The Right to Assemble: An Introduction

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INTRODUCTION

The First Amendment rights "of the people to peaceably assemble, and to petition the government for redress of grievances" are so intimately connected that commentators frequently treat them together as a single right. See J. Story, *Constitution of the United States* Section 448 (1833). They are, however, two distinct rights. Cooley, *Constitutional Limitations* 267-69 (1890).

Of the two, the right to petition was first protected by law, dating back to the Magna Carta of 1215. *Sources of Our Liberties* 228 (R. Perry, ed 1972). Implied in this right is a right to assemble, but such a right would be limited to the one purpose of petitioning the government. Furthermore, the right to assemble was most likely limited to an assembly of duly elected or appointed representatives. See Chapter 61 of the Magna Carta reprinted in *Sources* at 20-21.

In contrast, the right to assemble, as stated by the First Amendment, is explicitly extended to "the people." Thomas Cooley, the great constitutional scholar of the late 19th century, asserted that this reference to "the people" meant "the whole people ... because the rights of all are equal, and are meant to be equally protected." Cooley, *Constitutional Limitations* at 268.

In addition, Cooley observed that the right to assemble was not modified in any way by the right to petition, and included assemblies for a variety of public purposes besides petitioning the government for redress of grievances. *Id.* at 269.

Cooley's textual reading is amply supported by the historical development of the right to assembly that took place in the American colonies and in the first two decades of America as a free and independent nation.

THE HISTORY

The early American revolutionary documents contain claims that the king and the English Parliament violated the right of assembly. These claims appear to be anchored in the traditional right of assembly arising out of the well recognized right of petition.

During the late 1760's the Parliament, acting directly, and the king, acting through his royal governors, suspended the authority of the colonial legislative bodies in New York, Massachusetts, and Virginia in their fight to tax the colonies. *Sources* at 279-80. In its 1774 *Declaration and Resolves,* the First Continental Congress charged that these acts were "contrary to the rights of the people," violating the "right of the people to participate in their legislative council" and the right of the "colonies ... peaceably to assemble, consider of their grievances, and petition the king." *Sources* at 287, 288, 276, 281, 283.

On July 4, 1776, the Congress reiterated these charges and claims in the Declaration of Independence. *Sources* at 320, 321. At the same time, Congress laid the groundwork for extending the right to assemble to all the people when it stated that the king had refused, after dissolving the colonial legislatures, to reconstitute them "whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise." *Sources* at 320.

This claim of the continuing civil sovereignty of the people, even after a civil society has been

formed and civil power has been delegated to the people's representatives, did not surface for the first time in the Declaration. Rather, it had deep roots in American colonial history. In 1620, prior to coming ashore in the new world, the Pilgrims issued the Mayflower Compact in which they as a people did "covenant and combine ... [themselves] together in a Civil Body Politick." *Sources* at 60. In his book, *The Foundations of American Constitutionalism* (1932), Andrew McLaughlin has proved that this action establishing civil self-government was based upon Puritan theology:

> *This theology found in the Scriptures the right of men to associate and covenant to form a church and civil government and to choose their own officers to administer both church and civil affairs. Sources* at 57.

Nineteen years later, a group of Puritan dissenters left the Massachusetts Bay colony to establish the colony of Connecticut. They too formed a civil government, relying upon the same theological principle as had the Pilgrims before them. Thus, the Preamble to the 1639 Fundamental Orders of Connecticut stated:

> *... And well knowing where a people are gathered together the word of God requires that to maintain the peace and union of such a people there should be an orderly and decent Government established according to God, to order and dispose of the affairs of the people at all seasons as occasion shall require; do therefore associate and conjoin ourselves to be one Public State or Commonwealth.... Sources* at 120.

This document has been called "the oldest truly political constitution in America." *Sources* at 115. As such, it is a forerunner to all of the claims in the Declaration of Independence of the right of the people "to alter or to abolish" any form of government destructive to the people's unalienable rights and to "institute a new government, laying its foundation on such principles, and organizing its power in such form, as to them shall seem most likely to effect their safety and happiness." *Sources* at 319.

