Inazu, *supra* note 1, at 574; see also Baylen J. Linnekin, "Tavern Talk" and the Origins of the Assembly Clause: Tracing the First Amendment's Assembly Clause Back to Its Roots in Colonial Taverns, 39 HASTINGS CONST. L.Q. 593, 617-18 (2012) ("Even modern scholars who *do* focus on the origins of the right of assembly nevertheless tend to overlook the pre-Revolutionary, Revolutionary, and preratification American origins of the right.").
 20. See MASS. CONST. of 1780, pt. 1, art. XIX, in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1888, 1892 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS]; N.H. CONST. of 1784, art. XXXII, in 4 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2453, 2457; N.C. CONST. of 1776, declaration of rights, art. XVIII, in 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2787, 2788; PA. CONST. of 1776, declaration of rights, art. XVI, in 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3081, 3084. The three states without assembly clauses today are Maryland, Minnesota, and New Mexico. See MD. CONST. declaration of rights, art. 13 (petition clause only); MINN. CONST. art. I (no petition or assembly clause); N.M. CONST. art. II (no petition or assembly clause).
 21. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 63, 70 (Worthington Chauncey Ford ed., 1904) (declaration and resolves of the First Continental Congress on October 14, 1774).
 22. James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 342-44 (1990). Other brief discussions of the 1774 assembly clause include *Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 121 P.3d 671, 680-81 (Or. Ct. App. 2005); and Thomas Linzey & Daniel E. Brannen, Jr., *A Phoenix from the Ashes: Resurrecting a Constitutional Right of Local, Community Self-Government in the Name of Environmental Sustainability*, 8 ARIZ. J. ENVTL. L. & POL'Y 1, 15 (2017).
 23. Pope, *supra* note 22, at 344; see Kenneth Colegrove, *New England Town Mandates*, in 21 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS: TRANSACTIONS 1919, at 410, 414-17 (1920); Maggie Blackhawk, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1145-47 (2016); Mazzone, *supra* note 16, at 646-48, 713-17, 724-25; Margaret E. Monsell, "Stars in the

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.”²⁴ 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.”²⁵ 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.”²⁶ 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.”²⁷

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.²⁸ 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.²⁹ 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.³⁰ By the time the American colonists drafted their first

Constellation of the Commonwealth”: Massachusetts Towns and the Constitutional Right of Instruction, 29 NEW ENG. L. REV. 285, 309 n.138 (1995).

24. Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 144 (1986).
25. Monsell, *supra* note 23, at 287.
26. Pope, *supra* note 22, at 336.
27. See *Lahmann*, 121 P.3d at 680-81.
28. EDWARD RAWSON, SAMUEL SEWALL & INCREASE MATHER, *THE REVOLUTION IN NEW ENGLAND JUSTIFIED* 6 (Bos., printed for Joseph Brunning 1691).
29. *Id.*
30. See, e.g., John Adams, *Heads of Grievances and Rights* (Sept. 1774), in 2 PAPERS OF JOHN ADAMS 152, 152-54 (Robert J. Taylor ed., 1977); *Convention of Middlesex County* (Aug. 30-31, 1774), in *THE JOURNALS OF EACH PROVINCIAL CONGRESS OF MASSACHUSETTS IN 1774 AND 1775*, at 609, 612-13 (William Lincoln ed., Bos., Dutton & Wentworth 1838) [hereinafter *MASS. PROVINCIAL CONGRESS JOURNALS*].

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.³¹ 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.³² 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.³³ 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;³⁵ why a royal governor could not dissolve Massachusetts's General Assembly for failing to repeal a prior resolu-

31. See 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 21, at 63, 66-70 (declaration and resolves of the First Continental Congress on October 14, 1774); Address to the People of Great Britain, *in* 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 21, at 81, 93 (within the proceedings of October 21, 1774).

32. See JOHN K. ALEXANDER, SAMUEL ADAMS: THE LIFE OF AN AMERICAN REVOLUTIONARY 332 n.17 (2011); Abby Goodnough, *Small Brewer Outgrowing Label*, N.Y. TIMES (June 8, 2010), <https://www.nytimes.com/2010/06/09/us/09beer.html> [<https://perma.cc/VV59-RLUE>].

33. See ALEXANDER, *supra* note 32, at 149, 172; Harry Alonzo Cushing, *Preface* to 1 THE WRITINGS OF SAMUEL ADAMS, at v, v (Harry Alonzo Cushing ed., 1904).

34. See 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 21, at 66-70 (declaration and resolves of the First Continental Congress on October 14, 1774).

35. See, e.g., JOHN DICKINSON, *Letter I*, *in* LETTERS FROM A FARMER, IN PENNSYLVANIA, TO THE INHABITANTS OF THE BRITISH COLONIES 5, 7-11 (London, reprinted for J. Almon 1774) [hereinafter LETTERS FROM A FARMER].

tion;³⁶ and why neither Parliament nor the Crown could take away powers previously granted to Boston's town meeting.³⁷

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.³⁸ 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.³⁹

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

36. See, e.g., Letter from the Massachusetts House of Representatives to the Earl of Hillsborough (June 30, 1768), in 1 THE WRITINGS OF SAMUEL ADAMS, *supra* note 33, at 219, 220-21.

37. See, e.g., A REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON CONTAINING THE BOSTON TOWN RECORDS, 1770 THROUGH 1777, at 121-22 (Bos., Rockwell & Churchill 1887) [hereinafter BOSTON TOWN RECORDS, 1770-1777].

38. See, e.g., DICKINSON, *supra* note 35, at 7-11; DICKINSON, *Letter IX*, in LETTERS FROM A FARMER, *supra* note 35, at 83-86 [hereinafter DICKINSON, *Letter IX*].

39. See, e.g., Address to the People of Great Britain, *supra* note 31, at 93; DICKINSON, *Letter IX*, *supra* note 38, at 83-86.

needed legislation.⁴⁰ 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.⁴¹ 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.⁴²

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

40. See, e.g., GEORGE RICHARDS MINOT, THE HISTORY OF THE INSURRECTIONS, IN MASSACHUSETTS, IN THE YEAR 1786, at 24-25 (Worcester, Isaiah Thomas 1788); Letter from Samuel Adams to Noah Webster (Apr. 30, 1784), in 4 THE WRITINGS OF SAMUEL ADAMS 303, 305-06 (Harry Alonzo Cushing ed., 1908).

41. See Letter from Richard Henry Lee to Doctor William Shippen, Jr. (Oct. 2, 1787), in 2 THE LETTERS OF RICHARD HENRY LEE 440, 442 n.1 (James Curtis Ballagh ed., 1914).

42. See *infra* Sections II.A, II.B.

their behalf.⁴³ 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.⁴⁴ Many American citizens find it impossible to meaningfully participate in their governments due to disproportional representation.⁴⁵ 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.⁴⁶

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

43. See, e.g., RON HAYDUCK, *DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES* 1-6 (2006); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 308-11 (2000).

44. See, e.g., *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 320 (1820) (discussing the authority of Congress with respect to D.C. and the territories despite their lack of congressional representation); see also *Talton v. Mayes*, 163 U.S. 376, 382-83 (1896) (discussing the “paramount authority of Congress” with respect to tribal governments despite their lack of congressional representation).

45. See, e.g., LANI GUINIER, *TYRANNY OF THE MAJORITY* 105-08 (1995); HENDRIK HERTZBERG, *POLITICS: OBSERVATIONS & ARGUMENTS*, 1966-2004, at 485-87, 495-507 (2004).

46. See David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2379 (2003); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1105-20 (1980); see also, e.g., COOLEY, *supra* note 9, at 191-93 (suggesting that such a right of self-government may be implied); JOHN F. DILLON, *TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS* 81-82 (Chi., James Cockcroft & Co. 1872) (finding no express right of local self-government in most state constitutions). This lack of autonomy has been compounded by a new trend of “hyper preemption” in which state legislatures further disempower local governments—usually after the local governments have intended to enact progressive legislation. See Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997-2008 (2018); Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1121-24 (2012); Clayton P. Gillette, *Who Should Authorize a Commuter Tax?*, 77 U. CHI. L. REV. 223, 224-25 (2010); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1494-1504 (2018); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1164-70 (2018); Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 165 (2017); Lauren E. Phillips, Note, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2240-47 (2017).

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.

I. THE RIGHT TO ASSEMBLE BEFORE AMERICAN INDEPENDENCE

A. *The Town Meeting Before 1764*

In 1782, when a French writer asked the American foreign minister, John Adams, what the writer would need to write a history of the American Revolution, Adams laughed and responded that it would take an entire lifetime to collect all the relevant sources. But Adams humored the writer by giving him a place to start: Massachusetts. According to Adams:

[Massachusetts's] primitive institutions . . . produced a decisive effect, not only in the first determinations of the controversies in writing, and the first debates in council, and the first resolutions to resist in arms, but also by the influence they had on the minds of the other colonies, by giving them an example to adopt more or less the same institutions.⁴⁷

To Adams, one of the most important of Massachusetts's "institutions" was its towns.⁴⁸ Towns were "corporations, or bodies politic," in which inhabitants exercised "certain powers and privileges, as, for example, to repair the great roads or highways, to support the poor, to choose their selectmen, constables, collectors of taxes, and above all, their representatives in the legislature."⁴⁹ Most significantly, town residents exercised "the right to assemble, whenever they are summoned by their selectmen, in their town halls, there to deliberate upon the public affairs of the town, or to give instructions to their representatives in the legislature."⁵⁰ By assembling and deliberating over public affairs, Adams explained, "it was in these assemblies of towns or districts that the sentiments of the people were formed in the first place, and their resolutions were

47. Letter from John Adams to the Abbé de Mably (1782), in 5 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 492, 494-95 (Bos., Charles C. Little & James Brown 1851).

48. *Id.*

49. *Id.* at 495.

50. *Id.*

taken from the beginning to the end of the disputes and the war with Great Britain.”⁵¹

As Adams well knew, Massachusetts’s town meetings were as old as the colony itself. As soon as Boston was founded in 1630, its residents gathered in an ad hoc manner to consult with one another about how to improve the town.⁵² By 1641, when the colony published a declaration of the colonists’ “liberties,” it provided not only that colonists had the right to trial by jury and the freedom from excessive punishment, but also that

[e]very man[,] whether Inhabitant or fforreiner, free or not free[,] shall have libertie to come to any publique Court, Councel, or Towne meeting, and either by speech or writeing to move any lawfull, seasonable, and materiall question . . . so it be done in convenient time, due order, and respective manner.⁵³

These liberties provided that recent immigrants, people convicted of crimes, and even enslaved people and servants had at least some formally protected voice in local government.⁵⁴

Subsequent laws reaffirmed the town meeting’s authority “to make such Laws and Constitutions as may concern the welfare of their Town; Provided they be not of a Criminal, but of a Prudential nature, and that . . . they be not Repugnant to the publick Laws and Orders of the Country.”⁵⁵ Although a

51. *Id.*

52. SECOND REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON; CONTAINING THE BOSTON RECORDS, 1634-1660, AND THE BOOK OF POSSESSIONS 1-2 (Bos., Rockwell & Churchill 2d ed. 1881).

53. A Coppie of the Liberties of the Massachusets Collonie in New England, in 8 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, THIRD SERIES 216, 218-21, 227 (Charles C. Little & James Brown eds., Bos., Freeman & Bowles 1843).

54. Blackhawk, *supra* note 23, at 1145-47; see Mark DeWolfe Howe & Louis F. Eaton, Jr., *The Supreme Judicial Power in the Colony of Massachusetts Bay*, 20 NEW ENG. Q. 291, 291-94 (1947) (observing that a series of petitions initiated by a woman, Goody Sherman, may have been responsible for bicameralism in the American colonies); Higginson, *supra* note 24, at 144-45 (observing that petitions from inhabitants, even the disenfranchised, “originated more bills in pre-constitutional America than any other source of legislation”).

55. THE COLONIAL LAWS OF MASSACHUSETTS 147 (Bos., Rockwell & Churchill 1672 ed. 1887); see also An Act for Regulating of Townships, Choice of Town Officers, and Setting Forth Their Power, ch. 28, § 5, 1692 Mass. Acts 64, 66 (“That the freeholders and inhabitants qualified as in this act . . . in any town meeting . . . be and hereby are impowred from time to time to make and agree upon such necessary rules, orders, and by-laws for the directing, managing and ordering the prudential affairs of such town . . .”).

county court could review local ordinances to ensure that they were not preempted, in practice “the power of the town meeting knew no limit.”⁵⁶

Town meetings in Boston and elsewhere spent the next century assembling a half-dozen times per year to make all sorts of “Prudential” laws. As Adams explained, these addressed issues like adjusting a resident’s property lines, giving another resident the power to “hang a gate across a public road,” and ordering all households on penalty of fine to keep a ladder in case of a fire.⁵⁷ And with nothing more than a majority vote of the people assembled, each meeting could also levy taxes for the welfare of anything the meeting deemed necessary.⁵⁸ To administer all these laws, town meetings also established and oversaw hundreds of elected offices. These included important ones, like selectman, and esoteric ones, like fence viewer or informer of deer.⁵⁹

The meetings could also formally direct the agenda of the colony’s General Assembly. When Massachusetts was founded in 1629 as a literal corporation—the Massachusetts Bay Company—its corporate charter authorized any shareholder, or “freeman,” to participate in colonial legislation.⁶⁰ In 1632, when the corporation’s board of directors levied a tax on the colony’s towns, a group of freemen from Watertown complained that the charter prohibited all taxation without their immediate consent.⁶¹ Faced with the logistical nightmare of needing to assemble thousands of freemen every time it wanted to pass a law, the board agreed to a compromise in which each town meeting would be allowed to send two “Deputyes,” or representatives, to vote on taxes “by proxie.”⁶² As time passed, town meetings began to draft for their representatives binding orders, or “instructions,” to vote particular ways on taxes or other

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56. KENNETH A. LOCKRIDGE, *A NEW ENGLAND TOWN: THE FIRST HUNDRED YEARS* 47 (1970) (discussing the town of Dedham).
57. *Id.* at 122-24; T. MCCLURE PETERS, *A PICTURE OF TOWN GOVERNMENT IN MASSACHUSETTS BAY COLONY* 33 (N.Y.C., McWilliams Printing Co. 1890); see Letter from John Adams to the Abbé de Mably (1782), *supra* note 47, at 495.
58. G.B. WARDEN, *BOSTON: 1689-1776*, at 28-33 (1970).
59. *A REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON, CONTAINING THE BOSTON TOWN RECORDS, 1758-1769*, at 82-83 (Bos., Rockwell & Churchill 1886) [hereinafter *BOSTON TOWN RECORDS, 1758-1769*]; LOCKRIDGE, *supra* note 56, at 121-22; WARDEN, *supra* note 58, at 30-33.
60. See Nikolas Bowie, *Why the Constitution Was Written Down*, 71 *STAN. L. REV.* 1397, 1416-18 (2019).
61. *Id.* at 1420.
62. *Id.* (quoting *THE JOURNAL OF JOHN WINTHROP, 1630-1649*, at 63 (Richard S. Dunn, James Savage & Laetitia Yeandle eds., 1996)).

pending issues or else face immediate recall by a vote of the town.⁶³ This form of representative government kept town meetings firmly in control of both local and colonial matters.⁶⁴ It was eventually formalized in a colonial charter that authorized town meetings to send representatives to a “Generall Court of Assembly.”⁶⁵

Taken as a whole, these powers to tax, regulate, and elect and instruct local and colonial officers made town meetings one of the most powerful political institutions in colonial Massachusetts.⁶⁶ As the Watertown episode illustrated, these powers also made town meetings effective sites of protest against policies by more centralized governments. In 1686, for example, after decades of tension between the Massachusetts Bay Company and the Crown, the British government vacated the Company’s charter and replaced its General Assembly with a Crown-appointed governor, Edmund Andros.⁶⁷ When the Andros government attempted to levy a new tax on the colony, a town meeting of Ipswich resolved that “no Taxes should be Levied upon the Subjects without consent of an Assembly chosen by the Freeholders” and that none of the town’s officers would participate in collecting any tax “until it be appointed by a general Assembly.”⁶⁸ The Andros government responded to this town resolution by enacting its own law declaring “it shall not be lawful for the inhabitants of any town within this Dominion to meet or convene themselves together at a town meeting, upon any pretence or colour whatsoever,” except to elect local officers who could collect taxes.⁶⁹ But some of Ipswich’s residents insisted that this ban also was unlawful because “the design of it was to prevent the people in every Town from meeting to make complaints of their Grievances.”⁷⁰ By “constant usage under their Charter Government,” the town’s advocates explained, “the Inhabitants of each Town did assemble as occasion offered to consider of what might conduce to the welfare of their respective Towns, the relief of the poor, or the like.”⁷¹ In petitions to the Crown, they requested “[t]hat all townships

63. Colegrove, *supra* note 23, at 414-17, 425-27.

64. *Id.* at 418-26.

65. Bowie, *supra* note 60, at 1477-78.

66. See Letter from John Adams to the Abbé de Mably (1782), *supra* note 47, at 494-95.

67. Bowie, *supra* note 60, at 1460-61.

68. RAWSON ET AL., *supra* note 28, at 9-10.

69. Robert N. Toppan, *Andros Records*, in 13 PROCEEDINGS OF THE AMERICAN ANTIQUARIAN SOCIETY, NEW SERIES 463, 494 n.1 (1901).

70. RAWSON ET AL., *supra* note 28, at 6.

71. *Id.*

may have liberty to assemble and manage the business of their several precincts as under the former government.”⁷²

The residents of other Massachusetts towns eventually vindicated the Ipswich protesters, deposing the Andros government in a 1689 coup and instructing representatives to assemble in Boston and reestablish their General Assembly.⁷³ They explained in pamphlets to England that they had revolted against a government that had suppressed their town meetings and made “Laws for the *Levying Moneys without the consent of the People either by themselves or by an Assembly.*”⁷⁴ The Crown capitulated, giving Massachusetts a new charter in 1691 with a newly established General Assembly comprising a House of Representatives and a “council” of representatives elected from the lower house.⁷⁵ Yet for decades afterward, some members of town meetings remained paranoid about potential attempts by the British government to interfere with their local or general assemblies.

B. *The Stamp Act Protests of 1765*

John Adams first witnessed the power a town meeting could command in 1763 when he was a young lawyer visiting Boston. He was there to see his cousin, Samuel Adams. Samuel, the Harvard-educated son of a maltster, had been elected one of Boston’s tax collectors.⁷⁶ Samuel was terrible at his job. Walking from door to door, he routinely failed to persuade people to pay all the taxes they owed the town.⁷⁷

At night, John joined Samuel for a meeting of the “Calker’s” or “Caucus Club,” a political organization that introduced the word *caucus* into English-language dictionaries.⁷⁸ In this literal smoke-filled room, Samuel and the other men drank, chose whom to push as moderator for the town meeting, and strategized how to ensure that their “choice of men and measures” would be

72. THOMAS HUTCHINSON, *THE HISTORY OF THE COLONY OF MASSACHUSETTS-BAY, FROM THE FIRST SETTLEMENT THEREOF IN 1628*, at 368 (Bos., Thomas & John Fleet 1764).

73. See Bowie, *supra* note 60, at 1466-71; Colegrove, *supra* note 23, at 416.

74. RAWSON ET AL., *supra* note 28, at 7.

75. Bowie, *supra* note 60, at 1477-78.

76. See BOSTON TOWN RECORDS, 1758-1769, *supra* note 59, at 8.

77. 1 WILLIAM V. WELLS, *THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS* 36-37 (Bos., Little, Brown & Co. 1865).

78. *Id.* at 85-86; *An Impartial Account of the Conduct of the Corkass by a Late Member of That Society*, BOS. EVENING-POST, Mar. 21, 1763, at 2, 2 [hereinafter *An Impartial Account*].

approved by the rest of the town.⁷⁹ They then left to meet with similar clubs around the town to coordinate how best to promote their agenda.⁸⁰

Days later, on the second floor of the enclosed market building known as Faneuil Hall, Samuel's tiny caucus so dominated the town meeting of over a thousand Boston residents that John allegedly scoffed afterward that the town was being managed by a "clique of intriguers."⁸¹ After getting one of their own elected as moderator, members of the caucus spent the next two days promoting candidates for the hundreds of other town offices up for grabs.⁸² The meeting reelected Samuel tax collector—an office he would continue to perform leniently.⁸³ And after the meeting voted to support the caucus's radical resolutions "on freedom and English liberty," a member of the press wrote with both awe and distaste that "[t]he arts made use of by them to carry a point at town meeting are so notorious, that they need not be here particularly mentioned."⁸⁴ Even the lieutenant governor of the colony, Thomas Hutchinson, later wrote that the "mobbish" coordinators of Boston's town meeting were so influential that they could get the town or the colony's General Assembly to approve whatever policies they wanted.⁸⁵

Extraordinary resolves were indeed introduced the following year when rumors reached Boston that the British Parliament was planning to enforce a tax on sugar within the American colonies.⁸⁶ Alarmed, the town meeting appointed Samuel Adams to a committee to draft instructions for Boston's representatives in the General Assembly.⁸⁷ The instructions urged Boston's representatives to "use your power and influence in maintaining the invaluable

79. 2 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 144 (Bos., Little, Brown & Co. 1856).

80. See Alan Day & Katherine Day, *Another Look at the Boston 'Caucus,'* 5 J. AM. STUD. 19, 27-29 (1971).

81. Colegrove, *supra* note 23, at 418. For the number of participating residents and the composition of the caucus, see Day & Day, *supra* note 80, at 28-34. See also ABRAM ENGLISH BROWN, FANEUIL HALL AND FANEUIL HALL MARKET 97-99, 123-24 (1900) (illustrating the use of Faneuil Hall for town meetings as a "suitable place for transacting business").

82. BOSTON TOWN RECORDS, 1758-1769, *supra* note 59, at 82-85; see also 1 WELLS, *supra* note 77, at 86-87 (providing John Adams's account of the caucus meetings).

83. 1 WELLS, *supra* note 77, at 37.

84. *An Impartial Account*, *supra* note 78.

85. Letter from Thomas Hutchinson to Thomas Pownall (Version I) (Mar. 8, 1766), in 1 THE CORRESPONDENCE OF THOMAS HUTCHINSON 403, 406 (John W. Tyler & Elizabeth Dubrulle eds., 2014).

86. See Sugar Act 1764, 4 Geo. 3 c. 15 (Gr. Brit.).

87. BOSTON TOWN RECORDS, 1758-1769, *supra* note 59, at 116.

Rights and Privileges of the Province, of which this Town is so great a[]part.”⁸⁸ They continued, “If Taxes are laid upon us in any shape without ever having a Legal Representation where they are laid,” Parliament would “annihilate[] our Charter Right to Govern and Tax ourselves.”⁸⁹

Acting on these instructions in the fall of 1764, the Massachusetts General Assembly became one of several colonial legislatures to protest Parliament’s power to tax the colonies.⁹⁰ The same month, the New York General Assembly sent a petition asserting that they had “the exclusive Right of Taxing them[s]elves” for “the Support of your Majesty’s Government.”⁹¹ Soon, newspapers up and down the coast “groaned with the loss of liberty.”⁹²

Many of the assemblies that officially protested parliamentary taxation in 1764 and 1765 were formal assemblies: governments like the Boston town meeting and the Virginia House of Burgesses. But over the summer of 1765, thousands of individuals, including Samuel Adams, also began organizing clubs, gatherings, and other informal assemblies. One of these assemblies became known as the “Sons of Liberty,” due to their gathering around a tree they named the “Liberty Tree.”⁹³ There, Adams and hundreds of other Bostonians met to strategize how to get the Stamp Act repealed.⁹⁴

Adams also called for another type of informal assembly: a congress of delegates from “his Majesty[']s other Northern American Colon[ie]s” where, “by the united Applications of all who are Aggrieved, All may happily obtain Redress.”⁹⁵ Boston’s representative in the General Assembly soon invited such a continent-wide congress to assemble in New York City in October 1765.⁹⁶ There, a group of delegates from nine of the continent’s general assemblies met and, after two weeks of debate, signed a resolution declaring “[t]hat the only Representatives of the People of these Colonies, are the Persons chosen therein

88. *Id.* at 120.

89. *Id.* at 121-22.

90. *See id.*; *see also, e.g.*, JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA, 1761-1765, at 360 (John Pendleton Kennedy ed., 1907).

91. 2 JOURNAL OF THE VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE COLONY OF NEW-YORK: BEGAN THE 8TH DAY OF NOVEMBER, 1743; AND ENDED THE 23D OF DECEMBER, 1765, at 769, 770 (N.Y.C., Hugh Gaine 1766) (proceedings of October 18, 1764).

92. *See* Thomas Hutchinson, A Summary of the Disorders in the Massachusetts Province (Dec. 1765), in 1 THE CORRESPONDENCE OF THOMAS HUTCHINSON, *supra* note 85, at 354, 354.

93. 1 WELLS, *supra* note 77, at 63-64.

94. *Id.*

95. BOSTON TOWN RECORDS, 1758-1769, *supra* note 59, at 122.

96. 1 WELLS, *supra* note 77, at 64-65.

by themselves.”⁹⁷ Sending this resolution to Parliament, the so-called Stamp Act Congress added that all British subjects had the right “to petition the King, or either House of Parliament” and that this continental assembly was demanding “the Repeal of the Act for granting certain Stamp Duties.”⁹⁸

Parliament refused to hear the Stamp Act Congress’s petition partially on the ground that “the Congress was widely regarded as an illegal assembly.”⁹⁹ But even extralegal assemblies had power to pressure other governments to hear their concerns, particularly when they relied on organization, intimidation, and other forms of economic or political coercion.

Boston’s town meeting, meanwhile, reassembled in September to confer on “such Measures as shall appear necessary to be taken in consequence of The Stamp Act, and other Matters of Grievance.”¹⁰⁰ Samuel Adams and six other residents drafted new instructions. Because coercion appeared to be the only way the General Assembly could influence a Parliament in which it was unrepresented, the town meeting urged Boston’s representatives to “use [their] best endeavors” to vindicate their constituents’ rights by other means.¹⁰¹ Adams himself was soon elected to the General Assembly to carry out these instructions.¹⁰²

Boston’s town meeting published its instructions in the local newspapers on September 23, 1765, sparking a month of similar instructions in nearly fifty town meetings from Andover to Yarmouth.¹⁰³ The most famous of these instructions were drafted by John Adams, who, on behalf of his suburban town of Braintree, declared parliamentary taxation illegal “because we are not Represented in that assembly in any sense.”¹⁰⁴ Like Boston, the Braintree instructions also urged the Massachusetts General Assembly to “oppose the Execution” of

97. Resolutions of Stamp Act Congress (Oct. 1765), in 1 THE WRITINGS OF JOHN DICKINSON 183, 184 (Phila., Historical Soc’y of Pa., Paul Leicester Ford ed., 1895).

98. *Id.* at 186-87.

