THE FIRST AMENDMENT

FREEDOM OF ASSEMBLY AND PETITION

Its Constitutional History and the Contemporary Debate

EDITED BY MARGARET M. RUSSELL

BILL OF RIGHTS SERIES
DAVID B. OPPENHEIMER, SERIES EDITOR

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

—FROM THE FIRST AMENDMENT

The First Amendment of the US Constitution's Bill of Rights guarantees the protection of freedoms through a number of clauses. Among these, the least explored is the Assembly and Petition Clause. Most literature about the First Amendment omits sustained consideration of the core concepts of assembly and petition, which date back to the Magna Carta. This omission exists despite the fact that the US Supreme Court has termed these rights "among the most precious of liberties guaranteed by the Bill of Rights" (*United Mine Workers v. Illinois Bar Association* [1967]).

This is the first anthology to focus exclusively on the fundamental constitutional freedoms of assembly and petition, and to analyze them as distinct foundational rights within the First Amendment. Editor and law professor Margaret M. Russell has selected authoritative articles that masterfully illuminate the origins, history, scope, and contemporary relevance of the right of the people to gather (assemble) in order to urge (petition) the government to address their concerns.

The first section examines the textual origins of assembly and petition as a unitary clause in the First Amendment and explains the historical roots of the interdependence of the two concepts. Because scholars usually break up this clause into two mini-clauses, the remaining sections of the anthology address the Petition Clause and the Assembly Clause separately. In the second section, the focus is on the Petition Clause, which has generated significant scholarly attention in the last two decades in areas as diverse as libel, immigration, and antitrust law. The third section looks at the Assembly Clause, which has sparked considerably less legal attention, perhaps because it is often included in analyses of freedom of speech.

This highly accessible and well-organized anthology should be read and appreciated by all who have an abiding interest in our basic constitutional rights. It will be of great value to students and scholars of the law, American history, and political science.

MARGARET M. RUSSELL is a professor at Santa Clara University School of Law, specializing in civil procedure and constitutional law, particularly the First Amendment. She is a member of the American Law Institute and is a longtime leader in the American Civil Liberties Union, the Equal Justice Society, and other law and policy organizations.

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CONTENTS

APPENDIXES

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To my parents and my children

CONTENTS

APPENDIXES

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BILL OF RIGHTS SERIES EDITOR'S PREFACE

Abortion; the death penalty; school prayer; the pledge of allegiance; torture; surveillance; tort reform; jury trials; preventative detention; firearm registration; censorship; privacy; police misconduct; birth control; school vouchers; prison crowding; taking property by public domain—these issues, torn from the headlines, cover many, if not most, of the major public disputes arising today, in the dawn of the twenty-first century. Yet they are resolved by our courts based on a document fewer than five hundred words long, drafted in the eighteenth century, and regarded by many at the time of its drafting as unnecessary. The Bill of Rights, the name we give the first ten amendments to the United States Constitution, is our basic source of law for resolving these issues. This series of books, of which this is volume 4, is intended to help us improve our understanding of the debates that gave rise to these rights, and of the continuing controversy about their meaning today.

When our Constitution was drafted, the framers were concerned with defining the structure and powers of our new federal government, and balancing its three branches. They didn't initially focus on the question of individual rights. The drafters organized the Constitution into seven sections, termed "Articles," each concerned with a specific area of federal authority. Article I sets forth the legislative powers of the Congress; Article II the exec-

utive powers of the president; Article III the judicial power of the federal courts. Article V governs the process for amending the Constitution. Article VI declares the supremacy of federal law on those subjects under federal jurisdiction, while Article VII provides the process for ratification. Only Article IV is concerned with individual rights, and only in a single sentence requiring states to give citizens of other states the same rights they provide to their own citizens. (Article IV also provides for the return of runaway slaves, a provision repealed in 1865 by the Thirteenth Amendment.)

When the Constitutional Convention completed its work, in 1787, it sent the Constitution to the states for adoption. The opponents of ratification, known as the "Anti-Federalists" because they opposed the strong federal government envisioned in the Constitution, argued that without a Bill of Rights the federal government would be a danger to liberty. The "Federalists," principally Alexander Hamilton, James Madison, and John Jay, responded in a series of anonymous newspaper articles now known as the "Federalist Papers." The Federalists initially argued that there was no need for a federal Bill of Rights, because most states (seven) had a state Bill of Rights, and because the proposed Constitution limited the power of the federal government to only those areas specifically enumerated, leaving all remaining powers to the states or the people. But in time, Madison would become the great proponent and drafter of the Bill of Rights.

The proposed Constitution was sent to the states for ratification on September 17, 1787. Delaware was the first state to assent, followed rapidly by Pennsylvania, New Jersey, Georgia, and Connecticut. But when the Massachusetts Legislature met in January 1788 to debate ratification, several vocal members took up the objection that without a Bill of Rights the proposed Constitution endangered individual liberty. A compromise was brokered, with the Federalists agreeing to support amending the Constitution to add a Bill of Rights following ratification. The Anti-Federalists, led by John Adams and John Hancock, agreed, and Massachusetts ratified. When Maryland, South Carolina, and New Hampshire followed, the requisite nine states had signed on. Virginia and New York quickly followed, with North Carolina ratifying in 1789, and Rhode Island in 1790. In addition to Massachusetts, New Hampshire's, Virginia's, and New York's ratifying conventions conditioned their acceptance on the understanding that a Bill of Rights would be added.

The first Congress met in New York in March 1789, and among its first acts began debating and drafting the Bill of Rights. Federalist Congressman

James Madison took responsibility for drafting the bill, having by then concluded that it would strengthen the legitimacy of the new government. He relied heavily on the state constitutions, especially the Virginia Declaration of Rights, in setting out those individual rights that should be protected from federal interference.

Madison steered seventeen proposed amendments through the House, of which the Senate agreed to twelve. On September 2, 1789, President Washington sent them to the states for ratification. Of the twelve, two, concerning congressional representation and congressional pay, failed to achieve ratification by over three-quarters of the states (the congressional pay amendment was finally ratified in 1992). The remaining ten were ratified and, with the vote of Virginia, on December 15, 1791, became the first ten amendments to the Constitution, or the "Bill of Rights."

The Bill of Rights as originally adopted only applied to the federal government. Its purpose was to restrict Congress from interfering with rights reserved to the people. Thus, under the First Amendment the Congress could not establish a national religion, but the states could establish state support for selected religions, as seven states to some extent did (Connecticut, Georgia, Maryland, Massachusetts, New Hampshire, South Carolina, and Vermont). Madison had proposed that the states also be bound by the Bill of Rights, and the House agreed, but the Senate rejected the proposal.

Although the Declaration of Independence provided that "We hold these truths to be self-evident, that all men are created equal," the Constitution and Bill of Rights are conspicuously silent on the question of equality, because the agreement that made the Constitution possible was the North/South compromise permitting the continuation of slavery. Thus, today's issues like affirmative action, race and sex discrimination, school segregation, and same-sex marriage cannot be resolved through application of the Bill of Rights. This omission of a guarantee of equality led to the Civil War, and in turn to the post–Civil War Fourteenth Amendment that made the newly freed slaves US and state citizens, and prohibited the states from denying equal protection of the laws or due process of law to any citizen. In light of this amendment, the Supreme Court began developing the "incorporation doctrine," holding that the Fourteenth Amendment extended the Bill of Rights so that it applied to all government action. By applying the Bill of Rights so expansively, the legal and social landscape of America was fundamentally changed.

In the aftermath of the Civil War, as the Supreme Court slowly began

applying the Bill of Rights to state and local governments through the Fourteenth Amendment, the debates of 1787–91 became more and more important to modern life. Could a high school principal begin a graduation ceremony by asking a minister (or a student leader) to say a prayer? Could a state require a girl under sixteen to secure her parent's permission to have an abortion? Could a prison warden deny a pain medication to a prisoner between midnight and 7:00 a.m.? Could a college president censor an article in a student newspaper? These questions required the courts to examine the debates of the eighteenth century to determine what the framers intended when they drafted the Bill of Rights (and raised the related question, hotly disputed, of whether the intent of the framers was even relevant, or whether a "living" Constitution required solely contemporary, not historical, analysis).

Hence this series. Our intent is to select the very best essays from law and history and the most important judicial opinions, and to edit them so that the leading views of what the framers intended, and of how we should interpret the Bill of Rights today, are made accessible to today's reader. If you find yourself passionately agreeing with some of the views expressed, angrily disagreeing with others, and appreciating how the essays selected have examined these questions with depth and lucidity, we will have succeeded.

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University of California, Berkeley, School of Law

EDITOR'S INTRODUCTION

Margaret M. Russell

"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 a redress of grievances."

* * *

Of the forty-five words comprising the First Amendment, the least recognized by the bench, bar, academy, and public are the guarantees of its final section: the Assembly and Petition Clause. Case law construing the clause is remarkably thin; by comparison, US Supreme Court jurisprudence interpreting the Establishment, Free Exercise, Speech, and Press clauses is voluminous. Before the 1980s, legal scholarship on the right to petition was nearly nonexistent; even now, legal scholarship on the right to assembly is sparse. Accordingly, it is perhaps unsurprising that there is no major legal casebook that includes more than a brief mention of these core liberties. The Assembly and Petition Clause has not disappeared from the Bill of Rights; it has simply fallen from public, scholarly, and judicial attention.

In response to this disquieting neglect, I am pleased to introduce this volume of essays. To my knowledge, it is the first anthology of scholarship on the Assembly and Petition Clause. As such, its construction felt a bit like con-

stitutional detective work—a task that, I imagine, confronted the authors herein who discovered much rich history and little jurisprudence related to the freedom of assembly and petition. It is my hope that the curious reader—whether scholar or mere "consumer" of First Amendment rights—will embark as well on the worthwhile study of this unfairly overlooked cornerstone of individual and collective freedom.

The Assembly and Petition Clause, like the rest of the First Amendment, originated with James Madison's draft language in 1789. However, this language preserved only antecedent rights of assembly and petition in state constitutions as well as in early English constitutional history. The ratification deliberations of Madison's words resulted in at least two salient textual distinctions between this clause and the rest of the First Amendment: first, the Assembly and Petition Clause is the only First Amendment guarantee referred to as a "right of the people"; second, the right is linguistically described as one unitary right "to peaceably assemble, and to petition the Government for a redress of grievances." Therefore, to be perhaps overly literal, there is not so much an "Assembly and Petition Clause" as there is an "Assembly *to* Petition Clause." Fortunately for the reader, dogged literalism does not hold sway in this volume; however, the point is a basic one worth mentioning at the outset.

This volume is composed of three major sections. Part I, "The Right of the People: Assembly and Petition as a Unitary Clause," initiates the reader into the central interpretive questions about the clause as a whole. The volume then—somewhat artificially and quite deliberately—divides the clause into a Petition Clause (part II) and an Assembly Clause (part III). I adopt this division primarily for functional purposes, because nearly all the scholars herein use this bifurcation. With equal deliberation, I chose to present materials about the Petition Clause first because they are far more detailed and plentiful than is Assembly Clause scholarship. It is my hope that the comparatively expansive scope of Petition Clause literature—particularly in striking contrast with its greater "disappearance" from public and legal discourse—will underscore the collective political right of redress to which "peaceable assembly" is a conduit. Rather than list each contributor and article in this introductory essay, I provide more detail about the contents of each chapter in editor's notes at the outset of part I, part II, and part III. I hope that this approach serves to clarify the structure and purpose of each section as the reader progresses through the volume.

Finally, I hope that the pertinence of the chosen essays adequately conveys to the reader my conviction that the Assembly and Petition Clause should be restored to its rightful place within the First Amendment and the Bill of Rights as a whole. Far from being moribund or arcane, the right of assembly and petition is recognized as not only an essential component of American liberty and equality but as a fundamental human right worldwide. We must remember the reason why the clause is worth the brilliant research and interpretation of scholars and judges: it exists to protect the extraordinary voices of "ordinary" people and allows people on an individual and collective level to ask for responsive and accountable government. Far from being anachronistic or obsolete, this right is the very essence of the Bill of Rights.

Part I

"THE RIGHT OF THE PEOPLE"

Assembly and Petition as a Unitary Clause

EDITOR'S NOTE

The authors in this section closely examine the significance of Assembly and Petition as a unitary clause, textually and historically distinct from the rest of the First Amendment. Unlike the individual clauses accorded to Establishment, Free Exercise, Speech, and Press guarantees, the Freedom of Assembly and Petition is separately phrased as one "right of the people."

In "Freedom's Associations," Jason Mazzone discusses the clause's language and explains how it originated as a separate proposed amendment to protect the collective welfare of the people. Carol Rice Andrews, in "A Right of Access to Court under the Petition Clause of the First Amendment: Defining the Right," also acknowledges the right's origins in notions of popular sovereignty. However, she argues not only that assembly and petition are freedoms of the individual as well as the collective, but also that assembly and petition are completely separate rights from each other, despite their textual interdependence. Finally, in "The Bill of Rights as a Constitution," Akhil Reed Amar offers a historical framework for understanding the clause as part of the Bill of Rights and argues that this right—like those retained by the people in the Ninth and Tenth Amendments—is integrally linked to the structural process of constitutional amendment through convention.

FREEDOM'S ASSOCIATIONS

JASON MAZZONE

* * *

ASSEMBLY AND PETITION: TEXT

A good place to begin constitutional analysis is with the text. The First Amendment reads: "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 a redress of grievances."[1] The amendment has two main commands—evidenced by the use of the semicolon. The first is the limitation on Congress's authority with respect to religion. The second, our present interest, is the limitation on Congress's power with respect to speech, the press, assembly, and petition.

From *Washington Law Review* 77, no. 639 (2002): 712–19. Reprinted by permission of the *Washington Law Review.*

Focusing on this second command, as a textual matter there are three issues of concern: abridging the freedom of speech; abridging the freedom of the press; and abridging the freedom of the people to assemble and petition the government. There are two clues that we should understand assembly and petition to belong together. The first clue is the use of "and to petition," which contrasts with the use of "or" in the remainder of the First Amendment's language. The second clue is the use of "right," in the singular (as in "the right of the people peaceably to assemble, and to petition"), rather than the plural "rights" (as in "the rights of the people peaceably to assemble, and to petition"). The prohibitions on Congress's power can therefore be understood as prohibitions with respect to speech, press, and assembly in order to petition the government.[2]

It is also useful to note the difference in syntax between the two principal commands of the First Amendment. Beginning with the religion command, the amendment prohibits Congress from making a law that respects the establishment of religion, or that prohibits free religious exercise. There is no indication that there are no laws (i.e., laws made by individual states) that respect an establishment of religion; similarly there is no indication that individuals necessarily enjoy the free exercise of religion. It is just that Congress may not legislate with respect to these matters. Contrast the syntax of the speech, press, and assembly/petition command. Congress is prohibited from making a law abridging the freedom of speech, the freedom of the press, or the right of assembly and petition. Textually, the implication is that these freedoms already exist—Congress is prohibited from interfering with them.

Two additional textual observations about the assembly/petition clause merit comment. First, unlike the other provisions of the First Amendment, the assembly/petition clause specifically refers to a right of "the people." The phrase reflects a populist notion, a commitment to popular sovereignty. It also suggests a relationship between assembly and petition and the other provisions of the Constitution that also refer to "the people."[3] For instance, the phrase alerts us that the right of assembly and petition is not just any old right but rather a right belonging to the same "We the People" that established the Constitution in the first place.

Second, the right of petition and assembly is qualified. It is the right "*peaceably* to assemble." This suggests something about the scope of Congress's power: while Congress may not abridge the right peaceably to assemble, some limitations on un-peaceable assembly are permissible. The qualification also suggests

that the scope of the present right is already limited: there is no general right of assembly but only a right of peaceable assembly that the people enjoy.

Further light is shed on the meaning of these textual provisions by examining briefly their passage through the Congress that proposed them to the states. James Madison's draft Bill of Rights, introduced on June 8, 1789, contained separate amendments for religion, for freedom of speech and the press, and for freedom of assembly and petition.[4] The select committee of the First Congress rewrote and combined the speech and press proposal with the assembly and petition proposal into a single amendment that read: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for the redress of grievances, shall not be infringed."[5] When this proposed amendment was debated in the House, Theodore Sedgwick of Massachusetts moved to eliminate the assembly clause on the ground that it was "derogatory to the dignity of the House to descend to such minutiae."[6] In Sedgwick's view, the right to speak necessarily entailed the right to assemble: "If people converse freely, they must assemble for that purpose: it is a self-evident, unalienable right which people possess." Sedgwick's motion was defeated. Also defeated was a proposal by Thomas Tucker of South Carolina to add a clause protecting the right of the people not just to petition but to instruct their representatives.

In the Senate, the language of the proposed amendment was changed to apply specifically to Congress: "That Congress shall make no law, abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances."[7] The Senate thereafter combined this amendment with Madison's separate amendment protecting religion, and deleted from the result the phrase "and consult for their common good." Following some additional minor changes, on September 25, 1789, the Speaker and the vice president signed a resolution asking President George Washington to send this amendment, as the third of twelve proposed amendments, to the states for ratification. The first two of these twelve proposed amendments were not ratified, and so this, the third, became our First Amendment.

We should not make too much of prior drafts of constitutional provisions. But here is one understanding of how this short textual history is instructive. First, it underscores that assembly and petition were not simply afterthoughts to free speech and free press. Rather, they originated in a separate proposed amendment. Second, Madison's original proposal combines assembly and

petition in the same amendment, underscoring that these rights are linked. Third, Madison's draft includes some additional information about the right of assembly: the right allows for the people to "consult for their common good." This suggests that assembly is not just any old gathering but that it has an important underlying purpose connected to the collective welfare.

Antecedent state constitutional provisions also shed light on the meaning of the assembly and petition clause. At the time the Bill of Rights was ratified, the constitutions of Delaware, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Vermont provided for a right of assembly or petition or both. Four observations are especially relevant. First, in these state constitutions, assembly and petitioning are closely linked. While Maryland's Constitution provides for a right of petition but no specific right of assembly, all of the other states protect the right of assembly and petition in the very same constitutional provision. Second, in every case, protections for assembly and petitioning are contained in amendments separate from protections for free speech and free press. Third, in every instance except one, the right of assembly is specifically limited to "peaceable" activities. Fourth, assembly is plainly related to popular sovereignty: in all of the state constitutions protecting a right of assembly, the right belongs to "the People," to allow them to consult upon their common good, redress grievances, and instruct their representatives.

JUDICIAL DECISIONS

How has the modern Supreme Court construed the assembly and petition clause? Four developments are notable. First, the Court has made clear that the right of assembly and petition is not limited to the preparation and discussion of petitions in their traditional sense. Rather a variety of activities are protected, including political meetings,[8] marches,[9] sit-in protests,[10] rallies before government buildings,[11] gatherings in a public park,[12] group boycotts,[13] labor pickets,[14] the filing of lawsuits,[15] and lobbying government.[16] The Court has also refused to limit the right of assembly and petition to the pursuit of political goals.[17]

Second, the Court has come to view assembly and petition as largely a right of free expression, rather than as the opportunity to influence government.[18]

Third, the Court has treated the rights of speech and petitioning as equally important[19] Accordingly, the Court understands limitations on free speech to apply with the same force to petitioning.[20]

Fourth, the Court has emphasized that the right at issue is a right only of peaceable assembly; the Court has, therefore, upheld regulations designed to prevent disturbances, and to protect public safety.[21]

NOTES

1. U.S. Constitution, First Amendment.

2. Note that the comma in "to assemble, and to petition" mirrors the comma in "establishment of religion, or prohibit the free exercise thereof." Ibid. It does not therefore signal a right of petition separate from the right of assembly.

3. See U.S. Constitution, preamble; art. I, sec. 2; Second Amendment, Fourth Amendment, and Ninth Amendment.

4. Madison's proposed speech and press clause read: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." "Madison Resolution" (June 8, 1789) in *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 12, edited by Helen E. Veit et al. (1991). Madison's assembly and petition clause read: "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." Ibid.

5. 1 *Documentary History of the First Federal Congress of the United States of America, 1789–1791*, p. 28, edited by Charlene B. Bickford and Helen E. Veit (1986).

6. 1 *Annals of Congress* 732, edited by Joseph Gales, 1834 (statement of Theodore Sedgwick).

7. *Journal of the First Session of the Senate* 70–71 (J. Gales & W. Seaton printers, 1820) (1789).

8. See, e.g., *De Jonge v. Oregon*, 299 U.S. 353, 365–66 (1937); *Herndon v. Lowry*, 301 U.S. 242, 264 (1937).

9. See, e.g., *Gregory v. City of Chicago*, 394 U.S. 111, 111–12 (1969).

10. See, e.g., *Brown v. Louisiana*, 383 U.S. 131, 142 (1966).

11. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963).

12. See, e.g., *Hague v. CIO*, 307 U.S. 496, 512–13 (1939).

13. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907–12 (1982).

14. See, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611, 614–16 (1971).

15. See, e.g., *Cal. Motor Trans. Co. v. Trucking Unlimited*, 404 U.S. 508, 510–11 (1972).

16. See, e.g., *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–38 (1961).

17. See, e.g., *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

18. The change is evidenced by the difference in the way the Court describes the right of assembly in two cases. In the first, in 1875, the Court writes:

> The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship.... 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.

United States v. Cruikshank, 92 U.S. 542, 552 (1875). Here, assembly is protected specifically to allow the petitioning of government for the redress of grievances. By 1937, however, the Court describes the right as involving a more general interest of free speech:

> Freedom of speech and of the press are fundamental rights.... The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.... The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.

De Jonge v. Oregon, 299 U.S. 353, 354–55 (1937).

19. See, e.g., *McDonald v. Smith*, 472 U.S. 479, 485 (1985).

20. See ibid.

21. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 478 (1988) (upholding ban on picketing in front of a single residence); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912–17 (1982) (explaining that the government may limit boycotts designed to suppress competition for economic advantage and the government may also limit violent gatherings).

A RIGHT OF ACCESS TO COURT UNDER THE PETITION CLAUSE OF THE FIRST AMENDMENT: DEFINING THE RIGHT

CAROL RICE ANDREWS

* * *

... 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."[1] The term "right" appears only once, as a preface to both assembly and petition, and this clause is separated by a semicolon 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,

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From *Ohio State Law Journal* 60 (1999): 628–31. Courtesy of the author.

one need not "assemble" first. In England, the right of petitioning evolved by the fourteenth century to be both collective and individual. The right to petition, as Blackstone noted in 1765, was one "appertaining to every *individual*."[2] 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. 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.

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."[3] That law met with uproar, and Parliament quickly revoked it. But Parliament did succeed in limiting the number of signatories to twenty persons. 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. 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. 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 but that expressly stated the right to petition one of "every freeman."[4]

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."[5] 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."[6] When the Senate "tightened" all of the proposed amendments, it deleted the reference to "consult for the common good."[7] 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...."[8] The House objected and reinserted "to" in the final version of the clause. 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. On August 15, 1789, Representative Sedgwick of Massachusetts moved to strike "assemble and" from the amendment. 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 purpose; it is a self-evident unalienable right which the people possess...."[9] 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. The opponents carried the day, and the motion "lost by a considerable majority." 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.

NOTES

1. U.S. Constitution, First Amendment.
2. 1 William Blackstone, *Commentaries*, p. 138 (emphasis added).
3. 10 Holdsworth, *A History of English Law* 697, 3d. ed. (1938).
4. See Virginia Ratifying Convention (1788), reprinted in 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 76 (1971).
5. *Documentary History of the First Federal Congress 1789–1791*, p. 10.
6. Ibid., p. 28.
7. See 2 Schwartz, *supra* note 4, pp. 1145–46; *supra* notes 198, 208.
8. 4 *Documentary History*, *supra* note 5, pp. 47–48.
9. 11 *Documentary History*, *supra* note 5, pp. 1262–63.

THE BILL OF RIGHTS AS A CONSTITUTION

AKHIL REED AMAR

* * *

ASSEMBLY AND PETITION

Both [the assembly and petition] clauses obviously protect individuals and minority groups, but the clauses contain a majoritarian core that contemporary scholarship has virtually ignored. The right *of the people* to assemble does not simply protect the ability of self-selected clusters of individuals to meet together; it is also an express reservation of the *collective* right of We the People to assemble in a future convention and exercise our sovereign right to alter or abolish our government by a simple majority vote. In the words of Rousseau's 1762 treatise on the social contract, "the sovereign can act only when *the people are assembled.*"[1]

From *Yale Law Journal* 100, nos. 1152–57 (1991). Reprinted by permission of the *Yale Law Journal.*

Listen carefully to the remarks of President Edmund Pendleton of the Virginia ratifying convention of 1788:

> *We, the people,* possessing all power, form a government, such as we think will secure happiness: and suppose, in adopting this plan, we should be mistaken in the end; where is the cause of alarm on that quarter? In the same plan we point out an easy and quiet method of reforming what may be found amiss. No, but, say gentlemen, we have put the introduction of that method in the hands of our servants, who will interrupt it from motives of self-interest. What then? ... Who shall dare to resist *the people*? No, *we* will *assemble in Convention,* wholly recall our delegated powers, or reform them so as to prevent such abuse.[2]

This rich paragraph has it all: primary attention to the "agency" problem of government self-dealing, dogged unwillingness to equate Congress with a majority of the people, and keen appreciation of the collective right of the people to bring wayward government to heel by *assembling* in convention. Pendleton saw that the "agency" problem of government meant that future amendments might be necessary to bring government under control. Obviously, ordinary government officials—Congress, state legislatures, and so on—could not be given a monopoly over the amendment process, for that would enable them to thwart desperately needed change by self-interested inaction. Hence the need to keep open the special channel of the popular convention acting outside of all ordinary government, convenable, if necessary, by popular petition. (Indeed, it was the very threat of a second constitutional convention that induced many Federalists in the first Congress to support a Bill of Rights limiting their own powers, lest a new convention propose even more stringent amendments.)

Pendleton's language reveals the obvious bridge between the Preamble's invocation of "the People" and the reemergence of that phrase in our First Amendment. The Preamble's dramatic opening words, quoted by Pendleton, trumpeted the Constitution's underlying theory of popular sovereignty. Those words and that theory implied a right of "the People" (acting by majority vote in special conventions) to alter or abolish their government whenever they deemed proper: what "the People" had "ordain[ed] and establish[ed]" (by majority vote in special conventions), they or their "posterity" could disestablish at will (by a similar mode). To good lawyers of the late 1780s, Pendleton was merely restating first principles. Madison's very first proposed amendment was a prefix to the Preamble that similarly declared: "*[T]he people* have an indu-

bitable, unalienable, and indefeasible right to reform or change their Government...."[3] Not a single representative quarreled with Madison on the substance of this claim, although some considered any prefix superfluous. When Congress eventually decided to add amendments to the end of the document rather than interweave them into the original text, the prefix was abandoned; but the underlying idea survived, repackaged as a guarantee of the right of "*the people* to assemble." Members of the first Congress shared Pendleton's understanding that constitutional conventions were paradigmatic exercises of this right. As Gordon Wood has observed, "conventions... of the people... were closely allied in English thought with the people's right to assemble...."[4] Thus, our First Amendment's language of "the right of the people to assemble" simply made explicit at the end of the Constitution what Pendleton and others already saw as implicit in its opening. (Many other provisions of the Bill of Rights were also understood as declaratory, inserted simply out of an abundance of caution to clarify preexisting constitutional understandings.)

Pendleton's language about the people's right to assemble was echoed by the Declaration of Rights adopted by the Virginia convention, which included the following language: "That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives."[5] This was neither the first nor the last time that the people's asserted rights of assembly and instruction were yoked together. The same pairing had appeared in the Pennsylvania and North Carolina state Constitutions of 1776, the Vermont Constitutions of 1777 and 1786, the Massachusetts Constitution of 1780, and the New Hampshire Constitution of 1784; and would later appear in the Declarations of Rights of the New York, North Carolina, and Rhode Island ratifying conventions. When Madison proposed the assembly clause to the first Congress, Thomas Tucker of South Carolina quickly moved to add to it an express right of the people "to instruct their Representatives."[6]

The juxtaposition of assembly and instruction is illuminating. Both clauses have strong majoritarian components and reflect the Anti-Federalist concern with attenuated representation in Congress. Yet there is a vital difference between the two rights—a difference that led Madison and his fellow Federalists to embrace the former while successfully opposing the latter. Instruction would have completely undermined the Madisonian system of deliberation among refined representatives. All the advantages of "skimming" would be lost if each representative could be bound by his relatively uninformed and parochial constituents rather than his conscience, enlightened by

full discussions with his fellow representatives bringing information and ideas from other parts of the country.... [A]ll of Madison's central arguments in *The Federalist* No. 10 are premised on a repudiation of the idea of instruction.

By contrast, Madison and his fellow Federalists could embrace the idea of a popular right to assemble in convention. Unlike instruction, such a right would not continually undermine ordinary congressional deliberation on day-to-day affairs, but would simply reserve to the people the right to meet in future conventions to consider amending the Constitution—just as the people had assembled in convention in the previous months to ratify the Constitution proposed by Madison and his fellow Federalists. Under the Federalists' "two track" scheme, ordinary legislation during moments of "normal politics" should be reserved to the legislature, but We the People could take center stage during "constitutional moments."[7] Thus, like the rights *of the people* explicitly reserved in the Ninth and Tenth Amendments, the assembly clause has important implications for the structural process of constitutional amendment.

So, too, with the petition clause. I have argued elsewhere that whenever a majority of voters so petitioned, Congress would be obliged to convene a constitutional convention, just as it would be when presented with "Application of the Legislatures of two thirds of the several States" under Article V. The key textual point here is that the Amendment explicitly guarantees "the right of *the people*" to petition—a formulation that decisively signals its connection to popular sovereignty theory and underscores Gordon Wood's observation that the ideas of petition, assembly, and convention were tightly intertwined in eighteenth-century America. The precursors of the petition clause suggested by state ratifying conventions had obscured these connections. Each of the four conventions spoke of the "people's" right to "assemble" or to alter or abolish government (and as we have seen, these two rights were closely linked); yet each convention described the right of petition in purely individualistic language—a right of "every freeman," "every person," or "every man." Under these formulations, petition appeared less a political than a civil right, akin to the right to sue in court and receive due process. The language and structure of our First Amendment suggest otherwise. As with assembly, the core petition right is collective and popular.

To be sure, like its companion assembly clause, the petition clause also protects individuals and minority groups....

But to focus only on minority invocations of the right to petition is to miss

at least half of the clause's meaning, even if we put to one side its momentous implications for constitutional amendment. Like the other provisions of the First Amendment, the clause is not primarily concerned with the problem of overweening majoritarianism; it is at least equally concerned with the danger of attenuated representation.... In eighteenth-century Virginia, for example, more than half of the statutes ultimately enacted by the state legislature originated in the form of popular petitions.[8] And as we have seen, Congress's small size gave rise to special concern about whether representatives would have adequate knowledge of their constituents' wants and needs. If we seek historical examples illustrating this point, we need look no further than the 1816 election, when citizens used petitions to Congress as one of several devices to educate their "agents" and each other.

Indeed, the populist possibilities implicit in the petition clause should be evident from a simple side-by-side comparison of the First Amendment's language with English precedent. According to Blackstone's *Commentaries*, in England

> *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, alderman, and common council; *nor shall any petition be presented by more than ten persons at a time.*[9]

In his American edition of Blackstone, St. George Tucker took obvious satisfaction in reminding his readers that "In America, there is no such restraint."[10]

Like their speech and press clause counterparts, the rights of petition and assembly became applicable against state governments only after the adoption of the Fourteenth Amendment. As suggested above, incorporation of these guarantees against state governments makes a good deal of sense in light of the text of the amendment's privileges or immunities clause, its historical purpose of safeguarding vulnerable minorities against majority oppression, and the overall structure of federalism implied by that amendment—namely, that those citizen rights formerly protected against the national government should also be protected against state governments.

NOTES

1. 3 J. Rousseau, *Du Contrat Social*, chap. 12 (1762) (emphasis added).

2. 3 *Debates on the Adoption of the Federal Constitution* 37, edited by J. Elliot (1888) (emphasis added).

3. 1 *Annals of Congress* 451, edited by J. Gales (1789) (1st ed. pagination) (June 8, 1789) (emphasis added).

4. G. Wood, *The Creation of the American Republic 1776–1787*, p. 312 (1969).

5. 3 Elliot's Debates, *supra* note 2, pp. 658–59.

6. 1 *Annals of Congress*, *supra* note 3, p. 761 (August 15, 1789).

7. I borrow here the phrasing of my colleague Bruce Ackerman. See Ackerman, "The Storrs Lectures: Discovering the Constitution," *Yale Law Journal* 93, no. 1013 (1984).

8. R. Bailey, *Popular Influence upon Public Policy: Petitioning in Eighteenth-Century Virginia* 64 (1979). [122]

9. 1 W. Blackstone, *Commentaries*, p. 139 (emphasis added).

10. 1 Blackstone's *Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* 299–300 app., edited by Tucker (1803).

Part II

". . . TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES"

EDITOR'S NOTE

Part II is made up of three chapters specifically focused on the right to petition, referred to by most of this volume's contributors as the Petition Clause. As noted in my introductory essay, Petition Clause scholarship is far more plentiful and wide-ranging than Assembly Clause scholarship. Moreover, in terms of constitutional text, freedom to petition is the core guarantee for which the right to "peaceably assemble" is the prefatory modifier. For these reasons, I have decided to proceed first with the Petition Clause, followed in part III by the Assembly Clause (and its doctrinal relative, freedom of association). It is beyond dispute that assembly and petition are coequal freedoms, so this order of presentation is a choice to provide clarity rather than to suggest a ranking.

In chapter 1, "Origins and Early History," five scholars explore the rich background and evolution of the Petition Clause, from its pre–Magna Carta roots through early English constitutional history, the American colonial experience, the Bill of Rights, to its so-called disappearance in the 1830s congressional debates about slavery. Gregory A. Mark's "The Vestigial Constitution: The History and Significance of the Right to Petition" draws upon both English and American constitutional histories to explain the centrality of the

right to petition as a complex compact between the government and the governed (including disenfranchised groups such as women, racial minorities, and non-property-owning white males). In "Petitions," a chapter from *Rampant Women: Suffragists and the Right to Assembly*, Linda J. Lumsden examines the role of petitioning in the political empowerment of disenfranchised women from the seventeenth through early twentieth centuries, focusing particularly on petitioning as a catalyst in both anti-slavery and women's suffrage campaigns. The next two brief excerpts, from Stephen A. Higginson's "A Short History of the Right to Petition Government for the Redress of Grievances" and Emily Calhoun's "Initiative Petition Reforms and the First Amendment," provide further detail on the framers' intent—namely, James Madison's authorship of the Petition Clause and the congressional debates surrounding its passage. Chapter 1 concludes with "John Quincy Adams, Slavery, and the Disappearance of the Right to Petition" by David C. Frederick, who argues that the traditional usage of the right shifted radically after the congressional imposition of a "gag rule" to quash the acceptance of anti-slavery petitions in the 1830s; according to Frederick, the "gag rule" debates resulted in both a decline in the use of petitions and the submersion of petition's doctrinal distinctiveness into general free expression jurisprudence.

The articles in chapter 2, "Scope and Meaning," further explore the theme of petition's "disappearance" by asking what it means (or should mean) today. In "The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth," Julie M. Spanbauer acknowledges that the right is rarely invoked by litigants and courts, yet she argues for its historical primacy and even supremacy over the freedoms of speech and press. Carol Rice Andrews, in "A Right of Access to Court under the Petition Clause of the First Amendment: Defining the Right" (also excerpted in part I), finds conflicting authority for the proposition that the clause guarantees a right to pursue executive and legislative branch petitions; however, she contends that the clause definitively ensures a right of access to the judicial branch at least through the initial filing of a civil complaint. Norman B. Smith, in "'Shall Make No Law Abridging...': An Analysis of the Neglected, but Nearly Absolute, Right of Petition," reviews the relatively scant US Supreme Court case law on the Petition Clause and concludes that the right is unduly neglected as an essential component of First Amendment liberties.

The two concluding articles in chapter 2, James E. Pfander's "Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to

Pursue Judicial Claims against the Government" and Gary Lawson and Guy Seidman's "Downsizing the Right to Petition," debate the scope of the Petition Clause's protections today. Pfander, like the three previous authors in this chapter, argues for a broader construction. Specifically, his historical and policy analysis critiques long-standing sovereign immunity doctrine's high barrier against the individual right to sue for government misconduct; he asserts that the doctrine is inimical to the protections of the right to petition. Lawson and Seidman's piece is a direct reply to Pfander's article; in arguing for a much more limited scope of the clause, Lawson and Seidman differ from most of the authors in this part of the volume.

"Contemporary Debate," the final chapter of part II, is intended to give the reader a glimpse of the diversity of contemporary applications of Petition Clause principles in legal scholarship, all of which have emerged only in the past two decades. The first two articles dissect the US Supreme Court decision in *McDonald v. Smith* (1985), in which the Court rejected a Petition Clause claim and held that there is no immunity from civil libel for statements made in petitions. In "'Libelous' Petitions for Redress of Grievances: Bad Historiography Makes Worse Law," Eric Schnapper argues that the Court's failure to consider the complex history of the clause led not only to a fundamentally flawed direction in libel law, but also to a distortion of the true significance of the right to petition today. In "The Return of Seditious Libel," Ronald J. Krotoszynski Jr. and Clint A. Carpenter also denounce the *McDonald* decision's devaluation of the Petition Clause. In their view, the history of the right to petition contains two fundamental components: the right to immunity from prosecution for seditious libel and the right to be heard. Krotoszynski and Carpenter examine the censorial implications of the right's diminished power in the post–September 11 world, in which protest against government action is treated with increased suspicion.

In "Antitrust Immunity, the First Amendment and Settlements: Defining the Boundaries of the Right to Petition," Raymond Ku examines one of the relatively few current doctrinal areas in which the Petition Clause is prominently recognized: the *Noerr-Pennington* doctrine, through which the US Supreme Court has recognized immunity from antitrust liability for anticompetitive harms flowing from exercising the right to petition. Ku analyzes the historical basis for *Noerr-Pennington* immunity and concludes that it should be inapplicable to antitrust settlement agreements and consent decrees.

The remaining articles in chapter 3 all focus in different ways on the par-

ticular significance of the right to petition in ensuring that the least powerful in society have a voice in the public sphere. In "'Strategic Lawsuits against Public Participation' (SLAPPs): An Introduction for Bench, Bar, and Bystanders," George W. Pring and Penelope Canan explain the proliferation of the use of SLAPPs (their invented acronym) to deter politically powerless but outspoken individuals from exercising their right to petition; their study includes a guide for identifying SLAPPs across broad dispute categories and recommendations for responding to them. In "Petitioning and the Empowerment Theory of Practice," Anita Hodgkiss applies insights from critical theory to the everyday lawyer-client relationship, and suggests ways in which lawyers can further the purpose of the right to petition by fostering greater respect and autonomy for their clients. In the final article of this chapter (and of part II), "Immigrants and the Right to Petition," Michael J. Wishnie argues for recognition of the right on behalf of one of the most neglected groups in contemporary First Amendment jurisprudence: noncitizens, particularly undocumented persons. Wishnie analyzes the history of noncitizen petitioning in both English and early American history, and rejects the US Supreme Court's recent suggestion that noncitizens may not be among "the people" included in the First Amendment.

Chapter 1

ORIGINS AND EARLY HISTORY

THE VESTIGIAL CONSTITUTION: THE HISTORY AND SIGNIFICANCE OF THE RIGHT TO PETITION

GREGORY A. MARK

Tucked away at the end of the First Amendment, looking to the modern eye almost like an afterthought, lies the right to "petition the Government for a redress of grievances."[1] Yet, the history of this seeming afterthought can tell us more about the evolution of constitutional culture than that of almost any other portion of the Constitution. Understanding petition's history will unsettle some of our most comfortable assumptions about modern constitutionalism, as much as it will give us insights into our evolution as a polity and our relationships with the structure of government.

The history of the right to petition is at once a social, political, and intellectual story reflected in the narrative of the evolution of a constitutional and legal institution. Understood properly, it tells us about popular participation in politics, especially by disenfranchised groups such as women and African

From *Fordham Law Review* 66, no. 2153 (1998): 2153–58, 2161–70. Reprinted by permission of the *Fordham Law Review.*

Americans, that has remained invisible because of our contemporary fixation on voting as the measure of political participation. At the same time, it reminds us that the participation of disenfranchised groups before much of the nineteenth century was part and parcel of a different political culture, one marked by a strikingly greater degree of hierarchy, deference, and group identity than we observe in late twentieth-century polity. The evolution of petitioning itself is also a story of the transformation of an unmediated and personal politics into a mass politics. The earlier politics was one characterized by a willingness of petitioners not just to compile grievances but also to suggest the remedy for the grievances, even by way of proposed legislation—and for officials to take such suggestions very seriously. That unmediated and personal politics was set in the surroundings of governmental institutions that had roles far more flexible than our contemporary understandings of separation of powers would countenance—at the behest of petitioners, the legislature adjudicated complaints and acted as an appellate body, courts performed administrative functions, and the executive issued orders that look to us strikingly legislative, among other things. Making coherent this combination of hierarchical but unmediated participation in an institutional setting so foreign to us were assumptions about social order and theories of representation that were only partially and occasionally articulated before the American Revolution.

The Revolution, the experience of the confederation, and the deliberations of the Constitutional Convention and ratification brought together these disparate strands of politics, social order, and thought. From the first Congress emerged what is our First Amendment, containing the federal right to petition. The structural constitutional component of the right has been eclipsed by the rise of a liberal polity that has voting as its participatory cornerstone and a nation-state grown so populous as to render an unmediated politics seemingly impossible, at least at the national level. Moreover, even from a narrow rights-as-protection-from-government perspective, where once political speech had petitioning at its very core, and what we understand as speech and press stood at the periphery, now the core and periphery are reversed. Modern doctrine has elevated the protections for speech and press, while the protection of petitioning has not stayed proportionally greater; indeed, it has been all but subsumed in the protections of speech and press.