Pursuant to this claim, the people of each of the American colonies, and the people of the United Colonies (under their claim of right to be free and independent States) adopted constitutions forming their civil governments as they saw fit. To accomplish these formative tasks, the people "assembled in full and free convention," as the Virginia Constitution of 1776 recited, to declare their rights "as the basis and foundation of government." *Sources* at 311.

After forming their governments, did the people of the several States and of the United States give up their right to assemble for the purpose of consulting for the common good and of changing the government if they saw fit to do so? No, this right was one to which they were entitled by the "laws of nature and of nature's God."

As the Supreme Court acknowledged in 1875, the right of the people to assemble has "always ... been one of the attributes of citizenship under a free government ... [and] is found wherever civilization exists." *United States* v. *Cruikshank,* 92 U.S. 542, 551 (1875).

The question before the people in the first two decades following the Declaration of Independence, therefore, was not whether they had the right to assemble. Rather, it was whether to secure that right by the written constitutions forming their new civil orders.

The people of Pennsylvania were the first to take this step. On August 16, 1776, they included in their first constitution a declaration that guaranteed the "people's 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." Article XVI of the Constitution of Pennsylvania reprinted in *Sources* at 331.

Thereafter, the people of North Carolina on December 14, 1776, the people of Vermont on July 8, 1777, the people of Massachusetts on October 25, 1780, and the people of New Hampshire on June 2, 1784 followed suit. *Sources* at 356, 366, 377 and 385. But the people of Virginia, Delaware, and Maryland did not. *Sources* at 311-12, 339, 347.

It was not until the United States Constitution was submitted to the people of the original thirteen states, that the people began to see the importance of securing, by constitutional means, their right to assemble.

This time it was the people of Virginia who took the lead. At the state ratifying convention called to approve or disapprove of the proposed United States Constitution, it soon became evident that the fate of the new constitution turned on the absence of a Bill of Rights. The Antifederalists insisted that ratification be postponed until after such a Bill was attached. The Federalists argued that the constitution be ratified with the promise that a Bill of Rights be added later.

The Federalists prevailed, with the Virginia convention voting in favor of ratification with the explicit understanding that its representatives in the first Congress "exert all their influence" to secure a Bill of Rights as amendments to the new constitution. Included in the proposed bill of rights was "the right of the people to peaceably assemble together to consult for the common good, or to instruct their representatives."

THE TEXT

On June 8, 1789, James Madison, duly elected to the First Congress as a member of the Virginia delegation to the House of Representatives, honored this commitment when he introduced a proposed Bill of Rights. Having been a member of the Virginia ratifying convention, Madison naturally chose the Virginia report as his model.

His first draft of the right to assemble read: "The people shall not be restrained from peaceably assembling and consulting for their common good." *Sources* at 422. The House of Representatives approved a text closely tracking this initial proposal: "... the right of the people peaceably to assemble and consult for the common good ... shall not be infringed." *Sources* at 424. The Senate proposed the final version, dropping the phrase, "and consult for the common good," and substituting the word, "abridging" for "infringed." The House concurred.

According to the records of the debates in the House, there was some discussion about the significance of the phrase, "consult for the common good." It began with Congressman Sedgwick's motion to strike the words, "assemble and" so that the assembly guarantee would be protected as "the right of the people to consult for the common good."

The Sedgwick motion was vigorously opposed, and ultimately defeated. Sedgwick claimed that the

"right to assemble" was presupposed by the "right to consult for the common good." Congressman Gerry claimed the opposite. To assemble, he argued, was a condition precedent to the right to consult "because ... [the people] could not consult unless they met for that purpose."

Congressman Gerry carried the day. The right to assemble was primary; the right to consult was derived from it, not the other way around. While this position could have led to further discussion whether the phrase, "consult for the common good," was surplusage, there was none.

