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Julie M. Spanbauer

John Marshall Law School, jspanbau@uic.edu

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ARTICLES

The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth

By JULIE M. SPANBAUER*

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* Assistant Professor of Law, The John Marshall Law School. LL.M. 1992, Northwestern University School of Law; J.D. 1986, Valparaiso University School of Law. The author wishes to thank Professor Lawrence Marshall and Professor Victor Rosenblum, Northwestern University School of Law, each of whom read at least one draft of this article and provided invaluable comments. Special thanks are also given to Associate Dean Robert G. Johnston, Professor Walter Kendall, and Jessie C. Grearson, The John Marshall Law School, for their comments and encouragement. A final thank you is extended to The John Marshall Law School Administration for providing financial assistance which made possible some of the research efforts for this paper.

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Introduction

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹ Of these expressive rights, the right to petition has engendered the least discussion among litigants, judges, and scholars.² The First Amendment Petition Clause is rarely invoked by litigants as a substantive constitutional right and, when invoked, it affords no greater or different protection than under the Speech, Press, or Assembly Clause.³ In fact, the Supreme Court has described the right to petition as a right "cut from the same cloth"⁴ as the other expressive rights embodied in the First Amendment:

1. U.S. CONST. amend. I.

2. As a simple illustration of this fact, one need only consult a recent article by former Justice William J. Brennan in which he completely failed to mention petitioning when he stated: "The American Bill of Rights, guaranteeing freedom of speech, religion, assembly, and the press, . . . provides a noble expression and shield of human dignity." William J. Brennan, Jr., *Why Have a Bill of Rights?*, 26 VAL. U. L. REV. 1, 1 (1991); see also Anita Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569, 569 & n.1 (1987) (noting scant attention paid to Petition Clause).

3. See *infra* notes 213-17, 251-55 and accompanying text. This restricted view of petitioning under the First Amendment does not accord with the importance given the right in a series of late 19th and early 20th century Supreme Court cases. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872) (right to petition a privilege and immunity of national citizenship); *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907) (right of access to courts, as component of right to petition government, also a privilege and immunity of national citizenship); see also *Crandell v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867) (stating that a citizen's right to petition is correlative to the plenary powers granted the federal government). While restricting the reach of the Privileges and Immunities Clause in the *Slaughter-House* line of cases, the Court simultaneously emphasized the constitutional right to petition the government for redress of grievances. Yet, current Supreme Court First Amendment jurisprudence has virtually forgotten the Petition Clause and has buried it within the speech or assembly provisions of the First Amendment. See *infra* notes 200-12, 250-56, 282-84 and accompanying text.

4. *McDonald v. Smith*, 472 U.S. 479, 482 (1985).

The Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition . . . than other First Amendment expressions.⁵

This Article will demonstrate that, contrary to the Court's assertion, the right to petition was cut from a different cloth than were the rights of speech, press, and assembly. Historically, the right to petition was a distinct right, superior to the other expressive rights.⁶ The history of the right to petition reveals that, although originally restricted, it evolved over time in both England and America into a superior expressive right that was subject to few restrictions.⁷ In comparison, the corollary rights of speech, press, and assembly were subject to greater legal burdens.⁸

History also reveals that in 1791 the definition of petitioning was much broader than it is today. For instance, petitioning encompassed both *individual* and *collective* written requests to the executive, legislative, or judicial authorities.⁹ And from its inception, the right of petitioning and receiving redress contemplated quasi-judicial procedures, such as administrative review. Inherent in the right to petition was the right to a response. The debates surrounding the framing of the First Amendment do not indicate that the original understanding of the Petition Clause was any different from this historical understanding.

Although the Supreme Court has conceded that the use of the word "government" as contained in the Petition Clause protects peti-

5. *Id.* at 485 (citations omitted).

6. Norman B. Smith, "Shall Make No Law Abridging . . .": *An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1165-67 (1986). In his article, Norman Smith asserts that the right to petition was both distinct from and superior to the other First Amendment guarantees. *Id.* I agree with and have adopted a great deal of his analysis in this regard. He also asserts, however, that historically the right to petition was nearly an absolute right. *Id.* In reaching this conclusion, Smith omits discussing one important limitation on petitioning: in both England and the American colonies, sanctions were assessed against petitioners who submitted frivolous, vexatious petitions. See *infra* notes 79, 110-12. Additionally, he omits any discussion of the right to petition the judicial arm of the government. Smith, *supra*, at 1190 & n.218. Because so much of the history of petitioning government is intertwined with the development of the judiciary, one must also examine the evolution of the right of access to the courts in order to fully understand the historical roots of the right to petition government.

7. See *infra* notes 71-80, 103-09 and accompanying text.

8. See *infra* notes 130-78 and accompanying text.

9. See *infra* notes 42-57, 89-94 and accompanying text. These petitions were typically one or two paragraphs long and contained one or more signatures.

tions to *all* branches of government, the Court has paid scant attention to other important historical aspects of petitioning. For example, the Court has concluded that the First Amendment does not provide a substantive right of access to the courts;¹⁰ it has granted only limited immunity to petitioners;¹¹ and it has concluded that whatever the breadth of the right to petition may be, there is no correlative duty on the part of the government to respond.¹² In analyzing different claims, the Court has purported to rely on history; however, its historical analysis is frequently selective and misleading.¹³ Not only has the

10. See *infra* notes 196-231 and accompanying text. Although the Supreme Court has not specifically addressed the issue, it has limited Petition Clause protection to fact settings in which associational or speech interests are also implicated. See *infra* notes 207-12 and accompanying text. A number of lower federal courts have addressed the issue, however, and have ruled that the First Amendment Petition Clause does not provide a substantive right of access to the courts. See *infra* notes 213-17 and accompanying text.

11. Petitioner immunity has arisen in three different contexts. First, in the context of libel laws, the Supreme Court has afforded petitioning, like speech, only a qualified immunity. See *infra* notes 251-56 and accompanying text. History refutes such a limited finding. Petitioners in both England and America were historically immune from private libel actions unless the petition was republished. See *infra* notes 257-90 and accompanying text.

Federal Rule of Civil Procedure 11, as applied to prefiling factual and legal inquiries, raises a second immunity issue. Although the colonial assemblies and courts sometimes assessed sanctions against petitioners and litigants, a subjective bad faith standard governed whether sanctions were appropriate. See *infra* notes 110-12, 298-309 and accompanying text. Rule 11 uses an objective standard. See *infra* notes 312-14 and accompanying text. Because the objective standard encompasses merely negligent conduct, it sweeps well beyond the scope of the subjective standard historically imposed and is unconstitutional as applied to prefiling inquiries.

Third, immunity has arisen in context of the antitrust laws. See *infra* notes 327-49 and accompanying text. In what has developed as the Noerr-Pennington Doctrine, however, the Court has conditioned petitioner immunity on a definition of petitioning that is both overinclusive and underinclusive. See *infra* notes 345-49 and accompanying text.

12. See *infra* notes 234-49 and accompanying text. The debates surrounding the framing of the First Amendment make clear that Congress believed, in conformity with history, that the right to a response inhered in the right to petition. See *infra* note 187 and accompanying text. The debates mirror historical practice. See *infra* notes 75-80, 120-29 and accompanying text.

13. For example, in *McDonald v. Smith*, 472 U.S. 479 (1985), the Court provided only a limited historical analysis of petitioner immunity and failed to address the critical historical distinction made between petitions which were confined to the responsible governmental official and those which were republished. See *infra* notes 250-97 and accompanying text.

In discussing the right to governmental consideration or response, the Court made *no* reference to history when it summarily concluded that, “[n]othing in the First Amendment . . . suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals’ communications on public issues.” *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984). Again, the Court’s conclusion is clearly refuted by history.

Court elected to grant less protection than history warrants, but it has also been less than forthright about that decision.

I. Evolution of Petitioning From Tolerated Practice to Individual Right

Historical practices evidence the superior status of petitioning relative to other First Amendment guarantees.¹⁴ While it may be argued that tolerance of a particular practice does not establish an individual *right*, but merely establishes that the *practice* was tolerated in some specific instances,¹⁵ the right to petition rests on more than historical practice.

When the English government first began to speak of petitioning as an “inherent right” of citizens¹⁶, the rights of speech, press, and assembly were regulated. These regulations called for and frequently resulted in punishment.¹⁷ Not only did government ordain petitioning as an individual right, but also treated it as one. Petitioners were not punished (as they would have been under the regulations specifically directed to speech, press, and assembly).¹⁸ The failure to prosecute petitioners under these prohibitions bolsters the notion that petitioning was, in fact, recognized as a right distinct from speech rights.¹⁹

Petitioning did not evolve into a superior right quickly or without setback. From its inception in the thirteenth century and for approximately 500 years thereafter, petitioning was not a meaningful right because petitioners were frequently punished. Even when petitioning

14. Smith, *supra* note 6, at 1154-75; *see infra* notes 36-129, 131-78 and accompanying text.

15. In constitutional doctrine, this right/practice dichotomy is spoken of as a right/privilege distinction. *See* Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982). Rights are “interests enjoyed ‘as a matter of right,’” and privileges are defined as “interests created by the grace of the state and dependent for their existence on the state’s sufferance.” *Id.* at 71.

16. For example, the House of Commons issued a resolution in 1669 declaring that “it is an inherent right of every commoner of England to prepare and present [p]etitions . . .” Smith, *supra* note 6, at 1160.

17. In 1648, Parliament, by ordinance, regulated assembly when it required that all petitions be presented in a peaceful fashion and that each petition contain no more than 20 signatures. *Id.* at 1158-59. *See infra* text accompanying notes 77-78. Speech and the press were similarly restricted by seditious libel laws. Smith, *supra* note 6, at 1168-69, 1171. *See infra* notes 130-78 and accompanying text. The colonial assemblies placed similar restrictions on the right of assembly when individuals joined together to formulate and present group petitions. Smith, *supra* note 6, at 1174. *See infra* note 101.

18. *See infra* notes 176-178 and accompanying text.

19. Smith, *supra* note 6, at 1165-69, 1174-75, 1180.

was legitimized through written guarantees during that period, the right was not always tolerated in practice.²⁰ Petitioning did not mature into an individual right in either England or the American colonies until early in the eighteenth century.²¹ In both England and the colonies, the changing political climate was the catalyst for this transformation.²²

In England, the presence of a strong monarchy had always allowed the British government to suppress petitioners.²³ Over time, the ascendancy of Parliament counterbalanced the sovereign's power.²⁴ Petitioners did not immediately gain from this shift in power—they were simply punished by a different branch of government, namely Parliament.²⁵ Another transfer of sovereignty, this time from Parliament to the people as electors, was required before petitioning was elevated to an individual right free from punitive governmental measures.²⁶

In colonial America, the local assemblies ceased punishing petitioners more than fifty years before the Constitution mandated governmental responsiveness to the people through popular election.²⁷ The assemblies may have abstained from punishing petitioners because the local representatives (who were sometimes punished themselves for their petitions to England) recognized the need to provide a meaningful channel for redress.²⁸ It is more likely, however, that petitioners were no longer punished by the assemblies because of the unique features which distinguished petitioning from speech, press, and assembly.²⁹ For instance, a petition was not a publication of opinion to the world at large and was therefore less likely to cause political

20. *Id.* at 1154.

21. *Id.* at 1165, 1173. Norman Smith asserts that petitioners in England were not punished after 1702. *Id.* at 1165. He does not cite an exact date upon which petitioning developed into an individual right. Instead, he simply states that petitioning in England "had become an unqualified right" by the time of the American Revolution *Id.* at 1166-67, 1173-75.

22. *Id.* at 1154-77.

23. *Id.* at 1155.

24. See BRYCE LYON, *A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND* 642-49 (2d ed. 1980).

25. Smith, *supra* note 6, at 1157-65.

26. *Id.* at 1165-67; see *infra* notes 71-80 and accompanying text.

27. Even after the First Amendment was ratified, petitioners were not punished for seditious libel. Speech and the press, however, were subject to punishment. Smith, *supra* note 6, at 1170-71; see *infra* notes 103-09 and accompanying text.

28. See *infra* notes 119-20 and accompanying text.

29. See *infra* notes 165-66 and accompanying text.

divisiveness.³⁰ Also, because petitioning never dictated a favorable governmental response, the continued existence of government was not threatened, which minimized local governments' self-preservation instincts.³¹ Finally, an elected government could not easily punish petitioners because they were also likely to be voters.³² Whatever the reasons, by 1789 the individual right to petition had solidified.³³

An understanding of the history and evolution of the right to petition relative to the development of speech and press rights is crucial to ascertain the appropriate level of protection petitioners deserve today. Although the First Amendment speaks of the rights of speech, press, and petition in absolute terms, that alone is insufficient to evince an original intent regarding the appropriate protection to be afforded those rights.³⁴ The only concrete evidence of intent is the relative protection historically afforded those rights both before and immediately after ratification of the First Amendment. History in the form of contemporaneous practices provides this missing meaning.³⁵

30. See *infra* notes 171-72.

31. See *infra* notes 167-72 and accompanying text.

32. The same argument can be made for those who spoke out against the government or published anti-government rhetoric. Because the danger involved was greater when such information was published to the public at large, however, the government was likely to be more willing to punish speech and to risk public resistance. Furthermore, although the disenfranchised were allowed to petition government, Smith, *supra* note 6, at 1172 & n.112, this large segment of society was without the power to vote in 1789. THE FRAMING AND RATIFICATION OF THE CONSTITUTION 76-77, 132 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) [hereinafter FRAMING AND RATIFICATION]. Petitioning enjoyed mass popularity, however, and transgression of this right almost always met with great public resistance.

33. Because the Constitution was ratified in 1789 and because it called for the election of representatives in both the House and the Senate, U.S. CONST. art. I, §§ 2, 3, I point to this date as the outside date at which punishment of petitioners ceased.

34. Absent an express articulation of original intent, the simple alignment of the rights of speech, press, and petition in the First Amendment is also insufficient evidence of an intent to equalize the level of protection to afford these rights. Only an originalist of the strict textualist variety would argue that the alignment of these rights, and the sweeping language of the First Amendment standing alone, mandate that these expressive rights receive the same degree of protection. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205-06 (1980). A theory of constitutional interpretation which "encompass[es] all those and only those instances that come within its words read without regard to its social or perhaps even its linguistic context" has been rejected by a majority of theorists, including originalists. *Id.* at 222; see Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 378 (1982) (examining the problems of originalism).

35. A precise theory of interpretation, whether originalist or nonoriginalist, is not a necessary prerequisite to the conclusions reached in this article. For the originalist, the historical practices dictate both the starting and ending point for discovering the appropriate protection for petitioning. For the nonoriginalist theorist, the historical practices provide only the starting point in determining constitutional protection. The nonoriginalist may thus advocate greater protection for the First Amendment expressive guarantees than

A. Emergence of Petitioning in England

By signing the Magna Carta in 1215,³⁶ King John granted the right to petition the crown to his barons.³⁷ By the King's grace, they were also granted life tenure in land in exchange for their allegiance, protection, and counsel.³⁸ On its face, the Great Charter appears to be a monumental achievement because it represents the first instance in which British subjects exerted external coercion over the monarch, exacting the right to petition, among other liberties, in exchange for a promise of continued loyalty. Yet the only method of enforcing the Magna Carta was baronial seizure of royal land and possessions each time John refused or delayed redress.³⁹ This procedure was crude and ineffective.⁴⁰ Unless the barons were willing to mobilize an effective armed revolt against the king's forces each time a petition was denied, the right to petition was little more than a hollow act of grace on the part of the crown. The exercise of the right to petition could meet with indifference—even retaliation or punishment—at the whim of the ruler.

In June of 1215 the barons, as representatives of the nobility, were granted a personal audience with the King at Runnymede to present their written petition in exchange for their promise to finance

is historically justified based on extra-constitutional value judgments. Depending on the theory of constitutional interpretation employed, the historical practices would dictate the *minimum* level of constitutional protection to be afforded the right to petition.

36. LYON, *supra* note 24, at 310; Smith, *supra* note 6, at 1155. The name "Magna Carta" was not originally used to refer to the Great Charter of 1215. Rather, the name was gradually applied to the reissue of 1217. DORIS M. STENTON, *AFTER RUNNYMEDE: MAGNA CARTA IN THE MIDDLE AGES* 21-22 (1965). Any reference to the Magna Carta in this article is intended as a reference to the Great Charter of 1215.