* * *

To say that the right is today moribund is grossly to understate the case. The Petition Clause, though originally a central feature of the relationship between the governed and the government, has never been a central concern of the American judiciary and today, to the extent that it is noticed by the courts at all, it has been almost completely collapsed into the other rights that the First Amendment protects. Moreover, the right to petition in America has received little serious attention from academics. If the Supreme Court has rightly merged the Petition Clause into other constitutional guarantees, however, we should still question why its historical significance, especially its significance outside of constitutional litigation, has not been well explored. Its current desuetude, after all, seems an inappropriate measure of its importance in a different era.

Contemporary doctrine notwithstanding, petitioning was at the core of the constitutional law and politics of the early United States. That was why it was included in the First Amendment, not as an afterthought but rather as its capstone. Petitioning embodied both Revolutionary idealism and a lengthy domestic colonial practice, while reflecting a widespread understanding about both what the founders perceived to be the necessary and the best traditions of English constitutionalism, as well as newly articulated domestic political aspirations embedded in the Constitution. For the colonists and citizens of the early republic, petitioning embodied important norms of political participation in imperfectly representative political institutions, and therefore tells us about the political roles of varying elements in American society of that period. Petitioning was the most important form of political speech the colonists had known, not just because of its expressive character, but also because of the ways in which it structured politics and the processes of government, even as separation of powers was becoming a reality. For individuals and groups, it was a mechanism for redress of wrongs that transcended the stringencies of the courts and could force the government's attention on the claims of the governed when no other mechanism could. Petition's history is important, therefore, because it gives us a way to measure the changes in our constitutional politics and law too often obscured when our historical vision is blindered in service to our own ends. Precisely because its history is not much contested by those seeking historical justification for current positions, it is likely to provide as undistorted a mirror as we can get on our constitutional past.

The right to petition has not received the attention it warrants because

those who have taken the time to consider it, either as a constitutional or historical phenomenon, have not understood it as a political and constitutional institution linked to, but independent of, speech, press, religion, and even assembly. They, thus, failed to appreciate the right of petition's unique significance in a legal, political, and social structure that was dissimilar, in some ways quite radically so, from that of the late twentieth, or even the nineteenth, century. Other constitutional guarantees, because of their contemporary significance, today occupy center stage for scholars and advocates seeking to chronicle or explain their development. Thus, the history of the right to petition is to constitutional and legal history as the history of alchemy is to the history of chemistry or the history of science. That is, it is a phenomenon of considerable significance to its historical practitioners, but one that today apparently lacks immediate relevance.

* * *

I. THE COLONIAL EXPERIENCE

The American colonies adopted and adapted the right to petition from petition's English precursors....

In the colonial era, a petition was, in the words of one commentator, "an affirmative, remedial right which required governmental hearing and response."[2] Petitioning was a right enjoyed by all persons and one that all classes and strata exercised, at least to some degree, both individually and collectively. To miss both the mandatory and participatory features of the right to petition is to put on modern blinders, seeing only in enfranchisement the base of political participation. Indeed, in a liberal and formally egalitarian society, that may be a proper understanding. In a society more corporately constituted than ours, in which degrees of difference meant a great deal to one's political and social status, however, that was not the case.

A. The English Background

Numerous distinguished historians have effectively set out the role of petitioning in English constitutional history, so far as the evidence allows. A summary of their findings, doing as little violence to the texture of English his-

tory as possible, is useful, not to demonstrate the importance of petitioning and the right to petition to the English, but rather to give as clear a sense as possible of the practice and right the colonists sought to bring with them.

Chronicling references to redress and petition as far back as possible in English legal history, that is to Magna Carta and somewhat beyond,[3] quickly leads to the discovery that requests for a redress of grievances initially had a tenuous quality and only after centuries of experience became such a part of English political life that they lay at the core of English constitutionalism.

1. The Evolution of Petitioning in English Constitutionalism

The practice of petitioning the king for redress long antedated Magna Carta.[4] In its origins, petitioning was apparently narrow in application. Although the king regularly provided relief to petitioners, he generally did so when it was in his own interests, that is, when the request coincided with his interests and when the king could extract something beneficial in return for granting relief.

While the practice's origins and its original significance are murky, its utility to petitioners was originally as an error-correcting device for a limited set of grievances. That is, petitioners usually sought the king's resolution of a claim already handled by another, lesser authority. Indeed, the earliest codes appear to have required resort to other tribunals before petitioning the king. Petitioning was thus premised on a vision of ultimate royal authority and the early codifications are quite explicit in stating that such relief was available for the benefit of the monarch, not the claimant. The ability to apply for redress of grievances was, at least in its earliest stages, clearly not a tool for general grievances, much less reform, or even a mechanism for first hearing an individual's grievance, but rather was akin to an appellate mechanism from the decisions of inferior authorities.

Early petitions, that is, petitions prior to Magna Carta, were also therefore not likely a vehicle that created or reinforced a sense of political power on the part of the petitioner. They were generally not a mechanism to assert a right against the state or otherwise to assert one's autonomy but instead reinforced royal authority. While monarchs reigning before the Great Charter had pledged to observe certain rights and liberties of their subjects, no real methods existed for checking the king when he trenched on those rights in violation of his pledge. Magna Carta, thus, "derived its importance... from its coincidence as a grant of liberties with the formative period of English legal

development."[5] Among those legal developments was the method whereby the king provided for a check on the exercise of his power, that is, through the use of petition. Magna Carta provided for a petition by barons to the king notifying him of his failure to observe the pledges contained in the Great Charter.

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 as well. Nonetheless, Magna Carta hardly produced a democratic or egalitarian polity. Rather, we know both from the document's language and the circumstances under which the barons exacted it from King John, that the king's pledge to respond to such petitions was conditioned on the barons' allegiance, and therefore constituted an acknowledgment of hierarchy and the corporate character of the English polity. By requiring the petitioners to acknowledge the primacy of the king's authority, even the barons' petitions thus reinforced the hierarchy of the community to which all belonged. Although the barons' petitions could force the king's attention, their petitions, much less those of others, do not, at least from the claimant's point of view, immediately appear to have contained within themselves the empowering or dignity-enhancing features we today associate with the exercise of liberties. The politics of petitioning was more ambiguous than that. Precisely because petitions sought the invocation of a power inherently greater than that of the petitioner, they humbly acknowledged royal authority even while purporting to draw attention to its limits.

Following Magna Carta, however, petitions took on greater significance than just as a mere tenuous appellate mechanism for resolving private disputes or as a method for the barons to secure their privileges against the king. From the beginning, petitions were a formal and peaceful way to draw the attention of the king and his counselors 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 counselors were informed of political complaints, asked to review actions of government officials, and through which individuals and groups suggested changes in policies. That is, individuals and groups petitioned for redress of both public and private grievances.

* * *

Not only did petitions reflect a wide range of grievances, they quickly came to dominate Parliament's calendar—indeed, they often became the legislative agenda. Moreover, Parliament, especially the House of Commons, became ever more central to the operation of English government, and petitions were central to Parliament's accumulation of power. Ultimately, to act, the king had to rely on Parliament to provide him with funds. Parliament would not act on the king's request for funds until the king agreed to redress the grievances contained in petitions he had received or, after the beginning of the fifteenth century, that the House of Commons forwarded to him. Parliament thus had an interest in considering all petitions because any given grievance could ground an attempt to increase Parliament's power at the expense of royal authority.

* * *

While the king and his counselors had, of course, treated petitions as a matter to be handled with monarchical discretion, even a petition with a complaint that was never acted upon or was rejected had to be read. It is not surprising, therefore, that subjects came to expect that their petitions would be received and heard. Nonetheless, mechanical explanations, such as the quasi-judicial character of the petitions and formal similarity of public and private grievances, and even the use of petitions by one governmental entity to leverage power from other organs of government, may, however, obscure other subtler explanations for the importance of petitions and the right to petition buried deeper in English political and legal culture.

Petitioning came to be regarded as part of the Constitution, that fabric of political customs that 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, monarchical challenge to a petition could be, and was, defended on the basis that petitioning was an ancient right. Petitioning became part of the regular political life of the English, not just because it was conducive to the interests of petitioners, and not just because it provided a foundation for Parliament, especially the Commons, to assert its own expanding legislative powers. It was also a mechanism that bound the English together in a web of mutual obligation and acknowledgment of certain commonalities. Its structure reflected an element of reciprocal obligation, embodying the recognition of hierarchy both in that every petition was a

prayer to authority for the grace of assistance as well as an implicit acknowledgment by the petitioner that the king, ultimately the king in Parliament, had authority—that is, legitimate power—to resolve the complaint. In accepting the petition, the king, in turn, acknowledged a duty to subjects, one that had come to mean both hearing the complaint and not exercising power in an arbitrary fashion.

The sense of reciprocal duties had a profound meaning for English politics. Because petitions became the basis for much legislation and because petitions were the vehicle for the expression of grievances with both public and private characteristics, they were a mechanism, indeed the formal mechanism, whereby the disenfranchised joined the enfranchised in participating in English political life. In the thirteenth and fourteenth centuries, for example, an extremely wide band of English society participated in politics by petitioning for redress of grievances, without question a wider spectrum of society than that with the franchise. Moreover, petitioners acted not just individually, but collectively, defining themselves as members of a collectivity and seeking redress for that community of interests. For example, petitioners defined themselves by class, for example, those petitions signed solely by members of the nobility; by occupation, for example, those petitions expressing the grievances of merchants or scholars; by community, for example, those petitions sent from cities and shires; and in other ways clearly collective. A petition from a group of prisoners, for example, suggests a participatory consciousness that extended well beyond even that which underlies some quite modern concepts of enfranchisement.

The political participation suggested by petitioning is, obviously, of a different order than is voting in a liberal society, for petitioning was based on a reciprocity of obligation and, as I have noted, an acknowledgment of a hierarchy extending beyond the structure inherent in any prayer for assistance, such as a modern civil lawsuit. Its hierarchical component is also evident from more than just the language of supplication that introduces each petition, for such prefatory language has also long been characteristic of lawsuits. More telling is the right, albeit a limited one, that the monarch and Parliament arrogated to themselves to reject petitions based on the language of the petition. That is, if the petition was phrased in terms disrespectful of authority, it could be rejected without consideration. Rather than genuine deference, however, individuals and groups may have exercised self-censorship in both the subject matter and language of their petitions to ensure that their petitions were

heard. Separating genuine deference from self-censorship, especially when both forces may have been at work simultaneously, is an enormously difficult, if not an impossible, task. Virtually everyone, however, had the right to petition. At some point or another, members of virtually every stratum of society exercised the right on a wide variety of topics, however humbly phrased their entreaties.

* * *

Participation—The Practice

The enfranchised—property-owning adult white males—made the most vigorous use of petitions. Even the better off, who had both formal and informal measures of political suasion available to them to a greater degree than others, used petitions. In Virginia, for example, "[p]rominent political figures, wealthy planters and merchants, local officials, and other members of the upper class petitioned the assembly on numerous occasions."[6] Their concerns usually reflected their status. Landowners sought legislative termination of entail; men of property sought the assistance of one colonial legislature in disputes over land claims contested by other colonies; men of money and ambition sought the establishment of governmental offices in their localities. In short, the well-born and well-off sought governmental assistance to maintain and enhance their social position.

Nonetheless, not all white male propertied inhabitants of the colonies could necessarily be counted among the powerful, well-born, or well-off. Indeed, scholarly examination of some of the available evidence has made clear that the white, male, and propertied, except in the most general manner, cannot be regarded as homogenous, in class, occupation, or ideology, among other interests. Within the large class identifiable as white, male, and propertied, discernable, though changing, ideological and occupational groups have been identified.

* * *

Although they are more difficult to identify than the enfranchised, disenfranchised white males also exercised the right to petition. In one group, however, the disenfranchised can be easily discerned. Nowhere is the evidence for the

existence of the formal political participation of the disenfranchised clearer than in the flow of petitions from prisoners to colonial authorities. In keeping with the quasi-judicial nature of petitions, most of these petitions have a *habeas*-like quality to them. Inherent in the broader capacity to alter court judgments via legislative act, of course, was a legislative power to alter not just the judgment itself but also sentences. Debt prisoners, for example, filed many such petitions, a phenomenon that, not surprisingly, accelerated during times of economic hardship. Whether imprisoned for crimes with modern counterparts or for reasons unrelated to criminal activity, such as debt, prisoners' highly individualized grievances carried with them seeds of legislation—legislation that would extend beyond immediate relief for the petitioner. Not only did such petitions create a movement for forms of debt relief, they also led to such legislative actions as the investigation of the treatment of prisoners.

Given that the colonial charters and subsequent affirmations by colonial legislatures quite often contained language that formally provided for widespread use of the right, the use of petitions by white males, propertied or not, enfranchised or not, may not be particularly surprising. What is far more demonstrative of the significance of petitioning in American political culture was its use by those usually conceived of today as having been completely outside of direct participation in the formal political culture, namely, women, blacks (whether free or slave), Native Americans, and, perhaps, even children.

Petitioning provided not just a method whereby individuals within those groups might seek reversal of harsh treatments by public authority, judicial or otherwise, but also a method whereby such individuals could seek the employment of public power to redress private wrongs that did not fit neatly into categories of action giving rise to a lawsuit. In that sense, even individual grievances embodied in petitions carried powerful political weight simply because of the individual's capacity to invoke public power. That such power might reside in the hands of those with little, or no, other formal political power greatly heightens the constitutional significance of the right.

Despite its availability, petition was, unsurprisingly, something of an extraordinary remedy for members of these groups. Insofar as women, slaves, free blacks, Native Americans, and children constituted identifiable groups with coherent political, social, and economic needs, however, those groups had clear places in society. Because they were, in the organic metaphor, not at the apex of the hierarchy, however, their relatively lesser use of petitions is not surprising. Indeed, it is to be expected. It is all the more important, then,

to note what their grievances were, how they were expressed, and the ways in which their grievances reflected matters of political significance. Unfortunately, we know too little of their grievances.

In the records of colonial Georgia, for example, there are instances of petitions from women as a matter of course, though the records give only hints at what those petitioners actually wrote. "The Minutes of the Common Council of the Trustees for Establishing the Colony of Georgia in America" contain several such examples, some quite mundane sounding, others sounding quite odd to the modern ear. On May 5, 1735, for example, Mary Bateman petitioned on behalf of her married son, who "had great illness" and whose "Servant left him." She sought "Credit for a Year's Maintenance" and a new servant. She got both.[7] The following January 16, the council entertained Susannah Haselfoot's petition "*on behalf of her Husband*," asking to swap a lot in Savannah for a one-hundred-fifty-acre plot "as near as may be to some River or Island." As with Mary Bateman, Susannah Haselfoot got what she prayed for. June 27, 1739, witnessed petitions from Ann Emery and Mary Crowder. Each dealt with property in Georgia, and Emery's petition prayed for "a License to sell beer." The council dealt with other petitions for assistance or recompense for losses over the years.

* * *

The most important insight we may glean from considering instances of women petitioning, however, is one that is easily overlooked because it is a background assumption to a twentieth-century observer: The fact that the women petitioned at all meant that they felt they had a right to appeal to public authority for help. Likely not all women shared that feeling, but at least these women felt that they were sufficiently within the polity to be heard and helped. On their own, women may well have voiced not just individuated but also collective, economic grievances concerning governmental policy in colonial society. In the early national period, as historian Linda Kerber has discovered, records exist concerning at least one petition seeking a political remedy for an economic grievance.

Identifying and analyzing petitions of slaves and free blacks is at least, if not more, problematic than identifying and analyzing those of women, for several reasons. Unless the signatories identified themselves by race or status, discerning their racial identity can be very difficult. Also, petitions by slaves

and free blacks, like those of women, are comparatively rare. Nonetheless, clear examples of their effective political participation via petition exist. Raymond Bailey has described one of the most prominent of them in Virginia:

> A group of mulattoes and free blacks petitioned the house in 1769 to ask that their wives and daughters be exempted from paying poll taxes, a tax assessed on adult males of both races but on black females only. Both houses of the assembly and the governor agreed that the request was reasonable, and a bill ending the poll tax on black women was passed into law.[8]

This pre-Revolutionary petition is remarkable for a number of reasons. Not only does it antedate the Revolution and whatever additional egalitarian sentiments attended independence, it was also a petition from a "group" of African Americans. A group of African Americans, even free, acting in concert on a political matter was as incendiary an action as could be conceived in the slave South. All the more stunning, then, that the petition was not simply heard, but granted.

Revolutionary America saw an upsurge of petitioning by African Americans. These petitions, while nominally personal—they dealt with status, both in economic terms (property-seeking emancipation) or in legal and political terms—obviously raised issues concerning the most profound of public matters. In the Revolutionary era, some of the petitioners were bold enough to claim "a natural right to our freedoms without Being depriv'd of them by our fellow men as we are a freeborn Pepel and have never forfeited this Blessing by aney compact or agreement whatever."[9] Thus, not only did petitions serve to raise the topic of slavery, but also, by the very act of petitioning, the slaves and free blacks *by themselves* put the issue of their humanity and the very extent of their membership in the polity into the political debate.

Petitions by Native Americans, while also rare, raised grievances of public importance, for they usually involved questions concerning tribal land. Significantly, the Native Americans who petitioned did so with a clear tribal identification, and their petitions concerned a matter of clear and classic concern to an organic community, the land. What is equally intriguing is that their tribal status, uniquely not a part of the larger immigrant community, did not preclude consideration of their petitions.

Making too much of the petitions of women, African Americans, and Native Americans is easy to do. By their rarity, such petitions seem to stand

out as examples of the potential for the accommodation of all in the political process. One cannot know what might have happened, however, had members of such groups individually or collectively sought regularly and often to press their access to the political process via petition. They might well have precipitated their preclusion altogether. That is, had large numbers of women, African Americans, or Native Americans actually used the process, a political reaction formally excluding them might have ensued. The structure of a hierarchical and corporate community, however, imposes a powerful form of self-control in deference, often extreme deference, while at the same time mandating—because of that deference—the attention of those to whom deference is paid. That form of deference was an aspect of the "social contract" of the American colonies. It was that facet of colonial America that helped legitimize and give force to petitioning.

NOTES

1. U.S. Constitution, First Amendment.

2. Stephen A. Higginson, Note, "A Short History of the Right to Petition Government for the Redress of Grievances," *Yale Law Journal* 96, no. 142 (1986).

3. See, e.g., Don L. Smith, "The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations" (1971), pp. 12–15, unpublished PhD dissertation, Texas Tech University (tracing the development of petitioning at least to Edgar the Peaceful during the years 959 to 963 CE).

4. See ibid., pp. 10–15. The textual summary in this and the following paragraphs dealing with pre–Magna Carta practice and law relies on Smith's review of primary and secondary sources.

5. J. C. Holt, *Magna Carta and Medieval Government* 292 (1985).

6. Raymond C. Bailey, *Popular Influences upon Public Policy: Petitioning in Eighteenth-Century Virginia* (1979), pp. 41–42.

7. 2 Colonial Records of the State of Georgia 99, compiled by Allen D. Candler (1904).

8. Bailey, *supra* note 6, p. 44 (citation omitted).

9. Petition to Governor Thomas Gage and the Massachusetts General Court, May 25, 1774, quoted in Sidney Kaplan, *The Black Presence in the Era of the American Revolution 1770–1800* (1973), p. 13.

"PETITIONS"

LINDA J. LUMSDEN

WOMEN PETITION

The earliest example located for this book of women petitioning occurred in London in 1641, when a delegation of English "gentlewomen and brewers' wives" stood at the House of Commons doors to petition Parliament for the same rights to petition as men.[1] Its form was as significant as its message, because the women's presence at the portals of authority served as their petition. The first English suffrage petition was delivered to Parliament in 1866 by John Stuart Mill, as women were forbidden from attending its sessions, and in 1910 the National Union of Women's Suffrage Societies gathered 280,000 signatures on a petition to the House of Lords. Northern British textile workers launched their mammoth suffrage petition drive with an open-air meeting,

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From *Rampant Women: Suffragists and the Right to Assembly* (University of Tennessee Press, 1997), pp. 54–58, 206–208. Used with permission.

indicative of how these two forms of agitation would complement each other in Britain and the United States. The British militant campaign became violent when Parliament refused suffrage petition delegations, and the women stoned its windows.

In colonial America, petitioning meant that no group in colonial society was totally without political power. "Slaves, women, and various reform societies had petitioned since colonial days," noted historian Gerda Lerner.[2] Connecticut women petitioned to replace an indiscreet minister as early as 1658, and fifty-one women in Edenton, North Carolina, signed a petition in 1774 supporting the tea boycott. After American soldiers in 1782 expelled loyalist wives and children from Wilmington, North Carolina, the bond between women proved stronger than politics. Local patriot women, earlier themselves expelled by the Tories, petitioned patriot military leaders to rescind the order. "It is not the province of our sex to reason deeply upon the policy of the order," they began, reflecting their self-consciousness over stepping outside gender roles by venturing into politics.[3]

The abolition movement in the 1830s developed women's experience in wielding the right to petition. Abolition petition drives significantly strengthened women's ability to express themselves and organize. From 1834 to the early 1840s, women in local abolition societies undertook door-to-door canvassing for signatures on anti-slavery petitions to Congress. The experience gave women practice in political organizing and in improving their verbal skills of persuasion; it also demonstrated to them the power of the corresponding rights of association and assembly. Angelina Grimké pointed out in her *Appeal to the Christian Women of the South* that petitioning was particularly appropriate work for women, as they could not vote.[4] Historian Jean Fagan Yellin has argued that Grimké viewed the right to petition as an affirmation of selfhood, because it was the "only significant action" allowed women. Denied a say in her governance, Grimké grasped the petition as women's only avenue toward freedom. She wrote to Catharine Beecher, "The *very least* that can be done is to give [women] the right of petition in all cases whatsoever; and without any abridgement. If not, they are mere slaves, known only through their masters."[5]

The act of petitioning required a willingness to violate considerable cultural restrictions; women in a Massachusetts anti-slavery society encouraged each other not to "shrink before scorn and ridicule."[6] As historian Eleanor Flexner observed: "It took the same kind of courage as that displayed by the

Grimké sisters for the average housewife, mother, or daughter to overstep the limits of decorum, disregard the frowns, or jeers, or outright commands of her menfolk and go to her first public meeting, or take her first petition and walk down an unfamiliar street, knocking on doors and asking for signatures to an unpopular plea."[7]

Susan B. Anthony, Elizabeth Cady Stanton, and Lucretia Mott were among feminist leaders who sharpened their communications skills as petition solicitors in the 1830s. More than half of the signatures on the annual flood of anti-slavery petitions to Congress throughout the decade belonged to women. As the number of anti-slavery petitions rose, the House of Representatives passed its infamous "gag rule," which automatically tabled without discussion all anti-slavery petitions. The outraged reaction expanded the abolition campaign into a broader debate about free speech. Abolition historian Gilbert Barnes said the exercise of the right of petition inaugurated a new era for women: "Upon that right, which woman's 'physical weakness renders so peculiarly appropriate that none can deny her its exercise,' the women of the new era built a mighty organization, the first corporate expression of women's will in American history and the first organized stage in their century-long struggle for civic freedom."[8]

The petition campaign angered Congress, partly because the flood of abolition petitions clogged its operations and partly because the women's political involvement offended male politicians. Senator Benjamin Tappan of Ohio expressed the sentiments of many Americans when he refused to present abolition petitions collected by women. "The field of politics is not her appropriate arena," Tappan said. "The powers of government are not within her cognizance, as they could not be within her knowledge unless she neglected higher and holier duties to acquire it."[9] A Maryland congressman expressed "sorrow" over women petitioners' "departure from their proper sphere."[10] Many women agreed petitioning was beyond woman's sphere, such as educator Catharine Beecher, who lectured Angelina Grimké: "Men are the proper persons to make appeals to the rules whom they appoint, and if their female friends, by arguments and persuasions, can induce them to petition, all the good that can be done by such measures will be secured."[11]

WOMAN'S RIGHTS PETITIONS

The earliest recorded woman's rights petition was filed by Mary Ayres to the New York legislature in 1834. Although nineteenth-century woman's rights activists began to petition only after the power of petition waned, they grasped the petition because it remained their only political tool. The main purpose of many woman's rights conventions, for instance, was to organize petition drives articulating their members' grievances. Petitioning remained closely tied to the right of assembly because solicitors naturally sought crowds. When the Albany woman's rights convention in 1854 resolved to annually petition the state legislature for suffrage, it also urged activists to hold public meetings across the state to educate the public about their movement.

During the Civil War, Susan B. Anthony and Elizabeth Cady Stanton channeled fledgling female political activism through the petition, organizing the Woman's Loyal National League to collect a million signatures urging a constitutional amendment forbidding slavery. The league gathered some four hundred thousand signatures, representing approximately one signature for every fifty Americans in the northern states, on petition rolls that were carried into the Senate in huge bundles by two African American men on February 9, 1864. Such ceremony would also play an integral role in twentieth-century suffrage petition campaigns.

The women's efforts on slaves' behalf spurred ratification of the Thirteenth Amendment freeing the slaves, followed by the Fourteenth Amendment that in part protected voting rights—for men only. The amendment for the first time inserted the word "male" into the Constitution. Anthony and Stanton futilely turned to the petition to deal with this blow, a bitter lesson to voteless women on the limits of the petition's power. When petition drives to strike "male" from the amendment failed in 1865 and 1866, Stanton and Anthony unsuccessfully petitioned in 1867 and 1868 to include women in the Fifteenth Amendment protecting voting rights. Finally, they petitioned Congress in 1868 and 1869 for adoption of a Sixteenth Amendment that would specifically guarantee women the vote. By 1872, nearly five million signatures had been collected on petitions for women's rights. But Stanton and Anthony vowed to appeal no more because the petitions only piled up in Congress, "unheeded and ignored."[12] Lacking any other recourse, however, they launched a "mammoth petition" they believed too big for Congress to ignore. Obtaining ten thousand names a day during the first ten days of 1877, they

pinned high hopes on the process, as they recalled in the *History of Woman Suffrage*: "In view of the numbers and character of those making the demand, this should be the largest petition ever yet rolled up in the old world or the new; a petition that shall settle forever yet the popular objection that 'women do not want to vote.'"[13]

It, too, failed, but female activists clung to the petition as their only political recourse. The petition proved a mainstay of the temperance movement and other women's reform campaigns. One of the first political acts of the Woman's Christian Temperance Union involved submitting to Congress forty thousand signatures on a petition requesting the establishment of a committee to investigate the evils of alcohol. Intense petitioning by the WCTU, concerned about the sexual exploitation of girls, pushed more than a dozen states to raise the age of consent in the late 1800s (it was as low as ten years in many states). Louisiana women in 1879 petitioned a state constitutional convention to enlarge their civil rights, and Oregon women petitioned Congress to revise homesteading laws. In 1882, twelve hundred persons signed a petition requesting that women be allowed to enter Columbia College. African American women wielded the petition to protest encroaching Jim Crow laws and the convict-lease system at the turn of the century.... Although women knew the petition was a weak political tool, they optimized its utility as an educational and propaganda tool.

Nineteenth-century suffragists scored some success with petitions. Although the Colorado legislature denied suffrage petitioners a referendum in 1891, when women petitioned again, in 1893, they won a referendum—and the vote. Historian Beverly Beeton credited petitions to state political leaders with winning Utah women the vote in 1896. So many women crowded into the legislature to deliver a petition one day that they spilled over from the guest seats into the delegates' seats. Suffrage campaigner Laura Clay oversaw the distribution of 1.5 million tons of petitions and leaflets prior to the unsuccessful Oregon suffrage referendum in 1906. The National Association of Colored Women included a suffrage resolution in its petition to Congress demanding more equitable treatment of African American women. Circulating a petition was a prime function of the American suffragists' first open-air meeting on New York City's Madison Square on December 3, 1907. While her three companions spoke, Mrs. L. C. A. Volkman solicited signatures.

NOTES

1. "Report on the Committee of Libraries," *Woman's Journal*, October 31, 1908, p. 176.

2. Gerda Lerner, ed., *Female Experience: An American Documentary* (Indianapolis: Bobbs-Merrill Educational Pub., 1977), p. 329.

3. Linda K. Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1980), p. 52.

4. Angelina Grimké, "Appeal to the Christian Women of the South," in *The Public Years of Sarah and Angelina Grimké: Selected Writings, 1835–1839*, edited by Larry Ceplair (New York: Columbia University Press, 1989), p. 66.

5. Jean Fagan Yellin, *Women & Sisters: The Antislavery Feminists in American Culture* (New Haven: Yale University Press, 1989), p. 39.

6. Anne Firor Scott, *Natural Allies: Women's Associations in American History* (Urbana: University of Illinois Press, 1991), p. 50.

7. Eleanor Flexner, *Century of Struggle: The Woman's Rights Movement in the United States* (New York: Athenaeum, 1973), p. 51.

8. Gilbert Barnes, *The Antislavery Impulse: 1830–44* (New York: D. Appleton-Century, 1933), p. 143.

9. Lerner, *Female Experience*, p. 335.

10. Flexner, *Century of Struggle*, pp. 50–51.

11. Gerda Lerner, *The Grimké Sisters from South Carolina: Pioneers for Women's Rights and Abolition* (Chapel Hill: University of North Carolina Press, 2004), p. 184.

12. *HWS* 3:59.

13. Sally R. Wagner, *A Time of Protest: Suffragists Challenge the Republic, 1870–1887* (Sky Carrier Press, 1998), p. 77; and *HWS* 3:59.

A SHORT HISTORY OF THE RIGHT TO PETITION GOVERNMENT FOR THE REDRESS OF GRIEVANCES

STEPHEN A. HIGGINSON

THE BILL OF RIGHTS AND THE NEW NATION

The right of petition, so fundamental in colonial politics, was included in the Bill of Rights. That the framers meant to imply a corresponding governmental duty of a fair hearing seems clear given the history of petitioning in the colonies and the colonists' outrage at England's refusal to listen to their grievances.

The ratification controversy itself was, in large part, a debate among Federalist and Anti-Federalist petitioners and state assemblies. In Delaware, New Jersey, and Pennsylvania, widespread petitioning provided the catalyst for ratification conventions.

Although Congress, in its first session, approved the right of petition vir-

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tually without comment, two historic episodes are noteworthy. First, when Madison introduced his proposed list of amendments on June 8, 1789, he separated the clause for the rights of assembly, consultation, and petition from the clause containing the free expression guarantees of speech and the press. The express function of the assembly-petition clause was to protect citizens "applying to the Legislature... for a redress of their grievances."[1]

Second, both the House and Senate debated whether to include with the guarantees of free speech, press, and petition, "the people's right to 'instruct their Representatives.'"[2] Members defeated the amendment because they feared that obligatory instructions would subvert Congress's deliberative character and lead to irreconcilable factionalism. Yet, in statements denying the right, members expressly affirmed Congress's duty to receive and consider, although not to be bound by, citizens' communications. Thus, while refusing to vest individuals and groups with the power to bind Congress, and while guarding jealously their discretion to judge and reject instructions as unwise, the framers of the Bill of Rights nonetheless maintained that citizens' "instructions," like petitions, would be heard and considered.

Indeed, in Congress's first decades petitions were received and considered, typically by referral to committees. The petition-response mechanism dealt procedurally with such controversial issues as contested election results, the National Bank, the expulsion of Cherokees from Georgia, land distribution, the abolition of dueling, government in the territories, the Alien and Sedition Acts, and the slave trade. Generally, favorable legislation or an adverse report halted further petitioning.

Nonetheless, systemic strains appeared early in the nineteenth century. Since the daily business of Congress began with the reading by each state of its petitions, too many petitions could bring proceedings to a standstill. Groups like the American Anti-Slavery Society emerged with national constituencies able to mobilize such petitioning drives. The development of nationwide petitioning efforts, coupled with the Jacksonian sentiment that representatives owe "unrelaxing responsibility to the vigilance of public opinion,"[3] made the petitioning process less a means by which legislators were informed of public opinion and more an offensive device for propaganda. Failure to satisfy the petitioners' demands became a political garrote for accountability.

Fundamentally, the right of petition lacked a secure foundation in the national legislature. Its roots in local assemblies vested with investigatory duties

disappeared. The close geographical association between petitioners and colonial legislatures was lost. Developing judicial institutions removed private grievances from legislative attention. Congress, with its enumerated constitutional powers, did not rely on petitions to expand its jurisdictional reach. Finally, broadened franchise and the evolving party system diminished the need for legislators to inform themselves through popular, localized petitions.

NOTES

1. 2 B. Schwartz, *The Bill of Rights: A Documentary History*, p. 1026 (1971).
2. Ibid., pp. 1052–1105 (House debates).
3. *An Introductory Statement of the Democratic Principle*, from the *Democratic Review* (October 1837), in *Social Theories of Jacksonian Democracy*, edited by J. Blau (1954), pp. 21, 23.

INITIATIVE PETITION REFORMS AND THE FIRST AMENDMENT

EMILY CALHOUN

* * *

Despite the fact that petitioning rights (and the corollary right of the people to assemble) were historically extremely important, there was debate about whether a petition right should be included in the Constitution and, if so, what form that petition right should take. Some believed that a form of petitioning should be adopted that would enable voters to "instruct" (or bind) their representatives to vote in a particular way on a given issue. James Madison, however, strongly disagreed. He advocated a version of the First Amendment right to petition government that he believed would not undermine the purposes of the representative form of government generally embodied in the Constitution. Madison's version of the right to petition preserved the citizen's right of direct access to government but gave to elected

From *University of Colorado Law Review* 129 (1995): 131–33. Reprinted by permission of the *University of Colorado Law Review.*

representatives the ultimate power and responsibility for debating, adopting, or rejecting a particular petition.

Madison rejected a petition right of instruction in favor of the First Amendment right we now enjoy because he adhered to a familiar theory of government and understanding of human nature. Madison believed that representative government (for all practical purposes an inevitable feature of decision making, including initiative decision making) should be structured to guard against the possibility that "factions" of citizens might take control of government and abuse its powers. According to Madison, factions are composed of a "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[1] Madison feared any group of citizens—minority or majority—driven by self-interest to the exclusion of the interests of other citizens or the interests of the public good and the community as a whole. In the system of government advocated by Madison, representatives were obligated by their office to exercise judgment on behalf of the common good, after deliberation and debate. Representatives could not fulfill these obligations if a faction—even a majority faction—of voters had a petition right of instruction that would bind representatives to a particular position.

These arguments were grounded in part in a principle of government trusteeship. According to the trusteeship principle, government has a trust relationship with all of its citizens. As trustee of the *res publica*, government is obligated to act for the general public good rather than in a partial or self-serving manner. An instruction right would make it impossible for representatives to take into account the public good before adopting public policy; it would enable factions to bind representatives to positions that served only the interests of some voters, contrary to the trusteeship principle.

The trusteeship principle has firm roots in political philosophy. It was an essential part of John Locke's writings on government.[2] It was incorporated into many post-Revolution charters of state government. Most importantly, the principle of government trusteeship was familiar to and accepted by a broad range of people instrumental to the framing of the Constitution. Even those who were more skeptical of elected representative government than Madison—for example, Thomas Jefferson—believed in the principle. One cannot doubt that this principle influenced the decision to favor the First Amendment version of the petition right over a petition right of instruction.

NOTES

1. Garry Wills, *Explaining America: The Federalist* (1981), pp. 193–94.

2. Peter C. Hoffer, *The Law's Conscience: Equitable Constitutionalism in America* (1990), pp. 73–74.

JOHN QUINCY ADAMS, SLAVERY, AND THE DISAPPEARANCE OF THE RIGHT TO PETITION

DAVID C. FREDERICK

* * *

This article explores a key incident in the history of the right of petition—the congressional imposition in the 1830s of a "gag rule" to prohibit the reception of petitions related to slavery. This restriction on petitions was a turning point both for a change in the meaning of the right and for the procedures permitted by Congress to give it expression. The gag rule effectively quashed the right to petition as it had been exercised for centuries—as a means of communicating the people's grievances to government. Although the right still exists, its traditional usage and meaning "disappeared" in the 1830s.

The debates were also a critical juncture in the relationship between the rights of petition and free speech. A brief survey of the origins and early sub-

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stantive meanings of the petition and free speech rights reveals that the imposition of the gag rule did much to alter the preexisting conceptual relationship between these two rights. The right to petition emerged first, and free speech rights grew out of the English parliamentary experience. By the early nineteenth century, when the right of free speech had begun to take on a libertarian character, both rights were practiced widely. Petition campaigns produced a flood of anti-slavery petitions in the 1830s, and both houses of Congress developed gag rules to control debate on slavery. These procedural barriers greatly diminished the effectiveness of petitions and led to the decline of petitioning as a means for individual citizens to communicate grievances on issues of public policy to Congress. From a First Amendment coequal, the right to petition became submerged doctrinally in general free expression jurisprudence in the twentieth century.

* * *

ABOLITIONISM AND THE PETITION CAMPAIGN OF THE 1830s

First Stirrings of the Abolition Campaign in Congress

Fervent abolitionism did not reach full bloom in the United States until the 1830s. Heated debates over slavery had accompanied the constitutional convention of 1786–1787, the congressional prohibition of the slave trade in 1808, and the Missouri Compromise of 1820. Nevertheless, North-South relations in these periods were relatively tranquil by comparison with the 1830s when abolitionists and anti-slavery activists began to press for definitive action by Congress.

The petition struggle itself occurred amid the fracturing of the anti-slavery forces. Early abolition societies, formed in the first two decades of the Republic, tended toward paternalism and moderation. The American Colonization Society, founded in 1816, advanced a gradual approach to anti-slavery by advocating resettlement of emancipated and already-free blacks in Africa. Horace Mann captured the prevailing mood of this movement in 1833 when he stated: "Let us... carefully abstain from the adoption of all unlawful measures. [Though] we may seem to divest ourselves of available means for

the accomplishment of our purpose, yet the gain will overbalance the loss.... [L]et us endeavor to diffuse useful information, and to inculcate just sentiments... upon all within the sphere of our influence."[1] Diametrically opposed to these moderates was the American Anti-Slavery Society, formed in January 1832. The AASS called for immediate emancipation of slaves. One member of the sect, Lydia Maria Child, who was closely allied with William Lloyd Garrison, declared in an 1833 speech that "[t]his Society do not wish to see any coercive or dangerous measures pursued. They wish for universal emancipation, because they believe it is the only way to *prevent* insurrections."[2]

These two groups disagreed over both the methods and the pace of achieving change. But the increasing spiritedness of the anti-slavery movement produced new tactics in the struggle. Immediatist abolitionists first began a postal campaign, circulating anti-slavery publications by mail throughout the United States. A constitutional struggle over the mails campaign soon erupted, with the abolitionists winning the battle but losing the war. Congress eventually passed a statute creating a federal misdemeanor for postmasters to detain or delay delivery of letters, pamphlets, and newspapers, but the law was unenforced in the South, and the AASS abandoned the postal campaign in 1837.

The tactical importance of the mails initiative to the anti-slavery forces became secondary to petitioning and the gag rule controversy. In this latter episode John Quincy Adams played a pivotal role. After a bitter defeat to Andrew Jackson in the 1828 election, Adams expected a quiet retirement, but friends and neighbors in Quincy, Massachusetts, persuaded him to serve as their congressman. He entered the House of Representatives in 1830, the same year that William Lloyd Garrison began publishing *The Liberator.* In his private life, Adams had expressed concern over slavery, but he was more reticent in public. On December 12, 1831, he nevertheless presented his first petitions requesting the abolition of slavery in the District of Columbia. Although the petitioners were not his immediate constituents, he felt obliged to present them. If the petitioners, most of whom were members of the Society of Friends, expected his support, they were gravely disappointed. He would only say that "the most salutary medicines, unduly administered, were the most deadly of poisons."[3] He concluded by moving to refer the petitions to the committee for the District of Columbia. Adams thus sanctioned the *right* of persons to petition for the abolition of slavery in the District, but opposed the *action* itself.

Adams privately abhorred slavery but believed its public discussion "would lead to ill will, to heart-burnings, to mutual hatred, where the first of wants was

harmony; and without accomplishing anything else."[4] Throughout the early period of abolition (1831–1835), he avoided debate on the issue, especially over prayers that called for emancipation in the District of Columbia. He reasoned that if the "inhabitants of the District of Columbia... should petition the Legislature of Pennsylvania to enact a law to compel all citizens of that State to bear arms in defense of their country... the people of the District of Columbia might say the same of the citizens of Pennsylvania petitioning for the abolition of slavery, not in the State itself, but in the District of Columbia." Both would be "meddling with what did not concern them."[5]

This position, privately articulated at an early stage of the great petition battle, explains much of Adams's later behavior. He believed fervently that any citizen should be permitted to present a petition to Congress. But so long as Congress treated the petition respectfully, it need not concern itself when the merits of the prayer impinged on the citizens of another state. Thus emerged an underlying principle of the right of petition: in the context of responding to petitions, Congress should give greater consideration to concerns immediate to the petitioner than to petitions requesting action with remote effects.

Although the Constitution invested Congress with the power to govern the District of Columbia, the legislature's power to abolish slavery or the slave trade there was contested by the slavocracy. Nevertheless, the District was an ideal battleground for the anti-slavery forces. Whereas the Constitution protected slavery in the South, slavery opponents could at least maintain an argument that Congress had the power to emancipate slaves in the District. Moreover, the specific concerns of southern slaveholders—continuation of a stable labor force and the perpetuation of the plantation system, to name two—could be avoided by discussing slavery in the District. Finally, there was at least an argument that citizens outside the District could legitimately petition Congress to abolish slavery there. Adams rejected this position, but other northern congressmen believed that citizens from across the country could request congressional action in the nation's capital.

