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A Right of Access to Court under the Petition Clause of the First Amendment: Defining the Right

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This Article explores the use of the Petition Clause as a vehicle for gaining access to courts. Professor Andrews reviews the English origins of the right to petition, the formation of the American version of the right, and Supreme Court decisions addressing court access generally and the right to petition in particular, all with a view to determining whether the right to petition properly extends to courts. She concludes that a right of access to the courts does exist via the Petition Clause. However, she argues that this right is limited and "protects a person's right only to file winning claims within the court's jurisdiction." Professor Andrews concludes by proposing protections borrowed from free speech doctrine in order to ensure and to effectively broaden this right of court access.

This nation has long viewed a person's ability to gain access to court as a fundamental element of our democracy. Chief Justice Marshall in *Marbury v. Madison*[1] described the ability to obtain civil redress as the "very essence of civil liberty."[2] Yet, until recently, the Supreme Court has granted little constitutional protection to court access in civil cases. Certain groups, such as prisoners, enjoy a constitutional right of court access, but the average person in an ordinary civil case has not had such a right. A universal right of court access is emerging, though, and it is coming from an unlikely source, the Petition Clause of the First Amendment. This Article looks at this "new" right of court access.

The right to petition the government is the last guarantee of the First Amendment: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."[3] Relatively

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[1] 5 U.S. (1 Cranch) 137 (1803).

[2] *Id.* at 163.

[3] The First Amendment states:

few courts and academic commentators have addressed the meaning of the Petition Clause.[4] One of the only contexts in which the right to petition regularly

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> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

U.S. CONST. amend. I. In the text, I quote the right to petition without stating the right to assemble. I address whether the right to assemble limits the right to petition in *infra* Part III.A.

[4] For a survey of the academic literature on the Petition Clause, see Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2155 n.3 (1998). Almost every recent article that concerns the Petition Clause begins by noting the dearth of academic or judicial analysis of the right to petition. Although the sheer repetition of this "oversight" would seem to belie the point, it is a valid observation. The Petition Clause, as a First Amendment freedom, has received some judicial and academic attention, but this discussion is minimal compared to other First Amendment rights. For example, the classic constitutional law hornbook of Professors Nowak and Rotunda dedicates 345 pages to the First Amendment, but only four pages to the right to petition. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 16.53–54 (5th ed. 1995). The comparison is even more dramatic in Professor Tribe's treatise: the near 1800-page treatise cites the right to petition only once, in a footnote. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 866 n.31 (2d ed. 1988).

Until recently, most cases and commentary concerning the Petition Clause fell into three broad categories. First, courts and academic commentators analyzed the right to petition under the *Noerr-Pennington* doctrine, under which petitioning activity, such as lobbying, is immune from antitrust liability. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137–38 (1961) (recognizing petition immunity); *see also* Thomas A. Balmer, *Sham Litigation and the Antitrust Law*, 29 BUFF. L. REV. 39 (1980); 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); David McGowan & Mark Lemley, *Antitrust Immunity: State Action and Federalism, Petition and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293 (1994); Gary Minda, *Interest Groups, Political Freedom and Antitrust: A Modern Reassessment of the* Noerr-Pennington *Doctrine*, 41 HASTINGS L.J. 905 (1990).

Second, courts and scholars debated whether the right of petition, in light of its long history, is a "higher" right than other First Amendment freedoms. *See* McDonald v. Smith, 472 U.S. 479 (1985) (refusing to elevate the right of petition over other First Amendment rights); Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986); Mark, *supra*; Eric Schnapper, *'Libelous' Petitions for Redress of Grievances—Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303 (1989); 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, 1154–70 (1986); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15 (1993); Robert A. Zauzmer, *The Misapplication of the* Noerr-Pennington *Doctrine in Non-antitrust Right to Petition Cases*, 36 STAN. L. REV. 1243 (1984).

appears is antitrust. The Supreme Court holds, under its "*Noerr-Pennington* doctrine," that petitioning activity, such as lobbying, cannot be subject to the antitrust laws even if done for an anti-competitive motive.[5] It was an application of this doctrine in which the Supreme Court first recognized an individual's right of access to court under the Petition Clause. In 1972, the Supreme Court announced in an antitrust case that the right of access to courts is indeed but one aspect of the right to petition.[6]

Though recognition of a right of court access under the Petition Clause is more than twenty-five years old, it is only now taking hold as a constitutional principle.[7] The connection between "petitioning" and filing a civil suit initially went unnoticed as anything other than an antitrust doctrine. Until recently, due process was the primary battleground for attempts to gain a general right of court access in civil suits. That battle is now over. The Supreme Court repeatedly has held that the average person does not have a due process right to go to court

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Third, scholars analyzed whether the Petition Clause is a proper basis for restricting "SLAPP" suits (Strategic Lawsuits Against Public (or Political) Participation), the paradigm of which is a defamation suit by a real estate developer against citizens who protest his development. *See, e.g.*, Barbara Arco, *When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. MIAMI L. REV. 587 (1998); Thomas A. Waldman, *SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Response to Frivolous Litigation*, 39 UCLA. L. REV. 979, 1003 (1992). Professors Pring and Canan first coined the term "SLAPP suit" in 1988 and today continue their work on SLAPP suit deterrence. *See* GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (1996); Penelope Canan & George W. Pring, *Strategic Lawsuits Against Political Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC'Y REV. 385 (1988).

Scholars recently have begun to break new ground with regard to the right to petition. Professor James Pfander, for example, questioned whether the right to petition the government overrides sovereign immunity. *See* James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899 (1997). Professor Gary Lawson and Guy Seidman have in turn challenged Professor Pfander's proposition and that of other scholars, by arguing that the right to petition is a narrow right. *See* Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. (forthcoming 1999). In short, the Petition Clause is beginning to spark new interest and debate.

[5] *See supra* note 4 and accompanying text; *infra* notes 75–84.

[6] *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972) ("That right, [the right of access to the courts] is part of the right of petition protected by the First Amendment."); *see also infra* notes 85–95 and accompanying text.

[7] *See generally* NOWAK & ROTUNDA, *supra* note 4, § 16.54, at 1192 ("Everyone has a right to institute non-baseless litigation. A lawsuit is a form of a petition for the redress of grievances."). For a non-exclusive list of authorities that recognize a Petition Clause right of court access outside of antitrust, see *infra* notes 117–19.

except in extraordinary cases.[8] In the wake of these due process decisions, the Petition Clause is becoming, slowly, the best avenue for asserting a right of court access. Though many courts still summarily reject challenge under the Petition Clause, some courts have begun to give it more serious considerations. In two recent cases, for example, courts relied upon the Petition Clause to limit application of the common law tort of abuse of process[9] and invalidate a statute that authorized fee awards against winning plaintiffs.[10]

It is time to consider and define the right of court access under the Petition Clause. There are several competing concerns that may frustrate proper development and application of the right. On the one hand, this new principle has great potential for protecting a long-neglected right; it can at least partially fill the gap left by the Court's due process decisions. But it can not do so if it becomes lost among, or confused with, the Court's existing court access doctrine. The new principle presents dangers in the other extreme as well. It could wreak havoc upon the very courts it purports to protect by calling into question the system by which courts operate. First Amendment rights are "supremely precious" freedoms and are subject to heightened protection.[11] An undefined right of judicial access under the First Amendment could call into question any law that purports to limit or regulate civil filings, including existing rules of procedure. The need to properly define this new right may be particularly pressing now, in the era of outcry about "lawsuit abuse." The debate about "tort reform" could take on constitutional proportions under a broad view of the Petition Clause.[12]

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[8] *See infra* Part I.A.2.

[9] The Rhode Island Supreme Court held that the Petition Clause protected both petitioning at "the town-council level" and "access to court" and thus limited application of the state common law torts of abuse of process and interference with contractual relations. In other words, liability could not attach to the mere filing of a meritorious civil suit, even if filed for an improper motive. *See* Cove Rd. Dev. v. Western Cranston Indus. Park Assocs., 674 A.2d 1234, 1237–38 (R.I. 1996).

[10] The Eighth Circuit applied the Petition Clause to invalidate a Minnesota statute that required plaintiffs to pay all of the state's costs in defending challenges to a new workers' compensation refund statute, regardless of whether the plaintiffs won or lost. *See In re* Workers' Compensation Refund, 46 F.3d 813 (8th Cir. 1995); *see also infra* sources cited notes 113–14.

[11] *See* NAACP v. Button, 371 U.S. 415, 433 (1963) (noting that First Amendment freedoms, including the right to petition, are "delicate and vulnerable, as well as supremely precious in our society" and demand exacting protection). For a discussion of the standards and forms of protections of First Amendment rights relative to that of other rights, see *infra* Part IV.C.

[12] Traditionally, courts have evaluated and upheld tort reform efforts under equal protection and due process. *See* Everett v. Goldman, 359 So. 2d 1256 (La. 1978) (upholding

Defining the right of court access under the Petition Clause, however, is not an easy task. The historical record offers little insight into the mere existence of a right to petition courts, let alone the proper contours of that purported right. Likewise, the Supreme Court, though it recognizes such a right, has barely begun to define the right. "Proper" definition of the meaning and extent of the right of court access under the Petition Clause will take years of debate and thought. In this Article, I hope to foster that debate by reviewing the existing state of the record and by making my own proposal as to the existence and meaning of the right of court access under the Petition Clause.

I initially examine whether a Petition Clause right of access exists at all in any form. I start, in Part I, with the Court's existing court access doctrine and the

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under equal protection and due process challenges a statute that required pre-filing screening of medical malpractice claims and barred complaint demands of specific dollar amounts); Barrett v. Baird, 908 P.2d 689 (Nev. 1995) (holding that medical malpractice screening statute did not violate equal protection, due process, or separation of powers).

Only a very few courts have considered the impact of the Petition Clause on efforts to curb alleged litigation abuse. A California court considered whether the First Amendment right to petition invalidated the California "vexatious litigant" statute under which a litigant with a specified history of frivolous litigation could be limited in his ability to file future suits. It upheld the statute. *See* Wolfgram v. Wells Fargo Bank, 61 Cal. Rptr. 2d 694, 704 (Cal. App. 1997) ("'[B]aseless litigation is not immunized by the First Amendment right to petition.'") (quoting Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743 (1983)). A New York court similarly upheld its rule allowing sanctions for "frivolous" litigation conduct, including civil filings made for an "improper purpose." Gordon v. Marrone, 616 N.Y.S.2d 98, 102 (App. Div. 1994) ("[W]e reject the petitioner's contention that an award of sanctions . . . here impermissibly infringes upon his First Amendment right of access to the courts."). In addition, a few commentators have begun to question whether the Petition Clause limits or invalidates rules of procedure, such as Rule 11 of the Federal Rules of Civil Procedure, which set standards for the filing of civil complaints in federal court. *See* FED. R. CIV. P. 11; *infra* note 436; *see also* Gary Myers, *Antitrust and First Amendment Implications of* Professional Real Estate Investors, 51 WASH. & LEE L. REV. 1199 (1994); Spanbauer, *supra* note 4; Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 HARV. L. REV. 1111 (1993) [hereinafter Note, *Suits Against the Government*].

Some commentators and courts have addressed whether *state* constitutional provisions limit or otherwise impact tort reform efforts. Usually the state provision at issue is a clause found in the majority of state constitutions, variously called a "remedy" or "open court" clause. *See, e.g.*, Strahler v. St. Luke's Hosp., 706 S.W.2d 7, 9 (Mo. 1986) (en banc) (declaring invalid a limitations statute for medical malpractice claims as applied to minors, under state constitution which "grants to the people of Missouri an express constitutional guarantee not enumerated in our federal Constitution"); Donald B. Brenner, Note, *The Right of Access to Civil Courts Under State Constitutional Law: An Impediment to Modern Reforms, or a Receptacle of Important Substantive and Procedural Rights?*, 13 RUTGERS L.J. 399 (1982). Though the effect and meaning of each such remedy clause is beyond the scope of this article, I discuss the early development of remedy clauses in connection with the history of the right to petition and right of court access. *See infra* Part II.

practical reality that most courts and observers already recognize a right of court access under the Petition Clause. In Part II, I assess the validity of this reading of the Petition Clause and conclude that the history, text, and underlying policies of the clause reasonably support some form of a right of court access. In Part III, I take on the more difficult task of defining the right. I propose that the right in its absolute form is very narrow: it protects a person's right only to file winning claims within the court's jurisdiction. Finally, in Part IV, I propose how courts should protect this right. I principally borrow from free speech doctrine and propose protections that will effectively broaden the right of court access beyond its narrow absolute form. Finally, in subsequent articles, I will apply the proposed analysis to selected laws and governmental actions and, in the end, will conclude that the right of access under the Petition Clause overrides some, but not many, restrictions on court access.

I. DEVELOPMENT AND CURRENT RECOGNITION OF A CONSTITUTIONAL RIGHT OF COURT ACCESS

A right of court access in civil cases has a long but unsettled history in this country. Though the Court repeatedly has stated that court access is fundamental, it generally has not extended constitutional protection to the right of the average individual to go to court. The Court's decisions under the Due Process Clause—the constitutional provision traditionally associated with judicial procedure—protect court access only in isolated cases. Some persons enjoy a broader right of access, but this right depends on theories, such as the right to associate, not applicable to the typical individual. Courts and scholars are increasingly recognizing the general concept of the right to *petition* courts, but few have given the right meaningful scrutiny. Nevertheless, the Petition Clause has the most potential for protecting a broader right of access for individual civil litigants.

A. *Developing Theories of a Right of Court Access*

For nearly two hundred years, the Supreme Court did not recognize the Petition Clause as a basis for a right of access to court. The Court initially recognized judicial access as a fundamental liberty without citing any particular clause of the Constitution as the source of the right. In this century, the Court began to assess court access under a variety of specific constitutional provisions and theories. The Court started with the Due Process Clause, but in the early 1970s, the Court severely limited any due process right of access for average citizens. At about the same time—the 1960s and early 1970s—the Court granted special rights of access to certain groups. The Court used an amalgam of constitutional theories to give prisoners a relatively broad right of access to court.

It also applied the freedoms of speech and association to protect associations, such as the NAACP and labor unions, in their group organization of civil litigation.

During the middle of its efforts to define the right of judicial access in these other contexts, the Court suggested yet another potential basis for a right of access, the Petition Clause. The first hint came in the group litigation cases in the 1960s, but it took an antitrust case to draw the Court's most definitive statement of the right under the Petition Clause. In 1972, the Court proclaimed in *California Motor Transport v. Trucking Unlimited*, that "[t]he right of access to the courts is indeed but one aspect of the right of petition."[13] Perhaps because this pronouncement came in an antitrust case, not a usual setting for constitutional law developments, most observers and courts, including the Court itself, initially ignored the pronouncement outside the area of antitrust. But its most recent decisions have endorsed the doctrine in other contexts and have opened the door for a universal right of court access under the Petition Clause.

1. *The Fundamental Nature of Judicial Access*

From the very inception of this nation, jurists viewed the right of access to court as "fundamental." First, in *Marbury v. Madison*,[14] the Court in 1803 recognized that a person who has suffered a legally cognizable injury has a right to obtain a remedy in court:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives injury. One of the first duties of government is to afford that protection . . .
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> . . . .
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> . . . '[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'
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> . . . '[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.'
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> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[15]

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[13] 404 U.S. 508, 612 (1972).

[14] 5 U.S. (1 Cranch) 137 (1803).

[15] *Id.* at 163. The Court ultimately held that the petitioner, Marbury, had a cognizable injury but that the Court could not entertain his claim because of Article III limitations on the

In setting out this fundamental right of redress, Chief Justice Marshall relied upon the writings of the English legal historian, Sir William Blackstone, not the Petition Clause or any other provision of the Constitution.[16]

The Court has continued to refer generally to a right to judicial redress in a variety of contexts, without citing any constitutional authority.[17] The most common example is the Court's interpretation of the Privileges and Immunities Clause of Article IV of the Constitution, which prohibits states from denying citizens of other states certain basic rights that the states afford their own citizens.[18] In 1823, Justice Bushrod Washington, sitting as circuit justice, set forth an oft-quoted statement of these basic rights, which included the right to file civil suits in court:

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to

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Court's original jurisdiction. *See id.* at 173–80.

[16] *See id.* For a discussion of Sir Blackstone's writings on the right to judicial remedy, see *infra* notes 145–51 and accompanying text.

[17] For example, in *Ex Parte Young*, in which the Court interpreted the Eleventh Amendment to allow suits for prospective relief against state officers, the Court stated that persons faced with unconstitutional state laws ought to have a remedy to prevent enforcement of those laws. *See* 209 U.S. 123, 160 (1908) ("It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity."). Similarly, the Court has emphasized that the federal courts, with only minor exceptions, "must entertain" suits within their jurisdiction. *See* Bell v. Hood, 327 U.S. 678, 681–82 (1946). It also has held that the right to resort to federal court is a "fundamental" right upon which states may not infringe. *See* Terral v. Burke Constr. Co., 257 U.S. 529, 532–33 (1922) (declaring unconstitutional a statute that compelled a foreign corporation to waive "its constitutional right to resort to the federal courts" and apparently, without discussion, basing that "constitutional right" upon Article III).

[18] The Privileges and Immunities Clause of Article IV of the Constitution is in essence a "comity" provision that provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2. The Fourteenth Amendment also has a "privileges and immunities" provision: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1. The Court has narrowly interpreted this Fourteenth Amendment clause to apply only to rights of national citizenship. *See In re* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872); *see also infra* note 22.

> acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; *to institute and maintain actions of any kind in the courts of the state*....[19]

Thereafter, the Supreme Court repeatedly recognized that access to court was a fundamental liberty within the meaning of the Privileges and Immunities Clause.[20]

That access to court is protected by the Article IV Privileges and Immunities Clause means only that a state may not grant judicial access to its own citizens while denying it to non-citizens. It does not mean that it is a constitutional guarantee for all citizens.[21] And it certainly does not mean that the right is based in the First Amendment Petition Clause.[22] But, like *Marbury v. Madison*, the

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[19] Corfield v. Coryell, 6 F. Cas. 546, 551–52 (E.D. Pa. 1823) (emphasis added) (holding that New Jersey may reserve oyster fishing rights exclusively for its own citizens).

[20] *See* Blake v. McClung, 172 U.S. 239, 252 (1898) ("[T]he privileges and immunities, which the citizens of the same state would be entitled to under like circumstances,... includes the right to institute actions."); Cole v. Cunningham, 133 U.S. 107, 113–14 (1890) ("The intention of [the Privileges and Immunities Clause] was to confer on citizens of the several States a general citizenship... and this includes the right to institute actions."); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870) ("[T]he [Privileges and Immunities] [C]lause plainly and unmistakably secures and protects the right of a citizen... to maintain action in the courts of the State.").

[21] The "fundamental" rights and benefits protected under the Privileges and Immunities Clause are not limited to those that are independently protected by other constitutional provisions:

> The modern Court's reference to determining whether a right is sufficiently "fundamental" to be protected by the clause should not be confused with a determination of whether an activity constitutes a fundamental right so as to require strict judicial scrutiny under the due process and equal protection clauses. For example, the regulation of conditions of employment is not considered a limitation of a fundamental right for due process and equal protection analysis, but the ability to engage in a private sector activity or employment is a fundamental right protected by the privileges and immunities clause.
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> ....
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> ... All rights directly protected by the Constitution, such as First Amendment rights, or other constitutional rights that the Court has found to be fundamental for the purposes of due process and equal protection analysis, constitute privileges and immunities of citizenship.

NOWAK & ROTUNDA, *supra* note 4, § 9.6, at 330–31.

[22] In *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867), the Court hinted that the right of

privileges and immunities cases reflect the importance of the right to go to court. The Court, for example, in a privileges and immunities case explained that access to courts is essential to orderly government:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all

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access to court was tied to the right to petition. The Court invalidated a Nevada state tax on out-of-state passenger service on grounds now called the "right to travel." *See* NOWAK & ROTUNDA, *supra* note 4, §§ 8.10, 14.38. In doing so, the Court used terms remarkably close to the Petition Clause and specifically mentioned the right of access to court:

> The people of these United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. Here sits its legislature.... Here resides the President.... Here is the *seat of the supreme judicial power of the nation, to which all its citizens have a right to resort to claim justice at its hands....*
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> ....
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> ... [The citizen] has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, *and the courts of justice in the several States*, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.

Crandall, 73 U.S. (6 Wall.) at 43–44 (emphasis added). The Court five years later in the *Slaughter-House Cases*, quoted this second paragraph, including its reference to the courts of the states, as an example of the few rights of national citizenship guaranteed by the Privileges and Immunities Clause of the Fourteenth Amendment. *See* 83 U.S. (16 Wall.) at 79. Interestingly, the Court separately listed the right to petition as another right of national citizenship. *See id.* This separation of the right to petition the *national government* and of access to *state courts* does not necessarily mean that the Petition Clause has no application to courts. At that time, the federal right of petition, whatever its meaning, did not guard against infringement by state governments. In fact, one aspect of the *Slaughter-House Cases*, now overruled, was rejection of the argument that any part of the Fourteenth Amendment incorporated the Bill of Rights. *See id.* at 80–81 (construing the Due Process Clause of the Fourteenth Amendment as extending only procedural protections); *see also* United States v. Cruikshank, 92 U.S. 542, 552 (1875) (stating that the right of petition "like other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone"). It was not until 1937 that the Court expressly protected the right to petition against state interference, through incorporation of the right to petition into the Fourteenth Amendment Due Process Clause. *See* DeJonge v. Oregon, 299 U.S. 353, 364–65 (1937).

other States to the precise extent that it is allowed to its own citizens.[23]

Thus, although the Court in these cases had not yet expressly declared that the right of access derives from the Petition Clause, it put the right on the same plane as other core freedoms.

2. *A Limited Due Process Right of Court Access*

The first line of cases in which the Court considered whether a specific guarantee of the Constitution protects court access was under due process. These cases, however, functioned more as a rejection, rather than an affirmation, of the right of access. Initially, neither the litigants nor the Court termed the issue as one of court access, but the cases nevertheless challenged preconditions to filing civil suits. An early example is the 1924 case of *Jones v. Union Guano Co.*,[24] which was a challenge to a North Carolina statute that required for all product suits against fertilizer manufacturers that the plaintiff, before filing his complaint, first obtain a chemical analysis of the fertilizer. The trial court dismissed the plaintiff's claim because he had no chemical analysis (even though he presented other evidence that the fertilizer was inferior) and the plaintiff claimed that the statute violated due process. The Court disagreed, finding that the restriction was a "reasonable" precondition to filing suit.[25]

Twenty-five years later, the Court again applied a reasonableness test to reject a due process challenge to a restriction on filing suit. In *Cohen v. Beneficial Industrial Loan Corp.*,[26] the plaintiff challenged the requirement that he post security as a precondition to bringing a shareholder derivative action. In an opinion by Justice Jackson, the Court held that the security requirement was reasonable and did not violate due process:

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[23] Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148 (1907).

[24] 264 U.S. 171 (1924).

[25] The Court explained the reasonableness of the statute:

> The act does not deprive purchasers of any right or cause of action. On the contrary, it gives additional rights and remedies [the statute overrode a common law limit on damages in fertilizer suits] .... The requirement imposed is reasonable and seems well calculated to safeguard against uncertainty, conjecture and mistake....
>
> The Fourteenth Amendment does not prevent a State from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real, and the condition imposed has reasonable relation to a legitimate object.

Id. at 180–81.

[26] 337 U.S. 541 (1949).

> A state may set the terms on which it will permit litigations in its courts. No type of litigation is more susceptible of regulation than that of a fiduciary nature. And it cannot seriously be said that a state makes such *unreasonable* use of its power as to violate the Constitution when it provides liability and security for payment of *reasonable* expenses if a litigation of this character is adjudged to be unsustainable. It is urged that such a requirement will foreclose resort by most stockholders to the only available judicial remedy for the protection of their rights. Of course, to require security for the payment of any kind of costs, or the necessity for bearing any kind of expense of litigation, has a deterring effect. But we deal with power, not wisdom; and we think, notwithstanding this tendency, *it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met.*[27]

The defining cases for access to court under due process came in the early 1970s as challenges to court filing fees. The first was the 1971 case of *Boddie v. Connecticut*,[28] in which indigent petitioners protested the Connecticut filing fee for divorce actions. The Court noted that due process is usually a protection for defendants, not a means by which plaintiffs can gain access to court, because plaintiffs, unlike defendants, may resort to other means:

> [Due process] litigation has [ ] typically involved rights of defendants—not, as here, persons seeking access to the judicial process in the first instance. This is because our society has been so structured that resort to the courts is not usually the only available, legitimate means of resolving private disputes. Indeed, private structuring of individual relationships and repair of their breach is largely encouraged in American life, subject only to the caveat that the formal judicial process, if resorted to, is paramount. Thus, this Court has seldom been asked to view access to the courts as an element of due process. The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain. But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its

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[27] *Id.* at 552 (emphasis added). One year later, Justice Jackson, in *Mullane v. Central Hanover Trust*, 339 U.S. 306 (1950), wrote a seminal due process opinion that again established a reasonableness test for the question at hand—the required method of providing parties with notice of proceedings. *See id.* at 314 ("An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

[28] 401 U.S. 371 (1971).

legitimacy.[29]

The Court nevertheless held that in narrow circumstances due process requires states to open their courts to plaintiffs.[30] *Boddie* presented these circumstances. The filing fee in *Boddie* violated due process because marriage is a fundamental right,[31] divorce is one of the few examples of a dispute that the parties cannot otherwise reconcile, and the petitioners were indigent.[32]

The narrowness of the due process right of access to courts became apparent in two 1973 cases. First, in *United States v. Kras*,[33] the Court refused to extend *Boddie* to filing fees for bankruptcy. The Court emphasized that the due process

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[29] *Id.* at 375–76.

[30] The Court emphasized the narrow application of its holding:

> In concluding that the Due Process Clause... requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the *bona fides* of both appellants' indigency and desire for divorce are here beyond dispute. We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause... so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the... Due Process Clause... pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.

Id. at 382–83.

[31] "[M]arriage involves interests of basic importance in our society." *Id.* at 376. Justice Black in his dissent argued that this was the only basis on which to distinguish *Cohen*, which upheld a security requirement for a shareholder derivative action, *see supra* notes 26–27, and that this "fundamental interest" test was too vague. *See Boddie*, 401 U.S. at 392–93 (Black, J., dissenting). The majority tried to distinguish *Cohen* on the basis that *Cohen* looked at a statute on its face, whereas the *Boddie* petitioners had established that they were in fact indigent and barred from court for failure to pay the fee. Justice Black noted that *Cohen* recognized that the security requirement may in fact foreclose resort to the courts by most shareholders but nevertheless held that the state had the power to close its courts to such litigation if the condition was not met. *See id.* at 392.

[32] The Court noted that the filing fee would not be improper for non-indigents and that the question of what process is due depends on the circumstances of each person: "The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due." *Boddie*, 401 U.S. at 380. The Court referred by analogy to *Mullane*, 339 U.S. at 306, where it had held that notice by publication is proper for some but not all defendants. *See Boddie*, 401 U.S. at 380.

[33] 409 U.S. 434 (1973).

right recognized in *Boddie* applied only to fundamental rights and only where judicial access is the exclusive means of resolving the issue:

> The denial of access to the judicial forum in *Boddie* touched directly . . . on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. . . . The *Boddie* appellants' inability to dissolve their marriages seriously impaired their freedom to pursue other protected associational activities. Kras' alleged interest in the elimination of his debt burden, and in obtaining his desired new start in life, although important and so recognized by the enactment of the Bankruptcy Act, does not rise to the same constitutional level. . . .
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> . . . .
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> Nor is the Government's control over the establishment, enforcement, or dissolution of debts nearly so exclusive as Connecticut's control over the marriage relationship in *Boddie*. . . . The utter exclusiveness of court access and court remedy . . . was a potent factor in *Boddie*. . . .
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> However unrealistic the remedy may be in a particular situation, a debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors.[34]

Similarly, in *Ortwein v. Schwab*,[35] the Court refused to invalidate a filing fee for judicial appeals from adverse administrative welfare determinations: the interest at stake, increased welfare payments, "like that in *Kras*, has far less constitutional significance than the interest of the *Boddie* appellants,"[36] and the welfare appellants already had administrative hearings, a form of dispute resolution.[37] In essence then, under the Court's holdings, due process rarely requires that a plaintiff be given access to court.

In these due process cases, the Court did not meaningfully address the Petition Clause. The reason for this oversight is difficult to discern. After all, the Court issued its Petition Clause edict in *California Motor Transport* in 1972, in the interim between *Boddie* and *Kras*, and litigants and scholars at the time were actively challenging the narrowness of the due process holdings.[38] The answer

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[34] *Id.* at 444–45.

[35] 410 U.S. 656 (1973) (per curium).

[36] *Id.* at 659.

[37] *See id.*

[38] In 1973, for example, Professor Frank Michelman published the first of his thoughtful two-part series that criticized the Court's filing fee cases, but he did not rely upon the Petition Clause. *See* Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 6 DUKE L.J. 1153 (1973). A student note in the same year, directly analyzed filing fees under the Petition Clause as "a more comprehensive and workable theory of access," but the note garnered little attention. *See* Note, *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE L.J. 1055, 1055 (1973) [hereinafter Note, *First*

apparently is that some litigants tried to advance the Petition Clause as an alternative protection but they could not convince the courts that the Petition Clause right of court access was a right distinct from that under due process.[39] Even the Supreme Court in *Ortwein* summarily dismissed a Petition Clause argument by equating the challenge to that under due process.[40] But, as will be seen, a due process analysis is not what the Court applied only one year earlier in *California Motor Transport*.[41] Nevertheless, at least for a time, the Petition Clause lay dormant as anything other than an antitrust doctrine.

3. *A Broader Right of Court Access for Prisoners*

Ironically, while the Court was narrowly defining the due process right of court access for average citizens, it was broadly interpreting the right of prisoners to gain access to court to file civil actions. The first of the prisoner cases challenged interference by state prison officials with the ability of prisoners to file habeas petitions (civil actions) in federal court. In the 1941 decision of *Ex Parte Hull*,[42] the Court, without citing a specific constitutional provision, invalidated a prison regulation under which prison officials pre-screened habeas petitions and barred the filing of those that officials deemed "not properly drawn."[43] In 1961, the Court held that a state may not charge a filing fee to an

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Amendment Right of Access].

[39] For example, the trial court in *Boddie* tied the Petition Clause argument to due process: "It is claimed that the State of Connecticut is denying the plaintiffs the equal protection of the laws by barring them from seeking a divorce because of their indigency, and is *denying them due process of law by infringing their right to 'petition* the Government for a redress of grievances,' U.S. Const. Am. 1." Boddie v. Connecticut, 286 F. Supp. 968, 970 (D. Conn. 1968) (emphasis added).

[40] *See Ortwein*, 410 U.S. at 660 n.5 ("Appellants also claim a violation of their First Amendment right to petition for redress. Our discussion of the Due Process Clause, however, demonstrates that appellants' rights under the First Amendment have been fully satisfied.").

[41] *See* California Motor Transp. v. Trucking Unlimited, 404 U.S. 508 (1972). *See generally infra* notes 85–95 and accompanying text. In *California Motor Transport*, the Court did not look to whether the underlying suit involved fundamental rights or whether the courts were the only means of redress. The litigation challenged competing truckers' applications for operating licenses. *See* 404 U.S. at 509. Whether these challenges could have been resolved outside of court is uncertain, but operating licenses are no more fundamental than the debts in *Kras* and welfare rights in *Ortwein*. Therefore, the Court could have decided *California Motor Transport* on this fundamental interest ground alone, if access to court were a due process question. It did not. Instead, it looked to see if the challenges were "sham." *See id.* at 511–13.

[42] 312 U.S. 546 (1941).

[43] Michigan prison officials intercepted Hull's habeas petition because it was not properly drawn. *See id.* at 548–49. The Court invalidated this procedure: "[w]hether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must

indigent prisoner who wishes to file a habeas petition.[44] Likewise, in 1969, the Court in *Johnson v. Avery*[45] invalidated a prison regulation that forbade inmates from helping each other prepare habeas petitions.

In none of the three decisions did the Court cite a specific constitutional provision, except by implication in its reference to "the fundamental importance of the writ of habeas corpus in our constitutional scheme."[46] When the Court eventually addressed prisoner civil cases not involving habeas petitions, it cited the Due Process Clause. In *Procunier v. Martinez*,[47] the Court expressly relied on due process to invalidate a prison ban on law student or paralegal interviews with prisoners.[48] In *Wolff v. McDonnell*,[49] the Court extended *Avery* to civil rights actions,[50] declaring that *Avery* was based on due process, not the Habeas

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contain are questions for that court alone to determine." *Id.* at 549.

[44] *See* Smith v. Bennett, 365 U.S. 708 (1961).

[45] 393 U.S. 483 (1969).

[46] *Id.* at 485. Habeas petitions are separately protected in the Constitution. *See* U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[47] 416 U.S. 396 (1974).

[48] The Court explained the due process foundation for a prisoner's right of access to court:

> The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right to access to the courts are invalid.

Id. at 419 (citing *Ex Parte* Hull, 312 U.S. 546 (1941)). The Court agreed that the ban imposed a "substantial burden on the right of access to the courts" but also noted that "this conclusion does not end the inquiry." *Id.* at 420. Rather, the Court must conduct a balancing test: "[t]he extent to which [the right of access] is burdened by a particular regulation or practice must be weighed against the legitimate interest of penal administration and the proper regard that judges should give to the expertise and discretionary authority of correctional officials." *Id.* The regulation failed this balancing test because the ban was absolute and the state did not show that a less restrictive regulation would unduly burden the administrative task of screening visitors. *See id.*

[49] 418 U.S. 539 (1974).

[50] In *Wolff*, the Nebraska prison appointed one legal adviser to inmates and forbade inmates from assisting each other on legal matters. *See id.* at 544 n.4. *Avery* left open the option of states providing legal advisors in lieu of inmate assistance. *See* 393 U.S. at 490; *supra* note 45. The issues in *Wolff* were whether a single adviser was adequate and whether adequacy must be judged on the adviser's ability to counsel prisoners on habeas petitions alone or both habeas and civil rights actions. *See* 418 U.S. at 577.

Clause.[51]

These cases arguably are consistent with the Court's other due process cases, such as *Boddie*. Each prisoner was seeking to challenge either his confinement or the conditions of his confinement—seemingly fundamental rights. In addition, the courts are arguably the only means by which a prisoner can pursue these fundamental rights.[52] What is different about the prisoner cases is that the barrier to access in some prisoner cases is not as direct as in the case of filing fees. In *Avery*, for example, the invalid restriction was a prison ban on affirmative assistance, by other inmates, in the preparation of habeas claims, whereas in *Boddie*, the Court actually barred the divorce petition when the indigent petitioner could not pay the filing fee.

The Court soon carried this prisoner doctrine even farther. In 1977, in *Bounds v. Smith*,[53] the Court required prisons not only to refrain from banning assistance to prisoners in civil cases but also to affirmatively provide assistance at the state's expense, in the form of law libraries or legal advisers.[54] The *Bounds*

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[51] *See Wolff*, 418 U.S. at 579. The *Wolff* Court applied a distinction similar to that in *Boddie* and *Kras* by holding that civil rights actions are equally as fundamental as habeas petitions. *See id.* Though *Wolff* was decided in 1974, three years after *Boddie* and one year after *Kras*, the *Wolff* Court did not cite either case. Instead, the Court explained:

> First, the demarcation line between civil rights actions and habeas petitions is not always clear. The Court has already recognized instances where the same constitutional rights might be redressed under either form of relief. Second, while it is true that only in habeas actions may relief be granted which will shorten the term of confinement, it is more pertinent that both actions serve to protect basic constitutional rights. The right of access to the courts, upon which *Avery* was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ. The recognition by this Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates, often "totally or functionally illiterate," were unable to articulate their complaints to the courts.

Wolff, 418 U.S. at 579 (citations omitted).

[52] Access to courts is not literally required for civil rights challenges to the conditions of a prisoner's confinement. The prisoner could seek to informally persuade prison authorities to cure the defects. This may be a futile effort, but arguably not any more so than the bankruptcy proceedings in *Kras*, where the Court held that the mere possibility of outside relief was sufficient. *See supra* notes 33–34.

[53] 430 U.S. 817 (1977).

[54] The Court ordered the state to affirmatively provide law libraries or other legal assistance to prisoners, presumably without regard to the nature of the underlying litigation for which the prisoners would use the facilities. The Court declared "that the fundamental

expansion of prisoner access does not necessarily open the door for like challenges by average citizens.[55] The Court in effect created an independent "access to court" doctrine for prisoners. This special rule for prisoners has some policy justifications. A prisoner has unique circumstances: he is in special need of judicial relief yet he is confined away from normal avenues of case preparation and settlement.[56]

Even with these constraints, some applications of the prisoner access doctrine—those dictating affirmative assistance—have uncertain constitutional footing, at least in the view of some members of the Court. For example, in *Bounds*, Justice Rehnquist dissented and claimed the majority had created the

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constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate prison law libraries or adequate assistance from persons trained in the law." *Id.* at 828.

[55] Indeed, the Court has since tried to narrow the expansive reach of *Bounds* even in prisoner cases. In *Lewis v. Casey*, 518 U.S. 343 (1996), where prisoners challenged the adequacy of the prison law library, the Court denied relief and declared that "*Bounds* did not create an abstract, freestanding right to a law library or legal assistance...." *Id.* at 351. The Court went on to note:

> It must be acknowledged that several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied, which was a right to bring to court a grievance that the inmate wished to present. These statements appear to suggest that the State must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court. These elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases, and we now disclaim them. To demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires.
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> In other words, *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement.

Id. at 354–55 (citations omitted).

[56] In his dissent in *Bounds*, Justice Rehnquist explained what he believed to be the basis of *Avery*, *Procunier*, and *Wolff*:

> [Those cases] depend on the principle that the State, having already incarcerated the convict and thereby virtually eliminated his contact with people outside the prison walls, may not further limit contacts which would otherwise be permitted simply because such contacts would aid the incarcerated prisoner in preparation of a petition seeking judicial relief from the conditions or terms of his confinement.

Bounds, 430 U.S. at 838–39 (Rehnquist, J., dissenting).

right "out of whole cloth."[57] The Court continues to debate the proper constitutional grounding of the prisoner access doctrine.[58] Interestingly, the Court, in this debate, has virtually ignored the Petition Clause,[59] even though it

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[57] Justice Rehnquist stated:

> [The Court] proceeds [ ] to enunciate a "fundamental constitutional right of access to the courts," which is found nowhere in the Constitution.... [T]he "fundamental constitutional right of access to the courts" which the Court announces today is created virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived.