37. Barons are members of the English nobility ranked below earls and above knights.

38. WILLIAM S. McKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 466-67 (2d ed. 1914); Smith, *supra* note 6, at 1155. John, faced with pressing inflation, the need to finance a losing war with France, and no system of taxation, increased both the rate and the frequency of the customary feudal obligations until the barons mounted an armed rebellion and refused to pay in 1214. McKECHNIE, *supra* at 48-76. In an attempt to resolve the conflict, representatives of the barons met personally with John and those loyal to him at Runnymede where the barons presented a written list of their grievances. *Id.* at 36-37. This list of grievances is known as the Articles of the Barons, a document that is believed to be an initial draft of the Magna Carta of 1215. *Id.*

Five days of negotiations ensued and culminated in John reluctantly placing his seal on the Magna Carta, a document consisting of 63 chapters embodying those grievances most important to the barons. LYON, *supra* note 24, at 318-19. Chapter 61 declared that "four barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, petition to have that transgression redressed without delay." *Id.* at 467.

39. McKECHNIE, *supra* note 38, at 129, 468-69.

40. *Id.* at 129.

the government.⁴¹ Over time, this became the customary practice, and various segments of society, including knights and burgesses, were also granted audiences by the crown as the royal government's financial needs increased.⁴² Like those of the barons, the petitions these representatives presented on behalf of individuals and their communities were granted in exchange for commitments to make payments to the crown.⁴³

This process ultimately led to the development of Parliament,⁴⁴ whose advice and consent was often sought by the royal government before it took action of any magnitude.⁴⁵ The king's council - which consisted of judges from the common law courts, officers, lawyers, and jurists - comprised the core of Parliament, and the king received the petitions through his council.⁴⁶ Some representatives were asked to act as witnesses to the petitions they presented, and some individuals appeared to personally present their petitions.⁴⁷ As a result, the demarcation between representative petitioning and individual petitioning was blurred in Parliament's infancy.

The practice of petitioning also included quasi-judicial functions. When petitions were presented to the council, the council would examine the petitioners and refer them to the appropriate common law court.⁴⁸ As the fourteenth century progressed, the council began re-

41. *Id.* at 36-47. On August 24, 1215, John secured a papal declaration that the Great Charter was void because it was secured under duress. Although the chapters relating to petitioning were not included in subsequent reissues of the Magna Carta, this Charter was itself a petition. It established the framework for petitioning and formalized the procedure by which petitioning would occur. *Id.* at 37-38.

42. Individual writs of summons were sent to some, and general writs were also sent to the sheriffs of the different communities ordering them to secure the election of two knights and two burgesses from each borough. LYON, *supra* note 24, at 424; BERNARD SCHWARTZ, *THE ROOTS OF FREEDOM: A CONSTITUTIONAL HISTORY OF ENGLAND* 53-54 (1967).

43. SCHWARTZ, *supra* note 42, at 53-54.

44. The term "parliamentum" can be traced as far back as the reign of Henry II (1154-1189). LYON, *supra* note 24, at 413. The word "parliament" was used more frequently during the reign of Henry III (1216-1272). SCHWARTZ, *supra* note 42, at 22. At its inception, a parliament meant a discussion. Slowly this label became associated with discussions involving the king and a body summoned by him to conduct business. 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 171 (1st ed. 1956).

45. SCHWARTZ, *supra* note 42, at 44.

46. LYON, *supra* note 24, at 426.

47. *Id.* at 424-25.

48. 1 HOLDSWORTH, *supra* note 44, at 173. Many petitions that were presented directly to the council sought a favor from the king and were premised on the belief of the petitioner that a fair hearing could not be obtained through the appropriate court. FREDERICK MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 222 (1908). Technically, the petitioner admitted that he was not entitled to the relief he was seeking because his

ferring the growing number of petitions requesting individual relief to the king's chief advisor, the lord chancellor, who was also a leading member of the council.⁴⁹ The chancellor would make a recommendation to the council, and the council would dispose of these petitions.⁵⁰ By the fifteenth century, the chancellor, subject to the king's approval, possessed the authority to unilaterally refer and dispose of petitions.⁵¹ Sometimes petitioners were summoned by the chancellor to appear and testify under oath.⁵² From this process, an important branch of the judiciary emerged: the Court of Chancery.⁵³

Litigation in the Court of the Exchequer, the Court of Common Pleas, and the Court of the King's Bench was also initiated by petition.⁵⁴ Like Parliament these courts evolved primarily as a source of revenue for the crown.⁵⁵ Just as the crown agreed to parliamentary petitions in exchange for Parliament's agreement to finance the crown, individuals could initiate legal proceedings in the royal court system by paying a fixed fee to the crown.⁵⁶

Due to the intermingling of the executive, legislative, and judicial functions of government, petitioning possessed a very broad meaning for the British citizenry and was not limited to the submission of a written document signed by a group or an individual. Instead, petitioning included written requests for relief, examination of petitioners, and other quasi-judicial proceedings.⁵⁷

opponent had intimidated jurors or gained an unfair advantage in some other way. The petitioner did not actually allege that the existing court system had provided a forum for his petition. *Id.*

49. BERNARD O'DONNELL, *CAVALCADE OF JUSTICE* 124-25 (1952); Smith, *supra* note 6, at 1156.

50. 1 HOLDSWORTH, *supra* note 44, at 173.

51. In 1474 the Chancellor for the first time entered judgment without the consent or advice of the council. *Id.* at 403-04.

52. O'DONNELL, *supra* note 49, at 125. This is to be distinguished from the practice in other courts: interested civil litigants, either plaintiffs or defendants, were not considered competent to testify on their own behalf for redress of grievances until 1843. *Id.* at 116. Instead, witnesses testified in support of petitioners' claims. *Id.*

53. *Id.* at 126.

54. The Court of the Exchequer dealt with matters involving revenue, the Court of Common Pleas was concerned with private grievances between subjects, and the Court of the King's Bench was concerned with cases against important, privileged individuals and matters affecting the crown. JACK HARVEY & LESLIE BATHER, *THE BRITISH CONSTITUTION* 330 (2d ed. 1972).

55. SCHWARTZ, *supra* note 42, at 68.

56. *Id.* The royal courts soon replaced the local courts, which were privately owned by landholding lords and barons. O'DONNELL, *supra* note 49, at 16-81.

57. See *supra* notes 47-52 and accompanying text; see generally 10 HOLDSWORTH, *supra* note 44, at 326-41.

Despite its apparent breadth, petitioning was not a meaningful right. The crown was able to avoid parliamentary petitions⁵⁸ by not convening Parliament, by proroguing or dissolving Parliament⁵⁹ before responding to any undesirable petitions, or by invoking the crown's suspending powers.⁶⁰ Also, the king appointed the chancellor and the council members and presumably chose only those who were loyal to him.⁶¹ The proceedings of all courts were subject to review by the council.⁶² The crown similarly retained extensive control over the entire court system, and royal intervention in court proceedings was not unusual.⁶³ Finally, all judges served at the royal prerogative, and uncooperative judges were summarily dismissed.⁶⁴

Although this Article focuses upon the individual right to petition, that right evolved from and developed in conjunction with the right of parliamentary petition.⁶⁵ Additionally, for much of Parliament's early history, members of Parliament represented individuals and did not represent groups or communities. The history of parliamentary petitioning consisted of a power struggle between the crown and Parliament until the middle of the seventeenth century when Parliament was finally able to wrest control over legislation from the crown.⁶⁶ Parliament successfully obtained this power because its members learned they could control the royal response to their petitions by uniting and agreeing to grant financial assistance only if their petitions were favorably received.⁶⁷

58. When parliamentary petitions were granted, they were cast in the form of an ordinance or statute. SCHWARTZ, *supra* note 42, at 72-90.

59. Technically, dissolution occurs prior to the end of a parliamentary session and prorogation occurs at the end of the session. PHILIP S. JAMES, *INTRODUCTION TO ENGLISH LAW* 125 (2d ed. 1953). Charles II (1660-1685) dissolved Parliament several times to escape parliamentary petitions. T. ERSKINE MAX, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 410-11 (1862).

60. To subvert the effect of statutes, the king would use the suspending or dispensing powers of the crown which were designed to temporarily suspend the application of a law in an individual case where hardship was a likely result. LYON, *supra* note 24, at 554-55. The king began using these powers to completely nullify parliamentary enactments. *Id.*

61. DAVID L. KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485*, at 16-17, 20 (9th ed. 1969).

62. HARVEY & BATHER, *supra* note 54, at 209-10.

63. KEIR, *supra* note 61, at 28-29.

64. FREDERICK POLLACK & FREDERIC W. MAITLAND, 1 *THE HISTORY OF ENGLISH LAW* 203-06 (1959). This practice became especially common during the reigns of Charles II (1660-1685) and James II (1685-1688). SCHWARTZ, *supra* note 42, at 150-51.

65. *See supra* notes 43-48.

66. LYON, *supra* note 24, at 612.

67. *Id.*

Parliament, armed with the power to legislate, resorted to the same tactics that the crown had used against it. The petitions of those who supported Parliament were granted, and the petitions of those who failed to support Parliament were denied.⁶⁸ Some petitioners were imprisoned for the subject matter of their petitions.⁶⁹ Even the English Bill of Rights of 1689 which, in theory, explicitly recognized the individual right to petition free from governmental retaliation and called for the convening of Parliament for this very purpose, did not ensure a meaningful right for individuals to petition government.⁷⁰

Parliament's power to punish petitioners, however, was short-lived. A receptive attitude toward petitions was soon mandated by the popularity of petitioning, the strong public opinion against prosecutions for petitioning, and Parliament's increased sensitivity to the will of the ever-expanding electorate.⁷¹ The last record of an attempt by Parliament to punish petitioners was in January 1702.⁷² In that month, the House of Commons imprisoned two individuals who presented petitions concerning contested parliamentary elections.⁷³ Because of the public outcry against the arrests, the two were never prosecuted and were later released.⁷⁴ Future Parliaments received petitions expressing opinions against the government in "contemptuous silence"⁷⁵—Parliament's only recourse was to vote down such petitions.

Thus, written petitioning had evolved into a right. This "right" did not include a right to a personal audience or to argue in favor of a petition, nor did it include a right to dictate a favorable response or to demand parliamentary debate or discussion. The right to petition guaranteed a minimum level of consideration that might only be a vote to summarily deny a petition.

In 1765 William Blackstone described "the right of petitioning the king, or either house of parliament" to redress injury as "apper-

68. Kingsley B. Smellie, *Right of Petition*, in 12 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 98, 99 (Edwin R.A. Seligman & Alvin Johnson eds., 1934).

69. *Id.*

70. Smith, *supra* note 6, at 1163; see *THE FOUNDERS' CONSTITUTION* 197 (Philip B. Kurland & Ralph Lerner eds., 1987).

71. Smith, *supra* note 6, at 1162-64. Not only was Parliament informed of the will of the electorate through petitions and, thus, made more responsive to the wishes of the electorate, but mass petitions also prompted the expansion of the electorate via the voting reform acts of the 19th century. See HARVEY & BATHER, *supra* note 54, at 54-62.

72. Smith, *supra* note 6, at 1162-65.

73. *Id.*

74. *Id.*

75. Smellie, *supra* note 68, at 99.

taining to every individual.”⁷⁶ The only restriction Blackstone recognized was the numerical limitation placed by Parliament on both the number of signatures and the number of individuals allowed to present a petition.⁷⁷ Blackstone specifically justified this restriction as a means of avoiding riots or disruptive presentation of petitions.⁷⁸

In a similar vein, Blackstone spoke of the “right of every Englishman” to apply “to the courts of justice for redress of injuries.”⁷⁹ By abolishing the crown’s power to remove judges and mandating they be removed only at the request of both houses of Parliament, the English Act of Settlement of 1701 ensured this right by establishing judicial independence.⁸⁰ As a result, the right to petition the government for redress of grievances was free from punishment in eighteenth century England.

B. Establishment of Petitioning in the American Colonies

It is against the English backdrop that the early American colonial charters appeared.⁸¹ In 1641 the Massachusetts Body of Liberties became the first colonial charter to provide explicit protection to the right to petition:

Every 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, or to present any necessary motion, complaint, petition, Bill or information,

76. 1 WILLIAM BLACKSTONE, COMMENTARIES *138.

77. *Id.* at *139.

78. *Id.*

79. *Id.* at *137; *see also* EDWARD COKE, SECOND INSTITUTES *55. Beginning in 1607, English law also provided an additional restriction on petitioning: the prevailing party, whether plaintiff or defendant, was awarded costs. 4 HOLDSWORTH, *supra* note 44, at 538. This law was designed to discourage meritless actions and appeals. 3 BLACKSTONE, *supra* note 76, at *403-05.

80. JACK P. GREENE, THE QUEST FOR POWER 330 (1963); SCHWARTZ, *supra* note 42, at 199.

81. As the colonies were settled, local charters were promulgated by voluntary action of the colonists pursuant to decree from England. 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 49-50 (1971). The earliest to emerge included the First Charter of Virginia in 1606 and the Fundamental Orders of Connecticut in 1639. 2 BENJAMIN P. POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 1888-93 (1878); 1 FRANCIS N. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 519-23 (1909).

whereof that meeting hath proper cognizance, so it be done in convenient time, due order, and respective manner.⁸²

By the time of the American Revolution, Delaware,⁸³ New Hampshire,⁸⁴ North Carolina,⁸⁵ Pennsylvania,⁸⁶ and Vermont⁸⁷ also provided explicit protection for the right of colonists to petition local governing bodies for redress of both individual and collective grievances. Thus, the early colonial governments recognized petitioning as a tangible right. All colonies, including those which did not provide explicit protection for petitioning activity, recognized petitioning as a method by which individuals participated in government and voiced their views to the local governing bodies.⁸⁸

A simple, informal procedure was utilized for the presentation of petitions in colonial America. Petitioners directly presented written petitions (usually one or two paragraphs long with one or more signatures) to the court, legislative body, council, or governor.⁸⁹ As in England, the same colonial body often performed legislative, judicial, and executive functions. For example, petitions directed to the legislature were frequently referred to legislative committees which would investigate, subpoena witnesses and records, and review deposition testimony.⁹⁰

Individuals or groups also petitioned courts for redress of private grievances.⁹¹ Generally, the local governor and his council acted as an appellate court when petitioners were dissatisfied with a judicial decision.⁹² Many judges were also members of the council and would participate in resolution of the same case at both the trial and appellate

82. GEORGE L. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* 197 (1960); WILLIAM H. WHITMORE, *THE COLONIAL LAWS OF MASSACHUSETTS 1672*, at 35 (1890); see Smith, *supra* note 6, at 1170-71.

83. 1 Del. Laws, app. §§ 8 to 9 (1791); Smith, *supra* note 6, at 1174.

84. 4 THORPE, *supra* note 81, at 2457; Smith, *supra* note 6, at 1174.

85. 2 POORE, *supra* note 81, at 1409-11; Smith, *supra* note 6, at 1174.

86. 5 THORPE, *supra* note 81, at 3084; Smith, *supra* note 6, at 1174.

87. 6 THORPE, *supra* note 81, at 3741-42; Smith, *supra* note 6, at 1174.

88. At the time that the American colonies were being settled, the practice of petitioning was firmly established in England despite the fact that the risks accompanying petitioning continued until 1702. RAYMOND C. BAILEY, *POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA* 13 (1979). The first recorded petition in Virginia was submitted on June 6, 1607. *Id.* at 15.

89. *Id.* at 28-30; MARY P. CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 210-15 (1943).

90. BAILEY, *supra* note 88, at 29.

91. *Id.* at 23; see Stephen A. Higginson, *A Short History of the Right To Petition Government for the Redress of Grievances*, 96 *YALE L.J.* 142, 144-46 (1986); Erwin C. Surrency, *The Courts in the American Colonies*, 11 *AM. J. LEGAL HIST.* 253, 268-69 (1967).