John Dickson, a Whig attorney from West Bloomfield, New York, held this view. In a speech presenting several petitions from citizens of New York praying for the abolition of slavery and the slave trade in the District of Columbia, Dickson disclaimed all power in the national government to tamper with slavery in the States. But on the power of Congress to abolish it in the nation's capital, he held firm. In a long, rambling speech, Dickson presented a case for emancipation in the District of Columbia and for substance

to the right of petition. He even criticized Adams's proposal that abolition petitions be referred to committees or tabled upon reception:

> A right "to petition the Government for a redress of grievances" is secured to the people. But, sir, of what use to the people is the right of petition, if their petitions are to be unheard, unread, and to sleep "the sleep of death," and their minds to be enlightened by no report, no facts, no arguments? Have Congress the power to abolish slavery and the slave trade in the District? It is believed they have. Of the three committees who have reported very briefly on the subject, one expressed no opinion, another admitted Congress had unlimited powers, and the other admitted that they had by the letter, but denied that they had by the scope, spirit, and meaning of the constitution, without the consent of the people of the District.[6]

Although Dickson consented to refer his petitions to a select committee, Joseph Chinn of Nulsville, Virginia, won a vote to table the petition.

During February 1835, northerners presented many such petitions, and southerners succeeded in tabling them. But northern abolitionist representatives, such as William Slade and William Jackson, succeeded in luring their southern colleagues into a trap. By exciting, then calming, southern passions, these northerners were casually but gradually drawing southern members into a debate over the right of petition and the abolition of slavery in the District of Columbia.

After the Twenty-third Congress ended in 1835, the slavery issue sparked numerous public demonstrations of violence. During the summer, Baltimore erupted in a series of anti-abolition riots. In Charleston, mobs of slaveholders intercepted the mails and withheld abolitionist pamphlets. Mississippi witnessed vigilante "justice" when lynch mobs started hanging blacks suspected of abetting the abolitionists....

When the Twenty-fourth Congress convened, slavery dominated the early debates. On December 16, 1835, John Fairfield of Maine began the procession of many petitions praying for the abolition of slavery and the slave trade in the District of Columbia. The success of the southerners in tabling these petitions without a discussion of their merits frustrated men like Slade, who took the floor to push the cause of emancipation in the District....

... [T]he enormous time spent debating the same issue without achieving a resolution was an acute concern for Congress. Some members called for immediate reception, others for referral to committee, and still others for

reception, then tabling. Hiram Hunt offered a sensible solution. He suggested that so long as the petitioners believed they were not getting their just due, they would continue to flood Congress with petitions. "[B]ut the very moment [the House] gave them what he conceived to be their proper direction, by referring them to a committee, which made a report thereon, that very moment the excitement was allayed, and nothing more [would be] heard on the subject.... The subject was put forever to rest."[7]

Thomas Glascock of Georgia appreciated Hunt's good intentions but disagreed both with his proposal and its underlying constitutional premise. He maintained that as soon as a member brought forward a petition, the Constitution was fulfilled, and the House could do what it wanted. A ringing declaration that a petition would be rejected after reception would mean that "the South would be secure in their lives, their property, and their rights." All might then say "this republic is safe; then every thing like disunion would be quieted... forever."[8] Glascock's speech echoed the hard-line southern position on the right of petition: the right entitled citizens to transmit a grievance to the legislature and no more. After submission, Congress could do as it pleased. Initially, even the southerners accepted a right of reception, but as the abolition campaign continued, they came to deny the petitioners even that much if the subject of the prayer was inappropriate.

The week's debates on slavery in the District of Columbia revealed the early divisions in the southern ranks on how to deal with the increasing numbers of petitions. The hard-liners, James Henry Hammond and Glascock, wanted a stinging rejection of the petitions, lest Congress be perceived as waffling. Rice Garland of Louisiana and Charles Fenton Mercer of Virginia encouraged moderation, maintaining that an extended debate on reception would play into the abolitionists' hands. For their part, several northerners tried to accommodate the South. Samuel Beardsley, Hiram Hunt, and Aaron Vanderpoel, three New Yorkers, offered proposals closely in accord with the southerners'. The abolitionist congressmen wisely abstained from debate as their southern counterparts became increasingly consumed by the petition issue.

* * *

THE IMPOSITION OF THE GAG RULE

PINCKNEY'S COMMITTEE

By early February 1836, the time spent on the abolition petitions was considerable. Partly as an attempt to increase congressional efficiency and partly as an effort to throttle the emancipation movement, Henry Pinckney presented a resolution to establish a select committee that would receive all papers or propositions on slavery and report that "Congress possesses no constitutional authority to interfere in any way with the institutions of slavery in any of the States in this confederacy" and that "Congress ought not to interfere in any way with slavery in the District of Columbia."[9]

Pinckney's aim was to arrest debate and obtain a direct vote on the abolition of slavery. But Hammond feared that any report would merely inflame the abolitionists: "They have tasted blood, and are too keen upon the scent to be deterred by any thing that can be put on paper, no matter what rhetorical excellences it may possess."[10] Pinckney, nevertheless, secured the formation of a special committee to report on the petitions for abolition in the District of Columbia. Petitions were referred to the select committee, and debate on slavery slowed to a halt. Order returned to the House. Although the results of the committee report were foregone, its tenor remained a mystery.

On May 18, 1836, Henry Pinckney presented the findings of a unanimous committee. After the clerk read the report, Henry Wise immediately denounced it for omitting the conclusion that Congress had no power to abolish slavery in the District of Columbia.... Debate finally ended after more than a week. The final resolution held a surprise, one completely unanticipated on either side of the aisle:

> And whereas it is extremely important and desirable that the agitation of this subject should be finally arrested for the purpose of restoring tranquillity to the public mind, your committee respectfully recommend the adoption of the following additional resolution, *viz:*
>
> *Resolved*, That all petitions, memorials, resolutions, propositions, or papers, 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.[11]

Although Adams loudly voiced his opinion that the resolution was "a direct violation of the constitution of the United States, the rules of this House, and the rights of my constituents," his colleagues adopted it anyway, 117–68.[12] The Pinckney resolution was the first formal "gag rule" imposed on petitions in the House of Representatives. Adams had voted for the formation of the committee in February because he had believed it to be another necessary compromise for the sake of the Union. But the gag rule shocked him, and efforts to repeal it occupied him for the next eight years.

At one level, the gag rule or some variant may well have been necessary for the proper functioning of the House. Petition floods similar to the abolitionists' were commonplace.... But after the success or failure of a bill, the flood receded. Not so with abolition. With each succeeding resolution condemning it, the number of petitions multiplied to the point that normal House business became difficult, on occasion impossible. Moreover, these pressures were part of a developing strategy on abolition: "[I]t was not until the postal campaign was smashed by southern intransigence that abolitionists appreciated the tactical advantages of petitions over mailings."[13]

* * *

The Repeal of the Gag Rule

By 1842... the moderate anti-slavery forces were still attempting to promote abolitionism through the political process. The radical abolitionists had already forsaken the political arena and were taking their campaign to the states, advocating disallegiance to the Constitution and sectional disunion. One of the most eloquent champions of the moderates' cause, Congressman Joshua R. Giddings, a Whig from Ohio, advanced the position that slavery was a creature of state law and thus could not be sanctioned or extended by the federal government. After Adams had once again pushed the pro-slavery forces of the House to the brink by presenting petitions in violation of the gag rule, Giddings propelled the majority of his colleagues over the edge when he... argue[d] that slaves became free persons once outside the slave state's coastal waters.

As a parliamentarian, Giddings was no Adams, and the Ohioan was prostrate when pro-slavery Whigs and Democrats moved the previous question before Giddings could speak in his own defense. Censure passed easily and Giddings resigned his seat. He soon returned, however, after winning reelec-

tion over his Democratic opponent by an unprecedented eighteen-to-one margin. This vote sent a clear signal to Congress because it was the first referendum dedicated primarily to the slavery question.

Giddings's electoral victory in a sense liberated northern Whig abolitionists, but John Quincy Adams's role in the Twenty-fourth Congress had set the stage. Through his defense of the right to petition and his ability to link the slavery of blacks in the South with the constitutional rights of whites in the North, the abolition movement mushroomed. Whereas in the early 1830s only the most ardent abolitionists transmitted memorials to Congress, by 1836–37 hundreds of thousands petitioned Congress and increased their output after Pinckney's gag snuffed out their reception. Many of these petitioners were lukewarm to the anti-slavery cause but saw in the gag rule an infringement of their basic constitutional rights.

Giddings's triumph also arguably affected the great petition struggle. So long as pro-slavery forces held widespread popular support, their representatives in Congress could employ absolutist tactics in stifling anti-slavery viewpoints. The gag rule represented an extreme example of this position. Adams opposed this rule not because it restricted anti-slavery discussion, but because it violated a fundamental constitutional right. He would have been content to permit reception of petitions and referral to committees.... Yet even this relatively moderate position was too incendiary for the pro-slavery advocates of the late 1830s.

The gag rule was renewed by strong majorities every year until 1840, when it became the twenty-first standing rule of the House. On December 3, 1844, Adams moved a resolution to repeal the gag rule. After a failed table motion, the House voted in favor of Adams's resolution by a majority of twenty-eight votes, 108–80....

By 1844, however, the political climate had shifted enough toward abolitionism that Adams's proposed disposition was no longer seen as radical.... [T]he concession of the pro-slavery forces on the gag rule was a relatively minor one in the struggle over slavery. Adams ensured that this concession would be less painful to slavery advocates by his promise that anti-slavery petitions would be effectively silenced by their referral to committee. Pro-slavery advocates could thus be assured that repeal of the gag rule would not generate daily anti-slavery discussion in the House.

In retrospect, it may seem that Adams himself was partly responsible for the "disappearance" of the right of petition, by recommending that they hibernate in committee. Adams had long distinguished between the right of a

petition to be considered and the appropriateness of its prayer. He pleaded with his colleagues to receive the petitions and refer them to committees that would give reasons why they should be rejected. Although he abhorred slavery, Adams did not insist upon anti-slavery discussion in Congress. He believed that such debates divided the Union, but he could not condone actions that precluded basic rights.

Petitions calling for abolition in the District of Columbia illustrated this distinction. Adams fervently believed that Congress had the power to emancipate slaves in the District. But the pleas of non-District citizens imploring action were impractical and improper. Impractical, he believed, because a majority in the Union opposed it; improper because such action would violate still another basic political right: the right of the people to determine how the government should exercise its power. Because District citizens appeared to favor slavery, congressional emancipation of slaves would operate exclusively on them. The petitioners would not be affected at all.

Moderate abolitionists, who in the 1830s and early 1840s recognized Adams as their champion in Congress, decried this position. But Adams's inconsistency was neither gross hypocrisy nor political expediency. He fought for abstract rights—to petition and to be governed justly—that produced conflict at one level and not the other. On the one hand, he maintained that petitioners had an absolute right to seek redress from grievances; on the other, that the people affected by legislation had the right to approve or deny it. With slavery in the District of Columbia, the two principles appeared to collide, or so it seemed to the abolitionists. But to Adams, the right to petition Congress did not guarantee the right of action. He thought it appropriate that Congress should dismiss such petitions on the merits, but he did not believe Congress had the authority to reject petitions without proper consideration.

The distinction was subtle, often missed by Adams's contemporaries as well as by some historians. Historians initially called Adams's inconsistency "deliberate," for "Adams was a sectionalist, the most zealous of them all," and his fight for the right of petition "cloaked a determination to further the anti-slavery cause."[14] More recent scholars discredit this view. Adams no doubt perceived the petition issue as a means of instigating debate on slavery, which he privately desired to end. But Adams was more zealous of constitutional causes than anti-slavery efforts, even when the two meshed. He consistently declared that slavery should not be discussed, and called for a committee to report that suppliants' appeals be rejected. If Adams had supported abolition

in the district, he might then be accurately called "inconsistent." He avoided contradiction, however, in his distinction between the petition process and the goal of the petitions. Political pragmatism necessitated that he publicly oppose abolition when privately he supported it. The end of the gag rule brought neither an exhaustive discussion of slavery in the District of Columbia nor a full restoration of the right of petition as it had been practiced from 1789 to 1836. Slaveholding Speaker after Speaker made repeal of the gag rule a pyrrhic victory by constituting committees such that they never reported on the petitions. Slavery was not abolished in the District of Columbia until 1862, when, as Adams had predicted in 1836, wartime legislation emancipated the slaves.

CONCLUSION

The congressional debates of this period remain the most vivid arguments for and against the right of petition, a right little exercised in the aftermath of the gag rule. By the twentieth century, when the Supreme Court began interpreting the First Amendment, the practice of the petition right as a means of communicating grievances to government in the eighteenth century had long since been abandoned. The Court thereupon merged the right of petition with other First Amendment rights in a doctrine that obscures both the original meaning and the form of the right.

The 1830s congressional debates on abolition petitions served as a watershed for the American exercise of the right. Prior to the imposition of the gag rule, people used petitions to communicate with the government on a wide variety of issues. Implied in this right was the duty of Congress to receive and respond to petitions. Mere reception, however, did not demand acceptance. Even the most ardent supporters of the right to petition believed that Congress could properly reject petitions on their merits. The gag rule struck at a more fundamental issue: whether Congress could peremptorily reject petitions on a subject deemed inappropriate by the majority. The clashes over parliamentary procedure tended to obscure the more important concerns over the substantive meaning of the petition clause. Nevertheless, the outcome of the debates dissuaded people from sending petitions to Congress on matters of public import.

These debates also followed several decades of dispute over how far to

permit the reception of petitions on subjects deemed inappropriate. As early as 1792, members of Congress worried aloud that abolition petitions should be rejected as dangerous to the Union. Although the general rule was to receive and respond to petitions, Congress began to permit the rejection of opprobrious petitions as an exception to this rule. In the 1830s flood of abolition petitions, this narrow exception became the general rule.

The issues that arose in the 1830s never resurfaced, and none of the cases taken by the Supreme Court have presented parallels. The debates over abolition petitions were, however, a significant episode in our constitutional history that led to the abandonment of the right in practice. Occasional Supreme Court opinions that speak of petition as a distinctive right without elaborating its content keep alive the issue of the relationship between free speech and petition. The anti-slavery petition debates, borne of a different historical context, do not form the basis for a current distinctive right of petition. But this period does make clear that speech and petition were distinctive though related rights, and perhaps should spark a reconsideration of the appropriateness of their assimilation in twentieth-century doctrine. This assimilation has produced a clause in the First Amendment curiously devoid of meaning and a historical development with an interesting irony. Whereas the right to petition arguably led to the development of free speech rights in England and was practiced in the first fifty years of American constitutional history as a vibrant, independent First Amendment right, the most recent Supreme Court opinions have treated petition as a subset of free speech. Prior to that doctrinal merger, the zealous efforts of anti-slavery activists and the determined resistance of pro-slavery forces led to the "disappearance" of the right to petition.

NOTES

1. Horace Mann, "Address to the Boston Young Men's Colonization Society, March 13, 1833," *Colonizationist and Journal of Freedom* (April 1833), quoted in B. Weisberger, ed., *Abolitionism: Disrupter of the Democratic System or Agent of Progress?* (1963), p. 16.

2. Lydia Maria Child, "Colonization Society and Anti-Slavery Society," *An Appeal in Favor of That Class of Americans Called Africans* (1836), quoted in Weisberger, *Abolition*, p. 28, note 1.

3. 8 Congressional Debates (1831), p. 1426.

4. 8 *Memoirs of John Quincy Adams*, pp. 454–55 (1875) (January 9, 1832).

5. Ibid.

6. 11 Congressional Debates (1835), p. 1137.
7. 12 Congressional Debates (1835), p. 1988.
8. Ibid., p. 1990.
9. Ibid., p. 2483.
10. Ibid., p. 2496.
11. 12 Congressional Debates (1836), p. 4052.
12. Ibid., p. 4053.
13. W. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848* (1977), p. 184.
14. See G. Barnes, *The Antislavery Impulse: 1830–1844*, p. 125.

Chapter 2

SCOPE AND MEANING

THE FIRST AMENDMENT RIGHT TO PETITION GOVERNMENT FOR A REDRESS OF GRIEVANCES: CUT FROM A DIFFERENT CLOTH

JULIE M. SPANBAUER

INTRODUCTION

* * *

The First Amendment Petition Clause is rarely invoked by litigants as a substantive constitutional right and, when invoked, it affords no greater or different protection than under the Speech, Press, or Assembly Clause. In fact, the Supreme Court has described the right to petition as a right "cut from the same cloth"[1] as the other expressive rights embodied in the First Amendment:

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> The Petition Clause... was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition ... than other First Amendment expressions.[2]

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

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

Although the Supreme Court has conceded that the use of the word "government" as contained in the Petition Clause protects petitions to *all* branches of government, the Court has paid scant attention to other important historical aspects of petitioning. For example, the Court has concluded that the First Amendment does not provide a substantive right of access to the courts; it has granted only limited immunity to petitioners; and it has concluded that whatever the breadth of the right to petition may be, there is no correlative duty on the part of the government to respond. In analyzing different claims, the Court has purported to rely on history; however, its historical analysis is frequently selective and misleading. Not only has the Court elected to grant less protection than history warrants, but it has also been less than forthright about that decision.

* * *

THE RIGHT TO PETITION WAS DISTINCT FROM AND SUPERIOR TO THE RIGHTS OF SPEECH AND PRESS

The rights of speech and press evolved much more slowly in England than the right to petition. The English Bill of Rights of 1689, while providing explicit protection for the right to petition, made no mention of an individual right of speech or of any rights of the press.[3] In the first years following the Revolution of 1688, press licensing laws remained in effect. Although these laws expired in 1694, the press continued to be controlled through application of the law of seditious libel and treason. The judicial extension of treason via the doctrine of constructive treason allowed for greater controls over the press. Although only three printers were executed for treason during the sixteenth and seventeenth centuries, this extreme penalty was a likely deterrent to a free press.

Seditious libel laws provided another and more effective method for suppressing the press. The definition of seditious libel was very broad, encompassing "any reflection on the government in written or printed form."[4] While intent to publish the material was required, actual intent to produce sedition was not. Convictions were relatively easy to obtain because the judge determined whether the publication was seditious and whether malice was shown. The truthfulness of the published material was not an affirmative defense and in fact, was not even considered relevant to these prosecutions. Penalties were less severe than those levied for treason, and included fines and imprisonment for indefinite terms.

Although members of Parliament possessed the privilege of free speech, Parliament punished as seditious libel all reports of parliamentary proceedings, including any critical discussions of these proceedings, on the theory that free speech in Parliament was necessary for effective government. Because parliamentary measures were often enacted after much debate and great differences of opinion, such internal discussions were deemed absolutely privileged from disclosure to the public. Due to public opposition, the House of Commons no longer punished accurate publication of its debates after 1771 but continued to punish as libel those publications that allegedly misrepresented these debates. In an effort to prohibit publication of its proceedings, Parliament sometimes completely barred reporters from its sessions. Additionally, Parliament taxed publishers through the early part of the nineteenth century. It was not until 1860 that these suppressive practices ceased in England.

Press licensing laws survived in colonial America until 1720, approximately a quarter century after the expiration of the British licensing laws.[5] These laws restricted expression to those few printers the government approved. The laws were allowed to lapse in the face of the emerging eighteenth-century belief that speech was a right enjoyed in common by all people. As in England, the colonial government removed these prior restraints on speech only to replace them with the possibility of subsequent punishment for seditious libel.

These practices were generally accepted throughout the early part of the eighteenth century by both the British and the American colonists who understood freedom of speech to mean nothing more than an absence of prior restraints.[6] Critical speech was suppressed for two reasons. First, the government was viewed as superior to the individual citizen and was therefore justified in suppressing critical speech as a method of self-preservation. Also, truth was thought to be absolute, and there could be no tolerance for any ideas or opinions which differed from the orthodox view of the government.

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

Despite the repressive governmental response to critical political expression,[7] many printers did publish anti-revolutionary rhetoric. This may be attributed in part to the divergent views held in the different colonies on various political issues. People intent on publishing material offensive to the governing authority in one colony could simply move to another colony where the government was more tolerant of written opinions. The fact that printers risked punishment by publishing objectionable material throughout the late eighteenth century did not alter the law. Seditious libel laws existed in all of the colonies, and punishment for statements critical of the government was an accepted, lawful practice which continued even after the framing and ratification of the First Amendment. Although the press was used throughout the Revolution to unite and inform the colonists, the press could play a politically divisive role through its ability to reach so many people. The revolutionary movement utilized the doctrine of seditious libel as its tool for suppressing critical political speech.

In comparison, the right to petition was far less restricted and was the only

authorized means by which individuals could speak out against governmental action. It is likely that individuals were allowed to petition government without fear of reprisal because petitioning did not present the same potential threat to the patriot cause as did the unrestricted freedom to publish. A petition signed by an individual or group and submitted to an assembly, even if highly critical of the assembly, was not a likely threat to the continued existence of the government or the assembly. Thus, the theory of self-preservation that underlies the seditious libel laws was not present.

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

Influential writers espoused toleration of critical political speech during the period immediately preceding the framing and ratification of the First Amendment.[8] Their libertarian views, however, emerged as colonial society was in transition. Although considerable debate exists about the content and meaning of that era's libertarian thought about freedom of speech and the press, the academic community agrees that seditious libel laws existed in the colonies. In 1798, seven years after ratification of the First Amendment, the Sedition Act was passed by Congress and a number of individuals were prosecuted under it. However, not a single petitioner was prosecuted. The existence of both state seditious libel laws and the Federal Sedition Act coupled with the failure to prosecute petitioners under those laws indicate that there was no original intention to raise freedom of speech and the press to the level of protection given to petitioning.

* * *

AN EXAMINATION OF SUPREME COURT DOCTRINE

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

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

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

The Supreme Court has recognized that the right of access to the courts is a component of the right to petition government for a redress of grievances and is constitutionally protected.[9] In several cases, the Court has analyzed claims of a right of access to the courts under either the Due Process or Equal Protection Clause of the Fourteenth Amendment. For instance, in *Boddie v. Connecticut*,[10] the Court held that the Due Process Clause required states to waive court costs and fee requirements for indigents seeking a divorce. The Court ruled that, unlike resolution of other private disputes, a denial of access to those who could not afford to pay for a divorce was a denial of the right to a divorce and a complete denial of the right to be heard.

In *Ortwein v. Schwab*,[11] a similar case involving a right of access claim, welfare recipients relied on *Boddie* to argue that state laws requiring appellate filing fees violated the Due Process and Equal Protection Clauses for indigents seeking to reverse a reduction in benefits. The Court distinguished *Boddie* and ruled that a post-hearing review of a reduction in benefits, as

opposed to a complete denial of benefits, did not implicate fundamental interests. The Court found that due process was satisfied by an initial hearing, which did not require the payment of fees, and that the appellate filing fees were rationally related to the legitimate state interest in recouping operating costs.

The results in these cases can be read as not offending the protection historically afforded petitioning. The unique circumstances present in *Boddie* seem to require that fees be waived to allow an indigent access to the courts, the only avenue by which relief could be afforded. In *Ortwein*, by contrast, the petitioner was provided redress at the administrative level and sought discretionary review at the appellate level. The right to petition was not denied, rather, the right was burdened as to appeal. The problem is not the results but the Court's failure to recognize that the First Amendment Clause should govern these claims. In both cases, petitioners invoked the First Amendment Petition Clause. The *Boddie* court, however, did not address the First Amendment issue. In a cursory footnote, the *Ortwein* court concluded: "Our discussion of the Due Process Clause, however, demonstrates that appellants' rights under the First Amendment have been fully satisfied."[12]

The only context in which the Supreme Court has been willing to find First Amendment Petition Clause protection is civil actions in which collective activity is undertaken to secure legal advice and initiate legal proceedings. In *NAACP v. Button*, the Supreme Court held that the activities of the NAACP and the NAACP Legal Defense Fund in soliciting and financing litigation aimed at ending racial discrimination were protected under the First Amendment from state laws prohibiting attorney solicitation. The Court emphasized that NAACP-sponsored litigation was a "form of political expression"[13] and was very possibly the only avenue by which minority groups could petition government for redress of grievances. The Court explicitly refused to rest its decision exclusively on the First Amendment Petition Clause, however, and instead focused on a conjunctive reading of the First Amendment expressive guarantees and its protection of group activities, associational interests, and speech on political issues.[14]

In subsequent decisions, the Supreme Court extended First Amendment Petition Clause protection to unions that utilized collective plans to provide legal advice to union members for personal injury claims.[15] Unlike *Button*, First Amendment protection was granted in these later cases despite the fact that the underlying litigation was not of constitutional magnitude. The Court

found crucial to its decision the fact that collective activity was undertaken to secure meaningful access to the courts, and thus First Amendment associational interests were implicated.

In each of these cases, the Court emphasized the presence of constitutionally protected speech and relied on the presence of collective activity but failed to squarely address the right to petition. Whether individuals pursue redress of political grievances or groups collectively seek redress of private grievances, the Court should focus on the fact that the judicial process has been invoked. If the Court only grants First Amendment protection for right-of-access claims when other First Amendment rights are implicated, then the historically distinct, superior right to petition will be lost through collapse into the other rights of the First Amendment.

* * *

The Right to Petition Must Include Mandatory Governmental Response

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

* * *

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

NOTES

1. *McDonald v. Smith*, 472 U.S. 479, 482 (1985).
2. Ibid., 485 (citations omitted).

3. Frederick S. Siebert, *Freedom of the Press in England, 1476–1776* (1952), p. 381.

4. Ibid., p. 271.

5. Patrick M. Garry, *The American Vision of a Free Press* (1990), p. 37.

6. Leonard W. Levy, ed., *Freedom of the Press from Zenger to Jefferson* (1966), pp. 103–105.

7. Leonard W. Levy, *Emergence of a Free Press* (1985), pp. x, xvi–xvii.

8. Ibid., pp. 289–94.

9. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

10. 401 U.S. 371, 376–77 (1971).

11. 410 U.S. 656 (1973).

12. *Ortwein*, 410 U.S. 660, n.5.

13. 371 U.S. 415, 444.

14. Ibid., 430–31.

15. *United Mine Workers of America v. Illinois State Bar Ass'n.*, 389 U.S. (1967), pp. 217, 222–24; *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. (1964), pp. 1, 7–8.

A RIGHT OF ACCESS TO COURT UNDER THE PETITION CLAUSE OF THE FIRST AMENDMENT: DEFINING THE RIGHT

CAROL RICE ANDREWS

* * *

A RIGHT ONLY TO FILE CLAIMS

[A] 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

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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. 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. Fortunately, for purposes of defining the right to petition *courts*, this debate need not be categorically settled. Instead, important conclusions about the government's duty with regard to judicial petitions can be drawn from the noncontroversial aspects of the historical record and the Court's precedent. For example, a consensus 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.*[1] There, a taxpayer charged that due process required him to be heard before the government implemented a city-wide tax increase. 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.[2]

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*,[3] 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 meet with individuals. The employees claimed "an entitlement to a government audience for their views."[4] 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 lands 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. 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.

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."[5] 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, offhandedly 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 part of the government at all, other than stating that Congress may not abridge the right to petition.

Nevertheless, a number of academic commentators,... 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." 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 that they did not support or to take actions that were unconstitutional.[6] Though the representatives had different views as to whether the duty to instruct would in fact bind them, few seemed to endorse the concept. Moreover, no one voiced a concern that the right of petition (as opposed to 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 peti-

tions, even if that response was a denial. In particular, they cite the comments of Representative Gerry, Sherman, and Madison.[7] 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."[8] Elsewhere, Representative Gerry stated that a representative would present the petition to the House if "he thinks proper."[9] 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."[10] Similarly, James Madison broadly stated that "the people have a right to express and communicate their sentiments and wishes" through various means including "by petition to the whole body," but he did not say that Congress must specifically respond to each of these views.[11]

[One] 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. This is the most compelling point. The history books are full of accounts of the English Parliament and the colonial and early American governments processing and responding to petitions. In fact, the First Congress—the drafters of the Petition Clause—established rules for processing citizen petitions. Documentary records of the First Congress show instance after instance of the House affirmatively considering and acting upon citizen petitions. The petitions helped to shape the legislative agenda of the First Congress.

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. Second, the response of the First Congress to legislative petitions may have depended on the discretion of individual members. Representative Gerry's comments, quoted above, suggest 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. 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. If this were the view, it arguably reflects a bal-

ancing of interests that may change with time, particularly as the government grows.... [S]ome members of the First Congress expressed concerns about the practical problems of implementing a right to instruct. 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.

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. In 1836, Congress instituted a rule by which it could not refer, present, or consider abolitionist petitions. In 1842, Congress abandoned its former practice of formally presenting petitions to the House and began to direct petitions to the House clerk instead.[12] This move "was found necessary, in order to save time." 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. 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. A duty to respond therefore would not give 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. 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 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. 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, so, unlike other forms of petitions, 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 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. 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 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.

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. The Petition Clause, with all of its attendant "strict scrutiny" protections under the First Amendment, protects the initial filing of the complaint, and the Due Process Clause, and its somewhat lower "reasonableness" standard of protection, steps in from that point forward. 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. 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. 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 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, 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.

NOTES

1. *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915).
2. Ibid., 445.
3. *Minnesota State Board of Community Colleges v. Knight*, 465 U.S. 271 (1984).
4. Ibid., 282.
5. Ibid., 285 (citation omitted) (relying in part on the *Federalist No. 10* (James Madison).
6. 11 *Documentary History of the First Federal Congress 1789–1791*, p. 1266.

7. See, e.g., Stephen A. Higginson, note, "A Short History of the Right to Petition Government for the Redress of Grievances," *Yale Law Journal* 96, no. 142 (1986): 155.

8. "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, August 15, 1789, reprinted in 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* (1971), pp. 1095–96.

9. Ibid., p. 1095.

10. Ibid., p. 1094.

11. Ibid., p. 1096.

12. See Rules of the House of Representatives, H. Doc. 97–271, p. 571 (1983) (Rule XXII, Section 2).

"SHALL MAKE NO LAW ABRIDGING . . .": AN ANALYSIS OF THE NEGLECTED, BUT NEARLY ABSOLUTE, RIGHT OF PETITION

NORMAN B. SMITH

* * *

The Supreme Court first considered the right to petition in two nineteenth-century cases, *Crandall v. Nevada*[1] and *United States v. Cruikshank*.[2] In the former, the Court expounded a privilege of interstate travel that is derived from the right to petition the national government. In the latter, the Court decided that petitioning itself, as related to matters within the concern of the federal government, is a Fourteenth Amendment privilege and immune from both federal and state government action. Later, in *De Jonge v. Oregon*, the Court broadened the right of assembly and made it clear that assembly is not dependent on the right of petition; this case conversely emphasizes the status of peti-

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tioning as an independent right.[3] Then, in *Thomas v. Collins*, the Court declared that grievances for which the right to petition was created are not solely religious or political and are not confined to any particular field of interest.[4] The *Thomas* Court also stated that the First Amendment expressive rights of petition, speech, press, and assembly are inseparable.

The Court first placed a limitation on the right to petition in the 1961 decision of *Eastern Railroad Conference v. Noerr Motor Freight*.[5] In *Noerr* the Court developed the "sham exception," holding that liability can be imposed on one who makes a pretense out of petitioning to cloak an ulterior purpose of injuring the private interests of another. The sham exception, although without common law or historical basis, is appropriate in a system where the right to petition is broader than other expressive rights, because one should not be able to evade constitutionally acceptable limitations on speech and press by disguising a communication as a petition.

Until its 1985 decision in *McDonald v. Smith*,[6] the Supreme Court had not considered whether the right to petition was subject to any of the limitations that had been engrafted on the cognate rights of free speech and press. In *McDonald*, a lawyer, who had unsuccessfully sought appointment to a United States attorney's position, brought a libel suit against an individual who wrote to the president claiming that the plaintiff had violated individuals' civil rights while a state judge, had committed fraud and blackmail, and had violated professional ethics. The complaint alleged that these charges were knowingly false. In a unanimous decision, the Supreme Court held that the right to petition did not accord the defendant an absolute privilege against liability for defamation and that the *New York Times* standard of known falsity or reckless disregard for truth applies to the contents of petitions, just as it does to speech and press generally.

The *McDonald* Court failed to give adequate consideration to the history, textual development, and draftsmen's intent of the right to petition and to the purposes and interests it serves. The Court failed to refer to the lengthy history by which petitioning developed as an essentially unlimited right in advance of and separate from the other expressive rights. The majority and concurring opinions contained only two historical references. The chief justice, writing for the majority, mischaracterized a parliamentary enactment in "the 1790s" as an "attack" on the right to petition. The statute made public meetings of more than fifty persons illegal if assembled for the purpose of petitioning and if a magistrate was not present. This statute controlled the assembly incidental to petitioning, not the core petitioning activity itself. This

law imposed no penalty or damages upon the content of a petition, unlike the civil suit that was before the Court. Moreover, the statute, the Seditious Public Meetings Act of 1795, was enacted four years after 1791, the year in which the common and constitutional law of England had become fixed for the purposes of American constitutional law.

The other historical reference, which appears in both the majority and concurring opinions, is a claim that American libel cases decided prior to adoption of the First Amendment reveal conflicting positions regarding privilege afforded to petitioners. In fact, there appear to have been no cases of this description. It must be assumed, therefore, that the English common law of absolute immunity, as set out in the 1680 case of *Lake v. King*, was the law in America.[7] The first reported American case dealing with this issue is *Harris v. Huntington*,[8] an 1802 Vermont case. The *Harris* opinion relied upon the English common law and the history of the right to petition and ruled that petitioners had absolute immunity from defamation claims.

The majority and concurring justices in *McDonald v. Smith* made only one reference to the intent of the draftsmen of the First Amendment. Both opinions referred to Madison's speech in the First Congress about how people can communicate with their representatives by speech, press, and petition. Both opinions failed to mention that Madison made this speech during a debate on whether the people should have a right to give binding instructions to their representatives. Madison's statement taken in context attaches considerable importance to petitioning as a separate and unique right, as an alternative to the right of instruction, not as a redundancy to the rights of speech and press.

The concurring opinion made the only reference to the interests served by petitioning. In a generalized comment, the opinion stated that the "self-governance" function is as fully served by speech and the press as it is by petition.[9] Moreover, the Court in *McDonald v. Smith* failed altogether to discuss the textual development and draftsmen's intent of the right to petition.

Undoubtedly, in the future, citizens will be deterred from alerting government officials to the unsuitability of prospective appointees for public office and of wrongful conduct on the part of officeholders. They must face the prospect of a defamation action that will be costly to defend, of doubtful outcome as all litigation is, and in which, as a practical matter, the burden of proving the truth of their statements will be on themselves. This result is completely at odds with the crucial petitionary interest of informing the government. Ironically, when malice is the applicable test, expression of the very

kind of passionate, deeply held opinions that the right to petition was designed to protect likely would expose the petitioner to liability.

The fundamental weakness in the Court's opinion in *McDonald v. Smith* is its careless assumption that the right to petition can never be accorded higher protection than the cognate expressive rights. The Court should reconsider this assumption. Most of the limitations that have been imposed on speech and the press, whatever their justifications in the contexts of these expressive rights, are inappropriate restrictions upon petitioning.

SCOPE AND LIMITATIONS OF THE RIGHT TO PETITION

This part discusses the conduct properly classified as coming within constitutionally protected petitioning, the different degree of protection that should be accorded petitioning when private interests are and are not affected, and certain issues decided on free speech and press principles that should have been decided differently on petition principles.

THE CONDUCT PROPERLY EMBRACED WITHIN PETITIONING

Preparing a written communication and sending it to the government are the essentials of petitioning. Whether there are other activities that by necessary implication are embodied in the right to petition is a key question. Thus, perhaps the concept of petitioning should be broadened to include meetings for the purpose of formulating and signing petitions, public gatherings for the purpose of presenting them, and disclosure of their contents to the press for the purpose of publicizing the cause.

The question of what ancillary activities are embodied in the right to petition arose in *Bridges v. California*.[10] Bridges, a labor leader, sent a telegram to the secretary of labor calling a judge's decision in a labor dispute outrageous and saying that any attempt to enforce the court order would tie up the entire port of Los Angeles. Bridges released the telegram to the press. Referring to the lower court decision, the Court stated, "[T]he Supreme Court of California recognized that, publication in the newspaper aside, in sending the message to the Secretary, Bridges was exercising the right to petition . . . protected by the First Amendment."[11] The Court held that release of the telegram to the newspaper was protected as an exercise of free speech, not as an implied extension of the right to petition.

The scope of petitioning issue also is encountered when riot, unlawful assembly, and trespass laws are invoked against disorderly crowds present on the occasion of some demand made upon the government. The cases unanimously hold that the First Amendment does not preclude the government from enforcing public order and safety just because petitioning is involved.

Both *Bridges* and the public disturbance cases are correct. The First Amendment specifically guarantees speech and assembly. When conduct passes beyond the limit of that which is uniquely necessary to petitioning, it is to be measured by whatever other constitutional guarantees are applicable. In *Bridges* the free speech right protected Bridges' letter against the claimed need to uphold the dignity of the courts. In the public disturbance cases, freedom of assembly yielded to the demands of public order. If the activities related to petitioning had been judged under the petition clause rather than as speech and assembly, the nearly absolute nature of the right to petition would have been eroded, and lower court judges would have been signaled that petitioning is a right that can be riddled with exceptions.

A related problem is whether there is an implied right to have the governmental body consider or act upon the petition addressed to it. During the congressional controversy in the 1830s over whether to act upon petitions seeking abolition of slavery, John Quincy Adams strongly opined that the right of petition comprehended the right to have the petition duly considered. Such an extension of the right of petition, however, 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. The Supreme Court correctly decided this issue in *Smith v. Arkansas Highway Employees Local 1315* when it held that "[t]he 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 [or] to respond...."[12]

In sum, the 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. Any protection of activities

beyond this scope is derived from other constitutional rights. The important lesson from this analysis is that no need can be established to impose time, place, and manner restrictions on petitioning because no legitimate government interest such as maintaining public order could be affected by the exercise of the core petitioning activities themselves.

NOTES

1. 73 U.S. (6 Wall.) 35, 44 (1867).
2. 92 U.S. 542 (1876).
3. 299 U.S. 353, 364 (1937).
4. 323 U.S. 516, 531 (1945).
5. 365 U.S. 127 (1961).
6. 105 S.Ct. 2787 (1985).
7. 1 Wms. Saund. 131, 132, 85 Eng. Rep. 137, 138 (1680).
8. 2 Tyl. 129 (Vt. 1802).
9. *McDonald*, 105 S.Ct., 2793 (Brennan, J., dissenting).
10. 314 U.S. 252 (1941).
11. Ibid., 277.
12. 441 U.S. 463, 465 (1979).

SOVEREIGN IMMUNITY AND THE RIGHT TO PETITION: TOWARD A FIRST AMENDMENT RIGHT TO PURSUE JUDICIAL CLAIMS AGAINST THE GOVERNMENT

JAMES E. PFANDER

* * *

INTRODUCTION

Among the most remarkable and least understood provisions of the First Amendment, the Petition Clause guarantees the "right of the people... to petition the Government for a redress of grievances." In this article, I propose that we interpret the Petition Clause as a guaranteed right to pursue judicial remedies for unlawful government conduct. In particular, I contend that the clause's affirmation of government suability operates as a constitutional anti-

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dote to the familiar doctrine of sovereign immunity, which nowadays purports to prohibit the federal courts from entertaining claims against the United States government in the absence of a legislative waiver of immunity that meets a fairly demanding clear-statement requirement.

My argument rests in roughly equal parts on the text and drafting history of the Petition Clause itself, and on the constitutional context in which the clause appeared. The text and drafting history make clear that the framers of the Petition Clause, including most notably James Madison, deliberately chose to broaden the clause to encompass submissions not only to the Congress of the United States but also to the executive and judicial branches of the federal government. Such a three-branch petition clause was unique at the time it appeared; predecessor clauses in state constitutions entrenched a right to petition only the legislature. On its face, such a broadened right to petition would seem to ensure the right of the people to seek redress from the federal courts as well as from the two political branches of government.

History and context confirm that the Petition Clause guarantees the right of individuals to pursue judicial remedies for government misconduct. By 1789, the right to petition had long been seen as a cornerstone of Anglo-American jurisprudence and in particular as a solution to the sovereign immunity of the Crown. In the same paragraph in which William Blackstone proclaimed the immunity of the Crown, he also sketched the procedure on the "petition of right," a relatively technical proceeding by which the subjects sought judicial remedies for government wrongdoing through the submission of petitions for redress.[1] Although nominally addressed to the king, such petitions of right (and a host of related proceedings that also began with the submission of petitions) invoked the exercise of judicial discretion and were adjudicated by the courts of justice on legal principles. For Blackstone, as for other British authorities, the right to petition solved the problem of sovereign immunity by ensuring the subject access to a remedy for government wrongdoing.

My review of early American statutes provides new evidence that the "petition of right" and the many related British remedies against the Crown that made up the right to petition found their way into the codes of the independent American states. Although many British colonies in North America relied on the legislative petition as an all-purpose mode of securing the disposition of disputes with the government, many also borrowed British judicial remedies for government wrongdoing. The pace of borrowing picked up after Independence, particularly in the Commonwealth of Virginia. There, in 1785,

Madison persuaded the legislature to reenact a provision drafted by his countryman Thomas Jefferson that authorized individuals to bring suit on any claim or demand against the Commonwealth by submitting a petition for the redress of grievances to an appropriate court. The Virginia statute, and others like it in New York and Pennsylvania, reflected distrust of legislative adjudication and growing support for an independent judiciary.