430 U.S. at 839–40 (Rehnquist, J., dissenting) (internal citations omitted); *see also id.* at 833–34 (Burger, C.J., dissenting) ("The Court leaves us unenlightened as to the source of the 'right of access to the courts'...."). *Bounds* arguably extended court access doctrine by blending the due process cases addressing initial access, such as *Boddie*, and equal protection cases addressing criminal appeals. *See* Douglas v. California, 372 U.S. 353 (1963) (requiring states to affirmatively provide counsel on appeals as of right); Burns v. Ohio, 360 U.S. 252 (1959) (same as for filing fees on discretionary review of conviction); Griffin v. Illinois, 351 U.S. 12 (1956) (forbidding, on appeal, a state from requiring an indigent criminal defendant to pay for transcripts on due process and equal protection grounds). The criminal appeal cases have been challenged as having no constitutional footing. For example, in *Ross v. Moffitt*, 417 U.S. 600 (1974), the Court (per Justice Rehnquist) refused to extend *Douglas* to discretionary appeals, and questioned its constitutional basis:

> The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment. Neither Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors. "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.

Id. at 608–09 (footnote omitted).

[58] *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 129–44 (1996) (Thomas, J., dissenting) (protesting the Court's holding that Mississippi must waive transcript fees for indigents on appeals from parental right terminations and arguing that the Court was blending equal protection and due process doctrine to protect rights that neither clause alone would protect).

[59] Justice Stevens apparently was the only member of the Court to mention the Petition Clause in the prisoner cases. He did so in his dissent from *Lewis v. Casey*, 518 U.S. at 404–14, in which he opposed any attempt to limit *Bounds* and suggested the First Amendment Petition Clause as a possible basis for a broad right of access:

> Within the residuum of liberty retained by prisoners are freedoms identified in the First Amendment to the Constitution: freedom to worship according to the dictates of

decided *California Motor Transport* during the height of the prisoner case development.[60]

4. *Court Access for Group Litigation*

A fourth area in which the Court recognized a right of court access was in cases in which the state sought to restrict associations in assisting their members in litigation. In these cases, the Court primarily addressed infringement of other First Amendment rights, namely those of association and political expression, but obliquely referred to both the right of court access and the right to petition. This is the first line of cases in which the Court connected the right to petition with litigation.

The seminal case was *NAACP v. Button*.[61] In this 1963 case, the NAACP had actively encouraged black citizens of Virginia to retain NAACP lawyers and fight segregation in Virginia schools. The Commonwealth of Virginia contended that this activity violated its statute against solicitation of legal business. The Court held that the NAACP activities were protected exercises of association and political expression.[62] Though the Court expressly based its ultimate holding on the rights of association and expression, the Court also discussed the right to petition and suggested that it protected litigation:

> [A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn

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> their conscience, freedom to communicate with the outside world, and the freedom to petition their government for a redress of grievances. While the exercise of these freedoms may of course be regulated and constrained by their custodians, they may not be obliterated either actively or passively. Indeed, our cases make it clear that the States must take certain affirmative steps to protect some of the essential aspects of liberty that might not otherwise survive in the controlled prison environment.

Id. at 404–05 (Stevens, J., dissenting) (citations omitted).

[60] The Court decided *California Motor Transport* in 1972, five years before *Bounds*, and, in *California Motor Transport*, the Court ironically relied upon two prisoner cases, *Hull* and *Avery*, *see* discussion *supra* notes 42–43, 45–46, for its court access pronouncement. *See* discussion *infra* notes 85–95.

[61] 371 U.S. 415 (1963).

[62] *See id.* at 428–29.

> to the courts. . . . And under the conditions of modern government, *litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.*[63]

The next year, the Court extended *Button* to the personal injury context in *Brotherhood of Railroad Trainmen v. Virginia.*[64] There, the union advised its injured members to consult with union-approved lawyers before settling claims for work-related injuries, primarily claims under the Federal Employer's Liability Act.[65] Virginia enjoined the union from continuing this advisory service, charging that the service constituted unlawful solicitation and practice of law. The Court overturned the injunction, based primarily on the union's right of association, but also on the right to petition and its corresponding right of access to court: "The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. *The right to petition the courts cannot be so handicapped.*"[66]

Justices Clark and Harlan dissented in *Railroad Trainmen* and argued that the protection recognized in *Button* applied only to political litigation, not to private personal injury cases.[67] This is not an unreasonable interpretation of

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[63] *Id.* at 429–30 (emphasis added) (citations omitted). The Court further explained the relationship between litigation and more traditional views of First Amendment freedoms:

> We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. . . .
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> The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of the members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.

Id. at 430–31.

[64] 377 U.S. 1 (1964).

[65] *See id.* at 1–5.

[66] *Id.* at 7 (emphasis added).

[67] The dissent argued:

> [In *Button*] the vital fact was that the claimed privilege was a "form of political expression" to secure, through court action, constitutionally protected civil rights. Personal injury litigation is not a form of political expression, but rather a procedure for the settlement of damages claims. No guaranteed civil right is involved.

Id. at 10 (Clark, J., dissenting).

Button, which repeatedly had referred to the political nature of the NAACP litigation.[68] But the Court twenty years before, in *Thomas v. Collins*,[69] already had held that the First Amendment rights of speech, association, and petition are not limited to "great" or political issues. The *Thomas* Court declared that rights of free speech, assembly, and petition apply even if their exercise is for solely private purposes:

> This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience.... Great secular causes, with small ones, are guarded. *The grievance for redress of which the right of petition was insured, and with 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.[70]

If *Thomas* and *Railroad Trainmen* left any doubt that the First Amendment protected more than just political litigation by associations, the Court soon put the question to rest when it twice reaffirmed application of the right to union organization of personal injury litigation, in *UMW of America, District 12 v. Illinois State Bar Association*,[71] and in *United Transportation Union v. State Bar*

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[68] *See supra* note 63 and accompanying text; *see also Button*, 371 U.S. at 443 ("Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain.").

[69] 323 U.S. 516 (1945). In *Thomas*, the Court overturned the conviction of a national CIO representative who violated a Texas law requiring him to register as a labor organizer before giving a labor speech.

[70] *Id.* at 531 (citations omitted) (emphasis added).

[71] 389 U.S. 217 (1967). The Court protected the UMW's hiring of lawyers to assist its members in FELA claims, and, in doing so, the Court again cited the right to petition: "[w]e hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives [the union] the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." *Id.* at 221–22 (footnote omitted). The Court, quoting *Thomas*, rejected the contention that the implicated rights do not apply to personal injury litigation:

> We think that both the *Button* and *Trainmen* cases are controlling here. The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button*, but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. "Great secular causes, with small ones, are guarded. 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 of course in *Trainmen*, where the litigation in question was, as here, solely designed to compensate the victims of industrial accidents, we rejected the contention made in dissent, that the principles announced in *Button* were applicable only to litigation for political purposes.

of Michigan.[72]

Thus, in these group litigation cases, unlike the due process and prisoner cases, the Court did not ignore the right to petition. To the contrary, the Court affirmatively cited the Petition Clause to further support its holdings. The only limitation was that the cases involved organized activity. Because the cases involved associational rights, some commentators, and even the Court, questioned their application to individual cases where other First Amendment freedoms were not at stake.[73] It took an antitrust case for the Court to more

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Id. at 223 (citations omitted).

[72] 401 U.S. 576 (1971). The union recommended counsel to its members in FELA actions and required all such counsel to limit his or her fees to 25% of all recovery. *See id.* at 577. The Court overturned a Michigan injunction of this union activity:

> The common thread running through our decisions in *NAACP v. Button*, *Trainmen*, and *United Mine Workers*, is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation.... The injunction... cannot stand....

Id. at 585–86.

[73] Indeed, the failure of the Court to discuss or apply the union litigation cases in the near contemporaneous due process cases prompted some lower courts to assume that the Petition Clause did not independently support a right of access to court. For example, the Oregon Supreme Court in *Ortwein v. Schwab*, 498 P.2d 757 (Or. 1972), dismissed a First Amendment petition argument on the ground that other filing fee cases such as *Boddie* had not mentioned or analyzed this basis:

> Petitioners' first amendment contention is grounded upon that part of the amendment prohibiting the right "to petition the Government for redress of grievances."
>
> This phrase of the First Amendment emerged into popularity in Mr. Justice Black's majority opinions in *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* and *United Mine Workers of America, Dist. 12 v. Illinois State Bar Assn.* These decisions held that the rights of workers to associate for the selection of legal counsel was a right protected by the First Amendment, including the right to petition clause.
>
> Based upon the issues in those decisions, later decisions concerning the right of access to the courts without paying filing fees, which do not mention such clause, and our understanding of the historical background of that clause, we are of the opinion that the First Amendment is not relevant to our present inquiry.

Id. at 758–59 (en banc) (citations omitted); *see also* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 335 (1985) (noting a "conceptual difficulty" in applying the union litigation cases to an individual claim because "the First Amendment interest at stake was primarily the right to associate collectively" rather than an individual's interest in prosecuting his own claim to his best advantage); Spanbauer, *supra* note 4, at 43–49 (reading *Button* and its progeny as requiring the presence of another First Amendment freedom, whether political

directly state the right of court access under the Petition Clause as separate from and independent of other First Amendment freedoms.

5. *An Individual Right of Court Access Under the Petition Clause*

In 1972, the Court launched a new doctrine of court access in *California Motor Transport*. The pronouncement initially garnered little attention in the field of constitutional litigation. Indeed, because the Court in *California Motor Transport* was applying an antitrust doctrine, the *Noerr-Pennington* immunity, some courts and commentators questioned if its discussion of court access was a constitutional precept or merely an application of antitrust law. However, in 1983, the Court applied *California Motor Transport* in a labor case, *Bill Johnson's Restaurants v. NLRB*,[74] and opened the door for more widespread recognition of a right of access under the Petition Clause. The Court is not retreating from its position. In 1993, the Court returned to the question of court access under *Noerr-Pennington* and extended broad, though not absolute, First Amendment protection to court access in civil suits.

Court access under the Petition Clause began with the *Noerr-Pennington* doctrine. *Noerr-Pennington* is a rule of statutory construction that has constitutional dimensions. The starting point was the 1961 case of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[75] which was an antitrust dispute between truckers and railroads. The truckers complained that the railroads had acted with "the sole motivation" to "injure the truckers and eventually to destroy them as competitors" in persuading the governor of Pennsylvania to veto a bill that would have benefited truckers.[76] The Court, in an opinion by Justice Black, held that the complaint did not state a cause of action under the antitrust laws because the only alleged harm came from lobbying efforts. It reached this result by reading the Sherman Act more narrowly than its literal terms.[77] Though the Court cited more than one policy basis for its

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speech or associational activity, before the Court will protect access to court). *But see* Robert H. Birkby & Walter F. Murphy, *Interest Group Conflict in the Judicial Arena: The First Amendment and Group Access to Courts*, 42 TEX. L. REV. 1018, 1043 (1964) (citing Terral v. Burke, 257 U.S. 529 (1922), and noting that *Button* "may be only a logical extension of earlier decisions holding access to the courts to be constitutionally protected right of individuals"). I further discuss the distinction between a collective and individual right of access *infra* Part III.A.

[74] 459 U.S. 942 (1982).

[75] 365 U.S. 127 (1961).

[76] *See id.* at 129.

[77] Under its literal terms, the Sherman Act would outlaw lobbying efforts if done collectively in restraint of trade or to monopolize trade. Section 1 states that "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce

narrowing of the Act,[78] Justice Black explained that the Sherman Act could not apply to lobbying activity because "such a construction . . . would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."[79] Thus, though *Noerr* is a principle of statutory construction, it is one made necessary by the First Amendment.[80]

The Court, however, has stated some key definitional elements of this petitioning immunity. First, in *Noerr*, the Court explained that the immunity was not absolute:

> 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. But this certainly is not the case here.[81]

Yet, the *Noerr* Court also explained that the anti-competitive intent of the railroads was irrelevant so long as their lobbying efforts were aimed at obtaining governmental action.[82] Likewise, the Court four years later, in *United Mine*

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among the several States . . . is declared to be illegal." 15 U.S.C. § 1 (1994). Section 2 declares that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony." 15 U.S.C. § 2 (1994).

[78] The Court noted that the legislative history of the Act did not suggest any intent to legislate political, as opposed to business, activity. *See Noerr*, 365 U.S. at 137. This has been termed the "essential dissimilarity" rationale for *Noerr-Pennington*; in other words, the activity that the Sherman Act was meant to regulate is essentially different from political activity. *See, e.g.*, McGowan & Lemley, *supra* note 4. This rationale grew out of the "*Parker* doctrine" under which "the Court was unanimous in the conclusion that the language and legislative history of the Sherman Act would not warrant the invalidation of a state regulatory program as an unlawful restraint upon trade." *Noerr*, 365 U.S. at 137–38 (citing Parker v. Brown, 317 U.S. 341, 352 (1943)).

[79] *Noerr*, 365 U.S. at 138.

[80] That the Court based its decision on statutory construction rather than constitutional grounds is made clear in its footnote:

> The answer [defendant's pleading] . . . also interposed a number of other defenses, including the contention that the activities complained of were constitutionally protected under the First Amendment . . . . Because of the view we take of the proper construction of the Sherman Act, we find it unnecessary to consider any of these other defenses.

Id. at 132 n.6.

[81] *Id.* at 144 (emphasis added).

[82] The Court explained that motive was irrelevant under the Petition Clause so long as the

Workers v. Pennington,[83] emphasized that *Noerr* immunity applies even though the defendant had the specific intent to eliminate his competitor through his lobbying efforts.[84] Thus, the right is broad, in the sense that bad motive does not compromise the right, but narrow in that the petition must not be a sham.

In 1972, the Court issued its decision in *California Motor Transport v. Trucking Unlimited*[85] and expanded the *Noerr-Pennington* doctrine to apply to adjudication. There, truckers in California complained that defendants, a competing group of truckers, had consistently interfered with their administrative and judicial efforts to acquire, transfer, or register operating rights. The alleged interference primarily took the form of what the Court described as a "pattern of baseless, repetitive claims."[86] The Ninth Circuit held that *Noerr-Pennington* was not applicable because the activity was not traditional lobbying but instead adjudicatory efforts before courts and administrative agencies.[87] Justice Douglas, writing for the Court in *California Motor Transport*, disagreed:

> The same philosophy governs the approach of citizens or groups of them to

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petition itself seeks governmental action:

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.... Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. We... hold that, at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anti-competitive purpose it may have had.

Id. at 139–40.

[83] 381 U.S. 657 (1965).

[84] Small coal mine operators charged that the UMW and large coal companies had collectively lobbied the Secretary of Labor and the TVA for regulations and practices that would drive the small operators out of business. *See id.* at 659–61. The Court held that these efforts could not constitute a violation of the antitrust laws: "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Id.* at 670.

[85] 404 U.S. 508 (1972).

[86] *Id.* at 510.

[87] *See* Trucking Unlimited v. California Motor Transp. Co., 432 F.2d 755, 758–59 (9th Cir. 1970).

> administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of the Government. Certainly, the right to petition extends to all departments of the Government. *The right of access to the courts is indeed but one aspect of the right of petition.*[88]

Justice Douglas did not cite, as support for this "new" constitutional precept, the union litigation cases, such as *Button* and *Railroad Trainmen*.[89] This is surprising given the contemporaneous timing of the two lines of cases and the fact that the union cases expressly tied the right of petition to civil litigation. The only limitation of the union cases was that they involved group adjudication and thus implicated the right of assembly, but *California Motor Transport* also alleged concerted "group" litigation efforts by the highway carriers. Nevertheless, Justice Douglas did not rely on this ground. To the contrary, he noted that the right of court access under the Petition Clause applies to "*citizens or groups of them.*"[90] Instead, Justice Douglas cited two prisoner cases—*Hull* and *Avery*—as his only support (other than *Noerr* and *Pennington*) for the court access principle.[91] This is an ironic choice given that *Hull* and *Avery* themselves cited no independent constitutional basis—other than the Habeas Clause—and were part of the prisoner line of cases in which the Court never relied upon the Petition Clause.[92]

Another irony of the *California Motor Transport* decision is that the Court found that the litigation at issue was not protected by *Noerr-Pennington* petitioning immunity. The filings were unprotected, not because they were adjudicative, but rather because they were sham. The Court offered a variety of explanations as to why the challenged litigation was sham.[93] One was that the

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[88] *California Motor Transp.*, 404 U.S. at 510 (emphasis added).

[89] Justice Douglas cited *Button*, but he did not do so to support the assertion that the right to petition encompasses access to court. Instead, he used *Button* to explain the *Noerr* "sham" exception. "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' which the legislature has the power to control." *Id.* at 515 (quoting NAACP v. Button, 371 U.S. 415, 444 (1963)). Justice Stewart in his concurrence cited *Button*. He stated—in arguing for a more narrow definition of sham litigation—there is "no difference . . . between trying to influence executive and legislative bodies and trying to influence administrative and judicial bodies." *Id.* at 517 (Stewart, J., concurring).

[90] *Id.* at 510 (emphasis added).

[91] *See id.*; *see also* discussion *supra* notes 42–46.

[92] *See* discussion *supra* Part I.A.3.

[93] For example, the Court made the following seemingly contradictory statement about sham litigation:

> Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of

filings were baseless.[94] The defendants allegedly filed their court papers "with or without probable cause and regardless of the merits of the cases."[95]

The principle that the Petition Clause protects a right of court access in civil cases did not immediately take hold. This hesitation may have resulted from confusion about the Court's varied definitions of sham litigation.[96] In addition, some courts and observers questioned whether the principle was an independent constitutional doctrine at all. Perhaps the best example is Judge Posner's opinion in *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*,[97] in which he opined that *California Motor Transport* was not a matter of constitutional law, but instead an "antitrust principle:"

> The holding [in *Noerr*] was presented as an interpretation of the Sherman Act rather than of the First Amendment, but one strongly influenced by the First

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> the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.
>
> It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.

California Motor Transp., 404 U.S. at 513–14. In addition, the Court suggested that the sham exception was broader—and therefore provided less First Amendment protection—for adjudicative proceedings than for executive or legislative lobbying. *See id.* at 512–13 ("The political campaign operated by the railroads in *Noerr* to obtain legislation crippling truckers employed deception and misrepresentation and unethical tactics. . . . Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.").

[94] The Court explained:

> [A] pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz.*, effectively barring respondents from access to the agencies and courts.

Id. at 513.

[95] *Id.* at 512.

[96] *See* Balmer, *supra* note 4, at 47 (discussing the confusion and "perplexity" of *California Motor Transport*'s sham exception, particularly its use of court access doctrine to describe the acts of both plaintiffs and defendants); William R. Jacobs, *The Quagmire Thickens: A Post-*California Motor *View of the Antitrust and Constitutional Ramifications of Petitioning the Government*, 42 U. CIN. L. REV. 281, 301 (1973) ("The *California Motor* decision, by its loose language, created or let fester more problems than it solved.").

[97] 694 F.2d 466 (7th Cir. 1982). In *Grip-Pak*, a maker of "six-pack" plastic rings for beverage cans sued a competitor for theft of trade secrets and related claims. The competitor then claimed in federal court that the first suit was an antitrust violation. Judge Posner, writing for the court, held that the factual and legal merit of the first suit did not by itself render the suit immune from antitrust liability. *See id.* at 473.

> Amendment.... Although [the Court in *California Motor Transport*] said that "the right of access to the courts is indeed but one aspect of the right of petition," this statement was used as the fulcrum to lever the petitioners out of range of the First Amendment by characterizing the alleged conspiracy as one to prevent the respondents from exercising their legal rights to obtain and transfer operating rights....
>
> It takes a rather free-wheeling imagination to extrapolate from the *California Motor Transport* opinion a principle that if applied across the board would... make the tort of abuse of process invalid under the First Amendment;[98] and we decline to do so—noting, also, that the Court used the language of abuse of process to describe the kind of litigation activity that the First Amendment does not protect. But it is a separate question whether, as a matter of antitrust principle, the Sherman Act should be interpreted to forbid using litigation to suppress competition.[99]

Judge Posner recognized that the First Amendment protects some litigation, but, despite *Thomas* and *Railroad Trainmen*, limited the protection to political cases, such as *Button*.[100]

One year after *Grip-Pak*, the Supreme Court applied *California Motor*

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[98] Judge Posner used the tort of abuse of process—and what he considered to be the universal view of the tort as constitutional—as a "fulcrum" (to use his term) to narrowly interpret *California Motor Transport*:

> If all nonmalicious litigation were immunized from government regulation by the First Amendment, the tort of abuse of process would be unconstitutional—something that, so far as we know, no one believes. The difference between abuse of process and malicious prosecution is that the former does not require proving that the lawsuit was brought without probable cause. If abuse of process is not constitutionally protected, no more should litigation that has an improper anticompetitive purpose be protected, even though the plaintiff has a colorable claim.

Id. at 471 (citations omitted). This fulcrum (analogy to abuse of process) may not be as strong today as in 1982. A few courts have held the First Amendment Petition Clause does in fact limit certain extreme applications of the tort of abuse of process, such as that suggested by Judge Posner. *See supra* note 9.

[99] *Grip-Pak*, 694 F.2d at 471–72 (citations omitted).

[100] Judge Posner stated:

> [W]e do not believe that the extent of protection is invariant to the nature of the lawsuit—that the efforts of the National Association for the Advancement of Colored People to use constitutional litigation to break down official segregation are entitled to no more protection than the efforts of Illinois Tool Works to collect damages for an alleged theft of trade secrets—or, if Grip-Pak is right, to drive a competitor out of business.

Id. at 471 (citations omitted).

Transport in a labor case and belied both the notion that *California Motor Transport* was merely an antitrust principle and also that it protects only political litigation. In *Bill Johnson's Restaurants, Inc. v. NLRB*,[101] an employer sued picketing employees for alleged defamatory statements in the employees' leaflet. The NLRB enjoined the defamation suit as an unfair labor practice, finding that the employer filed it in retaliation against the workers' picketing. A unanimous Court overturned the injunction.[102] The Court was not blind to the fact that employers and others can abuse litigation. Indeed, the Court discussed how an employer could subvert the process and use a suit "as a powerful instrument of coercion or retaliation."[103] Despite the great risk of abuse, however, the Court found that "weighty countervailing considerations," including both the First Amendment right of access to the courts and the states' interest in providing remedies and protecting its citizens from injury, argued against allowing the NLRB to enjoin the state suit.[104]

Though *Bill Johnson's Restaurants* was an exercise in statutory construction, the construction, like *Noerr-Pennington*, was dictated at least in part by the Petition Clause.[105] Indeed, the Court repeatedly used strong First Amendment

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[101] 461 U.S. 731 (1983). *Bill Johnson's Restaurants* is discussed in more detail infra Part III.C.

[102] Justice White wrote the opinion of the Court. *See id.* at 732. Justice Brennan filed the only separate opinion, a concurring opinion. *See id.* at 750 (Brennan, J., concurring); *see also* discussion *infra* notes 104–05.

[103] *Bill Johnson's Restaurants*, 461 U.S. at 740. The Court acknowledged that the burden of such a retaliatory lawsuit is particularly high when filed by a powerful employer, against hourly employees, such as the waitresses picketing Bill Johnson's Restaurants:

> [B]y suing an employee who files charges with the Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it. Furthermore, . . . the chilling effect of a state lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief. Where, as here, such a suit is filed against hourly-wage waitresses or other individuals who lack the backing of a union, the need to allow the Board to intervene and provide a remedy is at its greatest.

Id. at 740–41 (citations omitted).

[104] *See id.* at 741.

[105] The Court left open the possibility that it was merely construing the labor laws: it noted both that it must be "sensitive to these First Amendment values in construing the NLRA in the present context" and that it was reluctant "to infer a congressional intent to ignore the substantial state interest 'in protecting the health and well-being of its citizens.'" *Id.* at 741–42 (quoting Farmer v. Carpenters, 430 U.S. 290, 302–03 (1977)). Justice Brennan's concurring

language both in initially construing the labor laws[106] and in defining what "baseless" suits might fall outside the protection of its holding.[107] This recognition of the right of court access under the Petition Clause is important for a number of reasons. First, the Court applied the Petition Clause doctrine outside of antitrust. Second, the Court did so in a private suit by one plaintiff. Unlike the group litigation cases and *California Motor Transport*, *Bill Johnson's Restaurants* did not involve collective efforts to litigate and could not rest on the right of assembly.[108] Nor was it a political suit such as *Button*. It raised simple defamation claims. Thus, *Bill Johnson's Restaurants* opened the door to a universal right of court access for individuals.

The Court has since reaffirmed that the Petition Clause independently protects access to court. The first two affirmations of this right were dicta. First,

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opinion likewise noted that the Court's responsibility was to interpret the labor laws but that the interpretation had "constitutional resonances." *Id.* at 751 (Brennan, J., concurring).

[106] For example, the Court ultimately held:

> Considering the First Amendment right of access to the courts and the state interests . . . we conclude that the Board's interpretation of the [NLRA] is untenable. The filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act.

Id. at 742–43. The Court further noted:

> In *California Motor Transport v. Trucking Unlimited*, we recognized that the right of access to the courts is an aspect of the First Amendment right to petition. . . . "The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right."

Id. at 741 (citations omitted) (quoting Peddie Bldgs., 203 N.L.R.B. 265, 272 (1973)). Likewise, Justice Brennan agreed that the Court had "recognized a right under the First Amendment to seek redress of grievances in state courts." *Id.* at 752 (Brennan, J., concurring).

[107] "Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition." *Id.* at 743 (citations omitted). For further discussion of the Court's standards for determining whether suits are protected by the Petition Clause, see *infra* Part III.C.

[108] The Court did not discuss the distinction between group or individual litigation. Indeed, it did not cite any of the group litigation cases, such as *Button*, but instead cited only *California Motor Transport* for the right of access to court under the Petition Clause. *See Bill Johnson's Restaurant*, 461 U.S. at 741. *California Motor Transport*, on the other hand, stated (in dictum) that the right extended to both "citizens or groups of them." California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1971). For further discussion of whether the right to petition courts is a collective or individual right, see *infra* Part III.A.

in *Sure-Tan v. NLRB*,[109] the Court, in dictum, stated that "[t]he First Amendment right protected in *Bill Johnson's Restaurants* is plainly a 'right of access to the courts . . . for redress of alleged wrongs.'"[110] Second, in *McDonald v. Smith*,[111] the Court broadly stated, also in dictum, that the Petition Clause protects civil court filings: "[F]iling a complaint in court is a form of petitioning activity."[112]

The Court's more significant pronouncement came in another antitrust case, *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*[113] In this 1993 decision, the Court resolved a split in the circuits as to the definition of sham litigation and granted broader *Noerr-Pennington* protection than had been extended by some lower courts.[114] Unlike in *California Motor Transport*,

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[109] 467 U.S. 883 (1984).

[110] *Id.* at 897. In *Sure-Tan*, the Court narrowly interpreted the right of petition to apply only to requests for remedy of legally cognizable wrongs. *See id.* The NLRB had found that the employer had engaged in an unfair labor practice by reporting its employees to the Immigration and Naturalization Service (INS), in retaliation for their efforts to unionize. *See id.* at 886–88. The Court found that the employer's communications with the INS were not protected petitioning activity because they "did not invoke the INS administrative process in order to seek the redress of any wrongs committed against them." *Id.* at 897. This may be a proper interpretation of the right to file adjudicatory petitions, but to the extent that the petition sought merely to inform the executive, this may be an unduly narrow reading of the right to petition the Executive Branch. *See infra* Part III.C.

[111] 472 U.S. 479 (1985).

[112] *Id.* at 484 (citing *Bill Johnson's Restaurants*, 461 U.S. at 743, and *California Motor Transport*, 404 U.S. at 513). *McDonald* did not involve litigation but instead defined the proper test for allegedly defamatory statements made in an executive petition. For an extended discussion of *McDonald*, see *infra* notes 313, 398–400.

[113] 508 U.S. 49 (1993).

[114] The Court accepted certiorari in the case in order to resolve the confusion that followed *California Motor Transport*. *See id.* at 56–57. For a discussion of this confusion, see *supra* notes 93–96 and accompanying text. One recurring issue was whether an otherwise meritorious lawsuit is sham simply because the plaintiff did not file the suit to win but instead to hurt the defendant. *See Professional Real Estate Investors*, 508 U.S. at 57 ("We left unresolved in [*California Motor Transport*] the question presented by this case—whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant. We now answer this question in the negative . . . ."). The Court suggested that this confusion may have arisen from the two meanings of the word "genuine" which it used in its prior definitions of sham, and that "genuine has both objective and subjective connotations." *Id.* at 61. The Court held that "sham" litigation must have both elements (both objectively unreasonable and also improper motive), thus rejecting definitions that relied solely on a subjective test:

> [T]he District court had no occasion to inquire whether Columbia was indifferent to the outcome on the merits of the copyright suit, whether any damages for infringement would be too low to justify Columbia's investment in the suit, or whether Columbia had decided

the Court in *Professional Real Estate Investors* stated a fairly straight-forward standard: all objectively reasonable civil suits are immune from antitrust liability.[115] In extending this protection, Justice Thomas, writing for the Court, again used First Amendment language and relied in part upon *Bill Johnson's Restaurants*, noting that the protection for civil filings was not just an antitrust principle but also one that applied "in other contexts."[116] This was the Court's last significant pronouncement concerning the right of court access under the Petition Clause.

B. *Current Status of the Right of Court Access Under the Petition Clause*

Though the Court recognized the right of court access under the Petition Clause almost thirty years ago, the existence of a right to petition courts undoubtedly continues to surprise some observers. The failure of the doctrine to immediately garner attention is difficult to explain. The demise of due process as a viable avenue for court access seemingly should have prompted repeated reliance on the Petition Clause as an alternative basis for the right, but it surprisingly did not do so. Even *Bill Johnson's Restaurants*, which was a significant advancement of the right, went relatively unnoticed. Instead, *Professional Real Estate Investors*, another antitrust case, seems to have been the catalyst for more wide-scale recognition of the right. To be sure, some lower courts and commentators had earlier concluded that "petitioning immunity" protected court access outside of the area of antitrust.[117] But in the six years

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> to sue primarily for the benefit of collateral injuries inflicted through the use of legal process. Such matters concern Columbia's economic motivations in bringing suit, which were rendered irrelevant by the objective legal reasonableness of the litigation.

Id. at 65–66 (citation omitted).

[115] *See Professional Real Estate Investors*, 508 U.S. at 57 ("We . . . hold that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent."). The *Professional Real Estate Investors* definition of protected litigation is discussed in more detail *infra* Part III.C.

[116] *Id.* at 59 ("Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham.").

[117] *See* Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 705–06 (9th Cir. 1992) (noting that the First Amendment right of petition is one of three sources of the right of court access); McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1562 (11th Cir. 1992) (applying *Noerr-Pennington* to immunize a civil filing from liability under state unfair trade practices statute because "the *Noerr-Pennington* doctrine rests in large part on the general First Amendment guarantees of freedom to petition and freedom of association"); Hoeber v. Local 30, United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Ass'n, AFL-

since *Professional Real Estate Investors*, there has been a relative flood of recognition by both courts[118] and scholars.[119] The probable explanation is that

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CIO, 939 F.2d 118, 126 (3d Cir. 1991) ("The filing of a lawsuit carries significant constitutional protections, implicating the First Amendment right to petition the government for redress of grievances, and the right of access to courts."); Ryland v. Shapiro, 708 F.2d 967, 971–72 (5th Cir. 1983) (noting three constitutional sources of the right of court access—privileges and immunities, due process, and the right to petition); Acevedo v. Surles, 778 F. Supp. 179, 184 (S.D.N.Y. 1991) ("The right of access to the courts is guaranteed by the First Amendment right to petition the government for the redress of grievances."); Pacific Gas & Electric Co. v. Bear Sterns & Co., 791 P.2d 587, 596 (Cal. 1990) (en banc) (holding that the tort of malicious interference with contract cannot derive from filing of a civil suit and noting that the court previously had "been guided by the constitutional right to petition for relief of grievances in interpreting the reach of the tort of malicious prosecution"); Protect Our Mountain Env't, Inc. v. District Court for County of Jefferson, 677 P.2d 1361, 1365 (Col. 1984) (en banc) ("[T]he right to petition the government for redress of grievances necessarily includes the right of access to the courts. Were it otherwise, the right to petition would have little significance in the constitutional scheme of things."); King v. Levin, 540 N.E.2d 492 (Ill. App. 1989) (applying *California Motor Transport* and its First Amendment immunity to limit tort of interference with economic advantage); *see also* Balmer, *supra* note 4, at 56 ("The antitrust immunity extended to good faith litigation by the *Noerr-Pennington* doctrine is based on the first amendment's protection of the right of petition and the freedom of association."); Fischel, *supra* note 4, at 98 (arguing that *Noerr-Pennington* is a constitutional doctrine and that "the Court's extension of the right to petition to adjudicatory bodies in *California Motor Transport* was clearly correct"); David Goldberger, *First Amendment Constraints on the Award of Attorney's Fees Against Civil Rights Defendant-Intervenors: The Dilemma of the Innocent Volunteer*, 47 OHIO ST. L.J. 603 (1986) (analyzing fee awards under the First Amendment right to petition but relying principally on group litigation cases such as *Button*); Jacobs, *supra* note 96, at 293 n.52 (1973) ("It may seem surprising to equate the right of petition with resort to the judiciary, but the right had its origins in appeals to Parliament sitting as a court to redress private grievances.") (citations omitted); Spanbauer, *supra* note 4, at 43 ("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."); Carl Tobias, *Civil Rights Conundrum*, 26 GA. L. REV. 901, 934 (1992) ("[T]he Supreme Court has long held that the First Amendment right to petition prohibits punishing persons who pursue legitimate litigation for an apparently improper purpose."); Waldman, *supra* note 4, at 968 (noting that "[t]he right to obtain a remedy and to access the courts for assistance has its genesis in the First Amendment" but relying principally on group litigation cases such as *Button*); Note, *First Amendment Right of Access*, *supra* note 38, at 1059 ("In a tripartite system of government, any meaningful right to petition must extend to the judiciary."); Note, *Suits Against the Government*, *supra* note 12 (arguing that suits against the government are protected under the Petition Clause).

[118] *See, e.g.*, Monsky v. Moraghan, 127 F.3d 243, 246 (2d Cir. 1997) ("It is well established that all persons enjoy a constitutional right of access to the courts, although the source of this right has been variously located in the First Amendment right to petition for redress, the Privileges and Immunities Clause... and the Due Process Clauses...."); Proportion Air, Inc. v. Buzmatics, Inc., 1995 WL 360549 (Fed. Cir. June 14, 1995) (relying on

Professional Real Estate Investors standard, vacating judgment for defendant on counterclaims for tortious interference and abuse of process, and remanding for district court to make specific finding of whether the main claim was objectively baseless); Whelan v. Abell, 48 F.3d 1247, 1254–55 (D.C. Cir. 1995) ("As *Noerr-Pennington* rests on the conclusion that the filing of claims in court or before administrative agencies is part of the protected right to petition, it is hard to see any reason why, as an abstract matter, the common law torts of malicious prosecution and abuse of process might not in some of their applications be found to violate the First Amendment."); San Filippo v. Bongiovanni, 30 F.3d 424, 434 (3d Cir. 1994) (filing of "lawsuits . . . implicate[s] the petition clause, rather than the free speech clause, of the first amendment"); Lyon v. Vande Krol, 940 F. Supp. 1433, 1437 (S.D. Iowa 1996) (recognizing a fundamental right of court access under the right to petition); Gen-Probe, Inc. v. Amoco Corp., 926 F. Supp. 948, 955–56 (S.D. Cal. 1996) (applying *Noerr-Pennington* to state claims attacking the filing of a patent suit: "The majority of courts who have considered the issue have concluded that the immunity is constitutional and rooted in the First Amendment right to petition"); Armuchee Alliance v. King, 922 F. Supp. 1541, 1549 (N.D. Ga. 1996) ("It is well-established that 'the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.'"); Scioto County Reg'l Water Dist. No. 1 v. Scioto Water, Inc., 916 F. Supp. 692, 701–02 (S.D. Ohio 1995) (holding that the *Noerr-Pennington* doctrine is "grounded on the First Amendment principle that an individual or entity has the right to pursue legitimate efforts to influence government decision-making and to approach the courts in order to obtain redress of grievances" and "applies whether those efforts are challenged under federal antitrust law or under state law"); Computer Assocs. Int'l, Inc. v. American Fundware, Inc., 831 F. Supp. 1516, 1522 (D. Col. 1993) (surveying the "numerous" cases "in which the *Noerr-Pennington* doctrine has been applied to non-antitrust claims" and stating that the doctrine "is fundamentally based on First Amendment principles"); Kellar v. Von Holtum, 568 N.W.2d 186, 192–93 (Minn. App. 1997) (noting that *Noerr-Pennington* applied outside antitrust and was an additional ground for rejecting the torts of abuse of process and malicious prosecution); DeVaney v. Thriftway Mktg. Corp., 953 P.2d 277, 284–85 (N.M. 1997) (recognizing right of court access under the Petition Clause and narrowly construing tort of misuse of process); RRR Farms, Ltd. v. American Horse Protection Ass'n, Inc., 957 S.W.2d 121, 129 (Tex. App. 1997) (surveying the cases and recognizing that *Noerr-Pennington* is "fundamentally based on First Amendment principles" and "bars litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying cause of action"); *see also supra* notes 9–10.

[119] *See, e.g.*, Aaron R. Gary, *First Amendment Petition Clause Immunity From Tort Suits: In Search of a Consistent Doctrinal Framework*, 33 IDAHO L. REV. 67, 88 (1996) (concluding that *Noerr-Pennington* is a constitutional doctrine that applies to civil litigation in other contexts); Lawson & Seidman, *supra* note 4, at manuscript pp. 19–20 (recognizing a right to petition federal courts); Myers, *supra* note 4, at 1240 (noting that "*Noerr*, *California Motor Transport*, and *Professional Real Estate Investors* establishes that the First Amendment right to petition constrains the types of litigation activities that can be penalized under the Sherman Act" and that "[t]here is no reason to believe, however, that these principles are limited to antitrust cases"); Charles C. Hsieh, Note, Professional Real Estate*: The Line Between Patent and Antitrust*, 7 HARV. J.L. & TECH. 173, 185 (1993) (recognizing that the right to petition covers right of access to courts but noting a "doctrinal gap" in Court precedent as to the extent of that protection). *But see* David Franklin, Comment, *Civil Rights vs. Civil Liberties? The Legality of State Court Lawsuits Under the Fair Housing Act*, 63 U. CHI. L. REV. 1607

Professional Real Estate Investors for the first time provided a clear standard for *Noerr*'s judicial petitioning immunity—objectively reasonable suits.