99. P.D.G. THOMAS, BRITISH POLITICS AND THE STAMP ACT CRISIS: THE FIRST PHASE OF THE AMERICAN REVOLUTION, 1763-1767, at 189 (1975).

100. BOSTON TOWN RECORDS, 1758-1769, *supra* note 59, at 152.

101. *Id.* at 156.

102. *Id.* at 157.

103. Colegrove, *supra* note 23, at 437 & n.2; see, e.g., WILLIAM BARRY, A HISTORY OF FRAMINGHAM, MASSACHUSETTS, INCLUDING THE PLANTATION, FROM 1640 TO THE PRESENT TIME 89-90 (Bos., James Munroe & Co. 1847); *At a Meeting of the Freeholders and Other Inhabitants of the Town of Salem*, BOS. EVENING-POST, Oct. 28, 1765, at supp. 1.

104. Instructions Adopted by the Braintree Town Meeting (Sept. 24, 1765), in 1 PAPERS OF JOHN ADAMS, *supra* note 30, at 137, 138; see also Adams’s Original Draft, in 1 PAPERS OF JOHN ADAMS, *supra* note 30, at 132, 132-36 (John Adams’s original draft of the instructions).

the Stamp Act “by all Lawfull means consistent with our allegiance to the King . . . till we can hear the Success of the Cries and Petitions of America for relief.”¹⁰⁵ Reading his cousin’s acknowledgment that petitions had to be accompanied by coercion in order to be effective, Samuel invited John to attend Boston’s next town meeting, where John was thrust into colonial politics.¹⁰⁶

C. *The Restraining Act of 1767*

In February 1766, a month before Parliament repealed the Stamp Act along with a declaration of its right to tax the colonies, the royal governor of New York asked the commander in chief of British soldiers in America, Thomas Gage, for military assistance in suppressing anti-tax riots in New York City.¹⁰⁷ When the soldiers arrived, the governor asked the New York General Assembly to appropriate tax revenue toward quartering Gage’s soldiers, as the Quartering Act required.¹⁰⁸ But after the General Assembly received news of the Stamp Act’s repeal, it refused to comply with this second act of Parliament.

Parliament passed retaliatory legislation.¹⁰⁹ In light of the “direct Disobedience of the Authority of the *British* legislature,” the Restraining Act prohibited New York’s General Assembly from passing any other law until “Provision shall have been made by the said Assembly of *New York* for furnishing his Majesty’s Troops within the said Province with all such Necessaries as are required by the said Acts of Parliament.”¹¹⁰

The New York General Assembly caved and passed a law complying with Parliament’s instructions.¹¹¹ But while this concession went unremarked

105. Instructions Adopted by the Braintree Town Meeting (Sept. 24, 1765), *supra* note 104, at 139.

106. See 1 WELLS, *supra* note 77, at 33 n.*.

107. Letter from Henry Moore to Henry Conway (Feb. 20, 1766), in 7 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF NEW YORK 810, 810-11 (E.B. O’Callaghan ed., Albany, Weed, Parsons, & Co. 1856).

108. Letter from Henry Moore to Henry Conway (June 20, 1766), in 7 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF NEW YORK, *supra* note 107, at 831, 831.

109. See, e.g., Thomas Pownall, Speech on the Bill for Suspending the Assembly of New York (May 15, 1767), in 16 THE PARLIAMENTARY HISTORY OF ENGLAND 331, 337-41 (London, T.C. Hansard 1813) (criticizing the Restraining Act as an unwarranted retaliation against perceived disobedience by the colonies).

110. Rebellion in America Act 1767, 7 Geo. 3 c. 59 (Eng.).

111. See Nicholas Varga, *The New York Restraining Act: Its Passage and Some Effects, 1766-1768*, 37 N.Y. HIST. 233, 250-51 (1956); see also An Act Granting Unto His Majesty the Sum of Three Thousand Pounds for Furnishing Necessaries for the Troops Quartered Within This Colony (June 6, 1767), in 4 THE COLONIAL LAWS OF NEW YORK 947-48 (Albany, James B. Lyon 1894).

throughout most of the colonies, it infuriated a lawyer in Pennsylvania, John Dickinson, who began writing an essay about the Restraining Act.¹¹² A planter who inherited immense wealth and became a legislator,¹¹³ Dickinson had attended the Stamp Act Congress in 1765 and was the principal author of its declaration of the colonists' rights.¹¹⁴ "With a good deal of surprise I have observed, that little notice has been taken of an act of parliament, as injurious in its principle to the liberties of these colonies, as the Stamp-Act was," Dickinson began his essay: "I mean the act for suspending the legislation of New-York."¹¹⁵

Dickinson explained that if Parliament had the power to suspend a colonial legislature's ability to pass certain legislation, then it could also deprive all the colonies of their right of self-government.¹¹⁶ "For it is evident, that the suspension is meant as a compulsion," Dickinson wrote: "It is a parliamentary assertion of the *supreme authority* of the *British legislature* over these colonies in *the part of taxation*; and is intended to compel *New-York* unto a submission to that authority."¹¹⁷ And if Parliament had this authority, he continued, "[i]t seems therefore to me as much a violation of the liberty of the people of that province, and consequently of all these colonies, as if the parliament had sent a number of regiments to be quartered upon them, till they should comply."¹¹⁸

Dickinson titled his essay the first of several "Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies," and it was quickly reprinted in newspapers throughout the colonies.¹¹⁹ Subsequent letters published between December 1767 and February 1768 reemphasized the need for the colonists to protect the exclusive powers of their colonial assemblies. The purpose of any assembly, Dickinson wrote, is "to obtain redress of grievances," either by passing laws or issuing petitions or taking whatever other actions might be necessary to solve their constituents' problems.¹²⁰ Yet everyone "perfectly know[s] how much their grievances would be regarded, if they had no

112. Varga, *supra* note 111, at 253.

113. MILTON E. FLOWER, JOHN DICKINSON: CONSERVATIVE REVOLUTIONARY, at viii, 2, 85 (1983).

114. See 1 THE WRITINGS OF JOHN DICKINSON, *supra* note 97, at 181-82 (editor's note to the Resolutions of Stamp Act Congress); see Resolutions of Stamp Act Congress (Oct. 1765), *supra* note 97.

115. DICKINSON, *supra* note 35, at 5, 7.

116. *Id.* at 9.

117. *Id.* at 10.

118. *Id.*

119. See, e.g., *Letter I*, CONN. J., Dec. 11, 1767, at 1; *Letter I*, N.Y. GAZETTE, Dec. 10, 1767, at 2.

120. DICKINSON, *Letter IX*, *supra* note 38, at 83, 84-85.

other method of engaging attention, than by complaining.”¹²¹ The only reason royal governors convened colonial assemblies and assented to their laws was the same reason that the King convened Parliament and assented to its laws: because all assemblies had won by force the exclusive right to raise taxes. “[B]y withdrawing supplies,” assemblies could “regularly and peaceably admonish the King of his duty, and ensure the execution of the laws.”¹²²

Dickinson’s *Letters from a Farmer* had significant effects. For one thing, they eventually prompted the New York General Assembly to protest the Restraining Act. The assembly resolved

that this colony lawfully and constitutionally has and enjoys an internal legislature of its own, in which the crown, and the people of this colony, are constitutionally represented; and that the power and authority of the said legislature, cannot lawfully or constitutionally be suspended, abridged, abrogated or annulled by any power.¹²³

For another thing, the *Letters* helped radicalize members of the gentry across the eastern seaboard. In Virginia, a planter named Richard Henry Lee was so taken by the *Letters* that he even commended Dickinson in a piece of fan mail for “giving a just alarm, and [for] demonstrating the late measures to be, at once, destructive of public liberty, and in violation of those rights which God and nature have given us.”¹²⁴ A wealthy member of the Virginia House of Burgesses and the enslaver of dozens of people, Lee was another veteran of the Stamp Act protests who, thanks to Dickinson, interpreted the Restraining Act as the Stamp Act’s dangerous sequel.¹²⁵

In Massachusetts, Samuel Adams called Dickinson “the generous Farmer” whose talents had “awak[ened] a Continent to a sense of the Danger their civil Rights are in from incroaching power.”¹²⁶ He agreed with Dickinson that it could not be said “that the Assembly of New York hath the free exercise of leg-

121. *Id.* at 85.

122. *Id.* at 84 (attributing the words to “Mr. Hume”).

123. JOURNAL OF THE VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE COLONY OF NEW-YORK, BEGAN THE 27TH OF OCTOBER, 1768, AND ENDED, BY DISSOLUTION, THE 2D OF JANUARY, 1769, at 70, 70 (Albany, J. Buel reprint 1820) (proceedings of December 31, 1768).

124. Letter from Richard Henry Lee to John Dickinson (July 25, 1768), in 1 THE LETTERS OF RICHARD HENRY LEE 29, 29 (James Curtis Ballagh ed., 1911).

125. OLIVER PERRY CHITWOOD, RICHARD HENRY LEE, STATESMAN OF THE REVOLUTION 19-20, 46-47 (1967); see also, e.g., Letter from Richard Henry Lee to a Gentleman of Influence in England (Mar. 27, 1768), in 1 THE LETTERS OF RICHARD HENRY LEE, *supra* note 124, at 201.

126. Samuel Adams, *A Puritan*, BOS. GAZETTE, Apr. 4, 1768, in 1 THE WRITINGS OF SAMUEL ADAMS, *supra* note 33, at 201, 201.

islative power, while their very existence is suspended upon their acting in conformity to the will of another body.”¹²⁷ “Such a restriction throughout the colonies,” Adams wrote, “would be a short and easy method of annihilating the legislative powers in America, and by consequence of depriving the people of a fundamental right of the constitution, namely, that every man shall be present in the body which legislates for him.”¹²⁸ Adams warned that “[s]hould the time ever come, when the legislative assemblies of North America shall be dissolved and annihilated, no more to exist again,” then Parliament would be forced to rule over a far-off people without knowing “the local and other circumstances of the governed.”¹²⁹

Adams was also sympathetic to Dickinson’s call for the colonies to treat the cause of one as the cause of all—a message he himself had announced in 1764 when he used Boston’s instructions to its representatives to call for the assembling of a continental congress.¹³⁰ After a tumultuous debate within the Massachusetts House of Representatives, the House voted on February 4, 1768, to draft a circular letter to all the other colonial legislatures protesting the recent parliamentary legislation as unconstitutionally exceeding Parliament’s powers.¹³¹

Over the next few months, through August 1768, Adams received favorable replies from the general assemblies of New Hampshire, Virginia, New Jersey, Connecticut, Georgia, South Carolina, and Rhode Island.¹³² The most thoughtful reply came from Virginia, where Lee’s House of Burgesses responded that the Stamp Act was bad, but “[t]he act suspending the Legislative power of New-York . . . [is] still more alarming to the Colonies, tho’ it has that single Province in View.”¹³³ The Virginia assembly wrote that it agreed with Massachusetts that the Restraining Act was based in “a doctrine replete with every Mischief, and utterly subversive of all that’s dear and valuable,” as there was no point in defending the colonists’ right to elect their own representatives “if

127. Letter from the Massachusetts House of Representatives to Dennys de Berdt (Jan. 12, 1768), in 1 THE WRITINGS OF SAMUEL ADAMS, *supra* note 33, at 134, 147.

128. *Id.*

129. *Id.* at 151.

130. See BOSTON TOWN RECORDS, 1758-1769, *supra* note 59, at 122.

131. See 44 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1767-1768, at 147, 147-48 (Bos., Mass. Hist. Soc’y 1975) (proceedings of February 4, 1768).

132. See 45 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1768-1769, at 104, 104-12 (Bos., Mass. Hist. Soc’y 1976) (collecting letters).

133. Letter from the Speaker of the House of Burgesses of the Province of Virginia (May 9, 1768), in 45 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1768-1769, *supra* note 132, at 104, 106.

those Representatives when chosen [were] not permitted to Exercise their own Judgments [and] were under a Necessity (on Pain of being deprived of their Legislative Authority) of enforcing the Mandates of a British Parliament.”¹³⁴ Dickinson, Adams, and Lee were all converging on an argument that Parliament was depriving colonial assemblies of the only leverage they had for ensuring that Crown-appointed officials would redress their constituents’ grievances. In Dickinson’s words, the power to “redress . . . grievances” was more than the power to “complain[]”: it was also the power to develop leverage by exercising coercion.¹³⁵

D. *The Convention of Towns of 1768*

Massachusetts’s February circular letter reached Great Britain in April 1768. There, the secretary of state for the Americas responded with a circular letter of his own, which he sent to all the colonial governors. Denouncing the Massachusetts circular letter for its “dangerous and Factious Tendency” to “promote an unwarrantable Combination”—that is, another Stamp Act Congress—the secretary urged the colonial governors to ignore it.¹³⁶ In a letter personally directed to the governor of Massachusetts, Francis Bernard, the secretary also ordered the governor to “require of the House of Representatives, in his Ma[jes]ty’s Name, to rescind the Resolution which gave Birth to the Circular Letter from the Speaker, and to declare their Disapprobation of, & Dissent to that rash and hasty Proceeding.”¹³⁷ The secretary warned that if “the new Assembly should refuse to comply with His Majesty’s reasonable Expectation,” then it was “the King’s Pleasure that you should immediately dissolve them, & transmit to me, to be laid before His Ma[jes]ty, an Account of their Proceedings.”¹³⁸

On June 21, Governor Bernard received and passed along excerpts of the British ministry’s letter demanding that the Assembly “Rescind the Resolution which gave Birth to the Circular Letter.”¹³⁹ After a week of debate, the assembly

^{134.} *Id.*

^{135.} DICKINSON, *Letter IX*, *supra* note 38, at 83, 85.

^{136.} Letter from the Earl of Hillsborough to Francis Bernard (Apr. 22, 1768), in 4 THE PAPERS OF FRANCIS BERNARD: GOVERNOR OF COLONIAL MASSACHUSETTS, 1760-69, at 149, 151 & n.7 (Colin Nicolson ed., 2015) [hereinafter THE PAPERS OF FRANCIS BERNARD].

^{137.} *Id.* at 150.

^{138.} *Id.*

^{139.} Letter from the Earl of Hillsborough to Francis Bernard (Apr. 22, 1768), in 45 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1768-1769, *supra* note 132, at 68, 69.

voted 92-17 against rescinding the prior resolution.¹⁴⁰ To draft a formal response, the assembly then appointed a committee consisting of several representatives, including those who Bernard called “the most violent of the Heads of the Faction[,] viz[,] the Representatives of the Town of Boston.”¹⁴¹

This response, drafted by Adams and the other representatives, included two arguments that tied the colonists’ right to govern themselves with their right to assemble in governments like the General Assembly.¹⁴² The first, animated by Adams’s earlier criticism of the New York Restraining Act, rejected the idea that anyone within the British government had the power to coerce a colonial assembly into passing or rescinding legislation. “If the Votes of the House are to be controuled by the Direction of a Minister, we have left us but a vain Semblance of Liberty,” the committee wrote.¹⁴³

The second argument focused on the secretary of state’s letter to Bernard that criticized the February circular letter as “illegal.”¹⁴⁴ After quoting this language, the Adams committee wrote “that we take it to be the native, inherent and indefeasible Right of the Subject, jointly or severally, to petition the King for the Redress of Grievances; provided always, that the same be done in a decent, dutiful, loyal, and constitutional Way.”¹⁴⁵ Like Dickinson’s *Letters from a Farmer*, the committee added that this right to petition for a redress of grievances wasn’t the mere right to complain, but to complain *effectively*.¹⁴⁶ The reason the assembly had issued the circular letter in the first place, Adams wrote in a separate letter to the secretary of state, was that it “very justly supposed, that each of the Assemblies on the continent, would take such methods of obtaining redress, as should be thought by them respectively, to be regular and proper.”¹⁴⁷

140. 45 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1768-1769, *supra* note 132, at 88, 89-90 (proceedings of June 30, 1768).

141. Letter from Francis Bernard to the Earl of Hillsborough (June 25, 1768), *in* 4 THE PAPERS OF FRANCIS BERNARD, *supra* note 136, at 220, 221.

142. *See* 45 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1768-1769, *supra* note 132, at 70, 70-71 (proceedings of June 22, 1768, discussing the formation of the committee that drafted the response).

143. Letter from the Massachusetts House of Representatives to Francis Bernard (June 30, 1768), *in* 45 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1768-1769, *supra* note 132, at 90, 93.

144. *Id.* at 92.

145. *Id.*

146. *Id.*; *see supra* notes 120-121 and accompanying text.

147. Letter from the Massachusetts House of Representatives to the Earl of Hillsborough (June 30, 1768), *supra* note 36.

The governor responded to the 92-17 vote predictably: he dissolved the General Assembly.¹⁴⁸ It would not reconvene until May 1769, almost a year later.¹⁴⁹ Writers from Virginia to New Hampshire compared the Massachusetts governor's response with the New York Restraining Act, warning of a pattern by the British government to compel colonial assemblies to pass demanded legislation.¹⁵⁰ Indeed, from June through December, the governors of Maryland, Georgia, and New York had to dissolve their colonies' assemblies after the assemblies either endorsed the Massachusetts circular letter or wrote petitions to the Crown complaining about the Townshend duties.¹⁵¹

The dissolution of Massachusetts's General Assembly also meant that the Boston town meeting became the focal point for organizing Massachusetts's protests.¹⁵² By the end of August, its defiant attitude was the subject of newspaper columns around the world. In Philadelphia, a writer noted that "town-meetings (in imitation of the orderly republicans of Boston)" were blossoming even in colonies without a tradition of town meetings.¹⁵³ But in London, a columnist called Boston's town meetings a "declaration of war" and criticized Boston's leaders for "working up the populace to such a frenzy of rage, as to induce them in the proceedings of their town meetings, openly to arraign the whole legislature of Great-Britain."¹⁵⁴ In this context, Bernard received a letter from the British secretary of state announcing that General Thomas Gage and two regiments of soldiers were en route to occupy Boston. It was "but too evident," the letter explained, "that the Authority of Civil Power is too weak to enforce Obedience to the Laws."¹⁵⁵ The letter also asked Bernard to send the ministry more information "of what had passed at Town Meetings, and Meetings of the

148. Letter from Francis Bernard to the Earl of Hillsborough (July 1, 1768), in 4 THE PAPERS OF FRANCIS BERNARD, *supra* note 136, at 222, 223 & n.28; see Letter from the Massachusetts House of Representatives to Francis Bernard (June 30, 1768), *supra* note 143, at 93.

149. See 45 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1768-1769, *supra* note 132, at 115, 115 (proceedings of May 31, 1769).

150. See, e.g., *Extract of a Letter from a Gentleman in Virginia to His Friend in Boston*, ESSEX GAZETTE, Aug. 2, 1768, at 7, 7 (dated July 16, 1768); *Portsmouth, August 5, 1768*, MASS. GAZETTE, Aug. 8, 1768, at 2, 2 (describing instructions voted upon at a town meeting).

151. ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION 1763-1789, at 181-85 (rev. & expanded ed. 2005).

152. THOMAS HUTCHINSON, THE HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY, FROM THE YEAR 1750, UNTIL JUNE, 1774, at 200-02 (London, John Murray 1828).

153. *To Our "Patriotic" Freemen, the Promoters of Town-Meetings*, PA. CHRON. & UNIVERSAL ADVERTISER, Aug. 15-Aug. 22, 1768, at 233.

154. *From the Gazetteer*, Aug. 13, 1768, MASS. GAZETTE, Dec. 12, 1768, at 2, 2.

155. Letter from the Earl of Hillsborough to Francis Bernard (June 11, 1768), in 4 THE PAPERS OF FRANCIS BERNARD, *supra* note 136, at 181, 182.

Merchants, (which appear to me to be of far greater Moment than the less deliberate Proceedings of a Mob).¹⁵⁶

When Governor Gage warned Adams and Boston's other leaders that troops were arriving, a town meeting was called for September 12, before which Adams and other members of the Caucus Club "drew up the Resolves, Debates and other matter for the Meeting."¹⁵⁷ The meeting began in a Faneuil Hall festooned with hundreds of arms belonging to the town.¹⁵⁸ There, one organizer delivered a speech that if "Great Britain was not dispo'd to redress their Grievances after proper applications," "the Inhabitants had then nothing more to do, but gird the Sword to the thigh and shoulder the Musquet."¹⁵⁹ But the meeting resolved that it would not be wise to start a revolution without ensuring that they had the support of Massachusetts's other towns.¹⁶⁰ In a bold assertion of local power, the meeting not only "requested duly" that residents provide themselves with a "well fixed Fire Lock Musket[,] Accoutrement[,] and Ammunition," but also ordered Boston's selectmen to call for an assembly of representatives "from the several Towns in this Province, in order that such Measures may be consulted and Advised."¹⁶¹ The following day, Boston's selectmen issued a circular letter to all the other towns in Massachusetts, summoning an extralegal "Convention" to meet in Boston on September 22, a week later, to discuss how to return control over taxation and legislation to "American Assemblies."¹⁶²

Despite opposition from some towns that this convention was "unconstitutional, illegal, and wholly unjustifiable," seventy representatives from sixty-six towns convened in Faneuil Hall on September 22.¹⁶³ Adams was elected clerk of the convention,¹⁶⁴ and on its behalf he drafted a lengthy list of grievances, from parliamentary taxation to the governor's refusal to reconvene the General

156. *Id.*

157. John C. Miller, *The Massachusetts Convention 1768*, 7 *NEW ENG. Q.* 445, 454-55 (1934).

158. Letter from Francis Bernard to the Earl of Hillsborough (Sept. 16, 1768), in 4 *THE PAPERS OF FRANCIS BERNARD*, *supra* note 136, at 318, 319.

159. 4 *THE PAPERS OF FRANCIS BERNARD*, *supra* note 136, at 322, 322 (transcription of an "eye-witness account of an informer" about the September 12 meeting).

160. See Miller, *supra* note 157, at 455-61.

161. BOSTON TOWN RECORDS, 1758-1769, *supra* note 59, at 263-64.

162. CIRCULAR OF THE BOSTON SELECTMEN TO THE MASSACHUSETTS TOWNS (Sept. 14, 1768), in 4 *THE PAPERS OF FRANCIS BERNARD*, *supra* note 136, at 400 app. 13.

163. *Boston*, BOS. CHRON., Oct. 3-Oct. 10, 1768, at 391, 391 ("At a full Meeting of the inhabitants of the Town of Hatfield, Sept. 22, 1768"); see *Boston, September 26*, BOS. GAZETTE, Sept. 26, 1768, at 2, 2.

164. 1 *THE WRITINGS OF SAMUEL ADAMS*, *supra* note 33, at 241 n.1.

Assembly.¹⁶⁵ When he presented this list as a petition to Bernard, however, Bernard refused it on the ground that receiving a message from the convention “would be to admit it to be a legal Assembly; which I can by no Means allow.”¹⁶⁶

When the British secretary of state for the Americas received Bernard’s descriptions of the September convention that November, he declared the convention an “unlawfull assembly” and refused to forward their petition to the King.¹⁶⁷ Parliament soon adopted a formal resolution condemning the convention as a “subversive” and “audacious usurpation[] of the powers of government.”¹⁶⁸ It also resolved “[t]hat the declarations, resolutions, and proceedings, in the town meetings at Boston . . . were illegal and unconstitutional, and calculated to excite sedition and insurrections.”¹⁶⁹ These resolutions arrived in Boston along with rumors that Parliament was also considering punishing the colonists by “disfranchising the town of Boston,” “annulling the constitutional assemblies of the several towns,” “vacating provincial charters, and appointing the Council of the Massachusetts by the King.”¹⁷⁰

Samuel Adams and the Boston town meeting responded to these parliamentary denunciations with vehement defenses of their right to assemble. Discussing the convention in a January 1769 newspaper column, Adams wrote that it would be “difficult to prove it *illegal*, for a number of British subjects, to invite as many of their fellow-subjects as they please, to convene and consult together, on the most prudent and constitutional measures for the redress of their grievances.”¹⁷¹ In February, Adams and the Boston town meeting resolved that “[w]ith regard to the public transactions of the town, when legally assembled,”

165. *Id.* at 241-42.

166. *Boston*, September 26, *supra* note 163, at 2, 2.

167. Letter from Dennys De Berdt to Thomas Cushing (Dec. 7, 1768), in *LETTERS OF DENNYS DE BERDT, 1757-1770*, at 347, 347 (Albert Matthews ed., 1911).

168. 16 *THE PARLIAMENTARY HISTORY OF ENGLAND*, *supra* note 109, at 478-79.

169. *Id.* at 478.

170. March 25, N.Y.J., SUPPLEMENT, May 4, 1769, in *BOSTON UNDER MILITARY RULE, 1768-1769: AS REVEALED IN A JOURNAL OF THE TIMES* 82, 83 (Oliver Morton Dickerson ed., 1936); *see also* HUTCHINSON, *supra* note 152, at 218-19 (describing responses considered by Parliament in response to Boston’s alleged insurrection).

171. Samuel Adams, Article Signed “Shippen.,” *BOS. GAZETTE*, Jan. 30, 1769, in 1 *THE WRITINGS OF SAMUEL ADAMS*, *supra* note 33, at 297, 299.

they were “utterly at a loss, in what view they can appear to have militated with any law, or the British constitution of government.”¹⁷²

E. The Boston Tea Party of 1773

Francis Bernard soon asked to be recalled to London, and over the next four years, Hutchinson and Samuel Adams clashed repeatedly over actions that Adams interpreted as further attempts to subordinate the colony’s assemblies. For example, in 1770, after British soldiers arrived in Boston and fired on civilians in the Boston Massacre, Hutchinson ordered the General Assembly to reconvene across the river in Cambridge instead of at its ordinary place of business in Boston.¹⁷³ Adams objected to this relocation and announced that the Assembly would refuse to work until they were reconvened in Boston. “It is our Duty to procure a Redress of Grievances; and we may constitutionally refuse to grant our Constituents['] Monies to the Crown or to do any other Act of Government . . . that is not affixed by charter[] until the Grievances of the People are redressed.”¹⁷⁴ The General Assembly remained on strike for almost a year, denying Hutchinson a salary.¹⁷⁵

Similar fights over the General Assembly’s prerogatives continued through June 1772, when Hutchinson finally moved the Assembly back to Boston.¹⁷⁶ But along with his apparent capitulation came a controversial message: the British ministry had decided to start paying his salary directly, rather than forcing him to rely on grants from the General Assembly.¹⁷⁷ This decision would

172. *February 25*, BOS. EVENING POST, Apr. 17, 1769, in BOSTON UNDER MILITARY RULE, 1768-1769: AS REVEALED IN A JOURNAL OF THE TIMES, *supra* note 170, at 68, 70 (transcribing an address of the Boston town meeting to Governor Francis Bernard).

173. See Thomas Hutchinson, Speech to the Massachusetts House of Representatives (Mar. 15, 1770), in 46 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1770, at 90, 90 (Bos., Mass. Hist. Soc’y 1977).