Similar factors influenced the recognition of the right to petition the judiciary at the federal level. The framers of the federal Constitution created an independent judiciary with jurisdiction over all cases arising under the Constitution, laws, and treaties of the United States. Evidence from the Philadelphia convention suggests that Article III specifically contemplates the suability of the federal government and its officers. Two years later, the framers of the Petition Clause deliberately broadened its text to encompass petitions to the courts of the federal government. The resulting constitutional language resembles that of Virginia's version of the petition of right, and it was adopted by a committee that included Madison shortly after Madison had urged the House to adopt provisions that would secure individual access to the courts for an impartial determination of claims against the government. As originally understood, in short, the Petition Clause appears to establish a constitutional right to pursue judicial claims against the government and its officers.

Such an understanding of the right to petition as a guarantee of government suability represents, to put the matter mildly, a departure from traditional accounts. Most scholars assume that the Constitution fails to address the issue of government suability, an assumption that helps to explain why the doctrine of sovereign immunity has gained so strong a hold in America. Similarly, most accounts treat the Petition Clause as entrenching the right of individuals to participate in the political process free from retaliation or reprisal. Although a few scholars have noted the clause's application to judicial petitions, none have suggested that the clause bears any important relationship to the doctrine of sovereign immunity. As a consequence, my thesis will require a frank reappraisal of standard accounts of the right to petition and the doctrine of sovereign immunity.

* * *

THE RIGHT TO PETITION AND THE LAW OF SOVEREIGN IMMUNITY

The text and history suggest that the right of the individual to petition for redress should, in principle, guarantee access to the federal courts for a determination of the legality of government conduct. Yet the history of government accountability in England as in the United States also suggests that this right to seek judicial redress may be disguised by a doctrine of sovereign immunity that appears to place the government beyond the reach of the law. Blackstone explained the English system of government accountability in terms of such "fictions and circuities," comparing Crown practice to an old Gothic castle erected in the days of chivalry but actually fitted up for the modern inhabitant.[2] The American system also looks positively feudal, with its acquiescence in the ancient doctrine of sovereign immunity for no reason other than its doctrinal longevity. In this part, I suggest that we can now dismantle the doctrine of immunity and build up in its place a structure of petitioning more in keeping with our institutions and better fitted up for modern Americans.

The "Fictions and Circuities" of Sovereign Immunity

Two factors appear to support the idea that sovereign immunity exists as an independent bar to government responsibility. First, the Supreme Court has amassed an impressive collection of immunity rhetoric that appears to place the government beyond the reach of judicial redress except in cases where Congress has supplied the requisite consent. In its broadest formulation, sovereign immunity purports to bar all but consented suits against the government itself or its officers, agencies, or instrumentalities; indeed, the formulation in *Dugan v. Rank*[3] treats the suit as one against the government whenever a judgment in favor of the plaintiff "would expend itself on the public treasury or domain, or interfere with public administration, or if the effect would be to restrain the Government from acting, or to compel it to act."[4] This barrier to suit has been thought to apply to all claims against the government, including those based upon the Constitution, laws and treaties of the United States; traditional formulations treat sovereign immunity as a doctrine of "constitutional dimension, defeating even suits for enforcement of constitutional rights" in the absence of legislative consent. Coupled with the

requirement that waivers of immunity appear in statutory texts that speak with "unequivocal" clarity, the doctrine of sovereign immunity appears to offer a most impressive barrier to the vindication of individual rights against the government.

Second, many suits and proceedings against the government of the United States proceed under specific statutory provisions that authorize litigation with the government or its agents—a practical reality that tends to confirm the centrality of legislative consent. The three most important such statutes, the Tucker Act, the Federal Tort Claims Act, and the catch-all provision for the review of agency action that appears in the Administrative Procedure Act, all appear to operate as waivers of the government's sovereign immunity. The Tucker Act authorizes the award of damages against the federal government in non-tort claims based upon the Constitution and laws of the United States; the FTCA makes the government responsible for the torts of its agents; and the APA establishes a statutory predicate for a general right to test the legality of agency action through suits seeking injunctive and declaratory relief. This array of statutes, coupled with many other specialized provisions for suit against the government, contributes to the perception that government accountability depends entirely on statutory grace.

Yet the notion that the government's suability depends on legislative consent represents a grave misrepresentation of the rise of government accountability at common law. Faced with limited jurisdiction over claims against the government itself, the Marshall Court relied extensively upon officer suits to secure government accountability. Such suits became the norm in a variety of discrete doctrinal areas: the action of ejectment enabled individuals to test the government's title to property by suit brought against its officials; the action to enjoin a trespassory taking enabled the Bank of the United States to challenge the collection of a confiscatory tax by Ohio officials; suits brought against collectors of external and internal revenue enabled individual taxpayers to litigate the propriety of exactions by the officialdom. Many of these suits rested on the fiction that assets were subject to judicial disposition so long as they remained in the hands of officials and did not enter the treasury of the government.

In all such cases, the Court plainly understood that it was using suits against officials to test the legality of government action. Process in officer actions, as Chief Justice Marshall admitted in *Osborn v. Bank of United States*,[5] runs "substantially, though not in form, against the State."[6] Yet the fact that the

officer suits admittedly implicated "the direct interest of the State" did not transform such proceedings into actions against the government for purposes of triggering the prohibition on the exercise of entity jurisdiction. Rather, the Court decided the issue of its own jurisdiction by reference to the party defendant named on the face of the record. This party-of-record rule enabled the Court to overcome the absence of entity jurisdiction by treating government officers as defendants in all cases where the common law supplied a remedy for the official action drawn into issue.

These common-law rights of action against government officers provided the predicate for two of the twentieth century's most important accountability rulings: *Ex parte Young*[7] and *Bivens v. Six Unknown Named Agents*.[8] In *Ex parte Young*, the Court upheld the power of a federal district court to enjoin the state prosecutor from enforcing state laws determined to have imposed confiscatory rates in violation of substantive due process. The Court made similar injunctive remedies available to individuals who faced comparable threats from federal officials. This established body of doctrine offered decisive support for the recognition in *Bivens* that individuals who suffer invasions of their constitutional rights may sue the responsible federal officers for tort damages. For as Justice Harlan recognized in his influential concurring opinion, the *Ex parte Young* doctrine assumes the existence of a federal right of action to enforce the Constitution. *Bivens* simply makes an alternative form of relief available to individuals for whom it's "damages or nothing." Both cases went forward in federal court on the basis of the bare jurisdictional grant now codified in section 1331 of the Judicial Code.

Apart from the common law liability of the government officer, the Court has relied extensively upon prerogative writs as a source of authority with which to review the legality of government action. After striking down its own statutory grant of authority in *Marbury v. Madison*,[9] and initially refusing to permit other courts to entertain such actions, the Court empowered lower courts for the District of Columbia to issue writs of mandamus to federal officers and thereby restored that much-needed remedy to the arsenal of the federal courts. Mandatory injunctions came to play a role somewhat similar to that of mandamus in federal courts outside the District of Columbia. Habeas corpus gave the federal courts power to review criminal process and the administration of immigration policy.

Even the original writ of scire facias, the venerable English remedy for the cancellation of letters patent, provided authority for judicial review of

patented inventions before being swallowed up in patent practice by the all-purpose bill in equity. Together, these remedies made up the core of what came to be known as "nonstatutory" review of administrative action, a body of law that has now itself largely been codified.

...Officer suits and nonstatutory review enabled individuals to bring suits against government officers in a variety of situations, including those that seek to test the government's title to real property and those that seek to recover monies collected in payment of taxes and headed for the treasury. Similarly, federal courts have exercised mandamus jurisdiction to compel government officials to take action required of them by law, even where the action in question was to issue a patent for federal lands or to draw funds from the Treasury. Finally, federal courts have long granted injunctions, prohibiting action violative of federal law and mandating that government officials take action required in order to respect the rights of the individual. In all of these instances, the relief sought would appear to compel or prohibit government action, or to touch the public treasury or domain in ways that trigger the application of the sweeping rule of immunity set forth above. In all such instances, the relevant statutes would fail to pass muster under the modern "clear statement" test. Yet in all such instances, the Court has nonetheless permitted the actions to proceed against the official without regard to sovereign immunity.

Like those that do so in the context of suits against government officials, decisions that address the issue of sovereign immunity in the context of suits against the government itself treat the doctrine as something other than an absolute ban on unconsented suits against the government. Two cases in particular appear to suggest that governments themselves must occasionally pay damages to remedy breaches of their constitutional obligations. In *First English Evangelical Church v. City of Los Angeles*,[10] the Court held that the Just Compensation Clause of the Fifth Amendment demands a monetary remedy for governmental takings of property. Similarly, in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*,[11] the Court held that the Due Process Clause requires state governments to afford taxpayers an adequate opportunity to test the legality of a tax assessment. States that deny taxpayers an opportunity to litigate the legality of the tax in an action to enjoin its collection must give them a post-deprivation opportunity to recover monies paid pursuant to an unconstitutional tax. As a result, the *McKesson* Court ruled that Florida could not withdraw an available monetary remedy late in the course of a proceeding for a tax refund.

First English and *McKesson* suggest that in cases where the Constitution requires the government, as an entity, to make victims of certain kinds of constitutional violations whole, remedial obligations apply whether or not the government has adopted an effective waiver of sovereign immunity. In *First English*, for example, the Court rejected the suggestion of the government of the United States, as amicus, that the recognition of any liability under the Just Compensation Clause ought to await the enactment of an appropriately specific waiver of sovereign immunity by the legislature. Similarly, in *McKesson* the Court turned back Florida's claim that the doctrine of sovereign immunity embodied in the Eleventh Amendment prohibited federal courts from ordering the State as such to make retrospective monetary relief available to the claimant. Finally, in *Reich v. Collins*, the Court noted that the *McKesson* remedial obligation applies notwithstanding "the sovereign immunity States traditionally enjoy in their own courts." As a matter of principle, then, the cases suggest that the doctrine of sovereign immunity does not operate as an impenetrable barrier to suits against government bodies for monetary damages.

NOTES

1. Sir William Blackstone described the doctrine as follows:

> That the king can do no wrong, is a necessary and fundamental principle of the English constitution: meaning only... that in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the king...; and, secondly that the prerogative of the crown extends not to do any injury.... Whenever therefore it happens, that, by misinformation or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign,... yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to *know of* an injury and to *redress* it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.

2. 3 Blackstone, *supra* note 1.
3. 372 U.S. 609 (1963).
4. Ibid., 620.

5. 22 U.S. 738 (9 Wheat.) (1824).

6. Ibid., 847–58.

7. 209 U.S. 123 (1908).

8. 403 U.S. 388 (1971).

9. 5 U.S. (1 Cranch.) 137 (1803). The Judiciary Act of 1789 specifically empowered the Supreme Court to grant writs of mandamus to officers of the United States in accordance with the "principles and usages of law." Chief Justice Marshall famously struck that statute down in *Marbury*, ruling that Article III of the Constitution defined the content of the Court's original jurisdiction and implicitly forbade Congress from making additions.

10. 482 U.S. 304 (1987).

11. 496 U.S. 18 (1990).

DOWNSIZING THE RIGHT TO PETITION

* * *

GARY LAWSON AND GUY SEIDMAN

The First Amendment provides that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." Unlike the First Amendment's speech, press, and religion clauses, this "Petitions Clause" has not spawned an extensive body of case law or academic commentary. The right to petition has been, in many ways, the First Amendment's poor relation.

In recent years, however, there has been a marked upswing in scholarly interest in the right to petition. . . . The near-unanimous conclusion of the modern commentators, drawing on the rich and important history of the Anglo-American right to petition, is that there is more to the Petitions Clause than is generally recognized by the Supreme Court's jurisprudence or by con-

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temporary understandings and practice. In particular, a number of commentators urge that Congress has an obligation to consider and respond, in some perhaps informal but concrete manner, to all petitions from citizens addressed to it. A recent article by Professor James E. Pfander goes even further, insisting that the Petitions Clause guarantees a right to pursue judicial remedies for unlawful government conduct. In Professor Pfander's view, the Petitions Clause operates as "a constitutional antidote to the familiar doctrine of [federal] sovereign immunity."[1]

We welcome the long-overdue attention now being paid to the Petitions Clause, but we do not think it can bear the weight that these commentators would place upon it. The right to petition is powerful, but not that powerful. In particular, we do not agree that the Petitions Clause imposes on Congress a general obligation to consider or respond in any fashion to petitions that it receives. Nor do we think that the clause either strengthens or weakens the case against federal sovereign immunity. The right to petition served, and in many ways continues to serve, an important function in the development of modern government, but that function exhausts the meaning of the Petitions Clause. Put simply, the constitutional right to petition the government for a redress of grievances is precisely—for want of a better phrase—the right to petition the government for a redress of grievances.

* * *

THE CONSTITUTIONAL EFFECT OF PETITIONS

What is the constitutional significance and effect of the filing by a citizen of a petition to the national government? Certainly, the government must allow the petition to be sent, but does the government's obligation extend any further?

An emerging consensus of scholars insists that the right to petition includes the right to have one's petition considered in some serious fashion by the government. Many scholars further insist that the government must respond in some fashion, however informal, to petitions that it receives. We believe, however, that these conclusions are overgeneral and overstated. There are some contexts in which the government has such obligations, but there are other contexts in which the right to petition is exhausted by the mere sending of the petition. In particular, one must be very wary of unthinkingly extending the right

to petition as it existed in England and the colonies to the United States. There are important differences between the government created by the Constitution and the various forms of government that existed prior to 1789.

Most fundamentally, it is frequently misleading to speak in general terms about the "federal government." The federal government is not a single, monolithic entity. Rather, it is a network of institutions that share, sometimes exclusively and sometimes jointly, the various powers that are allocated by the Constitution to the national government. It is significant, for example, that the Constitution does not simply vest powers in a unitary national government. Instead, it vests powers in constituent institutions of that government: most notably, it vests "[a]ll legislative Powers herein granted" in Congress,[2] "[t]he executive Power" in a president,[3] and "[t]he judicial Power of the United States" in the federal courts.[4] A correct analysis of the right to petition must separately identify how that right applies to each distinct institutional actor. There is no a priori reason to suppose that the federal courts have precisely the same responsibilities with respect to petitions addressed to them as does Congress.

One other preliminary point bears emphasis. Because the First Amendment did not create the right to petition, the first question to ask is what obligations, if any, the Constitution of 1789 places on the various institutions of government with respect to petitions. Once that question is answered, one can then ask whether the restatement of the right to petition in the First Amendment alters in any way those governmental responsibilities. It is a profound misunderstanding of the right to petition, and of the Constitution generally, to attempt to analyze the right to petition without primary reference to the original constitutional text.

A. Petitioning the Courts

Federal courts have a clear obligation to consider and respond to petitions—typically in the form of court filings—sent to them. Even if a court concludes that it has no jurisdiction over the matters addressed in the petition, or that the petition is in a form that is inappropriate for judicial consideration, it has jurisdiction to determine its jurisdiction, and the exercise of that first-order jurisdiction is not discretionary. A federal court cannot lawfully discard a petition addressed to it without considering it, and it cannot rule on that petition without notifying the petitioner of the disposition.

There is no "smoking gun" evidence to establish any of these proposi-

tions, but there is no reason to expect any. They are so much part of what "[t]he judicial Power" means, both in 1789 and today, that they were and are simply taken for granted. A court that entered a secret disposition of a matter would uniformly be condemned, as would a court that utterly failed to examine a filing before it.

One does not need to invoke, or even mention, the right to petition to reach these conclusions. 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. Similarly, one need not invoke considerations of due process to say that a court cannot enter a judgment or impose a sentence against a person without first conducting some measure of formal proceedings, giving the party notice of those proceedings, and affording the affected party an opportunity for some kind of hearing. These minimal procedural requirements are simply part of the understanding of "[t]he judicial Power" contained in Article III. A court that sought to impose such an order would exceed its constitutionally enumerated powers, and a Congress that sought to authorize such an order as a "necessary and proper" incident to the judicial power would also exceed its power. Just as the Due Process Clause confirms and emphasizes these procedural requirements, the First Amendment right to petition restates and emphasizes the federal courts' obligations to consider filings—petitions—brought to their attention and to respond in some fashion to those filings.

B. Petitioning Congress

No one is startled by the notion that the federal courts have an obligation to consider and respond to petitions addressed to them. It is more startling, however, to say that *Congress* has an obligation to consider and respond to all petitions addressed to it. Such an obligation would give petitions a very powerful agenda-setting role in the constitutional structure. We do not believe that petitions addressed to Congress have the same legal consequences as petitions addressed to the federal courts. Put simply, the legal effect of a petition depends both on the petition itself and on the institution of the federal government to which it is addressed.

The Constitution of 1789 provides no support for the claim that Congress must consider and respond to petitions. On the contrary, it contains overwhelming evidence against such a claim.

The Constitution carefully and precisely sets out the procedural obligations of Congress. Congress is required to "assemble at least once in every Year."[5] Each house must "keep a Journal of its Proceedings, and from time to time publish the same."[6] Neither house can, without the consent of the other, "adjourn for more than three days nor to any other Place than that in which the two Houses shall be sitting."[7] The Senate may not originate revenue bills. There is no provision, however, that requires Congress to take any kind of action concerning citizen petitions. Indeed, the Constitution expressly provides that "[e]ach House may determine the Rules of its Proceedings,"[8] which prima facie includes the power to determine how and whether petitions will be handled.

Does this mean that Congress could provide that no petitions from citizens will even be received? If one could fashion a refusal to receive a petition in a manner that did not penalize the sending of the petition, the answer would be: quite possibly. Congress certainly cannot penalize citizens for the act of petitioning Congress, even if Congress does not want to receive any petitions. Such a law would be precisely the kind of law forbidden by the Sweeping Clause and the First Amendment. Similarly, Congress could not forbid the courts or the executive from receiving petitions, though it could, of course, limit the power of those entities to act on such petitions. But a law that merely regulates Congress's own internal procedures and does not impose any burdens on citizens or other governmental actors is a different story. Congress does not need the Sweeping Clause, with its limiting requirement of propriety, in order to enact such a law; it can rely directly on its authority to "determine the Rules of its Proceedings."

This position is a likely candidate for an ad hominem attack, because it was advanced by John Calhoun and other pro-slavery Southern representatives during debate over the so-called gag rule, which sought to prohibit Congress from considering or receiving any petitions calling for the abolition of slavery. While many of the arguments in favor of the gag rule were simply ridiculous, the argument that each house of Congress has the constitutional power to determine its own rules of proceedings is very difficult to answer. It is not an answer to say that bad people have used the argument in support of bad ends. The Devil's ability to quote scripture is not an argument against the authority of scripture.

It is difficult, however, to imagine how a restriction on receipt of petitions, as opposed to a restriction on their consideration, could be framed that would not in a serious way implicate the right to send them. Perhaps, then, the

right to petition at least ensures that all institutions of government, including Congress, must be available to receive petitions. The question is not tremendously important, because the right to have a petition received is worth very little without a corresponding duty on the part of the recipient to consider the petition in at least a cursory fashion. And it is quite clear that the right to petition does not impose any duty of consideration on Congress.

The Constitution places very few limits on the agenda-setting activities of Congress. There are circumstances in which Congress's power to act is triggered by the actions of some other entity, such as the president's power to propose treaties or appointments subject to Senate confirmation. But the Constitution imposes no specific obligation on the Senate in these circumstances to act on the president's recommendations. The Senate could simply refuse to consider or vote on all presidential appointments or treaties. Such action would be irresponsible in the highest degree, but not, strictly speaking, unconstitutional. There is no reason to think that petitions stand in a better position than treaties or presidential appointments.

The crowning blow, however, to the case for a congressional duty of consideration and response is Article V. Article V is the one provision of the Constitution that contains an express agenda-forcing clause. Whenever the legislatures of two-thirds of the states call for a constitutional convention, Congress "*shall* call a Convention for proposing Amendments...."[9] The state legislatures thus have an express power to affect the congressional agenda. If the original Constitution meant to give the same kind of power to citizen petitions, or presidential treaties or appointments, it knew how to do so.

The addition of an express right to petition in the First Amendment in 1791 adds nothing to the case for a congressional duty of consideration and response.... [T]he right to petition predated the First Amendment and bound Congress via the Sweeping Clause from the moment of the Constitution's ratification. As with most of the Bill of Rights, the First Amendment's Petitions Clause is declaratory of preexisting rights. If the right to petition did not include a congressional duty of consideration and response in 1789, it did not include such a duty in 1791 either.

The proponents of a congressional duty of consideration and response do not rely on, or even make reference to, textual or structural arguments. Their case is essentially historical: in England, parliaments typically gave petitions very serious consideration, and in America, the colonial legislatures and the early congresses typically treated petitions as matters calling for considera-

tion.... [T]he historical claims are essentially accurate, but the conclusions drawn from them are not.

The practices of Parliament and colonial legislatures say very little about the obligations of the United States Congress, because those pre-1789 bodies were not part of the Constitution's intricate scheme of separated powers. Parliament and colonial legislatures were, in terms of the Constitution's conceptual structure, judicial bodies as much as they were legislative bodies. No one doubts that judicial bodies have obligations to consider and respond to petitions. The federal Congress, however, is not a judicial body.[10] In the context of the American Constitution, the duty to consider *and* respond to petitions attaches to the body exercising the judicial power rather than to the body exercising the legislative power.

Nor do the practices of the early congresses demonstrate an obligation of consideration and response. It is true that the early congresses took petitions quite seriously and sought, at least through committee referrals, to address them all. There may even have been individual 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 Constitution's provisions for representation establish a formal mechanism through which citizens can affect governmental choices. 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.

In sum, the federal Congress may be well advised to treat petitions seriously, but it has no constitutional obligation to do so.

C. Petitioning the Executive

It is harder to identify the obligations of the executive with respect to petitions that it receives because those obligations are more context-dependent

than are the obligations of the judicial or legislative departments. Much of the activity of the federal executive looks very much like an exercise of judicial power: the realm of administrative adjudication is very hard to distinguish from the realm of judicial power. That is not surprising. The emergence of the judicial power as a distinct governmental power is a relatively recent event; until shortly before ratification of the Constitution the judicial power was considered an aspect of the executive power. When the executive is engaged in adjudication, it is therefore hard to explain why it should not have the same fundamental obligations of consideration and response with respect to petitions as does the judicial department.

Much executive activity, however, does not shade into the judicial power. The executive engages in prosecution, investigation and fact-finding, legislative-like rule making, and foreign affairs functions that Locke would have described as part of the federative power. In these contexts, the same considerations that counsel against a congressional obligation of consideration and response apply as well to the executive. The Constitution is quite specific about the executive's affirmative duties: the president "shall" give Congress information and legislative recommendations, receive ambassadors, take care that the laws be faithfully executed, and commission all federal officers. The Constitution also attaches legal consequences to the president's inaction if proposed legislation is presented for his signature. But the Constitution says nothing about a presidential duty to consider or respond to citizen initiatives. Nor does the history of petitioning support any such duty. Kings traditionally took petitions very seriously, but that was the result of a pragmatic calculus rather than a legal requirement. Thus, the executive's obligations with respect to petitions depend on whether the executive is performing judicial-like or distinctively executive functions.

D. Petitioning the Federal Government

In the end, any claims about the duty *vel non* of "the federal government" with respect to petitions are likely to be overgeneralizations. The answer depends very much on which actors within the federal government the petition addresses, and perhaps on the particular functions of those actors that are at issue in the petition. It is clear, however, that there is no generalized duty on the part of all governmental actors to consider and respond to all petitions.

THE RIGHT TO PETITION AND SOVEREIGN IMMUNITY

It is one thing to say that federal courts have an obligation to consider and respond in some fashion to all petitions addressed to them. It is quite another thing to say that those courts must address each of those petitions on the merits. Such a proposition is obviously false; the courts need not, and cannot, address on the merits a petition that raises matters beyond the federal courts' constitutional and statutory jurisdiction.

One traditional constraint on the federal courts' jurisdiction has been the doctrine of sovereign immunity, which holds that the federal government cannot be sued without the consent of Congress. A recent article by Professor James E. Pfander argues, however, that the doctrine of sovereign immunity is inconsistent with the First Amendment right to petition. As Professor Pfander puts it, "the Petition Clause establishes a constitutional right to pursue judicial claims for government wrongdoing that seemingly displaces the judge-made doctrine of sovereign immunity."[11]

We disagree. The Petitions Clause is a neutral player in the debate concerning federal sovereign immunity. The right to consideration and a response from the federal courts does not guarantee a determination on the merits whenever the federal government is the defendant.

Our position should not be misunderstood. Our aim in this article is not to provide either a doctrinal or a normative defense of the doctrine of federal sovereign immunity. Our analysis is entirely agnostic on whether the doctrine of federal sovereign immunity is and always has been a colossal mistake. Our position is simply that the right to petition does not contribute anything significant to that debate.

* * *

The existence *vel non* of federal sovereign immunity determines to some extent how effective petitioning the judiciary is likely to be as a strategy for obtaining redress from the government. The existence *vel non* and the particular scope of a right to petition does not determine the extent of the doctrine of sovereign immunity. The right to petition guarantees that citizens will not be punished for seeking redress from the government through the courts, but it says nothing about whether those efforts will be rewarded.

A POSITIVE THEORY OF THE PETITIONS CLAUSE

The true meaning of the Petitions Clause is undeceptively simple. The right to petition has traditionally served a vital communicative function between sovereign and citizen. That requirement of an open channel of communication is precisely what the right to petition embodied in the Constitution encompasses. The right does not impose a correlative obligation on the part of Congress to treat petitions with any particular degree of attention, nor does it say anything about the subject matter jurisdiction of the federal courts. As Freud might have said, sometimes a right to petition the government for a redress of grievances really is just a right to petition the government for a redress of grievances.

NOTES

1. See James E. Pfander, "Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims against the Government," *Northwestern University Law Review* 91, nos. 899, 904 (1997).
2. U.S. Constitution, art. I, section 1.
3. Ibid., art. II, section 1.
4. Ibid., art. III, section 1.
5. U.S. Constitution, art. I, section 4, cl. 2; see also ibid., Twentieth Amendment, section 2 (reaffirming this obligation but altering the default date for commencement of the session).
6. Ibid., art. I, section 5, cl. 3.
7. Ibid., art. I, section 5, cl. 4.
8. Ibid., art. I, section 5, cl. 2.
9. Ibid., art. V (emphasis added).
10. Except, of course, when the Senate is trying an impeachment.
11. Pfander, *supra* note 1, p. 990.

Chapter 3

CONTEMPORARY DEBATE

"LIBELOUS" PETITIONS FOR REDRESS OF GRIEVANCES: BAD HISTORIOGRAPHY MAKES WORSE LAW

ERIC SCHNAPPER

* * *

In *McDonald v. Smith*,[1] the Supreme Court faced... an argument that one of the Warren Court's landmark decisions, together with much of its intellectual progeny, was inconsistent with the original intent of the framers of the Constitution. The decision called into question was *New York Times v. Sullivan*,[2] which had held that the First Amendment permitted state courts to award libel judgments to public figures only if there was clear proof that the libel defendant knew that his statements were false, or had acted in reckless disregard of the truth of those remarks. *New York Times v. Sullivan* had long been a favorite target of conservative theorists. In *McDonald v. Smith*, however, the historical criticism came not from the libel plaintiff but from the defendant,

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From *Iowa Law Review* 74, no. 303 (1989) 303–12, 343–49.

who argued that *New York Times v. Sullivan* provided too little constitutional protection, rather than too much, when the alleged libel was contained in a petition for redress of grievances.

The litigation in *McDonald* arose as a result of the proposed selection of David Smith as United States attorney for North Carolina. Robert McDonald, the operator of several child-care centers in the state, wrote letters opposing Smith's selection to then President-Elect Reagan, as well as to presidential adviser Edwin Meese, the director of the FBI, and four members of Congress. McDonald accused Smith of "violating the civil rights of various individuals while a Superior Court judge," "fraud," and "violations of professional ethics,"[3] and referred to a number of specific incidents that McDonald claimed substantiated his allegations. After another candidate was selected as US attorney, Smith sued McDonald for libel, alleging that McDonald's charges had cost him the job, injured his professional reputation, and caused him "humiliation, embarrassment, anxiety, and mental anguish."[4] Smith did not claim that McDonald had shown the letter to anyone but the seven federal officials to whom it had been sent, or that he had repeated the allegations to anyone else; evidently those charges became known to the public only when Smith brought his libel action.

Smith filed his action in state court, and McDonald removed the proceeding to federal district court. The district court and the fourth circuit agreed that McDonald's letters fell within the scope of the petition clause of the First Amendment, but held that a defendant could be mulct in damages for submitting a petition for redress of grievances if a plaintiff could prove that the petition contained an inaccurate statement and that the defendant either knew the statement was false or had acted in reckless disregard of the truth.

McDonald contended in the Supreme Court that libel actions could never be founded on the contents of a petition, but the Court unanimously rejected that argument. Both the majority opinion by Chief Justice Burger and a concurring opinion by Justice Brennan emphasized that *New York Times v. Sullivan* had established for ordinary speech a lesser, nonabsolute protection from libel suits. Chief Justice Burger argued "[t]o accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status."[5] Justice Brennan noted that according absolute immunity to petitions, rather than merely creating a minor exception to the rule in *New York Times v. Sullivan*, would substantially alter the constitutional principles applicable to libel actions, since "the Petition Clause embraces a . . . broader . . . range of com-

munications addressed to the executive, the legislature, courts, and administrative agencies... [and] includes such activities as peaceful protest demonstrations," and that such absolute immunity for petitions would have encompassed the very statements at issue in *New York Times v. Sullivan* itself.

Both the majority and concurring opinions in *McDonald* concluded that there was no historical basis for McDonald's contention that the framers understood the right to petition to include an unqualified right to do so without being subject to suit for libel.[6] This article argues that the historical analysis in *McDonald* is incorrect; indeed, this appears to be one instance in which the relevant historical materials are both voluminous and crystal clear.

* * *

THE MEANING OF THE FIRST AMENDMENT PETITION CLAUSE

In 1791 there was a well-established common-law rule barring libel actions based on the contents of a petition. That rule had been constantly reiterated in judicial opinions and legal treatises for over a century.... Had McDonald written his letter opposing the nomination of Smith to President Washington or to George III, rather than to President Reagan, a libel action by Smith would have been dismissed out of hand.

Viewed from a historical perspective, the common-law prohibition against libel actions founded on petitions was not a particular application of a more general free speech principle but the result of institutional considerations at least as relevant today as they were three centuries ago. In England petitions and lawsuits were regarded as simply two different ways in which an aggrieved subject might request redress from the government. Although one could conceivably disagree about whether libel suits would impermissibly deter such requests, the common-law rule appears to have been virtually unchallenged. Legal writers regarded any distinction between libel rules for petitions and for judicial proceedings as making no more sense than separate libel rules for statements made in actions on the case and statements made in actions in trespass.... [T]he existence of different constitutional standards for petitions and lawsuits did not emerge until the 1986 decision in *McDonald* itself.

The inevitable effect of a distinction between petitions and judicial pro-

ceedings is to encourage, at times perhaps even compel, grievants with serious but potentially libelous complaints to file lawsuits rather than seek redress from elected officials. If McDonald could have concocted a relevant albeit far-fetched legal theory, he might with impunity have filed a federal lawsuit seeking to enjoin Smith's appointment, rather than risk financial disaster by taking the traditional course of writing to the president and Congress. Under the decision in *McDonald*, individuals who feel they have been mistreated by an IRS agent or a police officer must think twice before complaining to the officer's superiors, but have no similar reason to hesitate about taking the matter to court. Coming from a Supreme Court that repeatedly has insisted that grievants ought address their grievances to legislative and executive officials, rather than bring them to federal judges, the incentives created by *McDonald* seem perverse indeed.

* * *

The majority and concurring opinions in *McDonald v. Smith* suggest that, by placing the rights to freedom of speech, peaceable assembly, and petitioning in the same amendment, Congress intended the First Amendment to afford comparable degrees of protection to each of those rights. This syntactical argument is far too weak to support the extraordinary conclusion that the framers actually wanted to reduce the scope of the then existing right to petition. It is virtually inconceivable that the framers intended to afford American citizens a lesser degree of protection if they complained to the president or Congress than the colonists had enjoyed when, as British subjects, they complained to the king or Parliament. None of the states that proposed the adoption of a federal petition clause suggested that it be linked to freedom of speech. In the state bills of rights, state petition clauses were always set forth separately from provisions regarding freedom of speech or freedom of the press. It is not to be believed that Congress intended the federal Bill of Rights to afford a lesser degree of protection to a petition submitted to the federal government than was accorded by state constitutions to a similar petition submitted to state officials. It is even less likely that Congress sought, through the seemingly benign device of locating the petition clause in a guarantee with other rights, coyly to emasculate the rights requested by several states. Indeed, there is absolutely no contemporaneous history suggesting that anyone connected with the framing and approval of the petition clause harbored any

objection to or intended any limitation on the right to petition as it had existed under English law prior to the Revolution and as it continued in the several states....

NOTES

1. 472 U.S. 479 (1985).
2. 376 U.S. 254 (1964).
3. *McDonald*, 472 U.S. 485; see also ibid., 490 (Brennan, J., concurring).
4. Ibid., 484 (footnote omitted).
5. Ibid., 485.
6. Ibid., 488, n.2 (Brennan, J., concurring).

THE RETURN OF SEDITIOUS LIBEL

RONALD J. KROTOSZYNSKI JR. AND CLINT A. CARPENTER

* * *

A REBIRTH OF THE PETITION CLAUSE

In his seminal article on the paradigm shift in First Amendment doctrine wrought by *New York Times v. Sullivan*,[1] Professor Harry Kalven eloquently expressed his regard for the civil rights movement that precipitated the case, writing that "[w]hatever the irritations and crises of 'the long hot summer,' the protest has maintained the dignity of political action, of an elaborate petition for redress of grievances."[2] Kalven's reference to a "petition for redress of grievances," however, was more than mere poeticism; it was also an invocation of the oft-forgotten Petition Clause of the First Amendment: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Govern-

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ment for a redress of grievances." This most neglected of First Amendment freedoms is little more than a footnote in modern Supreme Court jurisprudence. Yet the right to petition for redress of grievances was once the preeminent right of the people against government tyranny, and it retained that status for well over a hundred years after giving birth to the secondary freedoms of speech and press.

Although made over thirty years ago, Professor Kalven's assessment of political protest activity is as relevant now as ever because such activity was the exemplar of his overall argument that, after the Court's decision in *Sullivan*, "[t]he central meaning of the [First] Amendment is that seditious libel cannot be made the subject of government sanction."[3] And despite courts' willingness of late to turn away from this central meaning, standing passively by as the government interest in security all but consumes the time, place, and manner doctrine, Kalven's recognition that a political protest is a petition for redress of grievances hints at a novel solution to this unwelcome return of seditious libel.

Indeed, for hundreds of years before the Petition Clause fell into desuetude by disuse and Supreme Court neglect, one of the foremost principles of the right to petition was that petitioners enjoyed absolute immunity from prosecution for seditious libel based on the contents of their petitions. Moreover, the history of the clause, including the history of its colonial and English antecedents, strongly suggests that the right to petition the government for redress of grievances contemplates a right to do so in close proximity to the government officials to whom the petition is addressed. In other words, the Petition Clause guarantees political protestors a right, exclusive of their speech and assembly freedoms, to seek redress of their grievances within both sight and hearing of those capable of giving such redress.

To be sure, there are reasonable limits to this right of proximity, as the history of petitioning amply demonstrates. Public safety remains a legitimate concern, though not an all-encompassing one, and petitioning activity may be restricted to public forums near places of official business. Our argument is not that protestors have a right, for example, to encamp at Senator John McCain's private residence. (The sidewalks outside the Senate office buildings or the Republican National Convention, however, should be another story.) Furthermore, our claim that the Petition Clause contemplates a right to be seen and heard is itself limited—we do not argue, as have some scholars, that the Petition Clause imposes on government officials an obligation to consider and respond to petitions for redress of grievances on their merits.

Yet even with these limitations, the Petition Clause provides the time-honored political protest with the needed protection that the other First Amendment guarantees have thus far failed to provide. By treating regulations that would remove protestors from the sight or hearing of government officials as presumptively invalid, the government is robbed of its broad brush; it is forced to justify its interest in security with more than mere speculation and to carry out that interest with the means that least restrict petitioning protestors' right to be seen and heard. With the reemergence of seditious libel, the Petition Clause is needed now more than ever. Through a Petition Clause–based right of proximity to government officials, the doctrine of seditious libel can be returned to its rightful place in the dustbin of history.

* * *

ENHANCED PROTECTION UNDER THE PETITION CLAUSE FOR PROTEST ACTIVITY PROXIMATE TO GOVERNMENT OFFICIALS

Although he stated the matter in particularly eloquent terms, Harry Kalven was not alone in recognizing that a political protest is "an elaborate petition for redress of grievances."[4] During the 1960s, even the Supreme Court acknowledged that civil rights protests constituted petitions for a redress of grievances (though its majority opinions uniformly avoided developing an independent theory of the Petition Clause, relying instead on the other First Amendment freedoms for its decisions).[5] Even *McDonald* reiterated this theme, with Justice Brennan stating in concurrence that the Petition Clause "includes such activities as peaceful protest demonstrations."[6]

This broad view of the nature of petitions and petitioning is not entirely inconsistent with historical practice. In England "[a] petition was not just any form of communication addressed to the King, his officers, or Parliament. Rather, it was a communication which, to be protected, had to take a certain form and embody certain components."[7] The colonies, however, were not always so formal. For example, the Body of Liberties adopted by the Massachusetts Bay Colony Assembly in 1641 allowed "[e]very man whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councell, or Towne meeting, and *either by speech or writing*... to present any nec-

essary motion, complaint, [or] petition...."[8] Thus, the Massachusetts colony appears to have allowed petitions to be presented both orally and in writing.

Accepting that political protests have a legitimate claim to protection under the Petition Clause, the question then becomes the nature of that protection. As the history of the Petition Clause demonstrates, fundamental to the right to petition are two constituent rights: the right to immunity from prosecution for seditious libel and the right to be heard. When considered in the light of history, these two rights work together to provide political protestors with a right of proximity to those government officials to whom their protests are addressed.

1. The Right to Immunity from Prosecution for Seditious Libel

In 1688, the right to petition faced perhaps its greatest challenge up to that point. That year, King James II, a Roman Catholic, issued a Declaration of Indulgence that many perceived as the first step in the establishment of Catholicism as the state religion of England. As head of the Protestant Church of England, James ordered that his declaration be read from all church pulpits. The Archbishop of Canterbury and six other bishops petitioned the king, setting forth the reasons why they could not comply with the order and asking to be excused. "The seven bishops were arrested and prosecuted for seditious libel, the allegedly libelous statement being the petition they had presented to the King."[9] Rather than defend against the charge on its merits, the bishops in effect asserted that they were immune from seditious libel prosecution for statements made in a petition.

At the famous Trial of the Seven Bishops, the defendant bishops were acquitted, much to the joy of the populace.[10] Nevertheless, the public outrage that the Crown would even attempt such a prosecution "led directly to the Glorious Revolution of 1688 and to the Bill of Rights that fully confirmed the right of petition as an element of the British constitution."[11] In response to the Trial of the Seven Bishops, the English Bill of Rights stated that "it is the right of the subjects to petition the King, and all committments [*sic*] and prosecutions for such petitioning are illegal."[12] Moreover, the government was nearly as good as its word—the Bill of Rights was enacted in 1689, and the last recorded prosecution for seditious libel based on the contents of a petition occurred in 1702. This absolute immunity crossed the Atlantic into the American colonies, where, with few exceptions, it persisted through the passage of

the First Amendment and beyond. For example, there were seventeen prosecutions under the Sedition Act of 1798, but none resulted from a petition for redress of grievances.

Of course, *New York Times v. Sullivan* ostensibly closed the book on seditious libel prosecution for any First Amendment activity. Yet... the government interest in security has given new life to the doctrine of seditious libel as applied to political protest activity. But if seditious libel is returning through the courts' willingness to allow protestors to be involuntarily shoved out of sight and hearing of government officials on pain of arrest and criminal prosecution, then the absolute immunity from seditious libel afforded to petitioning suggests that there must be a Petition Clause right of proximity. Anything less would allow a de facto return of a junior varsity form of seditious libel, in direct contravention of the right to petition as understood and embraced by the framers.

2. The Right to Be Heard

The evidence is clear that as a matter of history, petitioners have a right to have their petitions received and heard by the government. To be given effect in the context of political protests, this right to be heard must include a right of proximity to the government officials to whom a petition is addressed. To the extent that protestors are being moved out of the sight and hearing of government officials, these protestors are being denied their Petition Clause right to have their petitions heard. The only means of guaranteeing the right to be heard is through a right to be within the eyesight and earshot of the government officials to whom a petition is addressed.

Furthermore, the history of the Petition Clause strongly suggests that the right to petition has always contemplated a coordinate right of proximity:

> It was under Edward III that it became a regular form at the opening of parliament for the chancellor to declare the king's willingness to hear the petitions of his people: all who had grievances were to bring them to the foot of the throne that the king with the advice of his council or of his lords might redress them....[13]

That "all who had grievances" were to bring their petitions "to the foot of the throne" clearly establishes that the right of petition, at least as a historical

matter, encompassed a right to in-person presentation. Moreover, this "up close and personal" aspect of petitioning recurs throughout the history of the right. In short, petitioners have a historical right to present their petitions in the physical presence of the government officials to whom they are addressed.

For example, in the Tumultuous Petition Act of 1661, designed to prevent the near-riots that had sometimes accompanied the presentation of petitions by limiting the number of persons who could present a single petition to ten, Parliament made sure to note that "this Act... shall not be construed to extend to debar or hinder any person or persons not exceeding the number of ten aforesaid to present any publique or private grievance or complaint to any member or members of Parliament... or to the Kings Majesty for any remedy to bee thereupon had...."[14] The language and intent of the act clearly contemplate in-person presentation, else why specify "any member or members of Parliament," much less limit the number of presenters at all?