Unfortunately, few commentators or courts have accompanied this new recognition with meaningful analysis. In the first place, there is a dearth of analysis concerning whether the Petition Clause appropriately applies to courts at all. Even the Supreme Court has not given any historical, textual, or policy basis for this application. It has discussed the history of the right to petition generally in other contexts,[120] but it has not explained how, if at all, this history justifies application of the right to court access. Professor Pfander provides the most thorough analysis of the historical and textual basis for extending the right to petition to the courts, and he makes a compelling case.[121] However, his analysis is directed to the question of sovereign immunity and litigation against the government as a party defendant, not the broader issue of whether the right to petition includes a right of court access for all civil litigation.[122]

Second, observers tend to overlook that a right of court access under the Petition Clause may have unique meaning and effect. Many lower courts simply describe the right to petition as an additional ground for court access, apparently one without any independent significance from other court access doctrines.[123]

(1996) (arguing that civil suits are and should be within the definition of illegal activity under the Fair Housing Act and that *Noerr-Pennington* is not a constitutional doctrine though civil suits can have some First Amendment elements, such as in *Button*); Thies Kolln, Comment, *Rule 11 and the Policing of Access to the Courts After* Professional Real Estate Investors, 61 U. CHI. L. REV. 1037, 1064–67 (1994). Kolln notes that *Noerr* and *Professional Real Estate Investors* have two possible rationales— the Petition Clause and the "proper functioning of government" rationales—and preferring the latter because it has lesser repercussions:

> [G]iven the Court's emphasis on the proper-functioning-of-government rationale for *Noerr* over the First Amendment issues, it seems improbable that *Professional Real Estate Investors* was meant to be a revision of an entire aspect of First Amendment jurisprudence.... If it extends the right-to-petition analysis of *Noerr*, then *Professional Real Estate Investors* effectively mandates an objective test of intent for all sanctioning mechanisms that police access to the courts—not only Rule 11, but common law torts such as malicious prosecution and abuse of process as well.

Id.

120 Perhaps the most extensive analysis of the Petition Clause came in *McDonald*, but some scholars have criticized *McDonald* as inaccurate. *See supra* note 4; *infra* notes 328, 397.

121 *See* Pfander, *supra* note 4.

122 Nevertheless, Professor Pfander's work provides the best starting point for a broader historical analysis of the right of court access under the Petition Clause, and is discussed in more detail *infra* Part II.B.

123 *See* Monsky v. Moraghan, 127 F.3d 243, 246 (2d Cir. 1997) (noting three constitutional sources of the right of court access—privileges and immunities, due process, and the right to petition—and not distinguishing the rights in its analysis); Los Angeles County Bar

Ironically, this comes at both ends of the spectrum. Courts equate the right of access under the Petition Clause with either the narrow right under due process[124] or, at the other extreme, with the broad right of prisoners.[125] But, as the court access cases of the 1970s demonstrate, these two doctrines differ widely in their level of protection, and the Petition Clause right of access may have unique dimensions as well.

Even the authorities that recognize the Petition Clause right of court access as an independent freedom fail to give it sufficient attention. Instead, these authorities tend to merely import one test or definition, developed in a particular context, and apply it to all court petition cases without first considering whether it is the proper standard. Many courts, for example, apply the *Professional Real Estate Investors* antitrust definition of sham litigation—the objectively reasonable claim test—to determine whether a court rule or other law improperly infringes on the right to petition the courts.[126] This definition may be appropriate in some cases, but as discussed in Part III of this Article, it is not the standard that the Court applied in *Bill Johnson's Restaurants*.[127] Most authorities overlook this difference and the possibility that *Bill Johnson's Restaurants*, and its "win-lose" distinction, may instead be the proper constitutional test.

Moreover, the difference between *Bill Johnson's Restaurants* and *Professional Real Estate Investors* merely addresses one aspect of defining the Petition Clause right of court access—the requisite merit of the underlying action. A number of other questions remain as to proper contours of the right

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Ass'n v. Eu, 979 F.2d 697, 705 (9th Cir. 1992) (same); Ryland v. Shapiro, 708 F.2d 967, 971–72 (5th Cir. 1983) (same).

[124] *See* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) (dismissing summarily a Petition Clause challenge to a limitation on the amount that veterans may pay lawyers in benefit proceedings before the Veterans Administration and suggesting that the First Amendment challenge asked the same question as that under due process, whether the process allowed claimant to make a meaningful presentation); Barrett v. Baird, 908 P.2d 689, 696–98 (Nev. 1995) (holding that the right of court access challenge to imposition of attorney fees is a due process issue and subject to "the lowest level of judicial scrutiny—the 'rational basis test.'").

[125] *See* Simond v. Dickhart, 804 F.2d 182 (1st Cir. 1986) (recognizing a prisoner's right of access to court under due process, privileges and immunities, and the right to petition and holding that this singular "right" is violated where prison officials withhold legal materials). This distinction may become even more important as prisoners attack the Prison Litigation Reform Act's (PLRA) limitation on a prisoner's ability to proceed in *forma pauperis*. *Compare* Carson v. Johnson, 112 F.2d 818 (5th Cir. 1997) (upholding the "three strikes" provision of the PLRA against a challenge that it was an unconstitutional infringement on the prisoner's right of access to courts), *with* Lyon v. Vande Krol, 940 F. Supp. 1433 (S.D. Iowa 1996) (holding that the "three strikes" provision of the PLRA violated equal protection).

[126] *See, e.g.*, cases cited *supra* notes 117–18.

[127] For a detailed discussion of these different standards, see *infra* Part III.C.

itself. One is whether the right to petition courts extends beyond the mere filing of the complaint. Some courts have applied the right to various stages of litigation, such as motions and appeals, without first considering whether the right extends beyond initial access.[128] Likewise, whether the right to petition courts is a collective or individual right is still a source of some uncertainty.[129]

Finally, courts and commentators have not adequately analyzed how to protect the right (even assuming it is properly defined).[130] This is surprising given the varied degree of protection the Court gives other constitutional rights, especially First Amendment freedoms. A single test or rule does not strike the proper balance in all speech cases, and there is little reason to believe that it will in judicial petition cases.[131] For example, under the prior restraint rule, a

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[128] *See* Quinon v. FBI, 86 F.3d 1222 (D.C. Cir. 1996) (applying Petition Clause protection of court access to a motion to recuse); Hirshfeld v. Spanakos, 909 F. Supp. 180 (S.D.N.Y. 1995) (applying *Professional Real Estate Investors*' sham test to determine if defendant's motion to stay district court's order on appeal was a violation of plaintiff's right of access to court). *But see* Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 706 (9th Cir. 1992) (noting that the right of court access is only "the right to pass through the courthouse doors and present one's claim for judicial determination"); *cf.* Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before The Court*, 101 U. PENN. L. REV. 1172 (1953) (criticizing Supreme Court's limitation on amicus curiae briefs as infringing upon the right to "lobby" the government). As I explain more fully in Part III.B, I contend that the right of court access under the Petition Clause is one of filing an initial claim only and that it does not protect substantive rights or subsequent procedure.

[129] *See supra* note 73. I discuss this issue in *infra* Part III.A.

[130] A notable exception among the judicial treatment of the right is the Third Circuit's discussion in *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994). There, the court considered whether a state's alleged retaliatory discharge of a university professor who had filed grievances and lawsuits against the university violated that employee's right to petition. The court considered at length the Supreme Court's petition cases and free speech cases and their policies and declined to apply the political speech test that applies to a government's retaliatory firing of an employee for his speech. *See id.* at 434–43. A few academic commentators have applied, with varying degrees of success, speech doctrine to court petition cases. *See* Natalie Abrams, *The Sham Exception to the* Noerr-Pennington *Doctrine: A Commercial Speech Interpretation*, 49 BROOK. L. REV. 573 (1983) (discussing the commercial speech doctrine); Robert P. Faulkner, *The Foundation of* Noerr-Pennington *and the Burden of Proving Sham Petitioning: The Historical Constitutional Argument in Favor of a "Clear and Convincing" Standard*, 28 U.S.F. L. REV. 681 (1994) (arguing for application of *New York Times* clear and convincing burden to sham issue in antitrust cases); McGowan & Lemley, *supra* note 4, at 374–97 (analyzing right to petition and court access under "public fora" and "chilling effect" speech doctrines); Joseph S. Faber, Note, City of Long Beach v. Bozek*: An Absolute Right to Sue the Government?*, 71 CAL. L. REV. 1258 (1983) (proposing that a heightened *New York Times* speech standard apply to right to petition court access analysis to protect citizen suits against the government).

[131] *See* discussion *infra* Part IV.B.

regulation that might pass scrutiny as a penalty after the underlying litigation is finished may fail if it is applied to prevent filing of the suit in the first place. Seemingly, as in the case of free speech, a prior restraint on exercise of the right to petition demands stricter scrutiny than a subsequent punishment.[132] Yet, despite the example of speech cases, courts, for the most part, have not recognized distinctions such as this in court access challenges under the Petition Clause.[133]

This lack of analysis can cause more than mere confusion. Without more meaningful thought, the right of court access under the Petition Clause could become either so weak that it is meaningless or so ill-defined that it cuts too wide a swath. To be sure, the right of access to court under the Petition Clause is a "new" constitutional precept, at least in the eyes of most observers. Constitutional analysis takes years of refinement. The Court is still developing the myriad of speech tests. No single case or article, including this one, can fully explore and define a constitutional right. But we must begin to give the right serious consideration. In the remaining sections of this Article, I offer a starting point for further thought and debate concerning the right of court access under the Petition Clause.

II. THE HISTORICAL, TEXTUAL, AND POLICY BASES FOR A RIGHT OF COURT ACCESS UNDER THE PETITION CLAUSE

A basic question seemingly overlooked by the Court in recognizing a right of court access under the Petition Clause is whether there is any historical, textual, or policy support for this conclusion. The average observer might say no. To the extent that anyone—even a lawyer—would consider the "right to petition" at all, he likely would envision a petition to his local zoning board or letters to legislators urging passage or defeat of pending legislation, not a civil complaint in a court of law. Unfortunately, there is a paucity of information to tell us whether the drafters of the First Amendment actually intended the Petition Clause to encompass civil court filings.

We can at least say that the history, text, and policies of the Clause are not inconsistent with an application of the right to petition to the courts. In other words, a plausible argument can be made that the Petition Clause does protect, at least to some degree, a person's right to file a civil lawsuit. First, the right to

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[132] For a discussion of the prior restraint rule, see *infra* Part IV.C.

[133] For example, in *Wolfgram v. Wells Fargo Bank*, 61 Cal. Rptr. 2d 694, 704 (Cal. App. 1997), the court applied *Bill Johnson's Restaurants*—"baseless litigation is not immunized by the First Amendment right to petition"—to uphold a "vexatious litigant" statute without fully considering whether the injunction portion of the statute needed stricter scrutiny under the free speech "prior restraint" rule. *See* discussion *supra* note 12.

petition historically protected requests for some form of individual redress, even if by the legislature. Second, the actual text of the clause extends the right to petition the "government" and is not limited to a particular branch. Finally, the policies served by petitioning—citizen participation in government and opportunity for peaceful resolution of grievances—apply to the courts as well as to the other branches of government.

A. *The History of the Right to Petition*

Until the First Amendment, most written Anglo-American statements concerning a right to petition were made in the context of the legislature, or, in England, of both the Parliament and the King. They did not mention the "courts." But this is not to say that the historical right to petition did not protect the right to ask for redress of individual civil disputes. Both in England and in the colonies, there was no separation of powers as we conceive of that doctrine today, and petitions to the legislatures were often judicial in nature. The English Parliament and colonial legislative assemblies performed judicial roles and resolved individual grievances that today would constitute civil actions.[134]

1. *The English Right to Petition*

Most historians and constitutional scholars tie the right to petition to the Magna Carta, which in 1215 gave English barons the right to petition the King—if the King or his ministers violated other provisions of the Magna Carta.[135]

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[134] *See generally* Lawson & Seidman, *supra* note 4, at manuscript pp. 17–18. They note:

> [T]he right to petition antedated modern notions of separation of powers; early English governments . . . did not have clear demarcations between legislative, executive, and judicial powers. They certainly did not recognize the kind of demarcations reflected in the American Constitution. The same was largely true of colonial government; . . . Petitions sent to governmental bodies thus often sought what today we would regard as judicial relief.

Id. at manuscript p. 18.

[135] Chapter 61 of the original 1215 Magna Carta allowed the barons to present grievances to the King:

> Since, moreover, we have granted all the aforesaid things for God, for the reform of our realm and the better settling of the quarrel which has arisen between us and our barons, and since we wish these things to be enjoyed fully and undisturbed, we give them and grant the following security: namely, that the barons shall choose any twenty-five barons of the realm they wish, who with all their might are to observe, maintain and cause to be observed the peace and liberties which we have granted and confirmed to them by this our

Though the initial petitions were representative, by an appointed group of barons to the King, they evolved into direct petitions by individual subjects to the King, or his council, and to Parliament as it developed.[136] The nature of the petitions also evolved. Petitions no longer were just complaints about the King. By the fourteenth century, petitions had become both general—asking for relief that would resemble modern day legislation—and individual—asking for relief of a

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> present charter; so that if we or our justiciar or our bailiffs or any of our servants offend against anyone in any way, or transgress any of the articles of peace or security, and the offence is indicated to four of the aforesaid twenty-five barons, those four barons shall come to us or our justiciar, if we are out of the kingdom, and shall bring it to our notice and *ask that we have it redressed without delay.*

1215 MAGNA CARTA, ch. 61, *translated and reprinted in* J.C. HOLT, MAGNA CARTA 333–35 (1965) (emphasis added). Some historians note that petitioning preceded the Magna Carta and that the Magna Carta was itself a response to a petition to King John. *See* Lawson & Seidman, *supra* note 4, at manuscript p. 7 (noting that "Magna Carta in 1215 was the result of one [ ] episode in which King John had no choice but to accede to the petition of the powerful barons"); Mark, *supra* note 4, at 2163–64 ("The practice of petitioning the King for redress long antedated Magna Carta;" "Magna Carta is, however, hailed as the progenitor of English constitutional liberty because it came to provide a formal check on royal authority that could be exercised by other segments of English society...."). For a discussion of the history of petitioning in England, see Lawson & Seidman, *supra* note 4; Mark, *supra* note 4; Pfander, *supra* note 4; Smith, *supra* note 4, at 1154–70; Spanbauer, *supra* note 3, at 22–27; Don L. Smith, The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations 10–45 (1971) (unpublished dissertation in Government, Texas Tech University) (on file with the *Ohio State Law Journal*).

[136] Professor Spanbauer explains this development:

> Over time [the representative petitioning of the barons as provided for in the Magna Carta] 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. 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.
>
> This process ultimately led to the development of Parliament, whose advice and consent was often sought by the royal government before it took action of any magnitude. The king's council—which consisted of judges for the common law courts, officers, lawyers, and jurists—comprised the core of Parliament, and the king received the petitions through his council.... [S]ome individuals appeared to personally present their petitions. As a result, the demarcation between representative petitioning and individual petitioning was blurred in Parliament's history.

Spanbauer, *supra* note 4, at 23; *see also* NOWAK & ROTUNDA, *supra* note 4, § 16.53 (noting that "as Commons became more important than the House of Lords, petitions for redress of grievances began to be directed to it, instead of the Crown").

judicial nature on private matters.[137] Although judicial courts already existed, litigants petitioned the entity that they thought would give the desired relief.[138] When early Parliaments received "judicial" petitions, Parliament often referred the petitions back to the common law courts, but it also sent some to the King's chancellor or acted upon the petitions directly.[139]

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[137] *See generally* 10 HOLDSWORTH, A HISTORY OF ENGLISH LAW 696 (3d ed. 1938) (describing types of judicial and legislative petitions in fourteenth and fifteenth centuries). Some historians believe that the individualized or judicial petitions predominated and that early Parliaments functioned primarily as does a modern court:

> Parliament, up to the time of the Tudors, was hardly thought of primarily or principally as a legislature: it was still in reality "The High Court of Parliament." That court then retained the varied functions of the old Curia, as Parliament now does, but the judicial functions bulked larger in men's minds than the legislative.

CHARLES HOWARD MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY 109 (1979); *see also* JAMES S. HART, JUSTICE UPON PETITION: THE HOUSE OF LORDS AND THE REFORMATION OF JUSTICE 1621–1675, at 5 (1991) ("Parliament... had begun life as a court.... The business of Parliaments became the business of rendering decisions in *private disputes between party and party*.") (emphasis added).

[138] *See* BRYCE LYON, A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND 425–26 (1960). Lyon noted:

> [The King's small council] was the core and essence of parliament; it drafted most of the statutes, gave counsel, directed administration, and above all, dispensed justice.... [A]s the High Court of Parliament, a court above all other courts, the small council resolved difficult or doubtful judgments, provided remedies for new legal actions, and dispensed equity, that is, justice, when for some reason it could not be secured in any other royal or public court.

Id.; *see also* NICHOLAS UNDERHILL, THE LORD CHANCELLOR 78 (1978) ("The reign of Edward I [1272–1307] shows an enormous increase in the volume of petitions addressed to the king and his council by suitors who saw better prospects of success with them than in the courts."); Mark, *supra* note 4, at 2166 ("The petitions did not recognize fine *a priori* distinctions in categories of judicial, legislative, or executive authority, nor did they recognize a deep theoretical gulf between public and private grievances.").

[139] Professor Spanbauer credited this judicial petitioning practice as the origin of the chancery courts:

> 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. As the fourteenth century progressed, the council began referring 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. The chancellor would make a recommendation to the council, and the council would dispose of these petitions. By the fifteenth century, the chancellor, subject to the king's approval,

The "right" of individual English subjects to present any form of petition—whether "legislative" or "judicial"—was not sacrosanct. Petitioning activity was sometimes punished.[140] Nevertheless, scholars characterize the right to petition

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possessed the authority to unilaterally refer and dispose of petitions. Sometimes petitioners were summoned by the chancellor to appear and testify under oath. From this process, an important branch of the judiciary emerged: The Court of Chancery.

Spanbauer, *supra* note 4, at 23–24 (footnotes omitted); *see also* K. Smellie, *Right of Petition*, *in* 12 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 98 (1985) ("From the right of petition have developed . . . the equity jurisdiction of the chancellor;" if the petitions "could be satisfied in the ordinary courts of law they were referred to the appropriate court;" "[i]f they asked relief which known writ could give . . . their petition was considered by the king in Council, in which was concentrated for the time all of the powers of state."). *See generally* MCILWAIN, *supra* note 137, at 198–212 (describing the practice of and procedures for referral or handling of "judicial" petitions in Parliament); UNDERHILL, *supra* note 138 (describing origin of courts of chancery).

[140] The English government, as Holdsworth explains, attempted from time to time to curb some petitioning activity, including the so-called "tumultuous" petitions in the mid-17th century:

> Petitions multiplied during the years in which the Long Parliament sat. It was alleged by Clarendon that some of them did not represent the views of their signatories; and it is certain that the numbers who attended to present them, gave opportunities for that mob violence which often interfered seriously with freedom of Parliamentary debate. . . . In 1647 there was such an outbreak of tumultuous petitions that Parliament made an ordinance, "that it should be treason to gather and solicit the subscriptions of hands to petitions." But this ordinance so offended all parties that Parliament was compelled within two days to revoke it. . . . [In 1661] it then enacted that no petition to the King or Parliament for the alteration of matters established in church or state was to be signed by more than twenty persons, unless the petitions were approved by three or more justices of the peace. . . . No petition was to be presented to the King or Parliament by more than ten persons.

10 HOLDSWORTH, *supra* note 137, at 697; *see also* Lawson & Seidman, *supra* note 4, at manuscript p. 8 ("In early times, petitioners did not enjoy any immunity from prosecution or persecution for their petitioning activity."). One of the more infamous petition prosecutions was the trial of the Seven Bishops. In 1688, King James II ordered the clergy of the Church of England to read a declaration from their pulpits. Seven bishops filed a petition in which they stated that the declaration was illegal and asked the King to excuse them from this declaration. The King responded by arresting the seven Bishops and trying them for seditious libel. The counsel for the bishops argued that it was not a crime to petition the King and that "to make it a libel, it must be false, it must be malicious, and it must tend to sedition." Trial of the Seven Bishops for Publishing a Libel (1688), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, 193 (Philip B. Kurland & Ralph Lerner eds., 1987). The jury acquitted the bishops. Many commentators attribute this trial as the impetus for inclusion of a clause protecting the right of petition in the English Bill of Rights in 1689. *See infra* notes 142–43; *see also* Schnapper, *supra* note 4, at 312; Smith, *supra* note 4, at 1160.

as part of the "fabric" of English constitutional law.[141] Petitioning was important enough that it was one of the few individual rights exacted of William and Mary in the 1689 Bill of Rights.[142] The new English Bill of Rights guaranteed "that it is the right of the subjects to petition the king, and all commitments and the prosecutions for such petitioning are illegal" and "that for redress of all grievances . . . parliaments ought to be held frequently."[143]

Whether this right to petition included a right to go to court is a difficult matter to discern. One theory is that any right to petition the King included access to courts.[144] To be sure, England by 1689 had an elaborate court system, including law courts and chancery courts,[145] but these courts did not constitute a

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[141] *See* Mark, *supra* note 4, at 2169. Professor Mark noted:

> Petitioning came to be regarded as part of the Constitution, that fabric of political customs which defined English rights. That is, by its use, petition came to be such a clear part of English political life that, certainly by the seventeenth century, monarchial challenge to a petition could be, and was, defended on the basis that petitioning was an ancient right.

Id. (footnotes omitted); *cf.* Lawson & Seidman, *supra* note 4, at manuscript p. 3 ("The most important such proposition is that the First Amendment's Petitions Clause did not *create* the right . . . . That right existed . . . as a background principle of republican governance.").

[142] The 1689 Bill of Rights preserved few individual rights to the people. In addition to the right to petition, the Bill of Rights included some individual rights that recently had been subject to abuse, such as a prohibition against excessive fines and cruel and unusual punishment, but it principally addressed the rights of Parliament vis-a-vis the sovereign. *See* IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 164–66 (1965). Indeed, Thomas Paine criticized the Bill of Rights as ignoring the people and throwing them a bone in the form of the right to petition: "'The act, called the Bill of Rights . . . what is it but a bargain, which parts of the government made with each other to divide powers, profits, and privileges? . . . and with respect to the nation, it said, for your share *you* shall have the right of petitioning.'" *Id.* at 165 (quoting THOMAS PAINE, RIGHTS OF MAN).

[143] BILL OF RIGHTS (1689), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 43 (1971). The English Bill of Rights followed the "glorious revolution of 1688" and the ouster of James II in December 1688. William and Mary consented to the Bill of Rights in 1689, as a condition of their accession to the throne after James II fled England. *See id.* at 40–41.

[144] *Cf.* Pfander, *supra* note 4, at 956 ("Petition Clauses traditionally reflected the structure of government or the locus of sovereignty: Blackstone's right to petition Parliament and the King reflected his conception of the two-branch structure of government."); Spanbauer, *supra* note 4, at 24 ("Due to the intermingling of the executive, legislative, and judicial functions of governments, petitioning possessed a very broad meaning for the British citizenry . . . .").

[145] In 1768, Blackstone explained that England had a number of private and public courts:

> [There are] several species and distinctions of courts of justice, which are acknowledged

separate branch of government. English government had only two branches: Parliament and the King. The King retained supreme authority over the courts.[146] Hence, any right to petition the King theoretically could include petitions to his courts.

This argument may be too simple. Historical accounts suggest that Englishmen viewed the right to go to court as a right distinct from their right to petition. By 1685, litigants sought judicial relief directly from courts far more often than indirectly through petitions to the King himself or to Parliament.[147] In 1765, the English legal historian, Sir William Blackstone, wrote to explain five "subordinate" rights that protected all other rights of Englishmen.[148] Two of

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and used in this kingdom. And these are either such as are of public and general jurisdiction throughout the whole realm; or such as are only of a private and special jurisdiction in some particular parts of it. Of the former there are four sorts; the universally established courts of common law and equity; the ecclesiastical courts; the courts military; and courts maritime.

3 WILLIAM BLACKSTONE, COMMENTARIES *30.

[146] Blackstone likewise explains that the King had authority over the courts of justice:

> A court is defined to be a place wherein justice is judicially administred. And, as by our excellent constitution the sole executive power of the laws is vested in the person of the king, it will follow that all courts of justice, which are the medium by which he administers the laws, are derived from the power of the crown. For whether created by act of parliament, letters patent, or prescription, (the only methods of erecting a new court of judicature) the kings consent in the two former is expressly, and in the latter impliedly, given. In all these courts the king is supposed in contemplation of law to be always present; but as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative.

3 BLACKSTONE, *supra* note 145, at *23–24 (footnotes omitted).

[147] Holdsworth explains that as courts, including courts of chancery, became more established, the number of judicial petitions to King or Parliament decreased:

> The most important function of the King's Council in Parliament in Edward I's reign [1272–1307] was the receiving and answering of petitions. Some of these petitions asked for a remedy which could be given by the courts of common law, others asked for a remedy which the courts of common law were unable to give, others asked for a change in or an addition to the law. The first two classes of petitions ceased in course of time to be addressed to the King in Parliament, and came to be addressed to the appropriate courts. Petitioners for these remedies took their cases direct to the common law courts, to the court of Chancery, or, till 1640, to the Council or Star Chamber.

10 HOLDSWORTH, *supra* note 137, at 696.

[148] Blackstone explains the nature of these five subordinate rights:

> In the three preceding articles we have taken a short view of the principal absolute

these five rights were the right of access to court and the right to petition, which Blackstone described as *separate* rights:

> A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administred therein. . . .
>
> . . . .
>
> If there should happen any uncommon injury, or infringement of the rights beforementioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances.[149]

But even under Blackstone's view, the right to petition protected access to courts, albeit indirectly through the right to obtain judicial relief from Parliament. As Blackstone noted, petitions to Parliament or the King ensured relief where the courts could not act. Before and after the English Civil War, Parliament acted as a court and asserted both original and appellate jurisdiction over suits that today would resemble private civil suits.[150] Under this theory, the English Bill of

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> rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.

1 BLACKSTONE, *supra* note 145, at *136. In addition to the rights to court access and to petition, as quoted *infra* note 150, the remaining subordinate rights were "[t]he constitution, powers, and privileges of parliament," "[t]he limitation of the king's prerogative," and the right of the subjects "of having arms for their defense, suitable to their condition and degree, and such as are allowed by the law." 1 BLACKSTONE, *supra* note 145, at *136–37, *139.

[149] *Id.* at *137–39.

[150] For example, throughout most of the seventeenth century, the House of Lords reasserted itself as a court and regularly acted in a judicial role. James S. Hart provides an excellent history of the judicial work of the House of Lords in his book. *See* HART, *supra* note 137. His introduction gives an overview of this judicial work:

> The petitioners represented all ranks of English society and all geographic areas of the country. Their complaints reflected a broad range of problems from relatively mundane disputes over real property, debt, inheritance, wages, contracts and a variety of domestic matters, to more exceptional (and politically charged) appeals against unjust imprisonments, arbitrary taxation, judicial malfeasance, excommunication, deprivation of ecclesiastical livings and loss of public office. Some were brought originally as cases of first instance. Others requested review of proceedings and decrees in inferior courts. The

Rights did not need to independently preserve the right of access to courts. To the extent that avenue to the courts was closed or abridged,[151] the people still could bring their judicial claims by petition to Parliament, which met to redress "*all* grievances." Accordingly, the English model of the right to petition arguably included some form of right to seek judicial redress, whether viewed as a petition to the King, and therefore his courts, or as a form of back-up relief by Parliament.

2. *The Right to Petition in Colonial and Revolutionary America*

The experience in colonial America was similar to that in England. In fact, many of the original colonial charters granted the colonists the same rights as those of English subjects, thus enabling them to petition Parliament or the King.[152] Petitioning was important to colonial Americans. Their petitions to England were one of the few means by which colonists could attempt to be heard because they had no direct representation in Parliament.

The importance of the petition was reflected by the repeated references to petitions in the American fight for independence. In 1765, the Stamp Act Congress declared "[t]hat it is the right of the British subjects in these colonies, to petition the King or either House of Parliament."[153] The First Continental Congress again asserted in 1774 that 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."[154] Indeed, the failure of the petitioning process to achieve meaningful relief was a factor spurring revolution. When the colonists declared their independence, they complained in the Declaration of Independence that the King

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only thing they seemingly had in common were insoluble legal problems which required extraordinary remedy.

Id. at 3.

[151] Blackstone noted that Parliament, but only Parliament, could alter the "third subordinate right" of applying to court: "Not only the substantial part, or judicial decisions, of the law, but also the formal part, or methods of proceeding, cannot be altered but by parliament; for if once those outworks were demolished, there would be no inlet to all manner of innovation in the body of the law itself." 1 BLACKSTONE, *supra* note 145, at *137–38.

[152] *See generally* Smith, *supra* note 135, at 47–57 (describing the colonial charters and their general grants of the "liberties of an Englishman").

[153] DECLARATION OF RIGHTS AND GRIEVANCES, ART. 13 (1765), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 198.

[154] DECLARATION AND RESOLVES OF THE FIRST CONSTITUTIONAL CONGRESS (1774), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 217.

had answered their previous petitions "only by repeated Injury."[155]

American colonists did not just petition the distant government in England. They also petitioned their local governmental bodies. A few colonies expressly granted the right to petition the colonial government.[156] The 1641 Massachusetts Bay Colony Body of Liberties guaranteed a very broad right of petition that expressly encompassed the right to file complaints in local courts:

> Every man, whether Inhabitant or Sorreiner, 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, whereof that meeting hath proper cognizance, so it be done in convenient time, due order and, respective manner.[157]

Even without an express grant, most colonists viewed the right to petition their local governmental bodies as a fundamental "common law" right.[158]

When the new states prepared their individual declaration of rights or state constitutions (under the Articles of Confederation, before the Constitution), they continued to preserve the right to petition. Seven states included in their constitutions a statement of the right to petition.[159] Interestingly, these states did

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[155] THE DECLARATION OF INDEPENDENCE para. 21 (U.S. 1776) ("In every stage of these Oppressions We have Petitioned for Redress in the most humble Terms: Our repeated Petitions have been answered only by repeated Injury.").

[156] *See, e.g.*, THE MASSACHUSETTS BODY OF LIBERTIES (1641), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 73.

[157] *Id.* (spelling as appears in the original). Some commentators have characterized the Body of Liberties as one of the "most important [forerunners] of the federal Bill of Rights." *Id.* at 69.

[158] "The right of petition was regarded in the eighteenth century both in England and in America as a natural right which despotism itself could hardly stoop to withhold. It was a common law tradition in the colonies." Smellie, *supra* note 139, at 100.

[159] In order of enactment, the seven states were Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire. *See* PENNSYLVANIA DECLARATION OF THE RIGHTS art. XVI (1776), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 266 ("That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance."); DELAWARE DECLARATION OF RIGHTS, § 9 (1776), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 277 ("That every man hath a right to petition the Legislature for the redress of grievances in a peaceable and orderly manner."); MARYLAND DECLARATION OF RIGHTS art. XI (1776), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 281 ("That every man hath a right to petition the Legislature, for the redress of grievances, in a peaceable and orderly manner."); NORTH CAROLINA DECLARATION OF RIGHTS art. XVIII (1776), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 287 ("That the people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to

not express the right to petition as broadly as it had been stated in England. Englishmen had the right to petition both branches of government, Parliament, and the King. Yet the new American states preserved the right, if at all, only as to the *legislature*. Though we may never know the actual intent behind this legislative limitation on the right to petition, the drafters of the early state constitutions, like their English contemporaries, probably viewed the rights of petition and judicial relief as closely linked.

First, as in England, the legislative bodies in many colonies heard and resolved private disputes of a judicial nature.[160] The Massachusetts provincial legislature regularly acted as a court of equity.[161] The Connecticut General

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apply to the Legislature, for redress of grievances."); VERMONT DECLARATION OF RIGHTS art. XVIII (1777), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 324 ("That the people have a right to assemble together, to consult for their common good—to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition or remonstrance."); MASSACHUSETTS DECLARATION OF RIGHTS art. XIX (1780), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 343 ("The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives; and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."); NEW HAMPSHIRE BILL OF RIGHTS art. XXXII (1783), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 378–79 ("The people have a right in an orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their representatives; and to request of the legislative body, by way of petition or remonstrance, redress of the wrongs done them, and of the grievances they suffer."). The Georgia, New Jersey, New York, and South Carolina constitutions did not contain any guarantee of the right to petition. Nor did the Virginia or Connecticut Statement of Rights. Rhode Island did not enact any new constitution or statement of rights, but merely continued its charter. *See generally* 1 SCHWARTZ, *supra* note 143, at 231–375 (reprinting the Georgia, New Jersey, New York, and South Carolina constitutions and the Virginia and Connecticut Declarations of Rights).

[160] Whether all colonies had similar experiences is unknown. Most historians cite the same colonies—Maryland, Virginia, and the New England colonies—as examples of legislatures acting in judicial roles. *See, e.g.*, MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 29 (1971). Clarke noted:

> [I]t is seen that in New England and the Chesapeake region, and on very rare occasions elsewhere, the assembly considered itself a criminal court and actually judged crimes and misdemeanors and inflicted penalties. In the same two regions, New England and the old southern colonies of Virginia and Maryland, the assembly also had civil jurisdiction.

Id.

[161] An early note of the Harvard Law Review reports a sampling of 16 legislative equity cases in the Massachusetts General Assembly from 1708–1720. *See Judicial Action by the Provincial Legislature of Massachusetts*, 15 HARV. L. REV. 208 (1902). An example is the petition of Eleazar Walker in which he asked for relief in equity against Joseph Tisdale for

Assembly usually acted on more individual causes than on legislation.[162] Virginia and Maryland had similar experiences.[163] In his seminal work, *The Creation of the American Republic*, Gordon Wood explained the judicial role of the colonial legislature:

> [T]he assemblies in the eighteenth century [ ] saw themselves, perhaps even more so than the House of Commons, as a kind of medieval court making private judgments as well as public law. Because the courts themselves were so involved in governmental and administrative duties, it was inevitable that the line between what was political and what was judicatory would be blurred. Both the county sessions courts in Massachusetts and county courts in Virginia before and after the Revolution remained crucially important governing bodies, assessing taxes, directing expenditures on local projects, issuing licenses, and in general monitoring the counties over which they presided. Although there is some evidence that by the mid-eighteenth century the distinction between

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Tisdale's failure to return property to Walker. Walker had given the property to Tisdale as security for a debt. Walker claimed that he paid. The legislature ordered the case for hearing for the next session of the General Assembly. *See id.* at 214; *see also id.* at 208 n.1. The editor of this note observed:

> In these records . . . the provincial legislature will often be found acting in a judicial capacity, sometimes trying causes in equity, sometimes granting equity powers to some court of the common law for a particular temporary purpose, and constantly granting appeals, new trial and other relief from judgments, on equitable grounds.

Id.

[162] "In 1770, Connecticut's General Assembly promulgated only fifteen laws on its own initiative, while acting on over 150 causes, in law and equity, brought by petitioners." Higginson, *supra* note 4, at 146. For example, in 1770, the General Assembly entertained a petition from David Christie against George Nichols and Daniel Benedict, which charged that they had "in an undue manner by artful and oppressive means" gotten a deed from Christie. After appointing a committee to investigate, the General Assembly declared "null and void" both the deed and the note given by Nichols to Christie. *See* THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, MAY 1768–MAY 1772, at 320–21 (Charles J. Hoardley ed., 1885).

[163] *See* CLARKE, *supra* note 160, at 30. Clarke notes:

> Virginia and Maryland, in their early years, furnish illustrations of civil suits . . . . In Virginia, the session of 1661 considered several disputes, mostly over the ownership of land. In fact this session, during which no laws were passed, seems to have been given up entirely to judicial procedure of one sort and another.

Id.; *see also* RAYMOND C. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 166 (1979) (describing the "origin and development of the right of petition, the procedure used in the presentation and consideration of petitions, and the impact of petitions upon the political process").

> legislative and judicial functions was beginning to harden, the assemblies continued to exercise what we would call essentially judicial responsibilities, largely, it appears, because of the political nature of the court system, the fear of royally controlled judges, the dislike of gubernatorial chancery jurisdiction, and the scarcity of trained judges. The assemblies constantly heard private petitions, which often were only the complaints of one individual or group against another, and made final judgments on these complaints. They continually tried cases in equity . . . .[164]

Thus, many early Americans would have viewed the right to petition the legislature as including the right to present private disputes for resolution by the legislature.[165]

Second, five of the seven states that expressly preserved the right to petition also included a "remedy clause."[166] Though the meaning of these remedy

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[164] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 154–55 (1969).

[165] Moreover, Professor Mark argues that the statement in state constitutions of the right to petition only in terms of the legislature was not a limitation on the traditional broader right of petition and "did not mean that the petitioning of other branches of state governments was barred or left unprotected." Mark, *supra* note 4, at 2200.

[166] Again, in order of enactment, the first states were Pennsylvania, Delaware, Maryland, Massachusetts, and New Hampshire. *See* PENNSYLVANIA DECLARATIONS OF RIGHTS, § 26 (1776), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 271 ("Courts of session, common pleas, and orphans courts shall be held quarterly in each city and county; and the legislature shall have power to establish all such other courts as they may judge for the good of the inhabitants of the state. All courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay: All their officers shall be paid an adequate but moderate compensation for their services: And if any officer shall take greater or other fees than the law allows him, either directly or indirectly, it shall ever after disqualify him from holding any office in this state."); DELAWARE DECLARATION OF RIGHTS, § 12 (1776), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 277–78 ("That every freeman for every injury done him in his goods, lands or person, by any other person, ought to have remedy by the course of the law of the land and ought to have justice and right for the injury done to him freely without sale, fully without any denial, and speedily without delay, according to the law of the land."); MARYLAND DECLARATION OF RIGHTS art. XVII (1776), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 281 ("That every freeman, for any injury done him in his person or property, ought to have remedy, by the course of the law of the land, and ought to have justice and right freely without sale, fully without any denial, and speedily without delay, according to the law of the land."); MASSACHUSETTS DECLARATION OF RIGHTS art. XI (1780), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 342 ("Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."); NEW HAMPSHIRE BILL OF RIGHTS art. XIV (1783), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 377 ("Every subject of this state is entitled to a certain remedy, by having recourse

clauses are the subject of modern judicial and scholarly debate, most commentators agree that a remedy clause at least protects some form of court access.[167] Thus, the early state constitutions closely tracked Blackstone's statement, eleven years earlier in 1765, of the rights to judicial relief and to petition.[168] The primary difference was the states' omission of the right to

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to the laws, for all injuries he may receive in his person, property or character, to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws."). North Carolina, which had a petition clause, limited its remedy clause to men in confinement. *See* NORTH CAROLINA DECLARATION OF RIGHTS art. XIII (1776), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 287 ("That every freeman, restrained of his liberty, is entitled to a remedy . . . "). Vermont had a petition clause but no form of remedy clause. *See* VERMONT DECLARATIONS OF RIGHTS (1777), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 319–24. Connecticut, Georgia, New Jersey, New York, Rhode Island, South Carolina, and Virginia had neither. *See generally* 1 SCHWARTZ, *supra* note 143, at 231–375 (reprinting respective documents).