92. BAILEY, *supra* note 88, at 25.

level.⁹³ If the colonists were dissatisfied with the action taken, they occasionally exercised their right of final appeal by petitioning the king in England.⁹⁴

As in England, petitioning in America was not originally a meaningful right. Separate forces worked against petitioners early on in the American colonies. First, the British government controlled (and at times completely nullified) the right to petition within the colonies. Both the colonial governor and the colonial judge were dependent on the king for their tenure of office.⁹⁵ The English Act of Settlement of 1701, which established judicial tenure during good behavior, was declared inapplicable to the American colonies.⁹⁶ The colonial judges were subject to dismissal at the royal prerogative, and like the governors, their salaries were set by the crown.⁹⁷ Petitions to the judicial arm of the colonial government were not ensured an impartial hearing because uncooperative judges could be dismissed at the request of the British government. The colonial governors, under the directive of the British government, possessed the power to prorogue and dissolve legislative assemblies.⁹⁸ As such, petitions to local legislative bodies could not be effectively redressed as long as the governors were free to use these powers to circumvent the passage of legislation. In an effort to achieve greater control over legislation, the colonies attempted to enact triennial acts similar to the English Triennial Act of 1641 which mandated that assemblies be convened at specific intervals and not be prorogued without the consent of their members.⁹⁹ Local governors, however, routinely thwarted attempts to pass such acts.¹⁰⁰

93. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 159 (1969). Most revolutionary constitutions barred this sort of plural office holding. *Id.* at 160.

94. LOUISE P. KELLOGG, *THE AMERICAN COLONIAL CHARTER 66-67* (1971); see A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 70-71* (1968).

95. KELLOGG, *supra* note 94, at 66.

96. BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS 68* (1967). Blackstone characterized the American colonies as "conquered or ceded" territory and declared that British law applied to the colonists only if the colonies were specifically named in an enactment or decree. BEVERLY ZWEIBEN, *HOW BLACKSTONE LOST THE COLONIES 119-20* (1990); see also WILLIAM H. LOYD, *THE EARLY COURTS OF PENNSYLVANIA 13-14* (1910) (noting that Blackstone's position stemmed in part from his opinion that the common law should not generally apply to the colonies).

97. HOWARD, *supra* note 94, at 210.

98. BAILYN, *supra* note 96, at 67.

99. WOOD, *supra* note 93, at 166.

100. *Id.* Because of the distance separating England and the colonies and the growth in both the colonial electorate and the power and size of the representative assemblies, enforcement of the British will became increasingly difficult. BAILYN, *supra* note 96, at 71-81.

A second force working against petitioners were the local assemblies who, during their first 100 years, occasionally punished petitioners for the subject matter of their petitions. For example, in Virginia in 1677, two individuals were fined for using “objectionable” language in their petitions.¹⁰¹ Similarly, in South Carolina in 1722, twenty-eight merchants who signed a petition objecting to a paper currency were all arrested and fined \$1,200.¹⁰²

As in England, history was not one-sided. During the fifty years prior to the Revolution, individuals presented numerous petitions to the local assemblies criticizing both their representatives and the legislation their representatives enacted. None of these petitions evoked a punitive response from the assemblies. For instance, in New York in 1735, several residents of Queen’s County presented a sarcastic petition to the assembly which the House journal summarized as follows: “they [the residents] conceive [themselves] in Duty bound, to lay before this [House], the [D]esire of the People in general, that this [House] would do all in their Power, to give the People a new Choice of [Representatives].”¹⁰³ The petition was read to the whole House and was then ordered to lie on the table.¹⁰⁴ At a later time on that same day, the petition was read again, and the House, in apparent frustration, resolved that:

[t]he Petitioners [presuming] to [set] forth, that the [visible] Decay of Trade in this Colony, and the [lessening] of the Value of the Lands in that County, and the Province in general; is owing in a great [Measure], to the long Continuance of the [Assembly], is an [unjust] and audacious Charge, highly reflecting on the General [Assembly].¹⁰⁵

Although the petition was denied, the petitioners were not arrested or fined.¹⁰⁶

By 1775, the legislative assemblies in most colonies had acquired the sole authority to appoint judges. WOOD, *supra* note 93, at 160-61. The governors had lost their veto power and the revolutionary constitutions mandated specific time periods for assembling legislative bodies and stipulated the minimum periodicities for meeting. *Id.* at 166-67. Britain’s power over petitioners had eroded considerably.

101. CLARKE, *supra* note 89, at 129. In a number of the colonies, petitioning was also restricted by a requirement that petitions be presented in a peaceful, orderly fashion. Smith, *supra* note 6, at 1174. This requirement did not impact the subject matter of petitions. *Id.*

102. GREENE, *supra* note 80, at 215.

103. 1 JOURNAL OF THE VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE COLONY OF NEW YORK 687 (Hugh Greene ed. 1764).

104. *Id.*

105. *Id.*

106. *Id.*

The Massachusetts Assembly was even more solicitous of petitioners. In 1724 fifteen petitioners leveled a direct attack on a representative when they questioned the legality of an election in which Daniel Taft had allegedly received a majority of votes for another term in office.¹⁰⁷ The House ordered Taft to file an answer so that the matter could be heard and resolved.¹⁰⁸ Thus, even when a petition reflected on the veracity of a member of the assembly or was highly critical of the assembly, petitioners were allowed to voice their objections and to receive a response from the general assembly.¹⁰⁹ Petitioning had become meaningful because individuals or groups were allowed to express dissatisfaction with their government without fear of punishment for the substance of their petitions.

The right to petition, however, was never completely devoid of restrictions. In response to the great number of petitions, several assemblies promulgated rules and regulations imposing fines against anyone who filed a meritless petition.¹¹⁰ Similar enactments, aimed at "vexatious suits" and appeals, applied in the courts.¹¹¹ The general assemblies and the courts in the various colonies were empowered to impose fines and cost awards *sua sponte* against any petitioner who filed a meritless petition.¹¹² These enactments, however, did not encompass petitions which "reflected on the house" and were not designed or applied to squelch criticism of the government. Rather, these laws attempted to ensure that petitions with merit would be heard while individuals would be protected from defending baseless actions.

Petitioning also enjoyed special quasi-judicial protections. Legislative committees were given the authority to subpoena witnesses for testimony relevant to a petition, and individuals who refused to obey

107. 6 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1724-1726 at 6-7 (Arthur Lord et al. eds., 1925).

108. *Id.* at 7.

109. Significantly, under existing seditious libel doctrine, *any* reflection on the assembly or its members could have been punished, even if couched in highly deferential language. See *infra* notes 117, 143-52 and accompanying text. Both of these petitions were emotionally charged criticisms, yet, the petitioners were not punished.

110. ACTS AND LAWS OF HIS MAJESTY'S COLONY OF CONNECTICUT IN NEW ENGLAND 188 (Timothy Green ed., 1750); 6 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 95-96 (John Russell Bartlett ed., 1861).

111. GENERAL LAWS AND LIBERTIES OF CONNECTICUT COLONIES 64-65 (Samuel Greene ed., 1865); see generally 5 THE STATUTES AT LARGE, BEING A COLLECTION OF ALL LAWS OF VIRGINIA 477 (William W. Hening ed., 1819) [hereinafter LAWS OF VIRGINIA] (directing that appeals be brought before the county court as a means of addressing "inconsiderable causes").

112. See sources cited *supra* notes 110-11.

such subpoenas could be arrested and held in contempt.¹¹³ Upon issuance of the summons, witnesses were protected from prosecution for statements made before a legislative committee.¹¹⁴ Witnesses were also privileged from arrest during the hearing and while travelling to and from the hearing.¹¹⁵ Petitioners enjoyed special protections and were rarely punished for the subject matter of their petitions because the right to criticize the government was implicit in the original right to petition.¹¹⁶

Early petitions presented by the colonies to England were composed with respectful language and began with expressions of the petitioners' subservience, loyalty, and support for the crown.¹¹⁷ Such petitions were the only authorized channel through which criticism of the government was funneled. As the Revolution drew near, the colonists' discontent increased, and the tone of their petitions became less respectful and more caustic.¹¹⁸ Finally, in the 1774 Declaration and Resolves of the First Continental Congress which was patterned on the English Bill of Rights, the colonists proclaimed their right to petition and clearly declared the unrestricted nature of that right: "[T]hat they [the colonists] 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."¹¹⁹

113. RALPH V. HARLOW, *THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825* at 111-12 (1917); see Higginson, *supra* note 91, at 147.

114. HARLOW, *supra* note 113, at 112.

115. *Id.* In Virginia, courts awarded witness fees to those testifying on behalf of the parties. The fee, determined by miles traveled to testify and time spent in attendance, was in the form of tobacco and paid by the party calling the witness. 5 *LAWS OF VIRGINIA*, *supra* note 111, at 480.

116. RICHARD L. BUSHMAN, *KING AND PEOPLE IN PROVINCIAL MASSACHUSETTS 46-47* (1985).

117. In 1664 a petition from Massachusetts to the king stated:

If your poore subjects, who have remooved themselves into a remote corner of the earth to enjoy peace with God and man, doe in this day of their trouble prostrate themselves at your royal feete, and begg yor favor, wee hope it will be graciously accepted by your magestie, and that as the high place you susteine on earth doeth number you here among the gods, so you will imitate the God of heaven, in being ready to mainteyne the cause of the afflicted and the right of the poore, and to receive their cries and addresses to that end.

Id. at 47 (quoting 4 *RECORDS OF THE GOVERNOR AND COMPANY OF MASSACHUSETTS BAY 129-30* (Shurtleff ed.)).

118. *Id.* at 50-53.

119. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 95 & n.4 (1973) (quoting ELIZABETH G. BROWN, *BRITISH STATUTES IN AMERICAN LAW 1776-1836* at 21 (1964)); see also 1 SCHWARTZ, *supra* note 81, at 215 (discussing resolutions adopted by the First Continental Congress); Smith, *supra* note 6, at 1173-74 (noting the codification of the right to petition in the colonies and states).

This assertion of an unqualified right to petition may have been the result of the local assemblies' painful first-hand experience with representative government. Because the assemblies were denied a meaningful channel to complain against the home government's action, inaction, and abuse, the assemblies may have understood the futility of recognizing the right of petitioning without a corresponding prohibition against governmental retaliation. The assemblies' demand that England recognize an unqualified right to petition the home government mirrored their treatment of petitioners within the colonies for the fifty-year period preceding the Revolution. The right to petition had evolved so that the government no longer sanctioned punishment for the subject matter of petitions.

C. Petitioning Historically Included the Right to a Response

Inherent in the right to petition was a corresponding right to a response.¹²⁰ Because so many petitions were presented to the colonial assemblies, petitions were often referred to committees for consideration.¹²¹ Petitions were occasionally held over to the next session if a committee needed additional time to investigate and reach a decision¹²²—but petitions were always answered.¹²³ Although complaints arose about the slow administration of justice within the judicial system, colonial courts, like the assemblies, did not and could not restrict or refuse access when petitions became numerous; they simply labored more slowly.¹²⁴ As in England, the right to a response did not

120. See BAILEY, *supra* note 88, at 36, 166-74; Higginson, *supra* note 91, at 145-49, 155.

121. HARLOW, *supra* note 113, at 17; Smith, *supra* note 6, at 1173; see also CLARKE, *supra* note 89, at 210-12 (discussing the procedure for submitting petitions in the American colonies).

122. BAILEY, *supra* note 88, at 31. In Massachusetts the House of Representatives ordered the clerk to lock up all petitions that were being held over to the next session in order to protect them from tampering and to ensure that none were removed before they were considered by the House. 37 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 107, at 201.

123. BAILEY, *supra* note 88, at 29-31. When the number of private petitions to the Connecticut Assembly became great in 1762, the Assembly ordered that the petitions be recorded and that a few be placed on the docket for consideration each day until all petitions were heard or resolved. 12 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 63 (Charles J. Hoadley ed., 1881).

124. See generally Surrency, *supra* note 91, at 255-57. The local assemblies utilized private petitions as a way of extending their authority. Higginson, *supra* note 91, at 152. If a court dealt an injustice to a petitioner by denying access, the assemblies were frequently willing to hear an "appeal." *Id.* at 154. This check on the court was a likely deterrent to such actions even when the courts were understaffed and greatly burdened by the ever-increasing number of petitions presented.

include the right to a favorable response or to demand a hearing. The right could encompass a summary vote to deny a petition.¹²⁵

As petitions became more numerous, attempts were made in several of the colonies to obviate assembly consideration.¹²⁶ For example, in Virginia royal governors twice attempted to forbid petitions on controversial issues. First, in 1675 Governor Berkeley issued a proclamation forbidding any petitions concerning Bacon's Rebellion.¹²⁷ Second, in 1688 Governor Howard, the Baron of Effingham, demanded that the General Assembly give all petitions directly to him and his council for redress.¹²⁸ These and other attempts to deny assembly consideration of petitions were promptly disallowed by either the colonial assemblies or the British government. The right to petition, including the right to a response, became firmly embedded in pre-Revolutionary colonial America.¹²⁹

II. The Right to Petition Was Distinct From and Superior to the Rights of Speech and Press

The rights of speech and press evolved much more slowly in England than the right to petition.¹³⁰ The English Bill of Rights of 1689, while providing explicit protection for the right to petition, made no mention of an individual right of speech or of any rights of the press.¹³¹ In the first years following the Revolution of 1688, press licensing laws remained in effect.¹³² Although these laws expired in 1694, the press continued to be controlled through application of the law of seditious libel¹³³ and treason.¹³⁴ The judicial extension of trea-

125. See *supra* notes 75-79; *infra* notes 186-187 and accompanying text; see also Smith, *supra* note 6, at 1175.

126. Higginson, *supra* note 91, at 148-49; Smith, *supra* note 6, at 1172.

127. BAILEY, *supra* note 88, at 36-39; sources cited *supra* note 126.

128. See sources cited *supra* note 127.

129. *Id.*

130. Smith, *supra* note 6, at 1168-69.

131. FREDERICK S. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND: 1476-1776*, at 381 (1952).

132. *Id.* at 300-01. These licensing laws originated with Henry VIII (1509-1547) by proclamation in 1538. *Id.* at 48. The laws required that all books printed in English must receive prior approval by members of the Privy Council. *Id.* at 49. Penalties for violation included forfeiture of all goods and chattels, fines, and imprisonment. *Id.* In 1586 Elizabeth I (1558-1603) issued the most comprehensive licensing scheme for the press by Star Chamber Decree. *Id.* at 61. The decree allowed unrestricted search of printers' presses and seizure of all printing equipment used for unlicensed printing. *Id.* at 84-85.

133. Smith, *supra* note 6, at 1168. The crime of seditious libel originated in the 1606 case of *De Libellis Famosis*, 77 Eng. Rep. 250 (Star Chamber 1606). Prior to this decision, libel was a purely private action for damages. LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 8 (1964). *De Libel-*

son via the doctrine of constructive treason allowed for greater controls over the press.¹³⁵ Although only three printers were executed for treason during the sixteenth and seventeenth centuries,¹³⁶ this extreme penalty was a likely deterrent to a free press.

Seditious libel laws provided another and more effective method for suppressing the press.¹³⁷ The definition of seditious libel was very broad, encompassing "any reflection on the government in written or printed form."¹³⁸ While intent to publish the material was required, actual intent to produce sedition was not.¹³⁹ Convictions were relatively easy to obtain because the judge determined whether the publication was seditious and whether malice was shown.¹⁴⁰ The truthfulness of the published material was not an affirmative defense and in fact, was not even considered relevant to these prosecutions.¹⁴¹ Penalties were less severe than those levied for treason, and included fines and imprisonment for indefinite terms.¹⁴²

Although members of Parliament possessed the privilege of free speech,¹⁴³ Parliament punished as seditious libel all reports of parliamentary proceedings, including any critical discussions of these proceedings, on the theory that free speech in Parliament was necessary for effective government. Because parliamentary measures were

lis Famosis was a clear break from precedent with the obvious purpose of allowing the British government to suppress critical political speech. *Id.* at 8-11.

134. Smith, *supra* note 6, at 1168. The law of treason originated in England in a 1352 statute that criminalized: "(1) compassing or imagining the king's death, (2) levying war against the king, or (3) adhering to his enemies." SIEBERT, *supra* note 131, at 265.