174. Report of the Committee to Prepare an Answer to Thomas Hutchinson’s Speech (July 31, 1770), in 47 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1770-1771, at 63, 69 (Bos., Mass. Hist. Soc’y 1978). For attribution to Adams, see 2 THE WRITINGS OF SAMUEL ADAMS 19, 31 (Harry Alonzo Cushing ed., 1906).

175. See 46 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1770, *supra* note 173, at 89, 89-90, 146, 149-50 (proceedings of March 15, 1770 and April 11, 1770).

176. Malcom Freiburg, *Introduction* to 49 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1772-1773, at vii, viii (Bos., Mass. Hist. Soc’y 1980).

177. Cf. Report of the Committee Appointed to Consider a Message from Thomas Hutchinson (July 10, 1772), in 49 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1772-1773, *supra* note 176, at 103, 104-05 (arguing that “making Provision for the Support of the Governor of the Province, independent of the Grants and Acts of the General Assembly,

deprive the General Assembly of its main source of leverage with the governor.¹⁷⁸ When the General Assembly learned of rumors that the ministry planned to pay the salaries of the colony's judges as well, it grew so incensed that Hutchinson prorogued it until the end of the year.¹⁷⁹

Adams recognized that if the colony's judges and governor were financially independent from the General Assembly, then Hutchinson might have no need to reconvene or redress the grievances of the General Assembly in the future. As the battle lines shifted to the town meetings that October,¹⁸⁰ the Boston town meeting appointed Adams to a committee to draft an address to the governor.¹⁸¹ The address warned the governor of their "Alarm" that Parliament planned to make the colony's judges "Independent of the Grants of the General Assembly for their Support," which would "tend[] rapidly to compleat the System of their Slavery."¹⁸²

Hutchinson dismissively refused to receive the town meeting's address. He wrote that it was

by no Means proper for me to lay before the Inhabitants of any Town whatsoever, in Consequence of their Votes and Proceedings in a Town-Meeting, any Part of my Correspondence as Governor of the Province . . . whether I have or have not received any Advices relating to the public Affairs of the Government.¹⁸³

Hutchinson's actions incensed the Boston town meeting. It immediately resolved that

is . . . an Infraction upon the Rights granted to the Inhabitants by the Royal Charter, and in Derogation of the Constitution").

178. See *id.* at 105 ("[T]he Power and Authority of providing for the Support of the Governor . . . is necessary[] to preserve the Freedom of the Constitution . . ."); see also Freiburg, *supra* note 176, at vii, viii-ix (recounting the dispute between the General Assembly and Hutchinson).

179. See Letter from Thomas Hutchinson to the Massachusetts House of Representatives (July 14, 1772), in 49 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1772-1773, *supra* note 176, at 127, 127-32; Freiburg, *supra* note 176, at ix.

180. HUTCHINSON, *supra* note 152, at 361.

181. THE VOTES AND PROCEEDINGS OF THE FREEHOLDERS AND OTHER INHABITANTS OF THE TOWN OF BOSTON, IN TOWN MEETING ASSEMBLED, ACCORDING TO LAW, at iii, iv (Bos., Edes & Gill 1772) [hereinafter VOTES AND PROCEEDINGS] (proceedings of a town meeting on October 28, 1772).

182. *Id.* at app. 37.

183. *Id.* at 38.

as the Opinion of the Inhabitants of this Town that they have ever had, and ought to have a Right to Petition the King or his Representative for the Redress of such Grievances as they feel or for preventing of such as they have Reason to apprehend, and to Communicate their Sentiment to other Towns.¹⁸⁴

Adams used the opportunity also to move “That a Committee of Correspondence be appointed to consist of twenty one Persons—to state the Rights of the Colonists and of this Province in particular” and “to communicate and publish the same to the several Towns in this Province and to the World as the sense of this Town, with the Infringements and Violations thereof.”¹⁸⁵ If Hutchison would not reconvene the General Assembly, in other words, Boston would convene an informal assembly of correspondence, just as it had with its convention of towns four years earlier.

Leading Boston’s committee of correspondence, Adams began writing the selectmen of other Massachusetts towns “to ascertain the true Sense of the Country with regard to our Grievances, which being known, it will be the easier to determine upon & prosecute to Effect the Methods which ought to be taken for the Redress of our intollerable Grievances.”¹⁸⁶ The town meeting unanimously voted to approve a list of grievances drafted by Adams, which was published as a pamphlet, *The Votes and Proceedings . . . of Boston, in Town Meeting Assembled*,¹⁸⁷ and transmitted throughout the continent and across the Atlantic.¹⁸⁸ Within a few months, almost a third of the towns of Massachusetts assembled and either approved of the report or passed resolutions of the same nature.¹⁸⁹

When Hutchinson reconvened the General Assembly in January 1773, he opened the session by criticizing the colonists for “having assumed the Name

184. BOSTON TOWN RECORDS, 1770-1777, *supra* note 37, at 92-93.

185. *Id.* at 93.

186. Letter from Samuel Adams to Arthur Lee (Nov. 3, 1772), in 2 THE WRITINGS OF SAMUEL ADAMS, *supra* note 174, at 342, 344.

187. See VOTES AND PROCEEDINGS, *supra* note 181.

188. HUTCHINSON, *supra* note 152, at 367-68.

189. *Id.* at 368-69; see, e.g., THE HISTORY OF MEDWAY, MASS. 1713 TO 1885, at 53-54 (Providence, J.A. & R.A. Reid, E.O. Jameson ed., 1886); HISTORY OF THE TOWN OF SUTTON, MASSACHUSETTS, FROM 1704 TO 1876, at 88-89 (William A. Benedict & Hiram A. Tracy eds., Worcester, Sanford & Co. 1878); DANIEL T.V. HUNTOON, HISTORY OF THE TOWN OF CANTON, NORFOLK COUNTY, MASSACHUSETTS 333-34 (Cambridge, John Wilson & Son 1893); LUCIUS R. PAIGE, HISTORY OF CAMBRIDGE, MASSACHUSETTS 1630-1877, at 147-49 (Bos., H.O. Houghton & Co. 1877); *Saturday, February 13. Boston*, MASS. SPY, Feb. 18, 1773, at 2, 2 (describing the proceedings of a meeting of the Town of Sheffield on January 5, 1773).

of legal Town Meetings” in order to challenge the British government’s supremacy over the colonies.¹⁹⁰ He added in March that these town meetings were illegal because it was unlawful “for the Inhabitants of Towns, in their Corporate Capacity, to meet and determine upon Points which the Law gives them no Power to act upon.”¹⁹¹

Adams argued on behalf of the General Assembly that the town meetings’ conduct was an exercise of the colonists’ right to assemble. “[I]t is the indisputable Right of all or any of his Majesty’s Subjects in this Province, regularly and orderly to meet together to state the Grievances they labor under; and to propose and unite in such constitutional Measures as they shall judge necessary or proper to obtain Redress,” he wrote to Hutchinson.¹⁹² And at the March gathering of the Boston town meeting, the town resolved that even if no statute permitted it to discuss imperial trade policy, the town could still appeal to “the great and perpetual law of self preservation, to which every natural Person or Corporate Body hath an inherent right to recur.”¹⁹³

Throughout the summer of 1773, while the General Assembly sat prorogued, Adams began to “Cultivate a Correspondence” with Dickinson and other colonial leaders who had objected to the New York Restraining Act.¹⁹⁴ Adams hoped these leaders would call for an “*Assembly of States*”¹⁹⁵ or a “congress of American states,” one that would “be assembled as soon as possible, draw up a bill of rights and publish it to the world.”¹⁹⁶ “[H]ad it not been for the Boston Town Meeting,” he warned, the Massachusetts General Assembly

190. Freiburg, *supra* note 176, at xi; Thomas Hutchinson, Speech at the Massachusetts House of Representatives (Jan. 6, 1773), in 49 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1772-1773, *supra* note 176, at 138, 139 (within the proceedings of January 6, 1773).

191. Thomas Hutchinson, Closing Speech of the Session (Mar. 6, 1773), in THE SPEECHES OF HIS EXCELLENCY GOVERNOR HUTCHINSON, TO THE GENERAL ASSEMBLY OF THE MASSACHUSETTS BAY. AT A SESSION BEGUN AND HELD ON THE SIXTH OF JANUARY, 1773, at 114, 116-17 (Bos., Edes & Gill 1773) [hereinafter 1773 SPEECHES & ANSWERS].

192. Answer of a Committee of the House of Representatives to Thomas Hutchinson (Mar. 2, 1773), in 1773 SPEECHES & ANSWERS, *supra* note 191, at 90-91; see also HUTCHINSON, *supra* note 152, at 374.

193. BOSTON TOWN RECORDS, 1770-1777, *supra* note 37, at 121-22.

194. Letter from Samuel Adams to Arthur Lee (Apr. 9, 1773), in 3 THE WRITINGS OF SAMUEL ADAMS 18, 24 (Harry Alonzo Cushing ed., 1907); see HUTCHINSON, *supra* note 152, at 374 & n. *.

195. Letter from Samuel Adams to Arthur Lee (Apr. 9, 1773), *supra* note 194, at 18, 21.

196. *The Printers in this Land of Liberty*, BOS. GAZETTE, Sept. 27, 1773, at 2, 2. For attribution to Adams for this anonymous letter, see MARK PULS, SAMUEL ADAMS: FATHER OF THE AMERICAN REVOLUTION 139 (2006).

might also have been commandeered or silenced by the British government.¹⁹⁷ Accordingly, Adams proposed “the Establishment of Committees of Correspondence among the several Towns in every Colony.”¹⁹⁸

The first major payoff from one of these new committees of correspondence came from Dickinson’s Philadelphia. Like most places outside of New England, Philadelphia had no institutional history of governing with town meetings. Philadelphia was an incorporated city with a mayor and city council.¹⁹⁹ But on October 18, 1773, members of Philadelphia’s committee of correspondence assembled in the Pennsylvania statehouse as if they were holding a town meeting in Massachusetts.²⁰⁰ There, they issued a series of “[r]esolves” declaring that it was “the [d]uty of every American to oppose” a recent act of Parliament that lowered the existing tax on tea so that it might actually be enforced in the American colonies.²⁰¹

After these resolves were published in the *Pennsylvania Gazette*, the Boston town meeting assembled in Faneuil Hall to adopt the Philadelphia resolves.²⁰² Hutchinson used scare quotes to describe “what was called a ‘legal’ meeting of the inhabitants” of Boston.²⁰³ But he felt that he had no ability to stop “the measures of the inhabitants of Boston, who were in possession of the powers of government.”²⁰⁴ As representatives from the Boston town meeting spent the first three weeks of November trying unsuccessfully to persuade the East India Company’s importers not to land any tea in Boston,²⁰⁵ meetings in neighboring Charlestown and Cambridge resolved that they would be “ready on the shortest Notice, to join with the Town of Boston and other Towns, in any Measure that may be thought proper, to deliver ourselves and Property from Slavery.”²⁰⁶ When the first shipment of tea arrived in Boston harbor on November 28, Adams called these towns to join a mass meeting of all nearby residents in Faneuil Hall, later admitting that the assembled people failed to “observ[e] the rules

197. Letter from Samuel Adams to Arthur Lee (Apr. 9, 1773), *supra* note 194, at 19.

198. Letter from Samuel Adams to Richard Henry Lee (Apr. 10, 1773), in 3 THE WRITINGS OF SAMUEL ADAMS, *supra* note 194, at 25, 26.

199. See Mary Maples Dunn & Richard S. Dunn, *The Founding, 1681-1701*, in PHILADELPHIA: A 300-YEAR HISTORY 26-27 (Russell F. Weigley ed., 1982).

200. *Philadelphia, October 18*, PA. GAZETTE, Oct. 20, 1773, at 3, 3.

201. *Id.*; see Tea Act 1773, 13 Geo. 3 c. 44 (Eng.).

202. BOSTON TOWN RECORDS, 1770-1777, *supra* note 37, at 141-44.

203. HUTCHINSON, *supra* note 152, at 424.

204. *Id.* at 426.

205. BOSTON TOWN RECORDS, 1770-1777, *supra* note 37, at 147-48.

206. *Boston, November 29, 1773*, BOS. GAZETTE, Nov. 29, 1773, at 2, 2.

prescribed by law for calling them together.”²⁰⁷ Although Faneuil Hall could hold twelve or thirteen hundred people, the meeting was forced to reassemble at the Old South Meeting House, which could hold five to six thousand.²⁰⁸ There, a “meeting of the people of Boston and the neighbouring towns” unanimously voted to prevent the landing of any tea, resolving that they would “carry their votes and resolutions into execution, at the risque of their lives and property.”²⁰⁹

Hutchinson, fearing violence, ordered a local military company “to hold themselves in readiness to obey their orders, in suppressing all riotous assemblies of the people.”²¹⁰ The meeting soon dispersed after issuing its resolutions labeling anyone who attempted to land tea an “enemy to his country.”²¹¹ For the next two weeks, Samuel Adams and other members of the Boston committee of correspondence engaged in a standoff with the East India Company’s importers over whether the ships would land or return to England. Finally, on the night of December 16, less than four hours after another mass meeting of seven thousand people crammed into the Old South Meeting House, 342 chests of tea were dumped into Boston Harbor.²¹² “The people . . . had taken the powers of government into their hands,” Hutchinson later wrote.²¹³ “This was the boldest stroke which had yet been struck in America.”²¹⁴

F. *The Continental Congress of 1774*

Almost as soon as Parliament heard about the destruction of tea, the prime minister, Lord North, announced that “Boston ought to be the principal object of our attention for punishment.”²¹⁵ Calling Boston “the ringleader in all riots,” he declared that “the act of the mob in destroying the tea, and other proceed-

207. Letter from Samuel Adams to Arthur Lee (Dec. 31, 1773), in 3 THE WRITINGS OF SAMUEL ADAMS, *supra* note 194, at 73, 74.

208. *Id.*

209. Proceedings of the Town of Boston (Nov. 29-30, 1773), in TEA LEAVES 320, 330 (Francis S. Drake ed., Singing Tree Press 1970) (1884); see also BENJAMIN L. CARP, DEFIANCE OF THE PATRIOTS 95-116 (2010) (describing the events surrounding the Boston Tea Party).

210. HUTCHINSON, *supra* note 152, at 426-27.

211. Proceedings of the Town of Boston (Nov. 29-30, 1773), *supra* note 209, at 330.

212. Letter from Samuel Adams to Arthur Lee (Dec. 31, 1773), *supra* note 207, at 76.

213. HUTCHINSON, *supra* note 152, at 439.

214. *Id.*

215. 17 THE PARLIAMENTARY HISTORY OF ENGLAND, *supra* note 109, at 1165 (summarizing the speech of Lord North on March 14, 1774).

ings, belonged to the act of the public meeting.”²¹⁶ Over the objections of some members, like Edmund Burke, who worried that punishing an entire town would lead “to war with all America,”²¹⁷ Parliament soon passed the Boston Port Act.²¹⁸ The Act made it unlawful for anyone to unload any goods in Boston harbor until the town meeting fully reimbursed the East India Company and demonstrated “that peace and obedience to the laws shall be so far restored.”²¹⁹

Lord North and other members also took a closer look at Massachusetts’s 1691 charter and the laws that had long governed town meetings. Until this point, the inhabitants of Massachusetts towns had the discretion to assemble town meetings whenever “any business of publick concernment to the town” needed to be addressed.²²⁰ Town meetings then had wide powers to discuss this business and pass resolutions or “prudential” laws or taxes.²²¹ And towns could also elect members of the colony’s House of Representatives, which in turn could elect members of the House to serve in the upper “Councill” of the bicameral General Assembly.²²² This elected Council had the power to approve any of the governor’s nominees for judicial or executive offices.²²³

Evaluating this whole scheme, Lord North proposed a second, more comprehensive bill to amend Massachusetts’s 1691 charter.²²⁴ First, he proposed allowing the King to appoint the General Assembly’s Council. This change would allow the governor to appoint all judges, sheriffs, and, indirectly, grand juries, without being checked by an elected body—thus avoiding “the democratic part” of the colony that showed “contempt of obedience to the laws.”²²⁵ Second, Lord North proposed to have the town meetings “brought under some regulation, and would not suffer them to be held without the consent of the

216. *Id.*

217. *Id.* at 1184 (speech of Edmund Burke).

218. Boston Port Act 1774, 14 Geo. 3 c. 19 (Eng.).

219. *Id.* § 8.

220. An Act for Regulating of Townships, Choice of Town Officers, and Setting Forth Their Power, ch. 28, § 11, 1692 Mass. Acts 64, 68; *see also* An Act for the Better Regulating of Town and Proprietary Meetings, ch. 22, 1715 Mass. Acts 30 (outlining the procedures to be followed at town meetings).

221. § 5, 1692 Mass. Acts at 66.

222. *See* THE CHARTER OF MASSACHUSETTS BAY (1691), *in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1870, 1878-79.

223. *Id.* at 1879.

224. *See* 17 THE PARLIAMENTARY HISTORY OF ENGLAND, *supra* note 109, at 1193 (summarizing the speech of Lord North on March 28, 1774).

225. *Id.* at 1192-93.

governor.”²²⁶ By prohibiting them from meeting without the governor’s consent, the bill would ensure that the governor could police the town meetings’ agendas.

The final Massachusetts Government Act passed in May. The Act made some exceptions to the town-meeting rule—the annual meetings to elect officers and representatives would be allowed without prior authorization.²²⁷ But, it concluded, “no other matter shall be treated of at such meetings . . . nor at any other meeting, except the business expressed in the leave given by the governor.”²²⁸

The Act would not arrive in Massachusetts until August 1774.²²⁹ But the Boston Port Act arrived in May, along with a new governor to replace Thomas Hutchinson: General Thomas Gage.²³⁰ The Boston town meeting responded that “[t]he Town of Boston is now Suffering the Stroke of Vengeance in the Common Cause of America.”²³¹ It authorized Adams to correspond with the committees of correspondence in other towns and colonies to ask if they would support Boston by closing down their own ports in a continent-wide nonimportation agreement.²³²

When Gage, Massachusetts’s new governor, convened the Massachusetts General Assembly for the first time, Samuel Adams closed the door to the House of Representatives and persuaded the representatives secretly to appoint him, John Adams, and three other men as delegates to attend a continental congress in Philadelphia in September.²³³ He also urged the other colonies to meet, agree on “one general Bill of Rights,” and force the British government to respect those rights.²³⁴ In Philadelphia, John Dickinson helped to arrange two

226. *Id.* at 1193.

227. An Act for the Better Regulating the Government of the Province of the Massachusetts Bay, in New England, 14 Geo. 3 c. 45, § 7 (Eng.).

228. *Id.*

229. *Salem, August 9*, ESSEX GAZETTE, Aug. 9, 1774, at 3, 3.

230. Letter from Thomas Gage to the Earl of Dartmouth (May 19, 1774), in 1 AMERICAN ARCHIVES, FOURTH SERIES 333, 333 (D.C., M. St. Clair Clarke & Peter Force 1837).

231. Letter from the Town of Boston to the Colonies (May 13, 1774), in 3 THE WRITINGS OF SAMUEL ADAMS, *supra* note 194, at 107, 107-08.

232. Letter from the Committee of Correspondence of Boston to the Committee of Correspondence of Philadelphia (May 13, 1774), in 3 THE WRITINGS OF SAMUEL ADAMS, *supra* note 194, at 109-11.

233. 50 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1773-1774, at 287, 288-89 (Bos., Mass. Hist. Soc’y 1981) (proceedings of June 17, 1774).

234. Letter from Samuel Adams to Richard Henry Lee (July 15, 1774), in 3 THE WRITINGS OF SAMUEL ADAMS, *supra* note 194, at 136, 137-39.

mass meetings of thousands of people in which the city ultimately agreed not only to support Boston, but also to forward its decision to the southern colonies and consult them on the propriety of calling a continental congress.²³⁵ In Virginia, Richard Henry Lee persuaded the House of Burgesses to issue a lengthy series of resolutions—including that Parliament’s goal was “to render Assemblies Useless and to introduce Arbitrary Government.”²³⁶

On June 29, Gage tried to suspend the town meetings’ nonimportation agreements by issuing a proclamation “[f]or discouraging certain illegal Combinations”: namely, the “alarming and unprecedented” committees of correspondence that were agreeing to close down the colony’s ports.²³⁷ Gage promised “fatal Consequences” for anyone who assembled to sign this “unwarrantable, hostile, and traitorous Combination.”²³⁸ In this environment, the Boston committee of correspondence received its first rumors in mid-July that “[a] bill has been brought into parliament apparently for the purpose of taking away our charter rights.”²³⁹ Writing to Lee, Dickinson, and the committees of correspondence for other towns, Samuel Adams warned them that an act “annihilating our free Constitution” was expected, and that the towns would have to start considering “proper Measures to be adopted for the Common Safety.”²⁴⁰ In August, an actual copy of the Massachusetts Government Act finally arrived, along with its prohibition on town meetings without the governor’s consent.²⁴¹

235. See CHARLES J. STILLÉ, *THE LIFE AND TIMES OF JOHN DICKINSON*, in 13 *MEMOIRS OF THE HISTORICAL SOCIETY OF PENNSYLVANIA* 105-10, 341-45 (Phila., Hist. Soc’y of Pa. 1891); Paul Leicester Ford, *The Adoption of the Pennsylvania Constitution of 1776*, 10 *POL. SCI. Q.* 426, 426-29 (1895).

236. Letter from Richard Henry Lee to Samuel Adams (June 23, 1774), in 1 *THE LETTERS OF RICHARD HENRY LEE*, *supra* note 124, at 111, 115.

237. Thomas Gage, *A Proclamation*, *BOS. GAZETTE*, July 4, 1774, at 2, 2 (original dated June 29, 1774).

238. *Id.*

239. CIRCULAR LETTER FROM THE BOSTON COMMITTEE OF CORRESPONDENCE (June 8, 1774), http://www.masshist.org/database/viewer.php?item_id=687&mode=large&img_step=2#page1 [<https://perma.cc/9PMK-MJ8V>]; see Letter from Samuel Adams to Richard Henry Lee (July 15, 1774), *supra* note 234, at 137-38.

240. BOSTON TOWN RECORDS, 1770-1777, *supra* note 37, at 185; see, e.g., Letter from Samuel Adams to Peter Timothy (July 27, 1774), in 3 *THE WRITINGS OF SAMUEL ADAMS*, *supra* note 194, at 147; Letter from Samuel Adams to Richard Henry Lee (July 15, 1774), *supra* note 234, at 137-38.

241. *Salem, August 9*, *supra* note 229, at 3, 3; see An Act for the Better Regulating the Government of the Province of the Massachusetts Bay, in *New England*, 14 *Geo. 3 c. 45*, § 7 (Eng.).

Samuel Adams and residents of towns across Massachusetts immediately dared Gage to enforce its terms.²⁴² In Boston, the town meeting met and discussed the Massachusetts Government Act's ban on newly called *town* meetings and proposed electing delegates to a *county* convention of towns.²⁴³ It also agreed to recess itself rather than close the meeting—so that in the future it would not have to seek the governor's permission to call a new meeting. Gage thought the Bostonians had “clearly evaded” the Act.²⁴⁴ He attempted to initiate a prosecution.²⁴⁵ But he found it difficult to get anyone in the still-unreformed colonial government to assist him in his efforts to enforce the Act.²⁴⁶

Soon afterward, Gage wrote, “the phrenzy had spread,” and “forcible opposition and violence [was] transferred from the town of *Boston* to the country.”²⁴⁷ On August 16, Boston sent representatives to a convention of other town representatives from Suffolk County, which surrounded Boston.²⁴⁸ Sixty delegates assembled “to show [their] Contempt of the Act of Parliament touching Town Meetings.”²⁴⁹ Finding that several of the towns “had not had notice of [the] meeting,” the delegates called a new convention to meet a few weeks later,²⁵⁰ with “full power of adjourning, doing & acting all such matters & things . . . as they may judge of public utility in this time of publick & General Distress.”²⁵¹ Meanwhile, representatives from towns in Worcester County assembled on the theory that “we have, within ourselves, the exclusive right of originating each and every law respecting ourselves.”²⁵²

Gage ran into one of these extralegal assemblies in Salem toward the end of August. Noticing handbills that called for a meeting to elect members of an Es-

242. BOSTON TOWN RECORDS, 1770-1777, *supra* note 37, at 188.

243. *Id.*

244. Letter from Thomas Gage to the Earl of Dartmouth (Aug. 27, 1774), in 1 AMERICAN ARCHIVES, FOURTH SERIES, *supra* note 230, at 741, 742.

245. *Id.* at 742-43.

246. *Id.* at 742.

247. *Id.*

248. Letter from Benjamin Kent to Samuel Adams (Aug. 20, 1774) (on file with the Samuel Adams Papers, Manuscripts and Archives Div., N.Y. Pub. Library).

249. *Id.*

250. *Id.*

251. RECORDS OF THE TOWN OF BRAINTREE 1640 TO 1793, at 450 (Samuel A. Bates ed., Randolph, Mass., Daniel H. Huxford 1886).

252. Proceedings of the Convention of Worcester County (Aug. 9, 1774), in MASS. PROVINCIAL CONGRESS JOURNALS, *supra* note 30, at 629, 630.

sex County Convention, Gage ordered the sheriff to post a proclamation that “Town-Meetings called without the Consent of the Governor . . . are illegal.”²⁵³ The residents initially ignored him, treating the Act of Parliament as “a blank piece of paper and not more.”²⁵⁴ But as they began their meeting at 8 a.m. on the appointed day, Gage ordered two companies of soldiers to “prepare[] accordingly as if for Battle” and march within an eighth of a mile of the town house.²⁵⁵ After a tense standoff, Gage declared that he “came to execute the Laws, not to dispute them, and [was] determined to execute them.”²⁵⁶ By this point, however, the meeting had finished its business and dispersed.²⁵⁷ Gage attempted to prosecute the meeting’s organizers, committing a few of them to jail for several days.²⁵⁸ But he eventually dropped the prosecution, allegedly yelling, “Damn ‘em! I won[']t do any thing about it unless his Majesty sends me more troops.”²⁵⁹

As other colonies appointed their own delegates to the Continental Congress, they observed what was happening in Massachusetts. Even in colonies like Pennsylvania, whose towns had no custom of calling town meetings, various local committees of correspondence organized themselves into meetings like the Boston town meeting or the Middlesex County convention.²⁶⁰ “A Ministerial Parliament has made it unlawful for your neighbours to assemble,” a committee in Charleston, South Carolina reported of Massachusetts, “and many reasons make it highly probable that this is but act one of the begun tragedy of *American* liberty.”²⁶¹ In North Carolina, where residents of counties and towns began assembling in order to elect representatives to a provincial congress, the governor issued a proclamation declaring that these “Meetings

253. *Salem, August 30*, ESSEX GAZETTE, Aug. 30, 1774, at 3, 3.