[167] *See infra* note 206. Most states now have a form of "remedy" clause, but they word and interpret them differently, prompting considerable debate and confusion as to their meaning. *See* John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of State Courts*, 26 WAKE FOREST L. REV. 237, 237 n.2 (1991) (noting that "[t]hese provisions are variously called 'open courts,' 'access to courts,' 'remedy guarantee,' or just 'remedies' provisions" and that the names "reflect, in part, differences in the wording of the provisions" and "different emphasis by the various state courts"); *see also* Hans A. Linde, *Without "Due Process,"* 49 OR. L. REV. 125, 138 (1970) (arguing that the Oregon clause is "*not* a due process clause" because of its omission of the "law of the land" language). One debate centers on whether the clause limits the legislature's ability to alter remedies. *Compare* Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279 (1995), *with* David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197 (1992). A consensus exists that the clause at least protects "the right to seek judicial redress for injuries or to protect right and interests recognized elsewhere in the law." William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEMPHIS L. REV. 333, 437 (1997); *see also* Bauman, *supra*, at 284 (concluding that such a clause requires that the courts "be open and accessible and forbids the imposition of arbitrary barriers before a litigant may bring suit").

[168] *See supra* note 149. The state constitutional "remedy clauses" and Blackstone's statement of the third subordinate right "of applying to the courts of justice for redress of injuries" have a common origin: Sir Edward Coke's interpretation of § 29 of the 1225 version of the Magna Carta. Indeed, Blackstone in describing the right to petition and the right to judicial remedy, quotes Sir Coke's interpretation of the Magna Carta:

> The emphatical words of *magna carta*, spoken in the person of the king, who in judgment of law (says Sir Edward Coke) is ever present and repeating them in all his courts, are these; "*nulli vendemus, nulli negabimus, aut differemus rectum vel justitam*: and therefore every subject," continues the same learned author, "for injury done to him *in bonis, in terris vel persona*, by any other subject, be he ecclesiastical or temporal without any exception, may take his remedy by the courts of the law, and have justice and right for the

petition the executive. Judicial relief retained its importance. Thus, the purpose of the new limitation on the right to petition likely was not to change the nature of the petition right, which, as Blackstone had noted, included the ability to ask for relief of a judicial nature, but instead to limit the power of the executive.

Third, the link between the right to petition the legislature and the right to relief of a judicial nature persisted even though some states declared a separation of powers between the legislature, the executive, and the judiciary.[169] To be sure, a reader today understandably could look at the paper structure of the early state constitutions—petition rights expressed only as to the legislature, remedy clauses, and, most importantly, declarations of separation of powers[170]—and

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injury done to him, freely without sale, fully without any denial, and speedily without delay."

1 BLACKSTONE, *supra* note 145, at *137–38; *see also* SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55–56 (1642). Though legal historians object to Coke's interpretation as reflecting his own time rather than that of the early thirteenth century, most agree that Coke had a profound impact on American political thinkers in the eighteenth century. For a discussion of this debate and Coke's influence on the remedy clauses of early state constitutions, see generally Hoffman, *supra* note 167.

[169] Not all states declared a separation of powers. Only three states—Massachusetts, New Hampshire, and Maryland—had all three constitutional provisions: the right to petition, a remedy clause, and a separation of powers clause. *Compare supra* note 159 (petition), *with supra* note 166 (remedy), *and infra* note 170 (separation of powers).

[170] Six states expressly declared separation of powers in their state constitutions. *See* VIRGINIA DECLARATION OF RIGHTS art. V (1776), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 235 ("That the Legislative and Executive powers of the State should be separate and distinct from the Judicative."); MARYLAND DECLARATION OF RIGHTS art. VI (1776), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 281 ("That the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other."); NORTH CAROLINA DECLARATION OF RIGHTS art. IV (1776), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 286 ("That the legislative, executive and supreme judicial powers of government, ought to be forever separate and distinct from each other."); GEORGIA CONSTITUTION art. I (1777), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 292 ("The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other."); MASSACHUSETTS DECLARATION OF RIGHTS art. XXX (1780), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 344 ("In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."); NEW HAMPSHIRE BILL OF RIGHTS art. XXXVII (1783), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 379 ("In the government of this state, the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be kept as separate from and independent of each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.").

conclude that the revolution signaled an end to any form of *petition* right that also encompassed the right to present individual grievances for government resolution. However, this view overlooks the nascent status of the doctrine of separation of powers in early post-revolutionary America.

The state legislatures did not necessarily violate the principle of separation of powers—as the people then conceived it—when it acted as a court. Early state separation of powers proclamations primarily acted to separate and weaken the executive, not the legislature.[171] The state legislature, as the body of the people, was supreme. People felt they had a natural right to ask this representative body for whatever relief they desired. The state legislatures continued to oblige their constituents by acting in a judicial role, despite constitutional "separation of powers." Indeed, in the *Federalist Papers*, James Madison complained that in Virginia, his home state and the first to expressly provide for separation of powers in its constitution,[172] the legislature "*in many* instances, *decided rights* which should have been left to *judiciary controversy*" and that the intrusion was "*becoming habitual and familiar.*"[173] It took the post-revolutionary experience of the continued—and in some cases heightened—encroachment of legislatures

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[171] *See infra* note 173.

[172] Virginia's 1776 statement of separation of powers is credited with being the "first such statement in an organic instrument." 1 SCHWARTZ, *supra* note 143, at 233.

[173] THE FEDERALIST NO. 48, at 62 (James Madison) (Clinton Rossiter ed., 1961) (emphasis in original) (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, 195 (Lester DeKoster ed., 1976)). Madison concluded that Virginia's declaration of separation of powers was insufficient: "a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands." *Id.* Gordon Wood offers an explanation of the meaning of the Virginia separation of powers clause:

> This endorsement of legislative supremacy and encroachment into traditionally executive and judicial functions, despite the emphatic declarations, as in the Virginia Constitution . . . has understandably led historians to believe that the Americans in their 1776 constitutions meant by separation of powers nothing more than a prohibition of plural officeholding. . . .
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> . . . .
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> Yet separation of powers had a more precise significance for Americans than simply an abolition of plural officeholding—a significance that flowed from their conception of the way eighteenth-century politics worked. What particularly troubled the colonists was the means by which the governors had used their power to influence and control the other parts of the constitution. . . .
>
> When the American[s] in 1776 spoke of keeping the several parts of the government separate and distinct, they were primarily thinking of insulating the judiciary and particularly the legislature from executive manipulation.

WOOD, *supra* note 164, at 156–57.

on judicial functions to prompt political thinkers to further reconsider judicial decisionmaking by the legislature.[174]

In sum, in post-revolutionary America, a petition to the legislature was viewed as a fundamental right and served as a means of securing redress of private grievances. The "right to petition" thus protected the right to present individual petitions that today would constitute a civil action in court. It protected this right even despite the presence of remedy clauses and even despite the fact that the right to petition extended only to the legislature.

B. *The Drafting and Text of the Petition Clause*

The drafting history of the Petition Clause suggests an evolution in thinking about the right to petition. This evolution corresponds to the transformation from the early state model of government by legislature to the new federal model of government by three separate branches. The drafters of the Bill of Rights

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[174] Gordon Wood explains:

> [I]n 1776 it was only the beginning of an independence for the judiciary.... [M]ost of the early constitution-makers had little sense that judicial independence meant independence from the people.... The Revolutionaries had no intention of curtailing legislative interference in the court structure and in judicial functions, and in fact they meant to increase it.... The expanded meaning of separation of powers, as Jefferson and other Americans later came to express it, along with a new conception of judicial independence, had to await the experience of the years ahead.
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> ....
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> The department of government which benefited most from this new, enlarged definition of separation of powers was the judiciary. At the time of Independence, with the constitution-makers absorbed in the problems of curtailing gubernatorial authority and establishing legislative supremacy the judiciary had been virtually ignored or considered to be but an adjunct of feared magisterial power. Only the experience of the following years gave the judicial department the position of respect and independence as one of "the three capital powers of Government" that is so characteristic of later American constitutionalism. Once the reaction to legislative supremacy had set in, once legislative interference in judicial matters had intensified as never before in the eighteenth century, a new appreciation of the role of the judiciary in American politics could begin to emerge. "When the assembly leave the great business of the state, and take up private business, or interfere in disputes between contending private business, or interfere in disputes between contending parties," men now increasingly argued, "they are very liable to fall into mistakes, make wrong decisions, and so lose that respect which is due to them, as the Legislature of the State."... Out of just this kind of experience a growing recourse to judicial settlement was bred and nurtured.

WOOD, *supra* note 164, at 161, 453–54. *But see* Erwin C. Surrency, *The Courts in the American Colonies*, *in* 11 THE AMERICAN JOURNAL OF LEGAL HISTORY 259 (1967) ("[B]efore the end of the seventeenth century, the legislative bodies had, in general, given up any claim to judicial power, except in the New England colonies.").

replaced the right to petition the legislature, which was the supreme power in the states, with the right to petition the whole "government"—which possessed all of the powers of the federal government. Though these changes to the text of the clause may appear minor in other contexts, they are, as Professor Pfander has convincingly argued,[175] significant to defining the right to petition to include access to courts.

James Madison drafted the initial version of the Bill of Rights, including the first draft of the Petition Clause. He had a number of ideas and proposals from which to develop his list of rights, including the state constitutions and proposals for a Bill of Rights developed while the states debated and ratified the Constitution. Madison relied principally on the proposal from the ratification convention of his own Virginia, which proposed twenty amendments to the Constitution, including both petition and remedy clauses.[176] When Madison

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[175] *See* Pfander, *supra* note 4, at 954–62.

[176] *See* VIRGINIA RATIFYING CONVENTION (1788), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 765. Madison was a member of the Virginia ratifying convention that proposed twenty amendments to the Constitution. Virginia's proposals for a remedy clause and right of petition were:

> 12th. That every freeman ought to find a certain remedy, by recourse to the laws, for all injuries and wrongs he may receive in his person, property, or character. He ought to obtain right and justice freely, without sale, completely and without denial, promptly and without delay, and that all establishments or regulations contravening these rights are oppressive and unjust.
>
> ....
>
> 15th. That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the legislature for redress of grievances.

Id. at 841–42. Virginia was one of only two states that proposed both a petition and remedy clause during the ratification process, yet Virginia had neither clause in its own state Declaration of Rights drafted in 1776. *See* VIRGINIA DECLARATION OF RIGHTS (1776), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 234.

North Carolina submitted an identical proposal to that of Virginia. *See* 2 SCHWARTZ, *supra* note 143, at 966–67. New York proposed a petition clause only. *See id.* at 913 ("[T]he People have a right peaceably to assemble together to consult for their common good, or to instruct their Representatives; and that every person has a right to Petition or apply to the Legislature for redress of Grievances. That the Freedom of the Press ought not to be violated . . . ."). Rhode Island reportedly proposed a remedy clause after Congress had begun the amendment process. *See* Koch, *supra* note 167, at 373 ("'That every freeman ought to obtain right and justice, freely and without sale, completely and without denial, promptly and without delay; and that all establishments or regulations contravening these rights are oppressive and unjust.'") (quoting "Section XII of Rhode Island's recommended bill of rights"). Both Massachusetts and Maryland considered adding a right to petition the federal legislature, but the ratifying conventions did not formally endorse the proposals. *See*

submitted his draft of the Bill of Rights to the First Congress on June 8, 1789, one of his proposed rights was the right to petition:[177] "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."[178]

Had Madison's proposal made it intact into the Constitution, one reasonably could conclude that the Bill of Rights did not protect access to the new federal courts. Madison's right of petition was legislative only.[179] This is not surprising because at that time states expressed the right to petition in terms of the legislature only.[180] Yet, the new Constitution had a clearer separation of powers than the states. To be sure, the concept of separation of powers today is far more developed than it was in 1789, but even then, the concept had evolved beyond that practiced in the early state governments under the Articles of

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MASSACHUSETTS RATIFYING CONVENTION (1788), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 675, 681; MARYLAND RATIFYING CONVENTION (1788), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 735–36. A remedy clause is not recorded among their proposals. *See id.* Pennsylvania's defeated proposal was widely circulated but did not contain either a right to petition or a remedy clause. *See* PENNSYLVANIA CONVENTION DEBATES (1787), 2 SCHWARTZ, *supra* note 143, at 658. Massachusetts, South Carolina, and New Hampshire proposed amendments but not a petition or remedy clause. *See* SOUTH CAROLINA RATIFYING CONVENTION (1788), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 739–57; NEW HAMPSHIRE RATIFYING CONVENTION (1788), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 758–61; MASSACHUSETTS RATIFYING CONVENTION (1788), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 677–78. Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, and Maryland ratified the Federal Constitution without formally proposing a bill of rights. *See generally* 2 SCHWARTZ, *supra* note 143, at 627–979.

[177] Madison proposed that the amendments that are now called the Bill of Rights be incorporated in Article I of the Constitution, dealing with the legislative branch of the federal government. *See* 2 SCHWARTZ, *supra* note 143, at 1026. On the motion of Representative Sherman, an opponent of adding a Bill of Rights, the House of Representatives decided to add the amendments at the end of the Constitution, as a supplement. *See id.* at 1050–51, 1121–25.

[178] *Id.* at 1026.

[179] In addition, Madison chose to depart from the Virginia proposal and add the more common phrasing of the right, which included the word "remonstrances." Most statements of the right to petition in state constitutions included the term "remonstrances." *See supra* note 159. Professor Pfander views the choice of the term "remonstrance" as indicating a legislative view of the right to petition because the term was "frequently used to describe an address to a legislative body." Pfander, *supra* note 4, at 58.

[180] Nine of the thirteen original states—Delaware, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, Vermont, and Virginia—stated a right to petition either in their state declaration of rights or constitutions or in their proposed amendments to the Federal Constitution, or both. *Compare supra* note 159, *with supra* note 176.

Confederation.[181] More importantly, we know that Madison personally opposed legislatures acting as courts, as demonstrated both by his *Federalist Paper* that complained of the Virginia legislature encroaching on judicial power[182] and by his proposed amendment to the Constitution that affirmatively stated that the federal legislature shall not exercise the powers of the judiciary.[183] Therefore, Madison, when drafting his proposed right to petition, seemingly would not have viewed the right to petition the federal legislature as a right to obtain judicial relief or as a right to petition the federal courts.[184]

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[181] *See* WOOD, *supra* note 164, at 549 ("By 1787 the doctrine of separation of powers, as the various debates over reforming the state constitutions revealed, had become something far more important than what it had been in 1776, becoming in fact for many Americans an 'essential precaution in favor of liberty.'"). For a discussion of the concept of "separation of powers" in the early years of the new nation as being a balance of power rather than a "wall" of separation, see Wythe Holt, *Separation of Powers?: Relations Between the Judiciary and the Other Branches of the Federal Government Before 1803*, *in* NEITHER SEPARATE NOR EQUAL: CONGRESS AND THE EXECUTIVE AND JUDICIAL BRANCHES IN THE 1970S (Donald R. Kennon ed., forthcoming University of Virginia Press) (copy on file with its author).

[182] Madison's condemnation of the Virginia legislature acting in a judicial capacity in *The Federalist No. 48*, *see supra* note 173, was just one of several in which he discussed the importance of a true separation of powers. *See, e.g.*, THE FEDERALIST NO. 49; THE FEDERALIST NO. 51.

[183] Madison proposed a new Article VII of the Constitution that would have stated:

> The powers delegated by this constitution are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial, nor the executive exercise the powers vested in the legislature or judicial, nor the judicial exercise the powers vested in the legislative or executive departments.

House Debates (May–June 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1028.

[184] Madison also did not include or propose a remedy clause, even though such a clause appeared in Virginia's proposal as well as in some state constitutions. One could speculate as to his reasons, but the omission may simply reflect Madison's attitude about the amendments that he was proposing. Madison originally was unenthusiastic about adding a Bill of Rights but eventually decided to endorse and draft the amendments. *See* Letter from Madison to Jefferson (Oct. 17, 1788), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 614 (stating the reasons for his indifference); Letter from Madison to George Eve (April 25, 1788), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 984 (stating the reason for his endorsement of amendments to add a Bill of Rights). When he drafted the proposed amendments, Madison took a minimalist approach and aimed for a consensus. *See* Madison Address and Debate in Congress (June 8, 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1025 (stating that in the case of amendments "it is necessary to proceed with caution" and that he "shall not propose a single alteration but is likely to meet the concurrence required by the constitution"). One Representative reported that, when the Select Committee worked on Madison's draft, *see* discussion *infra* notes 185–88, it took a similar approach. *See* House Debate (Aug. 15, 1789), *reprinted in* 11 DOCUMENTARY

But Madison's draft was just a proposal. A "Select Committee" of the House of Representatives soon adjusted Madison's draft amendments and proposed what ultimately became the House version of the right to petition:[185] "The freedom of speech, and of the press, and the right of the people to assemble, and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed."[186] The Committee thus departed from the state legislative models of the right to petition and restated the right as the right to "apply to *the government.*" No record tells us why the Committee made this change.[187] The change apparently was initiated by Representative Sherman,[188] though Professor Pfander believes that Madison had an active role in the language change and that he did so in order to secure a right to present claims against the federal government in the federal courts.[189]

HISTORY OF THE FIRST FEDERAL CONGRESS 1789–1791, at 1274 (Statement of Rep. Vining) ("[T]he committee conceived some of [the States' proposed amendments] superfluous or dangerous, and found many of them so contradictory that it was impossible to make any thing of them.") [Hereinafter DOCUMENTARY HISTORY]. For a discussion of the possible reasons that the Senate may have rejected a proposal to add a remedy clause, see *infra* notes 204–07.

[185] The House appointed a Select Committee on July 21, 1789, and the Committee reported back to the House one week later, on July 28, 1789. *See* 2 SCHWARTZ, *supra* note 143, at 1050. The Committee members were Representatives Vining, Madison, Baldwin, Sherman, Burke, Clymer, Benson, Gilman, Goodhue, Boudinot, and Gale. *See* House of Representatives Journal (June-Aug. 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1054.

[186] House of Representatives Journal (Aug. 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1122.

[187] No records exist of the Select Committee's deliberations. *See* Pfander, *supra* note 4, at 962.

[188] Representative Sherman, a member of the Select Committee, prepared an intermediate draft of the Petition Clause, apparently based on Madison's draft. Sherman's draft stated: "The people have certain natural rights which are retained by them when they enter into society. Such are the rights . . . of applying to Government by petition or remonstrances for redress of grievances." HELEN E. VERT ET AL., CREATING THE BILL OF RIGHTS, THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 266–68 (1991).

[189] *See* Pfander, *supra* note 4, at 961–62. Professor Pfander relies in part on an intervening event—between Madison's original draft and the Committee draft—the debate on June 29, 1789, concerning the new treasury bill, in which Madison questioned the tenure and power of the comptroller to determine claims against the government. *See id.* Madison proposed that Congress have more control over the comptroller but also proposed that because the comptroller would be so "thoroughly dependent" it would be "necessary to secure his impartiality" and that "this might be effected by giving any person who conceived himself aggrieved, *a right to petition the supreme court for redress.*" 11 DOCUMENTARY HISTORY, *supra* note 184, at 1080–81 (emphasis added). Professor Pfander argues that though Madison withdrew this proposal the next day on June 30, 1789, Madison was influenced by the idea later, in July, when he worked on the Select Committee to draft the Bill of Rights and that Madison worked to secure a right to redress of claims against the government by restating the

One could reasonably read the new language as extending the right to petition to include all three branches of the federal government. The term itself does not suggest any limitation to the legislature. A contemporary dictionary, *Samuel Johnson's, A Dictionary of the English Language*, defines "government" as the "[f]orm of a community with respect to the disposition of the supreme authority."[190] Under this definition, the early post-revolutionary state legislatures might have constituted "the government" because the legislatures were supreme, but under the new Constitution, no single branch had "supreme authority." Power was more evenly distributed among the three branches, which together formed "the government."[191]

Moreover, the text of the Constitution and of drafts of other amendments suggests that the term "government" means all three branches. Then and now, the text of the Constitution rarely refers broadly to "the government" but instead distinguishes between the specific branches of government.[192] This distinction

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right to petition to apply to the entire government. *See* Pfander, *supra* note 4, at 962; *see also* DANIEL FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 231 (1990) (reporting that little is known about the workings of the Committee and assuming that "Madison played a major role in the drafting process").

[190] SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1784).

[191] The term "the government" could have an even broader meaning. The term as used in the Petition Clause could include all governments, including state governments. To be sure, at the time of the First Congress, the First Amendment reference to "Congress shall make no law" limited action by the federal, not state, government. In other words, until the Court interpreted the Due Process Clause of the Fourteenth Amendment to incorporate the Bill of Rights and apply their restrictions to the states, the prohibition against restricting the right to petition applied only to the federal government. *See supra* note 22. Use of the term "the government" in the Petition Clause instead goes to the activity that the federal government may not restrict. Under this view, the Petition Clause, as originally enacted would bar the federal government from abridging the right to petition any government (including state governments), not just the right to petition the new federal government. Though no records suggest that this was the intent of the First Congress, it is not an implausible view given the breadth of other First Amendment freedoms. Speech, for example, is seemingly protected from interference by Congress regardless of whether the speech addresses issues of national, as opposed to local, relevance.

[192] Professor Pfander notes that the term "government" appears only three times in the original Constitution: in the grant to Congress of power over the District for the "seat of the Government," in the guarantee to the states of a "Republican form of Government." Pfander, *supra* note 4, at 956–57, n.210 (1997). He views as most significant the reference to "the government" in the Necessary and Proper Clause of Article I:

> The familiar language of the Necessary and Proper Clause literally authorizes Congress to create a "government" of laws, by passing laws to effectuate its own "power" and the "powers" otherwise vested by the Constitution in the "Government of the United States." Such a reference to the "powers" of the "Government," in turn, reminds us that the first three Articles of the Constitution vest "power" in three distinct branches of

apparently was in the minds of the members of the Select Committee. The Committee adopted Madison's proposed separation of powers amendment and therein made careful distinctions in its choice of terms for "the government" as opposed to its individual branches:

> The powers delegated by the Constitution to the government of the United States, shall be exercised as therein appropriated; so that the legislature shall never exercise the powers vested in the executive or judicial; nor the executive the powers vested in the legislative or judicial; nor the judicial the powers vested in the legislative or executive.[193]

The proceedings of the entire House offer only minimal additional insight. The House adopted both the petition and separation of powers amendments with little comment. In approving the Petition Clause, the House debated only whether to delete the right of assembly and whether to add a right to instruct representatives.[194] This debate gives some insight as to other aspects of the meaning of the Petition Clause,[195] but it does not tell future generations whether the drafters viewed the right to petition as encompassing the courts. The limited House debate on separation of powers again does not tell us much, but it does suggest an evolving concept of separation of powers.[196] Under this emerging

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> government. Article I vests "legislative Powers" in Congress; Article II vests the "executive Power" in a President; and Article III vests "the judicial Power" in the federal judiciary. If Article I, Section 8 describes a "government" of "powers vested" in three distinct branches, then the Petition Clause promises the individual a right to invoke the "powers" of government by way of a petition for redress of grievances. By its terms, then, the clause affirms the right to invoke the "judicial power" of the government by petition for redress.

Id. at 957.

[193] House of Representatives Journal (Aug. 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1123.

[194] Some representatives thought that the right of assembly was obvious, given the other rights, and therefore appeared "trifling." House Debates (Aug. 15, 1789), *reprinted in* 2 SCHWARTZ, *supra* note 142, at 1089–91; *see also infra* notes 243–47. In addition, some wanted to resurrect the right to instruct representatives that appeared in many state constitutions and in state proposals for a Federal Bill of Rights. *See* House Debates (July–Aug. 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1091–1105; *see also* discussion *infra* notes 197, 270–77.

[195] Academic commentators, for example, have analyzed whether the debate on the duty to instruct indicates that the House believed that the right to petition included a duty by the government to formally respond to petitions. *See* discussion *infra* Part III.B. In addition, the debate on the right to assemble gives some insight as to whether the right to petition is an individual right or only a collective right. *See* discussion *infra* Part III.A.

[196] The House conducted only limited debate on the separation of powers amendment. The record of the House debate on August 18, 1789, reports the following comments:

view, the new federal legislature could not act in a judicial capacity, thus at least creating the need for a broader statement of the right to petition if the drafters wanted to include within it the right to request relief of a judicial nature.

Even fewer records reflect the intent of the Senate in adopting the Petition Clause. Existing records report only the actual results—those measures that the Senate adopted and rejected—not the substance of the Senate debate.[197] A few of these decisions have some relevance, albeit minimal, to the right to petition courts. First, the Senate made slight modifications to the Petition Clause—reviving the "petition" language to replace the "apply" language of the House version—but kept the right to "petition *the government* for a redress of grievances."[198] Retention of the broader term "the government" suggests that the Senate agreed with an expansive view of the right to petition. Although the change to the word "petition" (from "apply") is not particularly meaningful as to the question of its application to courts, the term is at least consistent with a judicial view of the right. The term "petition" had long connoted both legislative and judicial requests.[199] A variety of pleading systems over the years have

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> Mr. Sherman conceived this amendment [separation of powers] to be altogether unnecessary, inasmuch as the constitution assigned the business of each branch of the Government to a separate department.
>
> Mr. Madison supposed the people would be gratified with the amendment, as it was admitted that the powers ought to be separate and distinct; it might also tend to an explanation of some doubts that might arise respecting the construction of the constitution.
>
> Mr. Livermore, thinking the clause subversive of the constitution, was opposed to it, and hoped it might be disagreed to.

House Debates (Aug. 18, 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1117; *see also* House Debates (Aug. 13, 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1073 (statement of Mr. Sherman) ("[T]he last amendment but one provides that the three branches of Government shall exercise its own rights. This is well secured already . . . .").

[197] Senate sessions were closed until 1794. *See* 2 SCHWARTZ, *supra* note 143, at 1145.

[198] Senate Journal (Aug.–Sept. 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1149 (emphasis added). The Senate rejected the proposal to add to the Petition Clause a right to instruct representatives. The Senate Journal reports that "[it] was moved to insert, after the words 'common good,' the words 'to instruct their representatives'" and that "[o]n this question . . . it was decided as [two yeas and fourteen nays]." *Id.* at 1148.

[199] Indeed, bills in the chancery courts in England began as petitions to Parliament or the King, *see supra* note 139, and were commonly called petitions even when initiated in the courts of chancery. *See* MCILWAIN, *supra* note 137, at 211 ("The words 'petition' and 'bill' are used interchangeably in the Chancery down to the Tudor times, and the same is true in Parliament as well as in the ordinary speech of the people."). In 1784, Samuel Johnson defined "petition" as a "request; entreaty; supplication; prayer." *See* JOHNSON, *supra* note 190; *see also* BLACK'S LAW DICTIONARY 1145–46 (6th ed. 1990) ("Petition: . . . Formerly, in equity practice

termed original complaints "petitions."[200] Indeed, it is a fair characterization even today to call a civil complaint a "petition for redress of grievances."

Second, the Senate rejected the separation of powers amendment proposed by the House.[201] The Senate gave no reason for its rejection. The rejection does not necessarily mean that the Senate believed that Congress could encroach on the powers that the Constitution gave another branch.[202] Indeed, the Senate might have agreed with the view stated by Representative Sherman in the House that the Constitution already provided for a balance of power and that a separate amendment was unnecessary.[203] In any event, rejection of a separation of powers provision does not mandate a narrow interpretation of the right to petition. Indeed, only the converse result would have excluded application of the right to petition to the courts—Senate adoption of separation of powers amendment and revision of the right to petition to extend only to Congress.

Finally, the Senate also rejected adding a remedy clause to the Bill of Rights.[204] Again, any statement of the Senate's intent is necessarily speculative, but the Senate may have rejected the clause because it considered a remedy clause unnecessary. As noted earlier, the meaning and effect of a remedy clause

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the original pleading was denominated a petition or bill. Today . . . the initial pleading is a complaint.").

[200] Today, many court systems use the term "petition" to describe the pleading used to institute particular types of judicial proceedings (*e.g.*, a divorce action), but perhaps the most common use of the term "petition" is under the writ system. Most applications for writs, whether they be writs of habeas corpus, certiorari, mandamus, or other, are termed "petitions." Thus, parties seeking review by the Supreme Court are "petitioners." *Black's Law Dictionary* today defines petition as: "A formal written application to a court requesting judicial action of a certain matter. A recital of facts which give rise to a cause of action." BLACK'S LAW DICTIONARY, *supra* note 199, at 1145–46.

[201] *See* 2 SCHWARTZ, *supra* note 143, at 1145–46, 1151.

[202] Most scholars, and the Supreme Court, interpret the structure of the Constitution, with a separate article enumerating the power of each branch, as itself establishing separation of powers or at least a balance of power. *See generally* Pfander, *supra* note 4, at 945–47, 958–59.

[203] *See supra* note 196.

[204] *See* Senate Journal (Aug.-Sept. 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1151–52. The Senate Journal records that in September 1789, the "following propositions to add new articles of amendment were . . . decided in the negative," including:

> That every freeman ought to find a certain remedy, by recourse to the laws, for all injuries and wrongs he may receive in his person, property, or character; he ought to obtain right and justice, freely, without sale; completely, and without denial; promptly, and without delay; and that all establishments or regulations contravening these rights, are oppressive and unjust.

Id.

are the subject of modern scholarly debate,[205] and, depending on the proposed interpretation, a remedy clause arguably is redundant of a number of provisions of the Constitution.[206] Interestingly, the one thing that most commentators agree that a remedy clause protects is access to courts.[207] At the time that the Senate considered a remedy clause, its proposed Petition Clause already included the right to petition the whole government. Thus, Senators might have viewed a remedy clause as redundant of the right to petition courts.

After the Senate completed its consideration, the amendments package—then consisting of twelve amendments—went to Conference Committee for reconciliation of differences between the House and Senate versions. The Senate

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[205] *See supra* note 167; *infra* note 206.

[206] One scholar argues that the aim of the remedy clause movement was to ensure the independence of the judiciary and that this was amply accomplished by the separation of powers in the Constitution. *See* Hoffman, *supra* note 167, at 1318 (surveying the history of the remedy clauses, particularly its prohibition against "sale" of justice and arguing that the early states adopted the clause in response to royal interference with justice "to ensure that justice would not be compromised as it had been in the past"). In addition, a remedy clause may protect some form of fair judicial process, which was secured by the Fifth Amendment Due Process Clause. Though most commentators view the typical remedy clause as distinct from due process, the two clauses have a common origin—Chapter 29 of the 1225 Magna Carta—and the language of at least some of the state remedy clauses, *see supra* note 168, though not the version proposed and rejected by the Senate in 1789, contain "law of the land" language thought to have a due process element. *See* Hoffman, *supra* note 167, at 1295, n.104; *id.* at 1307–16 (setting forth the text of the early state constitutional remedy clauses); *id.* at 1295 (describing Sir Edward Coke's description of Chapter 29); *see also* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11–12 (1987) (noting that the Texas "open courts" provision might address Texaco's challenge to allegedly excessive appeal bond "more specifically than the Due Process Clause of the Fourteenth Amendment"). Another asserted protection of a remedy clause is the right of *public* access to civil trials. *See generally* Jack B. Harrison, *How Open is Open? The Development of the Public Access Doctrine Under State Open Court Provisions*, 60 U. CIN. L. REV. 1307 (1992). Public access to court is arguably protected by the First Amendment, but under the Press Clause, not the Petition Clause. *See* Hoffman, *supra* note 167, at 1317. *Compare* Gannett Co. v. DePasquale, 443 U.S. 368, 397–98 (Powell, J., concurring) (arguing that the First Amendment protects the right of access to the public, because the press is the agent for the people), *with id.* at 404 (Rehnquist, J., concurring) (arguing that the First Amendment does not guarantee public access to trials). Finally, one author suggests that a remedy clause protects substantive causes of action and hence would have been inconsistent with the Constitution, which he contends gave the federal government no (or little) power over common law. *See* Linde, *supra* note 167, at 138 n.38 ("[I]t would have made sense to 'limit' this [federal] government by a demand that it afford every man 'remedy in due course of law for injury done him in his person, property or reputation'—matters of common law that were not among the powers delegated to Congress.").

[207] *See supra* note 167.

version of the Petition Clause prevailed.[208] On September 25, 1789, the twelve amendments passed both houses of Congress.[209] The states ratified all but the first two amendments proposed by Congress, which placed the Petition Clause in the First Amendment.[210] The people thus secured in the First Amendment of the Bill of Rights the right to petition the *government* for redress of grievances.[211]

This drafting history provides perhaps the strongest argument in support of a right to petition the courts. The First Congress, and the states that ratified the Petition Clause, deliberately departed from existing models of the right to petition—the right to petition only the legislature. This was a change that reflected an evolution in government. The new right extends to the entire government—a government which consists of three independent branches, including a separate judiciary.

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[208] During the final stages of drafting, the Senate "tightened" the seventeen House amendments by combining several related provisions. *See* 2 SCHWARTZ, *supra* note 143, at 1121–38. On September 9, 1789, the Senate fused the religion, speech, press, assembly, and petition provisions into a single amendment, the Third Amendment at that time: "'Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the government for redress of grievances.'" Senate Journal (Aug.-Sept. 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1153. The clause that had immediately preceded the right to petition, the right to "consult for the common good," was now gone. *See id.* at 1159–66. The Conference Committee made some changes to the amendment, including deletion of the word "to" before the word "petition." This change was reversed by the House. *See id.* For a further discussion of this change, see *infra* note 241–42.

[209] *See* Senate Debates (Sept. 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1166.

[210] *See* 2 SCHWARTZ, *supra* note 143, at 1171. The states rejected the first two proposed amendments, which related to the method for calculating representation and to congressional pay. *See* Senate Journal (Sept. 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1164. Whether the states debated the right to petition is unknown. The states' failure to ratify the first two amendments would suggest at least some debate in ratification, but surprisingly few records exist of the state ratification process. *See* 2 SCHWARTZ, *supra* note 143, at 1171 ("It is amazing, considering the crucial significance of the Bill of Rights, that we know practically nothing about what went on in the state legislatures during the ratification process.").

[211] Many states, including some of the original thirteen colonies, later expanded their statements of the right to petition to likewise extend beyond the legislature. *See, e.g.*, N.Y. CONST. OF 1897 art. 1, § 9(1) ("No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government or any department thereof."); PA. CONST. OF 1873 art. 1, § 20 ("The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.").

C. *The Common Policies Underlying the Petition Clause and Court Access*

Having determined that the history and text of the Petition Clause suggest that the clause could encompass a right of access to court, the question remains whether application to courts makes any sense in light of the purposes and policies of the Petition Clause. Although little documentary evidence exists as to the actual purpose intended by those who drafted the Petition Clause, the Court has summarily stated the aims of the clause,[212] and many commentators have further developed what they believe to be the interests served by the right to petition.[213] These aims support—though perhaps not in equal measure—

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[212] The Court usually utters a one clause statement of a purpose behind the right to petition, depending on the type of petition. *See* McDonald v. Smith, 472 U.S. 479, 483 (1985) (executive petitions: "an important aspect of self-government"); Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743 (1983) (judicial petitions: "compensation for violated rights and interests, the psychological benefits of vindication [and] public airing of disputed facts") (quoting Balmer, *supra* note 4, at 60); United States v. Harriss, 347 U.S. 612, 625 (1954) (legislative petitions: "full realization of the American ideal of government by elected representatives"); *see also* United States v. Cruikshank, 92 U.S. 542, 552 (1875) ("The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.").

[213] *See* Fischel, *supra* note 4, at 98. Fischel notes:

> The right to petition serves two important values. First, it ensures that citizens can present grievances to their government. The nature of the grievance determines which governmental agency is petitioned, but the right of the people to present their claims remains uniformly important. Second, the right to petition helps ensure that the government is informed.

Id.; *see also* Anita Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569, 570 (1987) (arguing that petitioning empowers the people: petitioning embodies "the values of human self-determination, expression of individual conscience and freedom of association"); Lawson & Seidman, *supra* note 4, at Part II (manuscript pp. 5–18) (describing the petition as a form of communication between citizens and government); Smith, *supra* note 4, at 1178–80 (listing eight different interests served by petitioning, including informing the government, remedying government misconduct, measuring public approval, and avoiding force and revolution); Waldman, *supra* note 4, at 968 (arguing that judicial petitions serve the "basic human desire" and "need for relief from injustice"); Comment, *On Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules*, 132 U. PA. L. REV. 1515, 1520–24 (1984) (arguing that preservation of the right to petition is essential to the social contract between government and its citizens and to government legitimation); Note, *Suits Against the Government*, *supra* note 12, at 114–18 (arguing that petitions serve different interests depending on whether the petition is "general" and asks for change in government behavior, which serves the interest of governmental accountability, as opposed to "judicial,"

applying the right to petition to the courts as well as to the other branches of government.

Many of the policies supporting the right to petition are apparent from its history and the evolving use of petitions. First, though the right to petition started in England as a check on the King's power, petitioning grew to serve broader functions.[214] It became a means by which all English subjects, not just the Barons, could inform their government, whether Parliament or King, of their complaints and needs, whether large or small. It also became a tool of individual justice. By acting as a back-up to the courts when relief was wanting there, petitions gave individuals the opportunity, if nothing more, to have a peaceful solution to their disputes.

The American colonists viewed petitions as important to representative government. Prior to the revolution, petitioning was the colonists' primary form of access to British lawmakers. Indeed, the failure of their petitioning to influence British law likely prompted some states to include in their new constitutions, as a corollary to the right to petition, the right of the people to *instruct* their representatives.[215] The First Congress chose not to bind the federal government by citizen instructions, but James Madison, in speaking in the House on this issue, stated a purpose behind petitioning:

> [I]f we mean [in the proposed right to instruct] nothing more than this, that the people have a right to express and communicate their sentiments and wishes, we have provided for it already. The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiment by petition to the whole body; in all these ways they may communicate their will.[216]

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which serves the interest of neutral dispute resolution).