135. As originally defined, treason required an overt act evidencing an intent to murder the king or to levy war or to adhere to the king's enemies. *Id.* at 266. Under the doctrine of constructive treason, any writing that evinced such an intent was found sufficient to constitute an overt act. *Id.*

136. In 1584 William Carter was executed for a publication that allegedly called for the assassination of Queen Elizabeth I. *Id.* at 90, 265. John Twyn was executed in 1664 for printing a book advocating revolution and government by the people. *Id.* at 267. William Anderton was executed in 1693 for two publications which were found to advocate rebellion and called for the return of King James II to the throne. *Id.* at 267-68.

137. *Id.* at 269; see Smith, *supra* note 6, at 1168-69.

138. SIEBERT, *supra* note 131, at 271. The breadth of this doctrine was based on the prevailing notion that in order to have a successful government, all subjects must have a positive opinion about their government. *Id.*

139. *Id.* at 273.

140. *Id.* The jury only determined such facts as whether the material was published by the accused. *Id.* It was not until a 1796 act of Parliament that the jury was allowed to determine malice and intent. *Id.* at 274.

141. *Id.*

142. *Id.* at 268-70.

143. Immunity for statements made in a parliamentary session was secured by Parliament as a result of the Revolution of 1688. CARL F. WHITCKE, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* 30 (1921).

often enacted after much debate and great differences of opinion, such internal discussions were deemed absolutely privileged from disclosure to the public.¹⁴⁴ Due to public opposition, the House of Commons no longer punished accurate publication of its debates after 1771 but continued to punish as libel those publications that allegedly misrepresented these debates.¹⁴⁵ In an effort to prohibit publication of its proceedings, Parliament sometimes completely barred reporters from its sessions.¹⁴⁶ Additionally, Parliament taxed publishers through the early part of the nineteenth century.¹⁴⁷ It was not until 1860 that these suppressive practices ceased in England.¹⁴⁸

Press licensing laws survived in colonial America until 1720, approximately a quarter century after the expiration of the British licensing laws.¹⁴⁹ These laws restricted expression to those few printers the government approved.¹⁵⁰ The laws were allowed to lapse in the face of the emerging eighteenth century belief that speech was a right enjoyed in common by all people.¹⁵¹ As in England, the colonial government removed these prior restraints on speech only to replace them with the possibility of subsequent punishment for seditious libel.¹⁵²

These practices were generally accepted throughout the early part of the eighteenth century by both the British and the American colonists who understood freedom of speech to mean nothing more than an absence of prior restraints.¹⁵³ Critical speech was suppressed for two reasons. First, the government was viewed as superior to the individual citizen and was therefore justified in suppressing critical speech as a method of self-preservation.¹⁵⁴ Also, truth was thought to be absolute, and there could be no tolerance for any ideas or opinions which differed from the orthodox view of the government.¹⁵⁵

144. SIEBERT, *supra* note 131, at 346-47; see 8 HOLDSWORTH, *supra* note 44, at 376-77.

145. SIEBERT, *supra* note 131, at 361-62.

146. *Id.* at 362. During the 1775 debates on the American colonies, the press was not allowed to attend sessions of Parliament. *Id.*

147. *Id.* at 5.

148. *Id.*

149. PATRICK M. GARRY, *THE AMERICAN VISION OF A FREE PRESS* 37 (1990); Smith, *supra* note 6, at 1171.

150. GARRY, *supra* note 149, at 37-38.

151. *Id.* at 38; Smith, *supra* note 6, at 1168.

152. GARRY, *supra* note 149, at 40.

153. LEVY, *supra* note 133, at 16-17; see also *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON* 103-05 (Leonard W. Levy ed., 1966).

154. LEVY, *supra* note 133, at 16.

155. *Id.*

This restrictive theory of speech seems to conflict with historical accounts of frequent and vehement criticism of government by the press and by individuals during the period immediately preceding the American Revolution.¹⁵⁶ Political debate was accepted and criticism of England's governance was widespread. Although less numerous than in England, seditious libel prosecutions for speech critical of local governing bodies did occur.¹⁵⁷

Despite the repressive governmental response to critical political expression,¹⁵⁸ many printers did publish anti-revolutionary rhetoric.¹⁵⁹ This may be attributed in part to the divergent views held in the different colonies on various political issues.¹⁶⁰ People intent on publishing material offensive to the governing authority in one colony could simply move to another colony where the government was more tolerant of written opinions.¹⁶¹ The fact that printers risked punishment by publishing objectionable material throughout the late eighteenth century did not alter the law.¹⁶² Seditious libel laws existed in all of the colonies,¹⁶³ and punishment for statements critical of the government was an accepted, lawful practice which continued even after the framing and ratification of the First Amendment.¹⁶⁴ Although the press was used throughout the Revolution to unite and inform the colonists, the press could play a politically divisive role through its ability to reach so many people.¹⁶⁵ The revolutionary movement utilized the doctrine of seditious libel as its tool for suppressing critical political speech.

In comparison, the right to petition was far less restricted and was the only authorized means by which individuals could speak out against governmental action.¹⁶⁶ It is likely that individuals were al-

156. *Id.* at 18-19; Smith, *supra* note 6, at 1174.

157. LEVY, *supra* note 133, at 18-19.

158. LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* x, xvi-xvii (1985).

159. *Id.* at xvi.

160. GARRY, *supra* note 149, at 39; *see* LEVY, *supra* note 158, at 16-17.

161. LEVY, *supra* note 158, at 16-17.

162. *Id.* at 266-73.

163. Thus, freedom of speech was "dependent upon government sufferance." *Id.* at xvi; *see* Smith, *supra* note 6, at 1174-75.

164. LEVY, *supra* note 158, at xvi; Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 738-39 (1977); Smith, *supra* note 6, at 1174-75. The argument that the First Amendment was not meant to abrogate seditious libel laws is not new and, in fact, can be traced back to 1920. David A. Anderson, *Levy v. Levy*, 84 MICH. L. REV. 777, 781 n.22 (1986); Edward S. Corwin, *Freedom of Speech and Press Under the First Amendment: A Resumé*, 30 YALE L.J. 48, 49-50 (1920).

165. GARRY, *supra* note 149, at 45-47.

166. *See supra* notes 103-09, 116-18 and accompanying text.

lowed to petition government without fear of reprisal because petitioning did not present the same potential threat to the patriot cause as did the unrestricted freedom to publish. A petition signed by an individual or group and submitted to an assembly, even if highly critical of the assembly, was not a likely threat to the continued existence of the government or the assembly. Thus, the theory of self preservation that underlies the seditious libel laws was not present.

The right to petition consisted of a right to complain and a concomitant right to receive a response.¹⁶⁷ Like British citizens, the colonists did not possess a right to dictate a favorable response or to shape governmental policies and laws.¹⁶⁸ Laws restricting the number of signatures and the number of people allowed to present a petition¹⁶⁹ and requiring the peaceful and orderly presentation of petitions¹⁷⁰ minimized the likelihood that large coercive groups would organize and present mass petitions to the assemblies. Thus, petitioning was not as effective a method for spreading propaganda unless the petitions were subsequently published in a newspaper, pamphlet, or the like. In both England and colonial America, presentation of a petition to government was not a "publication" under the existing libel law.¹⁷¹ In the case of subsequent publication, however, the petitioner or the individual responsible for publication of the petition could be subject to prosecution for seditious libel, but not for the subject matter of the petition as originally presented to the government.¹⁷² These features distinguished petitioning from the rights of speech and the press and held petitioning in a superior status.

Influential writers espoused toleration of critical political speech during the period immediately preceding the framing and ratification of the First Amendment.¹⁷³ Their libertarian views, however, emerged as colonial society was in transition.¹⁷⁴ Although considerable debate exists about the content and meaning of that era's libertarian thought about freedom of speech and the press, the academic

167. See *supra* notes 120-25, 187 and accompanying text.

168. See *supra* notes 75-79, 125 and accompanying text.

169. See *supra* notes 77-78 and accompanying text.

170. See *supra* note 101.

171. 8 HOLDSWORTH, *supra* note 44, at 376.

172. *Rex v. Salisbury*, 1 Ld. Raym, 341 (1699); *Harris v. Huntington*, 2 Tyl. 129, 144-45 (Vt. 1802).

173. LEVY, *supra* note 158, at 289-94.

174. *Id.*; Emerson, *supra* note 164, at 738-39.

community agrees that seditious libel laws existed in the colonies.¹⁷⁵ In 1798, seven years after ratification of the First Amendment, the Sedition Act was passed by Congress and a number of individuals were prosecuted under it.¹⁷⁶ However, not a single petitioner was prosecuted.¹⁷⁷ The existence of both state seditious libel laws and the Federal Sedition Act coupled with the failure to prosecute petitioners under those laws indicate that there was no original intention to raise freedom of speech and the press to the level of protection given to petitioning.¹⁷⁸

III. The Right to Petition Received Protection in the Bill of Rights

On June 8, 1789, James Madison read nine amendments, embodied in twenty-six separate paragraphs, to the House of Representatives and requested that the House go into a committee of the whole to consider the amendments.¹⁷⁹ In these amendments the rights of assembly and petition were originally envisioned by Madison as an amendment separate from freedom of religion, speech, and the press:

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.¹⁸⁰

175. LEVY, *supra* note 158, at 289-94. *But see* David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 852-54 (1985); *accord* Anderson, *supra* note 164, at 783-86.

176. Professor Levy argues that the libertarian or "Jeffersonian" view of freedom of expression began to garner mass support in America in 1798. Levy, *supra* note 158, at 301. The reason for this sudden change, Levy asserts, is that Jefferson's supporters feared the Adams administration would use the Act to suppress critical political speech and thereby ensure re-election in 1800. *Id.* at 300-01. Thus, it was politically expedient to express the view that the Sedition Act violated the First Amendment. *Id.*; *see* Smith, *supra* note 6, at 1175-76.

177. Smith, *supra* note 6, at 1176. There were 17 prosecutions under the Act. *Id.* One petitioner, Jerediah Peck, was indicted for a petition which advocated repeal of the Sedition Act, but, due to mass public opposition to his prosecution, the case was dropped. *Id.*

178. In fact, the majority of Framers and ratifiers did not specifically articulate any view as to the meaning of freedom of speech and freedom of the press. Levy, *supra* note 158, at 266-74.

179. THE FRAMING AND RATIFICATION OF THE CONSTITUTION 311-12 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

180. 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1789-1791 at 10, 16 (Charlene B. Bickford & Helen E. Veit eds., 1986) [hereinafter DOCUMENTARY HISTORY]. Assembly and petition became closely aligned during the 18th century due to the enormous popularity of group meetings for the purpose of formulating and signing collective petitions. Smellie, *supra* note 68, at 99-100; Higginson, *supra* note 91, at 155-56.

A select committee of the House of Representatives was appointed to review the amendments, and on July 28, 1789, the committee issued a report delineating the amendments as modified.¹⁸¹ There is no record of the committee discussions and thus no indication as to why speech, press, assembly, and petition were consolidated into a single amendment and altered to read:

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.¹⁸²

The most significant change to the amendment for the right to petition was the substitution of the word "government" for the word "legislature."¹⁸³ This change implies a broad vision of petitioning, consistent with the British and colonial experience - a vision which encompassed the past practices of written application to the executive or legislative branch and initiation of judicial proceedings or requests for judicial review.¹⁸⁴ Also, given the "tripartite" system or "coequal nature" of government so recently created by the Constitution, application to government would logically include application to all three branches.¹⁸⁵ This, however, does not represent the full extent of the changes made to the Petition Clause of what would become the First Amendment.

After the House of Representatives reviewed the committee report, it debated amending the petition guarantee. Specifically, the debate focussed on whether to bind legislators to raise specific issues and to vote for or against legislation when individuals or communities "were committed to particular views they wished to have represented no matter what influence was brought to bear against their representatives."¹⁸⁶ This proposed change was defeated in the House on August 15, 1789, by a vote of forty-one to ten - the consensus was that

181. 1 DOCUMENTARY HISTORY, *supra* note 180, at 27-28.

182. *Id.* at 28; Smith, *supra* note 6, at 1175 (quoting 1 ANNALS OF CONGRESS 685-92 (1789)).

183. Smith, *supra* note 6 at 1175; Note, *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE L.J. 1055, 1059 (1973).

184. Note, *supra* note 183, at 1059-60.

185. *Id.* at 1059. Supreme Court precedent accords with this conclusion. See *infra* note 197 and accompanying text.

186. 2 SCHWARTZ, *supra* note 81, at 1092-95, 1098-1103; Smith, *supra* note 6, at 1175; see BAILYN, *supra* note 96, at 84-85. This concept of "actual representation" worked only in a homogenous society. BAILEY, *supra* note 88, at 168-73. Legislators introduced petitions to carry out the will of their constituents. *Id.* In some instances, petitions were used to poll the electorate on particular legislative measures. *Id.* at 31. If enough counterpetitions were presented, the measure was not adopted. *Id.*

Congress had a duty to consider petitions, but individual representatives were not bound to act favorably upon or to support the substance of the petitions presented on behalf of each constituent.¹⁸⁷ Nevertheless, the original understanding of the First Amendment Petition Clause included a duty of governmental consideration.

On the same date, a motion to strike the words “assemble and” was made in order to eliminate the explicit right to assemble. The motion was made because the sponsor considered the right to assemble implicit in the First Amendment; the motion was defeated.¹⁸⁸ In fact, a number of representatives argued that the right to assemble was “trifling” in comparison to the rights of speech, press, and petition.¹⁸⁹ These representatives believed that inclusion of “assemble and” suggested an exacting enumeration of the components of each right.¹⁹⁰ This sentiment did not carry the day, but those who opposed the motion to strike the words “assemble and” did not do so because assembly and petition were inextricably linked as a single right.¹⁹¹ The debates over the Petition Clause make clear that assembly was often a necessary component to the creation of collective petitions. The debates also indicate that the Framers wanted to ensure the assembly right in order to make meaningful the right of collective petition.¹⁹²

187. 2 SCHWARTZ, *supra* note 81, at 1146. The Senate also considered amending the petition guarantee to include a right of individuals to give binding instructions to their representatives. This proposal, however, was defeated. *Id.*; see also Higginson, *supra* note 91, at 156 (noting that while Congress had a duty to receive and consider petitions, its members were not obligated to support a constituent’s petition).

188. 2 SCHWARTZ, *supra* note 81, at 1052.

189. *Id.* One delegate sarcastically queried that if the right to assemble were enumerated, “why not also the right to wear one’s hat as he pleases or to go to bed when one chooses?” *Id.*

190. *Id.* at 1052, 1089-90.

191. “If the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause.” *Id.* at 1090. Those who spoke in favor of the motion to strike the words “assemble and” agreed that assembly was a component of the other expressive rights of the First Amendment: “If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess . . .” *Id.*

192. During the debates over whether to amend the Petition Clause to allow binding instructions, the Framers were in agreement when they spoke of the necessity of the right of the people to assemble and “consult for the common good” as a prerequisite to the formation of petitions. *Id.* at 1092, 1094. It was in this manner which the colonists expressed their dissatisfaction with both the British and the colonial government and exercised their power in numbers. The Framers realized that without the power to assemble, the right to formulate collective petitions was greatly diluted.

Given the final punctuation of the First Amendment, it is important to understand the link the Framers made not only between assembly and petition but also between assembly

On September 4, 1789, the Senate modified the amendment by substituting the words "to petition" for the words "apply to."¹⁹³ The Senate made some other minor changes, and on September 24, 1789, twelve amendments were finalized, approved by two-thirds of both Houses of Congress, and ready to be presented to the states for ratification.¹⁹⁴ Virtually no record of the state ratification debates exists beyond a tally of the actual vote.¹⁹⁵ Although the records of debates surrounding the framing and ratification of the petition guarantee are sparse, they evince no intent to change the original British and colonial experiences whereby the right to petition was subject to few restrictions and included a corresponding duty of governmental response.