The Trial of the Seven Bishops also makes the case for in-person presentation of petitions. In summarizing the testimony of a witness, "my lord president," Lord Chief Justice Sir Robert Wright explained the presentation of the seven bishops' petition as follows:

> [The court] staid till my lord president came, who told us how the bishops came to him to his office at Whitehall, and after they had told him their design, that they had a mind to petition the king, they asked him the method they were to take for it, and desired him to help them to the speech of the king: and he tells them he will acquaint the king with their desire, which he does; and the king giving leave, he comes down and tells the bishops, that they might go and speak with the king when they would; and, says he, I have given direction that the door shall be opened for you as soon as you come.... [W]hen they came back, they went up into the chamber and there a petition was delivered to the king.[15]

* * *

This is not to suggest that in-person presentation need rise to the level of a personal audience with a government official. Rather, in the context of political protest activity, the right to present petitions in the physical presence of the government officials to whom they are addressed amounts simply to a right of physical proximity such that the officials can see and hear the protestors' petitions.

UNCRITICAL ACCEPTANCE OF THE SECURITY RATIONALE: A VIOLATION OF BOTH THE HISTORY AND THE SPIRIT OF THE PETITION CLAUSE

As a general proposition, the courts are correct to give considerable weight to the government's strong interest in security, and the Petition Clause demands nothing else. Indeed, its history solidly supports the notion that the Petition Clause should accommodate reasonable concessions to security.... [T]he text of the Petition Clause itself can be read to protect only "the right of the people *peaceably*... to petition the Government for redress of grievances." Finally, there is nothing to suggest that the right of in-person presentation of petitions has ever extended beyond places of official government business.

* * *

It bears noting, moreover, that in the one doctrinal area in which the Supreme Court has given the Petition Clause independent effect, the *Noerr-Pennington* doctrine, the justices had no problem embracing the concept of "indirect" petitioning via billboards, print advertisements, and broadcast commercials. It is more than a little ironic that, under contemporary doctrine, the Petition Clause affords no meaningful right of access to government or party officers, in direct contravention of historical practice, but does protect mass media communications, for which there is no historical basis for treating as petitions. In any event, if the Petition Clause reaches indirect forms of petitioning, it certainly should extend to the older, more well-established forms of the right.

Above all, it must be remembered that the right to protest proximate to government officials is not simply a restoration of the Petition Clause's independent and historical meaning. It is also a constitutional, historically justified, and effective means of combating an invidious return of seditious libel that has thus far proven immune to the usual First Amendment doctrines. Therefore, this right should be construed liberally to provide the antiseptic to seditious libel that is both desperately needed and demanded by history.

NOTES

1. 376 U.S. 254 (1964).

2. Harry Kalven Jr., "The *New York Times* Case: A Note on 'The Central Meaning of the First Amendment,'" *Supreme Court Review* 191 (1964): 192–93.

3. Ibid., p. 209.

4. Ibid., pp. 192–93.

5. See, e.g., *Gregory v. Chicago*, 394 U.S. 111 (1969); *Adderley v. Florida*, 385 U.S. 39, 40–42 (1966); *Brown v. Louisiana*, 383 U.S. 131 (1966) (plurality opinion); *Henry v. Rock Hill*, 376 U.S. 776 (1964) (per curiam); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Bates v. Little Rock*, 361 U.S. 516 (1960).

6. *McDonald v. Smith*, 472 U.S. 478, 488, n.2 (1985) (Brennan, J., concurring).

7. Gregory A. Mark, "The Vestigial Constitution: The History and Significance of the Right to Petition," *Fordham Law Review* 66, nos. 2153, 2171 (1998).

8. Ibid., p. 2177 (emphasis added).

9. Eric Schnapper, "'Libelous' Petitions for Redress of Grievances: Bad Historiography Makes Worse Law," *Iowa Law Review* 74, nos. 303, 314 (1989).

10. See generally, "Trial of the Seven Bishops for Publishing a Libel," *How. St. Tr.* 12, no. 183 (1688), p. 415, reprinted in 5 *The Founders' Constitution*, *supra* note 268, pp. 189–96.

11. Norman B. Smith, "'Shall Make No Law Abridging...': An Analysis of the Neglected, but Nearly Absolute, Right of Petition," *University of Cincinnati Law Review* 54, nos. 1153, 1160 (1986).

12. Bill of Rights, 1689, 1 W. & M. (Eng.), reprinted in 5 *The Founders' Constitution* 1 (Philip B. Kurland and Ralph Lerner, eds., 1987).

13. 2 William Stubbs, *The Constitutional History of England* (1880), p. 602.

14. The Tumultuous Petition Act, 1661, 13 Chas. 2, st. 1, c.5, section 2 (Eng.), reprinted in 5 *The Founders' Constitution*, *supra* note 268, p. 188; see also 4 Blackstone, *supra* note 53, pp. 146–47 ("Nearly related to this head of riots is the offence of *tumultuous petitioning*, which was carried to an enormous height in the times preceding the grand rebellion. Wherefore by status... no petition shall be delivered by a company of more than ten persons.").

15. "Trial of the Seven Bishops for Publishing a Libel," *How. St. Tr.* 12, nos. 183, 192 (1688), reprinted in 5 *The Founders' Constitution*, p. 192.

ANTITRUST IMMUNITY, THE FIRST AMENDMENT AND SETTLEMENTS: DEFINING THE BOUNDARIES OF THE RIGHT TO PETITION

RAYMOND KU

INTRODUCTION

In the United States, the First Amendment and the antitrust laws[1] serve as twin pillars upholding our political and economic liberty. What happens, however, when these powerful laws collide? This article examines the interplay of the antitrust laws and the First Amendment right to petition, or what is more commonly referred to as *Noerr-Pennington* immunity.[2] In brief, *Noerr* provides immunity from antitrust liability for anticompetitive harms that flow from exercising the right to petition. While significant attention has been paid

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to the potential for *Noerr* immunity to be misused in efforts to use governmental processes to impose costs upon competitors, there has been virtually no discussion with respect to whether the First Amendment right to petition may be used to immunize cooperative/collusive behavior that could nonetheless adversely impact competition. This has been compounded by the Supreme Court's failure to articulate a clear explanation for when private conduct is considered immune under the First Amendment. Moreover, while there have been scholarly efforts to provide a coherent doctrine governing when private conduct is immune from antitrust liability, none has provided a doctrinal explanation of *Noerr* immunity through the lens of the right to petition that is consistent with its historic role in Anglo-American government. Specifically, this article examines whether settlement agreements and consent decrees resulting from what would otherwise be immunized litigation are protected from antitrust scrutiny and liability under *Noerr*. In order to conduct this analysis, this article develops a methodology for determining immunity by focusing the immunity examination upon the means used to petition government and the source of the alleged injuries. Ultimately, private conduct is immune from antitrust scrutiny when it represents a valid attempt to persuade an independent governmental decision-maker in an effort to solicit government action, and the alleged injuries result from that persuasive effort. The validity of any effort depends upon the forum in which the petitioning is conducted without reference to antitrust. By focusing upon the means used to petition government, this analysis ensures that *Noerr* immunity protects the people's right to petition their government for the redress of grievances without unnecessarily limiting the protection afforded by the antitrust laws.

* * *

This article analyzes the right to petition and the *Noerr* doctrine and suggests that immunity under *Noerr* is justified only when the conduct in question represents valid petitioning, and argues that settlement agreements and consent decrees should not be immune from antitrust scrutiny even when a court is asked to approve the agreement prior to dismissal....

* * *

THE *NOERR* DOCTRINE

In the context of antitrust law, the development of the right to petition begins with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[3] in which the Supreme Court considered whether the Sherman Act should be applied to a publicity and lobbying effort conducted by twenty-four railroads to restrict competition from the trucking industry. The railroads carried out their campaign through deceptive and unethical means with the sole aim of pursuing legislation that would destroy the trucking competition. However, because "the railroads were making a genuine effort to influence legislation and law enforcement practices," the Court held that their conduct was absolutely immune from antitrust liability.[4]

Writing for the Court, Justice Black emphasized that there is an "essential dissimilarity" between agreements to petition for laws that would restrain trade and private agreements that directly restrain trade, and that to condemn the lobbying effort "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act."[5] A contrary conclusion "would raise important constitutional questions," as 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."[6]

In reaching this conclusion, the Court recognized the structural importance of the right to petition. In a representative democracy, government represents the will of the people. If the people cannot make their wishes known to their agents, especially when they seek changes to the existing legal order, government would no longer represent the people in their sovereign capacity. "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[7] Punishing individuals for efforts to "influence the passage or enforcement of laws" even by the deceptive publicity adopted by the railroads, therefore, would be inconsistent with the principles of free government.[8]

The Court, however, was unwilling to immunize any and all efforts to influence government. The Court cautioned that "[t]here may be situations in which a... 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." Widely known as the "sham" exception, the Court's reservation has been the subject of extensive discussion notably for the Court's failure, until recently, to provide any additional guidance as to what sorts of activities fell within the exception.

In a series of decisions, following *Noerr Motor Freight*, the Supreme Court extended immunity from antitrust liability to attempts to influence members of the executive branch of government as well as the judiciary. In *United Mine Workers v. Pennington*,[9] the Court concluded that *Noerr* applied to the efforts of large coal mine operators and the United Mine Workers to persuade the secretary of labor to establish a higher minimum wage and convincing the Tennessee Valley Authority to curtail certain market purchases in order to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme violative of the Sherman Act.[10]

Subsequently, in *California Motor Transport Co. v. Trucking Unlimited*,[11] the Court concluded that:

> [I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors.[12]

"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."[13] However, despite reaching that conclusion, the Court found that the alleged conduct would fall outside *Noerr* protection under the "sham" exception. The controversy in *California Motor Transport* was between intrastate and interstate trucking firms in which the interstate firms allegedly conspired to oppose all applications filed by the intrastate firms for operating rights before the California Public Utilities Commission or the Interstate Commerce Commission. According to the Court, "[A] pattern of baseless, repetitive claims... effectively barring respondents from access to the agencies and courts" would not qualify for immunity under the "umbrella of 'political expression.'"[14]

Following its initial trilogy, the Court has taken some steps to define what it meant by "sham." Based on the Supreme Court's decisions, the sham excep-

tion became a catchall limit to petitioning immunity. Lack of a clear definition led primarily to a split over the extent to which the petitioning party's intent could form the basis for denying immunity. For example, Judge Posner concluded that even lawsuits presenting colorable claims could constitute sham conduct if the principal aim in bringing to suit was to burden competitors with the cost of litigation regardless of the outcome of the case.[15] In contrast, the Sixth Circuit ruled that the "sham exception does not apply merely because a party files a suit with the principal purpose of harming his competitor."[16] In its initial response, the Court made clear that private activity can only be considered a sham if it is "not genuinely aimed at procuring favorable government action."[17] Subsequently, the Court finally provided a definitive definition for what constitutes a "sham" in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* The Court adopted a two-part test:

> First, the 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. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere directly with the business relationships of a competitor"... through the "use [of] governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.[18]

Accordingly, the Supreme Court clarified that *Noerr* immunity protects all objectively reasonable acts of petitioning government regardless of intent.

Lastly, in addition to protecting the "act" of petitioning itself, courts recognize that *Noerr* immunity protects what can be described as "incidental" acts associated with "a valid effort to influence governmental action."[19] For example, the Supreme Court in *Noerr Motor Freight* concluded that even the deceptive advertising aimed at the public could not form the basis for antitrust liability because it was "incidental" to a valid effort to solicit government action. Along these lines, in the context of litigation, courts have held that the decision not to settle a lawsuit could not form an independent basis for antitrust liability, nor could the publicity associated with a lawsuit.

The application of petitioning immunity to all three branches of govern-

ment is consistent with the classical right to petition.... [O]ne of the primary protections offered by the right to petition was immunity from formal efforts to invoke governmental power. As petitions could be filed with the king, legislatures, or courts, immunity followed in all three contexts. Historically, the right was recognized by each of the branches as an effort to draw more power unto themselves. Its modern-day application is consistent with the principle of popular sovereignty and that all three branches of government are subordinate to and agents of the sovereign people. This conclusion is also consistent with the drafting of the First Amendment. The original draft stated, "The people shall not be restrained... from applying to the legislatures by petitions, or remonstrances for redress of their grievances."[20] The Senate rewrote the petition language with perhaps the most significant change being the replacement of "Legislature" with "Government." By replacing legislature with government, Congress clearly intended that the right should apply to all three branches. Consequently, the Supreme Court's development of the right under *Noerr* is consistent with the right's Anglo-American history.

The Supreme Court's treatment of the right to petition does differ, however, from the classical right in one important aspect: as the preceding decisions demonstrate, the Court has extended immunity beyond the formal act of written petitioning itself to what can be described as informal petitioning. With the exception of *California Motor Transport* in which the defendants had in fact filed formal "petitions" in the form of court documents, neither *Noerr Motor Freight* nor *Pennington* involved formal written petitions to the government bodies at issue. Instead, they dealt primarily with lobbying and other informal avenues of political persuasion. In *Noerr*, for example, the primary conduct immunized by the Court was a deceptive public relations campaign designed to influence Pennsylvania's governor, legislature, and people, while, in *Pennington*, the immunized conduct was the lobbying of the secretary of labor and the Tennessee Valley Authority. More recently, the Court has recognized that even letters to the president of the United States could be considered protected under the right to petition.[21]...

This extension of petitioning immunity beyond formal acts of petitioning is consistent with the adoption of the First Amendment. For example, James Madison, who is often considered one of the principal architects behind the petitioning clause of the First Amendment, noted in the debates over whether the people should have a right to instruct their representatives that "[t]he people may [instead] publicly address their representatives, may privately

advise them, or declare their sentiment by petitions to the whole body; in all these ways they may communicate their will."[22] In this statement, Madison explicitly recognized that the people's right extended beyond formal petitioning to informal acts such as publicly addressing them or privately advising them....

* * *

The protection of informal acts of petitioning, however, is in part responsible for the confusion surrounding the current attitude toward petitioning because it blurs the line between petitioning and speech. As discussed above, when the right to petition has been invoked by the Supreme Court, more often than not it is in the same breath as freedom of speech. In fact, the Court has stated that "[t]he right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression."[23] This confusion is understandable because some types of publicity and public relations campaigns are considered "petitioning" and not simply speech. Moreover, it is also understandable given that the right to petition is no longer the only protected avenue for seeking political change or criticizing government. The First Amendment now guarantees a wider range of freedom of expression than was recognized during petitioning's golden era. Likewise, the rise of popular sovereignty and universal suffrage broadened the accepted means for political participation. The extension of these other rights, however, should not obscure petitioning's continued importance. The right to petition remains the principal textual guarantee of the individual's right directly to seek government action and for immunity from prosecution for those efforts.

THE PROBLEM

Against this backdrop, an argument could be made that parties involved in an objectively reasonable lawsuit who enter into a settlement agreement with anticompetitive consequences are nonetheless immune, because the agreement is incidental to their constitutionally protected right to petition the government for redress. In making this argument, litigants would find support in the Ninth Circuit's decision in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.* In that case, the court held that "[a] decision to accept or reject an offer of settlement is conduct incidental to the prosecution of the

suit and not a separate and distinct activity which might form the basis for antitrust liability." So long as the litigation itself is not a sham and entitled to immunity, any settlement would likewise be immune.

Second, litigants could point to the fact that, as a general rule, the antitrust laws do not preclude settlement by agreement rather than by litigation, and emphasize the "general policy favoring settlement of litigation." Lastly, at least one commentator has argued that "[t]oo great a willingness to find antitrust violations in settlement arrangements would significantly inhibit settlements of many types of cases at real cost to the administration of justice, with little likelihood of any countervailing benefit to the public interest." In other words, denying immunity in the context of settlements would impose significant costs upon society either through the increased transaction costs associated with litigation or by limiting the ability of private actors to order their affairs. Despite the facial plausibility of this argument, a more probing examination of the right to petition reveals that the settlement of litigation is not the sort of activity that the right protects.

NOTES

1. See Sherman Anti-Trust Act, 15 U.S.C. Section 1 (1994 & Supp. IV 1998); 15 U.S.C. Section 2.

2. The *Noerr-Pennington* doctrine, hereinafter *Noerr*, refers to a series of decisions by the United States Supreme Court beginning with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), in which the Court recognized antitrust immunity for certain conduct related to the right to petition.

3. 365 U.S. 127 (1961).

4. Ibid., 144–45.

5. Ibid., 136–37.

6. Ibid., 138.

7. See ibid., 137.

8. Ibid., 140–41 ("[A] publicity campaign to influence governmental action falls clearly into the category of political activity.").

9. 381 U.S. 657 (1965).

10. Ibid., 670.

11. 404 U.S. 508 (1972).

12. Ibid., 510–11.

13. Ibid., 510.

14. Ibid., 513.

15. See *Grip-Pak, Inc., v. Illinois Tool Works, Inc.*, 694 F.2d 466, 471–72 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983).

16. *Westmac, Inc. v. Smith*, 797 F.2d 313, 317 (6th Cir. 1986), *cert. denied*, 479 U.S. 1035 (1987).

17. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988).

18. 508 U.S. 49 at 60–61.

19. *Allied Tube*, 486 U.S. at 499.

20. Charlene B. Bickford and Helen E. Veit, eds., *Documentary History of the First Federal Congress of the United States of America 1789–1791* (1986), pp. 10, 16.

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

22. Norman B. Smith, "'Shall Make No Law Abridging...': An Analysis of the Neglected, but Nearly Absolute, Right of Petition," *University of Cincinnati Law Review* 54, no. 1153 (1986): 1182 (quoting 1 *Annals of Congress* 738 [1789]).

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

"STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION" (SLAPPs): AN INTRODUCTION FOR BENCH, BAR, AND BYSTANDERS

GEORGE W. PRING AND PENELOPE CANAN

* * *

A new and very disturbing trend is happening in America, with grave consequences for politically active citizens and for our political system. Americans by the thousands are being *sued*, simply for exercising one of our most cherished constitutional rights—"speaking out" on political issues. Citizens are being sued just for communicating their views to their government.

* * *

Today, in America, multimillion-dollar lawsuits are actually being filed against citizens and groups for:

From *University of Bridgeport Law Review* 12, no. 937 (1992): 938–50. Reprinted by permission of the *Quinnipiac Law Review.*

- Circulating a petition for signatures;
- Voicing criticism at a school board meeting;
- Testifying at a zoning hearing against a new real estate development;
- Sending a letter to public officials;
- Reporting police misconduct;
- Filing a complaint with a government consumer, civil rights, or labor relations office;
- Reporting violations of law to health authorities;
- Lobbying for reform legislation;
- Filing administrative agency appeals;
- Engaging in peaceful, legal demonstrations;
- Being a named party in a nonmonetary, public-interest lawsuit; and
- Just going to a public meeting and signing the attendance sheet.

Civil actions are becoming the new means for stifling political expression. We have coined a name for these lawsuits—"Strategic Lawsuits Against Public Participation" in government, or "SLAPPs"—to capture both their causation and their consequences....

THE SLAPPs PHENOMENON: WHAT THE STUDY SHOWED

Every year, we estimate, thousands are being sued for their governmental advocacy. Surprisingly, the targets of these political lawsuits are generally not extremists or professional activists but instead are typical, middle-class, even middle-of-the-road Americans, and frequently first-time activists. Far from unusual, SLAPPs are found in every jurisdiction, at every government level, and against every type of public issue we have investigated. And this is a "new" phenomenon; virtually all the cases we have found were filed after 1970.

Our initial surprise at discovering such lawsuits has led to a ten-year-long, continuing study of SLAPPs. We chose to examine them from an interdisciplinary perspective, investigating both their legal aspects and their social and political dimensions. The study provides the first comprehensive legal and statistical views of SLAPPs. We examined them qualitatively as well, using in-depth, interview-based studies of select cases. Finally,... we performed a nationwide survey of SLAPP filers, targets, observers, and other activists to document conclusively the causes and effects of SLAPPs.

The study found that SLAPPs are filed by one side of a public, political dispute, to punish or prevent opposing points of view. They are an attempt to "privatize" public debate—a unilateral effort by one side to transform a public, political dispute into a private, legal adjudication, shifting both forum and issues to the disadvantage of the other side. Thus, citizens may involve themselves in a city hall zoning dispute, only to find that "city hall" has become "courtroom," and "zoning" has become "defamation" or "interference with business."

This "dispute transformation" works greatly to the advantage of the filer. As the US Supreme Court has noted, in a famous SLAPP:

> A lawsuit no doubt may be used... as a powerful instrument of coercion or retaliation.... Regardless of how unmeritorious the... suit is, the [defendant] will most likely have to retain counsel and incur substantial legal expenses to defend against it... furthermore... the chilling effect... upon a [defendant's] willingness to engage in [constitutionally] protected activity is multiplied where the complaint seeks damages in addition to injunctive relief.[1]

The costs immediately imposed on the defendants or targets can be substantial, including not only attorney's fees, court costs, and litigation expenses, but also time and dollar resources diverted from the campaign, lost wages, potential credit problems, insurance cancellations, and extreme psychological insecurity.

More than individual costs are involved. All of us have a stake in these lawsuits, as one state supreme court observed in another prominent SLAPP:

> The First Amendment to the United States Constitution guarantees "the right of the people... to petition the government for a redress of grievances." Citizen access to the institutions of government constitutes one of the foundations upon which our republican form of government is premised. In a representative democracy government acts on behalf of the people, and effective representation depends to a large extent upon the ability of the people to make their wishes known to government officials acting on their behalf. The right to petition has been characterized as one of "the most precious of the Liberties safeguarded by the Bill of Rights."... While the right to petition obviously encompasses activities of a traditionally political nature, its sweep is much broader and includes other forms of activity as well.[2]

* * *

The rest of us pay additional societal costs when SLAPPs are filed. Our overloaded courts are further burdened. Numerous government programs, which rely on citizen input, information, and involvement, are undercut. Most troublesome, SLAPPs actually impede solution of the public problem, by removing parties from the public decision-making forum where the *cause* of the dispute can be resolved and by invoking a judicial forum where only the *effects* of the dispute can be adjudicated. A judge in a defamation case cannot order a zoning change.

There is no lack of victims. In the last two decades, thousands have been sued into silence. For them, and for the estimated hundreds of thousands who know about them, SLAPPs have "worked" even when they lose. They have worked, in the US Supreme Court's word, to "chill" present and future political involvement, both of the targets and of others in the community, and have worked to ensure that those citizens never again participate freely and confidently in the public issues and governance of their town, state, or country.

* * *

SLAPPs, as lawsuits go, are losers; the vast majority ultimately are dismissed. But, as the New York judge observed, they frequently succeed in the real world, chilling the politically outspoken as well as observers, and chilling important public discussion and dispute. Unchecked, SLAPPs raise real concern for the future of "citizen involvement" or "public participation" in government, long viewed as essential in our representative democracy.

Despite the chill of SLAPPs, the study confirms and reinforces that most fundamental American right to speak up and be heard. Democracy itself, as authorities from Aristotle to Oliver Wendell Holmes have noted, depends on public involvement and support, and continued public participation today depends on knowing about SLAPPs and how to deal with them. To that end, ... [we] describe what we have learned about the phenomenon—what triggers SLAPPs, who wins and loses, how best to protect oneself or one's clients from them, how to manage them in court, and what effect they have on the future.

IDENTIFYING SLAPPs—A PRACTICE GUIDE

SLAPPs occur in spite of the fact that the US Constitution's Petition Clause [Congress shall make no law ... abridging ... the right of the people ... to peti-

tion the Government for a redress of grievances],[3] a host of other laws, and our political ethos encourage, promote, and purport to protect citizens' testifying, debating, complaining, campaigning, lobbying, litigating, appealing, demonstrating, and otherwise "invoking the law" on public issues. We observed early in the study that *failure to identify* a case as a SLAPP helped perpetuate it, despite the law's protections. Yet, working against SLAPP identification is a "Forest vs. Trees" problem of magnitude. Attorneys, clients, and judges who applied the traditional "issue spotting" approach ("This is a 'libel' case" or "This is a 'zoning' case") observed only the trees, missed the political-constitutional "forest," and became mired in long-running, costly, hard-to-end SLAPPs.

We saw the need for a different approach. Rather than deal with the cases as separate, traditional legal categories (as individual "trees," if you will), we pioneered viewing them as *one new category.* Given their similarities in cause, operation, and effect, we felt they could be better identified, understood, and dealt with collectively. By definition, they all are triggered, in whole or in part, by Petition Clause–protected activity; therefore, focusing on the overall "forest" of public political participation was crucial. The results have been dramatic. Thus viewed, would-be filers and filer attorneys reevaluate suing. SLAPPed targets and target attorneys take heart, succeed more frequently at dismissal, and are more inclined to file countersuits for violation of their rights (which we named "SLAPPbacks"). Finally, judges are more willing to adjudicate the cases expeditiously, recognizing that macropolitical and societal rights are at risk, not simply private, interpersonal ones.

To focus the research and guarantee its objectivity, it was necessary to develop a neutral, nonpartisan definition for "SLAPPs." The definition, we felt, should focus on the *nature of the target's political expression* triggering the suit (solely if Petition Clause–protected) and eliminate the subjective criteria of filers' or targets' "motives," "good faith," "intent," even rightness or wrongness on the merits. To qualify as a SLAPP, a lawsuit must be:

1. A *civil* complaint or counterclaim;
2. filed against *nongovernment* individuals or organizations,
3. because of their *communications to government* (government bodies, officials, or the electorate),
4. on a substantive *issue of some public interest* or concern.

Such a simple (re)definition is also necessary because SLAPPs come "camouflaged" as ordinary civil lawsuits, which contributes to many parties', attorneys', and judges' inability to recognize them and handle them appropriately. In the 228 cases that formed the basis of our detailed statistical study, six claim categories were typically used (and are therefore "indicators" of potential SLAPPs):

1. Defamation (libel, slander, etc.);
2. Business torts (interference with business, economic expectancy, contract, etc.; product disparagement, and antitrust or restraint of trade);
3. Judicial-administrative torts (malicious prosecution, abuse of process);
4. Conspiracy (to commit any of these torts);
5. Constitutional and civil rights violations (chiefly "taking" of filer's property and unlawful "discrimination" against filer); and
6. Miscellaneous wrongs (including nuisance, invasion of privacy, attacks on nonprofit tax status, etc.).

They strike predictable classes of public issues (which also serve as "indicators"), typically six broad dispute areas:

1. Real estate development and zoning;
2. Criticism of public officials and employees;
3. Environmental protection and animal rights;
4. Civil rights (race, gender, employment, and other forms of discrimination);
5. Neighborhood problems (frequently characterized as the "Not In My Back Yard" or "NIMBY" syndrome); and
6. Consumer issues.

Unfortunately, programmed as most lawyers, judges, and even sophisticated clients are, many still see only the tort or other traditional claim "trees" and ignore or reject the political "forest." This misperception permits SLAPPs to be threatened, filed, and prolonged for years in court, casting their pall on First Amendment rights. Clearly, solutions are needed.

"CURES" FOR THE SLAPP PROBLEM

All three branches of government, as well as the legal profession itself, have a role in developing solutions to the SLAPP problem.

THE LEGAL PROFESSION

Lawyers must become more attuned (to borrow Justice Stewart's famous comment) to "know it when they see it." The best cure is always prevention, but even prevention takes diagnosis. Attorneys representing anyone in a public, political-arena dispute should be alert to identify SLAPP warning signals. Based on our studies, those warning signals include:

1. Local issues (which cause SLAPPs more frequently than grander-scale state or national issues);
2. Bi-polarity (sharply two-sided, go/no-go, win-lose positioning of parties);
3. Public-private dichotomy (one side viewing the issues from a public-good, ideological, or value perspective, while the other side views the issues as private, property rights, personal financial gain, etc.);
4. Non-Goliaths (contrary to expectation, filers are more often small, local entities and individuals, rather than large operators);
5. Legitimizing-delegitimizing labels (potential filers typically delegitimate their opponents by labeling them as "ignorant," "self-interested," "little old persons in tennis shoes," "opportunists," etc., while they legitimize themselves as "professional," "free enterprise," "having rights," "protecting property," etc.);
6. Forum bias (SLAPPs are typically filed by "losers," by those who mistrust their ability to win in the public, political forum in which the dispute starts—be it a zoning board, consumer agency, school board, police conduct review body, or law-reform lawsuit; ironically, it is when citizens are being most successful in the political forum that they are most frequently SLAPPed out of it and into court).

When some or all of those warning signals appear, the politically active and their lawyers need to move quickly if they wish to prevent a SLAPP. The primary SLAPP prevention strategies are:

1. Know that citizens have a constitutional, Petition Clause–protected right to petition or otherwise make their views known to appropriate government bodies, officials, or the public on any issue that affects or concerns them.
2. Ensure the advocacy is:
    a. factually accurate,
    b. on firm legal footing, and
    c. legitimately motivated (not for harassment or improper purpose).
3. Communicate to the potential filer or its attorneys the personal risks to them of bringing a SLAPP (public relations disaster, losing lawsuit, potential SLAPPback damages, becoming identified as a constitutional violator).
4. Urge the involved government body and its lawyers to take a firm stand against SLAPPs or SLAPP threats.
5. Contact the media for exposure of the problem.

If a SLAPP cannot be prevented, it needs to be cured. Again, the first step is correct diagnosis.

Defense attorneys can fail their clients by not recognizing a SLAPP.... Not all SLAPPs are self-announcing; few filers would be so rash as to sue expressly for "petitioning the government" (although it does happen!). The classic indicators of a SLAPP are:

1. Politically active defendants;
2. Any of the six typical claim categories (above);
3. Huge money damage claims, out of proportion to realistic losses; and
4. Inclusion of "Doe" defendants (to spread the chill).

Given some or all of these, the complaint should be scrutinized for mention of Petition Clause–protected activity (communications to government or the urging of same). Whether or not protected activity appears facially in the complaint (and it is amazing how frequently it does), the attorney should carefully probe past client activities regarding the filer to see if any government contact has been engaged in, even though not pleaded.

NOTES

1. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740–41 (1983).
2. *Protect Our Mountain Env't., Inc. v. District Court*, 677 P.2d 1361, 1364–65 (Colo. 1984).
3. US Constitution, First Amendment.

PETITIONING AND THE EMPOWERMENT THEORY OF PRACTICE

ANITA HODGKISS

* * *

Modern legal theorists concerned with freedom of speech and assembly have virtually forgotten the First Amendment Petition Clause. The political role of petitioning has changed since colonial times, when it was a central element of direct democracy,[1] but the values of human self-determination, expression of individual conscience, and freedom of association that it embodies are still relevant. Given that expressing dissent and seeking redress of grievances are key activities for those attempting to build a movement for social change, the radical perspective on the right to petition is of particular importance.[2]

The first task for a radical theorist is to critique current Petition Clause doctrine. However, radical legal theory does not stop there; two types of positive approaches have been taken. One identifies the legal doctrine and practice

From *Yale Law Journal* 96, no. 569 (1987): 569–70, 573–76, 584–92. Reprinted by permission of the *Yale Law Journal.*

that should prevail in an ideal democratic socialist society. The other suggests legal theories and practices that can bring about change. This note develops a positive radical perspective of the second type, emphasizing the relevance of the idea of petitioning to the daily practice of law. I argue that the radical lawyer's task is to encourage individual and collective empowerment. The concept of petitioning, though problematic, provides a useful model to illustrate techniques of empowerment. Viewing the role of a lawyer as facilitating petitioning highlights the political nature of the lawyer's activities and suggests that lessons can be learned from past instances of petitioning.

* * *

LIBERAL AND RADICAL INTERPRETATIONS OF THE RIGHT TO PETITION

A traditional liberal approach to the right to petition examines whether First Amendment doctrine should be expanded to recognize the right in a greater number of situations, without fundamentally challenging or changing hierarchical social and economic structures. Early litigation involved the interaction between petitions and libel law in an attempt to give petitions greater protection from libel actions than speech generally. The Supreme Court's... ruling that false statements made with express malice are not immune from libel actions even if contained in a petition for redress of grievances has curtailed the effort.[3] In other areas, however, the Petition Clause has extended protection beyond the free speech guarantee. For example, the *Noerr-Pennington* doctrine shields attempts by businesses to combine and influence government decision making from antitrust liability because this lobbying is a form of petitioning.[4] In the early 1960s labor unions and the NAACP secured the right to provide legal assistance to their members on the grounds that lawsuits are petitions protected by the Petition Clause. More recently, politically motivated boycotts have been upheld as a legitimate form of petitioning.[5] Areas of further expansion include holding that the Petition Clause prohibits restrictions on medical malpractice suits or protects gathering signatures for petitions at shopping malls. The liberal lawyer would file test case litigation to try to secure the right in these areas.

In contrast, the Critical Legal Studies (CLS) approach first questions what the liberal takes for granted—the idea that the right to petition unam-

biguously serves the values of human self-realization and equality. The critical approach points out how rights can be used to legitimate oppression. For example, with respect to the Petition Clause, people who have many grievances but no financial means are effectively denied the right to petition. Likewise, people who want to petition private authorities such as corporations, employers, or landlords, are not protected by the Petition Clause. Liberal theory cannot accommodate the right to petition as an argument for the necessity of adequately funded legal services for the poor, for the legality of all consumer boycotts, or for the expansion of shareholder resolution rights to nonshareholders. These propositions involve altering the social structure by redistributing income or democratizing corporate decision making, efforts that go beyond liberalism. In short, citizens have the right to petition only if they can afford it. Constitutional protection attaches only to grievances addressed to government, and not to petitions to other authorities. By glossing over serious limitations in the construction of the right to petition, present legal doctrine legitimates denial of the right in many circumstances.

* * *

What does the CLS approach to the Petition Clause mean for the radical lawyer? She must develop both a theory that demonstrates how the values behind the right to petition can be better achieved through participatory social structures and institutions, and a practice that helps shape and realize that theory. Although liberal theory and current Petition Clause doctrine are flawed, it is the people in society whose class interests are in maintaining present social structures who perpetuate limitations on petitioning rights, not the theory itself. The radical lawyer should focus on enabling poor and powerless people to petition rather than on changing legal doctrine. Because lawyers frequently seek redress of grievances, they are in a unique position to further the realization of the right to petition.

* * *

WHAT PETITIONING ADDS TO THE EMPOWERMENT THEORY

Mutual respect, demythologizing the legal system, and characterizing cases in political terms are important techniques to avoid domination in the lawyer-client relationship. These techniques also will help a client recognize the political nature of his problem and of the law itself if he has not done so already. Empowerment requires a further step—that people actually gain political power and have greater control over their lives. Whether or not a lawyer's work will result in empowerment, either of an individual client or an entire community, depends on a number of factors, some of which are outside the lawyer's control. However, a lawyer can encourage empowerment through a variety of means, notably by encouraging petitioning.

Petitioning, as broadly conceived, is empowering in four ways: (1) it can be a catalyst for further political organization and a way to build a movement with far-reaching goals by starting with smaller goals; (2) it requires local involvement; (3) it focuses on collective activity; and (4) it suggests a range of options for seeking redress. The following discussion examines how petitioning activity during the civil rights movement had these characteristics and the conclusions they suggest about the proper practices and goals of a radical lawyer.

A. Catalyst

In many instances during the civil rights movement, the writing and circulation of a petition was the first step activists took to mobilize community support and to initiate protest. Boycotts, sit-ins, lawsuits, and attempts to register to vote were also tactics used to make demands. When such action was taken, other people in the community overcame their fears and feelings of powerlessness to support the movement. If this seems an obvious method of stimulating protest, consider that alternative approaches might have been taken, such as forming a mass membership organization prior to making any outright challenge. Petitioning publicized issues and enabled people to set specific goals, such as obtaining school buses, desegregating lunch counters, or registering to vote, even though their ultimate goals were broader. Success in one area was a catalyst for further efforts.

A lawyer will bring about empowerment when she clarifies goals for a client or client-community. Lawsuits are one type of petition that can specify

grievances, even if the community's goals go beyond what the current legal system will deliver. Lobbying, attending public hearings, organizing boycotts, and other forms of petitioning are actions the lawyer can facilitate to build support for social change movements. When viewing her actions as assisting a client to petition for redress, and knowing that a petition can be a catalyst for further action instead of an end in itself, the lawyer should not only politicize cases and try to encourage community organizing but also evaluate the potential for making the petition a stepping stone to other actions. For example, a lawyer can encourage tenants who organize in response to eviction proceedings to work together on more long-term solutions to their housing problems. The lawyer can give the group space for meetings, talk about what has been done in other localities, or find out how other people in the community have handled similar problems. This is not to suggest that a case without such catalytic attributes must be refused, but only that the lawyer should always explore the possibilities of further action. A petition stimulates further political action when it is used to politicize issues, identify a group of people with a common interest, and specify an immediate goal.

This method of encouraging social change may sound gradual and incremental, rather than revolutionary, but the speed and type of change depends on the contents of the petition. An underlying assumption here is that democratic principles require social change movements to begin with what people currently want. To this extent, new institutions and social structures are inevitably shaped by struggle within and over present ones. Petitioning can serve an important function in a movement for social change by stimulating protest activities with a definite goal.

B. Local Control

Ensuring local control of the petitioning process is equally important for a lawyer as the attempt to make petitioning activity a catalyst. Petitioning is empowering only when it encourages people to be involved directly in political struggles. Most of the protest activities during the civil rights movement required the participation of local people. Voter registration drives required residents to attempt to register. Boycotts required the community to stop patronizing the target store or company, as well as to cooperate in developing alternative means of getting groceries or rides to work. Even sit-ins and freedom rides, which sometimes involved non-southerners, required the sup-

port of local people to provide safe houses for battered students or communication between communities. The Freedom Summer Project relied heavily on local black communities to provide housing for volunteers. In these instances, local people could have stopped the petitioning activity altogether by withdrawing their support.

The nature of local people's involvement in the civil rights movement was also remarkable in that the situation demanded a significant commitment on their part. Often, signing a petition is a single, isolated act, involving little political activity beyond a cursory conversation with the person soliciting the signature. Other types of petitioning, such as attending a demonstration, can likewise entail minimal participation. In contrast, southern blacks in the fifties and sixties who participated in petitioning activities suffered harassment, intimidation, and loss of their homes, their jobs, and even their lives.[6] Signing a petition in those circumstances demonstrated a deep commitment. For veteran movement people, commitment meant a willingness to sacrifice whatever was necessary to achieve their goals.

This experience demonstrates that committed involvement in petitioning activity is necessary to make the activity empowering. Likewise, clients will only be empowered if they have a decisive and active role in the lawsuit, lobbying effort, administrative appeal, or other activity they choose to pursue in seeking redress of their grievances. Emphasizing client participation has two important implications. It requires a reconceptualization of the lawyer-client relationship and it alters the tasks that a lawyer should perform.

The dominant professional vision of the lawyer-client relationship assumes that clients are able to communicate their interests to the lawyer who will act as their agent. Commentators have questioned the applicability of this model to such areas as public defender work, legal assistance programs, and class action litigation. In these practices, the lawyer may be shaping or limiting the client's goals or interests, possibly to the extent that the relationship is one of domination and manipulation. The empowerment approach is vulnerable to the same problem unless lawyers pay careful attention to achieving a relationship of "genuine equality and mutual respect" as Gabel and Harris advocate. The model of a lawyer seeking to create a nonhierarchical community of interest in the course of representation is the ideal.[7] The lawyer and client should jointly define the client's problem, determine the desired relief, and choose the best course of action. They need to work together to pursue shared goals, each making suggestions about what should be done and each open to persuasion by

the other. If the client has strong political commitments that sharply conflict with those of the lawyer, this kind of relationship cannot develop.

A nonhierarchical relationship, in which lawyer and client share common interests and goals, transfers the client from a relationship of coercion to one of empowerment. One successful example of this process is Stephen Wexler's story of the interaction between himself and a group of black women who were trying to get emergency funds for a mother and medical care for her malnourished child.[8] Following a course of action they suggested, he accompanied them to the welfare office and the hospital even though his initial approach to the problem was different from theirs. His presence contributed to the effort, but the women could call the victory theirs because of their role in initiating it and carrying it out.

When client participation is a goal, it is necessary to develop different criteria for determining the best allocation of tasks between attorney and client. On the one hand, the lawyer must try to involve clients in any capacity that contributes to the effort, as well as foster further participation when their experience increases. For example, a client may be able to handle most of his eviction case. He may require assistance from the lawyer in preparing any complex pleadings or need advice to ensure that he does not make unfavorable concessions, but otherwise he may be able to contact building inspectors, file pleadings, attend hearings, and present his own case to the judge. Clients will gain a sense of personal involvement in the decisions that affect their lives only if they contribute time, energy, ideas, and purpose to the petitioning process.

On the other hand, to say that a client must handle his case is counterproductive when the client cannot reasonably be expected to have the time or resources necessary to pursue the matter. A lawyer should not have a rigid formula to determine how much and what type of client autonomy to encourage. In one case, a lawyer may organize a meeting as a facilitating task; in another, a client will organize the meeting as part of his involvement in and control over the activity. The underlying requirements are that the lawyer and client work cooperatively and that they strive to achieve personal and political empowerment.

C. Collective Action

Although related to the need for local or individual involvement, the significance of collective action in petitioning warrants separate discussion. Peti-

tioning activity during the civil rights movement was collective at the local and national levels. The activity was empowering in part because people worked together. Just as the sit-in movement gained strength from conferences drawing students together from different parts of the country, a local class action suit can gain strength from the support activities of a national organization. Lawyers pursuing an empowerment approach must not only encourage clients to work together but also work together themselves.

Of these two imperatives, cooperation among clients is perhaps the most difficult to achieve in a legal practice. Except when serving as house counsel to community organizations, lawyers generally face clients who have individualistic approaches to identifying and solving problems and who may not view their problems in a wider political context where the efficacy of group action becomes more apparent. Moreover, organization takes time, effort, and resources that poor people who are struggling to get by may not have. Recognizing these difficulties, lawyers must still encourage collective effort whenever possible. Class action suits can be used to foster collaboration, especially if clients know one another and can take an active role in directing their case....