[214] Professor Mark describes the functions of early English petitions:

> From the beginning, petitions were a formal and peaceful way to draw the attention of the King and his counsellors to grievances. Given the difficulty of communicating with the government as well as the limited access to the King and his council, petitions were also the most convenient and the most effective method of calling attention to a grievance. Petitions, by default, became a mechanism whereby the King and his counsellors were informed of political complaints, asked to review actions of government officials, and through which individuals and groups suggested changes in policies.

Mark, *supra* note 4, at 2165–66.

[215] *See supra* note 159.

[216] House Debates (Aug. 15, 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1096; *see also* discussion *infra* notes 270–77.

Thus, at least Madison, and likely most of his contemporaries, understood the right to petition as part of the system by which the First Amendment would guard the people's right to "communicate their will" to their government.[217]

But the right to petition is a right in addition to the right of free speech. It is different from the general right of free speech in two material respects. First, the right to petition guarantees the right to speak to a particular body of persons, those comprising the government. This targeted speech serves values not achieved by general speech. It gives citizens a better chance at having their voices heard by the very public servants who are making the decisions in government. People do not have to wait or hope that their views will be channeled by the press or others to the government. This not only gives citizens a sense of participation in government, but it also helps to keep the government better informed.

Second, the Petition Clause preserves a particular type of speech, the right of the people to petition the government for *redress of grievances*. The people are not limited to merely stating their views but can ask for relief. It does not say that they will get the relief, only that they have the right to ask for it.[218] What does this serve? It gives the people a chance at a peaceful and lawful alternative to self-help and force. It gives the people a feeling of justice and order in their government.

These two general aims—citizen access to, and participation in, government and a chance for just resolution of disputes—are fulfilled by petitions to all branches of the government, including the judiciary. It is easy to see how courts satisfy the second aim of providing an opportunity for peaceful dispute resolution. That is the function of courts. However, courts also allow the people to implement the first aim of the Petition Clause. It allows them access to government to air their views and inform their government.[219]

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[217] *See also* Lawson & Seidman, *supra* note 4, at manuscript pp. 5–6 (noting that petitions are just one of the many "formal channels of communication" between citizens and government and that "[i]n view of the myriad forms of direct and indirect communication with the government that are now available to citizens, the mere right to petition the government seems quite meager" but that "[i]t did not . . . seem meager or mere to earlier generations").

[218] The Court, however, stated in *Bill Johnson's Restaurants* that an aim of judicial petitioning is "vindication" and "compensation." *See supra* note 212. This undoubtedly is an over-statement, at least with regard to petitions to the legislature or executive. These petitions do not necessarily give vindication or compensation. This is an accurate statement with regard to petitions to courts at least under the Court's narrow application of the right to petition. In *Bill Johnson's Restaurants*, the Court suggested that the right extends only to winning claims, which, by definition, would give vindication and compensation. *See* discussion *infra* Part III.C.

[219] *See* Fischel, *supra* note 4, at 98 ("[T]he right to petition helps ensure that the government is informed. Courts, like administrative bodies, legislatures and executive agencies, are dependent on interested parties for much information.").

Today, courts, like the other branches of government, make and apply laws in ways that impact the everyday lives of American citizens. Indeed, as the Court noted in *Button*, litigation sometimes is the only practical method to bring about change.[220] This change need not involve the great social issues of the day. All civil cases have some potential for broad application, whether it is an advancement in the common law or a new nuance in interpretation of a statute or rule.

In sum, despite an understandable reluctance to take as a constitutional mandate the Supreme Court's statement that access to court is a part of the right to petition, the history, text, and policies of the Petition Clause support the Court's conclusion. The critical issues are not the recognition or existence of the right but instead the form and application of this right of court access. Without definition of its proper scope or guidance for its protection, the right of access to court under the Petition Clause runs the risk of sweeping too broadly or disappearing entirely.

III. THE NARROW SCOPE OF THE RIGHT OF COURT ACCESS UNDER THE PETITION CLAUSE

That a person has a right of access to court under the Petition Clause does not necessarily mean that he can file any claim at any time under any conditions. Courts and scholars do not read other First Amendment freedoms so broadly. For example, although the Constitution does not expressly delineate the scope of the Speech Clause, the Supreme Court has held that "there is no constitutional value in false statements of fact."[221] In other words, false speech, though "speech," is not within the scope of the right. In this section, I offer a similar proposal for narrowly defining the right to petition courts: the right of court access under the Petition Clause means only that *an individual or group of persons* has a right to *file* claims that are *winning* and *within the court's jurisdiction.*

Defining the extent of the right of court access is the most difficult aspect of analyzing the right. The literal text and history of the Petition Clause do not give much guidance. Indeed, as has been seen, it is difficult to ascertain from this record even the existence of a right to petition courts, in any form, let alone the precise contours of that right. Nevertheless, history offers some clues, if only by analogy, in the form of legislative petitioning practice and court procedures. Moreover, the Court's modern precedent on the right to petition, concerning both

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[220] *See supra* Part I.A.4; *see also* Protect Our Mountain Env't, Inc. v. District Court for County of Jefferson, 677 P.2d 1361, 1365 (Col. 1984) (en banc) ("Access to the courts is often the only method by which a person or group of citizens may seek vindication of federal and state rights and ensure accountability in the affairs of government.").

[221] Gertz v. Welch, 418 U.S. 323, 340 (1974).

the right to petition generally and the right to petition courts in particular, suggests a few key parameters of the right. My proposed definition of the right to petition courts attempts to fill the gaps left by these sources.

I recognize that any definition of the right of court access under the Petition Clause will prompt debate. Other First Amendment rights have taken years to develop both in scholarly journals and in the courts. My proposed definition is an early entry in the study and debate about the right to petition. But in assessing my proposal, which admittedly is a narrow view of the right, it is important to note that I attempt to define what the right is in its absolute form and that in Part IV of this Article, I add another layer to the proposal. I suggest there how courts should protect the right of court access under the Petition Clause, which in some applications, as in speech cases, will have the functional effect of broadening the narrow right.

A. *An Individual and Collective Right of Court Access*

An initial question about the nature of the right of court access under the Petition Clause is whether it applies only to "the people" collectively or also to an individual person.[222] Indeed, this was an issue of contention in the Court's early development of the right to litigate. The Court's group litigation cases, starting with *Button*, all spoke in terms of the collective right to litigate.[223] But the Court has since stated that the right applies to individuals. First, in *California Motor Transport*, the Court (in dictum) stated that the protection of petitioning activity also "governs the approach of *citizens or groups of them* to administrative agencies . . . and to courts."[224] Ten years later, the Court applied the doctrine in *Bill Johnson's Restaurants* to a suit by an individual plaintiff.[225]

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[222] The right of court access seemingly would apply to all persons, not just citizens. The First Amendment extends the right to petition to "the people." Moreover, the Court has held that other rights belonging to "persons" extend to aliens as well as citizens. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that the provisions of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality"). *See generally* NOWAK & ROTUNDA, *supra* note 4, § 14.11. Moreover, the right to petition historically was quite broad and not limited to enfranchised citizens. *See generally* Mark, *supra* note 4, at 2155–87 (describing the use of petitions in England and colonial America by disenfranchised groups of society).

[223] *See* discussion *supra* Part I.A.4.

[224] California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1971) (emphasis added). The statement was dictum because the litigation at issue was a collective effort by several truckers.

[225] *See* discussion *supra* notes 101–08. Two years later though, in *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985), the Court again questioned

Likewise, lower courts and commentators have addressed and applied the Petition Clause without regard to whether the plaintiff acts collectively or alone.[226] Thus, the right as developed by the courts appears to be an individual

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application of the right to litigate to individuals. There, individual veterans sought to overturn a limit on the amount that they could pay their lawyers in proceedings before the Veterans Administration. *See id.* at 308. However, the petitioners apparently relied solely upon *Railroad Trainmen* and *United Mine Workers* and did not cite *California Motor Transport* or *Bill Johnson's Restaurants*, and the Court's comments were limited to the application of the former two cases:

> There are numerous conceptual difficulties with extending the cited cases to cover the situation here; for example, those cases involved the rights of unions and union members to retain or recommend counsel for proceedings where counsel were allowed to appear, and the First Amendment interest at stake was primarily the right to associate collectively for the common good. In contrast, here the asserted First Amendment interest is primarily the individual interest in best prosecuting a claim, and the limitation challenged applies across-the-board to individuals and organizations alike.

Id. at 334–35.

[226] In *Acevedo v. Surles*, 778 F. Supp. 179 (S.D.N.Y. 1991), for example, the court invalidated a policy of the New York State Office of Mental Health, by which it submitted bills for past hospitalization and medical expenses to indigent patients who brought suits against the state. By thus rendering futile any suit against the state, the state hoped to save the cost of defending the suit in the first place. Patients sued under § 1983 and challenged the policy as violating their First Amendment right of access to courts. The court agreed and invalidated the practice. *See id.* at 184. Though the patients joined in their § 1983 suit, each had individually sued the state and it was that individual access that the court held that the state had impermissibly infringed through its billing policy. *See id.*; *see also* Scioto County Reg'l Water Dist. No. 1 v. Scioto Water, Inc., 916 F. Supp. 692 (S.D. Ohio 1995) (applying *Noerr-Pennington* to grant summary judgment for single plaintiff on defendants' counterclaims for tortious interference); Wolfgram v. Wells Fargo Bank, 61 Cal. Rptr. 2d 694 (Cal. App. 1997) (addressing challenge of individual plaintiff to vexatious litigant statute); Smith, *supra* note 4, at 1191 ("[T]he petition clause of the first amendment protects only the core petitioning activities—preparing and signing a written petition and transmitting it to the government—either individually or in concert with others but without the involvement of public meetings.").

To be sure, many of the cases recognizing court access involve more than one plaintiff, but that is not surprising given, first, the liberality of plaintiff joinder rules today, *see, e.g.*, FED. R. CIV. P. 20, and, second, the nature of many of the underlying suits that give rise to the question of court access. The Petition Clause court access doctrine started as an antitrust principle, and antitrust remains today the most common area in which the issue arises. Most of the *Noerr-Pennington* cases involving court access are collective litigation cases, not necessarily because of the nature of the Petition Clause but more likely because of the nature of the antitrust laws. Section 1 of the Sherman Act outlaws only concerted activity. *See supra* note 77. Therefore, for *Noerr-Pennington* even to arise in § 1 cases, there must have been group litigation efforts or else there would be no purported violation of the antitrust laws. Nevertheless, some suits based on § 2 of the Sherman Act, which outlaws monopolization, or

right, not dependent on group or associational interests.

But is this a proper reading of the Petition Clause? The phrasing of the First Amendment places the right to petition in close proximity to the right of assembly. In fact, they form the same clause: "Congress shall make no law . . . abridging . . .; the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[227] The term "right" appears only once, as a preface to both assembly and petition, and this clause is separated by a semi-colon from the Speech and Religion Clauses. Moreover, the right refers to the right of "the people" to petition, not that of an individual. Despite the appeal of these textual arguments, I believe that the courts are correct in applying the right as an individual as well as a collective right.

First, the history of the right to petition suggests that, in order to petition, one need not "assemble" first. In England, the right of petitioning evolved by the fourteenth century to be both collective and individual.[228] The right to petition, as Blackstone noted in 1765, was one "appertaining to every *individual*."[229] In the American colonies both individuals and groups petitioned the assemblies. Take, for example, the case of Eleazer Walker who petitioned the Massachusetts General Assembly for relief in equity and asked for the return of his property from a Joseph Tisdale.[230] Mr. Walker was not part of a group or other assembly. His was a petition by one individual against another, and such a petition was, according to Gordon Wood, a common feature of colonial legislative experience.[231]

It was the collective right to petition, not the individual right, that was uncertain. In 1647, Parliament, supposedly acting out of concern that petitions did not represent the views of all who signed them and the belief that violence accompanied large group petitions, declared "that it should be treason to gather and solicit the subscriptions of hands to petitions."[232] That law met with uproar,

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related state claims, may involve underlying litigation by a single plaintiff. *See* Computer Assocs. Int'l, Inc. v. American Fundware, Inc., 831 F. Supp. 1516 (D. Col. 1993) (holding that *Noerr-Pennington* is a First Amendment doctrine and applying it to bar a state unfair competition counterclaim against a single plaintiff whose main claim alleged breach of contract and misappropriation of trade secrets).

227 U.S. CONST. amend. 1. The full text of the First Amendment is reprinted at *supra* note 3.

228 For a discussion of English petitioning practice, see *supra* Part II.A.1.

229 1 BLACKSTONE, *supra* note 145, at *138 (emphasis added).

230 *See Judicial Action by the Provincial Legislature of Massachusetts*, *supra* note 161, at 214.

231 Wood reported that the colonial "assemblies constantly heard private petitions, which often were only the complaints of one individual or group against another." WOOD, *supra* note 164, at 154–55.

232 10 HOLDSWORTH, *supra* note 137, at 697.

and Parliament quickly revoked it.[233] But Parliament did succeed in limiting the number of signatories to twenty persons.[234] That limit and another that restricted the number of persons who can present petitions to "no more than two persons at a time," survived at least until Blackstone's day.[235] Thus, at the time of the American revolution, the right of persons to assemble to present a petition was subject to some question. This history would suggest that any association of the right to assemble with the right to petition was an effort to preserve the right of collective petitioning, not to limit the individual right to petition.

Moreover, the drafting history of the Petition Clause suggests more of an effort at economy of language than an intent to make the rights of assembly and petition dependent upon each other. The starting point was the early state constitutions. Most early state versions of the rights to assemble and to petition were longer than the current Petition Clause and separated the two rights by inserting between them references to other corollary rights such as the right to consult for the common good and the right to instruct legislators.[236] In addition, some states expressly stated the right to petition as an individual right. For example, the proposed bill of rights submitted by the Virginia ratification convention proposed a clause that stated both the right to assemble and petition

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[233] *See id.*

[234] *See id.*

[235] In 1765, Blackstone noted:

> Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult; as happened in the opening of the memorable parliament in 1640: and, to prevent this, it is provided by the statute 13 Car. II. St. I. c. 5. that no petition to the king, or either house of parliament, for any alterations in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace or the major part of the grand jury, in the country; and in London by the lord mayor, aldermen, and common council; nor shall any petition be presented by more than two persons at a time. But under these regulations, it is declared by the statute 1 W.&M. St. 2. c. 2. that the subject hath a right to petition; and that all commitments and prosecutions for such petitioning are illegal.

1 BLACKSTONE, *supra* note 145, at *138–39; *see also supra* note 140.

[236] Pennsylvania, North Carolina, Vermont, Massachusetts, and New Hampshire all stated the rights of assembly and petition in a single clause as the right of the "people" but the rights were separated by declarations of related rights of consultation for common good and instructing the legislature. The early state constitutions' petition clauses are reprinted at *supra* note 159. North Carolina's Declaration of Rights, for example, stated: "[T]he people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances." NORTH CAROLINA DECLARATION OF RIGHTS art. XVIII (1776), *reprinted in* 1 SCHWARTZ, *supra* note 143, at 287.

but that expressly stated the right to petition one of "every freeman."[237]

Though Madison did not adopt Virginia's wording, his initial draft separated the right of petition from that of assembly: "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."[238] The Select Committee, likewise, directly linked the right of assembly with the right to consult for the common good, and separately stated the right to petition: "[T]he 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."[239] When the Senate "tightened" all of the proposed amendments, it deleted the reference to "consult for the common good."[240] The rights of petition and assembly now were side by side.

After the Senate approved the amendments package, the Conference Committee modified the then third proposed amendment (now the First Amendment), by deleting the term "to" before the word petition so that the final clause read "the right of the people peaceably to assemble and petition . . . ."[241] The House objected and reinserted "to" in the final version of the clause.[242] No records reflect why this change was made and reversed at the eleventh hour, but the reversal, if it has any relevance at all, suggests an effort to separate assembly and petition, not to join them.

The debates over the right of assembly further suggest that members of the First Congress viewed the rights as separate. In fact, the House debated whether an expression of the right of assembly was necessary at all.[243] On August 15, 1789, Representative Sedgwick of Massachusetts moved to strike "assemble and" from the amendment.[244] He argued that statement of the right to assemble was unnecessary in light of the fact that the amendment already secured freedom of speech: "If people freely converse together, they must assemble for that

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237 *See supra* note 176. North Carolina's ratification convention submitted an identical proposal, even though its state constitution had stated the right as one of "the people." *Compare supra* note 159, *with supra* note 176. The Maryland and Delaware Declarations of Rights stated the right in terms as one of "every man" and did not preserve any right of assembly. *See supra* note 159.

238 4 DOCUMENTARY HISTORY, *supra* note 184, at 10.

239 *Id.* at 28. The Select Committee separated all of the rights, including the "freedom of speech, and of the press" merely by commas, not semi-colons. *See id.*

240 *See* 2 SCHWARTZ, *supra* note 143, at 1145–46; *supra* notes 198, 208.

241 4 DOCUMENTARY HISTORY, *supra* note 184, at 47–48.

242 *See id.* at 48.

243 *See* 11 DOCUMENTARY HISTORY, *supra* note 184, at 1262–63.

244 *See id.* His proposed version therefore would have read "the right of the people peaceably to consult for their common good, and to apply to the government . . . ." *Id.*

purpose; it is a self-evident unalienable right which the people possess . . . ."[245] Nowhere did he or any other supporter of the motion argue that assembly was necessarily part of or a limit on the right of petition. Opponents of the motion did not argue that the right to assemble was an essential limitation on the right to petition, but instead that the right of assembly was not self-evident and had been penalized in the past.[246] The opponents carried the day, and the motion "lost by a considerable majority."[247] This history, though somewhat ambiguous, suggests that the expression of the right to assemble was an effort to secure the right of assembly, not to limit an individual's right to petition by himself.

This leaves the phrase "the people" and whether it connotes a collective rather than individual right. First, the general history of the right to petition, as discussed above, argues against such an interpretation. Second, the term "the people," in context of other provisions of the Bill of Rights, does not seem to be a limitation. To be sure, the Framers chose to state some rights as belonging to an individual and others as belonging to the people. The Fifth Amendment starts its litany of procedural protections by stating that "[n]o person shall"[248] and the Sixth Amendment refers to the rights of "the accused" in criminal proceedings.[249] But, the Second Amendment,[250] the Fourth Amendment,[251] the Ninth Amendment,[252] and the Tenth Amendment[253] all refer to the rights of "the

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[245] *Id.* Representative Sedgwick argued that if the amendments included such a self-evident right as assembly, then the amendments might as well also secure other "trifles" such as a citizen's "right to wear his hat if he pleased, that he might get up when he pleased, and go to bed when he thought proper . . . ." *Id.*

[246] *See id.* at 1264. Representative Page argued in response to Representative Sedgwick "that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions" and that "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.* Representative Gerry argued that the right to assemble "had been abused in the year 1786 in Massachusetts" and that "the people ought to be secure in the peaceable enjoyment of this privilege, and that can only be done by making a declaration to that effect in the constitution." *Id.* at 1263.

[247] *Id.* at 1264.

[248] U.S. CONST. amend. V.

[249] U.S. CONST. amend. VI.

[250] *See* U.S. CONST. amend. II (stating that "the right of the people to keep and bear Arms, shall not be infringed").

[251] *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[252] *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

people." In fact, in most places in which the Bill of Rights refers to a "right" or "rights," it states that they belong to "the people."[254]

No one likely would contend that the Fourth Amendment right "of the people" to be secure "in their houses" from unreasonable searches and seizures applies only to communal living situations. A single person living alone is protected equally along with families and other groups of persons living together. Though one scholar has recently argued that the Second Amendment's guarantee of the right "of the people" to bear arms applies only to the "body of the people" and not individuals,[255] that argument is subject to scholarly debate and depends on factors unique to the Second Amendment.[256] The remaining two amendments, the Ninth and the Tenth, refer generally to all remaining "rights of the people" and act to reserve to the people and the states all rights and powers not enumerated in the Constitution.[257] This reference surely includes both

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253 *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

254 Only the Sixth and Seventh Amendments contain the term "right" without also stating that the right belongs to the people. *See* U.S. CONST. amend. VI (stating that "the accused shall enjoy the right to a speedy and public trial"); U.S. CONST. amend. VII ("[T]he right of trial by jury shall be preserved[.]").

255 David C. Williams, *The Unitary Second Amendment*, 73 N.Y.U. L. REV. 822, 822 (1998).

256 *See id.* at 827. Professor Williams argues that "the people" had two meanings in the eighteenth century: referring "indiscriminately to either individuals or the Body of the People" and that "[p]lainly, the Fourth Amendment emphasized people as individuals, but in [Williams's] view the Second Amendment emphasized the people as members of an organic collectivity, an entity that no longer exists." *Id.* He does not offer his view on the Petition Clause, but instead draws on unique wording and history of the Second Amendment to distinguish it from the Fourth. First, he looks to the "purpose clause" of the Second Amendment. *See id.* at 824. The Second Amendment is unique, at least among the amendments in the Bill of Rights, in that it contains a statement of purpose: "A well regulated Militia, being necessary to the security of a free State . . . ." U.S. CONST. amend. II. Professor Williams argues that "[b]y stressing the importance of the militia, the Framers implicitly referred to the tradition of civic republicanism, which placed militia service at the center of a well-ordered polity." Williams, *supra*, at 825. He also relies upon earlier drafts of the right to bear arms that specifically referred to the "body of the people." 4 DOCUMENTARY HISTORY, *supra* note 184, at 28 (Select Committee Version of the right to bear arms: "A well-regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed . . . ."). The Petition Clause has no such purpose clause, and no early draft of the Petition Clause referred to the "body of the people." For an argument against Professor Williams's interpretation of "the people" phrase of the Second Amendment, see Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831 (1998).

257 *See supra* notes 252–53.

collective and individual rights; otherwise, an individual would have no rights outside of those specifically reserved to individuals in the Constitution.

Accordingly, the mere addition of the term "the people" does not necessarily preclude application of a right to an individual. Use of the term in the Petition Clause should not override the history of the right to petition as both a collective and individual right. The Court's dicta in *California Motor Transport* was correct. The right to petition the courts should apply to an individual acting alone as well as groups of persons filing a civil lawsuit.

B. *A Right Only to File Claims*

Another fundamental question in defining the Petition Clause right of access to court is whether the right guarantees anything other than initial access, the mere act of filing a civil complaint. This is a significant question. If the right to petition courts is one of access only, it would not guarantee any substantive right to relief, only the right to ask for it. Moreover, such a narrow right of access would have minimal impact on procedure. Much of civil procedure, including appeals, are forms of governmental response. If the right to petition generally includes no requirement of a response, or requires at most a summary denial, then the right as applied to the courts would not impact most existing procedural practices. The Petition Clause, for example, would not govern or limit standards for filing answers, motions, discovery, or even appeals.

The question of the extent of the government's duty to respond to petitions, if any, is a subject of current controversy, particularly as to legislative and judicial petitions.[258] The Court has held that the government has no duty to respond to executive petitions, but many scholars argue that this decision is contrary to historical practice.[259] Fortunately, for purposes of defining the right to petition *courts*, this debate need not be categorically settled. Instead, important

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[258] A related question also arises from this definitional element—whether the right requires the government to merely receive the complaint or actively assist in its preparation. The Court in *Bounds v. Smith*, 430 U.S. 817 (1977), held that the right of court access as applied to prisoners extended beyond mere filing to include a governmental duty to assist the prisoner in preparation of his complaint by providing law libraries or legal advisers. *See supra* notes 53–58 (discussing *Bounds* and its extension of a prisoner's right of access to court). The right to access to court under the Petition Clause seemingly would not include a similar duty. First, the duty in the prisoner cases derives from the unique conditions of a prisoner in which he is isolated from all avenues of case preparation. *See supra* note 56. Second, nothing in the historical practice surrounding petitioning suggests government assistance in preparation of the petition. In fact, the record concerning whether the government has any duty to respond to petitions, as discussed in the text, suggests at most a duty to summarily deny a petition, not to assist in its preparation.

[259] *See infra* notes 268–69.

conclusions about the government's duty with regard to judicial petitions can be drawn from the non-controversial aspects of the historical record and the Court's precedent. For example, a concensus apparently exists that the Petition Clause does not require the government to *grant* redress. Similarly, the record suggests that to the extent that the Petition Clause requires any form of procedural response, that response is minimal and is overshadowed by the response required by due process. Due process affirmatively requires the government to provide meaningful procedural opportunities in response to judicial petitions, far and above any required by the First Amendment standing alone.

1. *The Government's Duty in Response to Petitions Generally*

The Supreme Court holds that the government has no duty in response to executive petitions. The Court doctrine on this point dates back to at least 1915, to the case of *Bi-Metallic Investment Co. v. State Board of Equalization*.[260] There, a taxpayer charged that due process required him to be heard before the government implemented a city-wide tax increase.[261] Justice Holmes writing for the Court explained that due process did not require that this taxpayer or any other individual have an opportunity to be heard on matters that were of general concern:

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General 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.... There must be a limit to individual argument in such matters if government is to go on.[262]

This case was argued and decided on due process grounds, but seventy years later the Court applied *Bi-Metallic* to the Petition Clause.

In *Minnesota State Board of Community Colleges v. Knight*,[263] state employees challenged a statute that required the state employer to meet only with the designated representative of public employees and did not require it to

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[260] 239 U.S. 441 (1915).

[261] *See id.* at 444. An owner of real estate in Denver sought to enjoin the Denver tax assessor from obeying an order of the State Board of Equalization to increase by 40% the valuation of all taxable property in Denver. *See id.* at 443.

[262] *Id.* at 445.

[263] 465 U.S. 271 (1984).

meet with individuals. The employees claimed "an entitlement to a government audience for their views."[264] Justice O'Connor writing for the Court held that no part of the Constitution, including the First Amendment Petition Clause, required the government to "listen or respond to individuals' communications on public issues:"

> However wise or practicable various levels of public participation in various kinds of policy decision may be, this Court has never held, and nothing in the Constitution suggests it should hold, that government must provide for such participation. In *Bi-Metallic* the Court rejected due process as a source of an obligation to listen. Nothing 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. Indeed, in *Smith v. Arkansas State Highway Employees*,[265] the Court rejected the suggestion. No other constitutional provision has been advanced as a source of such a requirement. Nor, finally, can the structure of government established and approved by the Constitution provide the source. It is inherent in a republican form of government that direct public participation in government policymaking is limited.... Disagreement with public policy and disapproval of officials' responsiveness, as Justice Holmes suggested in *Bi-Metallic* is to be registered principally at the polls.[266]

The Court based its holding primarily on practical necessity: "Government makes so many policy decisions affecting so many people that it would likely grind to a halt were policymaking constrained by constitutional requirements on whose voices must be heard."[267] But its interpretation also has some basis in the text of the First Amendment. The Petition Clause states that the people have a right *to petition* the government for redress of grievances. Though many authors, including this one, off-handedly refer to the right as the right "of petition," the right literally is one "*to* petition," which focuses the right on the actions of the petitioner, not the government. The clause does not state any obligation on the

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[264] *Id.* at 282.

[265] *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979) (per curiam), was the "converse" of *Knight*: the government listened only to individual employees and not to the union. The Court held that this did not violate the speech, assembly, or petition rights of the First Amendment. *See id.* at 465 ("The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.") (citation omitted).

[266] *Knight*, 465 U.S. at 285 (citation omitted) (relying in part on THE FEDERALIST NO. 10 (James Madison)).

[267] *Id.*

part of the government at all, other than stating that Congress may not abridge the right to petition.

Nevertheless, a number of academic commentators, beginning principally with a note in the *Yale Law Journal* by Stephen Higginson,[268] have argued that the Court is wrong, that the government does have a duty to respond. They essentially say that a failure to respond to a petition is itself an abridgment of the "right to petition."[269] They first argue that the right to petition, without a duty to respond, is meaningless and merely redundant of speech. This first argument does not carry the day. To be sure, a duty to respond would strengthen the right to petition, but a petition, even without any response, has some independent meaning. A petition targets the petitioner's speech to the government in particular and maximizes the opportunity to inform the government. The mere ability to make a request improves a person's chance of getting relief over a system in which he had no right to request relief.

In addition, the academic commentators advance two historical arguments in favor of a duty to respond, both focused on legislative petitions. First, they find support in the First Congress's rejection of a right to instruct representatives. They rely principally upon the content of the debate—comments made in this debate that also concerned the right to petition—rather than the mere fact that the House rejected a right to instruct. However, I will pause here and consider the meaning of the rejection of a right to instruct.

This rejection and comments specifically made about the proposed right to instruct offer one valuable insight into the right to petition—the right of petition does not guarantee redress. The House's primary concern in rejecting the right to instruct was that such a right would bind the representatives to adopt positions

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[268] *See, e.g.*, Higginson, *supra* note 4. Higginson states:

> In colonial America, the right of citizens to petition their assemblies was an affirmative remedial right which required governmental hearing and response. . . .
>
> The original design of the First Amendment petition clause—stemming from the right to petition local assemblies in colonial America, and forgotten today—included a governmental duty to consider petitioners' grievances.

Id at 142–43.

[269] *See* Edmund G. Brown, *The Right to Petition: Political or Legal Freedom*, 8 UCLA L. REV. 729, 732–33 (1961); David C. Frederick, *John Quincy Adams, Slavery and the Disappearance of the Right of Petition*, 9 LAW & HIST. REV. 113, 114–15 (1991); Higginson, *supra* note 4, at 145–149, 155–167; Hodgkiss, *supra* note 213, at 575; Mark, *supra* note 4, at 2169; Spanbauer, *supra* note 4, at 33–34, 49–51; Note, *Suits Against the Government*, *supra* note 12, at 1116–17; Comment, *Letting the Laity Litigate*, *supra* note 213, at 1524–28. *But see* Lawson & Seidman, *supra* note 4, at Part III.B. (manuscript pp. 20–23) (arguing that Congress has no duty to respond to legislative petitions); Smith, *supra* note 4, at 1190–91 (arguing that the Petition Clause does not impose any duty to respond).

that they did not support or to take actions that were unconstitutional.[270] Though the representatives had different views as to whether the duty to instruct would in fact bind them, few seemed to endorse the concept.[271] Moreover, no one voiced a concern that the right of petition (as opposed the right to instruct) would bind the representatives. The assumption apparently was that petitions were requests only, not instructions, and that the government therefore had no duty to *grant* petitions. The academic advocates of a duty to respond seemingly agree that the right to petition does not include any such substantive duty.

Instead, these academic commentators advocate a procedural response. They argue that the drafters believed that they must at least respond to petitions, even if that response was a denial.[272] In particular, they cite the comments of

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[270] *See* 11 DOCUMENTARY HISTORY, *supra* note 184, at 1266. For example, Representative Hartley warned:

> I have known within my own time some many inconveniences and real evils arise from adopting the popular opinions on the moment, that although I respect them as much as any man, I hope this government will particularly guard against them, at least that they will not bind themselves by a constitutional act.

Id.; *see also id.* at 1267 (Statement of Rep. Clymer). Representative Clymer noted:

> If they have a constitutional right to instruct us, it infers that we are bound by those instructions, and as we ought not to decide constitutional questions by implication, I presume we shall be called upon to go further, and expressly declare the members of the legislature bound by the instruction of their constituents; this is a most dangerous principle, utterly destructive of all ideas of an independent and deliberative body. . . .

Id.; *see also id.* at 1268 (Statement of Rep. Jackson) ("Consider the dangerous tendency of establishing such a doctrine, it would necessarily drive the house into a number of factions, there might be different instructions from every state, and the representation from each state would be a faction to support its own measures."); *id.* at 1271 (Statement of Rep. Madison) ("[T]he consequence that instructions are binding on the representative is of a doubtful, if not of a dangerous nature.").

[271] *See id.* at 1277. Some suggested that the right to instruct would not bind the representatives. *See id.* (Statement of Rep. Sumter) ("[T]hat [the representatives] shall notice [the instructions] and obey them as far as is consistent and proper, may be very just; perhaps they ought to produce them to the house, and let them have as much influence as they deserve; but nothing further, I believe, is contended for."); *see also infra* notes 285–86 (statements of Rep. Gerry). Some representatives argued that many states had such a provision and that failure to include such a provision in the Bill of Rights would provoke discontent. *See, e.g., id.* at 1278 (Statement of Rep. Burke) ("[T]he constitutions of Massachusetts, Pennsylvania and North-Carolina, all of them recognize, in express terms, the right of the people to give instruction to their representatives . . . [the amendments before the House] are not those solid and substantial amendments which the people expect. . . .").

[272] *See* Higginson, *supra* note 4, at 155 (arguing that during the debates the House

Representative Gerry, Sherman, and Madison.[273] However, these statements are ambiguous. Representative Gerry, for example, stated that Congress should never shut its ears to the voice of the people, but he stated it merely as a "hope."[274] Elsewhere, Representative Gerry stated that a representative would present the petition to the House if "he thinks proper."[275] Likewise, Representative Sherman explained that though an effective representative should generally inquire into the wishes of the people, whether contained in petitions or otherwise, the right of the people should go "no further than to petition."[276] Similarly, James Madison broadly stated that "the people have a right to express and communicate their sentiments and wishes" through various means including

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"expressly affirmed Congress' duty to receive and consider, although not to be bound by, citizens' communications") (citing statements of Representatives Gerry, Sherman, and Madison contained in 2 SCHWARTZ, *supra* note 143, at 1093–96); Note, *Suits Against the Government*, *supra* note 12, at 1116–17, n.54 (arguing that members of First Congress believed that they had a duty to inquire into petitions and could "never shut its ears") (citing 5 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 1093–94 (1980)); *see also* Spanbauer, *supra* note 4, at 40–41 ("[T]he consensus was that 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.") (citing the Senate rejection and House Debates (Aug. 15, 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1146).

[273] *See, e.g*, Higginson, *supra* note 4, at 155; Note, *Suits Against the Government*, *supra* note 12, at 1116–17, n.54.

[274] "I hope we shall never shut our ears against that information which is to be derived from the petitions and instructions of our constituents. I hope we shall never presume to think that all the wisdom of this country is concentred [sic] within the walls of this House." House Debates (Aug. 15, 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1095–96.

[275] *Id.* at 1095. Representative Gerry stated:

> [T]he amendment [proposing a right to instruct] does not carry the principle to such an extent [to bind representatives], it only declares the right of the people to send instructions; the representative will, if he thinks proper, communicate his instructions to the House, but how far they shall operate on his conduct, he will judge for himself.

Id.

[276] *Id.* at 1094. Representative Sherman noted:

> [T]he right of the people to consult for the common good can go no further than to petition the Legislature, or apply for a redress of grievances. It is the duty of a good representative to inquire what measures are most likely to promote the general welfare, and, after he has discovered them, to give them his support. Should his instructions, therefore, coincide with his ideas on any measure, they would be unnecessary; if they were contrary to the conviction of his own mind, he must be bound by every principle of justice to disregard them.

Id.

"by petition to the whole body," but he did not say that Congress must specifically respond to each of these views.[277]

The other alleged historical basis for a duty to respond is the actual petitioning practice in place immediately before and after the Petition Clause became a part of the Bill of Rights.[278] This is the most compelling point. The history books are full of accounts of the English Parliament[279] and the colonial and early American governments processing and responding to petitions.[280] In fact, the First Congress—the drafters of the Petition Clause—established rules for processing citizen petitions.[281] Documentary records of the First Congress

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[277] *Id.* at 1096.

[278] *See* Spanbauer, *supra* note 4, at 33–34. *See generally* Frederick, *supra* note 269; Higginson, *supra* note 4.

[279] The extent of the English practice of responding to petitions is somewhat unclear. David Frederick cites two examples of the duty to respond to petitions in England. First, he cites Holdsworth's observation "that receiving and answering petitions were the most important functions of the King's Council in Parliament under Edward I." Frederick, *supra* note 269, at 114 (citing 10 HOLDSWORTH, *supra* note 137, at 696). Indeed, the King apparently did have a duty to respond under the original 1215 Magna Carta: the barons had a right to petition the King for redress of the King's breaches of the other provisions of the Magna Carta, and, if he did not, the barons could seize the King's property until the wrong "has been redressed." 1215 MAGNA CARTA, ch. 61, *reprinted in* HOLT, *supra* note 135, at 339. This provision did not appear in the 1225 version of the Magna Carta. Frederick also cites a 1669 resolution of the English House of Commons "[t]hat it is an inherent right of every commoner in England to prepare and present Petitions to the House of Commons in case of grievances, and the House of Commons *to receive the same.*" Frederick, *supra* note 269, at 114–15 (emphasis added). However, he notes that "in the next breath, the Commons used unfortunate language in what appears to be a direct contradiction: 'That it is an undoubted right and privilege of the commons to judge and determine concerning the nature and matter of such petitions, how far they are fit or *unfit to be received.*'" *Id.* at 115 (quoting Resolution of the House of Commons (1669), *reprinted in* C. ROBERTSON, SELECTED STATUTES, CASES, AND DOCUMENTS TO ILLUSTRATE ENGLISH CONSTITUTIONAL HISTORY 1660–1833, at 27 (4th ed. rev. 1923)). Moreover, this statutory "resolution" of the duty of Parliament to receive petitions did not appear in the 1685 English Bill of Rights. *See supra* notes 138–41; *see also* 8 DOCUMENTARY HISTORY, *supra* note 184, at xv (noting that "the House of Commons was free to reject any petitions outright, and prevented by tradition from receiving others"). When Blackstone spoke of the right to petition, he spoke only of the right of the people to petition and the prohibition against prosecuting persons for such petitioning, not of an affirmative duty to respond to each petition. 1 BLACKSTONE, *supra* note 145, at *138–39.

[280] As to petitioning practice in colonial America, see BAILEY, *supra* note 163, at ch. 2 (surveying the different procedures for processing petitions in 18th century Virginia); CLARKE, *supra* note 160, at ch. II & VI (all colonies); Higginson, *supra* note 4, at 144–55 (providing the procedure used in colonial Connecticut); *see also* discussion *supra* notes 159–64.

[281] On April 7, 1789, the House adopted the following procedure for petitions:

> Petitions, memorials, and other papers addressed to the House, shall be presented

show instance after instance of the House affirmatively considering and acting upon citizen petitions.[282] The petitions helped to shape the legislative agenda of the First Congress.[283]

Yet, some questions remain. First, the practice of the First Congress reflects custom only with respect to legislative petitions and does not address the practice as to petitions addressed to the other branches of government.[284] Second, the response of the First Congress to legislative petitions may have depended on the discretion of individual members.[285] Representative Gerry's comments, quoted above, suggests that at least one member of the First Congress believed that the response to a constituent's petition depended on the discretion of the member.[286] If this were a universal view, then petitions may have gone unanswered. This is a difficult matter to uncover because the petitions that are reported in official records are necessarily those that received some sort of response.