IV. An Examination of Supreme Court Doctrine

Based on the history and evolution of the right to petition relative to the rights of speech and the press, this Article next focuses on a number of different contexts in which the Supreme Court has or has not addressed the right to petition. The Article then examines the impact of these decisions. The Supreme Court has unfortunately failed to recognize either legitimate petitioning activity or the superior status historically afforded petitioning. As a result, the Court has re-

and speech. In both the House and the Senate, the early versions of the First Amendment the Speech, Press, Assembly, and Petition Clauses were separated by a comma; the conjunctive "and" was used to separate the last two clauses. *Id.* at 1122, 1148, 1153. Very late in the formulation process and without any record of discussion, however, semicolons were substituted for the commas and the disjunctive "or" was substituted for the conjunctive "and" between the Speech and Press Clauses. *Id.* at 1160. The rights of assembly and petition remained separated by a comma and the conjunctive "and." *Id.*

If a strict textualist theory of interpretation were applied to the First Amendment, one might conclude that assembly, linked as it is to petition in a single clause, implies no separate or individual First Amendment right to petition government for redress of grievances. Strict textualism has been rejected by a majority of theorists, *see supra* note 34, and the debates show that, although assembly was frequently linked to petitioning, it was not intended to be linked exclusively to petitioning.

193. 1 DOCUMENTARY HISTORY, *supra* note 180, at 36 & n.12; Smith, *supra* note 6, at 1182. The Senate modification closely resembles the First Amendment as ratified.

194. FRAMING AND RATIFICATION, *supra* note 32, at 315-16. On October 2, 1789, President Washington sent the proposed amendments to the states for consideration. 2 SCHWARTZ, *supra* note 81, at 1171. Two amendments dealing with congressional representation and salaries were not ratified. FRAMING AND RATIFICATION, *supra* note 32, at 316. One of these two amendments was finally ratified just last year. On May 7, 1992, New Jersey was the last state to ratify what is now the Twenty-Seventh Amendment: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect until an election of Representatives shall have intervened." U.S. CONST. amend. XXVII.

195. 2 SCHWARTZ, *supra* note 81, at 1171.

fused to distinguish petitioning from speech and has refused to afford petitioning the appropriate level of constitutional protection.

A. The Right to Petition Must Include a Substantive Right of Access to Courts

Given both the historical development of petitioning and the tripartite system of government established by the Constitution, the First Amendment Petition Clause should be read to encompass a substantive right of access to the courts.¹⁹⁶ History notwithstanding, American jurisprudence has suffered due to insufficient recognition of the First Amendment Petition Clause.

The Supreme Court has recognized that the right of access to the courts is a component of the right to petition government for a redress of grievances and is constitutionally protected.¹⁹⁷ In several cases, the Court has analyzed claims of a right of access to the courts under either the Due Process or Equal Protection Clause of the Fourteenth Amendment. For instance, in *Boddie v. Connecticut*,¹⁹⁸ the Court held that the Due Process Clause required states to waive court costs and fee requirements for indigents seeking a divorce.¹⁹⁹ The Court ruled that, unlike resolution of other private disputes, a denial of access to those who could not afford to pay for a divorce was a denial of the right to a divorce and a complete denial of the right to be heard.²⁰⁰

196. The right to petition as historically developed, exercised, and understood included quasi-judicial procedures. Petitions were also used to invoke the judicial process and to initiate appellate review. As originally proposed, the First Amendment included only a right to apply to the legislature. Very early in the formulation process, however, it was expanded to clearly articulate that the "right to petition government" meant the right to apply to all branches of government, including the courts.

197. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); Comment, *On Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules*, 132 U. PA. L. REV. 1515, 1518-19 (1984).

198. 401 U.S. 371, 376-77 (1971); see also Note, *supra* note 183, at 1055-57 (discussing *Boddie* as the seminal case on indigent access rights).

199. *Boddie*, 401 U.S. at 376-77.

200. *Id.* Although the "American Rule" mandates that parties generally bear their own litigation costs and fees, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975), exceptions to this rule have been made, particularly when "important constitutional rights" are implicated. *Campaign for a Progressive Bronx v. Black*, 631 F. Supp. 975, 981 n.3 (S.D.N.Y. 1986); see *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 415-17 (1978). Thus, a waiver of costs and filing fees is an appropriate exception to the "American Rule" in those instances in which indigents will be completely denied their constitutional right to petition government.

In *Ortwein v. Schwab*,²⁰¹ a similar case involving a right of access claim, welfare recipients relied on *Boddie* to argue that state laws requiring appellate filing fees violated the Due Process and Equal Protection Clauses for indigents seeking to reverse a reduction in benefits. The Court distinguished *Boddie* and ruled that a post-hearing review of a reduction in benefits, as opposed to a complete denial of benefits, did not implicate fundamental interests.²⁰² The Court found that due process was satisfied by an initial hearing, which did not require the payment of fees, and that the appellate filing fees were rationally related to the legitimate state interest in recouping operating costs.²⁰³

The results in these cases can be read as not offending the protection historically afforded petitioning. The unique circumstances present in *Boddie* seem to require that fees be waived to allow an indigent access to the courts, the only avenue by which relief could be afforded. In *Ortwein*, by contrast, the petitioner was provided redress at the administrative level and sought discretionary review at the appellate level.²⁰⁴ The right to petition was not denied; rather, the right was burdened as to appeal. The problem is not the results, but the Court's failure to recognize that the First Amendment Petition Clause should govern these claims. In both cases, petitioners invoked the First Amendment Petition Clause.²⁰⁵ The *Boddie* Court, however, did not address the First Amendment issue. In a cursory footnote, the *Ortwein* court concluded: "Our discussion of the Due Process Clause, however, demonstrates that appellants' rights under the First Amendment have been fully satisfied."²⁰⁶

201. 410 U.S. 656 (1973); see also Note, *supra* note 183, at 1063-64 (discussing First Amendment considerations of filing fees, security bonds, attorneys' fees, and notice or discovery costs to indigent petitioners).

202. *Ortwein*, 410 U.S. at 659. *Boddie* was also distinguished in another Supreme Court decision. *United States v. Kras*, 409 U.S. 434, 443 (1973). In *Kras*, the Court refused to waive bankruptcy fees because a discharge in bankruptcy, unlike a dissolution of marriage, was not the only avenue for a debtor to adjust his legal liabilities with creditors. *Id.* at 445.

203. *Ortwein*, 410 U.S. at 659-60.

204. *Id.* at 656-58.

205. At the trial level in *Boddie*, the plaintiffs argued that the fee requirements denied them "due process of law by infringing their right, to petition the government for a redress of grievances, U.S. Const. Am. I." *Boddie v. Connecticut*, 286 F. Supp. 968, 970 (D. Conn. 1968), *rev'd*, 401 U.S. 371 (1971). The Court's opinion does not reveal whether the First Amendment was specifically raised in argument before the Supreme Court.

206. *Ortwein*, 410 U.S. at 660 n.5; see also Note, *supra* note 183, at 1064 (noting that an indigent's First Amendment right regarding petitions at both the trial and appellate level remain open questions).

The only context in which the Supreme Court has been willing to find First Amendment Petition Clause protection is civil actions in which collective activity is undertaken to secure legal advice and initiate legal proceedings. In *NAACP v. Button*,²⁰⁷ the Supreme Court held that the activities of the NAACP and the NAACP Legal Defense Fund in soliciting and financing litigation aimed at ending racial discrimination were protected under the First Amendment from state laws prohibiting attorney solicitation.²⁰⁸ The Court emphasized that NAACP-sponsored litigation was a “form of political expression” and was very possibly the only avenue by which minority groups could petition government for redress of grievances.²⁰⁹ The Court explicitly refused to rest its decision exclusively on the First Amendment Petition Clause, however, and instead focused on a conjunctive reading of the First Amendment expressive guarantees and its protection of group activities, associational interests, and speech on political issues.²¹⁰

In subsequent decisions, the Supreme Court extended First Amendment Petition Clause protection to unions which utilized collective plans to provide legal advice to union members for personal injury claims.²¹¹ Unlike *Button*, First Amendment protection was granted in these later cases despite the fact that the underlying litigation was not of constitutional magnitude. The Court found crucial to its decision the fact that collective activity was undertaken to secure meaningful access to the courts, and thus First Amendment associational interests were implicated.²¹²

In each of these cases, the Court emphasized the presence of constitutionally protected speech and relied on the presence of collective activity but failed to squarely address the right to petition. Whether

207. 371 U.S. 415, 444 (1963).

208. *Id.* at 437-39.

209. *Id.* at 429-30.

210. *Id.* at 430-31.

211. *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217, 222-24 (1967); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7-8 (1964); see also Note, *supra* note 183, at 1061 (discussing recent Supreme Court treatment of the right to petition).

212. *United Mine Workers*, 389 U.S. at 222-23; *Trainmen*, 377 U.S. at 7; see generally *In re Primus*, 436 U.S. 412, 426 (1978) (explaining effect of post-*Button* decisions). The Court's emphasis on collective activity lacks any historical basis because the right to petition was distinct from, and superior to, the right to associate. In England laws restricted tumultuous presentation of petitions, the number of signatures on petitions, and the number of people allowed to present petitions. See *supra* notes 77-78 and accompanying text. Laws requiring orderly, peaceful presentation of petitions restricted association in the colonies. See *supra* note 101; Note, *supra* note 183, at 1061-62.

individuals pursue redress of political grievances or groups collectively seek redress of private grievances, the Court should focus on the fact that the judicial process has been invoked. If the Court only grants First Amendment protection for right-of-access claims when other First Amendment rights are implicated, then the historically-distinct, superior right to petition will be lost through collapse into the other rights of the First Amendment.

Such a collapse has already occurred in the lower federal courts. A number of courts have concluded that the First Amendment right to petition the judiciary is not a substantive constitutional right separate from other First Amendment rights. In *Altman v. Hurst*,²¹³ a police officer who was demoted to foot patrol and denied the opportunity to work overtime in retaliation for filing a civil rights lawsuit against his employer. The United States Court of Appeals for the Seventh Circuit held that he failed to state a First Amendment right of access claim.²¹⁴ The court explained that the Supreme Court's decision in *Button* was premised on the presence of political expression, "not the general right to bring suit in a federal court of law."²¹⁵ The court made clear that unless the substance of the underlying lawsuit is constitutionally protected, "a private office dispute cannot be constitutionalized merely by filing a legal action."²¹⁶ Other federal courts of

213. 734 F.2d 1240 (7th Cir.), cert. denied, 469 U.S. 982 (1984).

214. *Id.* at 1244.

215. *Id.* at 1244 & n.10. This strict reading of *Button*, emphasizing the presence of speech on a matter of public concern, ignores other Supreme Court decisions that declare that First Amendment protection extends to "business or economic activity." *Thomas v. Collins*, 323 U.S. 516, 531 (1945). Although *Thomas* did not involve a right of access claim, the Supreme Court stated in dicta that: "The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest." *Id.*; see also Note, *supra* note 183, at 1061-62 & n.47 (recognizing that speech need not be "political" to be protected by the First Amendment).

216. *Altman*, 734 F.2d at 1244 n.10. For more recent decisions of the Seventh Circuit expressing a similar opinion on this issue, see *Gray v. Lacke*, 885 F.2d 399, 412 (7th Cir. 1989), cert. denied, 494 U.S. 1029 (1990); *Belk v. Minocqua*, 858 F.2d 1258, 1261-62 (7th Cir. 1988); *Phares v. Gustafsson*, 856 F.2d 1003, 1009 (7th Cir. 1988).

Two federal courts of appeal have provided an exception to this ruling in a very limited fact situation—when the employee alleges that an adverse employment decision was taken in retaliation for filing a complaint or an EEOC charge involving race or sex discrimination. *Greenwood v. Ross*, 778 F.2d 448, 456-57 (8th Cir. 1985); *Owens v. Rush*, 654 F.2d 1370, 1378 (10th Cir. 1981). The decisions in these cases are premised on the assumption that charges of race and sex discrimination are constitutionally protected speech because like *Button*, they involve matters of public, not private, concern. As such, these decisions are analytically flawed because they require that the subject matter of the lawsuit be constitutionally protected.

appeal have rendered similar assessments of public employee right-of-access claims.²¹⁷

Consistent with the historical understanding of the right to petition, the better reasoned approach is that endorsed by the Third Circuit in *Bradley v. Pittsburgh Board of Education*.²¹⁸ In *Bradley*, an individual claimed that he was discharged in retaliation for filing a workmen's compensation claim.²¹⁹ Although the court refrained from deciding the right-of-access issue, it indicated a willingness to consider the claim:

[W]e are reluctant to foreclose Bradley's claim as a matter of law on the present record. There is a general principle, the parameters of which have not yet been delineated, that resort to the courts falls within the First Amendment right to petition. Arguably resort to an administrative tribunal, even for the non-communicative purpose of filing a personal injury claim, should be protected to the same extent.²²⁰

The *Bradley* decision is consistent with several lower court decisions involving claims of retaliation in the form of official cover-ups or intentional concealment of information necessary to an individual's ability to obtain redress in the courts. In *Harrison v. Springdale Water & Sewer Commission*,²²¹ the plaintiffs sued a water and sewer commission for damages resulting from sewage discharge into the plaintiffs' well.²²² They subsequently filed a civil rights lawsuit alleging that the defendants filed a frivolous condemnation counterclaim in the initial lawsuit in an attempt to induce the plaintiffs to settle their first lawsuit and sell their property to the city.²²³ The Eighth Circuit Court of Appeals held that if the plaintiffs could prove that the defendants

217. See *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696, 700-01 (5th Cir. 1985), cert. denied, 474 U.S. 1101 (1986) (public school teacher fired in retaliation for filing grievance not entitled to First Amendment protection for petitioning government because substance of grievance did not contain protected speech); *Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir.), cert. denied, 468 U.S. 823 (1984) (public employee's grievance did not address matters of public concern and was therefore not protected under the Petition Clause).

218. 913 F.2d 1064 (3d Cir. 1990).

219. *Id.* at 1067.

220. *Id.* at 1076 (citations omitted). The court deferred ruling on the viability of the right-of-access claim for prudential reasons. The court found that the issue required resolution only if, on remand, the plaintiff could establish that he was terminated for filing a workmen's compensation claim. *Id.*; see also *Graham v. NCAA*, 804 F.2d 953, 959 (6th Cir. 1986). The court in *Graham* found that the plaintiff had arguably stated a right-of-access claim when he alleged "that he was kicked off the University football team in retaliation for filing [a] state court action." *Graham*, 804 F.2d at 959. The court, however, did not reach the issue because the claim was barred by the Eleventh Amendment. *Id.*

221. 780 F.2d 1422 (8th Cir. 1986).

222. *Id.* at 1424.

223. *Id.* at 1422.

utilized their power of eminent domain to force the plaintiffs to compromise their claims, the plaintiffs would establish that they were punished for seeking justice in the courts.²²⁴ Such conduct, the court held, would infringe upon the plaintiffs' "constitutional right of access to the courts."²²⁵ The court explained:

The cases from this Circuit, as well as from others, make it clear that state officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future.²²⁶

In *Ryland v. Shapiro*,²²⁷ the Fifth Circuit similarly found that wrongful interference with an individual's right of access to the courts is actionable.²²⁸ In *Ryland*, the plaintiffs alleged that a district attorney and an assistant district attorney conspired to cover-up their daughter's murder by procuring a doctor or coroner to declare the death a suicide, and thereby interfered with the "exercise of their constitutionally protected right to institute a wrongful death suit in the Louisiana courts."²²⁹ The *Ryland* court ruled that the First Amendment afforded substantive constitutional protection even though the underlying litigation involved a private dispute which did not implicate constitutional concerns.²³⁰

The lower federal courts are apparently willing to find substantive First Amendment protection in the case of intentional concealment or official cover-up regardless of the nature of the litigation at issue. A majority of these same courts, however, are not willing to

224. *Id.* at 1428.

225. *Id.*

226. *Id.* (footnote and citations omitted).

227. 708 F.2d 967 (5th Cir. 1983).

228. *Id.* at 971-72. In an earlier case, the Fifth Circuit ruled that the First Amendment right of access to the courts protected plaintiffs from retaliation by state officials if plaintiffs could prove that the officials initiated a criminal prosecution against them after they filed a civil lawsuit against the state. *Wilson v. Thompson*, 593 F.2d 1375, 1386 (5th Cir. 1979).