That phrase was struck, however, by the Senate. Because the Senate sat behind closed doors until February, 1794, there is no report of the Senate debates on the Bill of Rights.

The final version of the Bill of Rights was a product of a conference committee composed of members from both the House and the Senate. Most likely, the House accepted the Senate change in the text describing the right to assemble because the House had already determined that the right to assemble included the right to consult for the common good. Hence, the phrase was unnecessary, and possibly even limiting.

That the right to assemble includes purposes other than the common good was well settled. Cooley claimed that the right existed to assemble "for religious, social, industrial, or political purposes." While there was "no doubt its political value ... was in view in adopting the amendment," the language of the amendment could not be construed to require proof that the assembly was a political meeting. Cooley, *Constitutional Limitations* at 268.

Several Supreme Court opinions have endorsed this reading of the text. In *United States* v. *Cruikshank,* 92 U.S. 542,541 (1875), the Court stated that the right to assemble guaranteed the right to assemble for any "peaceful and lawful purpose." In *Hague* v. *CIO,* 307 U.S. 496, 519 (1939), Justice Harlan Fiske Stone stated that the First Amendment right to assemble extended to "any lawful purpose." In *Hague,* the claimed right to assemble related to the rights of workers under the National Labor Relations Act. The fact that the meetings had nothing to do with political matters, but solely concerned economic ones, did not preclude reliance on the right to assemble. *Id.,* 307 U.S. at 512-13.

THE PRINCIPLES

At the heart of the right of the people to assemble is the right of the people to choose the subject matter of the assembly and the viewpoints to be presented. To hold otherwise would, as the Supreme Court stated in the 1937 case of *DeJonge v. Oregon,* 299 U.S. 353 (1937), destroy the central purpose of the right, namely:

> *[T]o maintain the opportunity for free political discussion, to the end that government may be responsive to the* ***will*** *of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. Id.,* 299 U.S. at 365. (Emphasis added.)

Twelve years later, Justice William O. Douglas struck down a conviction for breach of the peace for a speech delivered at a meeting conducted under the auspices of the Christian Veterans of America. The trial judge had instructed the jury that it could convict upon a finding that the defendant's

remarks "stir[red] the public to anger, invite[d] dispute, ... [brought] about a condition of unrest, or create[d] a disturbance or ... arrous[ed] alarm."

Relying on the *DeJonge* statement quoted above, Justice Douglas observed:

> *The right to speak freely and to promote diversity of ideas and programs is ... one of the chief distinctions that sets us apart from totalitarian regimes.*
>
> *Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger .... There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups. Terminiello v. Chicago,* 337 U.S. 1, 4 (1949).

To guard against the unconstitutional "standardization" of ideas, the Court has consistently held that the First Amendment prohibits any law discriminating against the people's choice of subject matter, content or viewpoint. This twofold principle was endorsed just last term in a survey of cases stretching over a twenty-two year period:

> *It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys .... In the realm of private speech or expression, government regulation may not favor one speaker over another ... the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression .... When the government targets not subject matter but particular views taken by speakers on a subject the violation of the First Amendment is all the more blatant .... Viewpoint discrimination is thus an egregious form of content discrimination .... Rosenberger v. Univ. of Virginia,* - -U.S.--, 132 L. Ed2d 700,714-15 (1995).

In addition, the right of the people to assemble guarantees a right of access to other people in certain public places in order to invite others to communicate with them. This right is an absolute one subject only to rules governing time, place and manner.

In *Schneider v. State,* 308 U.S. 147 (1939), the Court dealt with three municipal ordinances forbidding the distribution of handbills on public streets and sidewalks. Two of the handbills invited the recipient to a meeting; one invited the recipient to join with the distributor in his decision not to patronize a store.

The cities defended their ordinances on the ground that they were designed to protect the streets from littering. There was no evidence that any of the ordinances had been enforced in a manner giving rise to an inference that the handbillers were being discriminated against on the basis of the subject matter content of their handbill or the viewpoint being disseminated.