Indeed, the practice may have been, as suggested in *Knight*, just a "wise" recognition by the First Congress that they should respond to petitions or else suffer the ill will of the people.[287] If this were the view, it arguably reflects a

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> through the Speaker, or by a member in his place, and shall not be debated or decided on the day of their being first read, unless where the House shall direct otherwise; but shall lie on the table to be taken upon in the order they were read.

8 DOCUMENTARY HISTORY, *supra* note 184, at xvi, 766.

[282] *See generally id.* at 1–462 (surveying histories of petitions presented to the First Congress); *see also* Frederick, *supra* note 269, at 117 (quoting a 1795 letter reporting that "[t]he principal part of [Congress's] time has been taken up in reading and referring petitions").

[283] *See* 8 DOCUMENTARY HISTORY, *supra* note 184, at xxv. The records note:

> The accomplishments of the petitions submitted to the First Congress were considerable. Their impact on the legislative agenda transcended private claims, in several instances influencing legislative business of far-reaching significance; for example, the acts relating to copyrights and patents, federal revenues and their collection, the federal debt, the location of the capital, the limitation of revenue penalties, and the land office.

Id. See generally id. at 1–462 (surveying actions on petitions presented to the First Congress).

[284] *See* Lawson & Seidman, *supra* note 4, at Part III (arguing that the duty to respond to petitions varies with each branch of government and requires separate analysis).

[285] *See* 8 DOCUMENTARY HISTORY, *supra* note 184, at xxvi ("Congressmen usually presented their constituents' petitions, which were either mailed to them or which they carried with them for their home districts when they returned from recess.").

[286] *See supra* note 276.

[287] Lawson and Seidman argue that this is precisely the reason for early Congressional response to petitions:

> It is true that the early Congresses took petitions quite seriously and sought, at least through committee referrals, to address them all. There may have even been individual

balancing of interests that may change with time, particularly as the government grows.[288] Indeed, the House debate on the Petition Clause and proposed right to instruct suggests some such balancing. For example, some members of the First Congress expressed concerns about the practical problems of implementing a right to instruct.[289] At the same time, some recognized the political reality of ignoring petitions. They recognized that if members of Congress did not listen to the people, they might suffer at the next election.[290]

> members of Congress who thought it their legal duty to treat petitions in this fashion. But this confuses expectations with legal requirements. There are very good reasons why legislative bodies will make every effort to treat citizen petitions seriously. Petitions are, or at least were in the seventeenth and eighteenth centuries, among the best sources of information for legislatures about citizen concerns, and careful attention to those concerns may improve the perceived legitimacy of the government, or even stave off revolution. But that does not mean that such treatment of petitions is a legal requirement. That is especially true given the Constitution's express provisions for periodic election of legislative officials. . . . The right to petition emerged in England largely as a substitute for such formal mechanisms of representation. The Constitution, however, expressly chooses electoral representation as the primary means of citizen input and control.

Lawson & Seidman, *supra* note 4, at manuscript p. 23.

[288] Norman Smith notes these practical considerations:

> Such an extension of the right of petition [to include a duty to respond] . . . could exceed the practical limitations of our system of government; with our present capacity for multiplying documents, the business of government could be halted if each paper produced in a massive petition campaign is addressed. The government would become acutely aware of such petitions from a variety of sources and would be no better informed if required to digest every word of every paper that is presented.

Smith, *supra* note 4, at 1190–91; *cf.* Higginson, *supra* note 4, at 166 (noting that "[t]he original character of the right to petition may impose an untenable restraint on the autonomy and agenda setting power of the federal legislature" but arguing that the Court and commentators should "be honest" and recognize that the duty of response disappeared with the antebellum Congress not with the Framers).

[289] *See supra* notes 270–71. In addition to the conceptual difficulties associated with binding a representative, they worried about how Congress would react when the people disagreed in their instructions and how Congress would collect the instructions from distant states. *See* 11 DOCUMENTARY HISTORY, *supra* note 184, at 1275–76 (Statement of Rep. Sedgwick) ("If instructions are to be of any efficacy, they must speak the sense of the majority of the people, at least of a state. In a state so large as Massachusetts it will behoove gentlemen to consider how the sense of the majority of the freemen is to be obtained and communicated."); *id.* at 1271 (Statement of Rep. Smith) ("I conceive [that the right to instruct] will operate as a partial inconvenience to the more distant states; if every member is to be bound by instructions how to vote, what are gentlemen from the extremities of the continent to do?").

[290] Accountability through the election process was a recurring theme in this debate. For

This balancing is reflected also in the actual responses that Congress has given petitions over time. Even in the First Congress, which relied upon petitions for its legislative agenda, the House sometimes tabled petitions indefinitely or ordered a petition's withdrawal.[291] In 1836, Congress instituted a rule by which it could not refer, present, or consider abolitionist petitions.[292] In 1842, Congress

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example, Representative Hartley argued:

> According to the principles laid down in the constitution, it is presumable that the persons elected know the interests and the circumstances of their constituents .... At least it ought to be supposed that they have the confidence of the people during the period for which they are elected; and if, by misconduct, they forfeit it, their constituents have the power of leaving them out at the expiration of that time—thus they are answerable for the part they have taken in measures that may be contrary to the general wish.

11 DOCUMENTARY HISTORY, *supra* note 184, at 1265; *see also id.* at 1277 (Statement of Rep. Wadsworth) (noting that representatives have ignored instructions in the past and "yet the representative was not brought to account for it, on the contrary, he was caressed and re-elected" and warning that if he were to get instructions contrary to his own good judgment, he "would disobey them and let the consequence be what it would").

[291] The editors of the *Documentary History of the First Federal Congress* report that "[t]he First Congress never once refused to accept a petition, although on several occasions it gave a petitioner leave to withdraw a petition it had tabled or otherwise ordered a petition's withdrawal" and that "[h]aving lain on the table the requisite time, a petition could remain there indefinitely, to be taken up or not at any time." *Id.* at xvi–xvii.

[292] Most commentators acknowledge that Congressional processing of petitions forever changed after abolitionists, beginning in the 1830s, inundated Congress with petitions urging it to end slavery in the District of Columbia. The House eventually passed an 1836 "gag" rule by which it would immediately "table" and give no consideration to petitions "relating in any way ... to the subject of slavery." 12 CONG. DEB. 4052 (1836) ("Resolved, that all petitions ... relating in any way, or to any extent whatever, to the subject of slavery, or the abolition of slavery, shall, without being either printed or referred, be laid upon the table, and that no further action whatever shall be had thereon."). Southern representatives argued that Congress had the power "to refuse to receive any petitions:"

> The English cases are conclusive authorities. The House of Commons, in numerous cases ... after the Bill of Rights, refused to receive petitions, and resolved, in several cases, standing orders not to receive certain classes of petitions and the precedents in the Senate and House of Representatives are as numerous, full, and conclusive to the same point.

H.R. REP. NO. 28-3, at 15 (1844). John Quincy Adams argued that this rule was unconstitutional, yet he recognized that all that was required was a "referral" to committee, where the petitions might languish forever. Over Adams's repeated objections, Congress renewed the rule until 1844, when on Adams's motion the House repealed it and again received anti-slavery petitions. *See generally* Frederick, *supra* note 269; Higginson, *supra* note 4, at 159–65; Smith, *supra* note 135, at 81–108.

abandoned its former practice of formally presenting petitions to the House and began to direct petitions to the House Clerk instead.[293] This move "was found necessary, in order to save time."[294] Today, the response appears entirely within the discretion of the individual members to whom the petition is directed. House Rules provide that members "may" deliver petitions to the Clerk, who shall then send them for entry in the Congressional Record.[295] There is no mechanism by which petitions are assured review by Congress.

For these reasons, the duty, if any, that the First Amendment imposes on government to respond to petitions likely is minimal. Indeed, some of the scholars who argue that the government has a duty to respond, propose that this extends only to a summary denial.[296] A duty to respond therefore would not give

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293 *See* RULES OF THE HOUSE OF REPRESENTATIVES, H. DOC. NO. 97-271, at 571 (1983) (Rule XXII, ¶ 2) ("At the first organization of the House in 1789 the rules then adopted provided for the presentation of petitions to the House by the Speaker and Members.... In 1842 it was found necessary, in order to save time, to provide that petitions and memorials should be filed with the Clerk.").

294 *Id.*

295 The Rule further states:

> Members having petitions or memorials or bills of a private nature to present may deliver them to the Clerk... and said petitions... except such as, in the judgment of the Speaker, are of an obscene or insulting character, shall be entered on the Journal... And the Clerk shall furnish a transcript of such entry to the official reporters of debates for publication in the Record.

Id. ¶ 1. A member at his option may also present a petition to the House, which may refer it to committee. A committee may receive a petition only by referral by the House. *See id.*

296 Professor Spanbauer, for example, argues that the duty to respond is limited solely to a literal response, even if just a summary denial:

> Historically [ ] 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. 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.
>
> 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. In order to be meaningful, the First Amendment right to petition government for a redress of grievances must also include minimal governmental consideration.

Spanbauer, *supra* note 4, at 51. John Quincy Adams also believed that only a minimal response

petitioners the opportunity to personally appear and present their views. It would not require the government to hold meaningful discussions concerning the petition. It would not mandate that the government provide any review or appeal of its response.

2. *The Government's Duty in Response to Judicial Petitions*

The debate on the duty to respond has centered on the duty with regard to legislative or executive petitions. Neither scholars nor the Court has addressed the issue in the context of courts.[297] However, certain principles can be taken from this debate and used to help define the meaning of the right to petition courts.

First, no one contends that the mere right to petition guarantees that the government will grant the petitioner's request. The government is free to deny the request. Thus, the First Amendment, as applied to judicial petitions, does not touch upon the substantive right to relief. The government, whether through its courts, legislature, or executive, may define, alter, even eliminate causes of action without infringing the right to petition.

Second, the historical debate as to the extent of the procedural response suggests that the Petition Clause will have a negligible impact on the procedure of the courts. If *Knight* applies to judicial petitions, then the Petition Clause does not impose any duty at all with regard to responsive procedure. If the academic advocates prevail, there is a duty of minimal response, merely a summary denial of the complaint. Either way, the duty would not require courts to provide any form of procedural consideration of complaints. It would not require courts to give plaintiffs or defendants the opportunity to be heard. It would not require courts to grant discovery rights or even appeals. At most, courts would simply have to tell the plaintiff that his complaint is denied.

But are courts different? Do they owe petitioners a more meaningful response than the other branches of government? Many of the policy reasons for limiting or rejecting a duty of response by the legislature or executive do not apply to courts. Unlike Congress and the President, courts, at least federal courts, are not accountable at the next election. And it is not impossible for courts to

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was due. Though Adams argued that Congress must both "receive and consider" petitions, he also said that this duty was fulfilled by reference to a committee, where a petition might "sleep the sleep of death." 3 CONG. GLOBE 134, Register of Debates, XII, p. 2000; *see also supra* note 292. Even Higginson concedes that modern practice realities constrain the response due petitions. *See* Higginson, *supra* note 4.

[297] Lawson and Seidman address the duty of courts to respond to judicial petitions, but they base the right under Article III, not the Petition Clause. *See* Lawson & Seidman, *supra* note 4, at Part III.A.

respond. In fact, courts have an elaborate mechanism for processing petitions. Indeed, history shows that the judiciary, unlike Congress, has always given petitioners some form of response, often including hearings and even appeal rights. More importantly, citizens typically have more invested in their civil complaints (as compared, for example, to a letter to the executive) and expect a meaningful response.

The answer is that courts are different. They do have a duty to give a considered response to petitions, but the source of that duty is due process, not the Petition Clause.[298] By its very terms, the Due Process Clause addresses the process by which the government may deprive a person of his property. The process must be "due," or in other words, fair and reasonable. A cause of action is a property interest,[299] so, unlike other forms of petitions,[300] the government may not simply ignore a civil complaint or deny it without consideration. To do so would be the equivalent of the government depriving a person of property without due process of law.

In fact, when the two clauses are read together, the Court's narrow reading of due process as applied to initial court access in the *Boddie* and *Kras* line of cases[301] may make more sense. In the usual case, the government is not depriving the plaintiff of a property right if it bars access to court. Another private party, by refusing to settle the dispute, frustrates that right, but the *government* does not. So long as the government does not require judicial access as the only means to resolve a dispute, it has not interfered with a plaintiff's property rights.[302] Once the government allows a plaintiff to file his claim and thereby assumes control over its disposition, however, it must do so fairly and reasonably—in other words, afford due process.

The government has a different obligation under the Petition Clause. The Petition Clause, unlike the Due Process Clause, embraces and places special

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[298] The duty to respond may also derive from the duty of federal courts under Article III to exercise their "judicial power." *See* Lawson & Seidman, *supra* note 4, at manuscript p. 20 ("A court's obligation to consider matters raised before it and to inform the parties of its dispositions is simply part of what it means to possess '[t]he judicial Power' vested by Article III.").

[299] *See* Phillips Petroleum v. Shutts, 472 U.S. 797, 807 (1985) ("[A] chose in action is a constitutionally recognized property interest...."); Mullane v. Central Hanover Trust, 339 U.S. 306, 313 (1950) (noting that the right to have others "answer for negligent or illegal impairment of... interests" is a form of property right).

[300] Under *Bi-Metallic*, there is no due process duty to respond to petitions to the executive and legislature if those petitions address matters of general concern. *See* discussion *supra* notes 260–62.

[301] *See* discussion *supra* Part I.A.2.

[302] This factor—exclusive means of resolving the dispute—was crucial to the Court's holdings in its court access cases under the Due Process Clause, *Boddie* and *Kras*. *See id.*

value on the citizen's initial request. Rather than telling the government that it must not reach out and interfere with a citizen's property rights, the Petition Clause mandates that the government must let the people come to it. It does so for good reason: the ability to apply for justice is the starting point of all justice.[303]

Thus, in the realm of the courts, there is a "good fit" between the right to petition courts and the right to due process. The right to ask for relief from *courts* (as opposed to the other two branches) is especially significant because it triggers independent obligations of the government under the Due Process Clauses.[304] The Petition Clause, with all of its attendant "strict scrutiny" protections under the First Amendment, protects the initial filing of the complaint,[305] and the Due

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[303] *See* Note, *Suits Against the Government*, *supra* note 12, at 1122, n.93. The author notes:

> More than any other litigation-related activity, *filing a complaint* is a citizen's presentation of a judicial petition to the government and thus attains special status in the context of the Petition Clause.... This is because a complaint is the first opportunity for the citizen to relate the basis of the grievance and forms the sole basis for determining the issues to be litigated.

Id. Courts in other contexts have held that the filing of a complaint warrants more deference than subsequent pleadings or motions. For example, courts have lessened the standards of Federal Rule of Civil Procedure 11, *see infra* note 436, when evaluating a complaint, as opposed to a subsequent pleading or motion. In *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1991), the Ninth Circuit en banc held that the improper purpose clause of Rule 11(b)(1) cannot apply to an otherwise meritorious *complaint*, even though a court could sanction a party for filing a meritorious *motion* for an improper purpose:

> The reason for the rule regarding complaints is that the complaint is, of course, the document which embodies the plaintiff's cause of action and it is the vehicle through which he enforces his substantive legal rights. Enforcement of those rights... may benefit the public, since the bringing of meritorious lawsuits by private individuals is one way the public policies are advanced.

Id. at 1362.

[304] Compare the due process duty in response to executing petitions, *supra* notes 260–62, 300.

[305] The initial claim for relief would encompass not only the original plaintiff's first complaint, but any other form of affirmative claim for relief, whether by amendment, counterclaim, intervention, or third party practice. But, as to these other forms of claims for relief, typical government regulation, such as pleading rules that limit the ability to state additional claims in a single case, probably would survive strict scrutiny. Rule 15, for example, limits plaintiff's ability to amend her complaint to state new claims. *See* FED. R. CIV. P. 15 (providing that after a specified time, plaintiff may amend her complaint only upon leave of court). The government's interest in preserving orderly management of a case is compelling

Process Clause, and its somewhat lower "reasonableness" standard of protection, steps in from that point forward.[306] These due process standards, not the stricter First Amendment standards, govern responsive pleadings and motions, discovery, trial procedure, and post-trial attacks on the judgment.

Finally, the question remains as to the proper characterization of an appeal. Is an appeal part of the process that follows the initial filing of a complaint or is it a new petition to be protected under the First Amendment? This is an important question because Court precedent suggests that due process does not require an appeal in civil suits.[307] The Petition Clause could fill the void left by the due process cases if an appeal is considered a new petition or a new grievance to a new court. Though this argument has some appeal (pardon the pun), I conclude that the Petition Clause does not convey any right of access to the appellate courts.

First, common sense dictates that the Petition Clause cannot guarantee an absolute right to take an appeal to higher courts. Otherwise, this single clause would override the constitutional structure of the federal courts. It would require Congress to establish levels of appellate or review courts even though Articles I and III of the Constitution impose no such duty.[308] Furthermore, the duty would have no natural limit. The government arguably would have to provide endless avenues for appeals from all petitions filed with all three branches of government.

Even in cases where Congress already has authorized appellate or other supervisory review by courts of appeal, that review is still part of the process by which the government responds to a judicial petition. To be sure, appeals and petitions of error raise new grievances in that they attack more specifically a particular ruling of the trial court (rather than the underlying conduct of the defendant), but they nevertheless arise out of that same basic grievance and should be considered the same petition. Otherwise, most phases of civil litigation could be characterized as a new petition for redress of grievance. A discovery motion, for example, typically complains more about the other party's litigation

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and the infringement on the right of access would be minimal given that the pleader could file the claims separately in another action. *See* discussion *infra* Part IV.C.

306 For a discussion of the standards that govern First Amendment and Due Process challenges, see *infra* Part IV.C.

307 The Court has not yet ruled whether due process requires an appeal in an ordinary civil case, but it has held that due process does not require appeals of criminal convictions. *See* Ross v. Moffitt, 417 U.S. 600, 611 (1974).

308 Article III of the Constitution requires only one court, the Supreme Court, and Article III leaves to the discretion of Congress whether it will establish additional inferior courts. *See* U.S. CONST. art. III, § 1. Article I allows, but does not require, Congress to establish a system of lower courts. *See* U.S. CONST. art. I, § 8, cl. 9 ("Congress shall have the Power... to constitute Tribunals inferior to the supreme Court.").

conduct than the underlying subject matter of the initial claim. Likewise, motions to reconsider, motions for new trial, and motions for judgment notwithstanding the verdict, often raise the same legal and factual attacks to the trial court's rulings that are made on appeal. Such requests for review, whether in the trial or appellate court, are all part of the process by which the government responds to the initial petition for redress of grievance. They therefore should be governed by the reasonableness standard of due process, not the Petition Clause's strict scrutiny.

In sum, the Petition Clause preserves and favors the initial request for justice. The request, standing alone even without any form of response, serves the important aims of the Petition Clause. It informs the government and gives citizens access. In the courts, this access extends only to the filing of an initial claim for relief in the original court,[309] but this petition, unlike petitions to other branches of government, has special significance. It triggers the protections of the Due Process Clause, which in turn guarantees a fair response.

C. *A Right to File Only Winning Claims*

Another question about the breadth of the right to petition is the nature or quality of the petition. Does the right of access to court guarantee the right to file any form of civil complaint, whether meritorious or not? This is perhaps the most difficult question in defining the right to petition courts. The text of the Petition Clause does not give much guidance. It refers only to "grievances," not the merit of those grievances. Yet, the Court has imposed a "win-lose" distinction for judicial petitions: only winning claims are within the absolute protection of the Petition Clause. Though this standard seems unduly restrictive, it mirrors the Court's interpretation of protected speech and has some support in both policy and historical practice.

Unlike other questions confounding definition of the right to petition courts, the Supreme Court has addressed whether a "merits" qualification applies to the right to petition courts. In *Bill Johnson's Restaurants v. NLRB*,[310] the Court explained that "baseless" litigation was not protected:

> [S]uits [that lack a "reasonable basis"] are not within the scope of First Amendment protection: "The first amendment interests involved in private litigation—compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts—are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims. Furthermore, since sham litigation by definition does not involve a bona

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[309] As noted, this right may in addition guarantee a summary denial.

[310] 461 U.S. 731 (1983); *see also* discussion *supra* notes 101–07.

> fide grievance, it does not come within the first amendment right to petition." Just as false statements are not immunized by the First Amendment right to freedom of speech... baseless litigation is not immunized by the First Amendment right to petition.[311]

The Court's imposition of at least some form of merits standard likely is correct. First, it makes practical sense. Without an ability to limit court access to at least non-frivolous claims, the courts could grind to a halt. Not only would government and its sponsors, the taxpayers, incur considerable expense, but other citizens also would suffer harm. The public generally would have less access to justice if the courts were overwhelmed with frivolous claims, and the defendant in particular would suffer reputation injury and financial loss if forced to defend suits that have no merit.

Furthermore, imposition of at least some form of merits standard for protected petitions is consistent with the Court's definition of protected legislative and executive petitions. In *Noerr*, the Court imposed a "sham" limitation on petitioning immunity. If the lobbying efforts are not genuinely aimed at obtaining governmental action, the purported petition is not protected and may be subject to antitrust liability.[312] Likewise, in *McDonald*,[313] the Court imposed a truth limitation on an executive petition. If the petition, though genuinely aimed at obtaining governmental action, contains false statements and the petitioner knew of or recklessly disregarded its falsity, the petitioner may be subject to defamation liability.

The problem is setting the proper standard for determining what suits are baseless. This problem is multi-dimensional. First, the Court has confused the issue. It has issued two opinions that seem to state contradictory tests. Second, even when the Court's test is extracted from these two cases, significant questions remain concerning whether this particular test is correct and consistent with the Petition Clause as a whole.

The initial hurdle is deciphering the Court's cases to determine the Court's test. In *Bill Johnson's Restaurants*, the Court adopted a win-lose test as the ultimate standard for imposition of damages under the labor laws.[314] If the

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311 *Bill Johnson's Restaurant*, 461 U.S. at 743 (quoting Balmer, *supra* note 4).

312 *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961). This standard does not turn on improper motive. Indeed, a petitioner may have a bad motive—such as to hurt his competitor—and still be protected so long as he meant to influence government action through his petition. *See* discussion *supra* notes 75–84.

313 McDonald v. Smith, 472 U.S. 479 (1985).

314 *Bill Johnson's Restaurants* is itself somewhat confusing as to the proper test. The Court gave two tests for determining whether a suit is baseless and therefore not protected under the First Amendment, depending on whether the litigation at issue is concluded or still in progress. For on-going state court litigation, the Court adopted the test for summary judgment.

employer wins the state suit, the employer cannot be liable at all under the labor laws, without respect to the employer's intent in filing the suit.[315] On the other hand, if the employer loses his suit in the state court, the suit loses its protection and the NLRB may impose attorney's fees and other damages against the employer.[316] Ten years later, in 1993, the Court in *Professional Real Estate Investors v. Columbia Pictures Industry, Inc.*[317] held that a claim that is objectively reasonable, regardless of the motive of the plaintiff, is immune from antitrust liability under *Noerr-Pennington*. A suit that survives summary judgment by definition is objectively reasonable and protected.[318]

The NLRB should determine for itself whether the state case presents "any genuine issues of fact" and, if it does not, the suit warrants no protection and the NLRB may enjoin it. *See Bill Johnson's Restaurants*, 461 U.S. at 745–46. On the other hand:

> When a suit presents genuine factual issues, the state plaintiff's First Amendment interest in petitioning the state court for redress of his grievance, his interest in having the factual dispute resolved by a jury, and the State's interest in protecting the health and welfare of its citizens, leads us to construe the Act as not permitting the Board to usurp the traditional fact-finding function of the state-court jury or judge.

Id. at 745. If the suit withstands this test and proceeds to conclusion in the state court, the test is, as discussed in the text, whether the state court plaintiff wins or loses suit. *See id.* at 747. The *Bill Johnson's Restaurants* opinion is confusing for the further reason that the Court variously referred to the test, as "sham," "meritorious," or "a reasonable basis"—not "win-lose." But the Court's ultimate holding unequivocally equates "meritorious" with winning for determining liability after the suit is completed:

> In instances where the Board must allow the lawsuit to proceed, if the employer's case in the state court ultimately proves *meritorious and he has judgment against the employees*, the employer should also prevail before the Board, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice. *If judgment goes against the employer* in the state court, however, or if his suit is withdrawn *or is otherwise shown to be without merit*, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the . . . unfair labor practice case. The *employer's suit having proved unmeritorious*, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation of the exercise of the employees' . . . rights. If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses.

Id.

315 *See id.*

316 *See id.*

317 508 U.S. 49 (1993).

318 In *Professional Real Estate Investors*, the claim at issue did *not* survive summary

These are two different standards. In *Bill Johnson's Restaurants*, whether a suit survived summary judgment merely determined whether the NLRB could enjoin the suit. If the suit survived summary judgment, the plaintiff could proceed to trial but he might be liable for considerable damages under the labor laws if he later lost his suit. In *Professional Real Estate Investors*, the Court held that a plaintiff could not be subject to any damages if his suit survived summary judgment. Such suits were absolutely protected. Thus, *Professional Real Estate Investors* does not set the constitutional standard unless the Court meant to change the standard. But the Court in *Professional Real Estate Investors* did not overrule *Bill Johnson's Restaurants*. Indeed, it cited *Bill Johnson's Restaurants* with approval.[319] This requires us to distinguish the two cases (for the Court itself did not do so).

The decisions are not inconsistent if *Professional Real Estate Investors* is read as setting the standard under the antitrust laws, rather than the Petition Clause. Indeed, both cases were exercises in statutory construction in which the First Amendment played only a part.[320] The different policies underlying the two statutes could explain the variance in the standards.[321] For example, as noted by the Court in *Bill Johnson's Restaurants*, the usual suit in the labor context is one

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judgment, yet the Court held that it was objectively colorable and therefore immune from antitrust liability. *See id.* at 65. A claim that survives summary judgment, by definition, presents genuine issues of fact, which, if ultimately found in plaintiff's favor, would entitle plaintiff to judgment as a matter of law. *See* FED. R. CIV. P. 56.

[319] The Court based its holding in part on *Bill Johnson's Restaurants:*

> Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. Indeed, by analogy to *Noerr*'s sham exception, we held that even an "improperly motivated" lawsuit may not be enjoined under the [NLRA] as an unfair labor practice unless such litigation is "baseless." Our decisions therefore establish that the legality of objectively reasonable petitions "directed toward obtaining governmental action" is "not at all affected by any anticompetitive purpose [the actor] may have had."

Professional Real Estate Investors, 508 U.S. at 58–59 (citation omitted).

[320] In *Professional Real Estate Investors*, the Court applied the *Noerr-Pennington* doctrine which at its essence, is a question of statutory interpretation. *See* discussion *supra* notes 77–80. In *Bill Johnson's Restaurants*, the Court noted that it must be "sensitive to these First Amendment values in construing the NLRA in the present context" and that it previously had been reluctant "to infer a congressional intent to ignore the substantial State interest 'in protecting the health and well-being of its citizens.'" 461 U.S. at 741–42.

[321] *See generally* James D. Hurwitz, *Abuse of Governmental Processes, The First Amendment, and the Boundaries of* Noerr, 74 GEO. L.J. 65, 102–05 (1985) (distinguishing *Bill Johnson's Restaurants* from antitrust application of petitioning immunity based on differences in application of labor and antitrust laws).

by a powerful employer against individual employees with far fewer resources. The typical case in the antitrust setting, on the other hand, is between commercial competitors. Thus, the Court can give more protection in the antitrust context because the burden on the defendant is less.[322] But there comes a point at which even a tremendous potential for abuse and burden on the defendant cannot justify any further weakening of the plaintiff's ability to file a civil suit. This is the constitutional "floor," which presumably is determined by *Bill Johnson's Restaurants* win-lose test.

That the win-lose test is the constitutional standard also is suggested by the Court's statements of the purposes underlying the right to petition courts. In *Bill Johnson's Restaurants*, the Court said that the First Amendment interests in private litigation were "compensation for violated rights . . . , psychological benefits of vindication, [and] public airing of disputed facts."[323] Public airing of facts may be served by a lesser test, such as an objectively reasonable standard, but the other two aims, actual compensation and vindication, can be served only by winning claims. Thus, a reasonable reading of *Bill Johnson's Restaurants* and *Professional Real Estate Investors* is that the former's win-lose test is the constitutional test, while the latter's objectively reasonable test is a policy limitation.

Having found (with some effort) the Court's test for constitutionally protected civil suits, the next question is whether this "win-lose" standard is correct. It seems contrary to the text of the Petition Clause and at least some of the policies behind the right to petition generally. The Petition Clause speaks of "grievances," not an absolute or "winning" right to relief. An arguable purpose of a petition to the government is for the government, not the petitioner, to decide if the petition is worthy of redress. Aside from cases where the claim is "fraudulent or knowingly frivolous," a citizen does not necessarily "know" whether his petition is deserving of redress. As noted by the Court, a social value derives from the public airing of disputed facts. The submission of a bona fide dispute (even if not a winning claim) to a neutral body of government to resolve is an alternative to force.

In addition, the win-lose test does not seem to square with at least one of the Court's tests for other petitions. In *Noerr*, the Court set a subjective test for protected petitions—whether the petition is a genuine attempt to influence government action. This subjective test can be reconciled with the text of the Petition Clause. If the petition is not a genuine attempt to influence government action, the petition, though a petition, is not one "*for* redress of grievances,"

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[322] *Cf.* DeVaney v. Thriftway Mktg. Corp., 953 P.2d 277, 284 n.1 (N.M. 1997) (suggesting that *Noerr-Pennington* has "more stringent requirements" than that required under the Petition Clause).

[323] 461 U.S. at 743 (quoting Balmer, *supra* note 4).

regardless of its contents or underlying "merit." The *Bill Johnson's Restaurants* Court did not explain why it departed from the *Noerr* standard. It did not even cite *Noerr*.[324]

One answer may be that the Court in *Bill Johnson's Restaurant* saw an objectively determinable standard that it could apply, whereas in *Noerr* no such standard was available. A win-lose test for most executive or legislative petitions would be unworkable. Legislative or executive petitions usually state only the preference of the petitioner, by, for example, asking the legislature to vote for or against a pending bill or asking the executive to appoint (or not) a particular person to a government post. To be sure, there are "winners" and "losers" to the extent that the government decides to act or not act on the petition, but these "decisions" depend not only upon the statements in the petition itself but also on unstated influences, such as the mere whim of the government agent or of other constituents. The petitioner would have no means whatsoever to predict the outcome of this request and thus such a test would deter petitions and would deprive the government of the views of the people.[325]

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[324] The Court cited *California Motor Transport*, which was an application of *Noerr*, but it did not quote the *Noerr* test for sham petitions. *See id.* at 741. The Court in *Professional Real Estate Investors*, however, as an antitrust case, cited *Noerr* and came closer to the *Noerr* subjective test. Though the Court rejected a merely subjective test for sham litigation, it nevertheless tied its objective test to the state of mind of a reasonable litigant:

> [T]he lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation.
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> The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation. . . . [P]robable cause to institute civil proceedings requires no more than a "reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication."

Professional Real Estate Investors v. Columbia Pictures Indus. Inc., 508 U.S. 49, 60, 62 (1993). In his concurring opinion, Justice Stevens argued that a case might be unreasonable and thus properly termed a sham, even though "some form of success on the merits—no matter how insignificant—could be expected." *Id.* at 68 (Stevens, J., concurring in judgment).

[325] The Court in *Sure-Tan v. NLRB*, 467 U.S. 883 (1984), seemed to overlook this function of legislative and executive petitions and their differences from judicial petitions. There, the Court held that an employer's contact with the Immigration and Naturalization Service (INS) to report its employees was not a protected petition. The Court relied upon *Bill Johnson's Restaurants* and distinguished the INS report on the ground that it did not state a request for redress of a legally cognizable wrong:

A civil complaint, on the other hand, does not merely state voter preferences. It purports to state facts and law and invoke established rules of decision.[326] The petitioner has a specific claim of right. Unlike the typical legislative or executive petition, the government has set standards, both with regard to substance and procedure, for determining whether a judicial claim should prevail. Though a judicial petitioner may not "know" whether his claim will win, that determination is not based solely on the whim or political leaning of the government agent. In sum, a judicial petition is more amenable to a win-lose test than the typical executive or legislative petition.

Moreover, the Court in adopting the win-lose test may have meant to track its precedent under the Speech Clause. In speech cases, the Court looks to the

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> The reasoning of *Bill Johnson's Restaurants* simply does not apply to petitioners' situation. The employer in that case, though similarly motivated by a desire to discourage the exercise of NLRA rights, was asserting in state court a personal interest in its *own* reputation.... Petitioners in this case, however, have not suffered a comparable, legally protected injury at the hands of their employees. Petitioners did not invoke the INS administrative process in order to seek the redress of any wrongs committed against them. Indeed, private persons such as petitioners have no judicially cognizable interest in procuring enforcement of the immigration laws by the INS.

Id. at 897 (citations omitted). This appears to be an erroneous interpretation of the Petition Clause. First, it is contrary to *Noerr*. Other than a simple citation to *California Motor Transport*, the *Sure-Tan* Court did not address no distinguish *Noerr*. The *Noerr* petitioner did not suffer a legally cognizable wrong at the hands of his competitor—its petition was a lobbying effort to the governor asking him to veto legislation. Second, the *Sure-Tan* approach frustrates the notice function of legislative and executive petitions. For the reasons discussed in the text, *Sure-Tan* may be a proper limitation of the right to petition courts or administrative agencies acting in an adjudicatory manner, but it otherwise too narrowly defines the right to petition the legislature and executive, both of which need citizen input to function. Indeed, the framers of the Petition Clause anticipated that petitioners would ask Congress for acts that it could not grant, but it nevertheless preserved the right to petition for that act. This is apparent from the debate on the right to instruct. *See* discussion *supra* notes 216, 270–73. James Madison, for example, argued that constituents may ask representatives to act contrary to the Constitution or against the public good and that representatives should and could not obey the instructions. *See* House Debate (Aug. 15, 1789), *reprinted in* 2 SCHWARTZ, *supra* note 143, at 1096 ("Suppose they instruct a representative, by his vote, to violate the constitution.... Suppose he is instructed to patronize certain measures, and from circumstances known to him, but not to his constituents, he is convinced that they will endanger the public good.").

[326] To some extent this would be true of some executive petitions, such as claims for relief filed with administrative agencies. To the extent that the executive acts in an adjudicatory manner, the standards for judicial petitions should apply. *Cf.* California Motor Transp. v. Trucking Unlimited, 404 U.S. 508 (1972) (expanding the right to petition to both courts and adjudicatory administrative agencies).

character of the speech. It may impose additional subjective standards (such as the *New York Times* actual malice standard),[327] but it first looks to the underlying speech itself to determine whether it is false, true, or opinion. In 1985, two years after *Bill Johnson's Restaurants*, the Court in *McDonald* expressly applied the *New York Times* standard to false statements made in executive petitions,[328] and *Bill Johnson's Restaurants* itself mirrors the Court's approach in speech cases.[329]

In *Bill Johnson's Restaurants*, the Court cited *Gertz v. Welch*,[330] a seminal case applying *New York Times* to private speech. The Court stated that "[j]ust as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition."[331] In *Gertz*, the Court held that false speech, though speech, is not within the protection of the First Amendment.[332] In *Bill Johnson's Restaurants*, the Court in essence did the same—it held that though a losing suit may be a

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[327] *See* New York Times v. Sullivan, 376 U.S. 254 (1964). There, the Court held that a public official could not recover civil damages for defamation unless the defendant acted with "actual malice"—knowing or reckless disregard for the falsity of the statement. *See also* discussion *infra* notes 340, 343, 401–02, 420–27.

[328] *See infra* notes 398–400. Commentators and historians have challenged *McDonald* as contrary to historical practice. *See* Smith, *supra* note 4, at 1196–97 (arguing that the *McDonald* Court erred in not granting absolute immunity); Spanbauer, *supra* note 4 (arguing that the *Noerr-Pennington* doctrine is a proper limitation on petitioning but that *McDonald* did not provide enough protection to petitioning activity). For further discussion of this speech doctrine as applied to the right to petition, see *infra* Part IV.B & D.

[329] The Court in *Bill Johnson's Restaurants* had no occasion to directly apply the *New York Times* defamation standard because it was a labor case, not one for defamation. Though the defamation truth limitation in theory would apply to factual statements in judicial petitions, as a practical matter such application is moot because the common law immunizes court filings from defamation liability. *See infra* note 403.

[330] 418 U.S. 323 (1974).

[331] Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 743 (1983) (citations omitted).

[332] *See Gertz*, 418 U.S. at 340; *see also supra* note 221; *infra* notes 334–38, 422–27. At times, the Court has characterized other speech as not within the protection of the First Amendment. For instance, it originally characterized commercial speech as outside the First Amendment's guarantee, though today it gives commercial speech some limited protection. *Compare* Valentine v. Chrestensen, 316 U.S. 52 (1942) (holding no protection for commercial speech), *with* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (recognizing that the First Amendment protects truthful commercial advertising). Even Justice Black, who championed an absolute view of the Speech Clause, engaged in defining the right of free speech so that it did not cover all arguably expressive actions. *See, e.g.*, Street v. New York, 394 U.S. 576, 609–10 (1969) (Black, J., dissenting) (concluding that flag burning is not protected speech). *See generally* NOWAK & ROTUNDA, *supra* note 4, at ch. 16.

request for redress of a grievance, it, like false speech, is not within the protection of the First Amendment.

Admittedly, the analogy between false speech and losing civil suits is not perfect. First, it is more difficult to determine whether a civil suit will win than it is to determine whether speech is false. The outcome of a civil suit depends not only on the truth of the facts but also on a number of other factors, such as the ability of the opposing lawyers, the developing status of the law, and the attitude of the judge and jury. A restriction on filing losing claims therefore may have a greater chilling effect than one prohibiting false speech. Moreover, the filing of a losing claim in a court (so long as it has at least some merit) has greater potential than airing false speech for staving off violence and for promotion of law and ideas. But the filing of losing suits also imposes greater burdens than general speech. A civil suit triggers a host of responsibilities and burdens on government and individuals, such as bearing the costs of litigation, that mere speech does not.[333] Thus, though the competing interests and values necessarily differ for the two activities, the relative balance of interests for false speech and losing claims may approximate each other.[334]

Balancing of interests is the means by which the Court derived its definition of protected speech. *Gertz* did not hold that false speech has no value at all, only that it has no "constitutional value when the relative interests are balanced against each other:"[335]

> Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "[336]

The Court in *Bill Johnson's Restaurants* balanced competing interests in much the same manner as it did in *Gertz*. It cited both the interest of the employer in exercising its rights as a litigant and the interest of the state in providing remedies to a litigant who feels aggrieved.[337] The Court also discussed at length

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[333] For further discussion of the burdens imposed when a plaintiff files a civil suit, see discussion *infra* Part IV.B–C.