A lawyer can also stimulate collective action by demonstrating that there are collective solutions to what clients may perceive as individual problems. Indeed, some individual problems can only be solved collectively. For example, when an unarmed man, Reggie Jordan, was killed by police, his relatives were unable to raise the $180,000 that they were advised was necessary to bring the case to court. Poet and writer June Jordan commented: "Unless the execution of Reggie Jordan became a major community cause for organizing, and protest, his murder would simply become a statistical item."[9] In this case, the necessary community involvement did not occur. A lawyer in a similar situation should try to mobilize community action and support to help fund a lawsuit, or to publicize and protest the police conduct at fault. This does not mean that a lawyer should be first and foremost a community organizer. The empowerment approach differs from Stephen Wexler's model of the lawyer as community organizer because it has different priorities. The goal of the practice is not to build an organization but rather to empower people. Although an organization may be helpful and sometimes instrumental in ensuring that petitioning results in empowerment, in some circumstances the two goals may diverge, such as when people needing legal assistance are wary of joining organizations.

D. Range of Options

The petitioning model makes a final contribution to empowerment theory by emphasizing that redress of grievances is often obtainable through a variety of methods. While no lawyer focuses on filing a court case as the universal panacea, the lawyer's overall theory of practice will determine what solutions she suggests for her client. Viewing a lawyer's role as facilitating a petition for redress of grievances emphasizes her responsibility to suggest and assist with a range of legal and nonlegal efforts. A client's problem may best be addressed with a demonstration, a hunger strike, a boycott, or a traditional petition. For example, in a case where a group of vulnerable single women suffered sexual harassment by a prominent landlord in a rural area, the women wanted to publicize the problem as one way of alleviating it. One client had the idea of visiting local shelters for abused women who may be looking for accommodation in order to educate them about the problem of sexual harassment by landlords. The lawyer in the case accompanied the client to a shelter in carrying out this essentially community education task. Another idea was that a picket of the landlord's business was an appropriate means of redress because if people in the community were aware that this landlord was illegally conditioning the rental of apartments on women granting sexual favors, he would be less likely or able to continue harassing prospective tenants. In this situation, the lawyer should help her clients evaluate picketing as a course of action, including giving them advice on local permit requirements or the potential of a retaliatory libel suit.

Finally, a range of options is important because petitioning is empowering when it involves activities that are more easily available to otherwise excluded groups. People attempting to have an effective role in political decisions may have the resources to organize and participate in a mass demonstration protesting welfare cuts yet be unable to wage a media campaign or hire lobbyists. Thus, the petitioning model suggests that the lawyer should encourage clients to consider various forms of political activity.

CONCLUSION

Radical lawyers representing poor and oppressed groups in society are in a strategic position. When these clients have a problem leading them to consult a

lawyer, the opportunity exists for the lawyer to make the experience an empowering one. Social workers, community organizers, and the clergy may all come in contact with the same groups of people, but lawyers have a unique role as mediators between clients and the legal system. Petitioning has historically been a means of political participation for disenfranchised groups. It can serve as a model illustrating how a lawyer's work can encourage empowerment.

NOTES

1. See R. Bailey, *Popular Influence upon Public Policy: Petitioning in Eighteenth Century Virginia* (1979); Note, "A Short History of the Right to Petition Government for Redress of Grievances," *Yale Law Journal* 96, no. 142 (1986).

2. See Bachmann, "Lawyers, Law, and Social Change," *New York University Review of Law and Social Change* 13, nos. 1, 22 (1984–85) (progressive lawyers should focus on First Amendment law including right to petition because to facilitate mobilization they must have access to public).

3. *McDonald v. Smith*, 105 S.Ct. 2787 (1985).

4. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

5. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

6. *Citizens' Petition for the Redress of Grievances: Hearing before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 84th Cong., 1st Sess. 30 (1955).

7. Peter Gabel and Paul Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law," *New York University Review of Law and Social Change* 11, no. 369 (1982–83): 376, 408–10.

8. Stephen Wexler, "Practicing Law for Poor People," *Yale Law Journal* 79, no. 1049 (1970): 1064–65.

9. June Jordan, "Nobody Mean More to Me Than You and the Future Life of Willie Jordan," in *On Call: Political Essays* 134 (1985).

IMMIGRANTS AND THE RIGHT TO PETITION

MICHAEL J. WISHNIE

* * *

...Petitioning is the act of presenting a communication to the legislative, executive, or judicial branch of government, orally or in writing, to seek redress of a grievance. In this article, I examine whether noncitizens, including undocumented immigrants, are among "the people" whose right to petition is constitutionally guaranteed,[1] and, more broadly, by what judicial standard an infringement on petition rights should be scrutinized.

My inquiry is prompted by the Supreme Court's declaration that many noncitizens are excluded from the protections of the First Amendment.[2] More fundamentally, it is motivated by the circumstances of the millions of undocumented persons who live in the United States, many of whom work long hours for illegally low pay, in workplaces that violate health and safety

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codes, for employers who defy labor and antidiscrimination laws. Many of those workers are loathe to report their harsh working conditions for fear they will attract the attention of immigration authorities. Many other undocumented immigrants are victims of criminal activity but hesitate to report it for fear of deportation....

It would seem a foolish policy to discourage millions of people from communicating with law enforcement officials about unlawful activity. Yet this is, in effect, what our federal, state, and local governments have done by refusing to guarantee that complainants will not be deported for petitioning law enforcement agencies for redress. The consequence has been to embolden lawbreakers who prey on immigrants, frustrate civil and criminal law enforcement generally, undermine public safety and health, entrench undocumented immigrants in a caste hierarchy, and foster an underground economy that depresses the terms and conditions of employment for all workers.

Policymakers have responded with modest steps to address the burdens on petitioning that result in the exclusion of undocumented immigrants from the mainstream of law enforcement. Congress has enacted "whistleblower" protections for certain immigrants, including battered women and children, criminal informants, and victims of international trafficking, as well as certain other crime victims who petition authorities for redress. On the civil side, Congress has established whistleblower protections for H-1B visa holders who report labor abuses, and the US Department of Labor (DOL) has narrowed its information-sharing agreement with the US Immigration and Naturalization Service (INS) to encourage undocumented workers to report wage and hour violations. Following the September 11, 2001, terrorist attacks, the vital importance of facilitating unimpeded immigrant petitioning achieved brief popular attention when the INS commissioner asked all persons to report missing loved ones and pledged not to use "immigration status information provided to local authorities in the rescue and recovery efforts." These measures are few and limited, however, and represent only minor deviations from the rule that undocumented immigrants petition government authorities at their peril. Deterring immigrants from communicating with law enforcement officials is surely unwise. This article argues that it may be unconstitutional as well, violative of the First Amendment right to petition.

Analysis of immigrants' right to petition is illuminating for several reasons. First, it has significant consequences for the welfare of millions of noncitizens and for the effectiveness of law enforcement policies touching the

lives of all residents of the nation. Second, analysis of the petition rights of noncitizens has important implications for understanding the scope of other First and Fourth Amendment rights of immigrants—protections that, like the right to petition, are reserved by constitutional text to "the people" and have been dramatically pressured by law enforcement strategies since September 11. Analysis of the right to petition also has important implications for a range of legal doctrines grounded in the Petition Clause, from the right of access to courts to the *Noerr-Pennington* doctrine of antitrust law to no-contact rules of legal ethics. Finally, consideration of the petition rights of noncitizens in particular sheds light on the contemporary meaning of membership in a national community and on the limits of the governmental power to regulate the lives of territorially resident noncitizens.

* * *

IMMIGRANTS AND THE RIGHT TO PETITION

The threshold question in examining immigrant rights under the Petition Clause is whether the clause applies to noncitizens at all. In 1990, the Supreme Court suggested that noncitizens, particularly undocumented persons, are excluded from the protections enshrined in the First and Fourth Amendments. The statements arose in *United States v. Verdugo-Urquidez*,[3] a case in which the Court concluded that the Fourth Amendment did not compel suppression of evidence obtained by US law enforcement officials who conducted a warrantless search of a Mexican citizen's private home in Mexico. Relying on a "textual exegesis" that he conceded was "by no means conclusive," Chief Justice Rehnquist concluded for the Court that "'the people' protected by the Fourth Amendment, and by the First and Second Amendments ... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[4]

The rationale for the Court's decision was largely originalist, driven by its examination of the text of the Constitution, the drafting history of the Fourth Amendment, and its determination that "'the people' seems to have been a term of art."[5] Most importantly for the purposes of this article, the Court declared that the applicability of the Fourth Amendment to "illegal aliens in

the United States" was an open question, as undocumented persons are not obviously among "the people" protected from an unreasonable search and seizure, notwithstanding prior decisions that assumed undocumented immigrants possess Fourth Amendment rights. Somewhat bafflingly, Justice Kennedy disagreed with Chief Justice Rehnquist's analysis but nonetheless joined the majority opinion in full, providing the fifth vote for the Court's opinion.

The Court's intimation that noncitizens are not included among "the people" protected by the Constitution recalls some of the most shameful moments of American legal history, from Justice Taney's decision in *Dred Scott*[6] back to the Federalist defenses of the 1798 Alien and Sedition Acts. Commentary has condemned the *Verdugo-Urquidez* Court's conclusory statements, primarily in the context of Fourth Amendment jurisprudence. Justice Kennedy's evident disagreement with the distinction between "people" and "person," not to mention the extraterritorial circumstances of the search at issue in *Verdugo-Urquidez*, should have limited the impact of the decision. But Chief Justice Rehnquist's opinion has had very real consequences for noncitizens physically resident within the United States.

Since *Verdugo-Urquidez*, federal and state courts have applicability of the First and Fourth Amendments to legal and illegal noncitizens as unsettled, and in several cases, the US Department of Justice has argued that neither the First nor Fourth Amendment applies to undocumented persons. The *Verdugo-Urquidez* statements may have contributed to the Court's subsequent rejection of First Amendment arguments by immigrants singled out for deportation based on their disfavored speech and associational activities. And they may have emboldened Congress to restrict First Amendment activities by immigrants: In addition to debating campaign finance legislation that would prohibit contributions by noncitizens, Congress enacted sweeping antiterrorism legislation in 1996[7] and 2001[8] targeting immigrants for deportation based on speech or political affiliation,[9] and even familial associations.[10] Accordingly, the inclusion of noncitizens among "the people" whose right to petition is guaranteed by the First Amendment cannot be assumed.

Naturally, the obscure Petition Clause has not been at the center of the debate about the applicability of the First and Fourth Amendments to noncitizens. Nonetheless, the reasoning of the *Verdugo-Urquidez* majority could encompass the Petition Clause along with the rest of the rights guaranteed to "the people" by the First and Fourth Amendments. But examination of the

history of petitioning at the time of the founding demonstrates that the right was exercised by noncitizens, including immigrants, Native Americans, and slaves, as well as by other marginalized members of the polity, such as women, Jews, and free blacks. Foreigners, including those with little "connection with this country,"[11] successfully petitioned Congress, at times with the support of framers like James Madison and Alexander Hamilton. Moreover, the concept of "citizenship," like the degree of one's "connection with this country," was ambiguous at the founding and did not function as the sort of classifier of rights claimed by the *Verdugo-Urquidez* Court.

In the absence of evidence that the drafters of the First Amendment sought to alter the scope or practice of the right to petition by limiting its exercise only to "persons who are part of a national community or who have otherwise developed sufficient connection with this country"[12]—and research has revealed none—the rich historical evidence of noncitizen petitioning confirms that the Petition Clause protects all persons present in the nation, regardless of their immigration status. It thereby contradicts the *Verdugo-Urquidez* Court's conclusion that the framers intended to exclude noncitizens, or at least those without a sufficient connection to the national community, from the protections guaranteed to "the people" by the First and Fourth Amendments. I do not contend that history is determinative in the interpretation of constitutional text. But if the *Verdugo-Urquidez* principle is to be defended, it must be done on grounds other than the historical arguments relied on by the Court.

* * *

TOWARD A NEW THEORY OF THE RIGHT TO PETITION

Current petitioning doctrine is inconsistent with the history of the right, inadequate to its purpose, and unsatisfactory from the perspectives of individual rights protection, effective law enforcement, and a concern for a well-functioning republican government. The next section argues for a new theory of petitioning, more faithful to the history and purpose of the right and consistent with several closely related doctrines.

Petitioning as Extraordinary Speech

Petitioning is not ordinary speech. This form of expression has a distinctive history and plays a unique function in facilitating republican government by ensuring that both the personal and generalized grievances of all persons are heard by those who govern. This particular history and functionality is reflected in the text of the Petition Clause, which extends beyond the general guarantee of the "freedom of speech" to promise that a particular audience—"the government"—is forever open to hear a specialized kind of expression—a "petition... for a redress of grievances." Accordingly, restrictions on petitioning should receive heightened judicial scrutiny, subject only to the sham petitioning exception already recognized.

As the history of petitioning well demonstrates, the practice serves important purposes for both the governors and the governed. The free flow of petitions supplies an important stream of information about the views and concerns of the people, informing government decisions about individual cases and the need for generalized policymaking. Unobstructed petitioning also creates an opportunity for all people, regardless of their political status, to be heard. The guarantee of the right to petition does not include a guarantee of substantive relief, of course, nor even of a formal response. But the founding generation understood petitioning as a singular political activity of the highest order, and the decision to memorialize it separately in our First Amendment reflected an appreciation for its unique role in republican government. Vindication of that role compels close judicial scrutiny of any governmental impediments to petitioning.

Today the nation is too populous, and the issues confronting state and national legislatures too numerous, for petitions to Congress to foster the same sort of "unmediated and personal politics"[13] they once did. Nevertheless, communications to national, state, and local legislators continue to serve vital purposes. They inform representatives of the grievances and concerns of the governed and of the operation of laws and agencies on residents of their districts; prompt inquiries by legislative offices to executive branch agencies that eventually yield individual redress; and illuminate broader statutory, regulatory, or budgetary deficiencies.

In addition to the nation's greater size and population, petitions to legislators today differ from those of the founding era because Congress and other legislatures have shifted to executive agencies many of the executive and

quasi-judicial functions performed by founding-era legislatures. But executive branch agencies today rely on petitioning in many of the same ways that colonial legislatures once did. Petitions enable the agencies to respond to individual grievances, private and public, in furthering the goals of their statutes. Petitions also create an information stream that enables agencies better to allocate resources, target enforcement, and identify gaps in statutory or regulatory coverage.

Petitions to the government also further important individual interests. Some result in direct redress. Others may further dignitary values by ensuring that a complainant's grievance will be heard, if not heeded, and confirming that the petitioner has a voice worthy of attention. Finally, in the case of new immigrants, lowering barriers to law enforcement services may promote civic engagement with public institutions, thereby reducing the need for immigrant communities to develop insular, sometimes undemocratic, governance structures. For these reasons of constitutional text, history, and purpose, as well as for sound policy reasons, petitioning is extraordinary speech, and infringements on the right to petition should be subject to heightened First Amendment scrutiny.

The principle of heightened protection can be achieved doctrinally in any number of ways. My purpose here is not to argue for a precise verbal formulation. Rather, my aim is to make the more fundamental point that petitioning warrants greater judicial protection than current speech doctrine now affords it. Nonetheless, it is not hard to identify familiar judicial tools that could be deployed to protect petitioning as extraordinary speech. One could conclude that content-neutral regulation of petitioning should be permissible only when narrowly tailored to achieve a compelling state interest (ordinarily the standard for content-based regulation of speech). Alternatively, one could conceive of a modified balancing test—which, like other First Amendment doctrines, requires a broad weighing of the amount of petitioning inhibited as against the interests served by the government regulation—but in which the proverbial thumb on the petitioning scale presses with special force on the speech-protective side of the balance. This could be done, for instance, by incorporating a rebuttable presumption of government unlawfulness upon a showing that a challenged policy or practice chills a significant amount of petitioning.

2. Coherence with Related Doctrines

The argument for a muscular theory of petition rights generally, and petition rights for immigrants in particular, draws strength not only from the text, history, and purpose of the Petition Clause, and from its relationship to speech doctrines, but also from its consistency with related decisions on court access, unconstitutional conditions, and equal protection.

A. The Court Access Doctrine

The court access cases, which some have argued are best understood as petitioning decisions, hold that the Due Process Clause forbids the government from restricting court access regarding fundamental rights and where the state exercises exclusive control over the means of redress. In 1971, in *Boddie v. Connecticut*,[14] the Supreme Court established this two-pronged test and applied it to invalidate filing fees for divorce petitions. Almost immediately, the Court retreated from the potentially sweeping implications of Boddie, concluding that filing fees for bankruptcy petitions and judicial appeals of adverse welfare determinations were constitutionally permissible. In its subsequent decisions, the Supreme Court displayed a special concern for barriers to court access for claims involving First Amendment concerns. In 1996, in its most recent application of the *Boddie v. Connecticut* standard, the Court struck down a filing fee for appeal of an order terminating parental rights, reaffirming the validity of the test.

...[I]n 2001, the Supreme Court clarified the right of court access in *Christopher v. Harbury*,[15] a decision rejecting the contention of the widow of a murdered Guatemalan citizen that US government officials had concealed information about her husband's circumstances and thereby violated her right of court access. Writing for eight members of the Court, Justice Souter grouped court access claims into two categories: the first being forward-looking "claims that systemic official action frustrates a plaintiff...in preparing and filing suit," and the second being backward-looking "claims... of specific cases that cannot now be tried (or tried with all material evidence)."[16] Common to both categories of court access claims, concluded the Court, was the requirement that a plaintiff possess a nonfrivolous underlying claim for relief, "without which a plaintiff cannot have suffered injury by being shut out of court."[17]

To put *Harbury* in Petition Clause terms, the right of court access protects a petition regarding a grievance that is capable of redress by the authorities to which the petition is submitted; conversely, interference with frivolous petitioning on matters not susceptible to redress does not contravene the right. From *Harbury*, therefore, comes the guidance that a petition must state a nonfrivolous claim for redress of grievances to a government body empowered to deliver relief on the claim. In addition, court access cases challenging systemic government interference, such as *Boddie* and *M.L.B.*, instruct that even government rules that indirectly burden petitioning, such as filing fees, are suspect when the petitioning involves a fundamental right and the state exercises exclusive control of the means of resolution of the dispute. The Court's other Petition Clause decision this term [2002], *BE & K Constr. Co. v. NLRB*, confirms the point that even slight burdens on petitioning implicate the right, for like other First Amendment freedoms, courts must safeguard sufficient "breathing space" to permit petition rights to flourish.[18]

Applying the guidance of the court access cases, some matters about which immigrants desire to petition the government are surely fundamental. For instance, an immigrant victim of domestic or other violence who seeks civil and criminal intervention is petitioning about a fundamental right to bodily integrity, and perhaps against slavery. Freedom from invidious discrimination is also undeniably fundamental, and thus immigrants' seeking to petition under antidiscrimination laws should meet this standard; so, too, for petitions alleging violations of the National Labor Relations Act (NLRA) right to organize, which has been described as an aspect of the First Amendment's right of association and of the Thirteenth Amendment's freedom from involuntary servitude. Petitions seeking redress for slave-labor conditions or the unlawful denial of life-sustaining support, such as subsistence welfare benefits, should also be regarded as implicating fundamental rights.

Further, as to some of these fundamental matters on which immigrants wish to petition, the government retains exclusive control of the means of dispute resolution, raising a court access notion that echoes the First Amendment inquiry into the availability of alternative avenues of expression. The clearest instance of exclusive government control may be criminal law: A victim who cannot petition the police has nowhere else to turn, and thus special protection for petitioning on criminal matters would cohere strongly with the court access doctrines.

Applying the court access tests to petitions on civil matters addressed to

executive branch authorities raises further issues, as these matters are at least theoretically amenable to negotiated settlements between private parties, and some civil statutes establish a private right of action in addition to administrative remedies. Nevertheless, for several reasons, barriers to immigrant petitioning on some civil matters are inconsistent with court access principles. First, the formal possibility of a private, negotiated settlement is frequently illusory.... Second, some civil regimes of particular importance to undocumented persons, including the NLRA and OSHA, foreclose a private right of action. Only by petitioning the NLRA or OSHA can immigrants redress grievances arising under these statutes. Third, and most importantly, even civil statutes that allow for private enforcement (such as wage-and-hour and antidiscrimination laws) rarely provide a meaningful alternative to petitioning executive branch agencies. Low-wage and indigent immigrants are largely unable to afford legal representation, the Legal Services Corporation (LSC) forbids its grantees from representing many immigrants, and few LSC-funded legal services offices offer representation in workplace matters in any event. Petitions to executive branch agencies are frequently the only realistic possibility of securing redress.

In sum, heightened scrutiny of even indirect or slight regulation of petitioning would be consistent in many regards with the court access cases. These principles are most likely to invalidate barriers to court access involving matters of fundamental rights and where the state exercises exclusive control of the means of dispute resolution, although the Supreme Court has wisely begun to retreat from equal reliance on the latter factor. Incorporating these principles into a theory of petition rights as applied to immigrants should yield close judicial scrutiny of burdens to nonfrivolous petitioning for redress of grievances arising under, at the least, criminal, labor organizing, health and safety, wage-and-hour, antidiscrimination, and subsistence benefits laws.

B. Unconstitutional Conditions Doctrine

The doctrine of unconstitutional conditions holds that government may not indirectly burden the exercise of rights that it could not restrict directly. The doctrine rejects the view, famously advanced by Justice Holmes, that the greater power to deny a benefit necessarily includes the lesser power to grant the benefit conditionally.[19] Instead, unconstitutional conditions principles

dictate close judicial scrutiny of regulations that coerce the forfeiture or nonexercise of a constitutional right, just as if the regulations were direct restrictions on the constitutional right. The Supreme Court relied on the doctrine initially to protect corporate economic interests from state regulation of the public highways and foreign corporations. Later the Court came to apply the doctrine in defense of some individual liberties, including particularly First Amendment rights and, most recently, in zoning and land use cases.

The Court's jurisprudence in this area is widely described by commentators as incoherent and dominated by judicial policy preferences. The difficulty is in identifying when conditions on government largesse, employment, or licenses amount to impermissible suasion subject to heightened judicial scrutiny, and the Court's opinions fail to establish a clear, defensible demarcation between legitimate incentives and illegitimate coercion.

It is not my purpose to analyze the extensive case law and theoretical work on unconstitutional conditions but rather to explain why the theory of petition rights advanced in this article fits comfortably with principles that animate that jurisprudence. In general, the unconstitutional conditions decisions tend to inquire into the degree of government coercion, the importance of the right affected, and the germaneness of the condition to the benefit. The presence of a government monopoly on the benefit at issue increases the likelihood that courts will closely scrutinize any conditions imposed.

The unconstitutional conditions doctrine does not apply directly to the circumstance of immigrant petitioners unable to communicate with government for fear of deportation because the government is not pressuring a predicate right (petitioning) by imposing a condition on a public benefit (law enforcement services); here, the right and benefit run together. Rather, the "exchange" at issue—the government price for undocumented immigrants accessing law enforcement services by petition—is possible deportation. But undocumented immigrants possess no constitutional right against deportation, and therefore conditioning communication with law enforcement agencies on an immigrant's exposing herself to deportation does not pose a direct "unconstitutional conditions" problem.

Nevertheless, underlying norms of the unconstitutional conditions doctrine are consistent with the theory of robust petition rights I urge here.... Kathleen Sullivan has argued persuasively that a better understanding of the doctrine lies in evaluating "the systemic effects that conditions on benefits have on the exercise of constitutional rights." Of particular constitutional

concern is a condition that "discriminates de facto between those who do and do not depend on a government benefit."[20] Sullivan's distributive argument is grounded in equality norms and discerns within the case law the principle that conditions that entrench a caste hierarchy are constitutionally suspect.

The anticaste strand of the unconstitutional conditions doctrine fits well with this article's analysis of immigrant petition rights. In classic unconstitutional conditions terms, the right to petition is a core First Amendment right, and immigration status is not "germane" to the organic mission and routine investigations of many, probably most, law enforcement agencies. More to the point, if government agencies not charged with immigration law enforcement discourage immigrant reporting, such a policy imposes a condition on the exercise of the right to petition that entrenches undocumented immigrants, many of them indigent, in a caste hierarchy. This condition does not weigh as heavily on wealthier members of society, who can more readily pursue private negotiation or litigation. Further, because agency policies that deter immigrant reporting frequently undermine law enforcement not just for the individuals directly affected, but for other victims, coworkers, and community members, such policies are even more likely to raise anticaste concerns.

In short, law enforcement agencies that discourage immigrant petitioning violate the anticaste principles that should, and often appear to, drive the doctrine of unconstitutional conditions, even if such policies do not directly enforce an impermissible exchange of preferred rights for government benefits. Treatment of petitioning as extraordinary speech deserving of heightened judicial protection would thus further cohere with the doctrine of unconstitutional conditions.

C. Equal Protection Doctrine

Rigorous scrutiny of burdens on the petition rights of immigrants would also be consistent with constitutional equality principles. The Supreme Court's equal protection jurisprudence has long scrutinized alienage classifications, recognizing that they are frequently pretexts for race and national origin discrimination. The Court has concluded that much state discrimination against legal permanent residents is subject to strict scrutiny and presumptively invalid, even as it has exempted federal discrimination against permanent residents and state regulation of undocumented persons from the baseline of strict scrutiny.

In its single decision involving equality claims by undocumented immigrants, *Plyler v. Doe*,[21] the Court applied heightened scrutiny to invalidate Texas's denial of free public education to undocumented children. Recognizing the presence in the United States of millions of undocumented persons in a huge "shadow population," the Court warned of the "specter of a permanent caste of undocumented resident aliens." "The existence of such an underclass," wrote the Court, "presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law." Rejecting arguments that would result in the creation of such a caste, the Court instead declared that the "Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."[22]

As a matter of strict precedent, *Plyler* may secure for immigrants at least that quantum of petitioning necessary to avoid establishment of a "permanent caste" of undocumented persons. This petitioning includes, at a minimum, communications on behalf of the vital interests of children—such as those affecting their education, health, and safety—and regarding other sorts of unlawful activity that threaten to entrench a permanent caste—such as domestic and other gross physical violence and slave-like working conditions. More broadly, the equality principles underscored by the Supreme Court in *Plyler* and its other alienage cases support a robust view of immigrant petition rights. Because equality rights are implicated along with petition rights in immigrant communications to government, immigrant petitioning should be treated as extraordinary speech deserving of special judicial protection.

In sum, petitioning is extraordinary speech warranting heightened judicial protection. Close scrutiny of burdens on petitioning is consistent with the history of the right to petition and its special role in fostering republican government as reflected in the specific codification of the right in the text of the First Amendment. A doctrine that values petitioning as a fundamental right and examines closely even indirect or modest burdens on the right would cohere with related lines of court access, unconstitutional conditions, and equal protection cases. It would also foster informed government and promote effective law enforcement, while avoiding the entrenchment of subordinated groups such as noncitizens in caste hierarchies.

NOTES

1. US Constitution, First Amendment ("Congress shall make no law... abridging ... the right of the people... to petition the Government for a redress of grievances").

2. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

3. 494 U.S. 259 (1990).

4. Ibid., 265.

5. Ibid., 265–66.

6. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–406, 409–11 (1857).

7. See Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214.

8. Uniting and Supporting America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act, Pub. L. No. 107–56, 115 Stat. 272 (2001).

9. See 8 U.S.C. Section 1182(a)(3)(B)(i)(V) (2000).

10. See 8 U.S.C. Section 1182(a)(3)(B)(i)(VII).

11. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

12. *Verdugo-Urquidez*, 494 U.S. 265.

13. Gregory A. Mark, "The Vestigial Constitution: The History and Significance of the Right to Petition," *Fordham Law Review* 66, no. 2153 (1998): 2154.

14. 401 U.S. 371 (1971).

15. 536 U.S. 403 (2002).

16. Ibid., 413–14.

17. *Harbury*, 536 U.S. 414–15; see also ibid. ("[T]he very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong."). The Court explained that it had previously intimated the requirement of a bona find underlying claim in *Lewis*, 518 U.S. 353, n.3 (declaring that prisoner alleging denial of court access must identify "nonfrivolous" or "arguable" underlying claim).

18. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002), 531–32.

19. See, e.g., *W. Union Tel. Co. v. Kansas*, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting).

20. Kathleen M. Sullivan, "Unconstitutional Conditions and Constitutional Rights," *Harvard Law Review* 102, no. 1413 (1989): 1490.

21. 457 U.S. 202 (1982).

22. Ibid., 213.

Part III

". . . THE RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE . . ."

EDITOR'S NOTE

As noted in my introductory essay, the comparative scarcity of legal scholarship on the Assembly Clause has resulted in a part III that is quite a bit briefer than part II. As is true of the right to petition, many scholars regard the right of peaceable assembly as vital but essentially submerged within the other expressive freedoms of the First Amendment. US Supreme Court jurisprudence reflects this approach as well; much First Amendment case law implicitly invokes the freedom to assemble, although the Court rarely relies on the Assembly Clause in its reasoning. The articles chosen for this section, however, amply set forth the rich history and enduring importance of the right.

Chapter 1, "Origins and Early History," is composed of four historically focused excerpts. In "The Intent of the Framers," from his book *The Right of Assembly and Association*, M. Glenn Abernathy explores the founders' consideration of assembly as a core freedom in the Bill of Rights, as well as the presence of the right in state constitutions. Abernathy also discusses the leading US Supreme Court case on freedom of assembly, *United States v. Cruikshank* (1876), and its limiting impact on the scope of protections from government interference. In "Women and Freedom of Expression before the Twentieth Century," a second excerpt from her book *Rampant Women: Suffragists and the*

Right of Assembly, Linda J. Lumsden locates the rise of the women's suffrage movement in the concrete physical acts of street assemblies in the nineteenth century. Lumsden emphasizes the importance of "taking to the streets"—through picketing, soapbox speeches, and parades—as early suffragists' core expressive vessel; without the right to assembly, she argues, freedom of speech would have had little meaning. In a second excerpt from "Freedom's Associations," Jason Mazzone explains the role of physical assemblies and associations in the early Republic. He underscores their critical role in the original meaning of the right to assembly as reflective of popular sovereignty. Finally, in "The Neglected Right of Assembly," Tabatha Abu El-Haj asserts that physical assemblies commonly occurred without extensive government regulation or permit requirements through the late nineteenth century. In her view, the origins and early history of the Assembly Clause did not include preordained limits on peaceable assemblies.

Chapter 2, "Assembly and Association," effects a transition between the Assembly Clause's literal guarantee of freedom of physical assembly and its modern-day jurisprudential counterpart, freedom of association. Although freedom of association is nowhere explicitly articulated in the text of the Constitution, it is now a well-developed doctrinal offshoot of several parts of the Bill of Rights, including the First Amendment. David Cole, in "Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association," posits that the right of association flows ineluctably from the right of assembly, and argues that the US Supreme Court should treat association as an independent right and not just a "second cousin" to expression and privacy. Amy Gutmann, in "Freedom of Association: An Introductory Essay" (from the anthology *Freedom of Association*), delves into the civic, political, and philosophical meaning of associations in our daily lives. Her essay argues not only for legal protection of associational and assembly freedom, but also for the civic engagement to make such freedom meaningful in the development of liberal democracy.

The final chapter on the Assembly Clause, "Contemporary Debate," briefly surveys a few of the most prominent freedom of association issues in recent US Supreme Court case law before returning to the assembly "roots" of part III and of the Assembly Clause itself. The chapter begins with a second excerpt from "Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association." David Cole argues that the US Supreme Court's failure to recognize associational freedom in recent cases such as *City*

of Chicago v. Morales (1999) (anti-gang ordinance) and *Reno v. American-Arab Anti-Discrimination Committee* (1999) (alien deportation) evokes the "guilt-by-association" ignorance of Communist Party prosecutions in the Smith Act era. Cole contends that modern-day fears about gangs and terrorists have eclipsed the public's, the government's, and the Court's rationality about the necessity of associational freedom.

Since the 1980s, US Supreme Court jurisprudence on freedom of association has evolved in a complex—some would say convoluted—manner. Thus, my intention in including contemporary freedom of association scholarship in this volume is not only to make clear its link to the original meaning of the Assembly Clause, but also to illustrate the constitutional tensions that arise when antidiscrimination principles conflict with the freedom to associate/assemble in exclusionary groups. The next three articles in this chapter reflect the subtleties of doctrine and values that arise in the clash of core constitutional principles. In "Speaking in the First Person Plural: Expressive Associations and the First Amendment," Daniel A. Farber divides relevant US Supreme Court case law since the 1980s into what he terms "The Old Freedom of Association" and "The Transformation of Freedom of Association," focusing particularly on the rise of expressive association claims. In "Association and Assimilation," Deborah Rhode questions a rigid doctrinal approach to sex-segregated organizations, explaining that private sex-segregated associations may present opportunities for expression and exploration that gender-integrated groups would not. Rhode suggests that the relevant larger framework should focus on societal gender disadvantage rather than gender separation alone.

In "The Expressive Interest of Associations," Erwin Chemerinsky and Catherine Fisk directly address the conflict of antidiscrimination and associational freedom principles in *Boy Scouts of America v. Dale* (2000), in which the Court upheld the Boy Scouts' defense of associational freedom against an antidiscrimination claim by a gay scoutmaster who was dismissed solely because of his sexual orientation. Chemerinsky and Fisk argue that freedom of association, while fundamental, was not a justifiable defense in *Dale* and that the decision will open the door to invidious discrimination under the guise of associational freedom.

Finally, with a second excerpt from "The Neglected Right of Assembly," the volume concludes with Tabatha El-Haj's exhortation for the courts, the bar, the academy, and the public to recognize and protect the right of peace-

able assembly as an enduring right of "the people," separate and distinct from the individualist protections of freedom of speech.

As the sole First Amendment freedom that textually is granted to "the people," the right "to peaceably assemble and to petition" richly deserves the close attention given by the authors in this volume. It is my hope that their fine work will spark further interest and research.

Chapter 1

ORIGINS AND EARLY HISTORY

THE INTENT OF THE FRAMERS

M. GLENN ABERNATHY

* * *

The framers of the Constitution apparently spent little time in considering a bill of rights. Toward the latter days of the convention, George Mason of Virginia suggested that "[t]he Constitution should be prefaced by a bill of rights. It will give great quiet to the people."[1] Elbridge Gerry of Massachusetts put the motion to appoint a committee to prepare a bill of rights. Roger Sherman of Connecticut spoke against it on the ground that such a statement of rights was unnecessary. The majority in the convention, whether for Sherman's reason or others, were opposed to the appointment of the committee, and the motion was defeated. When the proposed Constitution was sent to the states

From *The Right of Assembly and Association*, 2nd ed. (University of South Carolina Press, 1981), pp. 11–16. Reprinted by permission of University of South Carolina Press.

for ratification, one of the strongest objections raised by the Anti-Federalists was the absence of a bill of rights in that document. There were apparently differences of opinion as to what specifically should have been included in the enumeration, but there was agreement among the opposition group that some statement of rights must be added to the Constitution to make it acceptable. In a letter written in Paris to James Madison, Thomas Jefferson said, "It is a good canvas, on which some strokes only want retouching. What these are, I think the general voice from North to South, which calls for a bill of rights. It seems pretty generally understood that this should go to Juries, Habeas corpus, Standing armies, Printing, Religion and Monopolies."[2]

Alexander Hamilton considered a bill of rights unnecessary. He pointed out that the Constitution of the state of New York, as well as several others, had no bill of rights. He also asked, since the Congress had no power to pass legislation that would abridge personal liberties, "Why declare that things shall not be done which there is no power to do?"[3]

Several of the states ratified the proposed Constitution without reservation or suggestion as to a bill of rights. Massachusetts, following a proposal suggested by John Hancock, ratified the Constitution but recommended the early adoption of a bill of rights, and other states followed this pattern. The first Congress under the new government submitted twelve proposed amendments to the state legislatures, of which ten were ratified.

Despite general acceptance of the right of assembly, there was at least some objection in the Congress to its inclusion in the First Amendment. Representative Theodore Sedgwick moved to strike out the words "assemble and." He argued, "If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable [*sic*] right which the people possess; it is certainly a thing that never would be called in question...."[4]

The First Amendment contains the words: "Congress shall make no law ... abridging ... the right of the people peaceably to assemble...." The history of the incorporation of the Bill of Rights into the Constitution would not appear to justify a contention that any new freedom of assembly was thereby granted or that any expansion of the right of assembly generally was intended. The clause would appear to be simply a constitutional bar to congressional restrictions of freedom of assembly as the right was understood to extend at that time....

* * *

The leading United States Supreme Court case on freedom of assembly is *United States v. Cruikshank*,[5] decided in 1876. Cruikshank and others were charged with conspiring, in violation of the Enforcement Act of May 31, 1870, to hinder certain persons from assembling peaceably. Holding the act applicable only to deprivation of *national* rights and not *state* rights, the majority decided that the general right to hold a lawful meeting was in the latter category and dismissed the indictment. In his opinion for the Court, Chief Justice Morrison Waite stated in general terms the intent and effect of the Assembly Clause in the First Amendment:

> The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is and always has been one of the attributes of citizenship under a free government.... It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The Government of the United States, when established, found it in existence, with the obligation on the part of the States to afford it protection.[6]

This attitude that the Bill of Rights was merely a conservatory of old rights rather than an announcement of new ones is not, however, held unanimously. In *Bridges v. California*,[7] in 1941, Justice Black stated:

> No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that the religious test oath or the restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing. And since the same unequivocal language is used with respect to freedom of the press, it signifies a similar enlargement of that concept as well. Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society....[8]

It should be pointed out that Justice Black is emphasizing the difference between the exercise of basic rights in the United States and in England. He might very well be correct in that respect, but another question arises as to how far the Bill of Rights was intended to expand basic rights as exercised in colonial America. It appears that the pronouncement in *United States v. Cruikshank* is more accurate in answering the latter question.

No matter what the exact effect of the First Amendment was intended to be, it is clear, under the rule of *Barron v. Baltimore*,[9] that the protection offered therein is a protection only against national interference, not against interference by the states. This, too, was made clear by Chief Justice Waite in the *Cruikshank* case:

> The First Amendment to the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the Government for a redress of grievances." This, like the 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....

The particular amendment now under consideration assumes the existence of the right of the people to assemble for... lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment, neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.[10]

If the First Amendment to the Constitution of the United States was not intended to offer protection against abridgments of the right of assembly by the state, then what protection was the individual to have against state action? The answer must be that the individual had to rely on his state constitution. And examination of the state constitutions and charters in effect in 1789, however, reveals that only four of the original thirteen states had express guarantees of the right of assembly at the time the federal constitution was ratified.

The statement of the right of assembly first appeared in a state constitution in the North Carolina Constitution of 1776. Article XVII states, "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."[11] The other three states and the dates for their inclusion of the right to assembly in constitutions were: Vermont in 1777, Massachusetts in 1780, and New Hampshire in 1784. The New Hampshire Constitution added emphasis to the fact that the guarantee extended to "peaceable" assemblies: "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."[12]

Most of the other states that then and later came into the United States included at some time a constitutional guarantee of the right of assembly. South Carolina was slower to include this right than were most of the states, and it was not until its fifth constitution, that of 1868, that the right of assembly was stated. Even today, Virginia and Minnesota do not have specific constitutional guarantees of the right of assembly. Presumably, however, that right is still protected even in these states by the inclusion of a phrase similar to that of the Ninth Amendment to the Federal Constitution, which states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The problem of the absence of protection in the national Constitution against state abridgment of the right of assembly is one that no longer faces the American people, however. In 1925 the United States Supreme Court held that the "liberty" guaranteed by the Fourteenth Amendment against abridgment by the state without due process of law included the right of free speech.[13] In 1937, in *De Jonge v. Oregon*,[14] the Court officially extended to freedom of assembly the rule announced with respect to freedom of speech in *Gitlow v. New York*.[15] Chief Justice Charles Evans Hughes, speaking for a unanimous Court in the *De Jonge* case, stated:

> Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution.... The right of peaceable assembly is a right cognate to those of free speech and is equally fundamental.... The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil

and political institutions, principles which the Fourteenth Amendment embodies in the general terms of its due process clause....[16]

* * *

NOTES

1. Jane Butzner, *Constitutional Chaff* (New York, 1941), p. 80.
2. Julian P. Boyd, ed., *The Papers of Thomas Jefferson* (Princeton, 1956), pp. XIII, 442.
3. *The Federalist*, No. 84, Modern Library ed. (New York, 1941), p. 559.
4. 1 *Annals of the Congress* 759–61 (1789).
5. 92 U.S. 542 (1876).
6. 92 U.S. 542, 551–52.
7. 314 U.S. 252 (1941).
8. Ibid., p. 265.
9. Peters 243 (1833).
10. 92 U.S. 542, 552 (1876).
11. *American Charters*, V, 2788.
12. *American Charters*, V, 2457.
13. *Gitlow v. New York*, 268 U.S. 652 (1925).
14. 299 U.S. 353 (1937).
15. 268 U.S. 652 (1925).
16. 299 U.S. 353, 364 (1937).

WOMEN AND FREEDOM OF EXPRESSION BEFORE THE TWENTIETH CENTURY

LINDA J. LUMSDEN

* * *

... Perhaps American women would not have the vote today if their predecessors had not taken to the streets. Americans would have ignored the suffragists if they had not delivered their message so publicly. During the decade before Congress approved the Nineteenth Amendment in 1919, suffragists were innovators in soapbox speaking at "open-air" meetings, outdoor pageants, petition drives, picketing, civil disobedience, and use of symbolic expression, all manifestations of their exercise of the right of assembly.