229. *Ryland*, 708 F.2d at 969-73.

230. *Id.* *But see* *Crowder v. Sinyard*, 884 F.2d 804, 814 (5th Cir. 1989), *cert. denied*, 496 U.S. 924 (1990) ("The constitutional right of access does not, however, guarantee one the right to have one's case proceed in a particular procedural posture or the right to a particular form of relief."). Although the Seventh Circuit has discussed a substantive right of access in this context, it is likely to find that one exists only in limited circumstances:

Assuming the continuing validity of a substantive right of access to the courts, and even assuming a delay of access may be a constitutional deprivation, here plaintiff has not alleged in any fashion that he was prejudiced by the delay. . . . [D]epriving the plaintiff of ultimate access is essential for plaintiff to allege and prove

Chathas v. Smith, 884 F.2d 980, 988 (7th Cir. 1989), *cert. denied*, 493 U.S. 1095 (1990) (citation omitted).

extend First Amendment protection to public employee right-of-access claims unless the underlying litigation encompasses protected speech.²³¹

These decisions simply cannot be reconciled. This split of authority is a direct result of the Supreme Court's failure to find that invocation of the judicial process is a protected form of petitioning the government for a redress of grievances. As a component of the right to petition government, the First Amendment right of access to the courts should afford substantive protection to all who claim that state actors have retaliated against them for pursuing litigation, regardless of whether that litigation involves a private dispute, issues of public concern, an individual claim, or collective activity. The First Amendment Petition Clause should also extend to protect indigents through a waiver of filing fees and costs in those instances, such as divorce, in which the only avenue for resolving disputes is the court system.

B. The Right to Petition Must Include Mandatory Governmental Response

In both England and colonial America, the right to petition included a right to present a petition and a right to receive a response.²³² When the Petition Clause of the First Amendment was debated, Congress declined to include a personal right to give binding instructions to representatives. Congress did agree, however, that the government was required to respond to petitions.²³³ Thus, history clearly supports a First Amendment right of governmental consideration and response.

Contrary to historical understanding, the Supreme Court has clearly stated that the First Amendment does not require the government to listen to individuals or to respond to individual grievances. In the 1915 case *Bi-Metallic Investment Co. v. State Board of Equalization*,²³⁴ a real estate owner claimed that the Colorado State Tax Commission had unconstitutionally increased the valuation of all taxable property in Denver by forty percent. The plaintiff argued that it had no opportunity to be heard in opposition to the tax valuation increase, which violated the Fourteenth Amendment Due Process Clause.²³⁵ The Court wrote:

Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its

231. See cases cited *supra* notes 216-17.

232. See *supra* notes 120-29 and accompanying text.

233. See *supra* notes 186-87 and accompanying text.

234. 239 U.S. 441 (1915).

235. *Id.* at 443.

adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. Generally statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.²³⁶

In two more recent opinions, the Supreme Court employed identical reasoning to reach the same decision. In *Smith v. Arkansas State Highway Employees, Local 1315*,²³⁷ the Court held that the State Highway Commission's refusal "to consider or act upon grievances" of public employees when those grievances were presented by the employees' union representative did not violate the First Amendment Petition Clause.²³⁸ The Court reasoned that public employees were allowed to openly petition, but the Highway Commission did not have an affirmative obligation under the First Amendment "to listen, to respond or, in this context, to recognize the association and bargain with it."²³⁹

In its most recent pronouncement on this issue, the Supreme Court was faced with a situation factually similar to *Smith*. In *Minnesota Board for Community Colleges v. Knight*,²⁴⁰ a state employer refused to consider petitions presented directly by its employees, college faculty instructors, preferring instead to "meet and confer" solely with faculty representatives to resolve certain grievances.²⁴¹ Relying on *Bi-Metallic*, the Court, ruled: "[N]othing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues."²⁴² This is not supported by the historical understanding of the right to petition and, in fact, is refuted by the debates surrounding the framing of the First Amendment Petition Clause.²⁴³

As asserted by Justice Holmes in *Bi-Metallic*, the right to petition did not and should not encompass a right to a public hearing.²⁴⁴ Such

236. *Id.* at 445.

237. 441 U.S. 463 (1979).

238. *Id.* at 464-65.

239. *Id.* at 465.

240. 465 U.S. 271 (1984).

241. *Id.* at 275-78.

242. *Id.* at 285. Although Justices Brennan, Stevens and Powell dissented, their reasoning was based upon interpretation of the First Amendment Speech Clause, not upon the historical understanding of the Petition Clause.

243. See *supra* notes 186-87 and accompanying text.

244. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

a requirement could cause *any* government to “grind to a halt.”²⁴⁵ Historically, however, the right to petition did include both the right to present a written petition and the right to receive a response, which, at a minimum, might be summary denial.²⁴⁶ A petitioner never possessed the right to a full legislative discussion or debate of a particular petition, nor to a public forum to present testimony relevant to a petition, nor to an investigation of a petition, nor to a detailed explanation for the denial or rejection of a petition. Consistent with the original understanding, a petitioner is entitled to a response, which might exclude an explanation or simply state that, after consideration, the petition is denied.²⁴⁷

When understood in this limited sense, these minimal presentation and response requirements will not unduly burden government. The advent of the federal system and the unforeseen growth of this nation should not destroy either component of the right to petition.²⁴⁸ In order to be meaningful, the First Amendment right to petition government for a redress of grievances must also include minimal governmental consideration.²⁴⁹

245. *Knight*, 465 U.S. at 285.

246. *See supra* notes 75-80, 120-29 and accompanying text; *see also* Comment, *supra* note 197, at 1525 (“[T]he state must, at a minimum, accept delivery of petitions. . .”).

247. *Id.*; *see sources cited supra* note 246.

248. Demographics have changed dramatically since 1791 (total population now 226.6 million with only 100 seats in the Senate and 435 seats in the House of Representatives). *See* C. HERMAN PRITCHETT, *CONSTITUTIONAL LAW OF THE FEDERAL SYSTEM* 169-71 (1984); BUREAU OF CENSUS, U.S. DEP’T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1991*, at 7 (111th ed.). Members of Congress do routinely respond to their constituents’ letters, however, and are presumably meeting these minimal response requirements as a means of keeping in touch with constituents and ensuring re-election.

Additionally, under the First Amendment, the Court has consistently permitted burdens on government when necessary to vindicate individual rights. *See Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 140 (1987) (employer may burden an employee’s free exercise rights only when justified by a compelling state interest); *see also Schneider v. Irvington*, 308 U.S. 147, 162 (1939) (imposing burden upon city “as an indirect consequence of” distribution of leaflets outweighed by constitutional right of free speech). Thus, not only is the minimal burden of response placed upon government outweighed by petitioners’ constitutional rights, but the burden is justified by existing First Amendment precedent.

249. *Hodgkiss, supra* note 2, at 576 (“The duty to respond is essential to make petitioning a means of participation in democratic decisionmaking.”); *see also Higginson, supra* note 91, at 165-66 (The original meaning of the right to petition included a right to “fair hearing and consideration.”).

C. The Court's Failure to Grant Absolute Immunity to Petitioning

Petitioners were historically protected from both seditious libel prosecutions and private libel actions.²⁵⁰ The Supreme Court has ignored this history and has applied the same qualified immunity given speech and the press to the information contained in petitions. As a result, petitioners receive less protection than is historically justified.

In *McDonald v. Smith*,²⁵¹ the Supreme Court addressed a petitioner's claim of absolute immunity in a private libel action based on information contained in two letters to the President of the United States.²⁵² The petitioner, Robert McDonald, wrote the letters urging against the appointment of David Smith as a United States Attorney. The Supreme Court rejected McDonald's claim that statements made in a petition are absolutely immune from a subsequent libel action. The Court specifically held that the Petition Clause of the First Amendment does not enjoy a preferred status relative to the rights of speech and the press. In reliance on the 1845 decision in *White v. Nicholls*,²⁵³ the Court added that petitioners have not been historically afforded absolute immunity from private libel actions.²⁵⁴ The Court also implied that the immunity afforded petitioners under the antitrust laws is not absolute: "[F]iling a complaint in court is a form of petitioning activity; but 'baseless litigation is not immunized by the First Amendment right to petition.'"²⁵⁵

This last observation is most revealing of the analytical weakness in the Court's opinion. The Court did not frame the issue properly when it stated the baseless-litigation restriction on immunity from the antitrust laws.²⁵⁶ The Court should have addressed the level of immunity from the libel laws accorded to statements made in the course of litigation. This inquiry sheds more light on the level of immunity historically afforded to petitions.

The analysis begins with the judicial arm of the government because it is here that the immunity laws originated.²⁵⁷ In 1585 the

250. See *supra* notes 171-78 and accompanying text.

251. 472 U.S. 479 (1985).

252. *Id.* at 480-81.

253. 44 U.S. (3 How.) 266 (1845).

254. *McDonald*, 472 U.S. at 483-85.

255. *Id.* at 484 (quoting *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 742 (1983)).

256. For a discussion of petitioner immunity in the antitrust arena, see *infra* notes 327-49 and accompanying text.

257. 8 HOLDSWORTH, *supra* note 44, at 376.

Court of the King's Bench ruled in *Cutler v. Dixon*²⁵⁸ that allegations contained in articles of the peace that were exhibited to justices could not form the basis of a libel action even if such allegations resulted in "great abuses."²⁵⁹ The court reasoned that "if actions should be permitted in such cases, those who have just cause for complaint, would not dare to complain for fear of infinite vexation."²⁶⁰ In other words, absolute immunity was conferred so as not to chill legitimate court actions. By the early seventeenth century, the law in England was settled: judges, parties, witnesses, and attorneys were all immune from the libel laws for statements made and documents submitted in judicial proceedings.²⁶¹

In the 1668 case of *Lake v. King*,²⁶² the Court of the King's Bench extended the immunity recognized in judicial proceedings to individuals who submitted written petitions to Parliament.²⁶³ In *Lake* the petitioner delivered a written petition to the parliamentary committee on grievances in which he accused the plaintiff, Lake, of "many horrible and great abuses, such as extortion, oppression, vexation, and other misdemeanors."²⁶⁴ The court held:

The exhibiting of the petition to a Committee of Parliament was lawful, and that no action lies for it, although the matter contained in the petition was false and scandalous, because it is in a summary course of justice, and before those who have power to examine, whether it be true or false.²⁶⁵

The *Lake* decision was clarified in 1699 by *Rex v. Salisbury*.²⁶⁶ The English court declared that the privilege afforded to petitioners did not extend to anyone who published the content of a petition previously submitted to Parliament or a court to the world at large.²⁶⁷ The court reasoned that subsequent publication "tends to the breach of the peace."²⁶⁸ Contrary to the Supreme Court's decision in *Mc-*

258. 76 Eng. Rep. 886 (K.B. 1585).

259. *Id.* at 886-87.

260. *Id.* at 887-88.

261. 8 HOLDSWORTH, *supra* note 44, at 376 & n.5; see *Ram v. Lamley*, 123 Eng. Rep. 1139 (K.B. 1633); *Harding v. Bodman*, 123 Eng. Rep. 1064 (K.B. 1618); *Weston v. Dobniet*, 79 Eng. Rep. 369 (K.B. 1618); *Floyd v. Barker*, 77 Eng. Rep. 1305 (K.B. 1608); *Brook v. Montague*, 79 Eng. Rep. 77 (K.B. 1606).

262. 85 Eng. Rep. 137 (K.B. 1668).

263. *Id.* at 139; see *Smith*, *supra* note 6, at 1187.

264. *Lake*, 85 Eng. Rep. at 138.

265. *Id.* at 139.

266. 91 Eng. Rep. 1124 (K.B. 1699).

267. *Id.* at 1124.

268. *Id.* The court's decision in *Salisbury* also demonstrates the superior status of petitioning relative to other forms of speech, including publication in the press.

Donald, the law of immunity was clearly established in late seventeenth century England; *Lake* was not an "anomalous decision."²⁶⁹

A majority of American courts confer absolute immunity from the libel laws upon individuals for statements made and evidence submitted in the course of judicial proceedings.²⁷⁰ Immunity has been extended to statements made in all types of judicial proceedings, including administrative hearings and other quasi-judicial proceedings.²⁷¹ Before conferring immunity, however, American courts require that the allegedly libelous statement "have some reasonable relation or reference to the subject of inquiry, or be one that 'may possibly be pertinent,' with all doubts resolved in favor of the" alleged defamer.²⁷² The showing required to obtain immunity is relatively easy to meet.

The American courts have not limited absolute immunity to statements made in the course of judicial proceedings. In fact, the majority of American jurisdictions have extended absolute immunity to witnesses who testify at legislative hearings.²⁷³ Although very few American courts have been presented with the immunity issue in the context of petitions directed to the legislature or to the executive, support exists for the extension of absolute immunity to such petitioning. In the 1802 decision *Harris v. Huntington*,²⁷⁴ a Vermont court ruled that a petitioner who presented a petition to the legislature was absolutely immune from a subsequent claim of libel.²⁷⁵ The defendant and several others had submitted a petition to the Vermont legislature re-

269. *McDonald v. Smith*, 472 U.S. 479, 483 n.4 (1985) (quoting *White v. Nicholls*, 44 U.S. (3 How.) 266, 289 (1845)).

270. Nancy E. Borders, Comment, *Defamation: Republication of Defamatory Pleadings by a Litigant*, 20 WAKE FOREST L. REV. 145 (1984); see WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 114 (4th ed. 1971). Among the jurisdictions that confer absolute immunity to petitioners is Pennsylvania, one of the two jurisdictions cited by the *McDonald* Court to support its conclusion that absolute immunity was not uniformly granted to petitioners in this country when the First Amendment was framed. *McDonald v. Smith*, 472 U.S. 479, 483 (1985). The *McDonald* Court relied on *Gray v. Pentland*, 2 Serg. & Rawle 22 (Pa. 1815), in which the Pennsylvania Supreme Court extended only a qualified immunity to a petitioner. The Pennsylvania Supreme Court was of the opinion that statements made in the course of judicial proceedings were not absolutely immune from a private claim of libel. *Id.* at 30. Clearly, this opinion reflects a minority view which the Pennsylvania Supreme Court has since rejected. See *Post v. Mendel*, 507 A.2d 351, 355 (Pa. 1986).

271. PROSSER, *supra* note 270, § 114 at 779-80.

272. *Id.* at 779 (quoting *Ginsburg v. Black*, 192 F.2d 823, 825 (9th Cir. 1951), *cert. denied* 343 U.S. 934, *reh'g denied*, 343 U.S. 958 (1952)).

273. PROSSER, *supra* note 270, § 114, at 777, 781-82. Pennsylvania is one of these jurisdictions. See *Jennings v. Cronin*, 389 A.2d 1183, 1185 (Pa. Super. 1978).

274. 2 Tyl. 129 (Vt. 1802); see *Smith*, *supra* note 6, at 1187.

275. *Harris*, 2 Tyl. at 146.

questing that the plaintiff, Harris, not be reappointed as a justice of the peace.²⁷⁶ The court recognized the potential for abusing the right to petition, but granted immunity.²⁷⁷

The *Harris* court cautioned that liability would attach if the petition were republished "in the public newspapers without the order of the General Assembly, as such publication would not be necessary to the occasion, nor would [it] be within the course of proceedings in our Parliament."²⁷⁸ Thus, as in England, petitioners were not clothed with immunity if they published the content of their petition in a newspaper or in some other written communication. The *Harris* decision by the Vermont court is well reasoned and comports with the English resolution of the immunity issue in *Lake*.

The *McDonald* Court's reliance on *White v. Nicholls*²⁷⁹ is infirm. This 1845 decision involved allegedly libelous letters, which were sent to the President of the United States and to the Secretary of the Treasury, requesting that Robert White be removed from his position as customs collector.²⁸⁰ The *White* Court ruled that these letters enjoyed only a qualified privilege.²⁸¹ The Court found that if the statements were not made to obtain redress and were instead made with express malice, the statements would not receive immunity.²⁸² In discussing the immunity issue, the Court wrote that statements made in the course of judicial proceedings did not enjoy absolute immunity from common law libel claims.²⁸³ This clearly contradicts the law in the majority of American jurisdictions.²⁸⁴

Contrary to the Supreme Court's conclusion in *McDonald*, the case law supports an absolute immunity from libel actions for petition-

276. *Id.* at 130-31.