[334] This is not to say that they strike the same balance. As I explain in Part IV.B, balancing tests necessarily require individual application and assessment.

[335] *Gertz*, 418 U.S. at 340.

[336] *Id.* at 340 (citations omitted).

[337] *See* Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 745–47 (1983).

the potential abuses and costs of filing suit.[338] Thus, the Court developed a two-tier test for protection of civil suits, with absolute protection applying only to a narrow category of judicial petitions—winning suits.[339]

Analogy to the Court's speech cases also helps answer the policy concerns arising from the Court's narrow win-lose definition of protected judicial petitions. Narrow definition of the absolute right to apply only to winning suits does not mean that the ability to file losing suits will have no protection. As in the case of speech, some additional protection may be mandated by the First Amendment. In *Gertz*, for example, the Court recognized that the First Amendment required protection of some false speech—activity not otherwise within the protection of the First Amendment—in order to avoid chilling the exercise of true speech. In Part IV, I discuss, in greater detail, this "breathing room" doctrine and its application to the right to petition courts, but I raise it here to address some of the policy concerns arising from a narrow definition of the right to petition courts.

Narrow definition of the absolute right to petition courts as applying only to winning suits, coupled with additional protection for losing suits under the breathing room doctrine, provides constitutional protection while giving courts flexibility in assessing governmental restrictions on court access. This approach would start with the premise that the activity—the filing of losing claims—is not protected and that the governmental restriction is permissible in so far as it impacts the ability to file losing suits. A court then would look to the impact of the restriction on *protected activity*—the ability to file winning claims—and balance the relative interests to determine how much, if any, protection is needed for the ability to file *losing suits* in order to avoid chilling the filing of winning claims.

Take the example of an award of the costs of defending a suit, including the defendant's attorney's fees. These are some of the compensatory damages arising from a wrongful civil suit, and compensatory damages are a form of government restriction that can run afoul of the First Amendment just as a criminal penalty can.[340] Accordingly, just as the Court allows states to impose

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338 *See id.*

339 The Court granted higher protection to suits while they are still pending. *See id.*; *see supra* note 314. This distinction may be an application of the "breathing room doctrine," as discussed further in *infra* Part IV.D.

340 The Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), explained:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action [for defamation] and that is common law only....

compensatory damages for some cases of false speech but not for true speech,[341] it, in *Bill Johnson's Restaurants*, allowed an award of attorney's fees against losing suits but absolutely protected winning suits from such damages.[342] In both applications, the absolute right is protected but the non-protected activity is not immune from liability. The latter activity is protected if the absolute right needs breathing space. Under *New York Times*, for example, false speech about public figures is protected by the actual malice standard.[343] In *Bill Johnson's Restaurants*, the Court arguably imposed a different form of breathing room by holding that the NLRB may not enjoin civil claims that survive summary judgment.[344]

The alternative approach—more broadly defining the right to petition courts to include losing but meritorious suits—would require strict scrutiny of any restriction on filing *both winning and losing suits*.[345] If losing (but non-frivolous) suits were within the literal right to petition, the government might be able to assess some costs, such as filing fees, against losing but colorable claims, but as in the case of true speech, it likely could not impose larger penalties, such as attorney's fees. Though the Court has permitted the government imposition of some costs on the exercise of other First Amendment rights, these fees may not exceed "reasonable" limits,[346] and the Court's defamation cases strongly suggest

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Id. at 265; *see also* Whelan v. Abell, 48 F.3d 1247, 1255 (D.C. Cir. 1995) (noting that the Petition Clause may limit awards of damages pursuant to common law torts of malicious prosecution and abuse of process: "We know that a state cannot constitutionally impose liability based on proof of libel and slander in their unreconstructed forms, so there is nothing inherently sacrosanct about common law torts.").

341 *Cf.* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (holding that the First Amendment requires private figure plaintiff to prove falsity of speech in defamation suit against media defendant); Garrison v. Louisiana, 379 U.S. 64 (1964) (holding that criminal defamation law violated the First Amendment because it punished *true* speech made with ill motive). *See generally* NOWAK & ROTUNDA, *supra* note 4, §§ 16.33–35.

342 *See Bill Johnson's Restaurants*, 461 U.S. at 747. In one area of agreement, the Court also held that winning suits are immune from imposition of attorney's fees and other damages. *See* Professional Real Estate Investors v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60 n.5 (1993) ("A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham.").

343 *See supra* note 327; *infra* Part IV.B, Part IV.D.

344 *See Bill Johnson's Restaurants*, 461 U.S. at 747. This resembles the Court's prior restraint on speech doctrine, which is discussed *infra* notes 443–47.

345 Under strict scrutiny analysis, the Court asks whether the restriction serves a compelling state interest and is narrowly drawn to achieve that end. The strict scrutiny test and its application in speech cases and to the right to petition is discussed *infra* Part IV.C.

346 In *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), the Court invalidated a permit and fee requirement for parades and assemblies. The Court explained:

that large fees in the form of compensatory damages are may not be assessed on activities absolutely protected under the First Amendment.[347]

> The Forsyth County ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in "the archetype of a traditional public forum," is a prior restraint on speech. Although there is a "heavy presumption" against the validity of a prior restraint, the Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally. Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.

Id. at 130 (citations omitted). That the fee was nominal did not save it because the ordinance gave too much discretion to the administrator in assessing the fee. *See id.* at 136–37 ("A tax based on content of speech does not become more constitutional because it is a small tax."). In dictum, however, the Court suggested that states could constitutionally assess fees in greater than nominal amounts by distinguishing a prior case: "[it] does not mean that an invalid fee can be saved if it is nominal, or that only nominal charges are constitutionally permissible," *Id.* (quoting Murdock v. Pennsylvania, 319 U.S. 105 (1943)). Lower courts have since required the fee to be at least reasonable. *See* Northeast Ohio Coalition for the Homeless v. City of Cleveland, 885 F. Supp. 1029, 1033 (N.D. Ohio 1995) (rejecting argument that only nominal fees are constitutional and allowing a $50 fee because it was "reasonably related to the expenses incident to the administration of the ordinance and to the maintenance of public safety and order"); *see also* David Goldberger, *A Reconsideration of* Cox v. New Hampshire*: Can Demonstrators Be Required to Pay the Costs of Using America's Public Forums?*, 62 TEX. L. REV. 403, 409–10 (1983). ("[T]he state may recoup the actual costs of governmental services that are generated by the use of public property for speech activities, as long as the charge is not so great as to appear to the judiciary to be oppressive or completely preclusive of speech.").

[347] *See supra* note 340. Admittedly, this discussion mixes two distinct speech doctrines—defamation (*New York Times*) and public fora (*Forsyth*)—and attempts to apply them to a First Amendment right to which they have never before applied. Application of the *New York Times* defamation doctrine to fee awards may be a better fit than the *Forsyth* public fora doctrine because the defendant's attorney's fees, like a damages award in defamation cases, are not costs incurred by the government. Application of the public fora doctrine is further complicated by the fact that *Forsyth* and other license fee cases involve speech in traditionally open public fora. The Court has distinguished between the types of fora in which a person seeks to speak and allowed the government to impose greater restrictions on speech in public property not by tradition designated as open for public communication. *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 46 (1983). The Court, as to these fora, noted "[i]n addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* Some commentators have applied these distinctions to the right to petition courts and have argued that restraint on the right to petition courts is open to greater regulation because courts are

Under this second approach (more broadly defining the right to include losing suits), the government still could attempt to deter frivolous suits, but its restrictions must be narrowly tailored to achieve only that specific aim. The government likely could not assess attorney's fees against losing but not frivolous suits. This prohibition may be a desirable policy result in many cases (as the Court evidently believed in *Professional Real Estate Investors*), but if made a constitutional mandate, the rule would take away the government's ability to ever penalize and deter colorable but otherwise abusive suits. In other words, under this approach as applied to the facts of *Bill Johnson's Restaurants*, as long as the employer's suit was not frivolous (*i.e.*, it stated some colorable claim), the NLRB could not impose damages against the employer even if the employer ultimately lost and had filed suit solely to retaliate against its employees. On the other hand, a more narrow definition of the right, coupled with the breathing room doctrine, gives the courts flexibility to look at governmental policy, such as that reflected in the labor laws, and award damages in some cases of abuse.

Finally, a win-lose test also comports with Anglo-American tradition with regard to imposition of court costs. Indeed, courts have long required losing (but not winning) plaintiffs to pay at least some form of costs. England has the "English rule," dating back to at least the early seventeenth century, whereby the losing party pays not only incidental costs, but the attorney's fees of the winning party.[348] The American colonies likewise imposed costs, including attorney's

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public fora. *See* McGowan & Lemley, *supra* note 4. However, this overlooks that the issue in petition cases usually is not speech in the courthouse but instead the ability to file a civil suit, which activity is an "intended purpose" of courthouses.

[348] *See generally* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 n.18 (1975) (summarizing the history of the "English rule"). Early English practice imposed severe punishments on plaintiffs who lost cases:

> Anglo-Saxon courts employed a simple system for guarding against false suits: the complainant unfortunate enough to lose his cause also lost his tongue, or, if that option proved distasteful, was compelled to pay his opponent compensation, called *wer*, which was fixed according to the complainant's status. Each complainant was required to provide sureties—*borh*—who were subjected to the same penalties if the complainant could not be found.
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> These . . . sanctions, imposed in the action itself, were prompt and probably effective. . . .
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> The system of taxing fixed *wer* in response to false suits did not long survive the Norman conquest. It gave way to a new and more flexible system that evolved from Norman traditions—amercement.
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> The amercement system did not exact a previously fixed penalty from the losing plaintiff and in strict theory was not automatically applied to every case. In practice, however, immediately following the determination of the underlying suit, judges found

fees on losing parties, though the amount of those fees was often subject to limits.[349] To be sure, American courts today are more reluctant than English courts to impose the high costs of the other side's attorney's fees even on losing parties,[350] but this so-called "American rule" did not come into force until the

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> virtually all losing plaintiffs to be in the King's mercy for a false claim. Liability then attached for some monetary penalty, which was assessed or "affeered" by honest men of the neighborhood. Once the penalty had been ascertained, the losing plaintiff or his pledges would pay it to the court.

Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1221–22 (1979). Holdsworth describes how England in the sixteenth and seventeenth centuries moved to cost statutes under which the losing party reimbursed the winning party for his litigation expenses:

> [T]hough from an early date the Chancellor in the exercise of his equitable jurisdiction, had assumed the fullest power to order the defeated party to pay costs, it was only by decrees that the principle made its way into the common law. The amercement of the vanquished party was perhaps considered a sufficient punishment. But a payment to the king or lord was not much satisfaction to the successful party; and so, side by side with the amercement, we get the gradual growth of the rule that the vanquished party must pay costs. The amercement gradually became merely formal, and finally disappeared; but the law about costs has increased in bulk and complexity from the thirteenth century onwards.

4 HOLDSWORTH, *supra* note 137, at 536–37; *see also* Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 853 (1929) (describing the development of English awards of costs and fees against losing plaintiffs and noting that "[i]n 1607 the final step was taken when it was provided that a defendant might recover costs in all cases in which the plaintiff would have had them if he had recovered").

[349] The origin of the American rule reportedly was colonial dislike of lawyers, which prompted legislatures to set limits on how much attorneys could recover from the losing party. The operating assumption was that fees would be paid by the losing party:

> During much of the eighteenth century, virtually all the colonies tried to regulate fees by statute. To be effective, such legislation had to prescribe both the fees a lawyer could charge his client and those that could be recovered from a defeated adversary. The laws governing attorney fee awards, in other words, served less as a way to shift or not shift fees from one party to another than as a way to limit the amount of those fees. *Once the fee was set, it was taken for granted that it could be recovered from a losing party.*

John Leubsdorf, *Toward a History of the American Rules on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 10–11 (1984) (emphasis added).

[350] The American rule applies only to attorney's fees: American courts regularly make a losing plaintiff pay at least some of the defendant's other expenses. The practice of assessing costs against losing parties is so routine that a federal statute allows the clerks of the court to tax the costs, without judicial oversight. *See* 28 U.S.C. § 1920 (1994) (providing that "a judge or clerk or any court of the United States may tax as costs" certain listed items, such as marshal

mid-nineteenth century, and it always has been riddled with exceptions that allow courts to penalize losing parties with fee awards.[351]

Moreover, there is some evidence that this was not just the historical practice in courts. At least some losing judicial petitioners to early legislative bodies also bore the risk of fees and costs. For example, when the House of Lords entertained judicial petitions in the seventeenth century, it had the power not only to impose costs against losing petitioners but also to make petitioners post security before their petition could proceed.[352] This practice continued, at least to

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and clerk fees, court reporter fees, printing costs, and witness fees).

[351] An award of fees today requires statutory authority at least in federal court. In 1796, the Supreme Court, in its cryptic statement of what would become the American rule recognized that Congress had the power to authorize awards of costs against the losing party: "The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, until it is changed, or modified, by statute." Arcambel v. Wiseman, 3 U.S. (1 Dall.) 306 (1796) (reversing an award of $1600 in attorney's fees). Since the inception of the nation, Congress has enacted statutes allowing awards of attorney's fees. The early statutes often were simply directions to federal courts to follow state practice. *See generally Alyeska Pipeline Serv. Co.*, 421 U.S. at 247–61 (surveying history of federal cost and fee statutes). But fees were commonly awarded. In fact, Congress complained that "losing litigants were being unfairly saddled with exorbitant fees for the victor's attorney" and, in 1853, enacted a new statute limiting the amount of attorney's fees that the winning party could collect. *See id.* at 251–54 (tracing the history of current day 28 U.S.C. § 1923 and noting that "with the exception of the small amounts allowed by § 1923, the rule 'has long been that attorney's fees are not ordinarily recoverable'") (citations omitted). Today, a number of doctrines and statutes allow the assessment of attorney's fees against the losing party. *See id* at 257–69. *See generally* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1570–90 (1993) (summarizing the common law exceptions and the more than 2000 state and 200 federal statutes shifting attorney's fees).

[352] *See* HART, *supra* note 137, at 38 (describing the costs and security procedure in the House of Lords in the 17th century). Hart, however, also suggests that the more common practice may have been simply to deny a frivolous petition. *See id.* at 37. Sir Blackstone explains that "losing" petitions under some systems met with even greater restrictions, but that in England the petition was subject to only minimal restrictions:

> In Russia we are told that the czar Peter established a law, that no subject might petition the throne, till he had first petitioned two different ministers of the state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death, if found to be in the wrong. The consequence of which was, that no one dared to offer such third petition; and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and while they promote the spirit of peace, they are no check upon that of liberty.

1 BLACKSTONE, *supra* note 145, at *139.

some extent, in colonial America. In 1746, Rhode Island passed a law requiring petitioners who asked the General Assembly for relief from a trial court judgment "to pay all lawful costs and damages, that he, she, or they have put his, her or their antagonists unto, in defending against such a petition" unless the petitioner won the requested relief.[353] Whether other colonial legislatures also had this practice is open to question, but most tended to follow judicial customs, which as noted, allowed for imposition of costs and attorneys' fees against a losing plaintiff.[354]

In sum, though this is a difficult question, the Court's precedent, historical practice, and even policy considerations reasonably support the conclusion that the right to petition courts—in its absolute form—does not protect losing claims. This definition does not render the right meaningless. Like true speech, the filing of winning claims is substantial activity that merits protection. For example, because a citizen has a right to file a winning claim, any restriction, such as a motive restriction,[355] that burdens that right is suspect. More importantly, as in speech cases, the narrow definition of the right does not necessarily give

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[353] *See* 6 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1757–1769, at 95–96 (Knowles, Anthony & Co. 1861) (noting January 27, 1746 Act).

[354] Colonial legislatures apparently imposed "judicial restrictions" when acting as a court, but the record is admittedly thin as to actual cost procedures and the criteria for their assessment. *See* 4 CONNECTICUT RECORDS 246 (1698) (setting out procedures for petitions against other individuals, including service, and "if upon the tryall of the cause it doth appear that either the petitioners or the person or persons cited does or have given the other any unjust trouble, the party wronged shall be allowed his just costs and damages as in other cases"); 9 CONNECTICUT RECORDS 61 (1744) (providing for service of "all original and judicial writs . . . in civil cases, and petitions and memorials wherein there shall be any party or parties to be notified, returnable to any superior or county court or to the General Assembly" and providing for payment of costs to appellee on appeal); *see also* Lawson & Seidman, *supra* note 4.

[355] A surprising number of statutes and other regulations impose "motive restrictions" on court filings. Some laws could be applied to punish even a winning suit if filed for a proscribed purpose. Indeed, such applications were at issue in both *Bill Johnson's Restaurants* (the NLRA and a motive to retaliate against striking employees) and *Professional Real Estate Investors* (the antitrust laws and an anti-competitive motive). This focus on motive restrictions is not surprising. The Court has long been hostile to motive restrictions on speech. *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (reversing verdict for emotional distress arising out of comic parody even if published to humiliate and harm: "[W]hile such a bad motive may be deemed controlling for purpose of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures"); *see also* Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (reversing conviction for criminal defamation: "If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice") (quoting State v. Burnham, 9 N.H. 34, 42 (1837)). In a companion article, I will discuss the validity under the Petition Clause of motive restrictions on filing civil complaints.

government free rein to impede meritorious but losing suits. Rather, the definition gives the courts flexibility. It is a starting point for determining the appropriate additional protection to give to the right. In Part IV, I will show that, as is the case of false speech, some protection of losing suits will be necessary in order to not chill the right to petition courts.

D. *A Right to File Only Claims Within the Court's Jurisdiction*

Finally, I offer one additional definitional element (though the right may require many more) of the right to petition courts. The right protects only claims within the court's jurisdiction. This proposition seems simple. It is a corollary to *Bill Johnson's Restaurants* and the conclusion that the right of court access under the Petition Clause extends only to winning claims. If a claim is not within the court's jurisdiction, it is not a winning claim. Even a lesser standard of merit, such as the *Professional Real Estate Investors* objective test, would not include a right to bring claims that are outside the court's jurisdiction. This argument may be easy to accept when applied to constitutional limitations on a court's jurisdiction such as those imposed by due process or Article III, but it is not so simple when applied to jurisdictional limits imposed by Congress. Such a restriction seemingly is an act by "Congress" that "abridges" the right to petition federal courts.

I start with jurisdictional limits imposed by the Constitution. The Constitution established a new system of government. Each branch of government has limited powers. It can act only as the Constitution provides. Though the concept of "separation of powers" has evolved beyond that envisioned in 1789, the new federal government did effect some changes from the pre-existing models of government in the states.[356] The Constitution moved away from the concentration of power in a supreme legislature to a more even distribution or balance of power among three branches. The drafters presumably wrote the Petition Clause with this change in mind.[357]

Given the constitutional scheme of the new government, a fair reading of the Petition Clause is that the right to petition is distributed according to the powers of the branches of government under the Constitution. In other words, the right does not include the right to file any type of petition with any branch of government, without regard to the constitutional powers or limitations of that branch. A citizen, for example, would not have the "right" to file a civil lawsuit at the White House, or to ask a court to enter into a treaty with a foreign nation. This is not to say that a citizen may be punished for misdirecting his petition to

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[356] For a discussion of the evolving concept of separation of powers, see *supra* notes 171–74, 181, 193, 201–03 and accompanying text.

[357] *See supra* notes Part II.B.

the wrong branch, only that the right in its absolute form does not extend to filing a petition with the wrong department of government.[358]

In changing the language to "the government," the drafters of the Petition Clause likely did not give much thought to the question of jurisdictional allocation and misdirected petitions.[359] They had no experience with the problem. Previous American models of the right to petition extended only to the legislature and did not raise the issue. Nevertheless, members of the First Congress were mindful of constitutional divisions of authority when they dealt with petitions. They were concerned that the correct governmental branch address the petition, and the House, the most frequent recipient of petitions, regularly referred petitions to the executive.[360] The First Congress even respected divisional authority between its two houses. The Senate, for example, refused to allow a petition to be read that should have been directed to the House.[361]

This jurisdictional element of the definition of the right to petition is particularly significant when applied to federal courts. Federal courts have

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[358] This is an area in which courts likely would decide to extend breathing room and prevent penalties for some activity that is not protected by the right—filing a complaint at the White House—so as to not chill the exercise of a protected right—filing a protest with the President on a related matter. The breathing room doctrine is discussed at *infra* Part IV.D.

[359] Nor have courts or scholars given this issue sufficient attention, though some have raised the question. *See* Lawson & Seidman, *supra* note 4, at manuscript p. 5 ("Is the right to petition satisfied if at least one institution of the government is available to receive petitions, or must all institutions, or certain specific institutions, be available to receive petitions in all circumstances?"); *see also* Note, *First Amendment Right of Access*, *supra* note 138, at 1060 n.34 (suggesting that justiciability limits on federal courts would limit the ability to petition those courts). Some litigants have begun to challenge standing limitations under the Petition Clause. For example, amicus briefs in *Bennett v. Spear*, 117 S. Ct. 1154 (1997), argued that the Ninth Circuit's restrictive application of the "zone of interests" test to deny standing violated the right to petition the government. *See* Amicus Brief of the Ass'n. of Cal. Water Agencies, 1996 WL 282521, at *9–10. The Supreme Court did not reach the issue, holding instead that petitioners had standing.

[360] The editors of the *Documentary History of the First Federal Congress* explained:

> Petitioners were expected to observe certain conventions and petitions that failed to accord with accepted formulas could be challenged on those grounds alone. First and foremost, a petition was expected to be clear and correct about the authority to whom it appealed. Handling misaddressed documents required some delicacy in order to avoid unintended encroachments on constitutional prerogatives.... One petition, addressed to the House but presented to the Senate on 3 February 1791, was not even allowed to be read in that body.

8 DOCUMENTARY HISTORY, *supra* note 184, at xviii.

[361] *See id.*

limited powers. They can hear only those "cases" and "controversies" specified in Article III.[362] Under this view, a citizen would not have a "right" to file in federal court a petition that does not state a "case" or "controversy" within the court's Article III power.[363] Such a jurisdictional limitation is consistent with the view of courts expressed in *Marbury v. Madison*,[364] only a few years after ratification of the Petition Clause. There, Chief Justice Marshall recognized that although a citizen has a right to protection of the laws whenever he suffers an injury, he nevertheless does not have a right to present his claim to the Supreme Court if Article III does not give the Court power to hear his claim.[365] Thus, a fair reading of the Petition Clause, when viewed under the entire constitutional scheme, is that it does not include the right to petition federal courts on matters outside of their Article III jurisdiction.

This leaves the question of the power of Congress to limit the jurisdiction of the federal courts. This is a different issue than the Article III limits. Under this assumption, Congress, not the Constitution, is restricting access to federal courts, and the Petition Clause expressly says that *Congress* shall not abridge the right to petition. But, since the mid-nineteenth century, the Court has held that the jurisdiction of the lower federal courts depends on a statutory grant of authority from Congress.[366] Congress has never given the federal district courts the full power available under Article III.[367] Does this congressional refusal to extend

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[362] Article III sets forth nine categories of cases and controversies over which federal courts may assert jurisdiction. These in turn fall into two broad categories—those disputes involving the powers of the federal government and those involving interstate controversies. *See* U.S. CONST. art. III, § 2.

[363] This limitation would include many of the justiciability limits on federal court power, such as standing. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION, at ch. 2 (2d ed. 1994).

[364] 5 U.S. (1 Cranch) 137 (1803).

[365] The Court declared unconstitutional the statute that allowed Marbury to apply directly to the Court for relief because this exceeded the Court's power under Article III. *See id.*

[366] Article III provides for one court, the Supreme Court, and leaves to Congress the question whether it will establish any additional courts. *See* U.S. CONST. art. III, § 1. ("The Judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). The Court has read this delegation to Congress to establish lower federal courts, if any, as requiring a statutory grant from Congress even as to the subject matter of the lower courts. *See* Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850). The need for statutory authority was reaffirmed by the Court in 1989 when it held that pendent party jurisdiction was not permissible without an express statutory grant. *See* Finley v. United States, 490 U.S. 545 (1989).

[367] For example, Congress has chosen to grant federal courts a power to hear diversity cases that is more narrow than that which Congress could grant under Article III. Among other things, § 1332 of the Judicial Code imposes a jurisdictional amount of $75,000 for diversity claims. *See* 28 U.S.C. § 1332 (Supp. II 1996). *See generally* CHEMERINSKY, *supra* note 363, at

jurisdiction to the federal courts constitute an abridgement of the right to petition those courts? If so, the right to petition could be an important new argument for those who have long contended that Congress does not have the ability to limit federal court jurisdiction.[368]

A possible response is that congressional restriction does not violate the right to petition because Article III does not require Congress to establish federal courts at all. In other words, the limited extension of jurisdiction to federal courts is not an abridgement of the right to petition the courts, but arguably a facilitation of the right, by creating courts to hear at least some types of judicial petitions. However, this may argue too much. If Congress is free to restrict access to the lower federal courts simply because the courts are not required under the Constitution, then the right to petition federal courts could become almost meaningless. Carried to an extreme, the argument would allow Congress to impose unreasonable preconditions on filing suit in the district courts simply because those courts are not constitutionally required. Under this view, the only court left for citizen petitions would be the Supreme Court which Article III requires and does not put within the discretion of Congress.[369]

Historical practice may provide a better answer. Courts have always limited access by jurisdiction. The First Congress extended only narrow jurisdiction to the federal courts, far less than that available under Article III.[370] For example, it did not give lower federal courts the power to hear cases raising solely federal questions.[371] This history suggests that the drafters of the Petition Clause did not view the clause as a limitation on their power to control federal subject-matter jurisdiction. Therefore, there is some historical basis for concluding that the right to petition extends only as far as the power of the federal courts, as granted both by Article III and by Congress. But the line between jurisdictional limits and other restrictions on court access by Congress is a difficult one to draw. It is an intriguing question that merits further thought.[372]

274–310.

[368] For a summary of the authorities and their arguments against congressional restriction of federal court jurisdiction, see CHEMERINSKY, *supra* note 363, at 186–205.

[369] However, Congress may have the power to limit the jurisdiction of the Supreme Court under the "Exceptions" Clause of Article III. *See generally id.* at 172–86.

[370] *See* The Judiciary Act of 1789, ch. XX, §§ 9, 13, 1 Stat. 73, 76–77, 80–81.

[371] *See id.*

[372] One interesting question is whether Congress could limit the power of the federal courts where the state courts cannot hear the case. This would in effect deny the petitioner the right of access to any court. Some authorities have suggested that such a limitation would violate due process. *See* CHEMERINSKY, *supra* note 363, at 186–205. However, as demonstrated by *Boddie*, the Court assumes that due process does not require any form of court in most cases because the litigants may resort to other means to resolve their claims. The right to petition, however, does not turn on the presence of informal means to resolve disputes and

Finally, under this theory, the right to petition state government, as that right applies to the states through the Due Process Clause of the Fourteenth Amendment,[373] would encompass the jurisdictional limits of state governments. For instance, a citizen would not have the "right" under the Petition Clause to ask Florida's legislature to repeal a New Jersey minimum wage law. These limits would similarly restrict a citizen's right to petition state courts. State courts, like federal courts, have subject matter restrictions,[374] and they also have jurisdictional limits imposed by federal due process requirements.[375] Both types of restrictions seemingly would limit the right to petition state courts. In other words, a citizen would not have a First Amendment right to file a complaint in state court against a defendant over whom the state cannot assert personal jurisdiction.

In sum, a plausible reading of the Petition Clause would impose "jurisdictional" limits on the ability to petition. Though this interpretation is not mandated by the literal terms of the clause, it helps make sense of the right in terms of our system of government, at least as it exists today. As with other definitional elements of the right to petition courts, such as the win-lose limitation discussed above, this jurisdictional limitation does not mean that the government could freely punish people who submit a petition to the wrong department of government. As I discuss in the next section, such punishment, depending on its form, likely would have too much of a chilling effect on the right to file the petition with the correct branch. But this latter question asks how to protect the narrow right, not how to define the right in the first place.

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might be the better avenue of attack. One could argue that the right to petition "the government" applies to all forms of government, federal and state combined, *see supra* note 191, and that Congress is free to restrict federal court jurisdiction, but only so long as there is some court available to which it may present its claims.

373 *See supra* note 22.

374 Though state courts are often called courts of "general" or unlimited subject-matter jurisdiction, this description usually refers to the state court system as a whole, as compared to the limited jurisdiction of the federal courts as a whole. Many individual state courts have limited subject-matter jurisdiction. A small claims court, for example, usually limits the cases to a maximum amount in dispute. In addition, some state courts are dedicated to types of cases, such as divorce or probate actions.

375 *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945) (setting forth general due process limits on state court assertion of jurisdiction over absent defendants). Federal courts also have due process limits on their power to assert jurisdiction over particular defendants, but the limitation is under the Fifth Amendment Due Process Clause, not the Fourteenth Amendment. The exact parameters of this limitation are not defined because, for the most part, federal courts follow the geographic jurisdictional limits of the states in which they sit. *See* FED. R. CIV. P. 4(k) (setting territorial limits of federal court jurisdiction).

IV. PROTECTION OF THE RIGHT OF COURT ACCESS UNDER THE PETITION CLAUSE

Having found and defined the narrow right of court access under the Petition Clause, the question becomes the degree of protection due that right. Courts do not invalidate a governmental action simply because it touches upon a constitutional right, but they instead look to the actual and potential impact of the government action in relation to the interests served by both the constitutional right and the governmental action. At times, this analysis takes the form of different levels of judicial scrutiny—strict scrutiny versus rational basis, for example—that reflect varying degrees of deference to government policy decisions.[376] In other areas, such as cases brought under the Speech Clause, the Supreme Court has an array of standards and tests for particular applications.[377] The speech cases provide a good starting point for assessing the right of court access under the First Amendment, but in the end, the proper analysis will depend on the type and aim of the government action at issue and its relative impact on the right of court access.

A. *Governmental Actions That Potentially Infringe on the Right of Court Access*

A wide variety of governmental actions may infringe on a citizen's right of access to the courts. These actions fall into two broad categories. The first group of actions are individual *actions* that impact a person's ability to gain access to court, such as a move by a government official that prevents a plaintiff from filing his civil suit. The other category reflects broader government policy: formal regulations or statutes that directly or indirectly restrict or control access to court.

A significant portion of the constitutional litigation surrounding the right to petition courts arises under Section 1983.[378] These private damage suits typically

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[376] For example, the Court applies "strict scrutiny" in equal protection challenges to statutes that discriminate between citizens based on "suspect classifications" or involving fundamental rights, but applies a more deferential "rational basis" review to statutes that make other distinctions on non-fundamental issues. *See generally* NOWAK & ROTUNDA, *supra* note 4, § 14.3.

[377] For example, in cases alleging defamatory speech, the Court has created distinctions between public and private figures and applied different standards of liability and burdens of proof depending on these distinctions. In cases involving commercial speech and speech in public fora, the Court has devised a reasonable time, place, and manner test for government regulation. *See generally id.* at ch. 16.

[378] *See* 42 U.S.C. § 1983 (1994) ("Every person who under color of any statute . . . of any

challenge individual acts that uniquely impact the plaintiff. Section 1983 plaintiffs have alleged that government officers intentionally covered up evidence and thereby prevented them from preparing and filing a civil complaint.[379] They have alleged that court clerks have lost their complaints.[380] They have charged that governmental employers have retaliated against employees for exercising their right to file a civil complaint against the government.[381] One plaintiff even alleged that a judge's barking dog unconstitutionally barred his access to court.[382]

The tough legal question in these cases usually is (or should be[383]) the existence and nature of the right of court access (*e.g.*, whether the right extends beyond the initial filing of the complaint). However, once the right is defined, whether as I propose in this Article or otherwise, the primary issues should be factual, such as whether the government agent actually deprived the plaintiff of access to court and whether the agent had the requisite intent to deprive the plaintiff of his right of access. Rarely should the court in these cases of individual government action need to balance competing policies because the government agent usually is not acting pursuant to official government policy.[384]

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state . . . subjects or causes to be subjected any citizen . . . the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .").

[379] *See* Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983) (alleging interference with right to file wrongful death suit through intentional cover-up of district attorney's murder of plaintiff's daughter).

[380] *See* McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972) (alleging that the clerk of court negligently handled complaint).

[381] *See* San Filippo v. Bongiovanni, 30 F.3d 424 (3d Cir. 1994) (claiming that a state university professor was fired in retaliation for filing suit against the university).

[382] *See* Monsky v. Moraghan, 127 F.3d 243 (2d Cir. 1997) (claiming that plaintiff was harassed by judge's dog).

[383] As noted earlier, courts usually do not address the distinction between a right of court access under the Petition Clause as opposed to other bases, such as due process or the prisoner doctrine. *See* discussion *supra* notes 123–25.

[384] Some of these government "action" cases, however, raise questions of the proper legal standard. For example, courts in retaliation claim cases usually struggle with defining the rights of government employees, as opposed to those of ordinary citizens. In the context of speech, where the plaintiff alleges that the government employer fired him because of his speech, the Court has developed varying standards for protection of the employee's right to speak, turning primarily on whether his speech was political. *See* Connick v. Meyers, 461 U.S. 138 (1983). Whether any such distinction should apply in cases alleging retaliation for filing suit, and, if so, what type of distinction, are questions currently under debate by the federal courts of appeal. *See Bongiovanni*, 30 F.3d at 424 (surveying different positions); *see also* Margo Pave, *Public Employees and the First Amendment Petition Clause: Protecting the Rights of the Citizen-Employees Who File Legitimate Grievances and Lawsuits Against Their Government*

The resolution of the remainder of the court access cases will not be so simple. In these, the government, pursuant to official policy, has deliberately acted in an institutional manner, usually through a regulation or statute, to control access to court and the complaining party is seeking to avoid application of these controls.[385] These restrictions come in a variety of forms. Some, such as a number of rules of civil procedure, directly control court access. Pleading rules, for example, demand that plaintiff state the claim in a certain manner.[386] Filing fee requirements condition a plaintiff's access on payment of money.[387] Likewise any form of sanction, whether through procedural rule, the court's inherent authority, or tort damages, burdens access to courts. Even informal rules, such as holiday court schedules, can impact access to court.[388]

In addition, a surprising number of statutes outside of the judicial procedural context impact court access even though that impact is not the specific aim of the statute. As demonstrated by the *Noerr-Pennington* line of court access cases, the antitrust laws would reach court filings, absent the Court's narrow interpretation of the antitrust laws to exclude such activity.[389] *Bill Johnson's Restaurants* showed that the labor laws would have a similar impact.[390] Countless other laws could apply to court filings. Lower courts, for example, have narrowly construed obstruction of justice statutes,[391] and even the civil rights laws,[392] to avoid their

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Employers, 90 NW. U. L. REV. 304 (1995).

[385] Even policies and practices of government institutions other than courts sometimes are intended to restrict court filings. For example, the court in *Acevedo v. Surles*, 778 F. Supp. 179 (S.D.N.Y. 1991), found that a policy of a state hospital to bill indigent patients for medical services only if and when they sued the state violated the patients' right of access to court. *See supra* note 226.

[386] Federal Rule of Civil Procedure 8, for example, mandates that a plaintiff plead certain elements in a civil complaint in federal court. Though these are minimal standards (often termed "notice pleading"), a complaint is defective and subject to dismissal if these standards are not met. *See* FED. R. CIV. P. 8; FED. R. CIV. P. 12(b)(6).

[387] Filing fees were the subject of the due process cases in the mid-1970s, beginning with *Boddie*. *See* discussion *supra* Part I.A.2.

[388] *See* Morrison v. Lipscomb, 877 F.2d 463 (6th Cir. 1989) (addressing a Petition Clause challenge to a holiday court schedule).

[389] *See* discussion *supra* notes 75–88.

[390] *See* discussion *supra* notes 101–07 and accompanying text.

[391] In *United States v. Hylton*, 710 F.2d 1106 (5th Cir. 1983), the Fifth Circuit held that a tax protester's filing of a criminal complaint for trespass against IRS agents could not constitute criminal impediment of an IRS investigation under 26 U.S.C. § 7212, which bars a citizen from "corruptly" impeding an IRS investigation. *See* 26 U.S.C. § 7212 (1994). Though the case involved a criminal rather than civil complaint, the court rested its narrow construction of the IRS statute on the cases applying the Petition Clause to civil complaints:

> As the United States Supreme Court has held, the right to petition for redress of

collision with the right of access to court.

> grievances is "among the most precious of the liberties safeguarded by the bill of rights." Inseparable from the guaranteed rights entrenched in the first amendment, the right to petition for redress of grievances occupies a "preferred place" in our system of representative government, and enjoys a "sanctity and a sanction not permitting dubious intrusions." Indeed, "[i]t was not by accident or coincidence that rights to freedom in speech and press were coupled in a single guarantee with the rights of the people peaceably to assemble and to petition for redress of grievances. Moreover, the Supreme Court has held expressly that the first amendment right to petition protects the individual[']s right to file an action with a "reasonable basis" in a state tribunal.
>
> . . . [W]e have concluded that Hylton's actions represent a legitimate and protected exercise of her right to petition for the redress of grievances. The record clearly reveals that Hylton placed a high value upon her right to personal privacy and genuinely attempted to protect her rights through the orderly pursuit of justice—the filing of citizen complaints with a reasonable basis.

Hylton, 710 F.2d at 1111–12; *cf.* Quinon v. FBI, 86 F.3d 1222, 1229 (D.C. Cir. 1996) (citing *Hylton* and holding that a motion to recuse the entire Eleventh Circuit could not serve as basis for obstruction of justice: "[T]he filing of a non-fraudulent pleading cannot, taken alone, form the basis for a legitimate obstruction of justice investigation").