254. LETTERS OF JOHN ANDREWS, ESQ., OF BOSTON, 1772-1776, at 35 (Winthrop Sargent ed., Cambridge, John Wilson & Sons 1866) [hereinafter LETTERS OF JOHN ANDREWS].

255. *Salem, August 30*, *supra* note 253, at 3.

256. *Id.*

257. *Id.*

258. LETTERS OF JOHN ANDREWS, *supra* note 254, at 35.

259. *Id.*

260. See generally 1 AMERICAN ARCHIVES, FOURTH SERIES, *supra* note 230, at 527-31, 535-36, 537-39 (containing resolutions from various town meetings); Ford, *supra* note 235, at 428-30 (describing a Pennsylvania conference held over the objection of the governor).

261. To the Inhabitants of the Province of South-Carolina, About to Assemble on the 6th of July (July 4, 1774), in 1 AMERICAN ARCHIVES, FOURTH SERIES, *supra* note 230, at 508, 510. See generally WILLIAM AUGUST SCHAPER, SECTIONALISM AND REPRESENTATION IN SOUTH CAROLINA 357 (1901) (describing the events precipitating the Charleston meeting and its organization).

and Assemblies” were “without any legal authority” and therefore “illegal and unwarrantable in their nature.”²⁶² This proclamation was ignored, and the provincial congress elected delegates to Philadelphia.²⁶³ And in Virginia, various counties issued resolutions to explain why they had the power to petition and otherwise act without statutory authorization. “[A]s the constitutional Assemblies of *Virginia* have been prevented from exercising their right of providing for the security of the liberties of the people,” one county declared, “that right again reverts to the people, as the fountain from whence all power and legislation flow.”²⁶⁴ These counties eventually convened a colonial convention at a tavern in Williamsburg, which elected delegates to the Continental Congress. One of the convention members was an Albemarle County lawyer, Thomas Jefferson, who criticized “the several late oppressive Acts respecting the Town of Boston and Province of the Massachusetts Bay.”²⁶⁵ Jefferson wrote that under “the original Constitution of the American Colonies . . . Assemblies [had] the sole Right of directing their internal Polity, [and therefore] it is absolutely destructive of the End of their Institution that their Legislatures should be suspended, or prevented, by hasty Dissolutions, from exercising their legislative Powers.”²⁶⁶

This continental enthusiasm greeted Samuel and John Adams when they first arrived in Philadelphia as veritable celebrities.²⁶⁷ The Adams cousins quickly found allies in Lee, who had been elected from Virginia, and Dickinson, who was not yet a delegate to the convention but who lived in the area and often dined with the Adamses in the evenings.²⁶⁸ Within a week of the Continental Congress’s opening, Lee and the Adams cousins were all appointed to a committee to “[s]tate the rights of the Colonies in general, the several instances

262. Proclamation of Josiah Martin (Aug. 13, 1774), in 1 AMERICAN ARCHIVES, FOURTH SERIES, *supra* note 230, at 706, 706 (within the proceedings of a council held at Newbern, North Carolina on August 13, 1774).

263. See Letter from Josiah Martin to the Earl of Dartmouth (Sept. 1, 1774), in 1 AMERICAN ARCHIVES, FOURTH SERIES, *supra* note 230, at 761, 761-62.

264. York County (Virginia) Resolutions (July 18, 1774), in 1 AMERICAN ARCHIVES, FOURTH SERIES, *supra* note 230, at 595, 596.

265. Instructions by the Virginia Convention to Their Delegates in Congress (1774), in 1 THE PAPERS OF THOMAS JEFFERSON: 1760 TO 1776, at 141, 142 (Julian P. Boyd ed., 1950).

266. *Id.*

267. See 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 114-19 (L.H. Butterfield ed., 1961).

268. See, e.g., Letter from Samuel Adams to Joseph Warren (Sept. 25, 1774), in 1 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 101, 101 (Paul H. Smith ed., 1976); Letter of Richard Henry Lee to William Lee (Sept. 20, 1774), in THE LETTERS OF RICHARD HENRY LEE, *supra* note 124, at 123, 123-24.

in which these rights are violated or infringed, and the means most proper to be pursued for obtaining a restoration of them.”²⁶⁹

While the delegates met in Philadelphia, newspapers around Massachusetts were reporting that “[t]own-meetings and county-meetings, are now held and calling in all parts of the province.”²⁷⁰ Several of these county conventions drafted lists of resolves protesting the Massachusetts Government Act and other examples of parliamentary transgressions. The most notable of these resolves came from the Middlesex County convention. It 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,” and that “the act which prohibits these constitutional meetings, cuts away the scaffolding of English freedom, and reduces us to a most abject state of vassallage and slavery.”²⁷¹ In other words, the convention deployed the right to assemble—using the same language that Samuel Adams used in 1773—to justify the colony’s resistance to parliamentary supremacy in general and to the Massachusetts Government Act in particular.

The Middlesex convention’s resolves arrived in Philadelphia in mid-September.²⁷² As delegates read the convention’s defense of the right to assemble in the face of the Massachusetts Government Act, they cheered and praised the Adams cousins. “Our Brethren of the County of Middlesex have resolved nobly, and their Resolutions are read by the several Members of this Body with high Applause,” Samuel Adams wrote back to Boston.²⁷³ Days later, a messenger arrived with Suffolk County’s resolves, which specifically asked for the advice of the Continental Congress.²⁷⁴ After a daylong debate, the Congress unanimously declared “[t]hat this assembly deeply feels the suffering of their countrymen in the Massachusetts-Bay, under the operation of the late unjust, cruel, and oppressive acts of the British Parliament.”²⁷⁵

269. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 21, at 25, 26, 28 (proceedings and resolutions of September 6-7, 1774).

270. *Extract of a Letter from Leicester, August, 1774*, ESSEX GAZETTE, Sept. 6, 1774, at 2, 2.

271. Convention of Middlesex County (Aug. 30-31, 1774), *supra* note 30, at 611-12.

272. See 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 21, at 30, 31 (proceedings of September 14, 1774).

273. Letter from Samuel Adams to the Boston Committee of Correspondence (Sept. 14, 1774), in 1 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 268, at 71, 71.

274. Robert Treat Paine’s Diary (Sept. 16, 1774), in 1 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 268, at 75, 75.

275. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 21, at 39, 39 (proceedings of September 17, 1774); see Letter from Thomas Cushing to Richard Devens & Isaac Foster, Jr. (Sept. 19, 1774), in 1 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 268, at

A few weeks later, the Continental Congress agreed upon a final draft of its own Declaration of Rights. The Declaration began with a list of grievances, including that “[a]ssemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances; and their dutiful, humble, loyal, & reasonable petitions to the crown for redress, have been repeatedly treated with contempt.”²⁷⁶ It specifically called for Parliament to repeal the New York Restraining Act along with the Acts “for stopping the port and blocking up the harbour of Boston, [and] for altering the charter & government of the Massachusetts-bay.”²⁷⁷ It then continued with a list of eight resolutions articulating the “Rights” possessed by “the inhabitants of the English Colonies in North America.”²⁷⁸ One of these resolutions, the fourth, declared that the colonists were entitled to the “free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved.”²⁷⁹ The final three resolutions referenced recent events in Massachusetts, declaring “[t]hat they have a right peaceably to assemble, consider of their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.”²⁸⁰

It seems clear in context that this assembly clause was influenced by the Middlesex Resolves, which the Continental Congress had just read and which had nearly identical wording. But it remains unclear who actually drafted the Congress’s assembly clause, in part because it had been the product of constant debate.²⁸¹ An early draft of the Declaration of Rights was later found among the papers of John Adams in the handwriting of Dickinson, who was elected to the Congress in October.²⁸² The author also could have been John Adams himself, who wrote in his diary of being “[v]ery busy in the necessary Business of putting the Proceedings of the Congress into Order” by drafting some of its fi-

83, 83 (“[A]n Express arrived & brought us the Resolutions of the County of Suffolk and . . . [t]he affairs of the Massachusetts were immediately taken up & several Resolutions passed . . . approving of the Wisdom & Fortitude with which our People in general had Conducted the opposition to the late ministerial Measures.”).

276. See 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 21, at 63, 66-67 (resolutions of October 14, 1774, including the Declaration of Rights).

277. *Id.* at 72.

278. *See id.* at 66-67.

279. *Id.* at 68.

280. *Id.* at 70.

281. A DECENT RESPECT TO THE OPINIONS OF MANKIND: CONGRESSIONAL STATE PAPERS, 1774-1776, at 50-52 (James H. Hutson ed., 1975).

282. *Id.*

nal documents.²⁸³ But “[o]n comparing this Declaration of Rights with the previous writings of Samuel Adams,” one historian has written, “the similarity of expression and the repetition of sentences is so remarkable as to render it more than probable that his hand was engaged on it, either in drafting or revising.”²⁸⁴ Indeed, the assembly clause bears striking parallels with the instructions and letters Samuel Adams had written on behalf of the Boston town meeting in 1764 and 1765; the circular letter and resolves he drafted on behalf of Massachusetts’s General Assembly when it was dissolved in 1768; the pamphlet he wrote for the town meeting of Boston in 1772; his defense of the town meetings in 1773; his defense of effective petitioning in 1774; and the “many other state papers and political essays by Samuel Adams during the past ten years.”²⁸⁵

The language in the phrase “prosecutions, prohibitory Proclamations, and commitments for the same” almost certainly referred to Gage’s recent unsuccessful attempts to prosecute the Boston and Salem town meetings; Hutchinson’s proclamations to limit the scope of the Boston town meeting; and Gage and Hutchinson’s attempts to prevent the committees of correspondence from organizing with one another and signing nonimportation agreements.

So, while the direct authorship of the Continental Congress’s assembly clause is not self-evident, what *is* clear is that it was written in a broader context in which all kinds of assemblies—general assemblies, town meetings, county conventions, committees of correspondence, and even the Continental Congress itself—were under threat of subordination or elimination by the British government. What made all these assemblies effective was their ability to gather people together so that they could consult with one another, deliberate over the best way to resolve their grievances, and do everything they could to remove those grievances with the legal powers their assemblies offered them. With town meetings and general assemblies, those legal powers might look like laws, taxes, instructions, and petitions. With committees of correspondence and county conventions, they might look like nonimportation agreements, newspaper publications, and other forms of economic and political coercion. But with all of the assemblies, literally assembling was not the point. The point was using assemblies to solve problems.

283. John Adams’s Diary (Oct. 16, 1774), in 1 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 268, at 200, 200.

284. 2 WELLS, *supra* note 77, at 234-35.

285. *See id.* at 234 & n.1.

II. THE RIGHT TO ASSEMBLE AFTER AMERICAN INDEPENDENCE

A. *The State Constitutions of 1776*

During the opening days of 1775, the principal governments of several of the American colonies were not the governors and general assemblies of previous years but rather a new breed of conventions, congresses, and other informal assemblies. The colonial government of Massachusetts was particularly in disarray. For the previous four months, the nominal governor, Thomas Gage, had begun fortifying himself in Boston by raiding nearby arsenals, building earthworks around the town, and deploying cannons prominently.²⁸⁶ He was responding to rumors that the town meetings surrounding Boston were assembling—despite Parliament’s prohibition—and ordering their militias “to meet at one Minute’s Warning, equipt with Arms and Ammunition.”²⁸⁷ And those same town meetings had elected representatives to assemble in an unofficial “provincial congress” that had assumed for itself the legislative power of the still-dissolved General Assembly.²⁸⁸ Meeting first in Salem and then Cambridge and Concord, the provincial congress explained to Gage that “the want of a general assembly [has] rendered it indispensably necessary to collect the wisdom of the province by their delegates in this Congress, to concert some adequate remedy for preventing impending ruin, and providing for the public safety.”²⁸⁹ Gage responded simply that “[w]hilst you complain of Acts of Par-

286. See, e.g., Letter from Abigail Adams to John Adams (Sept. 2, 1774), in 1 ADAMS FAMILY CORRESPONDENCE 146, 146-48, 148 n.3 (L.H. Butterfield ed., 1963) (“Great commotions have arisen in consequence of the discovery of a Tratorous plot of Colonel Brattle’s—his advice to Gage to Break every commisiond officer, and to seize the province and Towns Stock of powder.”); Letter from the Boston Committee of Correspondence to the Continental Congress, in 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 21, at 55, 55-56 (within the proceedings of October 6, 1774); *id.* at 56 (“[A] number of cannon . . . were a few days ago seized & taken from [the] wharf by order of [Thomas Gage] . . . [T]here is reason to apprehend that Boston is to be made & kept a garrisoned town.”).

287. Letter from Abigail Adams to John Adams (Sept. 2, 1774), *supra* note 286, at 147 n.3.

288. See MASS. PROVINCIAL CONGRESS JOURNALS, *supra* note 30, at 4-6 (describing resolutions adopted in Salem on October 7, 1774).

289. Letter from the Massachusetts Provincial Congress to Thomas Gage (Oct. 13, 1774), in MASS. PROVINCIAL CONGRESS JOURNALS, *supra* note 30, at 17, 17 (within the proceedings of October 13, 1774).

liament that make alterations in your Charter, . . . you will not forget that by your assembling, you are yourselves subverting that Charter.”²⁹⁰

Massachusetts was far from the only colony in its situation. Towns and counties had appointed provincial congresses around the continent for similar reasons as in Massachusetts, and many also faced hostile, if not violent, opposition to their right to assemble. In North Carolina, shortly before the convening of a second Continental Congress, scheduled for May, town and county committees of correspondence elected a second provincial congress to send delegates to Philadelphia.²⁹¹ But North Carolina’s governor issued a proclamation “to renounce, disclaim, and discourage all such meetings, cabals, and illegal proceedings, which artful and designing men shall attempt to engage in, and which can only tend to introduce disorder and anarchy.”²⁹² Most local committees of correspondence in North Carolina ignored the governor and elected representatives to both a provincial congress (to elect delegates for Philadelphia) and a General Assembly (to legislate for North Carolina). When the General Assembly convened at the capital in April 1775, it responded to the governor’s earlier resolution using the language of the Declaration of Rights’ assembly clause. “It is not to be controverted,” it declared, “that His Majesty’s subjects have a right to petition for a redress of grievances, or to remonstrate against them; and as it is only a meeting of the people, that their sense respecting such petition and remonstrance can be obtained, that the right of assembling is as undoubted.”²⁹³

But while local control could be empowering, it could be threatening, too. Back in Massachusetts, the loyalists who controlled the Marshfield town meeting complained to Gage that they had been “under terrors . . . from the threats of their neighbours.”²⁹⁴ Gage ultimately had to send “a detachment of

290. Letter from Thomas Gage to the Massachusetts Provincial Congress (Oct. 17, 1774), in 1 AMERICAN ARCHIVES, FOURTH SERIES, *supra* note 230, at 836, 837 (within the proceedings of the provincial congress on October 17, 1774).

291. *See supra* text accompanying note 262.

292. Proclamation of Josiah Martin (Mar. 1, 1775), in 2 AMERICAN ARCHIVES, FOURTH SERIES 7, 8 (D.C., M. St. Clair Clarke & Peter Force, Peter Force ed., 1839) (within the proceedings of a council held at Newbern, North Carolina on March 1, 1775).

293. Letter from the North Carolina General Assembly to Josiah Martin (Apr. 7, 1775), in 2 AMERICAN ARCHIVES, FOURTH SERIES, *supra* note 292, at 263, 264 (within the proceedings of April 7, 1775).

294. Letter from Thomas Gage to the Earl of Dartmouth (Jan. 27, 1775), in 1 AMERICAN ARCHIVES, FOURTH SERIES, *supra* note 230, at 1698, 1699 (within the proceedings of March 8, 1775).

one hundred men to their relief.”²⁹⁵ And on the night of April 18, 1775, Gage sent another detachment of soldiers to the town of Concord, either to raid a weapons cache or to arrest the Massachusetts provincial congress’s leadership.²⁹⁶ When the town militias of Lexington and Concord blocked the soldiers’ path, the Revolutionary War began.²⁹⁷

After the battles of Lexington and Concord, Massachusetts’s provincial congress petitioned the second Continental Congress, meeting again in Philadelphia, for advice on how it should govern the colony in rebellion.²⁹⁸ The Congress ultimately advised Massachusetts to treat its 1691 charter as a written constitution and elect a new General Assembly as if Gage and the Massachusetts Government Act had never existed.²⁹⁹ The Massachusetts Congress followed this advice in June, authorizing the towns to elect a new bicameral General Assembly with the upper house, or Council, also serving as Massachusetts’s chief executive—as the charter allowed in the absence of the governor.³⁰⁰ In the first sign of how the previous decade of arguments against the British government might revolutionize the relationship between the General Assembly and local governments, one of the first laws passed by the General Assembly expanded the franchise so that all towns of at least thirty people could elect at least one representative.³⁰¹ Previously, the General Assembly had denied low-population towns, or districts, the right to send a representative. But it now thought that taxing towns without representation was “against common right, and in derogation of the rights granted to the inhabitants of this colony by the charter.”³⁰²

By the late fall of 1775, provincial congresses in New Hampshire and South Carolina also requested the “advice and direction of the Congress, with respect

295. *Id.* at 1699.

296. Account of an Attack upon a Body of the King’s Troops (May 20, 1775), in 2 AMERICAN ARCHIVES, FOURTH SERIES, *supra* note 292, at 436, 436-37; see Bowie, *supra* note 60, at 1492 & n.668.

297. Account of an Attack upon a Body of the King’s Troops, *supra* note 296.

298. See Bowie, *supra* note 60, at 1492-93.

299. See *id.*

300. *Id.* at 1494-95.

301. [An] Act Declaratory of the Right of Certain Towns and Districts in the Colony of the [Massachusetts] Bay, in New England, to Elect and Depute a Representative, ch. 3, 1775 Mass. Acts 419.

302. *Id.*

to a method for our administering Justice, and regulating our civil police.”³⁰³ Receiving these requests as a delegate to the Continental Congress, John Adams persuaded his colleagues to recommend “that each colony would assemble a ‘Convention[] of Representatives, freely, fairly and proportionally chosen,’ which could ‘fabricate[] a Government, or a Constitution rather,’ to replace their [colonial] charters.”³⁰⁴ On Congress’s advice, New Hampshire, South Carolina, and several other states adopted their first written constitutions.³⁰⁵

Adams later even offered personal advice in letters to representatives of North Carolina—which he then published as an influential pamphlet, *Thoughts on Government*³⁰⁶—explaining that their new constitution ought to be premised on what would come to be known as popular sovereignty.³⁰⁷ The ideal government, Adams explained, was one in which everyone could participate, like a town meeting.³⁰⁸ Because New England towns were “vested with Powers to assemble frequently, deliberate, debate and act, upon many Affairs,” Adams observed that they introduced “universal Knowledge among the People, and inspire[d] them, with a conscious Dignity,” to appreciate the rule “of Laws, and not of Men.”³⁰⁹ But this sort of ideal wasn’t often practical for an entire state: “In a Community consisting of large Numbers, inhabiting an extensive Country, it is not possible that the whole Should assemble, to make Laws.”³¹⁰ In this case, Adams wrote, “The most natural Substitute for an Assembly of the whole, is a Delegation of Power, from the Many, to a few of the most wise and virtuous.”³¹¹ In other words, just as the Massachusetts town meeting in the 1600s had begun electing local officers and colonial representatives to make decisions

303. 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 298, 298 (Worthington Chauncy Ford ed., 1905) (proceedings of October 18, 1775); see also Bowie, *supra* note 60, at 1497 (describing the New Hampshire and South Carolina requests).

304. Bowie, *supra* note 60, at 1496 (quoting 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 267, at 356).

305. *Id.* at 1497-98.

306. JOHN ADAMS, THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES (Phila., John Gill 1776), in 4 PAPERS OF JOHN ADAMS 86 (Robert J. Taylor ed., 1979).

307. Letter from John Adams to John Penn (Mar. 27, 1776), in 4 PAPERS OF JOHN ADAMS, *supra* note 306, at 78, 78-80.

308. Letter from John Adams to William Hooper (Mar. 27, 1776), in 4 PAPERS OF JOHN ADAMS, *supra* note 306, at 73, 74.

309. *Id.* at 74; see also Letter from John Adams to Abigail Adams (Oct. 29, 1775), in 1 ADAMS FAMILY CORRESPONDENCE, *supra* note 286, at 318, 318-19 (describing the advantages of New England, including its governance structures which allow for participation and education).

310. Letter from John Adams to John Penn (Mar. 27, 1776), *supra* note 307, at 80.

311. *Id.*

on their behalf by proxy, Adams understood representative government as an extension of the right of people to assemble and govern themselves. The best representative government, Adams wrote, should therefore be “in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them.”³¹² And to ensure that “it may be the interest of this Assembly to do strict justice at all times, it should be an equal representation, or in other words equal interest among the people should have equal interest in it.”³¹³

John and Samuel Adams also took a leading role in drafting early state constitutions. By early 1776, Pennsylvania’s delegates in the Continental Congress were emerging as the principal obstacle in the way of a declaration of independence.³¹⁴ Taking advantage of the Continental Congress’s location in Philadelphia, the Adams cousins sought to undercut these delegates’ positions by promoting candidates for election to the Pennsylvania Assembly, which appointed delegates to the Continental Congress.³¹⁵ Samuel in particular became so active in Pennsylvania politics that conservatives there referred to him as “Judas Iscariot.”³¹⁶ By June 1776, the two men had helped convene a Philadelphia “town-Meeting” of four to five thousand people, which resolved to form “a Provincial Conference” to elect new delegates to the Continental Congress and to elect a constitutional convention to form a new constitution for Pennsylvania.³¹⁷ This extralegal convention was elected on the morning of July 8 at

312. ADAMS, *supra* note 306, at 87.

313. *Id.* at 87-88.

314. See FLOWER, *supra* note 113, at 143-46; RICHARD ALAN RYERSON, *THE REVOLUTION IS NOW BEGUN: THE RADICAL COMMITTEES OF PHILADELPHIA, 1765-1776*, at 208-12 (1978); J. PAUL SELSAM, *THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY* 94-104 (1936).

315. See 4 *JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789*, at 342, 357-58 (Worthington Chauncey Ford ed., 1906) (detailing John Adams’s resolution for colonies to institute new constitutions); FLOWER, *supra* note 113, at 150-52 (discussing the influence of John Adams’s resolution on the Pennsylvania Assembly elections); RYERSON, *supra* note 314, at 211-12, 221-22 (discussing how John Adams’s resolution aided Pennsylvania radicals and imperiled conservatives); STILLÉ, *supra* note 235, at 174-76 (describing Samuel Adams’s role in the contentious fight for the Pennsylvania Assembly).

316. STILLÉ, *supra* note 235, at 174.

317. SELSAM, *supra* note 314, at 117-35; see also MERRILL JENSEN, *THE FOUNDING OF A NATION: A HISTORY OF THE AMERICAN REVOLUTION, 1763-1776*, at 686 (1968) (describing the “mass meeting” that voted to rescind the Pennsylvania Assembly’s “instructions against independence”); RYERSON, *supra* note 314, at 212-13, 228-37 (detailing how the mass meeting was organized).

the same time and place that the Declaration of Independence was proclaimed for the first time.³¹⁸

The Pennsylvania constitutional convention assembled on July 15 and elected its one well-known figure, Benjamin Franklin, as its president.³¹⁹ But Franklin initially served as little more than a figurehead, as he was frequently absent on account of his duties as a member of the Continental Congress.³²⁰ In his place, much of the initial work of the convention was produced by a twelve-person committee, later expanded, to draft “an Essay of a Declaration of Rights for this State.”³²¹ On July 29, the convention published a draft declaration of rights for two weeks of public consideration.³²² It was the first state to provide for any public expression on the merits of a proposed constitution.³²³

The convention’s draft declaration listed sixteen rights, many of which were borrowed from the Declaration of Rights proclaimed by the Continental Congress in 1774.³²⁴ It did not, at first, protect the right of the people to assemble. But the declaration prompted considerable debate as people pored over its words and submitted their own line-by-line edits.³²⁵ Samuel Adams, still in Philadelphia as a member of the Continental Congress,³²⁶ apparently became so involved in the declaration that contemporary observers credited him with writing some of its provisions.³²⁷ There is no documentary evidence to support

318. SELSAM, *supra* note 314, at 146; see PAULINE MAIER, *AMERICAN SCRIPTURE* 156 (1997).

319. John N. Shaeffer, *Public Consideration of the 1776 Pennsylvania Constitution*, 98 PA. MAG. HIST. & BIOGRAPHY 415, 417 (1974); MINUTES OF THE PROCEEDINGS OF THE CONVENTION OF THE STATE OF PENNSYLVANIA 3 (Phila., Henry Miller 1776) [hereinafter PA. CONVENTION MINUTES].

320. SELSAM, *supra* note 314, at 147-51.

321. PA. CONVENTION MINUTES, *supra* note 319, at 6.

322. AN ESSAY OF A DECLARATION OF RIGHTS (Phila. 1776), https://infoweb.newsbank.com/iwsearch/we/Evans/?p_product=EALX&p_theme=eai&p_nbid=T72D63WYMTYwMzU5MjQ1NC4zMzI1NjQ6MT0xMjoxMjguMzYuNy4xMDQ&p_action=doc&p_queryname=1&p_docref=v2:oF2B1FCB879B099B@EALX-oF30145B10FDA3D0@14984-oF97400F46A5BC88@1 [https://perma.cc/F7YS-WM5Y].

323. Shaeffer, *supra* note 319, at 416.

324. See *supra* text accompanying note 276.

325. See Ford, *supra* note 235, at 453-54; see also Revisions of the Pennsylvania Declaration of Rights, in 22 THE PAPERS OF BENJAMIN FRANKLIN 529, 529-33 (William B. Willcox ed., 1982) (Benjamin Franklin’s proposed revisions to Pennsylvania’s Declaration of Rights).

326. See Letter from Samuel Adams to Richard Henry Lee (July 15, 1776), in 3 THE WRITINGS OF SAMUEL ADAMS, *supra* note 194, at 296, 298.

327. CHARLES HENRY LINCOLN, THE REVOLUTIONARY MOVEMENT IN PENNSYLVANIA 282 & n.2 (1901); 3 WELLS, *supra* note 77, at 86-87 n.1; see also 2 WELLS, *supra* note 77, at 438-39 (quoting an “eyewitness”).

this observation. But whoever was responsible, when the constitutional convention adopted a final version of the Declaration of Rights on August 16, an assembly clause had been added.³²⁸ Pennsylvania became the first state whose constitution declared “[t]hat the People have a Right to assemble together, to consult for their common Good, to instruct their Representatives, and to apply to the Legislature for Redress of Grievances, by Address, Petition or Remonstrance.”³²⁹

This first state assembly clause was almost certainly inspired by the Continental Congress’s assembly clause of 1774, which declared that the colonists had “a right peaceably to assemble, consider of their grievances, and Petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.”³³⁰ But there are also some notable differences, a few of which suggest Samuel Adams’s influence.

First, Pennsylvania replaced “peaceably assemble” with “assemble together,” to unclear effect.