277. *Id.* at 146. In *Thorn v. Blanchard*, 5 Johns. 508 (N.Y. 1809), one justice writing for the majority argued that a petitioner must be absolutely immune from a subsequent libel action even if the petition is false and is presented with malice. *Id.* at 531-32.

278. *Harris*, 2 Tyl. at 146. The *McDonald* Court relied on *Commonwealth v. Clapp*, 4 Mass. 163 (1808), another state court decision to qualify immunity for petitioners. See *McDonald v. Smith*, 472 U.S. 479, 483 (1985). The court in *Clapp* extended only qualified immunity to a petitioner who posted the following petition in several public places: "Caleb Hayward is a liar, a scoundrel, a cheat, and a swindler. Don't pull this down." *Clapp*, 4 Mass. at 163, 169. Because this case involved publication to the world at large, absolute immunity was not at issue. The Supreme Court's reliance on *Clapp* for the assertion that absolute immunity was not historically afforded to petitioners is therefore misplaced.

279. 44 U.S. (3 How.) 266 (1845).

280. *Id.* at 267-74.

281. *Id.* at 291.

282. *Id.*

283. *Id.* at 288.

284. See *supra* notes 270-77 and accompanying text.

ers.²⁸⁵ This case law, while sparse, is uncontradicted. The Supreme Court's analysis in both *McDonald* and *White* is flawed because these Courts either ignored or misunderstood the case law from which petitioner immunity was derived:²⁸⁶ written and oral statements made in the course of judicial proceedings have been and are afforded absolute immunity from subsequent libel actions.²⁸⁷

The decisions from England and the state courts that confer absolute immunity focus on the right to petition. The Supreme Court opinions denying absolute immunity to petitioners give greater weight to protecting against malicious attacks and allowing vindication of reputations.²⁸⁸ The historical doctrine of absolute immunity from subsequent claims of libel, however, adequately protects individuals from public and wrongful defamation because it extends only to statements made to officials who reasonably appear to possess the power to provide redress. Subsequent publication of a petition is not afforded absolute immunity.²⁸⁹ As such, there is no legal justification for a public trial to vindicate an individual's reputation if a petition has been confined to the responsible governmental authority.²⁹⁰

285. American jurisdictions extend immunity for submitting a petition "to any person who reasonably appears to have a duty . . . or authority in connection with the matter." PROSSER, *supra* note 270, § 114, at 793. English courts, however, require that a petitioner present the grievance to the court, legislative, or executive body possessing the power to provide the relief. *See, e.g.*, *Buckley v. Wood*, 76 Eng. Rep. 888, 889-90 (K.B. 1591). If, for instance, a petitioner filed a lawsuit in an English court without jurisdiction over the controversy, the petitioner would do so at his peril. *Id.*

286. The *White* Court also relied on *Bodwell v. Osgood*, 20 Mass. (3 Pick.) 379 (1825). *See White v. Nicholls*, 44 U.S. (3 How.) 266, 290 (1945). In that case, the court upheld a conviction for the malicious publication of a vexatious petition after a groundless petition was presented to a school committee. *Bodwell*, 20 Mass. (3 Pick.) at 383-84. Absolute immunity has never been extended to these types of subordinate legislative bodies. *See Mills v. Denny*, 63 N.W.2d 222 (Iowa 1954); *Burch v. Bernard*, 120 N.W. 33 (Minn. 1909); *Ivie v. Minton*, 147 P. 395 (Or. 1915). Such entities do not possess the same powers of inquiry and investigation as do the legislature and the judiciary. The shield of absolute immunity is inappropriate where an administrative body lacks these powers. *Mills*, 63 N.W.2d at 226.

287. *See supra* notes 257-61, 270-77 and accompanying text.

288. *McDonald v. Smith*, 472 U.S. 470 (1985); *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845); *see supra* text accompanying notes 251-55.

289. Most American courts extend a qualified privilege to newspapers and to third parties who publish allegedly libelous statements contained in public records such as judicial pleadings. Comment, *Press Releases and Defamatory Pleadings*, 63 Nw. U. L. REV. 699 (1968). In order to discourage "the filing of a pleading for the sole purpose of circulating scurrilous charges," some courts do not even grant a qualified privilege to litigants who republish the contents of documents in a newspaper. *Borders, supra* note 270, at 147-49.

290. *See Smith, supra* note 6, at 1188 ("Most of the limitations that have been imposed on speech and the press, whatever their justifications in the contexts of these expressive rights, are inappropriate restrictions on petitioning."). Although information submitted

Today it is likely that the majority of petitions presented to the executive or to the legislature will involve fact scenarios very similar to those presented in *White* and *McDonald*: written requests urging against the appointment of or requesting the removal of a public official for misconduct.²⁹¹ If a petition is presented to the proper legislative or executive authority and that body possesses the power to initiate an investigation into the truth of the petition (or, at a minimum, possesses the authority to allow the official to refute the charges), then the requirements as enunciated in *Lake* have been met. Stated another way, the petition has been presented "in a summary course of justice, and before those who have power to examine, whether it be true or false."²⁹² Even if an official is not provided with the opportunity to respond to the petitioner's charges, the libel laws should not afford that remedy. As previously discussed, submission of a petition is not tantamount to public disclosure, and the real harm results from the government's failure to allow refutation of the charges contained in the petition.

The malice standard set forth in *New York Times Co. v. Sullivan*²⁹³ as applied by the *McDonald* Court does not provide adequate protection to petitioners. The standard announced in *Sullivan* allows a public official to recover in a libel action if the official can prove that a published statement was made "with knowledge that it was false or

in both legislative and judicial proceedings is a matter of public record and is generally available for inspection, the likelihood that such information will be inspected by the general public is low. The potential for harm in this setting is much less than where a document is republished in a public newspaper.

291. Van V. Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131, 139 (1910).

292. *Lake v. King*, 85 Eng. Rep. 137, 139 (K.B. 1668). Because the proceeding in *Lake* was judicial, the argument has been made that absolute immunity should be limited to judicial proceedings because the petition in *Lake* was addressed to Parliament, England's high court of justice. Veeder, *supra* note 291, at 138 & n.28. The court in *Lake* did refer to "a summary course of justice," *Lake*, 85 Eng. Rep. at 139, but in the 16th, 17th, and 18th centuries, the legislative assembly was sometimes named the "General Court." Higginson, *supra* note 91, at 144 n.9. Ascertaining the meaning of the words "course of justice" or "court" by reference to their historical context cuts against this argument. See *supra* notes 34-35.

Moreover, the *Lake* court could have said "court of justice," did not but use such specific language. The decision should not be limited to judicial proceedings so long as other governmental bodies possess some authority to investigate the charges made. Congressional committees, for example, hold the power to conduct hearings. 2 U.S.C. § 722 (1988). Administrative agencies possess powers that are very similar to courts including the power to administer oaths and to receive sworn testimony. 5 U.S.C. §§ 553, 554, 556 (1988). The truth of a petition may be investigated and ascertained if the legislative or executive committee chooses to do so.

293. 376 U.S. 254 (1964).

with reckless disregard of whether it was false or not.”²⁹⁴ Sullivan, an elected Commissioner of Public Affairs for the City of Montgomery, Alabama, sued a number of individuals and the New York Times Company for permitting the publication of an allegedly inaccurate full-page advertisement which appeared in the *New York Times* newspaper.²⁹⁵ *Sullivan* is clearly distinguishable from petitioning since the potential harm from publication in a newspaper of national circulation is absent if the very same information is limited to a written petition submitted to the government.

Contrary to *McDonald*, petitioners should be afforded absolute immunity from a subsequent libel action for all statements contained in a petition to the legislature or to the executive. For immunity to attach, however, these statements must be reasonably related to or pertinent to the subject of inquiry. They must be submitted to those government officials who reasonably appear to have the power to redress the grievance.²⁹⁶ Also, if an individual is being considered for public office, the information contained in the petition must reasonably relate to that individual’s fitness or abilities to serve and perform as a public official. Such information, if subsequently published to anyone other than those reasonably believed responsible for redress, should enjoy only a qualified privilege.²⁹⁷ This standard recognizes the features that distinguish petitioning from speech, encourages legitimate petitioning, and protects individuals who are the subject of petitioning.

D. Specific Problems

1. Rule 11’s Invalid Restriction on Petitioning

As previously discussed, petitioning was not completely free from governmental restrictions. The imposition of monetary sanctions or costs against a litigant originated in the Middle Ages.²⁹⁸ The English

294. *Id.* at 280. In essence, the actual malice standard in *Sullivan* is the same subjective bad faith standard utilized by both colonial legislatures and courts in assessing sanctions against petitioners who submitted frivolous petitions. See *supra* notes 110-12 and accompanying text.

295. *Sullivan*, 376 U.S. at 256-58.

296. See *supra* notes 272, 285 and accompanying text. *Contra* Comment, *supra* note 197, at 1525-26. (“Any attempt to delimit the petition right according to the power of the petitioned department, however, soon encounters insuperable difficulties. For any given grievance, almost no governmental authority is wholly without power to act on it in some manner.”).

297. See *supra* notes 266-69, 278 and accompanying text.

298. Anglo-Saxon courts infrequently enforced a rather harsh penalty against a plaintiff who lost his lawsuit—the plaintiff’s tongue was cut out. Note, *Groundless Litigation and*

system of amercement required that a losing plaintiff pay costs to the court for pursuing a meritless or "false" claim.²⁹⁹ The amercement system, however, provided no compensation to a defendant who was wrongfully sued. In the early seventeenth century, English law remedied this defect and allowed successful defendants to recover costs.³⁰⁰ The American colonies also promulgated legislation aimed at deterring frivolous, vexatious actions.³⁰¹ The penalties were similar to those provided by English law in that the court or general assembly had wide discretion to assess an appropriate monetary sanction against a petitioner, litigant, or appellant if it deemed an action frivolous.³⁰² The colonial laws contained a subjective bad faith standard for imposition of sanctions.³⁰³ The laws thus were aimed at the same type of conduct that Rule 11 of the Federal Rules of Civil Procedure³⁰⁴ was originally designed to discourage—the intentional initia-

the Malicious Prosecution Debate: A Historical Analysis, 88 YALE L.J. 1218, 1221 (1979). Often, less harsh monetary penalties were enforced against an unsuccessful plaintiff—the plaintiff was ordered to pay his opponent "wer"—an award based on the losing party's (plaintiff's) status and not the wrongful nature of that party's conduct. *Id.* at 1221 & n.27.

299. The amercement system replaced the wer system. *Id.* at 1222; see 3 BLACKSTONE, *supra* note 76, at *399. The amount of the amercement award was distinct from wer in that it varied depending upon "the wrongfulness of the complainant's conduct." *Friedman v. Dozorc*, 312 N.W. 2d 585, 595 n.20 (Mich. 1981). An indigent plaintiff suffered different punishment at the discretion of the court which sometimes included an order that the plaintiff be whipped. See 3 BLACKSTONE, *supra* note 76, at *400.

300. 4 HOLDSWORTH, *supra* note 44, at 538.

301. See *supra* notes 110-12 and accompanying text.

302. *Id.*

303. *Id.*

304. Federal Rule of Civil Procedure 11 provides:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the

tion or pursuit of frivolous, vexatious proceedings.³⁰⁵

Rule 11's signature requirement, which operates as certification that the document is submitted in good faith, can be traced back to the time of Sir Thomas More (1478-1535) when an attorney's signature served as a guarantee that "good ground for the suit" existed.³⁰⁶ If a pleading contained "irrelevant, impertinent, or scandalous" matter, the court could order the attorney to pay the opposing party's costs in defending against the pleading or action.³⁰⁷ This "good ground" standard was incorporated into the 1938 version of Rule 11 which required an attorney to certify "that to the best of his knowledge, information and belief there is good ground to support" the pleading.³⁰⁸ A subjective standard was utilized to assess whether the attorney was motivated by bad faith or an improper purpose.³⁰⁹ The standard, however, was never well defined and failed to provide proper notice to attorneys that certain kinds of conduct violated the rule.³¹⁰ The lack of a clear legal standard was not cause for concern because sanctions were rarely assessed.³¹¹

This practice changed in 1983 when Rule 11 was amended, pur-

filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11. At the time of publication of this Article, this was the current version of Rule 11. Amendments to the rule may have occurred subsequent to publication.

305. See Robert L. Carter, *The History and Purposes of Rule 11*, 54 *FORDHAM L. REV.* 4 (1985).

306. JOSEPH STORY, *COMMENTARIES ON EQUITY PLEADINGS* 49 (10th ed. 1892). The historical accuracy of this conclusion has been questioned. See D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 *MINN. L. REV.* 1, 10 (1976). Risinger argues that although the certification requirement originated with Sir Thomas More, the reason for the requirement was not to ensure to the court that an attorney believed there was "good ground" for the pleading. Instead, it was to ensure that an attorney was consulted before a pleading was filed. *Id.* at 10-13. Risinger further asserts that since Story was a United States Supreme Court Justice at the time he offered his view of the attorney certification requirement, his version of history was incorporated into Rule 24 of the Equity Rules of 1842, a precursor to Rule 11. *Id.* at 13.

307. STORY, *supra* note 306, at 49.

308. Risinger, *supra* note 306, at 5; see also Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 *GEO. L.J.* 1313, 1314-15 (1986) (discussing the historical reasons for changing Rule 11).

309. Kenneth F. Ripple & Gary J. Saalman, *Rule 11 in the Constitutional Case*, 63 *NOTRE DAME L. REV.* 788, 791 (1988).

310. See Carter, *supra* note 305, at 5-6.

311. Risinger, *supra* note 306, at 34-37. Only 11 reported cases found that Rule 11 was violated over the time period beginning in 1938 when Rule 11 was enacted and ending in 1976. *Id.*

portedly to provide clarification of the appropriate legal standard.³¹² The certification requirement was extended to specifically include both attorneys and unrepresented parties who, by their signature, must now certify “that to the best of the signer’s knowledge, information, and belief formed after reasonable inquiry it [the pleading] is well grounded in fact and is warranted by existing law.”³¹³ This amendment, which requires a “reasonable inquiry” into the facts and law governing a claim, mandates that courts utilize an objective standard in resolving sanction issues.³¹⁴

The introduction of an objective standard into the sanction equation broadens the scope of Rule 11 to include within its coverage conduct that was not historically subject to sanctions. Although Rule 11 sanctions have strong roots which predate the framing and ratification of the First Amendment Petition Clause, the colonial legislation explicitly required conduct intentionally designed or “wittingly and willingly” undertaken to injure an opposing party.³¹⁵ By replacing the subjective bad faith requirement with an objective standard, Rule 11 now encompasses merely negligent conduct.³¹⁶ From a historical perspective, these requirements governing the prefiling factual and legal inquiries sweep too broadly, and as applied, are an invalid restriction

312. The notes of the Advisory Committee for the 1983 amendments clearly state that another purpose of the amendment was “to reduce the reluctance of courts to impose sanctions [citations omitted] by emphasizing the responsibilities of the attorney . . .” FED. R. CIV. P. 11 advisory committee’s notes.

313. FED. R. CIV. P. 11. The 1983 amendments explicitly allow for the imposition of Rule 11 sanctions against a pro se litigant. *Id.* The committee notes, however, make clear that a court should use its “discretion to take account of the special circumstances” which may arise when an unrepresented party is involved in the litigation process. FED. R. CIV. P. 11 advisory committee’s notes. This is in conformity with colonial laws which allowed sanctions to be assessed directly against parties. *See supra* notes 110-12 and accompanying text.

314. After the amendment, some courts continued to apply a subjective standard. This practice has since changed, and courts now uniformly interpret Rule 11 to require an objective standard for the prefiling factual and legal inquiries. Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 205-07 & n.94 (1988). Some courts continue to apply a subjective test to pleadings which are allegedly filed for an “improper purpose,” which may include an intent to delay proceedings, to harass, or to increase litigation costs. *See Ripple & Saalman, supra* note 309, at 800-01.