The suffrage movement exemplified how the right of assembly can effect

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From *Rampant Women: Suffragists and the Right of Assembly* (University of Tennessee Press, 1997), pp. xiii–xviii, 177–80. Used with permission.

change in a democracy. Arguably the most ancient and basic principle of a free society, the right of assembly served suffragists well during the 1910s. As a disfranchised class with limited resources, suffragists took their message to the streets—that most public and accessible forum—forced their ideas upon an indifferent public, and gradually won over a significant portion of the public and politicians, who also were besieged by suffrage assemblies in male political bodies. Suffrage became a national issue only when women publicly agitated for the vote. If they had not taken to the streets—to soapbox, solicit petitions, parade, or picket—the suffrage movement never would have gotten off the ground, because no one was eager to listen to suffragists' ideas, much less act upon them. The right of assembly provided the foundation for every step of the suffrage campaign.

Suffragists also challenged beliefs about how women should behave when they took to the streets to speak, march, and picket. This book analyzes both the role the First Amendment right to assemble peaceably played in the twentieth-century suffrage campaign and the reciprocal, little-known role the suffrage protests played in the development of twentieth-century conceptions of the right to assemble. Among the minorities that fought for freedom of expression by staging a broad range of demonstrations during the tumultuous decade that encompassed World War I, suffragists indirectly helped prod the legal system to establish protections for dissidents exercising their First Amendment rights.

The right of assembly protects people meeting together or the communication of ideas among people to accomplish various common purposes. It is the foundation for all other forms of freedom of expression, because ideas must be shared before they can have an impact upon society. "The important political right of assembly and petition is rather the original than a derivation from freedom of speech," explained constitutional law scholar Frederic Jesup Stimson in 1908.[1] According to a pair of later legal scholars, "An assembly of two or more people is a necessary basis for the exercise of the right of freedom of speech and a multitude of other privileges."[2] Speech is meaningless if unheard: "Without that right of assembly, guarantees of free speech are empty gestures; for if no public forum is available, then the right to speak freely is of little value."[3]

The role of outdoor meetings in self-governance has been respected by free societies throughout history. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens," asserted the United States Supreme Court in a landmark case

involving the right of assembly.[4] The leading nineteenth-century Court case on the right of assembly simply stated: "It is found wherever civilization exists."[5] The concept of a right of assembly was first set down on paper in 1215 in the Magna Carta, from which all Anglo-Saxon civil liberties flow.[6]

Colonial Americans engaged in myriad street assemblies, including mobs, reflecting the Whig belief in the people's right of resistance. "Extralegal groups and conventions repeatedly sprang up to take public action into their own hands," according to historian Gordon Wood.[7] Revolutionary mobs characterized as "surprisingly humane and orderly" tended toward responsibility and purposefulness and arose out of the republican ethic that the people should rule.[8] Colonists drew heavily upon guidelines for direct action defined by English radical writers who justified extralegal action when all established avenues for change had failed. The nation's founders, in fact, prominently placed a clause in the First Amendment of the Bill of Rights specifically guaranteeing the people's right to assemble peaceably. This right was considered so basic that Representative Theodore Sedgwick of Massachusetts found including it "derogatory to the dignity of the House to descend to such minutiae" and wanted to strike the phrase from the proposed bill. Others, who foresaw the threat of governmental suppression, defeated his motion.[9] In republican America, mobs lost much of their respectability because domestic turbulence was viewed as reflecting poorly on the new nation's experiment in democracy. By the 1830s, the occasionally lethal violence of anti-abolition mobs had made street meetings anathema to most Americans.

Because of the disruptive potential of street assemblies, the Bill of Rights' rhetorical homage to the right of assembly was not matched by legal protections for assemblies. For one thing, the First Amendment was not considered applicable to state laws prior to 1925. Courts ruled erratically on all First Amendment freedoms until well into the twentieth century and were especially hostile to gatherings of politically radical groups....

...From 1791 to 1889, the United States Supreme Court heard only twelve cases involving speech and press issues. Between 1890 and 1917, the Court heard fifty-three such cases, still an average of just two a year.... Most nineteenth-century First Amendment cases never even went to court, partly because of extrajudicial factors such as threats of violence and economic and social pressures. And greater emphasis was placed upon the police power to protect the public's health, safety, and morals....

...Judges deferred to police power when occasional cases involving the

right of assembly reached the courts. Municipal authorities deemed police powers essential to protect the public welfare against unorthodox methods of expression, such as street meetings and parades. That meant a mayor could ban any outdoor gathering he believed might stir unrest. Only a handful of pioneering legal scholars decried this police power as a pernicious threat to individual liberties.[10]

The right of assembly suffered a blow in 1897 when the Supreme Court decided a Massachusetts minister had no right to preach on Boston Commons—hallowed ground of the Sons of Liberty. In *Davis v. Massachusetts*, the Court ignored free speech issues in upholding a Boston city ordinance prohibiting speeches on public grounds without a permit from the mayor.[11] When minister William Davis asserted his First Amendment rights of religion, free speech, and assembly to preach on Boston Commons, the Court rejected his argument: "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[12]

Davis demonstrated the nineteenth-century legal system's overreliance upon property law as well as the nineteenth-century view of parks as common property. The legal system's view that public property was for the use of the entire public rather than a disgruntled minority continued into the twentieth century....

* * *

...State courts routinely suppressed speech threatening violence out of fear of anarchy and socialism, especially after the fatal 1886 Haymarket riot was linked to anarchists. The public cheered when the codefendants were found guilty of conspiracy to commit murder because their speeches inflamed the crowd. The 1901 assassination of President William McKinley by an avowed anarchist fanned further repression. After anarchist lecturer Emma Goldman was refused a public hall in Philadelphia, a Pennsylvania court rebuffed her free speech defense. The court held that the government's right of self-preservation overrode the "abuse" of the right to free speech.[13]

Despite such limitations and infringements, the right of assembly was instrumental in helping nineteenth-century American women acquire a feminist consciousness. No disempowered group can organize without as-

sembling. Street meetings were the simplest, cheapest, and most effective way for such groups to gather to discuss and/or protest their plight. Public assemblies also enhance group cohesiveness as well as attract the public's attention, a prerequisite for social change.

Given the chilly reception nineteenth-century courts accorded freedom of expression, it probably was lucky for women that courts addressed no cases involving women and freedom of expression in the nineteenth century. The main reason for the absence of such cases, however, was that extralegal cultural proscriptions denied women the right of assembly among other constitutional rights. In eighteenth-century America, freedom of expression was linked to politics, and politics belonged in the public sphere, which remained taboo for women. Women had to fight to assert their right to assemble peaceably....

NOTES

1. Frederic Jesup Stimson, *The Law of the Federal and State Constitutions of the United States* (Boston: Boston Book, 1908), p. 43.

2. James Jarrett and Vernon Mund, "The Right of Assembly," *New York University Law Quarterly Review* 9 (1931): 5.

3. "Public Order and the Right of Assembly in England and the United States: A Comparative Study," *Yale Law Journal* 47 (1938): 404.

4. *Hague v. CIO*, 307 U.S. 496 (1939).

5. *United States v. Cruikshank*, 92 U.S. 542, 551 (1875).

6. William Sharp McKechnie, *The Magna Carta: A Commentary of the Great Charter of King John*, rev. ed. (New York: Burt Franklin, 1958), p. 467.

7. Gordon Wood, "A Note on Mobs in the American Revolution," *William and Mary Quarterly*, 3rd series, 23 (1966): 640.

8. Leon Whipple, *The Story of Civil Liberty in the United States* (New York: Vanguard Press, 1927), p. 52.

9. *Annals of Congress*, 1st Congress, 1789–1790, microfiche ed., I, col. 731.

10. See, for example, Richard Byrd, "The Decay of Personal Rights and Guarantees," *Yale Law Journal* 18 (1907): 252–54.

11. 167 U.S. 43 (1897).

12. Ibid., 47, citing *Commonwealth v. Davis*, 140. Mass. 485 (1886).

13. *Goldman v. Reyburn*, 18 Pa. Dist. R. 883, 884 (1909).

FREEDOM'S ASSOCIATIONS

JASON MAZZONE

* * *

EARLY ASSOCIATIONS

In colonial America, popular gatherings were common and they often entailed violence. Mobs and riots disrupted economic activity, blocked thoroughfares, destroyed property, and closed government offices. "These were not the anarchic uprisings of the poor and destitute; rather they represented a common form of political protest... by groups who could find no alternative institutional expression for their demands and grievances."[1] Accordingly, these gatherings were referred to as "conventions" or as "popular assemblies," terms denoting a variety of meetings for public purposes organized outside of the regularly constituted authority.[2] In the colonies,

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such extra-legislative conventions and assemblies received measured support from the Whigs, who saw them as a form of legitimate political activity rather than as illegal disruptions.

By 1775, transient mobs and riots were less common, displaced by the better-organized revolutionary associations. These associations were the institutional embodiment of the political functions served earlier by the mobs and riots, representing the same notion of popular assembly. In the years leading up to independence, the revolutionary associations took on governmental responsibilities, implementing policies where the government was slow to act. Numerous commentators have discussed the substantial role these associations played during the course of the Revolution.

With independence, Americans continued to assemble in regional and interstate committees to voice grievances, as well as to pursue and implement political goals, and to regulate the economy. "The emergence of a distinctive pattern of voluntary association was inextricably bound in with the history of liberty in America, for it created a significant range of alternatives to the use of coercive power through the state."[3] Gordon Wood reports that more associations serving quasi-public purposes arose in the dozen years after independence than in the entire colonial period.

* * *

How were these associations perceived and understood? In the new Republic, the proper role and proper limits of associations were hot issues. Although associations and other forms of popular assembly had played celebrated roles in colonial America and in the Revolution, after independence associations came to be viewed in a quite different light. Associations continued to represent a form of political activity outside the existing structure. But this was now a dangerous thing. Associations of like-minded citizens were viewed as aspiring to a governmental role. Since associations drew their strength from the allegiance of their members, these political aspirations were perceived as based on a claim to popular sovereignty. Such a claim could only be illegitimate, because associations were not subject to election and other popular constraints on representative government. A rival claim to popular sovereignty therefore threatened to destabilize and undermine the authority of the new constitutional government. "There were legitimate channels for public expression in the town meetings, warned Governor John Sullivan of New

Hampshire; assemblies of private orders of men 'under the cover of convention authority' would only undermine the constitution of the state."[4]

These fears were raised in the widespread opposition to the forty-odd Democratic-Republican societies that formed in the years 1793 and 1794. The members of these societies, a mix of professional men, merchants, printers, farmers, and manual laborers, united in the belief that the new government was insufficiently responsive to popular will, and that some additional mechanism was needed to keep elected officials in check. The societies therefore aimed to debate public questions... and the societies regularly published resolutions critical of Federalist policies. The societies also engaged in practical activities, like poll watching, philanthropy, tracking the voting of representatives, and even monitoring English ships in local harbors....

The Democratic-Republican societies were widely condemned as aspiring to a quasi-governmental role and seeking to represent popular sovereignty. These societies were not by today's standards large: many had only a few dozen members, and the biggest counted a few hundred individuals in their ranks. The societies also insisted their role was, like a town meeting, simply to promote the public good. But influenced by accounts of the political role of the Jacobin clubs in France, the critics of the societies feared that they challenged the power of the state. This fear was especially strong when the societies were linked—with some justification—to the Whiskey Rebellion of 1794.

...Of particular concern, the secrecy and membership restrictions of the Democratic-Republican societies were inconsistent with a claim of popular representation. Writing in the *Gazette of the United States* in 1794, for instance, "A Friend to Representative Government" complained, "Undoubtedly the people is sovereign, but this sovereignty is in the whole people, and not in any separate part, and cannot be exercised, but by the Representatives of the whole nation."[5] In other words, "[b]ecause it was the legislature that was supposed to discuss, decide, and speak for the people, when organizations did this, [the Federalists] saw only the individuals involved, not the 'people.'"[6] George Cabot expressed this concern, when he asked in 1895: "[W]here is the boasted advantage of a representation system... if the resort to popular meetings is necessary?"[7] Fisher Ames was especially critical of the Democratic-Republican societies. During House debates in November 1794, he warned: "If the clubs prevail, they will be the Government, and the more secure for having become so by a victory over the existing authorities."[8]

Importantly, this indictment was not limited to the Democratic-Republican societies, or even to overtly political associations. Business corporations were viewed with a similar skepticism in the early Republic because they entailed the granting of special legal privileges that, like the Democratic-Republican societies, threatened to undermine the cohesiveness of the polity. The incorporation of cities, with privileged status granted to city officials, also raised the threat of a competing sovereign. "The Revolutionary heritage had sharpened certain public values that included an abhorrence of special privileges and monopolies; at the same time, it was found less and less easy to determine for any given purpose what the public good was. This meant a corresponding difficulty in deciding that the advantages of incorporation should be extended to some groups and denied to others."[9]

* * *

SUMMARY

In the early Republic, associations were understood not in terms of free speech but in terms of assemblies, petitions, and popular sovereignty. Like mobs, riots, conventions, and the revolutionary committees, associations embodied extra-legislative political activity. Because today we focus on expression, and we see associations as just another kind of speaker, we have largely overlooked this political aspect of associations that lay at the core of their treatment in the early Republic. To be sure, historically this link between associations and popular sovereignty was highly problematic, revealing early fears about political forces that threatened to destabilize the new union. As we saw, for many critics, it was one thing for citizens to gather in temporary assemblies to exert occasional political influence, but quite another for permanent associations to assume a post-Revolutionary political role. Moreover, it may be that in safeguarding, in the Bill of Rights, a right to assemble and petition, it was not widely expected that the First Amendment would extend to freestanding associations like the Democratic-Republican societies. Nonetheless, it was in terms of popular sovereignty that associations in the early Republic were understood.

Accordingly, instead of forging a new doctrine of expressive association, we might have more success in thinking about associational freedom if we also

understand associations in popular sovereignty terms. In so doing, we need not agree with the views of Washington and other early critics on whether this sort of popular sovereignty is a good thing. Indeed, we will probably disagree. Today, the notion that there might be too much, or the wrong kind, of popular sovereignty seems strange. Knowing, as we do, that the Republic succeeded, it is more difficult to understand that groups of citizens exercising political influence interfere with the "real" site of popular sovereignty, the elected government. From a modern perspective, the early criticisms directed at the Democratic-Republican societies are inconsistent with understandings of self-rule. We should, therefore, be inclined to protect the popular sovereignty associations represent, rather than worry about its destabilizing effects.

In sum, rather than think of associations as speakers, we should see their significance—their constitutional significance—to lie in enabling people to influence government. Associations matter not because of what they say but because of their political role. The task, therefore, becomes to understand what, in practice, freedom of association means once it is understood in terms of citizens exercising political influence—and protected for that reason. What, in other words, is the proper scope of constitutional protection for associations if their value lies in popular sovereignty?...

NOTES

1. Gordon S. Wood, *The Creation of the American Republic 1776–1787*, 2nd ed. (1998), p. 320.

2. Ibid., pp. 312, 320–21. The term "assembly" continued to be used in the early Republic to refer to various public and private gatherings.

3. Oscar and Mary Handlin, *The Dimensions of Liberty* (1961), pp. 89–90.

4. Wood, *supra* note 1, pp. 326–27.

5. *Gazette of the United States*, April 4, 1794, quoted in Albrecht Koschnik, "Voluntary Associations, Political Culture, and the Public Sphere in Philadelphia, 1780–1830" (unpublished PhD diss., University of Virginia, 2000), 70 n51.

6. James P. Martin, "When Repression Is Democratic and Constitutional. The Federalist Theory of Representation and the Sedition Act of 1798," *University of Chicago Law Review* 66, no. 117 (1999): 132.

7. Michael Schudson, *The Good Citizen: A History of American Civic Life* (1999), p. 61.

8. 3 *Annals of Congress* 929 (1794).

9. Stanley Elkins and Eric Mckitrick, *The Age of Federalism* (1993), p. 453.

THE NEGLECTED RIGHT OF ASSEMBLY

TABATHA ABU EL-HAJ

* * *

Permit requirements were unheard of through most of the nineteenth century. As late as 1881, Chicago, Denver, Detroit, St. Paul, and San Francisco had no permit requirements for assemblies in their streets. In fact, it was not until July 7, 1914, that New York City adopted a permit requirement for parades and processions in its streets, and as late as 1931 the city did not require permits for street meetings.

Nineteenth-century cities were both congested and capable of regulating through permits. Yet, the law interfered only with public assemblies that became disorderly. Citizens were not required to ask permission prior to exercising their right of assembly, and the government was not considered entitled to regulate in anticipation of possible disorder. Moreover, the state supreme

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courts that reviewed the first municipal ordinances requiring a permit to lawfully gather on the streets found them void. These courts balked at the suggestion that general permit requirements were reasonable efforts to regulate street gatherings, emphasizing that the ordinances infringed upon important democratic and constitutional traditions of assembling.

* * *

... [T]he nineteenth-century right to assemble on the streets without needing to ask permission was replaced in the twentieth century with a right to assemble on the streets, so long as one obtains a permit (if that is required), abides by the conditions of the permit issued, and is peaceable. Moreover, the definition of "peaceable" was narrowed: Even where no permits are required, an assembly may be dispersed for obstructing, or potentially obstructing, traffic (including pedestrian traffic). The new constitutional understanding did come with an important safeguard: One is entitled not to have permission to assemble on the streets denied arbitrarily, capriciously, or based on viewpoint.

That is, we replaced the notion that the state can interfere only with gatherings that actually disturb the peace or create a public nuisance with a legal regime in which the state regulates all public assemblies, including those that are anticipated to be both peaceful and not inconvenient, in advance through permits. The state's enhanced regulatory oversight, moreover, came with an enhanced ability to shape the practice of public assembly in ways that undermine its meaningfulness for participants and its effectiveness as a check against government.

Chapter 2

ASSEMBLY AND ASSOCIATION

HANGING WITH THE WRONG CROWD: OF GANGS, TERRORISTS, AND THE RIGHT OF ASSOCIATION

DAVID COLE

> History should teach us..., that in times of high emotional excitement minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs and attempts will always be made to drive them out.[1]

The freedom of association vies with privacy and state sovereign immunity as one of the most potentially capacious and least textually based rights that the Supreme Court has ever found in the Constitution. On the one hand, it is impossible to imagine a democratic society—much less the First Amendment rights of speech, assembly, religion, and petition—without a corresponding right of association, so it is not surprising that the absence of any explicit mention of association in the Constitution has proven little barrier to recog-

From *Supreme Court Review* 203 (1999): 203–206, 225–33. Reprinted by permission of the University of Chicago Press and courtesy of the author.

nition of the right. But, on the other hand, virtually all conduct is at least potentially associational, presenting serious challenges to crafting a coherent jurisprudence. As a matter of democratic theory, the right of association is something we cannot live without; but as a matter of social governance, the right, if uncontained, is something we cannot live with.

The Supreme Court has sought to navigate these shoals in recent years by adopting a categorical approach, treating associations as either protected or unprotected depending on their character. The approach is founded on the proposition that associational rights derive from other constitutional rights, and therefore should be protected only when those other rights are at risk. On this view, the right of association is protected by the First Amendment when it serves an "expressive" function, and by the Fifth Amendment's right of privacy when it is "intimate." Association that is neither expressive nor intimate, however, is categorically excluded from constitutional protection.[2]

Two Supreme Court decisions last term reflect this categorical approach. In *City of Chicago v. Morales*,[3] the Court rejected in a single sentence a "right of association" challenge to a Chicago loitering ordinance that criminalized public association with gang members. The Court simply asserted that there is no right of social association, apparently assuming without discussion that gangs are neither expressive nor intimate associations. Moreover, the Court suggested that the real problem with the Chicago ordinance was that it reached non-gang members, and suggested that if the ordinance had been exclusively targeted at gang members, it might have withstood constitutional scrutiny.[4] The same term, in *Reno v. American-Arab Anti-Discrimination Comm.*,[5] the Court dismissed a First Amendment challenge to selective enforcement of the immigration laws against alleged members of a terrorist organization. Lower courts had found a First Amendment violation because the government had selectively targeted eight aliens for deportation based on their political associations, without regard to whether the aliens had furthered any illegal conduct of the terrorist group with which they were allegedly connected. The Supreme Court's rationale focused on the problems with recognizing any selective enforcement defense to deportation, whether the selection were predicated on politics, race, or religion. But the Court simultaneously if cryptically acknowledged that some (unstated) bases for selection might justify a selective enforcement defense, while asserting without explanation that selection based on membership in a terrorist organization certainly would not.

* * *

These developments threaten to erode constitutional protection of the right of association and warrant a reconsideration of the right's purpose in a democratic society. The Court's... categorical approaches to the right of association are unsatisfactory for three principal reasons. First, they require courts to engage in incoherent line-drawing. Under these approaches, judges must ask whether associations are sufficiently "expressive" to warrant protection, and whether acts of association should be viewed as "association" or "conduct." But most, if not all, association is expressive to one degree or another, and one cannot distinguish conduct from association without reducing the right to a meaningless formality. Second, these categorical approaches cannot explain a central feature of the right of association—its prohibition on guilt by association. That principle insists on individual culpability, and in no way turns on whether the association for which an individual is punished is expressive or intimate, nor on whether the punishment turns on associational conduct or association per se.

Finally, the categorical approaches used by the Court and advanced by the government are insufficiently protective of association, which deserves recognition not merely as a derivative right but as an independent constitutional right, and which if it is to be a meaningful right must protect associational conduct as well as association in the abstract. Association, no less than speech, plays a central role in both the political process and personal development, and deserves protection analogous to, but not limited to, that afforded speech.

* * *

ASSOCIATION AS AN END, NOT A MEANS— THE RIGHT TO WEAR A HAT

... [T]he Court's modern jurisprudence of association also fails adequately to reflect the normative reasons for protecting the right of association. It treats the right of association as derivative, protected only to the extent that it serves other constitutional rights. But the constitutional case for protecting association extends beyond the right's derivative functions, and supports pro-

tecting association not merely as a means to protecting other rights, but as an independent right in itself.... [T]he normative case for constitutionally protecting association is even stronger and ultimately justifies an independent jurisprudence of association, modeled on free speech jurisprudence, but not limited to expressive instances of association.

First, while the right of association is not literally mentioned in the Constitution, it nonetheless finds solid textual support in the First Amendment as the modern-day manifestation of the right of assembly. One of the Court's early right-of-association cases, *Bates v. City of Little Rock*,[6] treated the rights of assembly and association interchangeably, albeit without explanation, and the Court's right-of-association cases have relied on *De Jonge v. Oregon*, an early right-of-assembly case.[7] That intuitive connection between the rights of assembly and association deserves more explicit recognition.

When the Constitution was drafted, association and assembly were virtually synonymous. In the absence of modern communications, it was difficult, if not entirely impossible, to associate effectively without physically assembling. While correspondence by messenger and primitive mail delivery made association and coordinated action marginally conceivable without physical assembly, the shortcomings of such avenues in a period without a national postal service or telephones were self-evident. If one asks why the framers protected the right of assembly, the reasons would have little to do with the physical act of gathering together in a single place, and everything to do with the significance of coordinated action to a republican political process. Today we are connected by telephones, faxes, modems, and the Internet, and association can and more often than not does take place without any physical "assembly." This is not to denigrate the value of face-to-face encounters and public demonstrations and meetings, but simply to acknowledge that what was sought to be furthered by protecting assembly was not assembly for its physical sake, but for the *association* and collective action that it made possible. Thus, just as the Court famously adapted the Fourth Amendment to the modern era by interpreting it to protect against searches by electronic wiretaps despite the absence of a physical invasion of property,[8] so the First Amendment "right of assembly" is best understood today as protecting the right of association irrespective of whether a physical meeting actually takes place.

The right of association also finds support in the intent of the framers of the Constitution. The centrality of collective action to a republican government was so accepted by the framers that the only objection to including the

right to assemble in the First Amendment was that the right was so obvious that it did not need to be mentioned. Representative Theodore Sedgwick proposed deleting the reference to the right to assemble on the ground that "it is a self evident, inalienable right which the people possess; it is certainly a thing that never would be called in question."[9] He argued that "[i]f people freely converse together, they must assemble for that purpose," and sarcastically likened protecting the right to assemble to declaring that "a man should have the right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he pleased."[10] John Page of Virginia replied, however, that precisely because the right of assembly was so fundamental, it needed to be expressly protected: "If the people could be deprived of the power of assembly under any pretext whatsoever, they might be deprived of every other privilege contained in the clause."[11] Sedgwick's motion "lost by a considerable majority."[12] Thus, everyone agreed on the importance and purpose of the right of assembly; the only disagreement was whether something so fundamental as to be obvious needed to be mentioned in the Bill of Rights.

In its first extensive discussion of the right to assembly, the Supreme Court in effect agreed that the right was so basic that it did not need to be mentioned in the Constitution. In *United States v. Cruikshank*, the Court stated that the right of assembly was implicit in the structure of our government, and that the First Amendment merely confirmed a preexisting right: "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."[13] If the right of assembly is implicit in a republican government, so, too, is the right of association, since the very reason assembly was considered implicit was that it made association possible.

Thus, the right of association finds textual and historical support in the right of assembly, a right considered so fundamental that it would find constitutional protection even if never mentioned in the Bill of Rights, and a right that was protected not for its physical attributes but because without it collective action would be largely impossible. The right of association is simply the modern-day manifestation of the right to assembly.

An independent constitutional right of association also finds strong normative support. Indeed, all of the arguments traditionally advanced to justify protecting speech also apply to association, and not only to expressive association. As the Supreme Court acknowledged in *Cruikshank*, the freedom to associate, no less than the freedom to speak, is a critical element of a demo-

cratic government. Just as speech is critical to self-government,[14] so is association. Indeed, the central metaphor in Alexander Meiklejohn's famous argument for protecting speech is a town meeting, a simultaneous confluence of speech, assembly, and association.[15] There can be no politics without association. Politics in a democratic society requires collective action. If the government were free to restrict association, it could effectively close off the avenues for political change. As the Supreme Court recognized in *De Jonge v. Oregon*, free assembly is critical "in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means."[16]

Like the freedom of speech, the freedom of association also performs a checking function on the power of the state. Voluntary associations can and often have become important independent sources of authority that mediate and limit the effective power of the state. Indeed, in today's world of "interest group politics," the state in a very real sense must be responsive to private groups, rather than vice versa. Our tax code encourages the creation of such mediating institutions, and these institutions play a very important role in society. As Arthur Schlesinger has described, "[t]raditionally, Americans have distrusted collective organization as embodied in government while insisting upon their own untrammeled right to form voluntary associations."[17] It was this feature of associations as mediating structures of authority that led Alexis de Tocqueville, the philosophical father of the right of association, to call association "a necessary guarantee against the tyranny of the majority."[18] Laurence Tribe has similarly warned that "to destroy the authority of intermediate communities and groups... destroys the only buffer between the individual and the state."[19]

A defender of the Court's "labeling" theory of the right of association might respond to the link between association and democratic self-governance and the checking function of mediating institutions by maintaining that protecting association when undertaken *for expressive purposes* fully serves these normative goals. And, indeed, the centrality of association to the democratic process does justify extending heightened protection to association for political purposes, just as speech doctrine accords extra scrutiny to regulation of political speech. But even if the link between association and the democratic process were the only normative justification for protecting speech and association, and it is not, protection for association should extend beyond expressive association. First, it is difficult and perhaps impossible to

draw a clear line between political and nonpolitical association, just as it is difficult to distinguish political from nonpolitical speech. Are fraternities, sororities, country clubs, or corporations nonpolitical? Many of their most adamant critics would certainly argue otherwise. Second, nonpolitical association plays a critical role in making political association possible, by forging links that are then used to unite individuals and groups around issues of governance. Friendships forged on street corners and golf courses, and in dance halls and country clubs, are essential to making political association possible. Social ties often provide the seeds for more overtly political association.

In addition, as with speech, the reasons for protecting association are not limited to its political uses. Choosing with whom to associate is as central to personal development and self-realization as are the freedoms of speech and belief. We define ourselves in relation to others, and our associations simultaneously shape and reflect our sense of self. The freedom to choose one's associates is therefore fundamental to self-realization. Again, Tocqueville writes:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty.[20]

On this view, mediating institutions are important not only for their checking function but because they foster civic virtue in individuals. Association's role in furthering self-realization, self-fulfillment, and civic virtue is not limited to expressive or intimate association. Membership in a country club or sorority, or social association at the local bar, can and often will play a role in defining who we are and how we act as much as membership in the Republican or Communist parties. As Amy Gutmann writes:

> Freedom of association is valuable for far more than its instrumental relationship to free speech, ... Freedom of association is increasingly essential as a means of engaging in charity, commerce, industry, education, health care, residential life, religious practice, professional life, music and art, and recreation and sports.... associational freedom is not merely a means to other valuable ends. It is also valuable for the many qualities of human life that the diverse activities of association routinely entail. By associating with one another, we engage in camaraderie, cooperation, dialogue, deliberation, negotiation, competition, creativity, and the kinds of self-expression and

> self-sacrifice that are possible only in association with others. In addition, we often simply enjoy the company.[21]

Finally, like the freedom of speech, the right of association serves as a safety valve; allowing persons to join with like-minded others makes it less likely that individuals and groups will go underground and adopt violent means. Thus, the Supreme Court in *DeJonge v. Oregon*, unanimously reversing a conviction for participation in a Communist Party meeting, stated that "the security of the Republic, the very foundation of constitutional government" lies in preserving the right of assembly "to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means."[22] Again, Tocqueville concurs: "In countries where associations are free, secret societies are unknown. In America there are factions, but no conspiracies."[23] Here, too, social associations that are not explicitly expressive in the Court's sense of the term serve an important function in allowing otherwise alienated persons to find social support.

Thus, the reasons for protecting association closely parallel those for protecting free speech. Moreover, they are in no way dependent upon association as a mere instrument to speech or privacy but rest on the independent significance of association as a mechanism for participating in democratic politics, checking state power, achieving self-realization, and providing a safety valve for individuals unhappy with the status quo. If these normative claims are persuasive, the right of association should receive constitutional protection on its own terms, without a threshold inquiry into whether it is expressive or intimate.

The Court's efforts to cabin the right of association are understandable, even if they are ultimately unsatisfactory. The right of association is potentially limitless. Virtually everything we do in society involves some degree of association with someone else. Only the mythical self-supporting hermit could go through life without associations with others. At the same time, society must impose limits on associational freedom: the state enforces obligations to children and family, imposes restraints on association in workplace environments and public accommodations, assigns children to schools and classrooms, and establishes voting districts, all of which affect our freedom of association. The very act of governing a society requires the regulation of individuals' ability to associate. The Court's efforts to limit the right, then, can be seen as efforts to avoid constitutionalizing all social regulation. More specifically, the right of association, and particularly its negative corollary, the

right not to associate, have been advanced as objections to some of the nation's most important goals, in particular, desegregation.

But much the same can be said of speech. Like association, expression can be found in virtually everything that a person does, particularly once it is accepted that conduct can be as expressive as verbal or written speech. At the same time, for a society to operate, it must limit speech in many settings—a teacher in a classroom, a judge in a courtroom, an employer in a workplace, and a police officer on a street corner all have to exercise the authority to limit speech, and could not effectively do their jobs without that power. And the right of free speech, like the right of association, can be used to hinder important social goals.

What is needed is a more coherent approach to association. The Court's current approach—ignoring guilt by association, treating association as a second cousin to expression and privacy, and denying any protection for nonintimate and nonexpressive association—fails adequately to reflect the normative reasons for protecting association under our Constitution, and requires the drawing of incoherent and unpersuasive lines....

NOTES

1. *Barenblatt v. United States*, 360 U.S. 109, 150–51 (1959) (Black, J., dissenting).
2. See *Roberts v. United States Jaycees*, 468 U.S. 609, 617–23 (1984).
3. *City of Chicago v. Morales*, 119 S.Ct. 1849 (1999).
4. Ibid., 1862; ibid., 1864 (O'Connor concurring in part and concurring in judgment).
5. *Reno v. American-Arab Anti-Discrimination Comm.*, 119 S.Ct. 936 (1999).
6. *Bates v. City of Little Rock*, 361 U.S. 516 (1960).
7. *NAACP v. Claiborne Hardware*, 458 U.S. at 908; *NAACP v. Alabama*, 357 U.S. at 460.
8. *Katz v. United States*, 389 U.S. 347 (1967).
9. 1 *Annals of Congress* 731–32 (1789).
10. Ibid.
11. Ibid.
12. Ibid.
13. *United States v. Cruikshank*, 92 U.S. 542, 552 (1876). The Court elaborated:

> The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it

is, and always has been, one of the attributes of citizenship under a free government.... It is found wherever civilization exists.

14. Ibid., 551.

15. Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948); Alexander Meiklejohn, "The First Amendment Is an Absolute," *Supreme Court Review* (1961): 245.

16. *DeJonge v. Oregon*, 299 U.S. 353, 364–65 (1876).

17. Arthur M. Schlesinger, *Paths to the Present* (1949), p. 23.

18. Alexis de Tocqueville, *Democracy in America*, edited by Phillips Bradley (1948) (cited below as "Tocqueville"), pp. 194–95.

19. Laurence H. Tribe, *American Constitutional Law*, 2nd ed. (1988), p. 1313.

20. Tocqueville, p. 196.

21. Amy Gutmann, "Freedom of Association: An Introductory Essay," in *Freedom of Association*, edited by Amy Gutmann (1998), pp. 3–4.

22. 299 U.S. at 364–65 (1937).

23. Tocqueville, pp. 202–203.

FREEDOM OF ASSOCIATION: AN INTRODUCTORY ESSAY

AMY GUTMANN

* * *

Americans, Alexis de Tocqueville observed, are "forever forming associations." The associations are of many different types. They are not only commercial and industrial organizations that are necessary for a functioning economy, but also "religious, moral, serious, futile, very general and very limited, immensely large and very minute." Churches, synagogues, and mosques, colleges, universities, and museums, corporations, trade unions, and lobbying groups, sports leagues, literary societies, sororal and fraternal orders, environmental groups, national and international charitable organizations, and self-help groups, parent-teacher associations, residential associations, and professional associations together make a significant difference in the lives of many Americans and in the life of American democracy. "Nothing," Tocqueville concludes, "deserves more attention."[1]

From *Freedom of Association*, ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 1998), pp. 3–8, 31. Reprinted by permission of Princeton University Press.

Surveying the subject over a century later, we begin with the observation that the value and limits of free association in the United States have not received the attention they deserve. Freedom of speech, for example, has received vastly more attention from moral and political philosophers than has freedom of association. American culture correspondingly offers a far richer sense of the value and limits of free speech than it does of the value and limits of free association. The neglect of the values of free association even weakens our understanding of free speech because organized association is increasingly essential for the effective use of free speech in the United States. Without access to an association that is willing and able to speak up for our views and values, we have a very limited ability to be heard by many other people or to influence the political process, unless we happen to be rich or famous.

Freedom of association is valuable for far more than its instrumental relationship to free speech. Freedom of association is necessary to create and maintain intimate relationships of love and friendship, which are valuable for their own sake, as well as for the pleasures that they offer. Freedom of association is increasingly essential as a means of engaging in charity, commerce, industry, education, health care, residential life, religious practice, professional life, music and art, and recreation and sports. Any serious consideration of the activities on this list will indicate that not all the aims of associational activities are equally valued by individuals, or equally important for the well-being of a liberal democracy. But all are valued and valuable, and associational freedom is not merely a means to other valuable ends. It is also valuable for the many qualities of human life that the diverse activities of association routinely entail. By associating with one another, we engage in camaraderie, cooperation, dialogue, deliberation, negotiation, competition, creativity, and the kinds of self-expression and self-sacrifice that are possible only in association with others. In addition, we often simply enjoy the company. The pleasures of association are typically by-products of our associating for other reasons.

To appreciate the full value of associational freedom, we need to look beyond the explicit purposes that specific associations serve. The primary and explicit aim of most religious congregations is spiritual. But many congregations in the United States also serve important civic and political purposes that do not violate the constitutional prohibition on establishment of religion. My parents never doubted that they would join a Jewish congregation when they settled in the small town of Monroe, New York. But they had to decide whether to join an established congregation outside the town (since there was

no congregation in Monroe) or to create a new congregation in Monroe with the dozen or so other newly arrived Jewish families, many of them first-generation Americans. I remember having been told as a child by my parents—my father a German Jew who had recently moved to the United States after living in India for fourteen years and my mother a New Yorker—that they had decided to undertake the task of building a new congregation because, without a local place of worship, Jews would not be treated as first-class citizens in a predominantly Protestant town. Nor would my parents have felt that Monroe was their hometown had they not established a Jewish congregation there. The new Jewish settlers in Monroe were not unusual in valuing their religious association for civic and political purposes as well as spiritual and personal ones. The primary purpose of an association, as this example illustrates, does not exhaust its value either for individuals or for liberal democracies.

* * *

Recently there has been a revival among scholars of concern about associational life in the United States. The political scientist Robert Putnam reports that a decreasing proportion of Americans have been joining traditional associations such as churches and synagogues, trade unions and civic groups, parent-teacher associations and even bowling leagues, while an increasing proportion have been joining self-help groups, radical religious sects, and other traditionally less mainstream associations. Social scientists are addressing the empirical questions of who is joining which secondary associations with what social and political consequences. It is equally important that moral and political philosophers address the ethical questions of the value of freedom of association, its relationship to other important values that are essential to liberal democracy—including freedom of expression, religion, and conscience, economic opportunity, nondiscrimination, and civic equality—and the limits on freedom of association that are justifiable in light of these values. Without a more extensive examination of both sets of questions, we cannot responsibly decide whether or how to pursue the increasingly popular suggestion of encouraging more associational life in this country. Are all kinds of associational life worthy of encouragement? If not, which kinds? By whom? Defensible answers to these normative questions depend in large part on our understanding the value and limits of freedom of association in our contemporary context.

Are all kinds of associational life worthy of encouragement in a liberal democracy? The land of secondary associations is sometimes called "civic space." Some... warn against assuming that the label "civic" necessarily has positive moral content when it is applied to particular secondary associations. Although the Ku Klux Klan is a civic association, does it serve the positive civic functions that secondary associations in general are credibly said to serve? Putnam identifies these functions as follows:

> In the first place, networks of civic engagement foster sturdy norms of generalized reciprocity and encourage the emergence of social trust.... When economic and political negotiation is embedded in dense networks of social interaction, incentives for opportunism are reduced.... Finally, dense networks of interaction probably broaden the participants' sense of self, developing the "I" into the "we," or (in the language of rational–choice theories) enhancing the participants' "taste" for collective benefits.[2]

Among its members, the Ku Klux Klan may cultivate solidarity and trust, reduce incentives for opportunism, and develop some "I's" into a "we." But the solidarity and trust, the limits on opportunism, and the "we" cannot be characterized as fostering "sturdy norms of generalized reciprocity." Quite the contrary; the associational premises of these solidaristic ties are hatred, degradation, and denigration of fellow citizens and fellow human beings. By contrast to the positive contributions that many civic associations make to putting a moral principle of reciprocity into practice, the Ku Klux Klan stands for the undermining of reciprocity. It encourages social distrust, increases incentives for white citizens opportunistically to take advantage of black citizens, and endorses a racially exclusive sense of "self" among participants, thereby weakening participants' "taste" for generalized collective benefits in society. Although the Ku Klux Klan is a civic association, its pursuits undermine rather than foster reciprocity among a diverse citizenry.

May a liberal democratic government distinguish in its policies between those civic associations that do and those that do not foster reciprocity among a diverse citizenry? Reciprocity is a general value of liberal democracy that informs more specific values, such as racial nondiscrimination. Liberal democratic governments should distinguish in their policies between associations that discriminate on grounds of race and others that do not. In *Bob Jones University v. United States*, the Supreme Court rightly upheld the Internal Revenue

Service's denial of tax-exempt status to Bob Jones University on grounds that Bob Jones practiced racial discrimination and was therefore disqualified as a charitable institution, even though its discriminatory policy (of prohibiting interracial dating among its students) was based on a sincere religious belief that the Bible forbids miscegenation. "The state may justify a limitation on religious liberty," Chief Justice Burger argued, "by showing that it is essential to accomplish an overriding governmental interest."[3] After finding that Congress authorized the IRS policy, the Supreme Court reasonably concluded that overcoming racial discrimination in education is a compelling governmental interest, sufficient to override a religiously run university's claim to free exercise of religion. The Bob Jones decision serves as an example of one legitimate (and extremely powerful) way in which a constitutional democracy may favor associations that foster reciprocity in the form of racial nondiscrimination above those that do not. The government may deny—indeed it should deny—tax exemption to those secondary associations that discriminate on the basis of race.

Had Bob Jones been a secular university, the case would have been more one-sided in favor of denying tax exemption. A secular university would have lacked a constitutional claim as strong as the free exercise of religion to put forward against the government's interest in overcoming racial discrimination in education. Although associational freedom generally speaking is enormously valuable—indeed, it is essential for providing the opportunity to individuals to live a good life and for constituting a just society—not every example of its exercise can therefore be claimed as a moral or constitutional right. Something similar can be said about individual freedom more generally. Freedom is essential to living a good life, but it would be misleading to elevate it, without any further qualification, to the level of a moral or constitutional right.

Suppose that Bob Jones had been not a university but a church, and Bob Jones Church had claimed a right to forbid miscegenation among its congregants. A primary purpose of any university, by virtue of its being a university, is that it directly serves the social function of contributing to a system of fair educational opportunity in this society in a way that a church need not, by virtue of its being a church. Colleges and universities are educational gatekeepers to the professions and to other scarce and highly valued social offices that require advanced educational credentials. Churches serve largely different social purposes. The claims of a Bob Jones Church with a religiously based policy of forbidding miscegenation among its congregants would have

been significantly stronger relative to the state's claims in combating racial discrimination than were the similarly based claims of Bob Jones University. Liberal democracies legitimately depend on universities for providing fair educational opportunity in a way that they do not (and should not) depend on churches, because the primary purpose of churches is spiritual, not educational or economic. The state's claim is therefore far stronger vis-à-vis a university than it is vis-à-vis a church. The claims of a Bob Jones Church to discriminate on grounds of race therefore might be overriding as the claims of Bob Jones University are not. In the case of the church, the state could not as clearly claim to have a compelling interest in regulation as a direct means of securing educational and economic opportunity that is free from racial discrimination.