Second, the Pennsylvania version replaced the 1774 “consider of their grievances” with the 1776 “to consult for their common Good.” The reason for this change is also not self-evident, although the Pennsylvania version conveyed the same self-government meaning as the original: “public good” and “common wealth” were both English translations of the Latin *res publica*.³³¹ As Samuel Adams declared two decades later, “Government is instituted for the common good; not for the profit, honor or private interest of any one man, family, or class of men.”³³² And as he had earlier written in 1773, after Thomas Hutchinson accused the town of Boston of exceeding its corporate powers, “[T]he Inhabitants of this or any other Town, had certainly an uncontrovertible right to meet together, either in the manner the law has prescribed, or in

328. See PA. CONVENTION MINUTES, *supra* note 319, at 25-26.

329. *Id.* at 26.

330. See 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 21, at 63, 70 (resolutions of October 14, 1774, including the Declaration of Rights).

331. See *Republick*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan et al. 5th ed., 1773); see also THOMAS PAINE, DISSERTATIONS ON GOVERNMENT, THE AFFAIRS OF THE BANK, AND PAPER-MONEY 5 (Phila., Charles Cist 1786) (“[T]he word republic means the public good, or the good of the whole, in contradistinction to the despotic form, which makes the good of the sovereign, or one man, the only object of the government.”).

332. Samuel Adams, Speech to the Legislature of Massachusetts (Jan. 17, 1794), in 4 THE WRITINGS OF SAMUEL ADAMS, *supra* note 40, at 353, 357; see also Letter from Samuel Adams to James Warren (May 12, 1776), in 3 THE WRITINGS OF SAMUEL ADAMS, *supra* note 194, at 288, 288-89 (using the term “Common Good” to refer to the activity of protecting and defending the republic).

any other orderly manner, Jointly to consult the necessary means of their own Preservation and safety.”³³³

A third difference was the addition of a new clause: “to instruct their Representatives.” More than any other change, this clause betrays the influence of Adams or someone else from New England, because Pennsylvania had no similar tradition of assembling in town meetings to instruct representatives to the legislature.³³⁴ Rather, the practice of “draw[ing] up instructions” for members of the Pennsylvania General Assembly appears to have emerged in a widespread manner only after 1774, when Dickinson’s committee of correspondence in Philadelphia imitated the Boston town meeting.³³⁵

The fourth and final difference was the replacement of the right to petition the King with the right to “apply to the Legislature for Redress of Grievances, by Address, Petition or Remonstrance.” The reason for removing the King is obvious in the context of 1776. But the language also tracks Samuel Adams’s 1772 pamphlet, *The Votes and Proceedings . . . of the Town of Boston*, in which the town declared “[t]hat they have, ever had, and ought to have, a Right to Petition the King or his Representative for the Redress of such Grievances as they feel, or for preventing of such as they have Reason to apprehend; and to Communicate their Sentiments to other Towns.”³³⁶

The use of the term “Petition or Remonstrance” also reflects how the North Carolina General Assembly protested the governor’s criticism of the towns and counties that elected a provincial congress in 1775. That Assembly explained that “the right of assembling is . . . undoubted” because “it is only [by] a meeting of the people, that their sense respecting such petition and remonstrance can be obtained.”³³⁷ It is perhaps because of North Carolina’s own history of defending the right of extralegal assemblies to meet and to legislate that North Carolina’s constitution of December 1776 became the second to include an assembly clause, using language nearly identical to Pennsylvania’s.³³⁸

333. BOSTON TOWN RECORDS, 1770-1777, *supra* note 37, at 121-22.

334. See Colegrove, *supra* note 23, at 442-43.

335. See RYERSON, *supra* note 314, at 18, 49-50.

336. VOTES AND PROCEEDINGS, *supra* note 181, at 43.

337. Letter from the North Carolina General Assembly to Josiah Martin (Apr. 7, 1775), *supra* note 293, at 264.

338. See N.C. CONST. of 1776, declaration of rights, art. XVIII, in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 2787, 2788 (“[T]he people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances.”).

B. The Massachusetts Constitution of 1780

Shortly before Pennsylvania adopted the final version of its assembly clause in August 1776, Samuel Adams temporarily returned to Massachusetts.³³⁹ When he arrived, the Massachusetts General Assembly was beginning to debate whether Massachusetts should draft its own new constitution. Rural towns in the state's two westernmost counties, Berkshire and Hampshire, were prodding the legislature to act. Their demands for a new constitution illustrated a developing tension within the right to assemble.

Before 1776, when Adams invoked the right to assemble, he was usually making an argument about why an unelected British government should not be allowed to subordinate a local government. For Adams, the right to assemble explained why Boston had the inherent power to discuss and act upon international affairs even if the governor believed such affairs exceeded the town's statutory authority.³⁴⁰ And it also explained why the general assemblies of New York and Massachusetts could not be coerced into legislating in whatever manner Parliament or the Crown demanded.

After independence, however, Massachusetts was full of many overlapping and potentially competing assemblies—town meetings, the General Assembly, and informal caucuses and conventions. Although Adams continued to defend “a right to assemble upon all occasions” as “the priviledge of freemen” to govern themselves,³⁴¹ that right alone could not explain which of these assemblies should be considered supreme when their powers or policies conflicted.

The most important illustration of this tension emerged with county courts. For over a century, Massachusetts's towns had been organized into counties in which the most important institutions were the courts.³⁴² Under Massachusetts's 1691 charter, all of these courts were appointed by the governor with the “advice and consent of the Councill.”³⁴³

339. 2 WELLS, *supra* note 77, at 438-39.

340. *See, e.g.*, BOSTON TOWN RECORDS, 1770-1777, *supra* note 37, at 121-22.

341. Benjamin Rush's Notes of Debates (Feb. 4, 1777), in 6 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 217, 218 (Paul H. Smith ed., 1980).

342. *See* Meeting of the General Court (May 25, 1636), in 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 173, 175 (Nathaniel B. Shurtleff ed., Bos., William White 1853) (appointing judges); Meeting of the General Court (Jan. 27, 1643), in 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, *supra*, at 35, 38 (dividing the colony into Essex, Middlesex, Suffolk, and Norfolk “sheires”).

343. THE CHARTER OF MASSACHUSETTS BAY (1691), in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1870, 1879.

After the Continental Congress in 1775 advised Massachusetts to return to its 1691 charter, the General Assembly issued a proclamation declaring that the upper house, or Council, would serve as “the executive Branch of Government” — as the charter authorized in the absence of a legitimate governor.³⁴⁴ Among other things, this meant that the Council could appoint all officers throughout the state. The General Assembly considered the Council’s appointment power reasonable because the Council was “under the Influence and Controul of the People.”³⁴⁵ Towns could elect representatives in the House of Representatives, who in turn could elect members of the Council, who in turn could appoint judges.

But in western Massachusetts, a pastor named Thomas Allen objected to the Council’s appointment power using arguments similar to those that Samuel Adams had once deployed against the British governors. A recent graduate of Harvard College serving as a pastor in the town of Pittsfield, Allen was outraged that Massachusetts’s western towns appeared to have very little direct influence over who would serve as a local judge.³⁴⁶ In petitions to the General Assembly, Allen rejected its argument that “the People” controlled the appointment of judges: the populous eastern towns effectively controlled who would be appointed judges across the state.³⁴⁷ More fundamentally, Allen argued that the people of Massachusetts had never consented to the General Assembly’s 1775 decision to return to the 1691 charter.³⁴⁸ That charter was “defective,” Allen wrote, because its authority came from the Crown while “the people are the fountain of power.”³⁴⁹ In the charter’s place, Allen demanded that the people of the state be allowed to participate in drafting a new “fundamental Constitution as the Basis and ground work of Legislation.”³⁵⁰

To back up these demands, Allen helped to organize conventions of local committees of correspondence in Hampshire and Berkshire counties.³⁵¹ Each

344. See Proclamation of the General Court (Jan. 23, 1776), in *THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780*, at 65, 67 (Oscar Handlin & Mary Handlin eds., 1966) [hereinafter *POPULAR SOURCES*].

345. See *id.*

346. See ROBERT J. TAYLOR, *WESTERN MASSACHUSETTS IN THE REVOLUTION* 76-77, 80-82 (1954).

347. See *id.* at 83-86.

348. See *id.* at 86-87.

349. Petition of John Ashley *et al.* to the General Court (Apr. 12, 1776), in *MASSACHUSETTS, COLONY TO COMMONWEALTH* 23, 24 (Robert J. Taylor ed., 1961); Petition of Pittsfield to the General Assembly (May 1776), in *MASSACHUSETTS, COLONY TO COMMONWEALTH*, *supra*, at 26, 27.

350. Petition of Pittsfield to the General Assembly (May 1776), *supra* note 349, at 27.

351. TAYLOR, *supra* note 346, at 84-85.

convention voted that it would prevent the sessions courts from sitting until the people of Massachusetts were allowed to participate in ratifying a new constitution for the entire state.³⁵² While dissidents complained about “the irregularity of said Convention[s],” Allen and his allies declared that they would “rather submit to Lord *North*” than consent to having judges appointed by the General Assembly officiate.³⁵³ Exercising the right to assemble, Allen was defending the western towns’ right to govern themselves.

That September, with the western county sessions courts still closed, the Massachusetts General Assembly asked all eligible voters in the state to “assemble as soon as they can in Town-Meeting” and vote on whether to authorize the General Assembly to enact a new constitution.³⁵⁴ Several town meetings, including in Lexington and Concord, immediately objected to allowing the General Assembly to draft the new constitution, rather than first electing a new convention called for that specific purpose.³⁵⁵ But after taking a tally of the town-meeting returns, the General Assembly concluded that it possessed the authorization to propose a constitution. It misread the situation: the 1778 constitution it proposed was overwhelmingly defeated for a number of reasons, including that voters wanted a distinct assembly—a constitutional convention—to propose the constitution.³⁵⁶

Soon after the results were tallied, local committees of correspondence in Berkshire County called for another county convention at which they again voted to keep the sessions courts there closed.³⁵⁷ More than two years had passed since these courts—which oversaw criminal and regulatory matters—had been allowed to sit.³⁵⁸

While the first western-county conventions drew only local opposition, this 1778 convention drew statewide rebuke, with critics complaining that people in Berkshire County were abusing the right to assemble. Despite these criticisms, the Berkshire “constitutionalists,” as they became known, refused to open the county’s courts or recognize the General Assembly’s laws until the state adopted

352. *Id.* at 83-86.

353. Letter from Miles Powell and Francis Gillteau to Timothy Edwards (Apr. 3, 1776), in 5 AMERICAN ARCHIVES, FOURTH SERIES 808, 809 (Peter Force ed., Washington, D.C., M. St. Clair Clarke & Peter Force 1844).

354. Resolution of the House of Representatives (Sept. 17, 1776), in POPULAR SOURCES, *supra* note 344, at 99, 99.

355. Returns of the Towns on the House of Representatives Resolution of September 17, 1776, in POPULAR SOURCES, *supra* note 344, at 101, 149-52 (Lexington); *id.* at 152-53 (Concord).

356. See TAYLOR, *supra* note 346, at 88.

357. *Id.* at 91-92.

358. See *id.* at 83-87.

a new constitution. They maintained that “the Compact in this state is not yet formed . . . [I]f the Majority of the people of this state have adopted any such fundamental Constitution it is unknown to us and we shall submit to it as we always mean to be governed by the Majority.”³⁵⁹

Seeking to mediate this dispute, the General Assembly passed an act of pardon that applied to “all riots, routs and unlawful assemblies, committed, commanded, acted, done, or made, within the said county of Berkshire, since the tenth day of April, one thousand seven hundred and seventy-four.”³⁶⁰ But this pardon only insulted the Berkshire constitutionalists, because it implied that the 1774 county conventions—the ones that defended the right to assemble and which had received so much praise from the first Continental Congress—were “unlawful assemblies.”³⁶¹

Finally, in June 1779, the General Assembly called for town meetings to elect representatives to a special constitutional convention for the exclusive purpose of drafting a new constitution for the people of Massachusetts.³⁶² Thomas Allen’s home of Pittsfield instructed its representative to “unite with said convention in drawing up a Bill of Rights,” specifically requesting “that the people have a right peaceably to assemble, consider of their grievances, and petition for redress.”³⁶³

The 312 members of the constitutional convention began assembling in Cambridge on September 1, 1779.³⁶⁴ The participants included almost every prominent figure of the Revolutionary era of Massachusetts, including John and Samuel Adams.³⁶⁵ But despite the large numbers of people, the convention quickly delegated the actual drafting of the constitution to a subcommittee consisting of three people, including Samuel Adams and John Adams.³⁶⁶ Over the next two months, there is evidence that Samuel took the lead in drafting the

359. Statement of Berkshire County Representatives (Nov. 17, 1778), in POPULAR SOURCES, *supra* note 344, at 374, 377.

360. An Act of Pardon and Indemnification for Certain Offences Therein Mentioned; and for Holding a Superio[u]r Court of Judicature, Court of Assize and General Goal Delivery, in the County of Berkshire, ch. 38, § 1, 1778 Mass. Acts 932, 932.

361. TAYLOR, *supra* note 346, at 95.

362. See The Call for a Convention (June 1779), in POPULAR SOURCES, *supra* note 344, at 402, 402.

363. Votes of Towns in Choosing Delegates (July-Oct. 1779), in POPULAR SOURCES, *supra* note 344, at 404, 410-11 (instructions from Pittsfield to its representatives).

364. SAMUEL ELIOT MORISON, A HISTORY OF THE CONSTITUTION OF MASSACHUSETTS 19 (1917); Oscar Handlin & Mary Handlin, *Introduction* to POPULAR SOURCES, *supra* note 344, at 1, 23.

365. Handlin & Handlin, *supra* note 364, at 23-24.

366. See 3 WELLS, *supra* note 77, at 86-87.

constitution's first part, the "Declaration of Rights,"³⁶⁷ and that John took the lead in drafting the constitution's second part, the "Frame of Government."³⁶⁸ When the convention as a whole submitted the constitution for ratification by town meetings, Article 19 of the Declaration of Rights declared:

The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.³⁶⁹

The only substantive difference between Article 19 and the Pennsylvania assembly clause, aside from changes in punctuation, was the addition of the phrase "in an orderly and peaceable manner."³⁷⁰ A later article also confirmed the self-governmental meaning of Article 19's phrase "consult upon the common good," declaring, "[t]he legislature ought frequently to assemble for the redress of grievances, for correcting, strengthening, and confirming the laws, and for making new laws, as the common good may require."³⁷¹

When the Boston town meeting debated whether to ratify the constitution, its main suggestion was that a separate clause protecting the liberty of the press should also provide for "the Liberty of Speech."³⁷² Although Samuel Adams thought this would be a change "for the better,"³⁷³ a free speech clause was not added to the Declaration of Rights until 1948.³⁷⁴ No town meeting, by con-

367. *Id.* at 86-87 n.1.

368. See *The Massachusetts Constitution: Editorial Note*, in 8 PAPERS OF JOHN ADAMS 228, 231 (Gregg L. Lint et al. eds., 1989).

369. MASS. CONST. of 1780, pt. 1, art. XIX, in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1888, 1892.

370. *Id.*; cf. PA. CONVENTION MINUTES, *supra* note 319, at 26 ("That the People have a Right to assemble together, to consult for their common Good, to instruct their Representatives, and to apply to the Legislature for Redress of Grievances, by Address, Petition or Remonstrance.").

371. MASS. CONST. of 1780, pt. 1, art. XXII, in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1888, 1892. Another article, Article 20, prohibited anyone but the legislature from "suspending the laws, or the execution of the laws"—further evidence that the New York Restraining Act and other Revolution-era debates were on the Adams cousins' minds. *Id.* art. XX, at 1892. The Pennsylvania Constitution was later completely overhauled, and the current constitution includes the "peaceable manner" language. PA. CONST. art. 1, § 20.

372. Letter from Samuel Adams to John Adams (May 1780), in 4 THE WRITINGS OF SAMUEL ADAMS, *supra* note 40, at 187, 187.

373. *Id.*

374. See MASS. CONST. amend. LXXVII.

trast, appears to have suggested alterations to the assembly clause's Article 19. The closest suggestion came from the Bellingham town meeting, which, after commending Article 19, asked for explicit protections of "the Powers and Privileges of Every Incorporate town in this State to meet Annually in March and to chuse all town officers and to meet at other times as the Inhabitants may agree and to transact town affairs as has been Usual in this State."³⁷⁵

But it is reasonable to presume that such protections were already implied by the right to assemble. As John Adams wrote within a week of the Bellingham town meeting, "[B]y the ancient Laws of the Country, which are Still in force, any Seven Inhabitants of one of the[] Towns have a right to demand of the Magistrates a public assembly, of all."³⁷⁶ He added:

In th[ese assemblies every] Man, high and low; every Yeoman, Tradesman, and even [day Labourer, as well] as every Gentleman and public magistrate, has a right to vo[te] and [to speak his senti]ments of public Affairs; to propose measures; to instruct their Repr[esentatives in the] Legislature &c. This right was constantly, and frequently, used, under [the former] Government, and is now, much more frequently used, under the new.³⁷⁷

The Massachusetts Constitution as a whole was ratified without amendment in June 1780.³⁷⁸ And when John Adams reflected on it in the years afterward, he continued to emphasize the importance of towns in the constitutional order. Indeed, in a 1782 letter published in *A Defence of the Constitutions of Government of the United States of America*, Adams described "the right to assemble" as one of the precipitating causes of the Revolutionary War.³⁷⁹

C. Shays's Rebellion of 1786

Over the next decade, Samuel Adams remained active in Massachusetts politics, serving as a delegate to the Continental Congress until 1781 and as a senator in the Massachusetts Senate from 1781 through 1789.³⁸⁰ Even after he became president of the state senate in 1782, he continued to attend the Boston

375. Returns of the Towns: Bellingham, in POPULAR SOURCES, *supra* note 344, at 741, 742.

376. Letter from John Adams to Edmé Jacques Genet (May 28, 1780), in 9 PAPERS OF JOHN ADAMS 350, 353 (Gregg L. Lint et al. eds., 1996).

377. *Id.* (footnote omitted).

378. MORISON, *supra* note 364, at 22.

379. Letter from John Adams to the Abbé de Mably (1782), *supra* note 47, at 495.

380. ALEXANDER, *supra* note 32, at 257.

town meeting, often leaving his chair in the Senate to take part in town debates.³⁸¹ But with his assumption of power also came a measure of conservatism about the scope of the right to assemble that he had spent almost two decades defending. Now that Massachusetts had “regular & constitutional Governments,” he began to argue that “popular Committees and County Conventions are not only useless but dangerous. They served an excellent Purpose & were highly necessary when they were set up,” but no longer.³⁸²

Adams was reacting to the persistent county conventions in the western half of the state, which had long shut down the courts in Berkshire and Hampshire counties.³⁸³ Before 1780, these conventions had been motivated by an opposition to appointed judges and a demand for a new, popularly ratified constitution. After 1780, the western towns allowed the courts to reopen, but quickly began to second-guess this decision as Massachusetts’s economy collapsed.³⁸⁴ The Revolutionary War imposed significant costs on the people of Massachusetts in the form of lost men who died as soldiers, lost shipping and fishing channels, lost access to southern markets, and lost hard currency.³⁸⁵ All this, in turn, dramatically increased the indebtedness of the state and its residents.³⁸⁶

In February 1782, a crowd of 300 people assembled in Berkshire County to petition the court of common pleas to suspend civil actions until the following term.³⁸⁷ Two months later, similar demonstrations spread to Hampshire County, where 1,200 soldiers were mustered to disperse an armed group of 600 protestors.³⁸⁸ These county conventions continued through the next two years, extracting modest remedies from the General Assembly.³⁸⁹ Nevertheless, the conventions increasingly drew criticism from eastern towns.

Columnists in local newspapers began to defend the conventions’ right to assemble as something explicitly protected by the constitution of 1780. “If I rightly remember, our Constitution provides, that the people, or any number of them, may orderly assemble, to consult upon grievances, to remonstrate

381. See 3 WELLS, *supra* note 77, at 155.

382. Letter from Samuel Adams to John Adams (Apr. 16, 1784), in 4 THE WRITINGS OF SAMUEL ADAMS, *supra* note 40, at 293, 296.

383. See *supra* notes 351-352 and accompanying text.

384. TAYLOR, *supra* note 346, at 103-06.

385. *Id.* at 103-04.

386. *Id.* at 106-08.

387. *Id.* at 111.

388. *Id.* at 116-17 (describing the group of 600 protestors); 3 WELLS, *supra* note 77, at 159-60 (describing the 1,200 soldiers mustered).

389. TAYLOR, *supra* note 346, at 116-23; 3 WELLS, *supra* note 77, at 161-66.

against them, and petition for redress,” one columnist wrote in 1784.³⁹⁰ “It is true it is not said in the Constitution, whether such meetings shall be by two’s or three’s, towns, counties, states, or the whole United States assembled in one body; but the implication is plain that all aggrieved may assemble—may petition and remonstrate.”³⁹¹

But eastern town meetings, including in Boston, began to argue that the constitutional right to assemble applied only to towns, not extralegal gatherings. The Boston meeting emphasized that county conventions may have been necessary “when we were governed by foreign power, and a redress of grievances could be had in no Other way,” but now “that time is gone, & gone forever, unless the baneful influence of a few restless Spirits should induce the People at Large by County Meetings and irregular Assemblies to raise such commotions, as might eventually Overturn the Constitution.”³⁹² Like the opponents of the Berkshire constitutionalists, the Boston meeting urged the other towns to use constitutionally recognized methods for redressing their grievances, such as electing and instructing representatives.³⁹³

In a remarkable display of irony for someone who once objected to Thomas Hutchinson’s dismissal of town meetings, Samuel Adams wrote that “Bodies of Men, under any Denomination whatever, who convene themselves for the Purpose of deliberating upon & adopting Measures which are cognizable by Legislatures only will, if continued, bring Legislatures to Contempt & Dissolution.”³⁹⁴ Yet Samuel Adams didn’t think that he was being hypocritical. He obviously knew what was in the state constitution. But he evidently thought that the right to assemble was not a protection of assembling per se, but rather a protection of a right to meaningfully participate in enacting needed legislation—which he thought residents of Massachusetts could now do through town meetings and the General Assembly. Adams emphasized this point in a private letter, writing that “[w]hile we retain those simple Democracies in all our Towns which are the Basis of our State Constitutions, and make a good Use of them, it appears to me we cannot be enslaved or materially injured.”³⁹⁵

390. Jotham the Third, Letter to the Editor, MASS. GAZETTE, June 22, 1784, at 1, 1.

391. *Id.*

392. A VOLUME OF RECORDS RELATING TO THE EARLY HISTORY OF BOSTON CONTAINING BOSTON TOWN RECORDS, 1784 TO 1796, at 13 (1903).

393. *Id.*

394. Letter from Samuel Adams to Noah Webster (Apr. 30, 1784), in 4 THE WRITINGS OF SAMUEL ADAMS, *supra* note 40, at 303, 306.

395. *Id.*

Other opponents of the county conventions in 1784 elaborated on Adams's point, making an institutionalist argument that county conventions were likely to be less legitimate, trustworthy, and knowledgeable than were formal assemblies like a town meeting or the General Assembly. "If there be any good reason to think that we can furnish a county meeting with more wisdom and fidelity than our present governors possess, the constitution furnishes us with a very expeditious, and, which is a considerable advantage, a very cheap remedy," one columnist wrote: to "lend these very wise and faithful men to the legislature."³⁹⁶

Whether Adams's distinction between town meetings and county conventions was conceptually satisfying, it became a predominant interpretation of the state's assembly clause two years later, when Massachusetts's western-county conventions turned violent. The demonstration, known as Shays's Rebellion, was the consequence of longstanding grievances: persistent indebtedness, the failure of the General Assembly to pass debtor-relief laws, the scarcity of money, and other issues that had remained unresolved since 1780.³⁹⁷ When the General Assembly ended its 1786 session before addressing western petitions for tax and debtor-relief laws, dozens of towns in Worcester, Middlesex, Hampshire, and Berkshire counties all organized county conventions calling for the suspension of civil suits and tax collection as well as various constitutional amendments, including the abolition of the state senate.³⁹⁸ The most influential of these conventions, one held at Hatfield in Hampshire County, called itself a "constitutional" body.³⁹⁹ Yet within days of its meeting, 1,500 people gathered in nearby Northampton and took possession of the courthouse to prevent the sitting of the county courts.⁴⁰⁰ Soon, armed groups of hundreds of so-called Regulators disrupted courts in Worcester, Middlesex, Bristol, and Berkshire counties.⁴⁰¹ In October, as the Continental Congress voted to raise an armed force,⁴⁰² the Massachusetts General Assembly passed the state's first riot act since 1756, permitting justices of the peace to disperse "tumultuous assem-

396. Agrippa, *To the People*, INDEP. CHRON., Mar. 25, 1784, at 1.

397. TAYLOR, *supra* note 346, at 128-29.

398. *Id.* at 129, 136-37; see PAIGE, *supra* note 189, at 165.

399. TAYLOR, *supra* note 346, at 137-39.

400. *Id.* at 143.

401. *Id.* at 144-45.

402. See 31 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 891, 891-93 (John C. Fitzpatrick ed., 1934) (resolving, during the proceedings of October 20, 1786, to raise a force ostensibly in response to the "hostile intentions of the Indians in the Western country").

blies” of thirty or more people.⁴⁰³ Without money to raise a militia, however, the Commonwealth turned to donations from wealthy, private citizens to assemble a fighting force to put down the insurgency.⁴⁰⁴

In this environment, Samuel Adams and dozens of town meetings explained why the Massachusetts Constitution’s assembly clause didn’t apply to county conventions. Rather than simply accuse the westerners of violating the assembly clause’s “orderly and peaceable” language,⁴⁰⁵ Adams and his supporters interpreted the clause not to apply to informal assemblies at all.⁴⁰⁶ The town meeting of Cambridge, for example, declared that “[t]he constitution has provided for the annual choice of every branch of the Legislature, and that the people *in the several towns* may assemble to deliberate on public grievances, and to instruct their Representatives.”⁴⁰⁷ The meeting explained that informal conventions were justifiable only “where the legislative or executive powers of the State have been evidently and notoriously applied to unconstitutional purposes, and no constitutional means of redress remains.”⁴⁰⁸ In early September, the Boston and Concord town meetings expressed their “utter disapprobation of the disorderly proceedings of a number of persons in the counties of Hampshire and Worcester,” and demanded that the western towns instead “join in legal and constitutional measures to obtain redress of what may be found to be real grievances.”⁴⁰⁹ And on September 30, the governor of New Hampshire, which had adopted in 1784 an assembly clause nearly identical to that of Massachusetts, quoted his state’s assembly clause to urge dissenters “to have their ‘consultations upon the public good’ in regular, orderly, and constitutional town meetings.”⁴¹⁰

After a brief battle with the private militia outside the Springfield armory, the Regulators faced mass desertions before a complete surrender by February

403. An Act to Prevent Routs, Riots, and Tumultuous Assemblies, and Evil Consequences Thereof, ch. 38, § 1, 1786 Mass. Acts 87, 88.