Nevertheless, the Court struck down each ordinance on the grounds that it "abridge[d] the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion." *Id.,* 308 U.S. at 160.

The Court reached this conclusion by first observing that "[m]unicipal authorities, as trustees of the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which streets are dedicated." *Id.* Given this duty to keep streets and other public ways open to the public, the Court further observed that "the streets are natural and proper places for the dissemination of information and opinion." *Id.,* 308 U.S. at 163.

To reinforce this point, the Court cited *Hague v. CIO,* 307 U.S. 496 (1939) where Justice Owen Roberts had written:

> *Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.*
>
> *Such uses of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. Id.,* 307 U.S. at 515.

Having established the right of the handbiller to be upon the streets, the Court turned to the authority of the public officials. It concluded that its power was to insure that normal movement was not hampered, but that authority could not be extended to prevent an individual tendering a handbill to another without proof that the act unreasonably interfered with that movement. *Id.,* 308 U.S. at 160.

While the *Schneider* opinion purported to apply the First Amendment guarantees of the freedom of speech and the freedom of the press, neither the text nor the history of those two guarantees could possibly support the principle endorsed by the Court. See Titus, *The Freedom of Speech: An Introduction*, and *The Freedom of the Press: An Introduction*. But the right of the people to assemble could. For a right of access to certain public places, subject only to regulations of time, place, and manner, is essential to maintain the people's residual civil sovereignty without discrimination in favor of the existing civil order.

CONTROL OF THE PRESS

The licensing of the printing press in England ended in 1695. Hanson, *Government and the Press* 1695-1763 7 (1936). 70 years later, Sir William Blackstone wrote with confidence in his *Commentaries on the Laws of England* that the liberty of the press was firmly established by law. The liberty, Blackstone asserted, meant that the government could lay no "previous restraints" or exercise no editorial control over the private publication of ideas. See Titus, *The Freedom of the Press: An Introduction*.

The end of the licensing system did not mean, however, that the English governing authorities gave up on their attempt to control the press. To the contrary, throughout the 18th Century, the English Parliament and crown attempted to control the press through taxation and subsidization.

Neither the taxation of the press nor its subsidization through tax revenues was forbidden by the freedom of the press. That freedom, as noted above, was limited to the prohibition of licensing. During the period when the English government licensed the private press, it also subsidized the *Oxford Gazette* (later the *London Gazette),* a newspaper that served as an "instrument of government."

The subsidized press continued after the licensing system died and lasted over half a century. Hanson, *Government and the Press, supra,* at 84-122. The subsidized press took a variety of forms, from the overtly government newspaper to the covertly funded editorial writer. Many of the famous names of English literature - Daniel Defoe, Jonathan Swift, Joseph Addison, Richard Steele, Henry Fielding, Tobias Smollett, and Samuel Johnson - sought and received government largesse in exchange for writings supporting the government. Siebert, *Freedom of the Press in England 1476-1776,* 323-45 (1952).

The rationale for government subsidization of the press paralleled that for licensing. Both were based upon the theory that the civil sovereignty of the state resided in one or another government official. The licensing system presupposed that the sovereignty of the state was in the crown. The subsidization system rested upon parliamentary sovereignty. See *Id.* at 6-7.

So did the right to tax the press. In the early part of the 18th Century, the English Parliament levied a tax upon newspapers and upon advertisements. The purpose of such taxes was "to suppress the publication and criticisms objectionable to the Crown ..." *Grosjean v. American Press Co.,* 297 U.S. 233, 246 (1936).

More than a century of resistance and evasion followed in England, but this did not deter Parliament from imposing on its American colonies a Stamp Tax on newspapers and pamphlets. The Stamp Act was defeated primarily on the grounds that it had been enacted in violation of the principle of no taxation without representation. *Sources of Our Liberties* 263-67 (1972).

But there was an additional reason for resistance. When levied upon newspapers and pamphlets, the stamp duties were "taxes on Knowledge," and, as such, "intended to have ... the effect of curtailing the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses of the people ...." *Grosjean* v. *American Press Co., supra,* at 246.