[392] The issue does not arise often, but the civil rights laws could be applied to restrict at least some civil court filings. In a § 1983 action, for example, a plaintiff could allege that a person acting under color of state law brought a civil suit against her for a racially discriminatory motive. The few courts that have addressed application of petitioning immunity in civil rights actions have primarily addressed forms of petitioning activity other than civil court filings, and they are split as to whether any petitioning immunity applies in this context. *Compare* Barnes Found. v. Township of Lower Merion, 927 F. Supp. 874, 876–77 (E.D. Pa. 1996) (dismissing §§ 1983 & 1985 claims against neighbors based on their alleged lobbying for enforcement of regulations: "It is irrelevant that the neighbor's petitioning may have been motivated by racism. Under the *Noerr-Pennington* doctrine, it does not matter what factors fuel the citizen's desire to petition government. As long as there is petitioning activity, the motivation behind the activity is unimportant."), *with* LeBlanc-Sternberg v. Fletcher, 781 F. Supp. 261, 267 (S.D.N.Y. 1991) (rejecting First Amendment challenge to discrimination claim against neighbors who allegedly circulated petitions and advocated incorporation of village to oppose orthodox Jewish houses of worship). The *LeBlanc* court noted:

> Taking the plaintiffs' allegations of defendants' motives as true, we are not prepared to conclude that defendants' conduct is protected by the first amendment. The "first amendment . . . may not be used as the means or the pretext for achieving 'substantial evils' which the legislature has the power to control." . . . Particularly when the process invoked has no inherent safeguards to ensure that the rights of others are not abused, society's interest in protecting against discrimination must be accommodated. The value of the right to petition is not diminished by recognizing that the political process may not be subverted to achieve unlawful goals.

Id.; *see also* Kolln, *supra* note 119, at 1064–67 (arguing that the Petition Clause does not limit application of the Fair Housing Act).

Unlike isolated acts by a rogue government agent, institutional restrictions reflect considered policy judgments. The government has a reason for its restriction on court access. Courts cannot simply ignore these policies. In most cases, proper analysis of regulations requires courts to balance the respective interests at stake. This analysis will take different forms but in essence will require the courts to look at the nature and purpose behind the restriction and its impact on the right of access. This is not a new process. The courts have been doing this for years in speech cases against a similar array of governmental restrictions on speech.

B. *Applicability of Speech Doctrines to the Right of Court Access*

The right of petition, like that of speech, is a First Amendment freedom. They are both "precious" freedoms at the core of our republican government.[393] The Court more than fifty years ago in *Thomas v. Collins*[394] declared that the rights were "inseparable:"

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, and therefore united in the First Article's assurance.[395]

Indeed, speech and petition have overlapping functions, such as the interchange of ideas and citizen participation in government.

As *Thomas* recognized, however, speech and petitioning are "not identical." Petitioning has a separate, indeed longer, history of protection than speech.[396] It serves the distinct role of allowing the citizen to target his speech to lawmakers and giving him at least initial access to the government—aims not necessarily achieved by general speech. Accordingly, a number of courts and commentators have argued, and some continue to assert, that the right to petition merits *higher*

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[393] *See* NAACP v. Button, 371 U.S. 415, 432–33 (1963); *see also supra* notes 60–62.

[394] 323 U.S. 516 (1945).

[395] *Id.* at 530 (citation omitted).

[396] *See* Spanbauer, *supra* note 4, at 17 (surveying the relative histories of the rights to petition and speech and noting that "[t]he rights of speech and press evolved much more slowly in England than the right to petition"); *see also* Smith, *supra* note 4, at 1180–81 (noting that "in England after 1702, the right to petition in practice was an absolute right against the government" and that "[i]n contrast, prior to the American Revolution, several of the other rights guaranteed by the Bill of Rights, including the cognate rights of speech, press, and assembly, were subjected to widespread suppression").

protection than other First Amendment rights.[397]

In 1985, the Court in *McDonald v. Smith*[398] rejected this argument and refused to grant absolute protection to petitions. There, McDonald wrote President Reagan to urge the President not to appoint Smith as a United States Attorney and, in the process, allegedly made false and defamatory statements about Smith. When Smith later sued for defamation, McDonald claimed that his statements were absolutely protected under the Petition Clause. The Court applied the *New York Times* "actual malice" standard[399] to the defamation and refused to give McDonald's speech special protection solely by virtue of his putting it in a petition:

> To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, 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 to the President than other First Amendment expressions.[400]

Though speech and petition rights are co-equal and related, not all speech tests should apply with equal measure to all petition cases. The speech tests are the result of a balancing of interests and the specific tests differ even as to speech cases. For example, in the *New York Times* line of defamation cases, the Court makes distinctions based on the type of speech and the status of the alleged victim, affording greater protection to political speech and speech about public figures than to speech about private matters and private individuals.[401] It does so because the interest in protecting speech is greatest when the speech addresses public issues and the interest in protecting the victim is least when he is a public figure who has free access to the media to tell his version and attempt to remedy the falsehood.[402]

As it happens, the *New York Times* balance aptly applied to the petition in *McDonald*. The action was for defamation, so the government "regulation" at

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[397] *See* Spanbauer, *supra* note 4, at 17 (arguing that petition is a superior right to speech but not absolute); Smith, *supra* note 4, at 1183 (arguing that petition is a near absolute right).

[398] 472 U.S. 479 (1985).

[399] For a discussion of the *New York Times* standards for defamation, see *supra* note 327; *infra* notes 401–02, 420–26.

[400] *McDonald*, 472 U.S. at 485 (citations omitted).

[401] *See* New York Times v. Sullivan, 376 U.S. 254 (1964); discussion *infra* notes 401–02, 419–26.

[402] *See* Gertz v. Welch, 418 U.S. 323, 344–46 (1974); discussion *infra* notes 421–26.

issue and the policies supporting it were the same as in the *New York Times* line of cases—redress of reputation injuries and deterrence of misinformation through tort liability. Likewise, the countervailing interests were similar. McDonald's petition and its contested speech addressed a public figure and matters of public importance—the appointment of a new public prosecutor. Having already struck the proper balance of these interests in *New York Times*, it made no sense to reach a different balance in *McDonald*.

This identity of interests does not necessarily carry over to judicial petitions. First, the government interest in regulating the activity differs. Defamation liability does not attach to statements in civil complaints. The common law immunizes civil complaints from defamation liability and therefore seemingly recognizes that civil litigation involves different interests than general speech, which is not subject to such protection.[403] Of course, civil complaints are subject to other restrictions[404] (otherwise this discussion would be moot), but these restrictions involve government policies and interests different than those reflected in the tort of defamation. The limits on filing civil suits usually are not concerned about injury to reputation but instead other potential harms.

Unlike speech and other petitions, petitions to courts trigger an elaborate system of procedural responses by the government. This comes at considerable cost to the government and its taxpayers. The cost is not merely financial. Other citizens feel the impact of one person's filing of a civil complaint. Unlike the general populace's seemingly endless ability to receive speech, court process is not inexhaustible or free. Each petition to the court consumes judicial resources that otherwise could be spent on other petitions. The defendant feels a unique

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[403] The Restatement of Torts extends to civil litigants an absolute privilege from defamation liability arising from the communications "preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceedings." RESTATEMENT (SECOND) OF TORTS § 587 (1977). The Restatement explains the policy behind this privilege:

> The privilege . . . is based upon the public interest in according to all men the utmost freedom of access to the courts of justice for the settlement of their private disputes. Like the privilege of an attorney it is absolute. It protects a party to a private litigation . . . irrespective of his purpose in publishing the defamatory matter, of his belief in the truth or even his knowledge of its falsity.

Id. at cmt. a.

[404] The Restatement explains that the privilege does not extend to other forms of liability: "One against whom civil . . . proceedings are initiated may recover in an action for the wrongful institution of the proceedings . . . if the proceedings have terminated in his favor and were initiated without probable cause and for an improper purpose." *Id.*; *see also id.* § 586, cmt. a (explaining that absolute privilege for attorneys in civil litigation extends to defamation but not "the disciplinary power of the court of which he is an officer").

impact. He cannot ignore the petition or simply issue public denials. He must formally participate at considerable cost to himself, just to try to prevent further loss of property. Moreover, unlike most speech, the government is a participant in this "harm" to the defendant.

Second, civil filings do not correspond well with the distinctions on the speech side of the defamation formula—public versus private speech. The typical civil suit does not fall into either category. At first glance, a distinction might be made between civil suits raising political questions and ordinary civil complaints between private parties. But even a civil tort complaint against one's neighbor raises some issues of public concern. It asks for an application, and sometimes an outright change, in the law that can impact all citizens. A civil complaint, no matter how common, therefore is not the equivalent of private speech between private parties. Yet, this same civil complaint usually is not at the same level of public importance as political speech. The defamation categories of speech simply do not work for civil complaints.

In sum, though some specific speech tests might work in some petition cases, such as *McDonald*, they often will be a poor fit, particularly in access to court cases. This is not to say that the general speech doctrines are useless. They provide an excellent starting point for Petition Clause analysis. The specific speech tests took years to develop. Courts should repeat this process and look to the particular interests at stake in regulating right of access to court. In other words, courts in Petition Clause cases should apply the methods of the speech cases such as their strict scrutiny and breathing room balancing tests, but not necessarily their results.

C. *Strict Scrutiny of Restrictions on Court Access*

The Court has long applied "strict scrutiny" to judge regulation of First Amendment freedoms, including the right to petition.[405] This standard has many

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[405] In *Button*, the Court explained:

> [O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer to the constitutional claims . . . [to say] that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.
>
> However valid may be Virginia's interest in regulating the traditional illegal practices of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed by this record.

NAACP v. Button, 371 U.S. 415, 438–44 (1963); *see also* discussion *supra* notes 61–63.

articulations, but it generally requires courts to look to whether the government has a compelling state interest in regulating the exercise of the right and whether the regulation is narrowly drawn to achieve that goal with minimal impact on the right. Unlike other standards of review, this standard is not deferential to the government. Only a compelling state interest will justify even a minimal impact on the exercise of a First Amendment right. Thus, as the Court in *Thomas* recognized, First Amendment freedoms, including the right of petition, get more protection from government intrusion than do other constitutional rights, such as due process:

> [T]he preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment... gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standards governs the choice.
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> For these reasons, any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation.... Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly.[406]

This added scrutiny is an important distinction for, and "benefit" of, the right of court access under the Petition Clause, as compared to any claim of court access under due process. Even putting aside the Court's narrow application of due process to court access under cases such as *Boddie*,[407] the Court always has applied a "lesser" reasonableness standard to questions of due process.[408] As the Court stated in *Jones v. Union Guano*,[409] it will not invalidate a precondition to filing a civil suit under *due process* if "the condition imposed has *reasonable* relation to a legitimate object."[410] Strict scrutiny under the Petition Clause raises the standard by which the court will judge such a precondition. The Petition Clause requires that the state narrowly tailor its restriction—not just reasonably aim—to a compelling state interest—not just a legitimate object. What might pass due process reasonableness analysis, therefore, may not survive strict

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406 Thomas v. Collins, 407 U.S. 516, 530 (1945) (citations omitted).

407 *See generally* discussion *supra* Part I.A.2.

408 *See supra* notes 24–27.

409 264 U.S. 171 (1924); *see also* discussion *supra* notes 24–25.

410 *Id.* at 181 (emphasis added).

scrutiny.

Strict scrutiny, however, need not be the death knell for government regulation of court access. Though in other contexts many statutes fail to pass this exacting scrutiny, some survive. Otherwise, the test would be meaningless. For example, in *United States v. Harriss*,[411] the Court upheld under strict scrutiny the Federal Regulation of Lobbying Act against challenges based on the First Amendment rights of expression, press, and petition. Chief Justice Warren, writing for the Court, noted that Congress had a "vital national interest" in regulating lobbying to prevent the voice of the people from otherwise being "drowned out by the voice of special interest groups."[412] He also noted that the statute was narrowly drawn and not a direct prohibition on a lobbyist's right of access but instead only a disclosure requirement.[413] Any deterrent effect on exercise of First Amendment rights was only minor and indirect and therefore did not override the strong governmental interest in regulating lobbyists.[414]

Similarly, many government regulations touching upon access to court may pass strict scrutiny. In fact, *Harriss* provides a good analogy for perhaps the most prevalent restriction on access to courts—pleading rules. Pleading standards for complaints are forms of informational disclosures, aimed in part to ensure that pleaders have valid claims.[415] These "disclosures" in the initial complaint do not apply merely to losing claims; they apply equally to winning claims. Pleading standards may not deter winning claims, but they nonetheless "burden" the initial filing of a winning claim. But the burden is minimal and is supported by a compelling state interest. The governmental interest that the *Harriss* Court deemed compelling was the desire to give all persons a fair chance to air their views to Congress. In setting pleading standards, the government similarly helps

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411 347 U.S. 612 (1954).

412 *Id.* at 625.

413 *See id.*

414 The Court explained:

> It is suggested, however, that the Lobbying Act . . . may . . . act as a deterrent to their exercise of First Amendment rights . . . . But, even assuming some such deterrent effect, the restraint is at most an indirect one resulting from self-censorship. . . . The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest.

Id. at 626.

415 *See* JAMES FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.2 (2d ed. 1993) (summarizing the functions of modern pleading: "First, they permit the elimination from consideration of contentions that have no legal significance. . . . The second purpose of modern pleading is to guide the parties and the court in the conduct of cases").

give all persons access to court by ensuring that legitimate complaints are not drowned out by a flood of invalid claims.

Letting other plaintiffs be heard is not the only interest behind pleading standards and other restrictions that deter frivolous civil complaints. They help defendants. As noted above, the mere filing of a complaint can harm a defendant in many ways,[416] and the government has an interest in protecting its citizens from this harm. Moreover, as also noted above, every time a citizen files a civil complaint, the government (or more aptly, its sponsor, the taxpayers) incurs considerable costs.[417] The government certainly has an interest in promoting efficient use of its resources and in avoiding the waste of taxpayer money. Given these governmental interests, whether restrictions aimed at deterring frivolous suits pass strict scrutiny will depend, not on the compelling interest prong, but instead on the actual burden the restrictions place on the filing of winning claims.[418]

These are just a few examples. This general discussion cannot give a listing of restrictions on court access that do or do not pass strict scrutiny. Indeed, the strict scrutiny test necessarily looks at the particular circumstances of each regulation in light of the implicated interests and burdens on right of access. The point here is that because of the unique nature of courts and the burdens imposed by petitioning courts, the government likely will have compelling interests in regulating court access that it might not possess with regard to other First Amendment freedoms. These compelling interests justify at least some controls on court access, and whether a particular restriction passes strict scrutiny usually

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[416] *See* discussion *supra* pp. 675–76; *see also* Bill Johnson's Restaurant v. NLRB, 461 U.S. 731, 740–41 (1983).

[417] *See* discussion *supra* p. 675; *see also infra* note 418.

[418] For example, filing fees are aimed in part to deter frivolous suits, *see* Boddie v. Connecticut, 401 U.S. 371, 381 (1971), but if the fees act as a total bar or extreme deterrent for filing winning claims, either by their amount or as assessed against indigents, they likely will not pass the minimal impact prong of strict scrutiny. *See* Note, *First Amendment Right of Access*, *supra* note 38, at 1064–66 (arguing that filing fees as assessed against indigents would not pass strict scrutiny). Further complicating the analysis of filing fees, though, are the additional justifications for filing fees, which may add more weight to the compelling interest side of the equation. *See id.* at 1064 ("Filing fees may be justified on three grounds: cost recoupment, deterrence of unmeritorious litigation, and resource allocation."); *Boddie*, 401 U.S. at 381 (same). Indeed, legal commentators have argued that the government has a legitimate and, arguably compelling interest, in recovering the total cost of processing civil complaints. *See generally* Rex E. Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 CATH. U. L. REV. 267 (1985) (address by Solicitor General in which he argues that society should consider requiring court users to pay for court services); Phillip L. Spector, *Financing the Courts Through Fees: Incentives and Equity in Civil Litigation*, 58 JUDICATURE 330 (1975) (analyzing different policies and effects of charging "substantially higher fees" for court use).

will depend on the breadth of the regulation and its actual impact on access.

D. *"Breathing Room" for Court Access*

As discussed in Part III, I propose that the right of court access under the Petition Clause is a narrow right—it protects only the right to file winning claims within the jurisdiction of the courts. While strict scrutiny may apply to government restriction of this absolute right, the question remains whether courts should extend added protection to activity outside of this narrow right in order not to "chill" exercise of the narrow right.[419] In other words, should courts give "breathing room" to the right to file winning claims by protecting some losing claims?

The *New York Times* line of cases best illustrates the breathing room doctrine. There, the Court gives true speech, that protected under the First Amendment, breathing space by protecting some false speech, speech not otherwise within constitutional protection. In *New York Times* itself, the Court did this by requiring a defamation plaintiff to prove that the defendant either knew or recklessly disregarded that his speech was false.[420] Under this standard, false speech is protected if the defendant merely uttered it negligently.[421]

In *Gertz v. Welch*,[422] the Court further clarified and refined this breathing

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[419] For a general discussion of the concern about "chilling" exercise of First Amendment freedoms, see Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978).

[420] *See* New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964). The suit arose out of an "editorial" advertisement in the New York Times that, among other things, criticized the Montgomery, Alabama police department and solicited financial support for the civil rights movement. The commissioner of police for Montgomery brought a defamation suit, and the jury awarded him $500,000. The New York Times admitted that some of the statements about the police were false but appealed claiming that the award infringed freedom of speech and press. *See id.* at 256–64.

[421] The actual malice standard is not the only form of breathing room that the Court gives speech concerning public issues. In *New York Times*, the Court also imposes a higher standard of proof and requires public figure or official plaintiffs to prove the actual malice by clear and convincing evidence, not merely by the preponderance of the evidence. *See* 376 U.S. at 285. *See generally* NOWAK & ROTUNDA, *supra* note 4, § 16.33.

[422] 418 U.S. 323 (1974). Attorney Gertz represented the family of the victim in a suit against a Chicago police officer who allegedly killed their son. *See id.* at 325. Though the officer was convicted of murder, Welch, publisher of a John Birch Society newsletter, charged that Gertz was part of a national conspiracy to discredit law enforcement and substitute a national police force supportive of the communist party. *See id.* at 325–26. Gertz filed a libel action in federal court, and the jury awarded him $50,000. *See id.* at 327–29. The trial court entered judgment for Welch on the ground that *New York Times* immunized this speech, and the Supreme Court reversed. *See id.* at 329–32.

room doctrine. It explained that the degree and type of breathing space in defamation cases depended on a balancing of dangers or, put another way, the relative values of redressing false speech and promoting true speech:

> The need to avoid self-censorship by the news media is [ ] not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. . . .
>
> The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the state to abandon this purpose . . . .
>
> Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. . . . In our continuing effort to define . . . these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. To that end this Court has extended a measure of strategic protection to defamatory falsehood.[423]

The Court explained that *New York Times* involved speech about public officials and about issues of great moment of the day, the civil rights movement, and therefore warranted "extra" protection.[424] Speech about private individuals and private matters demands a separate balancing.[425] Because the dangers to the

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[423] *Id.* at 341–42 (citations omitted). The Court also elected to set general rules of application rather than allow courts to balance these interests in each case:

> Theoretically, of course, the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis. . . . But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.

Id. at 343–44.

[424] *See id.* at 334, 342.

[425] In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Court applied the *New York Times* actual malice standard to the tort of intentional infliction of emotional distress and noted that its application depended on the balancing of interests:

> We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the *New York Times* standard, it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by

private plaintiff are greater and the value of the speech is less, private speech does not mandate the same degree of breathing room.[426] Accordingly, a private plaintiff need not prove that the defendant knew or recklessly disregarded the falsity of his speech.

The Court in *Gertz* warned, however, that this different balance does not give the states free rein to punish in any way they wish false speech about individuals. A severe punishment of false speech may chill true speech just as much, if not more, than a negligence standard for determining the defendant's awareness of his wrong. Accordingly, the Court held that presumed and punitive damages for defamation are impermissible infringements upon speech.[427] These

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the First Amendment.

Id. at 56.

[426] The *Gertz* Court further explained these differences:

> [W]e have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.
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> ....
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> ... [Public officials and public figures also assume some of the risk of defamation]. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an "influential role in ordering society."... Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.
>
> For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.

Gertz, 418 U.S. at 344–46.

[427] The Court explained that its refusal to apply the *New York Times* actual malice standard to private speech was not based on a belief that the concerns at issue in *New York Times* were not present:

> Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury....
>
> The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss.... The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.... More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of

penalties are too likely to deter true speech and go beyond the state's legitimate interest in redressing the harm suffered by private individuals. In other words, true speech about private matters merits added protection through this form of breathing space.

Buffer zones might similarly protect the right of court access under the Petition Clause. The right to file winning claims may need breathing room through some protection of losing suits. The easiest example is a criminal penalty for filing a losing suit. The sanction would not directly infringe on the right protected by the First Amendment because the Petition Clause (under my proposed definition) protects only winning suits, but the threat of criminal penalties would deter all but the most brave, or perhaps irrational, litigants from filing even a winning claim. Such criminal penalties hence would destroy, albeit indirectly, the right guaranteed by the Petition Clause. As is the case of punitive damages in defamation cases, such penalties would not be valid because they do not give enough breathing room to the First Amendment right to file winning claims.

On the other hand, as discussed in Part III.C, the imposition of actual damages in the form of costs, including attorney's fees, against losing suits likely is not too great a risk, as a constitutional matter. To be sure, imposition of attorney's fees may deter even winning suits, but, as in *Gertz*, it is a lesser risk and one that more closely fulfills a legitimate state goal—compensation of the "victim" of the losing suit through payment of his expenses. This is not to say that all states should impose such costs and fees on losing suits. For their own policy reasons, states may decide to grant greater protection to court access. The question here is what is constitutionally permissible, and the Court in *Bill Johnson's Restaurants* specifically allowed the NLRB to impose against a losing plaintiff damages in the form of the defendants' attorney's fees.[428]

Another obvious breathing room issue is whether the original *New York Times* form of breathing room—the actual malice standard—is necessary for court access.[429] Some commentators and courts have claimed that right of access

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money damages far in excess of any actual injury.

> We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved.

Id. at 348–49.

[428] *See supra* note 314–16.

[429] *But see* McGowan & Lemley, *supra* note 4, at 395 (arguing that there "is no interest compelling the adoption of speech-protective rules in the litigation context that is similar to the interest in uninhibited debate that supported the actual malice rule in *New York Times*").

demands such protection. They argue that the plaintiff must actually know, or at least recklessly disregard, that his complaint is baseless (or, under my definition of the right to petition courts, a losing suit) before a court may punish him for filing it.[430] This argument was implicitly rejected in *Bill Johnson's Restaurants*, where the Court allowed the NLRB to impose sanctions on the employer simply because it lost the suit. To be sure, the sanctions there required a motive element—a retaliatory motive as defined by the federal labor laws—but, as the Court has noted in the context of *New York Times*, motive is a different question than "actual malice."[431] The *New York Times* actual malice standard looks to the defendant's awareness of the validity of his action. *Bill Johnson's Restaurants* did not require any such awareness by the employer.

The Court's implicit rejection of the *New York Times* actual malice standard for protection of court access likely is justified. In *Gertz*, the Court did not extend the actual malice protection to speech about private, as opposed to public, persons because the government has a stronger interest in compensating private victims of defamation and because such speech about private individuals has less societal value. In most applications of court access, the balance similarly is tilted toward compensation of the victim. Like the private defamation plaintiff, the

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[430] Some commentators argue that Federal Rule of Civil Procedure 11, *see supra* notes 12, 303; *infra* note 436, should have an actual malice rather than mere negligence standard. Rule 11 has a reasonable inquiry standard under which a plaintiff may be sanctioned for filing a baseless complaint even if he did not actually appreciate that the claim was baseless. *See* Spanbauer, *supra* note 4, at 60–62 (arguing that Rule 11, "[b]y replacing the subjective bad faith requirement with an objective standard . . . now encompasses merely negligent conduct" and is "an invalid restriction of the constitutional right of access to the courts via the First Amendment Petition Clause"); *see also* Note, *Suits Against the Government*, *supra* note 12, at 1127 (arguing for a higher standard than *New York Times*—actual knowledge—in applying Rule 11 to citizen suits against the government); *cf.* Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997 (1983) (raising the "difficult" question as to whether the Supreme Court has power under the Rules Enabling Act to sanction for non-willful conduct). For two reasons, the Rule 11 reasonable inquiry prong likely is not an unconstitutional invasion of necessary breathing space for the right to file civil suits. First, the Court implicitly rejected an actual awareness standard in *Bill Johnson's Restaurants*. *See supra* note 431. Second, breathing room can take different forms. Rule 11 already provides breathing room to winning suits in the form of a lower merits standard. The rule does not punish losing suits that had some merit at the time of filing, and thus it offers a substantial amount of breathing room for winning claims even without allowing for the state of mind of the filer.

[431] In *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967), the Court explained that the *New York Times* actual malice standard requires that the defendant have a "high degree of awareness of [the] probable falsity" of the speech, not "bad or corrupt motive" or "personal spite, ill will or a desire to injure plaintiff" through the speech. *See id.* at 82, 84 (internal quotation marks omitted).

victim of an invalid suit does not have a self-help option.[432] The typical civil defendant does not have access to the media. Even if he did, he could not redress all of the harm of a wrongful civil suit. To the contrary, the government forces him to participate and incur costs. Similarly, the value of the petitioning activity is not necessarily as great as that of political speech. As noted above,[433] civil complaints to courts do not fit into the two *New York Times* categories but rather fall somewhere between. Therefore, the balance of values and interests for most civil suits likely falls closer to *Gertz* than to *New York Times*.

A possible exception is a civil suit against the government or its officials. Most such suits will present issues of high social value. Civil rights actions against the government present issues, at least as important, if not more so, than general speech about public officials. A simple tort action against the government will not raise issues of such high import, but it still serves an added interest over that in a private tort suit, one of government accountability. On the other side of the equation, the interest in compensating the victim is less in suits against the government than in the typical civil suit. The victims here are the government defendants. Unlike private citizens, the government and its officials have access to mass media to state their views and to counter any reputation harm arising from the complaint. To be sure, the government defendants still would be burdened—they, like any other civil defendant[434] must respond and incur costs—but that burden is more easily absorbed by all taxpayers than by a private individual. Therefore, though the mix is not quite the same as that for defamation cases against public officials, the balance of interests still may justify application of breathing room in the form of an actual malice standard.[435]

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[432] The opportunity for such self-help through the media was a factor in the *Gertz* Court's distinction between private and public plaintiffs in defamation cases. *See* discussion *supra* note 426.

[433] *See supra* Part IV.B.

[434] The government's duty to respond and its extent of harm, of course, depends on the degree to which the government has waived sovereign immunity. Whether the right to petition affects sovereign immunity is the subject of debate. *See generally* Lawson & Seidman, *supra* note 4; Pfander, *supra* note 4.

[435] Some courts and commentators agree that suits against the government deserve special protection, but they advance different reasons for and variant forms of the protection. Some courts, for example, have held that plaintiffs who sue the government (as opposed to another private party) are absolutely immune from a subsequent action for malicious prosecution by the government. *See, e.g.*, City of Long Beach v. Bozek, 33 Cal. Rptr. 3d 727 (Cal. 1983); Cates v. Oldham, 450 So. 2d 224 (Fla. 1984). One Note argues that suits against the government are "double petitions"—they are petitions (1) to the government (2) against the government—and therefore demand special protection in the form of an actual knowledge standard before the plaintiff may be sanctioned for bringing a wrongful claim against the government. *See* Note, *Suits Against the Government*, *supra* note 12, at 1127.

Another potential source of breathing room is adjustment of the substantive merits standards for the initial filing of a civil suit. In other words, move the threshold for filing (as opposed to a subsequent award of damages) to something other than "winning" claims. Most procedural rules, including Rule 11 of the Federal Rules of Civil Procedure,[436] impose a far lower standard of merit for the initial filing of the suit. They merely require the plaintiff to have a modicum of evidence and law to support his claim and the fact that plaintiff later loses his suit does not mean he violated this initial filing standard.[437] The question is whether the Petition Clause mandates such lower standards in order to give breathing room to the winning claims. An initial answer would seem to be no. If a court may later impose compensatory damages, including substantial attorney's fees, on losing suits, then procedural rules, which impose lesser sanctions, do not have to allow losing suits.

This argument overlooks the different points in time at which the "winning" standard applies. There is a difference between telling a litigant, on the one hand, that he must have enough support to win a suit before he files it, and, on the other hand, warning him that he will have to pay substantial costs if he ultimately loses his suit. If the winning standard is applied at the beginning of the suit, as a prerequisite to filing, it would bar a suit that a plaintiff could win but needs discovery to support. Some breathing room at the point of filing therefore likely is necessary to avoid chilling the filing of winning claims. Indeed, this distinction

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[436] Rule 11(b) sets forth a certification requirement:

> (b) *Representations to Court.* By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonable based on a lack of information or belief.

FED. R. CIV. P. 11(b).

[437] *See* FED. R. CIV. P. 11(b)(2), (3); *supra* note 436.

is reflected in the Court's two-tier test for baseless suits in *Bill Johnson's Restaurants*. There, the Court held that the NLRB may not enjoin an employer's suit if that suit has enough factual and legal merit to withstand summary judgment.[438] The test is not whether the claim is a winning one, but instead a lesser standard—whether the suit presents genuine issues. Thus, suits not within the literal definition of the right have some protection and that protection is consistent with the Court's breathing room doctrine.[439]

This timing element of breathing space also is justified under the "prior restraint" doctrine that the Court applies in speech cases. The prior restraint rule is one under which courts view subsequent punishment, as opposed to prior restraint, as the preferable means of controlling improper and unprotected speech.[440] The Court does not absolutely forbid prior restraints in all circumstances, but it does impose a "heavy presumption" against prior restraints.[441] This rule, like the *New York Times* actual malice standard, is an application of the concern about chilling speech, but the prior restraint rule addresses a more extreme application. The subsequent punishment at issue in *New York Times* and *Gertz* deters speech, but prior restraint *stops* speech.[442]

Courts should similarly hesitate before issuing a prior restraint on access to court. To enjoin a person from filing a complaint is to deny him access, just as to

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[438] *See supra* notes 101–04, 314–16.

[439] To be sure, the Court did not expressly base this distinction on a breathing space rationale, and whether the federal government can enjoin a state court suit necessarily involves a number of policy considerations in addition to those underlying the breathing room doctrine. *See infra* note 443. However, the Court's sliding scale of merit is consistent with breathing room doctrine.

[440] This doctrine is rooted in the freedom of speech and, in particular, the freedom of the press. In fact, the Court has stated that the primary purpose of the Press Clause of the First Amendment is to prevent prior restraints. *See* Near v. Minnesota, 283 U.S. 697, 713 (1931). The Pentagon Papers case is the prime example. There, the government tried to enjoin the New York Times and the Washington Post from publishing secret government documents about the Vietnam War. *See* New York Times v. United States, 403 U.S. 713, 714 (1971).

[441] *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

[442] Professors Nowak and Rotunda explain this preference:

> Historically, prior restraint has always been viewed as more dangerous to free speech, but why? The marketplace theory of free speech supports this historical distinction between prior restraint and subsequent punishment. While subsequent punishment may deter some speakers, at least the ideas or speech at issue can be placed before the public. But prior restraint limits public debate and knowledge more severely. *Punishment of speech, after it has occurred, chills free expression. Prior restraint freezes free speech.*

NOWAK & ROTUNDA, *supra* note 4, at 1020 (emphasis added).

enjoin someone from speaking is to deny him speech. The prior restraint rule should give a plaintiff the benefit of the doubt in most cases and allow him to exercise the broad initial right to file the complaint while withholding any punishment until after a determination that the person filed a losing claim. Therefore, as in speech cases and as reflected in the Court's two-tier standard in *Bill Johnson's Restaurants*, courts should be particularly cautious against enjoining[443] or otherwise preventing the filing of civil suits.[444]

In sum, application of the breathing room doctrine, like strict scrutiny, necessarily depends on the particular regulation at issue. It is a balancing process. The above discussion merely highlights the guideposts for more detailed analysis. In the companion articles, I will address breathing room in the context of actual statutes and regulations that do not directly impede the right to file winning civil suits but come close to that right and therefore threaten a chilling effect.

E. *Avoidance of Vague and Overbroad Restraints on Court Access*

Two other speech doctrines also reflect the Court's concern about unnecessarily chilling the exercise of First Amendment freedoms. The vagueness doctrine demands an exacting clarity in statutes that regulate First Amendment activity. The overbreadth rule invalidates statutes that substantially restrict both non-protecting undertakings and activity secured under the First Amendment. These canons unite in their purpose to avoid undue deterrence and have some potential application in the safeguarding of the right of court access under the Petition Clause.

The vagueness doctrine in general application is a due process inquiry. The concern is that a statute is so poorly phrased that it does not put a person on

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[443] Of course, other doctrines require courts to exercise such caution when determining whether to enjoin proceedings in other courts. In fact, the Anti-Injunction Act severely curtails the ability of a federal court to enjoin state court proceedings. *See* 28 U.S.C. § 2283 (1994). Under a technical reading of the Petition Clause, the ability to enjoin ongoing state court proceedings is a separate question from enjoining initial access to state courts. Because the Petition Clause extends only to the initial filing of the action, not to its subsequent procedure and resolution, only the latter question is within its literal terms. However, the breathing room doctrine may mandate that government not unduly interfere with actions once filed, and due process likewise would impose some limits. *See* discussion *supra* notes 298–306.

[444] The Court has held that acts other than injunctions can constitute a prior restraint. For example, the Court has characterized a permit or fee precondition for assembly and speech in a public forum as a prior restraint. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) (holding that an "ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies . . . is a prior restraint on speech").

notice of what behavior is permissible and what is outlawed.[445] The Court has been especially vigilant in applying the vagueness doctrine to laws that regulate First Amendment freedoms. The Court in *Button* warned that statutes touching on such rights, including the right to petition, must be stated with "narrow specificity" in order to avoid chilling exercise of the person's rights:

> [S]tandards of permissible statutory vagueness are strict in the area of free expression... It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement.... [T]he danger [is] tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.[446]

What constitutes sufficient "specificity" is a complex question. The Court has given some guidelines. First, courts should have more tolerance for imprecision where the harm the government seeks to avoid is great and where the harm does not lend itself to detailed description.[447] Second, if the statute turns on a subjective interpretation, it is more likely to be declared impermissibly vague.[448] Third, courts should give greater indulgence to rules that have a particular meaning within a learned trade, such as attorney disciplinary rules.[449] Finally, and most importantly, when applying each of these standards, courts should demand greater specificity of statutes that affect First Amendment

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[445] In *Connally v. General Construction Co.*, 269 U.S. 385 (1926), the Court stated the due process test: "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Id.* at 391.

[446] NAACP v. Button, 371 U.S. 415, 432–33 (1963) (citations omitted); *see* discussion *supra* notes 61–63.

[447] Professors Nowak and Rotunda explain this tolerance: "If a threat is greater and its regulation or prohibition cannot be expressed more concretely, the Court will tolerate comparatively more vagueness. For example, a statute forbidding reckless *walking* would be unconstitutionally vague, while a statute forbidding reckless *driving* is not void for vagueness." NOWAK & ROTUNDA, *supra* note 4, at 1001 (emphasis in original).

[448] *See* Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971) (finding as unconstitutionally vague a statute that turned on a subjective standard of "annoyance").

[449] *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 665 (1985) (Brennan, J., concurring in part and judgment, and dissenting in part) ("Given the tradition of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts.").

rights.[450]

These guidelines should govern regulations that control court access, and courts should invalidate unnecessarily vague restrictions on filing civil complaints. This is true even though civil litigation usually is instituted by learned professionals—lawyers. These rules are not immune from attack.[451] The Court, for example, recently invalidated a Nevada attorney disciplinary rule as unconstitutionally vague even though the rule was based on the ABA's Model Rule and in wide usage.[452] This rule limited what a lawyer could say in public about a pending case, and the Court found that because its illustrative listing of prohibited speech was arguably inconsistent with its listing of permitted speech, the rule was unconstitutionally vague.[453]

The overbreadth doctrine provides similar protection to First Amendment freedoms. The flaw of an overbroad statute is that the statute prohibits both activity that the government is free to regulate and activity protected under the First Amendment. Not just any potential improper application will invalidate a statute that otherwise properly reaches activity within the police power of government. The test is whether the statute substantially burdens protected activity.[454]

The overbreadth doctrine is closely related to that of vagueness, and the Court usually addresses the two concepts together. The doctrine interacts with the vagueness rule where a statute does not define clearly the point at which its regulation stops, so that the statute arguably bars both protected and unprotected behavior. The statute is either overbroad—because it touches upon both types of activity—or vague—because it does not clearly state that it does not reach protected endeavors. Thus, to the extent that stricter standards apply to judge vagueness of regulations affecting access to court, those heightened standards also determine whether the regulations are overbroad.[455] A statute that

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[450] *See* Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) ("[W]here a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit those freedoms.") (internal quotations marks omitted).

[451] *See, e.g.*, Martha Elizabeth Johnston, *ABA Code of Professional Responsibility: Void for Vagueness?*, 57 N.C. L. REV. 671 (1979).

[452] *See* Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991). The Court noted that Nevada Supreme Court Rule 177 was "almost identical to ABA Model Rule of Professional Conduct 3.6." *Id.* at 1033.

[453] *See id.* at 1048–51.

[454] *See id.* at 1077 ("The 'overbreadth' doctrine applies if an enactment 'prohibits constitutionally protected conduct.' To be unconstitutional, overbreadth must be 'substantial.'") (citations omitted).

[455] In addition, the overbreadth doctrine creates a special rule of standing in cases under the First Amendment. If the statute applies to activity protected under the First Amendment, the plaintiff himself need not have engaged in the protected activity to challenge the breadth of the

substantially burdens the filing of both winning and losing claims would be invalid under the overbreadth doctrine even though it was intended to regulate and deter losing suits.

V. CONCLUSION

Now is the time to carefully consider an individual's right of access to court under the Petition Clause, before it is lost or becomes a source of ill-considered results. This Article offers a proposal for properly defining and protecting the right. Though I contend that the right of court access under the Petition Clause is a narrow right, I believe that it is a meaningful right. It fills the void left by the Court's due process decisions. The Petition Clause alone guarantees the average person the right to come to court and ask for redress of his claim. Otherwise, the government could impose undue restrictions even on suits that stated winning claims. On the other hand, because the right is a narrow one, its recognition and enforcement will not bring about wide-scale changes to civil procedure or other law. As I hope to demonstrate in subsequent articles, application of this new right of access to court will be one of adjustment, not overhaul.

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statute. As the Court explained in *Button*, the plaintiff in this circumstance may challenge the statute and a court may invalidate it to avoid chilling the exercise of protected activity by others:

> [T]he instant decree [banning the NAACP from encouraging litigation] may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the [NAACP] has engaged in unprivileged conduct. For in appraising a statute's inhibiting effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.

NAACP v. Button, 371 U.S. 415, 432 (1963). Presumably, this standing rule would apply, for example, to a litigant who had a "losing" claim, activity unprotected by the right of access under the Petition Clause, but still had an argument that a procedural rule also applied to bar the protected activity of filing a winning claim.