404. TAYLOR, *supra* note 346, at 159-62.

405. MASS. CONST. of 1780, pt. 1, art. XIX, *in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1888, 1892.

406. *See* 3 WELLS, *supra* note 77, at 222-24.

407. PAIGE, *supra* note 189, at 166 (emphasis added).

408. *Id.* at 167.

409. LEMUEL SHATTUCK, A HISTORY OF THE TOWN OF CONCORD 131-32 (John Stacy ed., 1835); *see* A VOLUME OF RECORDS RELATING TO THE EARLY HISTORY OF BOSTON CONTAINING BOSTON TOWN RECORDS, 1784 TO 1796, *supra* note 392, at 126-28.

410. John Sullivan, *General Sullivan’s Address*, PA. PACKET & DAILY ADVERTISER, Oct. 21, 1786, at 3, 3; *see also* 3 WELLS, *supra* note 77, at 228-29 (quoting letter from James Sullivan responding to the unrest).

1787.⁴¹¹ But their rebellion inspired Massachusetts's eastern elite to interpret the assembly clause as a protection of constitutionally recognized assemblies, like town meetings and the General Assembly, but not informal county conventions. When a Massachusetts judge, George Richards Minot, discussed the Regulators' reliance on Massachusetts's assembly clause in his *History of the Insurrections* in 1788, he confirmed this point:

[T]he sense of this article extended only to town meetings which are known to the laws. And indeed, to construe it in the most latitudinarian sense, might tend in practice, so to divide the sovereign power of the people, as to make the authority of the laws uncertain, and distract the attention of subjects; especially, in a republican government, where all power is actually delegated.⁴¹²

D. The First Amendment of 1789

Although Samuel Adams had been an advocate of a continental union since he first proposed a Continental Congress in 1774, he was not chosen to serve as one of Massachusetts's delegates to the convention that assembled in Philadelphia in May 1787. Yet when he got his first look at what the convention produced—an entirely new Constitution for the United States of America—he was stunned. “[A]s I enter the Building I stumble at the Threshold,” Adams wrote his longtime correspondent, Richard Henry Lee. “I meet with a National Government, instead of a Federal Union of Sovereign States.”⁴¹³ Adams read through the Constitution's grants of broad enumerated and implied powers to the federal government, noting that if they “shall extend to every Subject of Legislation, and its Laws be supreme & controul the whole, the Idea of Sovereignty in these States must be lost.”⁴¹⁴ He was skeptical that state governments would survive under the new system.

Adams's interpretation of the Constitution was commonly shared, including by several of the leading participants at the Philadelphia convention who saw the reduction of state power as a good thing. In the opening months of the convention, for example, Alexander Hamilton of New York called states “cor-

411. TAYLOR, *supra* note 346, at 156–65.

412. MINOT, *supra* note 40, at 25; *see also* Robert A. Feer, *George Richards Minot's History of the Insurrections: History, Propaganda, and Autobiography*, 35 *NEW ENG. Q.* 203, 216–19, 226–27 (1962) (discussing Minot's desire to downplay the rebellion to appease his peers abroad).

413. Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1787), in 4 *THE WRITINGS OF SAMUEL ADAMS*, *supra* note 40, at 323, 324.

414. *Id.*

porations for local purposes,”⁴¹⁵ declaring that “the states will be dangerous to the national government, and ought to be extinguished, new modified, or reduced to a smaller scale.”⁴¹⁶ Elbridge Gerry of Massachusetts, James Wilson of Pennsylvania, and Gouverneur Morris of New York all agreed, continuing Hamilton’s metaphor of treating states relative to the federal government as if they were cities, or “subordinate corporations,” relative to Parliament.⁴¹⁷ The delegate who took this metaphor the furthest was James Madison of Virginia, who spent the first two months of the convention strenuously arguing that “[t]he states ought to be placed under control of the general government—at least as much so as they formerly were under the [K]ing and British [P]arliament.”⁴¹⁸ To critics who complained that federal control of state legislation would destroy the states, Madison pointed out that states, like municipalities, “hav[e] the power of making by-laws . . . effectual only if they are not contradictory to the general [government].”⁴¹⁹ “The relation of a Genl. Govt. to State Govts. is parallel.”⁴²⁰

Madison’s proposal of allowing the federal government to veto state legislation was defeated over the course of the five-month convention by delegates like George Mason of Virginia, who worried about “reducing the States to mere corporations[,] as seemed to be the tendency of some arguments.”⁴²¹ Yet the Constitution as a whole embraced Hamilton and Madison’s view that the federal government should have wide legislative powers and that its laws should be “supreme.”⁴²² The convention also defeated a demand by Mason, the author of Virginia’s Declaration of Rights, to add a similar bill of rights to the Federal Constitution.⁴²³ This defeat so upset Mason that he declined to sign the final

415. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 287 (Max Farrand ed., 1911) (statement of Alexander Hamilton).

416. *Id.* at 328 (statement of Alexander Hamilton).

417. *Id.* at 331 (statement of James Wilson); *see id.* at 552 (statement of Gouverneur Morris); *id.* at 474 (statement of Elbridge Gerry).

418. *Id.* at 471 (statement of James Madison).

419. *Id.*

420. *Id.* at 357 (statement of James Madison).

421. 2 *id.* at 362 (statement of George Mason); *cf. id.* at 391 (statement of John Rutledge [Rutledge]) (stating that a proposed power of the federal government to veto state laws “would damn and ought to damn the Constitution,” as this would render the states worse than “mere corporations”).

422. U.S. CONST. art. VI, cl. 2.

423. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 415, at 587-88.

document.⁴²⁴ Indeed, as soon as the convention asked the Continental Congress to approve the Constitution and send it to the states for ratification, Lee proposed a series of amendments, including a version of the assembly clause.⁴²⁵

Similar assembly clauses became a touchstone for the document's critics, including Samuel Adams, who were collectively tarred by its supporters as "Antifederalists."⁴²⁶ As Delaware, Pennsylvania, and New Jersey became the first states to hold conventions on whether to ratify the Constitution, Antifederalists offered a variety of improvements to the Constitution premised on the right to assemble.⁴²⁷ In January 1788, when Massachusetts gathered its convention to decide whether to ratify the Constitution, Adams was also one of a majority of the convention delegates who were critical of the Constitution.⁴²⁸ Adams joined a narrow 187 to 168 majority to ratify the Constitution only after agreeing to a compromise in which Massachusetts would also propose amendments.⁴²⁹

Massachusetts's proposed amendments opened the door for other Antifederalist-controlled state conventions to do the same.⁴³⁰ Delegates in New York and Virginia particularly feared that Hamilton and Madison believed that "the state governments ought to be subverted; at least, so far as to leave them only

424. See George Mason: Objections to the Constitution (Oct. 7, 1787), in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 40, 40 (John P. Kaminski & Gaspare J. Saladino eds., 1988).

425. See Richard Henry Lee's Proposed Amendments (Sept. 27, 1787), in 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 337-39 (Merrill Jensen ed., 1976).

426. Letter from Samuel Adams to Richard Henry Lee (Aug. 24, 1789), in 4 THE WRITINGS OF SAMUEL ADAMS, *supra* note 40, at 333, 334 (indicating that Adams had been identified as an Antifederalist). See generally MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 305-96 (2016) (discussing the Antifederalists at length); *Centinel No. II*, FREEMAN'S J., Oct. 24, 1787, at 1-2, in 2 THE COMPLETE ANTI-FEDERALIST 152-53 (Herbert J. Storing ed., 1981) (describing another assembly clause).

427. See, e.g., *Brutus III*, N.Y.J., Nov. 15, 1787, in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 119, 121 (John P. Kaminski & Gaspare J. Saladino eds., 1983).

428. KLARMAN, *supra* note 426, at 430-44.

429. See The Massachusetts Convention (Feb. 6, 1788), in 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1452, 1453, 1463-68 (John P. Kaminski & Gaspare J. Saladino eds., 2000); CREATING THE BILL OF RIGHTS 241 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991).

430. See generally KLARMAN, *supra* note 426, at 453-510 (detailing battles between the Federalists and Antifederalists in New York and Virginia).

corporate rights.”⁴³¹ In the end, both states ratified the Constitution only after proposing an assembly clause: “That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the Legislature for redress of grievances.”⁴³²

After these last two states ratified the Constitution, candidates began running for seats in the First Congress, which would ultimately be responsible for drafting the amendments’ terms. In Federalist Massachusetts, Adams was roundly defeated in his campaign for the House of Representatives after being vilified by the press for his support of amending the Constitution.⁴³³ In Antifederalist Virginia, Madison ran for the House on a platform of supporting a bill of rights – which, he thought, would be safe under his authorship.⁴³⁴ Madison ended up winning a close election by about 300 votes, a margin he credited to his campaign strategy.⁴³⁵ So even though he, like most Federalists, initially did not support amendments, when he arrived in the Federalist-dominated House in March 1789, he emerged as one of the strongest supporters of new amendments.⁴³⁶

The lack of congressional support for any amendments meant that Madison had a difficult time engaging the Congress’s attention. After consulting the Declaration of Rights from 1774, the bills of rights of all the state constitutions

431. The New York Convention (June 28, 1788), *in* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2002 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler & Charles H. Schoenleber eds., 2008).

432. Virginia Convention Amendments (June 27, 1788), *in* 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 199, 202 (John P. Kaminski & Gaspare J. Saladino eds., 1995); *see also* New York Declaration of Rights, Form of Ratification, and Recommendatory Amendments to the Constitution (July 26, 1788), *in* 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2328 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler & Charles H. Schoenleber eds., 2009) (“That the People have a right peaceably to assemble together to consult for their common good, or to instruct their Representatives; and that every person has a right to Petition or apply to the Legislature for redress of Grievances.”).

433. *See* 1 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790, at 562-65, 570-71 (Merrill Jensen & Robert A. Becker eds., 1976) (describing press coverage prior to the election and providing election results).

434. *See* 2 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790, at 340-41 (Gordon DenBoer ed., 1984) (extracting a letter from James Madison to an unknown recipient); CREATING THE BILL OF RIGHTS, *supra* note 429, at 61.

435. *See* 2 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790, *supra* note 434, at 345-48 (listing excerpts from newspapers and letters describing the election); KLARMAN, *supra* note 426, at 563-66.

436. *See* KLARMAN, *supra* note 426, at 568-76.

adopted from 1776 through 1784, the dozens of amendments proposed by the ratifying conventions of 1788, and newspapers and pamphlets offering other suggestions, Madison proposed an enormous collection of amendments for the House to “do what they think proper with it.”⁴³⁷ This collection included a version of the assembly clause: “The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances.”⁴³⁸ Madison’s version of the assembly clause was similar to New York and Virginia’s 1788 proposals as well as Massachusetts’s 1780 version—except it omitted a right “to instruct their representatives.”⁴³⁹ Madison did not explain the change, but it was not yet clear that any of his Federalist colleagues really cared about the content of his amendments. One representative tried to explain Madison’s proposal as a consequence of Madison’s being “frightened with the antifederalism of his own state.”⁴⁴⁰

After a month of delay, in July 1789, the House appointed a committee to reframe Madison’s collection of suggestions into a shorter, more manageable list.⁴⁴¹ The version of the assembly clause reported by this committee on July 28 combined it with a free speech clause: “The freedom of speech, and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed.”⁴⁴² When the House turned to this clause on August 15, Representative Theodore Sedgwick of Massachusetts began the debate by moving to “strike out ‘assemble and.’”⁴⁴³

A Federalist representative from Berkshire County, Sedgwick had been the clerk of the county’s convention of 1774 preceding the Continental Congress.⁴⁴⁴ But after 1776, when he served as an appointed judge in Berkshire County amid the anti-court protests there, he became disillusioned with county conventions,

437. CREATING THE BILL OF RIGHTS, *supra* note 429, at 65-69.

438. *Id.* at 12.

439. *See supra* note 432 and accompanying text.

440. CREATING THE BILL OF RIGHTS, *supra* note 429, at 245.

441. *Id.* at 266-68.

442. *Id.* at 154.

443. 1 ANNALS OF CONG. 731 (1789) (Joseph Gales ed., 1834); *see* Letter from Oliver Wolcott, Jr. to Jeremiah Wadsworth (Aug. 15, 1789), *in* 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: 4 MARCH 1789-3 MARCH 1791, at 1328, 1328-29 (Charlene Bangs Bickford et al. eds., 2004).

444. *See* Convention of Berkshire County (July 6, 1774), *in* MASS. PROVINCIAL CONGRESS JOURNALS, *supra* note 30, at 652, 652.

even repudiating his role in helping to organize one.⁴⁴⁵ In 1778, Sedgwick was threatened by an armed mob.⁴⁴⁶ And by the time of Shays's Rebellion, Sedgwick had become such a reactionary that he had to be secreted out of the county for fear of his life.⁴⁴⁷ Nevertheless, after Shays's Rebellion had been suppressed, Sedgwick won an election that was so close that it was not decided until the summer of 1789.⁴⁴⁸

Sedgwick thought the race was close not only because of his opposition to Shays's Rebellion but also because he refused to "publicly declare[] my sentiments in favor of amending the national constitution of government."⁴⁴⁹ Like many Federalists, Sedgwick believed that to amend the Constitution "[b]efore we could be said to have a government . . . argues a frivolity of character very inconsistent with national dignity."⁴⁵⁰ When he arrived in Congress and it began debating what he called the "unpromising subject of amendments," he wrote to his wife that he thought "[t]he introduction of it at this period, of the existence of our government was in my opinion unwise and will not produce those beneficial effects which its advocates predicted."⁴⁵¹

Sedgwick's tactic to bring down the Assembly Clause was to condemn it as redundant of the right to free speech. "If people freely converse together, they must assemble for that purpose," he said; "it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minutiae."⁴⁵² He argued that specifically protecting the right to assemble was as unnecessary as a clause declaring "that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper."⁴⁵³ Such "trifles," he argued, were not in danger from the federal government.⁴⁵⁴

Although Sedgwick did not explicitly invoke Shays's Rebellion in his criticism of the Assembly Clause, Elbridge Gerry of Massachusetts invoked it in response. A devoted ally of Samuel Adams, Gerry had been a delegate to the 1774

445. TAYLOR, *supra* note 346, at 82-83, 93.

446. *Id.* at 94-95.

447. *Id.* at 145-46.

448. See CREATING THE BILL OF RIGHTS, *supra* note 429, at 228-29.

449. *Id.*

450. *Id.* at 283.

451. *Id.*

452. 1 ANNALS OF CONG. 731 (1789) (Joseph Gales ed., 1834) (statement of Rep. Sedgwick).

453. *Id.* at 732.

454. *Id.*

Essex County convention whose Salem elections had been interrupted by Thomas Gage's soldiers.⁴⁵⁵ Now, as a member of the First Congress, Gerry reiterated that the right to assemble was an "essential right," one that had been "inserted in the constitutions of several States."⁴⁵⁶ Ignoring Sedgwick's dismissal of the right as redundant, Gerry responded to what Sedgwick had left unsaid. Although the right to assemble "had been abused in the year 1786 in Massachusetts," Gerry said, "that abuse ought not to operate as an argument against the use of it. The people ought to be secure in the peaceable enjoyment of this privilege, and that can only be done by making a declaration to that effect in the Constitution."⁴⁵⁷

The remaining representatives who entered this debate did focus their responses on Sedgwick's dismissal of the right to assemble as a redundant trifle. John Vining of Delaware explained that "if the thing were harmless, and it would tend to gratify the States that had proposed amendments, he should agree to it."⁴⁵⁸ Thomas Hartley of Pennsylvania and Egbert Benson of New York also supported the amendment.⁴⁵⁹ John Page of Virginia responded to Sedgwick's claim about hats—that protecting the right to assemble was "no more essential than whether a man has a right to wear his hat or not"—by pointing out that "a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions."⁴⁶⁰ After Gerry and Sedgwick spoke again, Sedgwick's motion to strike the Assembly Clause "lost by a considerable majority."⁴⁶¹

That was almost the extent of the House debate over the Assembly Clause—a half-dozen speeches and three thin columns in the *Annals of Congress*.⁴⁶² Yet once this day of debate was published in the newspapers, it dramatically influenced how the Assembly Clause would be interpreted for generations. Ever since that hot and cloudy August morning, most commentators,

455. See Convention of Essex County (Sept. 6-7, 1774), in MASS. PROVINCIAL CONGRESS JOURNALS, *supra* note 30, at 615, 615; *Elbridge Gerry: Representative from Massachusetts*, in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: 4 MARCH 1789-3 MARCH 1791, at 618, 618-24 (Charlene Bangs Bickford et al. eds, 1995); *supra* notes 253-259 and accompanying text.

456. 1 ANNALS OF CONG. 732 (1789) (Joseph Gales ed., 1834).

457. *Id.*

458. *Id.*

459. *Id.* at 731-32.

460. *Id.* at 732 (statement of John Page).

461. *Id.* at 733.

462. *Id.* at 731-33.

judges, and law professors have all relied on the congressional debate as their main source of historical material for interpreting the scope of the Assembly Clause.⁴⁶³

But Sedgwick's motives for seeking to strike out the Assembly Clause likely had less to do with his stated opposition to meaningless protections than to his unstated opposition to the meaningful role of Massachusetts's assembly clause during Shays's Rebellion.⁴⁶⁴ After all, Sedgwick had fled Shays's Rebellion only two years before the House debate. In the meantime, his correspondent George Richards Minot had published his *History of the Insurrection*, in which he specifically described the right to assemble and sought to limit its meaning so as not to apply to the county conventions that had turned violent.⁴⁶⁵ On the advice of one Federalist politician, Minot had even sent his book to members of Congress.⁴⁶⁶ So while Gerry was the only person to raise Shays's Rebellion in response to Sedgwick, he could not have been the only person thinking about it. Indeed, an anonymous author published an essay three days after the House debate to harshly criticize the representatives for advancing the right to assemble despite Shays's Rebellion. Complaining that so-called "peaceable meetings" in 1786 had "prostrated all order and law," the author warned that inserting an assembly clause into the U.S. Constitution would lead local governments to "do acts that amount to open resistance, and your judges cannot punish them. For God's sake, gentlemen, reflect upon the fatal consequences of such declarations."⁴⁶⁷

Supporting this interpretation of how the House likely understood the right to assemble is what the House considered immediately after debating the clause: a motion by Thomas Tudor Tucker of South Carolina to add a declaration that the people should have a right to "instruct their representatives."⁴⁶⁸ In 1774, Tucker had lived in Charleston when its committee of correspondence declared that "[a] Ministerial Parliament has made it unlawful for your neighbours [in Massachusetts] to assemble."⁴⁶⁹ Now, he considered the right to in-

463. See *supra* notes 8-19 and accompanying text.

464. See Pope, *supra* note 22, at 342-44 & n.274 (1990) ("Sedgwick's weak reading is implausible given the historical proximity of strong usage by the American resistance movement and the Shaysites.").

465. See *supra* note 412 and accompanying text.

466. Feer, *supra* note 412, at 227.

467. *To the Representatives of the United States*, DAILY ADVERTISER (N.Y.C.), Aug. 18, 1789, at 2, 2.

468. 1 ANNALS OF CONG. 733 (1789) (Joseph Gales ed., 1834).

469. *To the Inhabitants of the Province of South-Carolina, About to Assemble on the 6th of July (July 4, 1774)*, *supra* note 261, at 510; see Tucker, 9 THE NATIONAL CYCLOPAEDIA OF AMERICAN

struct such a “material part” of the right to assemble that it belonged next to it.⁴⁷⁰ And just as the right to instruct in the Pennsylvania Constitution of 1776 betrayed the influence of a New Englander like Samuel Adams, adding a right to instruct next to the Assembly Clause in the First Amendment only made sense if the right to assemble referred to New England town meetings and the assemblies modeled after them.⁴⁷¹ Perhaps unsurprisingly, Gerry again became the biggest defender of the right of instruction, explaining that it was an illustration of popular sovereignty.

[T]o say the sovereignty vests in the people, and that they have not a right to instruct and control their representatives, is absurd to the last degree. They must either give up their principle, or grant that the people have a right to exercise their sovereignty to control the whole Government, as well as this branch of it.⁴⁷²

Indeed, this close connection between the right of instruction, the right to assemble, and the right to self-government is precisely what led most of the House to oppose adding a right of instruction. As Samuel Livermore of New Hampshire pointed out, “In some States the representatives are chosen by districts. In such case, perhaps, the instructions may be considered as coming from the district; but in other States, each representative is chosen by the whole people.”⁴⁷³ Given the relationship between the right to instruct and the right to assemble, Livermore asked, how would Congress determine which local assembly had the right to instruct?⁴⁷⁴ Livermore thought the right of instruction only worked with “boroughs and [municipal] corporations” that had clearly defined interests, not with amorphous districts that did not reflect local government boundaries. Many other representatives agreed. James Jackson of Georgia said he was “in favor of the right of the people, to assemble and consult for the common good; it had been used in this country as one of the best checks on the British Legislature in their unjustifiable attempts to tax the colonies without their consent.”⁴⁷⁵ But allowing a right of instruction when differ-

BIOGRAPHY 534, 534 (1907); Diana Dru Dowdy, “A School for Stoicism”: Thomas Tudor Tucker and the Republican Age, 96 S.C. HIST. MAG. 102, 105-07 (1995).

470. 1 ANNALS OF CONG. 732 (1789) (Joseph Gales ed., 1834).

471. See *supra* notes 334-335 and accompanying text.

472. 1 ANNALS OF CONG. 737 (1789) (Joseph Gales ed., 1834) (statement of Elbridge Gerry).

473. *Id.* at 742.

474. *Id.*

475. *Id.* at 736.

ent representatives are elected by different types of constituencies “would necessarily drive the House into a number of factions.”⁴⁷⁶

Ultimately, the House voted down Tucker’s proposal to add a right of instruction by a wide margin. And after an unpublished debate on September 4, the Senate voted to preserve much of the House’s language, so that its version declared: “Congress shall make no law, abridging the freedom of Speech or of the Press, or the right of the People peaceably to assemble and consult for their common good, and to petition the Government for a redress of grievances.”⁴⁷⁷ On September 9, the Senate consolidated these clauses with the religion clauses, prohibiting Congress from establishing “articles of faith or a mode of worship, or prohibiting the free exercise of religion.”⁴⁷⁸ And after a conference between House and Senate leaders, the Assembly Clause emerged in its final form: “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Congress’s language was ratified in 1791 as the First Amendment.

III. THE CONSTITUTIONAL RIGHT OF SELF-GOVERNMENT

This Article has so far described how the right to assemble developed and what it could have meant to readers at the time it was first constitutionalized. This descriptive account should be distinguished, however, from the normative or legal question of how a state or federal assembly clause should be interpreted and applied at present.⁴⁷⁹ The remainder of this Article offers a groundwork for further study, offering several suggestions for how the historical context surrounding the first assembly clauses could influence interpretations and applications of the right to assemble in the twenty-first century. But first, it attempts to provide an explanation for why this historical context might be relevant at all.

For judges and legal scholars who subscribe to some version of originalism, an explanation of the present-day relevance of this Article’s historical narrative may not be necessary. Since the 1970s, many scholars and judges have interpreted constitutional text with reference to the perceived original intent of the

476. *Id.*

477. CREATING THE BILL OF RIGHTS, *supra* note 429, at 38 n.12.

478. *Id.* at 38 n.8, 48.

479. See William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 814 (2019) (“Which features of a legal text are relevant is itself a legal question.”).

text's authors.⁴⁸⁰ For these original-intent originalists, the meaning intended by Samuel Adams and other advocates of the right to assemble would go far toward determining or lending authority to what the right should mean today. Even more scholars and judges today say they interpret constitutional text with reference to its "original public meaning," defined as "the meaning the words and phrases of the Constitution would have had, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted."⁴⁸¹ For these original-public-meaning originalists, the meaning of the assembly clauses was "fixed" as soon as they were framed and ratified, and the clauses should therefore be understood today in a manner consistent with how they were publicly understood at the time.⁴⁸²

But many legal historians—not to mention judges and other legal scholars—may be skeptical of efforts to interpret or understand constitutional text in the present as it was interpreted or understood in the past.⁴⁸³ They observe that the historical authors of a text rarely intend one clear meaning—regardless of whether the text is a poem,⁴⁸⁴ a bad joke,⁴⁸⁵ a work of art,⁴⁸⁶ or a constitutional provision. Authors change their minds about how to interpret their own

480. See generally INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (Jack N. Rakove ed., 1990) (collecting various perspectives that debate the historical and normative implications of original-intent jurisprudence); Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1685, 1696–1701 (2012) (describing original-intent originalism as a still-commonly practiced theory of authority in addition to or instead of a theory of interpretation).

481. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1118 (2003).

482. See Lawrence B. Solum, *We Are All Originalists Now*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 4 (2011); see also Thomas Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 729–30 (2011) (distinguishing original-public-meaning originalism from original-expected-application originalism).

483. See, e.g., Jonathan Gienapp, *Constitutional Originalism and History*, PROCESS (Mar. 20, 2017), <http://www.processhistory.org/originalism-history> [<https://perma.cc/CGP3-AHPX>].

484. T.S. ELIOT, *Tradition and the Individual Talent*, in SELECTED ESSAYS, 1917–1932, at 13, 14–15 (1932) (“No poet, no artist of any art, has his complete meaning alone.”); W.K. Wimsatt, Jr. & M.C. Beardsley, *The Intentional Fallacy*, 54 SEWANEE REV. 468, 468–69 (1946) (“[T]he design or intention of the author is neither available nor desirable as a standard for judging the success of a work of literary art, and it seems to us that this is a principle which goes deep into some differences in the history of critical attitudes.”).

485. AARON LAZARE, ON APOLOGY 56–57, 94–96 (2004) (discussing examples of how people apologize for jokes perceived as racist or misogynistic).

486. See Michael Kimmelman, *Revisiting the Revisionists: The Modern, Its Critics, and the Cold War*, in POLLOCK AND AFTER: THE CRITICAL DEBATE 294, 294–95 (Francis Frascina ed., 2d ed. 2000) (discussing the debate over how to interpret abstract expressionism in light of the Cold War context in which the art was produced).

work all the time.⁴⁸⁷ Historians also emphasize that even a generally accepted interpretation of a text's meaning is not the only reasonable interpretation.⁴⁸⁸ The various contexts that supply a given text's possible meanings are so dependent on specific, contingent perspectives that a text's generally accepted meaning at one time and in one location might be incommensurable with how anyone would interpret the same text later or in a different place.⁴⁸⁹ Moreover, assessing whether an interpretation is "generally accepted" requires an implicit analysis of who should count as part of the relevant "general" population: an analysis that necessarily excludes people whose perspectives were suppressed, ignored, or otherwise not saved in historical archives.⁴⁹⁰

Yet these concerns do not mean that knowledge of historical context should play no role in understanding the present, or that any use of history in constitutional interpretation makes one an originalist. Far from it. A primary purpose of history is to denaturalize the present by demonstrating how even the most unchallenged assumptions of our time are the product of chance, choices, and contingent circumstances.⁴⁹¹ "A belief in contingency has as its corollary an obligation to imagine alternatives," historian Richard White has written.⁴⁹² "Considering only what happened is ahistorical, because the past once contained

487. E.D. HIRSCH, JR., *VALIDITY IN INTERPRETATION* 7-8 (1967); see MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 15-16 (2015) (discussing how James Madison revised his notes to the 1787 Constitutional Convention, reflecting his changing interpretation of its meaning).

488. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 134 (4th ed. 2012) (describing how scientific revolutions cause scientists to draw new interpretations out of data with a previously accepted meaning: "The data themselves had changed. That is the last of the senses in which we may want to say that after a revolution scientists work in a different world").

489. Jonathan Gienapp, *Knowing how vs. Knowing that: Navigating the Past*, *PROCESS* (Apr. 4, 2017), <http://www.processhistory.org/gienapp-knowing-how> [<https://perma.cc/H5Z5-SESL>] ("Linguistic meaning is not isomorphic . . . ; it is always embedded in the activities that surround its usage."); cf. THOMAS S. KUHN, *Objectivity, Value Judgment, and Theory Choice*, in *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* 320, 338 (1977) ("Proponents of different theories are, I have claimed, like native speakers of different languages.").

490. See K-Sue Park, *This Land Is Not Our Land*, 87 *U. CHI. L. REV.* 1977, 1982-83 (2020) (challenging legal scholars not only to acknowledge these long-buried histories but also to reconstruct them and learn from them in order to retheorize the law and legal development).

491. See, e.g., JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 4 (2018); Robert Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 98-100, 124-25 (1984).

492. RICHARD WHITE, *RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA* 516 (2011).

larger possibilities, and part of the historian's job is to make those possibilities visible; otherwise all that is left for historians to do is to explain the inevitability of the present."⁴⁹³ Uncovering alternative possibilities is particularly important with respect to texts, whose setting—historical, cultural, authorial—“constrains and delimits the viable interpretations that these texts are able to bear.”⁴⁹⁴ For any text, an appreciation of the context and larger possibilities behind it “does help in understanding it.”⁴⁹⁵

In this respect, even a legal interpreter who rejects originalism would nevertheless benefit from understanding the historical context surrounding a text, the “mischief” that the text's supporters hoped to address,⁴⁹⁶ and the alternative interpretations that were once embraced as reasonable possibilities but have not since been followed because of contingent circumstances. If all texts have a multiplicity of meanings, then historical context can reveal that some of those meanings are today considered outlandish only because they are currently unfamiliar.⁴⁹⁷ “Equipped with a broader sense of possibility,” writes historian Quentin Skinner, “we can stand back from the intellectual commitments we have inherited and ask ourselves in a new spirit of enquiry what we should think of them.”⁴⁹⁸ In other words, understanding how Samuel Adams and others invoked the right to assemble can help us decide whether to keep the right buried in perpetual obscurity. As Thomas Jefferson famously wrote in 1789, “[N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.”⁴⁹⁹

493. *Id.* at 517; see, e.g., MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 12 (2004) (arguing that “a historical perspective” on a deeply embedded normative value “might show us how [that value's] content and relationship to other legal and moral norms are contingent—and, therefore, also subject to change”).

494. NICHOLAS RESCHER, *OBJECTIVITY: THE OBLIGATIONS OF IMPERSONAL REASON* 201 (1997).

495. Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 *HIST. & THEORY* 3, 43, 48 (1969).

496. See Samuel L. Bray, *The Mischief Rule*, 109 *GEO. L.J.* (forthcoming 2021) (manuscript at 5-7, 15-16, 51-52), <https://ssrn.com/abstract=3452037> [<https://perma.cc/DZ56-89WA>].

497. See Quentin Skinner, *Motives, Intentions and the Interpretation of Texts*, 3 *NEW LITERARY HIST.* 393, 404-05 (1972) (arguing that it is relevant to know “what a writer may have meant by what he wrote” and “his intentions in writing,” but that “the recovery of these intentions” and “accept[ing] any statements which the writer himself may make about his own intentions” does not “form the whole of the interpreter's task”).

498. QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* 117 (2012).

499. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON, 27 MARCH 1789 TO 30 NOVEMBER 1789*, at 392, 395-96 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958).

A. *Interpreting the Right to Assemble*

In the centuries since 1789, most interpreters have evaluated the right to assemble with reference to a limited set of sources: the text of the First Amendment;⁵⁰⁰ the brief House debate that preceded its passage;⁵⁰¹ the British statutes and common law that prohibited riots and unlawful assemblies;⁵⁰² and, most influentially of all, the proximity of the Assembly Clause to the Free Speech Clause in the First Amendment's final version.⁵⁰³ Even though the Massachusetts Constitution did not include a free speech clause until 1948, the U.S. Supreme Court and many scholars have long interpreted the First Amendment's Assembly Clause as nothing more than an application of the Free Speech Clause to public gatherings.⁵⁰⁴ As the Court declared in 1945, "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances."⁵⁰⁵

500. See INAZU, *supra* note 5, at 21; Abu El-Haj, *supra* note 3, at 579-80; Bhagwat, *supra* note 3, at 991-92; Brod, *supra* note 2, at 173-76; Inazu, *supra* note 1, at 575-76; Jarrett & Mund, *supra* note 11, at 3.

501. Jarrett and Mund and Brod have all inferred an incredible amount of meaning out of John Page's reply to Theodore Sedgwick's comment that protecting the right to assemble is as unnecessary as protecting the right of a man to wear his hat. Jarrett and Mund suggest that Page was referring to William Tell, who, according to Swiss legend, was arrested for failing to bow to an Austrian official's hat. Jarrett & Mund, *supra* note 11, at 1; see FRIEDRICH SCHILLER, WILLIAM TELL 66-67 (Providence, B. Cranston & Co. 1838). Brod claims instead that "[m]ost citizens would have recognized [Page's] statement as a reference to the trial of William Penn, a Quaker widely known throughout England and the American colonies as having been charged with engaging in an unlawful assembly when he delivered a sermon to Quakers on a London street." Brod, *supra* note 2, at 174; see also Inazu, *supra* note 1, at 575-76 ("Page was referring to the trial of William Penn."). Neither inference is obvious. But as Brod concedes, even if Page's meaning were clear, "one isolated exchange about the Assembly Clause can hardly serve as the lynchpin for how that right ought to be understood." Brod, *supra* note 2, at 174.

502. See THE COMPLETE BILL OF RIGHTS 252-61 (Neil H. Cogan ed., 2d ed. 2015); 5 THE FOUNDERS' CONSTITUTION 186-88 (Philip B. Kurland & Ralph Lerner eds., 1987); Jarrett & Mund, *supra* note 11, at 2-3. *But see* Pope, *supra* note 22, at 330 n.185 ("Those who argue that the right was recognized in English law rely not on any explicit declarations What existed in England might be better described as the *potential* for an affirmative right of assembly to be implied from existing law.").

503. See *Thomas v. Collins*, 323 U.S. 516, 530 (1945); Jarrett & Mund, *supra* note 11, at 2-3.

504. See, e.g., LEO PFEFFER, THE LIBERTIES OF AN AMERICAN: THE SUPREME COURT SPEAKS 111 (1956).

505. *Thomas*, 323 U.S. at 530.

But this assumption is incorrect. It *was* by accident or coincidence that the Assembly Clause was coupled in a single guarantee with the Free Speech and Free Press Clauses. Indeed, in the two centuries after Congress proposed the First Amendment, nearly every state also adopted its own assembly clause, and only five followed the First Amendment's structure by coupling the right to assemble with a right of speech or of the press.⁵⁰⁶ The rest followed the models of the first *state* assembly clauses, coupling the right to assemble with other provisions "declaratory of the general principles of republican government."⁵⁰⁷

What these forty-seven state assembly clauses hint at is something that the historical origins of the right to assemble reveal: a central purpose of protecting the right to assemble was to protect self-government, not expression alone. When Samuel Adams and his correspondents inscribed the right to assemble into the first continental bill of rights and four of the first state constitutions, they were constitutionalizing the right of the people to "take[] the powers of government into their hands."⁵⁰⁸ John Adams thought it was no coincidence that this right emerged in a place, colonial Massachusetts, that had such a long history of town meetings. But the right to assemble quickly grew out of its New England origins, spreading south and then west to communities that had no history of town meetings. The adoption of the right to assemble by the Continental Congress, counties in Virginia, the North Carolina provincial congress, and the ratifiers of the First Amendment can be understood as a generalization of this regional practice into an ideal form of government, one premised on the literal assembly of constituents to deliberate and legislate on their own behalf.

In each context, the right to assemble was invoked as *a right to meaningfully participate in enacting needed legislation*, whether directly, by representative, or by the threat of coercive behavior. Samuel Adams, for example, explained that he was campaigning on behalf of the "fundamental right . . . that every man shall

506. See HAW. CONST. of 1959, art. I, § 3 (now § 4); R.I. CONST. of 1986, art. I, § 21; S.C. CONST. of 1895, art. I, § 4, *in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 3307, 3307; UTAH CONST. of 1895, art. I, § 1, *in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 3700, 3702; VA. CONST. of 1971, art. I, § 12. Maryland, Minnesota, and New Mexico never adopted an assembly clause. See sources cited *supra* note 20.

507. COOLEY, *supra* note 9, at 35; see, e.g., IDAHO CONST. of 1890, art. I, § 10, *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 918, 919; IND. CONST. of 1816, art. I, § 19, *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1057, 1059; KAN. CONST. of 1855, art. I, § 3, *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1179, 1179.

508. HUTCHINSON, *supra* note 152, at 439.

be present in the body which legislates for him.”⁵⁰⁹ John Adams added that formal and informal assemblies were not merely places where people could dissent from other governments, but where everyone had a voice in deliberating over how to solve their community’s problems.⁵¹⁰ Because New England towns were “vested with Powers to assemble frequently, deliberate, debate and act, upon many Affairs,” Adams observed that they introduced “universal Knowledge among the People, and inspire[d] them, with a conscious Dignity,” to appreciate the rule “of Laws and not of Men.”⁵¹¹ Historically, any resident of a Massachusetts town, “whether Inhabitant or fforreiner [sic], free or not free,” had the right to propose legislation and advance their own perspective.⁵¹² As a consequence, even people with no formal right to the franchise nevertheless could become active participants in the governments that legislated for them.⁵¹³

This norm of meaningful participation in the governments that affected them was almost the opposite of the colonists’ relationship with Parliament. Where all people in Massachusetts had a formal right to participate in some form in local assemblies, Parliament was formally and geographically distant. Colonial activists “perfectly kn[ew] *how much* their grievances would be regarded, if they had *no other* method of engaging attention, than by *complaining*.”⁵¹⁴ Accordingly, they argued that it was only through their general and local assemblies that they could exercise their right “to determine upon & prosecute to Effect the Methods which ought to be taken for the Redress of our intollerable Grievances.”⁵¹⁵

When British officials prorogued, dissolved, and attempted to preempt these general and local assemblies, the Adams correspondents responded that there was a minimum baseline of authority that all people must be able to exercise through their government: “the free exercise of the powers of legislation” without having to “act[] in conformity to the will of another body” in which

509. Letter from the Massachusetts House of Representatives to Dennys de Berdt (Jan. 12, 1768), *supra* note 127, at 147.

510. See Letter from John Adams to the Abbé de Mably (1782), *supra* note 47, at 495.

511. Letter from John Adams to William Hooper (Mar. 27, 1776), *supra* note 308, at 74, 77.

512. See A Coppie of the Liberties of the Massachusets Collonie in New England, *supra* note 53, at 218.

513. See *supra* note 54 and accompanying text.

514. DICKINSON, *Letter IX*, *supra* note 38, at 85 (emphasis added).

515. Letter from Samuel Adams to Arthur Lee (Nov. 3, 1772), *supra* note 186, at 344; see Letter from the Massachusetts House of Representatives to Dennys de Berdt (Jan. 12, 1768), *supra* note 127, at 151.

they could not meaningfully participate.⁵¹⁶ They then turned to alternative informal conventions on the theory that they had an inalienable right “to convene and consult together, on the most prudent and constitutional measures for the redress of their grievances,” regardless of what formal institutions were available.⁵¹⁷ And they used these informal assemblies to exercise coercive power as leverage to ensure that their petitions to Parliament and the royal governors would be taken seriously.⁵¹⁸

The Adams correspondents repeated again and again that they understood the right to assemble as the right to use government to solve their problems. It included the power “to meet together, either in the manner the law has prescribed, or in any other orderly manner, Jointly to consult the necessary means of their own Preservation and safety”⁵¹⁹ – even in the face of arguments that it was unlawful “for the Inhabitants of Towns, in their Corporate Capacity, to meet and determine upon Points which the Law gives them no Power to act upon.”⁵²⁰ The right to assemble, as they understood it, included the power to “carry their votes and resolutions into execution, at the risque of their lives and property”⁵²¹ – whether through marches, effigies, boycotts, committees of correspondence, or throwing tea into the harbor. In sum, it included the power “to consult together concerning the best methods to obtain redress of our afflicting grievances, having accordingly assembled,”⁵²² to “exert every Power with which the Constitution hath entrusted them to check the Abuse . . . and redress the Grievance,”⁵²³ “to consult upon common grievances, . . . and use every legal method for their removal,”⁵²⁴ and “to unite in the most effectual Means for the

516. Letter from the Massachusetts House of Representatives to Dennys de Berdt (Jan. 12, 1768), *supra* note 127, at 147.

517. Adams, *supra* note 171, at 299.

518. See, e.g., BOSTON TOWN RECORDS, 1758-1769, *supra* note 59, at 263.

519. BOSTON TOWN RECORDS, 1770-1777, *supra* note 37, at 122.

520. Thomas Hutchinson, Closing Speech of the Session (Mar. 6, 1773), *supra* note 191, at 117.

521. Proceedings of the Town of Boston (Nov. 29-30, 1773), *supra* note 209, at 330.

522. Letter to the Inhabitants of Quebec, in 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 21, at 104, 105-06 (within the proceedings of October 26, 1774).

523. Letter from the Massachusetts House of Representatives to Thomas Hutchinson (July 31, 1770), in 47 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1770-1771, *supra* note 174, at 63, 68; see also BOSTON TOWN RECORDS, 1770-1777, *supra* note 37, at 120-23 (asserting the right of the people to assemble “to withstand a most dangerous attack of Arbitrary power”).

524. See Convention of Middlesex County (Aug. 30-31, 1774), *supra* note 30, at 609, 612 (emphasis added); see also *id.* at 609, 611 (describing the urgent need to defend against the Parliament’s abuse of power).

obtaining a Redress of their Grievances[,] . . . the Tranquility and good Order of the Government, and . . . the Safety and Welfare of the People.”⁵²⁵

Although the right to assemble began as a literal description of constituents assembling in town meetings, the Adams correspondents also translated the right into a description of an ideal *representative* government as well. For example, in his 1776 letters that he published as *Thoughts on Government*, John Adams argued that the ideal government was one in which everyone could literally assemble.⁵²⁶ But he recognized that “[i]n a Community consisting of large Numbers, inhabiting an extensive Country, it is not possible that the whole Should assemble, to make Laws.”⁵²⁷ He therefore justified representative government as “[t]he most natural Substitute for an Assembly of the whole,” one that should be “in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them.”⁵²⁸ From his perspective, the ideal central government was proportionally representative: “it should be an equal representation, or, in other words, equal interest among the people should have equal interest in it.”⁵²⁹ At the national level, other defenders of the right to assemble agreed that any federal “house of assembly, which is intended as a representation of the people of America,” must be a “true likeness of the people.”⁵³⁰

Invoking the right to assemble in the context of overlapping, representative governments generated tension when those governments disagreed with one another about what kinds of legislation to enact. After the adoption of the Massachusetts Constitution of 1780, for instance, Shaysites invoked the state’s assembly clause to justify their assertion of power through informal county conventions, scorning the state legislature in Boston as if it were Parliament. Adams and his allies responded that the assembly clause “extended only to town meetings which are known to the laws,” through which the Shaysites

525. Letter from the Massachusetts House of Representatives to Thomas Hutchinson (Feb. 5, 1774), in 50 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1773-1774, *supra* note 233, at 129, 130-31; *see also* MASS. PROVINCIAL CONGRESS JOURNALS, *supra* note 30, at 5, 6 (describing, in the resolutions adopted at Salem on October 7, 1774, preventions of the right to assemble as “unconstitutional”).

526. *See supra* notes 306-309 and accompanying text.

527. Letter from John Adams to John Penn (Mar. 27, 1776), *supra* note 307, at 80.

528. ADAMS, *supra* note 306, at 9-10.

529. *Id.*

530. Brutus III, *supra* note 427, at 122; *see also* THE FEDERALIST NO. 62, at 416 (James Madison) (Jacob E. Cooke ed., 1961) (defending the House of Representatives as embodying the theory that “among a people thoroughly incorporated into one nation, every district ought to have a *proportional* share in the government”); *cf.* THE FEDERALIST NO. 22, at 138-39 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (similar).

could elect representatives to the state legislature they opposed.⁵³¹ Because the Shaysites could meaningfully participate in the state legislature, Adams's allies insisted, there was no need to invoke the assembly clause to justify extraconstitutional assemblies. They thought such assemblies should be reserved for "where the legislative or executive powers of the State have been evidently and notoriously applied to unconstitutional purposes, and no constitutional means of redress remains."⁵³²

Yet any tension between the Shaysites and Adams over the meaning of the right to assemble can be reconciled as a question of application and not interpretation. Both sides appeared to agree that the assembly clause protected the basic right of all people to govern themselves by meaningfully participating in the assemblies that legislated for them. Their disagreement was over whether the Shaysites could, in fact, meaningfully participate in the state legislature, or whether their best option for passing the legislation they needed was to exercise coercive leverage elsewhere. As it happened, both sides may have been correct. Within a year of their uprising, dozens of towns that had previously failed to elect state legislators were inspired to do so for the first time.⁵³³ After the legislature became what historian Pauline Maier calls "a more genuinely representative body," it adopted conciliatory legislation that addressed the Shaysites' initial concerns.⁵³⁴

Decades later, when Massachusetts's highest court first interpreted the commonwealth's assembly clause, it did so in light of this right of all people to participate meaningfully in the direct and representative democracies that legislated on their behalf. In *Commonwealth v. Porter*,⁵³⁵ an 1854 decision, Chief Justice Lemuel Shaw explained that the assembly clause was the foundation for the "extended and almost unlimited rights of suffrage, secured to the people of this commonwealth by the constitution and laws," because it provides "the means of exercising a sound and enlightened judgment in regard to public men and political measures."⁵³⁶ In *Wheelock v. City of Lowell*,⁵³⁷ decided in 1907, the court further explained that the assembly clause embodied "the historic significance and patriotic influence of the public meetings held in all the towns of

531. MINOT, *supra* note 40, at 25.

532. PAIGE, *supra* note 189, at 167.

533. See PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788*, at 16-17 (2010).

534. *Id.*

535. 67 Mass. (1 Gray) 476 (1854).

536. *Id.* at 478.

537. 81 N.E. 977 (Mass. 1907).

Massachusetts before and during the Revolution,” and that “a vital appreciation of the importance of the opportunity to exercise the right still survives.”⁵³⁸ And in a 1918 decision, the court cited *Wheelock* to observe that “[e]ach qualified inhabitant of the town has an indisputable right to vote upon every question presented, as well as to discuss it.”⁵³⁹ The court added, “This form of local government was the fibre of our institutions when the Constitution was adopted. . . . The public spirit in Massachusetts which led to the opening battles of the Revolution was nurtured and promoted in large measure by the deliberations and votes in the various town meetings.”⁵⁴⁰

For all of these invocations of town meetings in Massachusetts, however, it is significant that the first states to adopt an assembly clause—Pennsylvania and North Carolina—had no such history of town meetings.⁵⁴¹ In fact, few states outside of New England have ever employed town meetings as Massachusetts had. Instead, as one historian has observed, “[i]n the Revolutionary epoch, New England’s methods for collecting public opinion were widely copied throughout the colonies. In the southern and middle colonies, the counties, parishes, and towns very generally began the practice of voting instructions for their representatives.”⁵⁴² In Pennsylvania, North Carolina, and elsewhere, activists also invoked the right to assemble after creating extraconstitutional provincial congresses to replace unrepresentative or disempowered colonial assemblies. As defenders of North Carolina’s provincial congress explained, “the right of assembling is . . . undoubted” because the power of any government comes from “the people,” and “it is only [by] a meeting of the people, that their sense respecting [any method of redressing grievances] can be obtained.”⁵⁴³

North Carolina’s example was an early illustration of what would become a nationwide pattern. Over the next century, when new states joined the Union and existing states amended their original constitutions, they often copied the first state assembly clauses word for word.⁵⁴⁴ One group of states, led by Pennsylvania’s 1776 assembly clause, coupled the “right to assemble together” with

538. *Id.* at 979.

539. *In re Op. of the Justices*, 119 N.E. 778, 781 (Mass. 1918).

540. *Id.* (citing *Wheelock*, 81 N.E. at 977).

541. See *supra* notes 153, 199–200 and accompanying text.

542. Colegrove, *supra* note 23, at 442.

543. See Letter from the North Carolina General Assembly to Josiah Martin (Apr. 7, 1775), *supra* note 293, at 263, 264.

544. See Colegrove, *supra* note 23, at 443 (discussing the right to instruct).

the right to consult, to instruct, and to petition.⁵⁴⁵ A second group, led by Massachusetts's 1780 assembly clause, modified the Pennsylvania clause by specifying the rights must be exercised in a "peaceable" manner.⁵⁴⁶ A third group, led by Kentucky's 1792 assembly clause, modified the Massachusetts clause by protecting "citizens" and omitting a right to instruct.⁵⁴⁷ A fourth group, led by Tennessee's 1796 assembly clause, modified the Massachusetts clause by protecting "citizens" and keeping a right to instruct.⁵⁴⁸ A fifth group, led by Missouri's 1820 assembly clause, modified the Massachusetts clause by omitting a right to instruct.⁵⁴⁹ A sixth group, led by New Jersey's 1844 assembly clause,

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545. PA. CONST. of 1776, declaration of rights, § XVI, *in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 3081, 3084 (now art. I, § 20); *see* CAL. CONST. of 1849, art. I, § 10, *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 391, 392 (now § 3(a)); MICH. CONST. of 1835, art. I, § 20, *in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1930, 1932; NEV. CONST. of 1864, art. I, § 10, *in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 2401, 2403; N.C. CONST. of 1776, declaration of rights, art. XVIII, *in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 2787, 2788 (now art. I, § 12); VT. CONST. of 1793, ch. I, art. 20, *in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 3762, 3764.
546. MASS. CONST. of 1780, pt. 1, art. XIX, *in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1888, 1892; *see* IDAHO CONST. of 1889, art. I, § 10, *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 918, 919; IND. CONST. of 1816, art. I, § 19, *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1057, 1059; KAN. CONST. of 1855, art. I, § 3, *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1179, 1179; ME. CONST. of 1819, art. I, § 15, *in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1646, 1648; OR. CONST. of 1859, art. I, § 27, *in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 2998, 3000; W. VA. CONST. of 1872, art. III, § 16, *in* 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 4033, 4037.
547. KY. CONST. of 1792, art. XII, § 22, *in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1264, 1275; *see* ALA. CONST. of 1819, art. I, § 22, *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 96, 98; CONN. CONST. of 1818, art. I, § 16, *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 536, 538 (now § 14); DEL. CONST. of 1792, art. I, § 16, *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 568, 570; MISS. CONST. of 1817, art. I, § 22, *in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 2032, 2034; N.D. CONST. of 1889, art. I, § 10, *in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 2854, 2855; R.I. CONST. of 1842, art. I, § 21, *in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 3222, 3224 (free speech clause added in 1986); TEX. CONST. of 1845, art. I, § 19, *in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 3547, 3549.
548. TENN. CONST. of 1796, art. XI, § 22, *in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 3414, 3423 (now art. I, § 23); *see* ARK. CONST. of 1836, art. II, § 20, *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 268, 270.
549. MO. CONST. of 1820, art. XIII, § 3, *in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 2150, 2163; *see* ARIZ. CONST. of 1912, art. II, § 5; COLO. CONST. of 1876, art. II, § 24, *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 474, 477; FLA. CONST. of 1838, art. I, § 20, *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 664, 665-66 (now § 5); MONT. CONST. of 1889, art. III, § 26, *in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 2300, 2304; NEB. CONST. of 1867, art. I, § 4, *in* 4 FEDERAL AND STATE CONSTITUTIONS,

modified the Massachusetts clause by replacing the right to instruct with a right “to make known their opinions to their representatives.”⁵⁵⁰ And finally, a seventh group, led by Georgia’s 1865 assembly clause, modified the Massachusetts clause by omitting a right to consult or to instruct.⁵⁵¹

As is common practice in state constitutional law, interpreters of these state constitutions have often looked to the legislative histories of the states whose constitutional provisions were copied.⁵⁵² This notably occurred in 2005, when an appellate court in Oregon considered the meaning of Oregon’s 1859 assembly clause.⁵⁵³ Finding no specific discussion of the right to assemble in Oregon’s constitutional convention, the court did determine that the Indiana Constitution “served as a model for Oregon’s.”⁵⁵⁴ Seeing that Indiana also copied its assembly clause from other constitutions without debate, the court next turned to broader historical circumstances to “trace the ‘bloodline’ of Oregon’s assembly clause to predecessors that predate the Indiana Constitution.”⁵⁵⁵ The court then observed that the most “useful starting point for appreciating the significance of the right of assembly is eighteenth-century Massachusetts, where town assemblies served a vital role in government, and where British attempts to suppress assemblies would contribute to the declaration and preservation of assembly rights across the young nation.”⁵⁵⁶ After quickly summarizing John Adams’s description of town meetings, the Massachusetts Government Act, and the 1774 Declaration of Rights, the court concluded that “the drafters of the

supra note 20, at 2349, 2349; OKLA. CONST. of 1907, art. II, § 3; S.C. CONST. of 1868, art. I, § 6, *in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 3281, 3282 (now § 2 with free speech clause); WASH. CONST. of 1889, art. I, § 4, *in* 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 3973, 3973.

550. N.J. CONST. of 1844, art. I, § 18, *in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 2599, 2600; *see* ILL. CONST. of 1870, art. II, § 17, *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1013, 1015 (now § 5); IOWA CONST. of 1846, art. I, § 20, *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1123, 1125; S.D. CONST. of 1889, art. VI, § 4, *in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 3357, 3370; WYO. CONST. of 1889, art. I, § 21, *in* 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 4117, 4119.