This lesson of the Stamp tax was quickly forgotten by the Massachusetts legislature when, in 1785, it "imposed a stamp tax on newspapers and magazines," followed in the next year by a tax on advertising. The opposition to these two taxes was so vehement that they were repealed within three years. *Id.* at 248.

The reason why such taxes perished so quickly was because neither executive nor legislative sovereignty survived the American Revolution. With the Declaration of Independence, the founders of the United States declared that the civil sovereignty of the new nation was rooted in the people. Having recognized the civil sovereignty of the people, the freedom of speech - theretofore guaranteed only to the people's representatives in legislative assembly - was now secured to the people generally. See Titus, *The Freedom of Speech: An Introduction*.

The freedom of speech, once extended to the people, meant that the people were secure from civil or criminal liability for seditious libel and stirring up sedition. As Frederick Siebert has put it, the theory of popular civil sovereignty led "to this position, a government could not restrict the right to speak and to print, even to save itself from destruction." Siebert, *Freedom of the Press in England, supra,* at 7.

The theory of popular sovereignty, however, did not anticipate that the people would spend their

energies on activities designed to advocate the overthrow of the government. Rather, they assumed the people would gather in a variety of peaceable assemblies for the purpose of consulting for the common good. Thus, the right of the people to peaceably assemble was to be secured against abridgments by the state.

Explicitly guaranteed by the right to assemble, is the right of the people to assemble. Implicit in the guarantee is the right of the people, free from government abridgment, to choose the place to assemble, the purposes of that assemblage, and the points of view to be presented.

NO TAXATION

Usually when one thinks of the right of the people to assemble, one thinks of a physical place where a group of people might get together for discussion, for hearing a speaker, or for a debate. But this way of thinking would mistake a manifestation of the right for the basic principle of the right.

The core principle of the right to assemble is the right of the people to consult one another for the common good. This may be accomplished through a meeting or through a communication, such as a newspaper, magazine, pamphlet, radio, or television.

Indeed, the very purpose of the communications media is to initiate an assembly, for where two or more are gathered together for a common purpose there is an assemblage of the people. Watching the evening news on television, reading the morning newspaper, or receiving a pamphlet while walking down the street - all of these activities are part of the right of the people to assemble.

Hence, the business of publishing books, periodicals, or other matter designed to communicate ideas to others belong to the people and the privilege to engage in such businesses cannot be taxed. This principle has been adhered to by the Supreme Court since 1936. *Grosjean* v. *American Press Co., supra.*

While the Court did not rest this principle upon the assembly clause, it conceded that the principle was not protected by the traditional understanding of the liberty of the press. The Court stretched the press clause beyond its historic meaning, but did so on the basis of a rationale more suited to the right of the people to assemble.

Justice George Sutherland, for a unanimous court, observed that the struggle against such taxes in England was waged "to establish and preserve the right of the English people to full information in respect of the doings and misdoings of their government." *Id.,* 297 U.S. at 247.

This right, unlike the freedom from the prior restraint imposed by licensing statutes, was stated not in negative terms, but in positive ones:

> *[A]n informed and enlightened public opinion was at stake; for as Erskine, in his great speech in defense of Paine, has said: "The liberty of opinion keeps governments themselves in due subjection to their duties.*" *Id.,* 297 U.S. at 247-48.

If this is true of England, it is truer still for America where the people are the ultimate civil sovereign. Thus, Justice Sutherland introduced his opinion in *Grosjean* with language commensurate in importance with the right of assembly:

> *[The question presented is] of the utmost gravity and importance; for ... it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests. Id.,* 297 U.S. at 243.

Later in this same opinion Justice Sutherland cited the great 19th Century constitutionalist, Thomas Cooley for the proposition that the First Amendment was designed to prohibit "any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." *Id.,* 297 U.S. at 249-50.