315. *See supra* notes 110-12 and accompanying text. An enactment by the Rhode Island General Assembly in 1757 provided for the assessment of costs against individuals who “by pretending to be aggrieved” obtained a new trial. 6 RECORDS OF THE COLONY OF RHODE ISLAND, *supra* note 110, at 95-96. Thus, intent or subjective bad faith was a prerequisite to imposition of sanctions.

316. *Ripple & Saalman, supra* note 309, at 797 (objective standard interpreted by courts to require inquiry into what a “competent attorney” would have done under the circumstances).

on the constitutional right of access to the courts via the First Amendment Petition Clause.³¹⁷

The amendments to Rule 11 may also produce a chilling effect on petitioners.³¹⁸ Efforts are under way to improve some of the potential chilling effects in the application of Rule 11, however. Proposed amendments to the Rule would require that a litigant be warned in writing of a potential Rule 11 violation with an explanation of the violation before sanctions can be imposed.³¹⁹ After a warning, if a litigant withdrew the objectionable pleading, sanctions could not be imposed.³²⁰ This notification requirement would greatly decrease the potential chilling effect, and, given the historical importance of the right of access to the courts, the proposed amendment is preferable to Rule 11 in its current form. Even if the notification requirement were adopted, however, that modification would still be inadequate. Any amendment short of abolition of the objective standard and reinstatement of the subjective bad faith standard provides insufficient protection to the rights of individuals to petition the judiciary.

Another proposed amendment would permit courts to impose nonmonetary sanctions.³²¹ Although not explicitly provided for in Rule 11, courts have infrequently imposed nonmonetary sanctions that directly infringe upon the right of access to the courts.³²² In the most restrictive instances, courts have ordered that a sanctioned party

317. See Stephen B. Burbank, Comment, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power 11* HOFSTRA L. REV. 997, 1006 (1983). In his article, Burbank raises the question of the Supreme Court's power to require the imposition of sanctions for non-willful conduct. The improper purpose component of Rule 11, however, conforms with the subjective bad faith requirements of the colonial laws and, as such, is not constitutionally infirm. See *supra* notes 110-12, 314-15. Rule 11 should therefore survive a facial constitutional challenge.

318. See William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1017 (1988). Judge Schwarzer asserts that "there is good ground for arguing that the standard a court will apply under Rule 11 is unpredictable." *Id.* He is not entirely convinced, however, that "this unpredictability has chilled advocacy" because "proof that conduct has been deterred is elusive." *Id.* Compare Schwarzer with Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1941 (1989) (arguing that Rule 11 has proven unpredictable in practice and can translate into "over-deterrence" and result in "chilling" legitimate advocacy); see Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 641 (1987).

319. See Henry J. Reske, *A Kinder, Gentler Rule 11: Committee Backs Warning Requirement to Prevent Surprise Attack*, 77 A.B.A. J. 25 (Aug. 1991).

320. *Id.* at 25

321. *Id.*

322. The proffered reason for imposing nonmonetary sanctions is the asserted need to carefully tailor sanctions "to the circumstances of the particular situation" and to "protect the litigants and possible future clients from further misfeasance." *United States v. Still-*

not file “any further causes of action until all monetary sanctions imposed have been paid in full and satisfactory proof thereof has been furnished.”³²³ This type of sanction denies individuals access for all lawsuits, including those that do not arise out of the same set of operative facts as the lawsuit in which sanctions were originally imposed. This is a drastic remedy that goes well beyond the sanction remedies historically provided.

Courts can employ less drastic alternatives that preserve a litigant’s right of access while simultaneously deterring frivolous conduct. These alternatives include a contempt finding for failure to pay a court order imposing sanctions,³²⁴ dismissal of the original lawsuit,³²⁵ or, in the most egregious case, a requirement that a litigious party submit a complaint to the court for review prior to issuance of the summons.³²⁶ If courts deny litigants the opportunity to pursue lawsuits which are unrelated to previously sanctioned actions, however, they are denying litigants their First Amendment right of access to the courts. Care must be taken to fashion nonmonetary sanctions narrowly to preserve the constitutional right to petition the courts for redress of grievances.

2. *The Noerr-Pennington Doctrine and the Definition of Petitioning*

As illustrated, petitioning encompassed only direct attempts to receive redress in the legislative, executive, or judicial arena. Publication of a petition to anyone other than those reasonably believed responsible for providing redress resulted in abrogation of petitioner immunity.³²⁷ The immunity extended to petitioners was not, however, dependent on the subject matter of the petition. For example, petitions submitted to the courts were granted immunity regardless of whether the litigation encompassed issues on matters of public concern, purely private disputes, or commercial transactions.³²⁸ The Supreme Court has failed to take note of this history when evaluating petitioners’ claims of immunity to the antitrust laws.

In a series of cases beginning with *Eastern Railroad Presidents*

well, 810 F.2d 135, 136 (7th Cir. 1987), *cert. denied*, 488 U.S. 973 (1988) (imposing sanctions pursuant to FED. R. APP. P. 46).

323. *Daniels v. Stovall*, 660 F. Supp. 301, 306 (S.D. Tex. 1987).

324. *See, e.g., Vakalis v. Shawmut Corp.*, 925 F.2d 34, 36-37 (1st Cir. 1991).

325. *See Naked City, Inc. v. Aregood*. 117 F.R.D. 634, 637 (N.D. Ind. 1987).

326. *See Elmore v. McCammon*, 640 F. Supp. 905, 912 (S.D. Tex. 1986).

327. *See supra* notes 171-72, 267-68, 278 and accompanying text.

328. *See supra* notes 270-77 and accompanying text.

Conference v. Noerr Motor Freight, Inc.,³²⁹ the Supreme Court granted immunity from the antitrust laws to petitioners who joined together to seek the passage and enforcement of laws. In *Noerr*, forty-one truck drivers and their trade associations filed a lawsuit against twenty-four railroads, an association of railroad presidents, and a public relations firm hired by the railroads alleging that the defendants conspired to create and implement a negative publicity campaign designed to influence legislation regarding truck weight limits and tax rates on heavy trucks.³³⁰ The Supreme Court held that even if the truckers could establish that the railroads' sole purpose in pursuing the executive veto was to "destroy the truckers as competitors for the long-distance freight business" there would be no antitrust liability.³³¹ Although the Court based its decision on the Sherman Antitrust Act, the Court also reasoned that prohibitions against group lobbying efforts would impair a group's ability to make its views known to lawmakers. The Court would not "lightly impute to Congress an intent to invade" the First Amendment right to petition government.³³² The Court, however, qualified the immunity enjoyed by petitioners:

There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.³³³

Four years later in 1965, the Supreme Court again addressed a claim of immunity from the antitrust laws. In *United Mine Workers v. Pennington*,³³⁴ unions and mine operators united to petition the executive branch of the federal government, specifically, the Secretary of Labor, to secure legislation requiring higher minimum wages for certain coal contractors.³³⁵ In conformity with *Noerr*, the Supreme Court held these concentrated efforts to influence minimum wage legislation were immune from the antitrust laws even if the petitioners' sole purpose was to eliminate competition and even if the conduct was "part of a broader scheme itself violative of the Sherman Act."³³⁶ The Court, however, again did not clarify whether the immunity was pre-

329. 365 U.S. 127 (1961).

330. *Id.* at 129-30.

331. *Id.* at 138-39.

332. *Id.* at 138.

333. *Id.* at 144.

334. 381 U.S. 657 (1965).

335. *Id.* at 660.

336. *Id.* at 670.

mised on the Sherman Act or on the First Amendment right to petition.

Seven years after *Pennington*, the Court clearly based its immunity decision on the First Amendment. In *California Motor Transport Co. v. Trucking Unlimited*,³³⁷ the petitioning efforts were directed toward the judiciary and administrative agencies. In this case, highway carriers alleged that another group of carriers instituted both federal and state actions to defeat the applications of its competitors for carrier certificates.³³⁸ The Supreme Court specifically based its immunity decision on the First Amendment Petition Clause ruling that those who join together “to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors” are immune from antitrust liability.³³⁹

But the Court distinguished the adjudicatory setting in *Trucking Unlimited* from the political activities in *Noerr* and *Pennington* and concluded: “Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.”³⁴⁰ The Court further ruled that allegations that the petitioners’ alleged attempts to deprive their competitors from meaningful access to both the courts and the administrative tribunals by filing “baseless, repetitive” claims, if proven, would be sufficient to establish a sham and thereby abrogate immunity.³⁴¹ The Court thus found anticompetitive intent relevant to the immunity issue in the context of judicial proceedings.

In the most recent petitioner immunity decision, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,³⁴² the Supreme Court clarified the distinction between private action and public or political action. The Court found “the source, context, and nature of the anticompetitive restraint” relevant to immunity.³⁴³ Because the allegedly anticompeti-

337. 404 U.S. 508 (1972).

338. *Id.* at 509.

339. *Id.* at 510-11; see also Note, *supra* note 183, at 1062 (noting that while vexatious litigation may be grounds for antitrust litigation, the Court has strongly affirmed the right to petition).

340. *Trucking Unlimited*, 404 U.S. at 513. The Court cited perjury of witnesses, fraud, and bribery as examples of misrepresentations. *Id.*

341. *Id.* The Court has since defined the sham exception in the context of litigation as “evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims.” *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973).

342. 486 U.S. 492 (1988).

343. *Id.* at 499. *Trucking Unlimited* and *Allied Tube* have been viewed as an expansion of the sham exception and thus an erosion of the *Noerr-Pennington* Doctrine as originally articulated. Stanley E. Crawford, Jr. & Andy A. Tschoepe II, *The Erosion of Noerr-Pennington Immunity*, 13 ST. MARY’S L.J. 291, 301-02 (1981). Although this may not have been the intention of the Supreme Court, the Court has failed to define the limits of the

tive conduct in *Allied Tube* was undertaken to influence a private association that set safety standards, and not to directly influence the government, the Court ruled that the petitioners were not immune from antitrust liability.³⁴⁴

The rulings of the Supreme Court in this series of cases are premised on both an overinclusive and an underinclusive definition of petitioning. Although the Court did not squarely base its decision in *Noerr* on the First Amendment Petition Clause, at least some of the allegedly anticompetitive conduct that the Court protected exceeded the historic definition of petitioning. To the extent it protected such conduct, the Court's definition of petitioning was overinclusive. For example, the publicity campaign in *Noerr* allegedly included distributing false reports to the public, suppliers and customers of the truckers, and public officials.³⁴⁵ The reports were allegedly made to appear as spontaneous declarations and opinions of concerned citizens groups. But the opinions were really a product of the publicity campaign. Because the Petition Clause was not historically understood to encompass indirect attempts to influence legislation,³⁴⁶ the immunity the Court granted the railroads for its other activities must have derived from the Sherman Act. The only activity which would fit within an historic definition of petitioning were the reports sent to the public officials. If the railroads sent the reports to support their opinions about the legislation, the Court should have held the railroads immune from antitrust liability under the First Amendment Petition Clause as opposed to finding immunity under the Sherman Act. In contrast, the unions and mine workers in *Pennington* engaged in direct attempts to influence the executive to establish high minimum wages. Since this was a direct attempt to influence legislation, the *Pennington* Court should have directly based its immunity decision on the First Amendment.

Although the Court reached the proper result under the First Amendment in *Trucking Unlimited*, it did so by fashioning an underin-

sham exception to petitioner immunity under the antitrust laws. See generally Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977) (arguing that inconsistent application of the Noerr-Pennington doctrine stems from the Court's failure to clearly articulate the basis for the doctrine).

344. *Allied Tube*, 486 U.S. at 501-05.

345. The decision of the trial court provides a more detailed discussion of the allegedly anticompetitive conduct. *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 155 F. Supp. 768 (E.D. Pa. 1957), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd*, 365 U.S. 127 (1961).

346. See *supra* notes 81-119 and accompanying text.

clusive definition of petitioning. The Court focused on the fact that litigation generally involves commercial and not political activity, and commercial activity justifies closer scrutiny of anticompetitive intent. Similarly, in *Allied Tube*, the Court reached the correct conclusion on the immunity issue, but again, the Court focused on whether the allegedly anticompetitive conduct involved political activity with a negative commercial impact, or whether the activity was primarily commercial with a political impact, the latter activity being unprotected from the antitrust laws.³⁴⁷

Whether petitioning occurs in the judicial, executive, or legislative arena, petitioner immunity should not be abrogated unless the petitioning is pursued in subjective bad faith or is frivolous or vexatious.³⁴⁸ Thus, in all of these antitrust cases, the Court should have phrased the issues as follows: 1) Was there a direct attempt to petition the executive, legislature, or judiciary? If so: 2) Was the petition presented in subjective bad faith or was it frivolous or vexatious?³⁴⁹ If so, there can be no intent to petition government for a redress of grievances. The sole intent underlying the petition should be deemed an intent to harass or to achieve an anticompetitive result. Interpreting antitrust immunity in this manner provides a clear standard for the sham exception to petitioner immunity while preserving the historical First Amendment right to petition. This interpretation simultaneously

347. It is indeed questionable whether the activity involved in *Allied Tube* was any less political than the activity involved in *Noerr*, given the fact that the standards adopted by the private association were routinely adopted by states. *Allied Tube*, 486 U.S. at 512 (White, J., dissenting).

348. In the judicial arena, subjective bad faith or sham litigation could be established by a pattern of baseless repetitive claims. Further, subjective bad faith also could be found in a single baseless lawsuit. See Comment, *supra* note 197, at 1524 & n.43; *supra* notes 110-12 and accompanying text.

349. Several authors have advocated the use of a malicious prosecution standard as a limitation on antitrust immunity. See, e.g., Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 HARV. L. REV. 715, 727-31 (1973). One author urges the reverse; that is, that the Noerr-Pennington Doctrine should be utilized in malicious prosecution actions to protect those who petition government. Eric M. Jacobs, Comment, *Protecting the First Amendment Right to Petition: Immunity for Defendants in Defamation Actions Through Application of the Noerr-Pennington Doctrine*, 31 AM. U. L. REV. 147, 168-71 (1981).

This standard may, in essence, produce the same result as the standard advocated in this Article. The latter standard, however, is tailored to mirror colonial restrictions on petitioning. See *supra* notes 110-12 and accompanying text; cf. Smith, *supra* note 6, at 1192-93 ("The sham exception provides enough protection to the private interests implicated in petitioning without unduly impairing the constitutional right.").

protects the free enterprise system and economic freedom which the antitrust laws were designed to promote.

Conclusion

In assessing the appropriate level of protection petitioners should enjoy pursuant to the First Amendment Petition Clause, the Supreme Court has given scant consideration to the evolution and history of the right to petition prior to its incorporation into the First Amendment. History reveals that the right to petition evolved in both England and America into a broad right which was distinct from and superior to the rights of speech, press, and assembly. Petitioning encompassed both individuals and collective written requests which were submitted to the executive, legislative, or the judicial branch of government. This right was generally not curtailed. In contrast, the rights of speech and the press were burdened by seditious libel laws. The right of assembly was also restricted via regulations which either limited the number of individuals allowed to present petitions or required groups to act in a peaceful, orderly manner.

Yet the Supreme Court has ignored these historical facts and has treated the right to petition as a right co-extensive with the other expressive rights of the First Amendment. The court has thereby collapsed the historically superior right to petition into the other historically inferior rights of the First Amendment. The Court has incorrectly concluded that the First Amendment Petition Clause should not provide a substantive right of access to the courts unless free speech rights are also implicated. The Court has also improperly granted only a limited immunity to petitioners: it has denied petitioners the absolute immunity from private libel actions as was enjoyed historically; and in the context of antitrust laws, the Court has conditioned petitioner immunity on a definition of petitioning that is both overinclusive and underinclusive. Another immunity issue arises under Federal Rule of Civil Procedure 11 which, as applied to pre-filing factual and legal inquiries, includes within its coverage negligent conduct historically immune from sanctions. Finally, in direct contradiction to the debates surrounding the framing of the First Amendment Petition Clause, the Supreme Court has erroneously concluded that the right to petition government has never included a duty of government response. A careful examination of historical practices reveals not only that the Supreme Court's analysis of petitioning is misguided, but that the Court has it backwards: the right to petition

was the important right; its development preceded and fostered the evolution speech, assembly, and the press.