551. GA. CONST. of 1865, art. I, § 7, *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 809, 810 (now § 9); *see* ALASKA CONST. of 1959, art. I, § 6; LA. CONST. of 1868, bill of rights, art. 5, *in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1449, 1449 (now art. I, § 9); N.Y. CONST. of 1846, art. I, § 10, *in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 2653, 2654 (now § 9).

552. *See, e.g.*, Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857—Part I*, 37 WILLAMETTE L. REV. 469, 483-85, 492-94 (2001).

553. *Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 121 P.3d 671, 679 (Or. Ct. App. 2005).

554. *Id.*

555. *Id.* at 679-80.

556. *Id.* at 680.

earliest state constitutions labored under the recent memory of British attempts to suppress town meetings and assert control over representative governments. It is not difficult to infer that those actions figured prominently in colonists' decisions to safeguard the right to assemble."⁵⁵⁷

The Oregon court's takeaway from this tantalizing discussion was the modest conclusion that Oregon's assembly clause protects political assemblies and not a "purely social assembly."⁵⁵⁸ Yet its brief account of the right to assemble is one of only a handful of articles and judicial opinions in the past century to investigate, however fleetingly, why the first assembly clauses were introduced.⁵⁵⁹ In providing a detailed account of the same narrative sketched by the Oregon court, this Article confirms the court's basic intuition that the right to assemble developed as a reaction to British attempts to suppress and control colonial America's local and general assemblies. The Article adds that the right to assemble was invoked not only because the literal act of assembling to discuss politics was important, but also because assemblies were the means by which the colonists governed themselves. This Article interprets this constitutional right of self-government as a right to meaningfully participate in enacting needed legislation, whether directly, by representative, or by the threat of coercive behavior. Although this thesis goes well beyond the Oregon court's humble interpretation, the Oregon decision provides an illustration of how the historical context surrounding the first assembly clauses offers a critical insight into how to interpret and apply the dozens of assembly clauses that remain across the country.

B. Applying the Right to Assemble

Whether an interpreter adopts the perspective of an originalist or a legal historian, there are several contexts in which the state and federal assembly clauses could today be applied to protect a right to meaningfully participate in enacting needed legislation. What follows are brief suggestions for further study about the consequences and normative issues surrounding such an interpretation.

1. *Universal participation.* The most immediate context in which such a right might apply is with laws that make it difficult for a person to meaningfully participate in a direct or representative government. The right to assemble developed in an environment in which there was a formally protected tradition of

557. *Id.* at 680-81.

558. *Lahmann*, 121 P.3d at 682.

559. *See supra* notes 22-26 and accompanying text.

empowering all people—“whether Inhabitant or fforreiner, free or not free”—to participate in the assemblies that legislated on their behalf.⁵⁶⁰ Although most people in colonial Massachusetts were allowed to participate in town meetings only by debating and proposing legislation, voting is the principal method today by which Americans meaningfully participate in any government, from local assemblies to Congress. Just as the Adams correspondents invoked the right to assemble to demand a right to meaningfully participate in political decisions that affected them, it would be reasonable to interpret state and federal assembly clauses to guarantee a similarly meaningful ability to participate in the political process. Such an interpretation would be consistent with defenses of judicial review that emphasize the judiciary’s role in ensuring that the political process does not systematically deny political minorities from influencing legislation.⁵⁶¹

In this spirit, an assembly clause might provide a basis for a legislature or court to reevaluate laws that burden or fail to provide affirmatively access to political participation. There are many groups of people whose relationship to governing assemblies are directly analogous to the relationship between American colonists and Parliament, including incarcerated people, unregistered voters, children, noncitizens, and even nonresidents. When these groups are taxed or regulated by assemblies in which they are not represented, there is a similar harm as that which animated the Adams correspondents.⁵⁶² Many cities and states across the country have already extended voting rights to these and other disenfranchised groups on the theory that all people who are taxed and regulated by a government have a right to participate in setting its policy.⁵⁶³ State courts might also invoke state assembly clauses to look more skeptically at disenfranchising laws that have survived scrutiny under the Equal Protection Clause, including voter ID laws,⁵⁶⁴ modern poll taxes,⁵⁶⁵ burdensome voter-

560. See *supra* notes 53-54 and accompanying text.

561. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 73-104 (1980).

562. See, e.g., *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 86 (1978) (Brennan, J., dissenting) (describing how geographical residency requirements can be “entirely arbitrary” when a legislature can exercise its police jurisdiction over nonresidents); *Evans v. Cornman*, 398 U.S. 419, 422-23 (1970) (extending the franchise to ensure that people who are “interested in or affected by electoral decisions have a voice in making them”).

563. See, e.g., HAYDUCK, *supra* note 43, at 1-6; KEYSSAR, *supra* note 43, at 308-11; Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 *GEO. WASH. L. REV.* 1039, 1086-88 (2017); Cristina M. Rodríguez, *Noncitizen Voting and the Extraconstitutional Construction of the Polity*, 8 *INT’L J. CONST. L.* 30, 38 (2010).

564. See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

565. See, e.g., *Jones v. Governor of Florida*, 975 F.3d 1016 (11th Cir. 2020).

registration requirements,⁵⁶⁶ and the many other laws passed in the wake of the Supreme Court’s 2013 decision in *Shelby County v. Holder*.⁵⁶⁷

Outside the context of voting, the historical context surrounding the right to assemble also provides support for the way the Federal Assembly Clause has been interpreted since the twentieth century. To the extent the clause has been invoked at all, it has generally been used to provide constitutional protection for marches, protests, picket lines, and other expressive gatherings whose goal is to build and exercise political power outside of formal governmental institutions.⁵⁶⁸ These gatherings appear analogous to the committees of correspondence, conventions, rallies, and other informal assemblies that the Adams correspondents defended when they were excluded from formal political participation. And just as the Adams correspondents turned to informal assemblies not only to dissent but also to govern, the right to assemble has also been invoked to support a more vigorous right of union representation in corporate governments.⁵⁶⁹ The federal and state assembly clauses might be interpreted further to empower unions to exercise coercive power, such as strikes or secondary boycotts, in order to gain leverage and ensure that worker participation is meaningful.

2. *Tribes and territories.* When the Adams correspondents first invoked the right to assemble in the 1760s, it was as an argument against the preemptive laws of a supreme legislature, Parliament, in which colonists were unrepresented. Today, almost the identical situation exists between Congress and the residents of territories and the District of Columbia—for whom “[r]epresentation is not made the foundation of taxation.”⁵⁷⁰ Although members of federally recognized Indian tribes can presently vote for members of Congress, tribes are formally unrepresented in the Senate even though Congress can exercise far more authority over tribal governments than it can exercise over a state gov-

566. See, e.g., *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020).

567. 570 U.S. 529 (2013).

568. See INAZU, *supra* note 5, at 20–117 (summarizing the history and doctrine of the right of assembly since 1789).

569. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 512 (1939); see also Nikolas Bowie, *Corporate Personhood v. Corporate Statehood*, 132 HARV. L. REV. 2009, 2035–40 (2019) (reviewing ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESS WON THEIR CIVIL RIGHTS* (2018)) (discussing the history of the labor movement treating corporations as forms of government subject to the same democratic norms as states).

570. *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 320 (1820).

ernment protected by principles of federalism.⁵⁷¹ The same is true in territories and the District of Columbia, whose governments are subject to Congress's plenary oversight.⁵⁷²

Residents of tribes, territories, or the District of Columbia might all reasonably invoke the federal right to assemble as part of a demand for formal representation in the legislature that affects them. In light of their lack of complete representation in Congress, they also might invoke the right to assemble as a constitutional limit on federal legislation that preempts their own ability to govern themselves.⁵⁷³ This sort of preemptive legislation is exactly the sort of colonial legislation that the Adams correspondents most opposed. The historical context of the right to assemble therefore might provide a creative yet directly applicable theory for expanding representation and federalism protections to the millions of Americans who currently lack both.⁵⁷⁴

3. *Proportional representation.* To meaningfully participate in government today, it is often not enough for a person to have the formal right to the franchise. Their vote must also be *effective*. As the Supreme Court explained in establishing the principle of one person, one vote, “representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies.”⁵⁷⁵ For that reason, the Court has required “that each citizen have an equally effective voice in the election of members of his state legislature,” because “the right

571. Compare, e.g., *Talton v. Mayes*, 163 U.S. 376, 382 (1896) (discussing the “paramount authority of congress” with respect to tribal governments), with *Coyle v. Smith*, 221 U.S. 559 (1911) (discussing the limited authority of Congress with respect to state governments).

572. See, e.g., *Palmore v. United States*, 411 U.S. 389 (1973); *Dorr v. United States*, 195 U.S. 138 (1904).

573. See, e.g., Joint Resolution Approving the Constitution of the Commonwealth of Puerto Rico Which Was Adopted by the People of Puerto Rico on March 3, 1952, Pub. L. No. 82-447, 66 Stat. 327 (1952) (ratifying the Puerto Rico Constitution with limits unilaterally imposed by Congress); *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938 (2016) (preempting Puerto Rico’s municipal bankruptcy law); Michael Isikoff & Eric Pianin, *Lopsided House Vote Overturns District’s Sexual Reform Law*, WASH. POST (Oct. 2, 1981), <https://www.washingtonpost.com/archive/politics/1981/10/02/lopsided-house-vote-overturns-districts-sexual-reform-law/5e364083-c1bb-46fa-a9f5-69b8bcfe6b37> [https://perma.cc/E7PE-2MND] (describing the House of Representatives’ decision to overturn an ordinance passed by the D.C. Council).

574. *Cf. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1658 (2020) (“The Constitution envisions a federalist structure, with the National Government exercising limited federal power and other, local governments—usually state governments—exercising more expansive power.”).

575. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."⁵⁷⁶

The right to assemble reinforces this "right to full and effective participation," adding the crucial insight that such a right might depend not only on a person's ability to cast a *vote*, but also for their interests to be meaningfully *represented*. The Adams correspondents "perfectly kn[ew] *how much* their grievances would be regarded, if they had *no other* method of engaging attention, than by *complaining*."⁵⁷⁷ Rather, for their participation in a representative assembly to matter, they had to have some way to ensure that their participation would not be simply ignored. John Adams and other supporters of the right to assemble repeatedly emphasized that a representative assembly is a normatively justifiable alternative to direct democracy only to the extent that it is, "in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them."⁵⁷⁸ This is an early articulation of the theory of proportional representation, the idea that "the right to vote is the right to cast an effective vote," and this right can be realized "only through an election system in which the majority or plurality does not win all of the representation, but only its appropriate share, while minorities, whether demographic or political, are not forced to waste their votes, but have the opportunity to elect their share of representatives."⁵⁷⁹ Advocates of proportional representation argue that normatively just electoral systems should "make it difficult for minority voices to be ignored at key points in the political process."⁵⁸⁰

The intuition that representative government is consistent with the right to assemble only if it is proportionally representative continues to animate challenges to laws that make it difficult for individuals or communities to represent their perspectives in the legislature.⁵⁸¹ Claims of a constitutional interest in proportional representation, for example, fueled several partisan-gerrymandering challenges that reached the Supreme Court, culminating in its

576. *Id.* at 555, 565.

577. DICKINSON, *Letter IX*, *supra* note 38, at 85 (emphasis added).

578. ADAMS, *supra* note 306, at 9-10.

579. KATHLEEN L. BARBER, *A RIGHT TO REPRESENTATION: PROPORTIONAL ELECTION SYSTEMS FOR THE TWENTY-FIRST CENTURY*, at xii-xiii (2000).

580. SHAUN BOWLER, TODD DONOVAN & DAVID BROCKINGTON, *ELECTORAL REFORM AND MINORITY REPRESENTATION: LOCAL EXPERIMENTS WITH ALTERNATIVE ELECTIONS* 4 (2003); *see, e.g.*, GUINIER, *supra* note 45, at 105-08 (1995); HERTZBERG, *supra* note 45, at 485-87, 495-507.

581. *See, e.g.*, GUINIER, *supra* note 45, at 105-08 (1995); HERTZBERG, *supra* note 45, at 485-87, 495-507.

2019 decision in *Rucho v. Common Cause*.⁵⁸² In that decision, Chief Justice Roberts rejected the argument “that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be,” asserting that “[t]he Founders certainly did not think proportional representation was required.”⁵⁸³ Yet shortly after *Rucho*, a court in North Carolina enjoined a partisan gerrymander of the state’s electoral districts in part because it violated the right to assemble. “[A] legislature that engages in extreme partisan gerrymandering burdens . . . the right of the people of our State to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances,” it declared.⁵⁸⁴ Other states might turn to their assembly clauses to provide similar protections.

4. *Local governments.* Considering the forty-seven state assembly clauses, residents of local governments—or the local governments themselves—might also reasonably invoke the right to assemble as a source of authority to legislate on their constituents’ behalf, particularly in contexts where states and other governments have been unresponsive or unable to redress their constituents’ grievances. Beginning in the 1630s, town meetings in Massachusetts exercised the power to pass virtually any legislation their residents thought necessary—a “continued practice and custome” that the General Assembly in Boston codified by legislation.⁵⁸⁵ Samuel and John Adams praised the right of towns to enact all “the necessary means of their own Preservation and safety” as embodying the right to assemble.⁵⁸⁶ By 1786, when opponents of Shays’s Rebellion also equated the right to assemble with town meetings,⁵⁸⁷ state law continued to declare that residents had a right to assemble in town meetings; to elect, instruct, and petition representatives; to “grant and vote such sum or sums of money, as they shall judge necessary for the settlement, maintenance and support of the ministry, schools, the poor, and other necessary charges”; and “to make and agree upon such necessary rules, orders and by-laws, for the direct-

582. 139 S. Ct. 2484 (2019); see, e.g., *Davis v. Bandemer*, 478 U.S. 109, 146 (1986) (O’Connor, J., concurring) (listing partisan-gerrymandering cases).

583. *Rucho*, 139 S. Ct. at 2499.

584. *Harper v. Lewis*, No. 19-CVS-012667, 2019 N.C. Super. LEXIS 122, at *13-14 (Oct. 28, 2019) (order granting preliminary injunction).

585. An Act for Regulating of Townships, Choice of Town Officers, and Setting Forth Their Power, ch. 28, § 3, 1692 Mass. Acts 64, 65 *passim*.

586. BOSTON TOWN RECORDS, 1770-1777, *supra* note 37, at 122 (statement of Samuel Adams); Letter from John Adams to Edmé Jacques Genet (May 28, 1780), *supra* note 376, at 351-52.

587. See *supra* note 412 and accompanying text.

ing, managing and ordering the prudential affairs of such town, as they shall judge most conducive to the peace, welfare and good order thereof.”⁵⁸⁸

This statutory language codified the close relationship between the right of people to assemble in town meetings and their right to legislate on their own initiative. In 1835’s *Democracy in America*, the French writer Alexis de Tocqueville described New England towns as “independent in all that concerns themselves; and among the inhabitants of New England I believe that not a man is to be found who would acknowledge that the state has any right to interfere in their local interests.”⁵⁸⁹ Similarly, at the Massachusetts constitutional convention of 1853, delegates reaffirmed this understanding of town power, describing the relationship between towns and the state as “nearly, if not quite,” equivalent to the relationship between states and the federal government.⁵⁹⁰ “There is no term used among men for the designation of political assemblies, no Parliament, Congress, States-General, Amphictyonic Council, or Wittenagemote, which to me comes invested, with more venerable, more sacred associations, than the homely word Town-Meeting,”⁵⁹¹ one delegate explained. “[W]hen you compare the acts of a town in their number and importance relatively with those of a state, you will find that the great majority of the objects sought to be obtained by township organizations are objects in connection with their own sovereign local affairs.”⁵⁹²

By the end of the nineteenth century, however, the relationship between the right to assemble and the right to legislate had been largely forgotten. In a series of decisions before the Civil War, the Supreme Judicial Court of Massachusetts suggested that the statutes respecting town meetings were not the codification of a longstanding practice in which town meetings legislated on their own initiative, but the source of positive authority without which town meetings could not legislate.⁵⁹³ When the chief justice of the Iowa Supreme Court,

588. See An Act for Regulating Towns, Setting Forth Their Power, and for the Choice of Town Officers, and for Repealing All Laws Heretofore Made for That Purpose, ch. 75, 1785 Mass. Acts 605, 610 *passim*.

589. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 67 (Henry Reeve trans., N.Y., J. & H.G. Langley 4th ed. 1841).

590. 1 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 823 (Bos., White & Potter 1853) (statement of Whiting Griswold).

591. *Id.* at 824.

592. *Id.* at 823-24.

593. See *Spaulding v. City of Lowell*, 40 Mass. (23 Pick.) 71, 76 (1839); *Willard v. Inhabitants of Newburyport*, 29 Mass. (12 Pick.) 227, 229 (1831); *Stetson v. Kempton*, 13 Mass. (13 Tyng) 272, 272-74 (1816). See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN*

John Forrest Dillon, later wrote a national treatise on *The Law of Municipal Corporations*, he cited these Massachusetts decisions to develop what he called “the foundation of the law of municipal corporations.”⁵⁹⁴ Dillon announced that it was “a general and undisputed proposition of law” that the only powers a local government could exercise were those “granted in *express words*” by a statute, “*fairly implied*” by those express powers, or “*essential*” to the local government’s overall purposes.⁵⁹⁵ In other words, Dillon reasoned that because Massachusetts had codified the powers of towns, local governments everywhere could exercise *only* whatever powers the legislature codified.⁵⁹⁶

Although Dillon’s rule was challenged as an ahistorical misreading of the Massachusetts experience,⁵⁹⁷ virtually every state around the country has since expressly adopted his rule as its own. Today, American cities typically possess no “right of local self-government, aside from such rights as may be expressly or by clear and specific implication guaranteed by the fundamental law of the State.”⁵⁹⁸ Even the Supreme Court has held in a variety of contexts that “[i]n the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government.”⁵⁹⁹

LAW, 1780-1860, at 26, 49, 57-58, 72-74 (1977) (discussing other examples where Chief Justice Isaac Parker modified precedent to suit an instrumentalist vision of the role of local governments); Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 421-26 (1985) (same).

594. DILLON, *supra* note 46, at 102-03.

595. *Id.* at 101-02.

596. Dillon’s assumptions were challenged from their inception. See, e.g., *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 98, 102-07 (1871) (opinion of Cooley, J.); Amasa M. Eaton, *The Right to Local Self-Government. I.*, 13 HARV. L. REV. 441, 450-54 (1900); see also *People ex rel. Bd. of Park Comm’rs v. Common Council of Detroit*, 28 Mich. 228, 234-44 (1873) (contrasting the powers of local communities with the powers of the state); David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 491-92 (1999) (discussing Cooley’s analysis of localism and constitutionalism); Jake Sullivan, Comment, *The Tenth Amendment and Local Government*, 112 YALE L.J. 1935, 1936 (2003) (reviewing David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377 (2001)).

597. See, e.g., Eaton, *supra* note 596, at 450-54; Amasa M. Eaton, *The Right to Local Self-Government. V.*, 14 HARV. L. REV. 116, 121-22 (1900).

598. Howard Lee McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 190, 216 (1916).

599. *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923); see *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 363 (2009) (differentiating between a private corporation’s constitutional protections and a political subdivision’s lack thereof); *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978); *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907); WILLIAM BENNETT MUNRO, *THE GOVERNMENT OF AMERICAN CITIES* 53 (1916).

Massachusetts and other states did eventually enact statutory or constitutional “home rule” provisions that nominally gave local governments the power to enact certain legislation without specific statutory authorization.⁶⁰⁰ But in practice, home rule in most states “is largely a myth.”⁶⁰¹ Instead, the typical home-rule provision has functioned as a “substantive legal structure that promotes certain kinds of local actions while foreclosing others.”⁶⁰² For example, few home-rule clauses give cities the power to levy taxes other than sales taxes or ad valorem taxes on real property, leaving them vulnerable when property values collapse due to white flight, a recession, or a pandemic.⁶⁰³ During the outbreak of the coronavirus pandemic in 2020, Texas cities had to plead with the state for the power to adopt measures as simple as requiring residents to wear face coverings.⁶⁰⁴ Absent even basic authority over their fiscal or public health, cities that bear the cost of maintaining large employers and regional services have no means of ensuring that the rest of the state provides support for the benefits they receive.⁶⁰⁵ Instead, the typical home-rule clause “empowers [local governments] to enact land use schemes that exclude low-income

600. See GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 64-66 (2008); Barron, *supra* note 46, at 2288-2322. Examples include MO. CONST. of 1875, art. IX, § 16-25, *in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 2229, 2256-59; CAL. CONST. of 1879, art. XI, § 7, *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 412, 434; UTAH CONST. art. X, § 5; N.Y. CONST. art. IX, § 2; and MASS. CONST. amend. LXXXIX.

601. See DAVID J. BARRON, GERALD E. FRUG & RICK T. SU, *DISPELLING THE MYTH OF HOME RULE: LOCAL POWER IN GREATER BOSTON*, at xi (2004); FRUG & BARRON, *supra* note 600, at 64-66.

602. Barron, *supra* note 46, at 2362.

603. See FRUG & BARRON, *supra* note 600, at 66-69, 74-92; KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 284-87 (1985); DOUGLAS W. RAE, *CITY: URBANISM AND ITS END* 373-76 (2003); Nikolas Bowie, *Poison Ivy: The Problem of Tax Exemption in a Deindustrializing City*, *Yale and New Haven*, 1967-1973, 3 FOUNDATIONS 61, 63, 68-69 (2009); *Comparing State and Local Taxes in Large U.S. Cities*, N.Y.C. INDEP. BUDGET OFF. 5 tbl.3 (Feb. 2007), <https://ibo.nyc.ny.us/iboreports/CSALTFINAL.pdf> [<https://perma.cc/3LHP-SVYB>] (discussing sources of revenue for nine of the nation’s largest cities); Joseph Henchman & Jason Sapia, *Local Income Taxes: City- and County-Level Income and Wage Taxes Continue to Wane*, TAX FOUND. 1-4 (Aug. 31, 2011), <https://files.taxfoundation.org/legacy/docs/ff280.pdf> [<https://perma.cc/MZ8N-XKAB>] (discussing how local income taxes are allowed in only seventeen states).

604. See Letter from Sylvester Turner to Greg Abbott (June 16, 2020), <http://www.houstontx.gov/govtrelations/coronavirus-documents/6.16.2020-Facemasks-Letter-To-Governor.pdf> [<https://perma.cc/8YKS-C5XF>].

605. JACKSON, *supra* note 603, at 141-45; HELEN. F. LADD & JOHN YINGER, *AMERICA’S AILING CITIES: FISCAL HEALTH AND THE DESIGN OF URBAN POLICY* 300 (1989); see DAVID RUSK, *CITIES WITHOUT SUBURBS: A CENSUS 2010 PERSPECTIVE* 21-25 (4th ed. 2013); Barron, *supra* note 46, at 2367-81.

residents . . . [and] also frustrates their efforts to adopt alternatives that would affirmatively include those same people. Home rule in its present form, then, is not local legal autonomy.”⁶⁰⁶

The historical origins of the right to assemble suggest that the assumptions underlying this legal regime may be vulnerable. If a state legislature fails to act on a particular issue, a town today could reasonably argue that their state assembly clause recognizes the town’s inherent powers to protect the health, safety, and welfare of its residents – in the same way that the Tenth Amendment is often invoked to exemplify a state’s reserved powers to protect the health, safety, and welfare of its residents.⁶⁰⁷ Subject to the preemption of a state legislature or Congress, a municipality might similarly claim the power to adopt redistributive ordinances, to municipalize private industry, or to respond to capital flight and exclusionary zoning practices in neighboring jurisdictions by enacting a commuter tax on nonresidents from the suburbs.⁶⁰⁸ Or a city might reasonably argue that an assembly clause protects its inherent power to function as a public voice for its residents by organizing other communities to lobby more centralized legislatures. Boston functioned as such a public voice in the 1760s when it called for a convention of towns,⁶⁰⁹ and in the 1970s when it spent \$1 million to persuade residents of other towns to vote a certain way on a statewide referendum.⁶¹⁰

On a more basic level, the historical context of the right to assemble could also lend support to recent proposals that urge states to adopt constitutional amendments to codify “Principles of Home Rule for the 21st Century.”⁶¹¹ One suggestion by the National League of Cities in 2020 would urge states to adopt a “local authority principle” (protecting the power of local governments to initiate legislation); a “local fiscal authority principle” (protecting the power of

606. Barron, *supra* note 46, at 2362; see also Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 101-09 (1990) (aggregating doctrinal treatment of land-use regulations); JACKSON, *supra* note 603, at 241-43 (discussing zoning ordinances).

607. See Sullivan, *supra* note 596, at 1935-37.

608. See, e.g., Frug, *supra* note 46, at 1108-09, 1126-28; Gillette, *supra* note 46, at 224-25.

609. See *supra* notes 162-166 and accompanying text.

610. See David J. Barron, *The Promise of Tribe’s City: Self-Government, the Constitution, and a New Urban Age*, 42 TULSA L. REV. 811, 821-23 (2007) (summarizing the city’s arguments); Nikolas Bowie, *Corporate Democracy: How Corporations Justified Their Right to Speak in 1970s Boston*, 36 LAW & HIST. REV. 943, 980 (2018).

611. *Principles of Home Rule for the 21st Century*, NAT’L LEAGUE CITIES 23-27 (2020), <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf> [<https://perma.cc/EYG9-V3L3>].

local governments to raise revenue on their own terms); a “presumption against state preemption principle” (making it more difficult for states to preempt local legislation); and a “local democratic self-governance principle” (protecting the power of local governments to determine their own governing structures).⁶¹² The report describing these principles explains that “[t]he inherent right to local self-government was an animating motivation for the American Revolution,” but states took advantage of “federal constitutional silence . . . to assert control over local governance.”⁶¹³ The historical context of the right to assemble demonstrates that early state constitutions and the First Amendment may not have been as silent as scholars assume.

CONCLUSION

The right to assemble is today protected by forty-seven state constitutions and the First Amendment. Participants in the American Revolution regarded the right as a fundamental protection of self-government: one that would long ensure that all people had a right to participate meaningfully in enacting needed legislation. More than two centuries later, however, the significance of the first state and federal assembly clauses has been forgotten. Most judges and legal scholars think the right is, at best, a redundant protection of self-expression.

The current interpretation of the right to assemble may be for the best—just because the right was interpreted one way by one person at one time is not alone a sufficient reason to interpret it the same way at all times. But in an era when politicians choose their voters, millions of taxpayers are formally or effectively disenfranchised, and countless representative governments are inhibited from redressing their constituents’ grievances, revitalizing a constitutional protection of self-government is invaluable. The context of the first assembly clauses in the eighteenth century reveals a range of possible interpretations that have not been repudiated but merely untested. Imagining how such a right could advance American democracy in the twenty-first century is an urgent challenge.

612. *Id.*

613. *Id.* at 9.