NO SUBSIDIZATION

While the Supreme Court has jealously guarded the no taxation principle when applied to the press [*e.g.*, *Arkansas Writers' Project* v. *Ragland,* 481 U.S. 221, 228 (1987)], it has almost completely lost sight of the principle of no subsidization.

In *Buckley* v. *Valeo,* 424 U.S. 1 (1976), the Court had before it a Congressional statute authorizing the public funding of election campaigns for federal office. It found no violation of the First Amendment because it found the "congressional effort, not to abridge, restrict or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.,* 424 U.S. at 92-93.

The Court offered absolutely no authority to support this proposition. It also made no reference to the historic experience in England of government manipulation of public opinion through a subsidized press. Instead, the Court merely stated in a footnote that "[o]ur statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media." *Id.*, 424 U.S. at 93, ns. 126 and 127.

Following *Buckley*, the Court has reaffrrmed its approval of government subsidization schemes. In *Regan* v. *Taxation with Representation,* 461 U.S. 540 (1983) the Court ruled that Congress could pick and choose among lobbying groups as to which ones it wished to subsidize, so long as it did not do so with an impermissible purpose. And in *F.C.C.* v. *League of Women Voters,* 468 U.S. 364 (1984) the Court saw nothing wrong with government subsidized public radio and television.

Again, in neither of these cases was there any reference to the historically discredited practice of government subsidy of the press.

On the other hand, the Court has struck down, on a number of occasions, laws that require the payment of dues when those dues are used by the recipient organization for the propagation of political views with which the dues payer disagrees. *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1971); *Keller v. State Bar of California,* 496 U.S. 1 (1990). Such laws, the Court reasoned, interfere with the right of the dues payer not to associate.

But the constitutional guarantee is stated in the affirmative, not the negative. The First Amendment guarantees to the people the right to choose with whom they will associate for the common good. The very heart of that principle is self-government which, by definition, is lost if the civil authorities

have jurisdiction through subsidies to influence these choices.

TIME, PLACE AND MANNER

This point is well-established in cases governing the access of the people to streets, sidewalks, and parks - areas immemorially dedicated to the use of the public. The right of peaceable assembly grants to the people an affrrmative right of access to such public places for the purpose of peaceable assembly. *Hague* v. *CIO,* 307 U.S. 496 (1939).

As for government regulations, they must be limited to time, place, and manner, and not extended to content or subject matter lest the government subsidize through its support of streets, parks, and sidewalks the assemblies of some to the exclusion of others. Compare *Kovacs* v. *Cooper,* 336 U.S. 77 (1949) with *Police Department of Chicago v. Mosley,* 408 U.S. 92 (1972).

Access to streets, sidewalks, and parks cannot be denied altogether, because by doing so the Government would be subsidizing the elected assembly of the people's representatives without providing a comparable public forum to the people generally. Thus, the right of the people to assemble necessarily requires that those government-subsidized places for the general traffic of human beings be open to communicative activities.

This does not mean that streets, sidewalks and parks can be shut down as the people see fit. In *Cox v. New Hampshire,* 312 U.S. 569 (1941), for example, the Court upheld a state statute requiring a permit before any "parade or procession" could take place on a public street.

Writing for a unanimous Court, Chief Justice Charles Hughes observed:

> *[T]he limited objective of the statute ... [was] with regard only to considerations of time, place and manner so as to conserve the public convenience. The obvious advantage of requiring application for a permit was noted as giving the public authorities notice in advance so as to afford opportunity for proper policing ... [and] in fixing time and place, the license served "to prevent confusion by overlapping parades and processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder." Id.,* 312 U.S. at 575-76.

CONCLUSION

The Supreme Court has been remiss, especially in recent years, to apply the right of the people to assemble and its principles to cases which fit within that right's historic parameters. Consequently, the Court has permitted a number of incursions upon that right, primarily through government subsidization.

A return to the text and its historic context would promote the cause of liberty and return the civil sovereignty to the people whose sole discretion it is to determine with whom they will consult for the common good and how much they will spend to do so.

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