Were we to suppose yet another slightly different set of facts—a Bob Jones Church that discriminates on racial grounds in hiring its office staff, which carry out the secular functions of the church (such as maintaining the building and paying bills)—then a government's grounds for regulation may once again become compelling and capable of overriding the competing claim of free association. In its role as employer of office staff, a church directly contributes to the system of economic opportunity and does so in a way that may be sufficiently disconnected from its religious missions that the state may legitimately claim a compelling interest in enforcing the principle of racial nondiscrimination.

The case becomes morally and constitutionally different yet again if the church discriminates on racial grounds only in religious offices, but not in its secular offices. After comparing the moral and constitutional claims of churches with those of secular associations, Kent Greenawalt concludes that what gives churches greater claims to associational freedom from state interference than other associations is not primarily their lesser impact on the basic opportunities of individuals. Rather, it is the churches' greater claim to freedom from state interference based on their transcendental or spiritual purposes. The closer the church's discriminatory policy is to the "core" of its internal spiritual practices, the stronger its claims to noninterference based on its distinctively religious (or at least spiritual) associational purposes. When a church engages in secular educational and economic activities, however, which can be separated from its spiritual activities, its claims to discriminate in those secular activities as its belief system dictates weaken.

NOTES

1. *Democracy in America* (New York: Doubleday Anchor, 1969), pp. 513–17, 522.

2. Robert Putnam, "Bowling Alone: Democracy in America at the End of the Twentieth Century," *Journal of Democracy* 6, no. 1 (January 1995): 67.

3. *Bob Jones University v. United States*, 461 U.S. 574 (1983).

Chapter 3

CONTEMPORARY DEBATE

HANGING WITH THE WRONG CROWD: OF GANGS, TERRORISTS, AND THE RIGHT OF ASSOCIATION

DAVID COLE

* * *

... [T]he incoherence problems with limiting protection to expressive, intimate, or "pure" association ... cannot be squared with the doctrine's bedrock principle—namely, that guilt must be personal, and that guilt by association is forbidden.

A simple example illustrates the point. Under modern doctrine, one has no constitutional right to be a member of a social country club, because the club would likely be treated as neither expressive nor intimate, and there is no right of social association. Yet a statute making it a crime to be a member of any country club that obtains illegal kickbacks from a vendor would plainly

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be unconstitutional, absent a requirement that the prosecutor prove that the individual member specifically intended to further the club's illegal conduct. Such a statute would violate the right of association in the most direct sense of the term, by imposing guilt by association. Similarly, while it is surely constitutional to criminalize the use of legitimate business activities as a cover or laundering operation to further illegal activity, as the Racketeer Influenced and Corrupt Organizations Act (RICO) does, it would surely be unconstitutional to prohibit mere association with the Mafia.

The principle of individual culpability, captured doctrinally in the "specific intent" requirement, was developed at a time when the right of association was most at risk in this country—during the McCarthy era, when thousands of Americans were targeted, investigated, blacklisted, harassed, and driven from public employment or office on charges that they were members of or fellow travelers with the Communist Party. The Court's early treatments of anti-Communist initiatives did not demonstrate much backbone, but in time the Court developed a bright-line rule that effectively halted such efforts: the government may not impose criminal or civil disabilities on an individual because of his association with a group that engages in legal as well as illegal activities unless it proves that he specifically intended to further the group's illegal ends.

Anti-Communist initiatives almost by definition took the form of guilt by association: they punished Communist Party members and supporters because the Communist Party had engaged in illegal activities, regardless of whether the individual had supported those illegal activities. In a series of cases, the Court consistently rejected that rationale as a basis for imposing either civil or criminal disabilities, and instead required a showing of individual specific intent to further the party's illegal ends.

The Court's most extensive discussion of the principle came in its first assessment of the Smith Act's membership provisions, which made it a crime to be a member of the Communist Party. In *Scales v. United States*, the Court interpreted that statute narrowly in order to avoid the imposition of guilt by association, which it said would violate both the Fifth Amendment Due Process Clause and the First Amendment. With respect to the Fifth Amendment, the Court reasoned:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the rela-

> tionship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.[1]

The due process principle recognized here is substantive, not procedural. It forbids the imposition of guilt by association no matter how clear the notice and no matter how fair the hearing. The point is that guilt must be "personal" in order to be consistent with due process. To punish A for the acts of B, without showing any connection between A and the illegal acts of B other than A's general connection to B, is fundamentally unfair. It is to punish a moral innocent. The "specific intent" requirement that the Court read into the Smith Act, and which it has subsequently held must be satisfied whenever the government seeks to penalize an individual for the acts of his associates, responds to the substantive due process problem by tying the imposition of guilt to an individually culpable act.

The guilt-by-association principle, and its doctrinal corollary, the requirement of "specific intent," also rest on the First Amendment. The Court in *Scales* noted that "[i]f there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired.[2] Thus, in order to save the Smith Act, the Court interpreted it to require a showing of specific intent to further the illegal ends of the Communist Party. When interpreted to require "clear proof that a defendant specifically intend[s] to accomplish [the aims of the organization] by resort to violence," the Court reasoned, the statute did not unnecessarily infringe on lawful associational activity.[3]

Significantly, the Court in the Communist Party cases never questioned Congress's findings that the party was engaged in illegal activity, including terrorism and espionage, toward the end of overthrowing the United States by force and violence. Nor did the Court ever question that protecting the nation against such threats was a compelling interest. But even accepting that government interest, the Court insisted that "[a] law which applies without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms" and relies on "'guilt by association,' which has no place here."[4] Under the First Amendment, then, the "specific intent" standard is necessary to tailor the government's regulation to the harms it may

legitimately regulate and to minimize the infringement of lawful association. It is, in effect, the result of the application of strict scrutiny to a regulation of association: it identifies the only narrowly tailored way to punish individuals for group wrongdoing (essentially by requiring evidence of *individual* wrongdoing), just as the *Brandenburg* test sets forth the narrowly tailored way to respond to advocacy of illegal conduct.

In the wake of *Scales*, the Court consistently applied the "specific intent" standard to a range of anti-Communist statutes, including many that imposed only a civil disability. While the principle of individual culpability is strongest where criminal sanctions are sought, it plainly extends to civil disabilities as well. The point is that individuals should not be sanctioned for the bad acts of others, but only for their own bad acts. Whether the sanction is criminal or civil in nature is not determinative.

The guilt-by-association principle quite plainly does not turn on the association being expressive, intimate, or "pure." Its twin rationales are that guilt must be personal, and that legitimate associations should not be sacrificed in the name of deterring illegitimate associations. Both rationales would apply to the hypothetical country club statute noted above. To punish a member who had no connection to the illegal kickbacks would be to punish a moral innocent, and therefore would contravene the due process principle that guilt must be personal. And to punish a member who had no intent to further the club's illegal conduct would be to deter legitimate association. Nor would the analysis be different if the statute punished the payment of dues to the country club as opposed to membership; it would still be imposing a penalty not for the culpable acts of the individual but for his or her wholly legitimate associational activity. Thus, the guilt-by-association principle, the cornerstone of the right of association, cannot be squared with the Court's limitation of the right to expressive and intimate association, nor with the federal government's suggestion that the right protects only membership itself.

While today's Court has never explicitly questioned its holdings in the Communist Party cases, its swift dismissal of the right-of-association claim in *City of Chicago v. Morales* suggests that the Court has lost sight of this principal feature of the right. The Chicago ordinance at issue imposed a criminal disability on gang members that did not apply to other citizens. Other citizens were free to stand on street corners with no apparent purpose to their hearts' content. But gang members who engaged in the same activity (and those who did so with them) could be ordered to move on and arrested. The definition of "gang

member," moreover, required no evidence that an individual had engaged in or sought to further any illegal activity, but only that the *gang* engaged in illegal activity.[5] The ordinance was a classic instance of guilt by association.

The Court's one-sentence response to the associational claim—that the right of association does not encompass "social contact between gang members and others"[6]—misses the point altogether. The associational problem with the Chicago ordinance was that it hinged criminal disability on gang *membership* without any showing that the individual sought to further the gang's illegal activities. Such a law might not violate the right of association if the gang engaged in exclusively illegal activity, but few if any gangs do, and in any event that was neither an allegation in the case nor a prerequisite to application of the ordinance.

The Court's failure to recognize the guilt-by-association feature of the *Morales* case went even further, as the Court affirmatively suggested that the ordinance's infirmity might have been cured had Chicago adopted a more extreme version of guilt by association. Justice Stevens, speaking for the majority, invalidated as unconstitutionally vague the ordinance's definition of loitering as standing with "no apparent purpose," but added in dicta that the ordinance would "possibly" be constitutional "if it only applied to loitering by persons reasonably believed to be criminal gang members."[7] Justices O'Connor and Breyer, concurring, agreed that "no apparent purpose" was vague, but twice said that if the law were limited to gang members, it "would avoid the vagueness problems of the ordinance as construed by the Illinois Supreme Court."[8]

This suggestion is a non sequitur. Limiting the scope of persons subject to the law would do nothing whatsoever to respond to the vagueness of the term "no apparent purpose." The term is equally vague whether it applies to a million citizens or a single citizen. As Justice Scalia explained:

> if "remain[ing] in one place with no apparent purpose" is so vague as to give the police unbridled discretion in controlling the conduct of non-gang-members, it surpasses understanding how it ceases to be so vague when applied to gang members. Surely gang members cannot be decreed to be outlaws, subject to the merest whim of the police as the rest of us are not.[9]

Justice Thomas echoed that critique in a separate dissent.

That the majority did not even offer a response to justices Scalia and

Thomas on this point only reveals how blind the majority was to the guilt-by-association problem. But beyond the logical fallacy pointed out by the dissenters, the majority had it exactly backward. Narrowing the ordinance to gang members would make the statute worse, not better, for it would exacerbate the law's reliance on guilt by association. The Court's suggestion that what cannot be done constitutionally to ordinary citizens might be done constitutionally to gang members, simply by virtue of their gang membership, is directly contrary to the lessons of the Court's Communist Party cases.

The majority was evidently motivated by concern about gangs, which undeniably pose a serious threat to the health and well-being of inner-city communities across the country. Gangs engage in criminal activity, fight over turf, and intimidate law-abiding citizens. They enforce antisocial norms, encouraging youth to engage in crime. And many young people growing up in poverty-stricken high-crime neighborhoods report that they feel compelled to join gangs for protection. Gangs play a particularly destructive role because they often provide one of the few sources of peer support and guidance in communities decimated by poverty and crime.

But it is undoubtedly the rare gang that engages exclusively in illegal behavior. Gangs also provide social activities and networks of support to their members. For better or worse, peer groups are a central part of virtually every young person's upbringing; gangs are simply one particularly urban and usually lower-class form of peer group. They provide for their members much as fraternities, sororities, basketball leagues, the Boy Scouts, and the Moose Lodge do. Some gangs engage in political activity, working for community development, voter registration, and civil rights.

Accordingly, for analytical purposes, most gangs are like the Communist Party—they engage in both legal and illegal activity. Anti-gang laws impermissibly impose guilt by association to the extent that they hinge adverse treatment of individuals (criminal or civil) on their gang membership, without evidence that the individual specifically intended to further the illegal ends of the gang.

This becomes clear in the Chicago case if one simply substitutes Communist Party for gang. If the Chicago ordinance had selectively authorized police to order loitering Communist Party members and their associates to move under penalty of arrest, the law's infirmity on associational grounds would have been self-evident, and it would certainly have been no response to assert that the right to social encounters on street corners is not protected

by the First Amendment. There is no need to prove that the "activity" targeted is constitutionally protected where the law discriminates on its face on the basis of association. A law that criminalized gum chewing by Communist Party members would not be saved from constitutional attack by the fact that the Constitution does not protect the chewing of gum. There is no constitutional right to work in defense facilities, yet in *United States v. Robel*[10] the Court recognized that when the government denied the opportunity to work on the basis of Communist Party membership, without the requisite showing of specific intent, it violated the right of association. Thus, even if there is no right to hang out on a street corner, a law that selectively bars gang members from hanging out while permitting all others to do so imposes guilt by association.

The Court's insensitivity to guilt by association is also reflected in its offhand treatment of the associational claim in *Reno v. American-Arab Anti-Discrimination Comm.*[11] The lower courts in that case had found that the government had selectively targeted eight aliens for deportation on the basis of their alleged political associations with the Popular Front for the Liberation of Palestine (PFLP), a constituent group within the Palestine Liberation Organization. The government called the PFLP a "terrorist organization," but did not dispute that it engaged in a wide range of perfectly legitimate and lawful activity, from the provision of health care and day care to political and cultural activities. Nor did the government ever allege that the eight aliens had intended to support any of the PFLP's unlawful activities. The lower courts enjoined the deportations on a showing that the INS had not sought to deport similarly situated aliens, and had targeted these aliens for deportation based on their political associations without any evidence of specific intent to further the PFLP's illegal ends.

The Supreme Court's principal holding in *American-Arab Anti-Discrimination Comm.* involved a jurisdictional issue. It concluded that a provision of the Illegal Immigration and Immigrant Responsibility Act of 1996 had effectively stripped the federal courts of jurisdiction to consider the aliens' selective-enforcement claims. It then confronted the question whether this interpretation raised constitutional concerns by depriving the federal courts of jurisdiction to hear a constitutional claim. The Court concluded that it did not, essentially because the Constitution does not recognize selective enforcement as a defense to deportation. The Court's analysis studiously avoided discussion of the First Amendment, focusing instead on the problems that any selective-enforcement claim would present, and thus the decision can be read as having little or no

implications for the doctrinal question of whether aliens have First Amendment rights. But the Court did expressly leave open the possibility that *some* "outrageous" grounds for selective deportation might violate the Constitution, while asserting without explanation that selective deportation for being a "member of an organization that supports terrorist activity" was not sufficiently outrageous.[12]

The fact that the Court felt no need to explain why the grounds for selection in *Reno v. American-Arab Anti-Discrimination Comm.* were not outrageous again illustrates its blindness to guilt by association. In other contexts, the Court has stated that guilt by association "has no place here"[13] and "is a philosophy alien to the traditions of a free society and the First Amendment itself."[14] Infringements on the right of association generally trigger as stringent scrutiny as infringements on the freedom of speech or violations of equal protection. Thus, it is not clear why a selective deportation motivated by race would be more "outrageous" than one motivated by association. Nor, if the guilt-by-association principle stands, is it clear why selective deportation triggered by association with the Democratic Party would be more "outrageous" than one motivated by association with the PFLP. Yet the Court evidently felt the point to be so obvious that it needed no explanation.

The problem may be that it is always easier to recognize guilt by association in hindsight. It is no accident that the Court's approach to anti-Communist laws developed as the Communist threat waned. Our fears today are directed not at Communists but at "gangs" and "terrorists." The Court's inability to recognize the guilt-by-association problem in *Morales* and *American-Arab Anti-Discrimination Comm.* may be attributed to the blinders of today's hysteria. But it is precisely when those fears are greatest that constitutional protection is most needed.

The Court's early right-of-association decisions make clear that the constitutional right of association cannot be limited, as the Court's more recent decisions suggest, to expressive and intimate association. The right extends to all associations, including the nonexpressive and nonintimate, at least inasmuch as it forbids the imposition of disabilities on individuals merely because of their ties to a group, absent proof of specific intent to further some illegal activity. The specific intent standard distinguishes individual culpability from guilt by association, and because it serves that independent purpose, applies even if the association charged is neither intimate nor expressive.

NOTES

1. *Scales v. United States*, 203, 224–25, 367 (1961).
2. Ibid., 229.
3. Ibid. (quoting *Noto v. United States*, 367 U.S. at 299).
4. *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966).
5. *City of Chicago v. Morales*, 119 S.Ct. 1849. The Chicago ordinance provided in relevant part:

> Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section. Gang Congregation Ordinance, Chicago Municipal Code Section 8-4-015(a), quoted in *Morales*, ibid., 1854 n2.

6. Ibid., 1857.
7. Ibid., 1862.
8. Ibid., 1865 (O'Connor concurring); see also ibid., 1864.
9. Ibid., 1879 (Scalia dissenting).
10. *United States v. Robel*, 389 U.S. 258 (1967).
11. *Reno v. American-Arab Anti-Discrimination Comm.*, 119 S.Ct. 936 (1999).
12. Ibid., 946–57.
13. *Elfbrandt v. Russell*, 384 U.S. at 19.
14. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 932 (1982) (internal citations omitted).

SPEAKING IN THE FIRST PERSON PLURAL: EXPRESSIVE ASSOCIATIONS AND THE FIRST AMENDMENT

DANIEL A. FARBER

* * *

I. THE OLD FREEDOM OF ASSOCIATION

As of a few years ago, the Court had developed several lines of authority about the freedom of association. One major development of the past few years has been to draw together and expand upon these lines of authority. Thus, it is helpful to begin with a quick look at the terrain, as it appeared before the latest wave of integration and expansion. These cases provided some protection to the autonomy of the organizations as such, but more vigorously defended the rights of members to join associations.

From *Minnesota Law Review* 85, no. 1483 (2000–2001): 1486–94. Reprinted by permission of the *Minnesota Law Review* and courtesy of the author.

One line of authority concerned the application of antidiscrimination laws to private associations. *Roberts v. United States Jaycees*[1] is illustrative. In compliance with state antidiscrimination laws, two local chapters of the Jaycees admitted women as members. The local chapters were sanctioned for violating a national bylaw prohibiting admission of women. The local chapters filed a state civil rights complaint against the national organization, which responded with a federal lawsuit. The Supreme Court held that compelling the national organization to accept women in its local chapter would not violate its constitutional rights.

Justice Brennan's opinion for the Court in *Roberts* distinguishes two different senses of freedom of association. Some cases had held that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."[2] Brennan referred to this as the intrinsic feature of the right to associate, since it involves protection of association for its own sake. The Jaycees did not qualify as an intimate association. Other cases had recognized a "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." Brennan referred to this as the instrumental feature of association; it would be called "expressive association" today.[3]

With respect to expressive association, Justice Brennan observed that "collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."[4] Hence, the Court has recognized a right to "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[5] As the Court noted, the Jaycees' national and local organizations had taken public positions on a variety of issues, and members regularly engaged in civic, charitable, lobbying, and other protected activities. But limitations on expressive association may be justified "by regulations adopted to serve compelling state interests, unrelated to suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[6] The Court concluded that the government's compelling interest in eliminating gender discrimination justified regulation of the Jaycees. The Court was skeptical that admission of women would change the content or impact of the organization's

speech, and in any event, found that any effect on protected speech was "no greater than is necessary to accomplish the State's legitimate purposes."[7]

Several years later, the Court extended the *Roberts* holding in *Board of Directors of Rotary International v. Rotary Club*.[8] The national Rotary revoked the charter of a local club because it had admitted women, and the local club and two women members filed suit in state court challenging the action as a violation of state civil rights law. As in *Roberts*, the Court found no significant impact on the clubs' expressive activities, and held that any "slight infringement" was justified by the state's compelling interest in eliminating discrimination.[9]

A second line of authority relating to expressive association involved political parties. Two cases from the 1980s illustrate the limits of state regulatory power. In *Democratic Party of United States v. Wisconsin, ex rel. LaFollette*,[10] state law required national political parties to seat only delegates who were pledged to abide by the Wisconsin primary. Contrary to the Democratic Party's rules for selecting delegates, Wisconsin held an "open" primary in which voters did not need to make a public declaration of party affiliation. The Democratic Party's rule was intended to restrict crossover voting, which had allowed Republican voters to play a decisive role in some controversial Democratic primaries. The Court held that the state could not constitutionally require party delegates to abide by the results of the primary. Freedom of association "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only."[11] The Democratic Party "chose to define [its] associational rights by limiting those who could participate in the processes leading to the selection of delegates to their National Convention," and the state was unable to show any compelling interest in interfering.[12]

The converse situation was presented in *Tashijian v. Republican Party*.[13] In *Tashijian*, the state insisted on a closed primary while the party wanted to allow independents to participate. Considering that "the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs," the Court held that the invited participation of independents was an aspect of freedom of association.[14] By placing limits on the "group of voters whom the Party may invite to participate," the state limited the "Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community."[15] The state asserted several justifications for the statute, most notably the desire to pre-

vent splintered parties and factionalism. Although concerns about the effects of open primaries were shared by some leading political scientists, the Court held that it was up to the party itself to determine its own long-term interest, not the state government.

A third line of decisions protected the ability of individuals to join groups. One question was whether an individual who joined a group for a lawful reason could be punished for the group's unlawful activities. This issue was highlighted in the McCarthy era,... In addition to banning advocacy of revolution, the Smith Act also made it a felony to be a knowing member of any group advocating forceful overthrow of the government. In *Scales v. United States*,[16] Justice Harlan's opinion for the Court gave the membership clause a narrow reading. He held that membership in the Communist Party could be punished only if the member was active in the party, knew of the party's illegal aims, and had a specific intent to further those aims.

Justice Harlan also wrote for the Court in another case protecting the right to join unpopular organizations, *NAACP v. Alabama ex rel. Patterson*.[17] As part of its general statute regulating foreign corporations, Alabama required disclosure of numerous NAACP documents, including membership lists. Taking cognizance of the obvious risk of retaliation against NAACP members in that state, the Court held that the production order violated the First Amendment. Notably, although the NAACP also attempted to assert its own rights as an organization, the Court said the group "more appropriately" argued the rights of its members.

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... [F]rom the 1960s to the 1980s, the "old" freedom of expressive association primarily applied to groups like political parties or civil rights groups, formed for the sole purpose of engaging in core political speech. The rights of non-political associations like the Jaycees were rarely at issue, and organizational autonomy was only one of several themes in the Court's decisions. At the turn of the century,.. the Court's emphasis shifted. The groups qualifying for vigorous constitutional protection were defined more broadly, and the right of the organization's leadership to control its members and platform loomed larger than concerns about barriers to membership.

II. THE TRANSFORMATION OF FREEDOM OF ASSOCIATION

Freedom of association is not a new concept in First Amendment law. In recent cases, however, it seems to be conceptualized in a subtly different way while receiving significantly more vigorous enforcement. This part traces the doctrinal evolution.

A. *DALE* AND EXPRESSIVE ASSOCIATION

The most dramatic example of the "new" freedom of expressive association is *Boy Scouts of America v. Dale*.[18] James Dale was virtually a lifelong Boy Scout, having joined at age eight, become an Eagle Scout, and finally taken his place as an assistant scoutmaster. While he was in college, however, a newspaper interview discussed his role as co-president of the student gay rights group. Finding his continued association with the organization intolerable, the Scouts promptly expelled him. In an opinion by Chief Justice Rehnquist, a sharply divided Supreme Court held that this action was from New Jersey's antidiscrimination law.

Rehnquist's opinion begins by stressing that the Boy Scouts "is a private, not-for-profit organization engaged in instilling its system of values in young people."[19] The opinion goes on to document in painstaking detail that the Scouts' mission is to transmit a system of values to young people, including moral straightness.

Whether the Scouts had any message with respect to homosexuality was contested. The Court deferred to the Scouts' brief, which asserted that the organization did have such a message. Would Dale's presence in the organization undermine its message? Again, the Court veered away from an independent evaluation of the record: "As we give deference to an association's assertions regarding the nature of its expression," Rehnquist said, "we must also give deference to an association's view of what would impair its expression."[20] Even though the Scouts were allegedly tolerant of heterosexual scoutmasters who advocated tolerance for gays, Dale was a "gay rights activist," and his presence "would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accept homosexual conduct as a legitimate form of behavior."[21]

Rehnquist also rejected the adequacy of the state's interest in combating

discrimination. Although he never actually described the state interests in question, he flatly asserted that those interests (whatever they may have been) could not "Justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."[22] But of course, the primary basis for finding a "severe intrusion" was deference to the Scouts' own assertions in the course of the litigation. Thus, the upshot of the majority opinion seems to be that once an association is identified as expressive, any colorable claim of interference with its activities is enough to block application of antidiscrimination laws (at least in cases where the Court does not find the particular state interest particularly compelling). This is a sharp turnabout from *Roberts*, in which the Court had demanded a greater showing of interference with the group's expression and had placed more emphasis on enforcing antidiscrimination laws.

Justice Stevens authored a pointed dissent that stressed the weakness of the record.[23] The group's failure to make any affirmative effort to communicate its alleged antihomosexual values to the boys themselves, he remarked, "speaks volumes" about the credibility of its claims. In the absence of any serious examination of the group's message, "there would be no way to mark the proper boundary between genuine exercises of the right to associate, on the one hand, and sham claims that are simply attempts to insulate nonexpressive private discrimination, on the other hand."[24] Stevens suggested that the majority's argument was so weak that it could only be explained on the basis "that homosexuals are simply so different from the rest of society that their presence—alone unlike any other individual's—should be singled out for special First Amendment treatment."[25] In the majority's view, he charged, "an openly gay male" carries with him a label that, "even though unseen, communicates a message that permits his exclusion wherever he goes."[26]

Only time will tell whether, as feared by Stevens and the other three dissenters, *Dale* will prove to be a major defeat for antidiscrimination law.... [I]t is unclear whether the decision provides any protection to commercial or quasi-commercial organizations. Indeed, even its impact on gay rights is sharply disputed. But if nothing else, it demonstrates a dramatic change since the days when Justice Brennan held that discrimination is akin to violence in being "a source of unique evils" and therefore "entitled to no constitutional protection."[27] Putting aside any arguable factual distinctions, the difference in the tone of the two opinions speaks volumes about how the Court evaluates the conflicting interests at stake: on the one hand, an arguable but unproven First Amendment harm, on the other, an open act of discrimination. *Dale* is a

tribute to the seriousness with which the Court now regards the freedom of expressive associations.

NOTES

1. 468 U.S. 609 (1984).
2. Ibid., 617–18.
3. Ibid., 618.
4. Ibid., 622.
5. Ibid.
6. Ibid., 623.
7. Ibid., 628.
8. 481 U.S. 537 (1987).
9. Ibid., 549.
10. 450 U.S. 107 (1981).
11. Ibid., 122.
12. Ibid., 12, 125–26.
13. 479 U.S. 208 (1986).
14. Ibid., 215, 224–25.
15. Ibid., 215–16.
16. 367 U.S. 203 (1961).
17. 357 U.S. 449, 451 (1958).
18. 120 S.Ct. 2446 (2000).
19. Ibid., 2449.
20. Ibid., 2453.
21. Ibid., 2454.
22. Ibid., 2457.
23. Ibid., 2460–66 (Stevens, J., dissenting).
24. Ibid., 2471 (Stevens, J., dissenting).
25. Ibid., 2476 (Stevens, J., dissenting).
26. Ibid. (Stevens, J., dissenting).
27. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984).

ASSOCIATION AND ASSIMILATION

DEBORAH L. RHODE

* * *

THE DUAL ROLE OF GENDER SEGREGATION

Missing from analysis in the leading associational privacy cases is also any acknowledgment of the values that separatism might serve, independent of an association's size or exclusivity. The dynamics of mixed and single-sex organizations differ, and separatism in some contexts may present opportunities for self-expression and collective exploration that would be inhibited by sexual integration. Many feminist associations have proceeded on that assumption, and much of the literature on single-sex affiliations suggests a factual basis for believing that socially subordinate groups can be empowered by the exclusion of socially

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dominant groups. Moreover, the ability to choose associates, to determine those with whom to share private information and social activities, is an aspect of personal liberty warranting some constitutional recognition. By according individuals the right to structure their social relationships free from state intrusion, the law can create spheres of solidarity that promote both private and public values. Such associations preserve opportunities for self-expression and mutual commitment, as well as constraints on governmental power.

In organizations like the Jaycees, of course, any interests in separatism often are already compromised by including female associate members in most official functions.[1] On one level, such a policy renders women's second-class status particularly offensive: these associations perpetuate male hierarchies, not male sanctuaries. Yet from another perspective, the willingness to grant women access to social contacts and organizational opportunities clearly mitigates the disadvantages that normally flow from all-male affiliations. It is often those clubs that totally exclude women that women feel most in need of joining. What is disturbing about cases such as *Jaycees* is not the result but the rationale, which fails adequately to acknowledge either the values of associational choice that are present even in "nonintimate" organizations or the special importance such values assume for socially subordinate groups.

Equally disquieting has been the courts' treatment of expressive interests. In the *Jaycees* case, for example, the plaintiffs asserted that women would have different attitudes about various issues on which the organization had taken a public position, particularly its campaign supporting President Reagan's economic policies. Justice Brennan dismissed such claims as "social stereotyping" and "unsupported generalizations about the relative interests and perspectives of men and women."[2] One problem with that analysis was not simply its willingness to overlook a wealth of gender-gap studies supporting the Jaycees' argument; an even more fundamental difficulty was the implication that access to an all-male institution may depend on whether women are in fact less likely than men to endorse its existing values. If the price of admission is a promise of assimilation, that alternative surely will not be embraced by all feminists.

Claims about "women's point of view" in cases like *Jaycees* are analogous to arguments that have divided American feminism for decades. In the late nineteenth and early twentieth centuries, suffragists vacillated between asserting that women were fundamentally the same as men, and therefore entitled to the same rights of citizenship, and contending that women were fundamentally different and that their distinctive perspectives and values warranted equal repre-

sentation. Comparable disputes surfaced again in the 1970s and 1980s, fueled in part by the research of feminist theorists such as Carol Gilligan, Nancy Chodorow, Dorothy Dinnerstein, and Sarah Ruddick. The implications of much of this work run counter to the positions of civil liberties and women's rights organizations as amicus curiae in *Jaycees*. For example, Carol Gilligan's claim that males and females tend to rely on different modes of moral reasoning[3] is not easily reconciled with the rhetoric of many amicus briefs, which rejected all "stereotypical assumptions" that women "as a group will express differing political views merely because of their sex."[4] Similarly, Dinnerstein's, Ruddick's, and Chodorow's theories about sex-linked attributes that arise from males' and females' different maternal relationships[5] rest uneasily with liberal feminist claims about the archaic nature of gender generalizations.

The case for full female participation in all-male associations, however, does not depend on a denial of sex-based differences or the values of single-sex affiliations. Rather, it involves a more contextual assessment of the significance of those differences and values in various cultural settings. If men and women as groups tend to differ in their approach to certain moral or political issues, it does not necessarily follow that the particular men and women likely to join a particular organization will differ. Nor does it follow that the organization should be entitled to use gender as a crude proxy for attitudinal characteristics. In a wide variety of other contexts, courts have declined to permit the use of sex-based generalizations, however accurate, because the social costs are too substantial. The same result should obtain for organizations in which the effects of gender segregation have been to perpetuate gender disadvantages. Organizations, of course, would remain free to consider political affiliations in selecting their membership; they simply could not rely on sex-based generalizations to justify categorical exclusions. Given the availability of more accurate screening devices, sexual integration need not impair an organization's expressive activities. Rather, it might enrich understanding of issues on which the sexes have a common interest.

A framework more attentive to gender disadvantages than gender differences would focus more directly on the social costs that flow from single-sex affiliations. Those costs are more extensive than conventional public/private distinctions have acknowledged. The exclusion of women from spheres conventionally classified as private contributes to women's exclusion from spheres unquestionably understood as public.

The perpetuation of all-male enclaves has worked to women's disadvan-

tage on several levels. The most direct harms involve lost opportunities for the social status, informal exchanges, and personal contacts that men's associations traditionally have provided. Although spokesmen for such institutions often have sought to cast the all-male club as a refuge from commercial activity with no demonstrable career significance, the available research provides little support for that characterization. During the 1960s, 1970s, and early 1980s, surveys of male executives as well as reports from business and professional women attested to the continuing significance of men's associations. Such clubs have provided forums for exchanging information and developing relationships that generate business or career opportunities. In a society in which men obtain almost one-third of their jobs through personal contacts, and probably a higher percentage of prestigious positions, the commercial role of social affiliations should not be undervalued. Nor should their political significance be overlooked. Elite, all-male associations such as the Bohemian or Cosmos clubs often have been the locus of private discussions that later emerged as public policy.

Women's exclusion from private associations also works in a variety of less direct ways to perpetuate their subordinate public status. When employers schedule business functions at discriminatory clubs, many female employees face a difficult choice: attendance will compromise personal principles, while a boycott will risk compromising collegial relationships and professional advancement. Moreover, as the Supreme Court long has recognized in the context of racial discrimination, the denial of equal access inevitably constitutes a "deprivation of personal dignity."[6] Sex discrimination carries similar symbolic freight. The nineteenth-century practice of organizational bundling—cordoning women off from the centers of activity—has numerous twentieth-century analogs. Relegating females to separate dining rooms, separate entrances, or separate organizations is an affront to individual integrity and self-worth. That affront is no less substantial because women "choose to put that construction on it." Rather, these symbols of inferiority, once perceived and internalized as such, often can become self-perpetuating.

In responding to this line of argument, defenders of all-male institutions frequently maintain that women, in fact, do not perceive separatism as degrading, but rather enjoy having their own clubs or dining facilities. Such rejoinders, which resemble explanations often given for excluding racial or religious minorities, obscure a fundamental distinction. Separatism imposed by empowered groups carries different symbolic and practical significance

than separatism chosen by subordinate groups. Given this nation's historic traditions and cultural understandings, the exclusion of men from women's liberation groups or garden clubs no more conveys inferiority than the exclusion of whites from black associations or Protestants from Jewish social organizations. Nor does such exclusivity serve to perpetuate existing disparities in political and economic power....

* * *

The boundary between public and private spheres is fluid in still another sense that traditional state action doctrine does not acknowledge. Most "private" clubs depend heavily on public support, largely in the form of state and federal tax subsidies. Clubs gain tax exemptions by claiming to be private organizations in which "substantially all" activities are for pleasure, recreation, and other nonprofit purposes, while members (or their employers) deduct dues and fees as "ordinary and necessary business expenses."[7] This privileged treatment reveals the difficulties of seeking to dichotomize organizations as either commercial or noncommercial, public or private. Such distinctions are further compromised by other forms of governmental support that state action doctrine has discounted, such as the conferral of federal grants, state liquor licenses, and municipal services.

An Alternative Approach to Sex-Segregated Associations

The preceding discussion suggests the need for a different approach to single-sex associations. Our policies require redefinition on several levels. What forms of single-sex affiliations should be supported or suppressed? What strategies of legal intervention are appropriate to that end? We need not only a better set of rules but also a better understanding of the capacity of those rules to express our underlying social aspirations.

An alternative theoretical framework for evaluating separatist associations should neither minimize the values at issue nor assume their primacy for all selective organizations. Such an approach requires a greater sensitivity to context, to the varying cultural functions, meanings, and consequences of particular social relationships. If, as the preceding discussion has suggested, we must begin to identify associations that serve largely to reinforce or challenge gender disadvantages, men's and women's groups frequently will stand on dif-

ferent footing. The point is not that values of choice and intimacy have less social importance for men than women, but rather that the social costs are different. In a male-dominated society, the price of male cohesiveness is substantial. Even seemingly benign organizations like Boys' Clubs may reinforce sex role stereotypes and the legitimacy of gender exclusion. The issue is not simply whether single-sex associations are beneficial, but whether experiences of commensurate value are available in mixed environments with fewer social costs.

This alternative framework will require a conceptualization of public and private spheres. Associational choices are expressions not only of individual autonomy but also of social constraints. In structuring our affiliations, the personal is the political and warrants legal recognition as such. That recognition, of course, only begins the analysis. The difficult task lies in drawing distinctions that adequately will reflect the dual role of sex-segregated institutions in both enhancing and confining human relationships. Such distinctions inevitably will entail difficult choices. In the current social order, we cannot maximize both male intimacy and female opportunity. Nor can we embrace the kind of neutral principles and individualist priorities that liberalism generally has fostered without compromising the collective and contextual concerns on which much feminist theory is grounded. It should be possible, however, to make our choices with greater sensitivity to the full range of values underlying them.

To this end, we might begin with a broader definition of "public" for purposes of both statutory and constitutional interpretation. That is not to imply that the definition need be the same for both purposes. Courts and legislatures operate within different cultural constraints that have obvious relevance for associational issues. Judicial decisions are informed by an extended history of state action doctrine that has precedential significance beyond the context of single-sex organizations and that cannot readily be reversed. Yet the freedom from direct electoral pressure also gives courts the opportunity to expand awareness of the social costs of separatism and to provide the impetus for further reform. The point of this discussion is not to speculate about how those considerations might operate in particular cases. Nor is it to propose a specific slate of policy initiatives. Rather, the attempt is to clarify the values at issue and to identify a range of responses that might accommodate those competing concerns.

An adequate response to separatist associations must focus not simply on

organizations' intimate or expressive character, but also on the totality of their public subsidies and public consequences. Rather than looking to any single nexus of state involvement, courts and legislatures should consider the aggregate of governmental and commercial entanglements. Public grants, licenses, and tax subsidies could serve as legitimate bases for regulation. For example, any association that receives a substantial percentage of its revenues from tax exemptions and business deductions could be considered "public" and thus subject to prohibitions against gender discrimination. Alternatively, the government could withdraw favorable tax treatment for sex-segregated organizations. Employers who subsidize membership fees and business functions at such clubs also could be denied governmental contracts or be held liable for discrimination under existing statutory prohibitions. Since employers provide an estimated one and one-half billion dollars in annual support to private clubs, and 40 to 50 percent of the revenues of certain selective men's associations, the cumulative effect of these strategies might be substantial.

Focusing on governmental support and commercial entanglements might avoid at least some of the idiosyncrasies of conventional balancing approaches. Associational liberty and equal opportunity are not commensurable values that can be calibrated and offset in neutral-principled fashion. Without a more focused analysis, we are left with the kind of decision making that has labeled the Bohemian and Kiwanis clubs as private, and the Jaycees and Princeton eating clubs as public.[8] Moreover, an approach that ties public sanctions to public entanglements is one means of accommodating competing concerns. Clubs willing to forgo tax advantages, employer contributions, or state licenses could retain their separatist status. This approach would leave scope for associational choices but would not purport to be content-neutral. Since women's organizations on the whole are less commercially oriented, and thus less likely to be dependent on employer support or business expense deductions than are men's associations, such strategies would target those groups with the greatest social costs.

This is not to underestimate the price of such a regulatory approach. Subjecting associational policies to state oversight necessarily increases the risk of harassing litigation and narrows the range of private choice. In some contexts, penalizing separatism by dominant groups may undermine its legitimacy for subordinate groups. Yet we have managed to prohibit racial discrimination by private clubs and schools, and sex discrimination by private employers, without the disabling social consequences that critics often envision. Private

organizations that serve public functions do not provide the only opportunities for male bonding in this society.

It is true, of course, that the more categorical the regulatory strategy, the more over- and under-inclusive it will prove. Of particular concern are all-female organizations that might be inhibited by withdrawal of preferential tax treatment. Yet a law that explicitly differentiates between men's and women's associations, while theoretically defensible, may prove politically unpalatable.

The problem is not, as advocates of all-male clubs frequently have argued, that such distinctions would be unprincipled. A framework that permitted women's but not men's organizations would be asymmetrical with respect to sex but not with respect to power. And from the viewpoint of reducing gender inequality, it is power that matters. From a more prudential perspective, however, it is risky to argue for a policy that expressly grants associational rights to women's but not men's affiliations. In some contexts, such as single-sex colleges, it may make sense to assume those risks. As the following discussion suggests, the small and declining number of all-male educational institutions, together with the remedial justifications for all-female learning environments, offers a defensible case for preferential treatment.

For most forms of association, however, it may be preferable to rely on strategies that differentiate between men's and women's organizations in practice rather than in principle. That is in part the justification for an approach that focuses on commercial entanglements and public subsidies. Even if such an approach encourages more women's groups to adopt formal postures of gender neutrality, it is by no means clear how many would find that their composition in fact changes. Nor is it apparent that change is undesirable. As women are more fully integrated into male organizations, the need for some all-female associations may diminish. To the extent that groups like the Jaycettes or local women's networks have functioned less as communities by consent than communities by imitation or exclusion, their passing may prove to be an acceptable by-product of a more egalitarian society. Their demise also may have certain compensating benefits. Male involvement in female-dominated organizations can break down gender stereotypes and enlarge understandings of women's concerns. At the very least, an increase in sex-neutral admission policies would help undercut one of the most convenient current rationalizations for male separatism—the claim that women are happy with their own institutions.

A final and more fundamental problem lies in the inevitable under-

inclusiveness of any legal assault on sex-segregated associations. The law is too crude an instrument to reach the most influential separatist networks. Golfing groups and luncheon cliques that form along gender lines may play a more substantial role in limiting women's opportunities than any of the organized entities susceptible to legal intervention. Moreover, even in formal organizations, access does not necessarily ensure acceptance. Getting women into the right clubs is far easier than getting them to the right tables. But access is a necessary first step. Although we cannot eliminate social segregation by legal fiat, we at least can seek to minimize its crudest form and the social legitimacy that perpetuates it.

NOTES

1. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).
2. Ibid., 628.
3. C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982).
4. Brief Amicus Curiae for the American Civil Liberties Union and Minnesota Civil Liberties Union at 15, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).
5. N. Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (1978); D. Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements and the Human Malaise* (1976); Ruddick, "Maternal Thinking," *Feminist Studies* 3, no. 342 (1980).
6. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964).
7. I.R.C. Section 501(c)(7), (i)(1982).
8. *Frank v. Ivy Club, State of N.J. Dep't. of Law & Pub. Safety, Div. of Civ. Rights*, D.Ct. 05-1678-1680 (1985). *Bohemian Club v. Fair Employment Commission, California Reporter* 231, no. 769 (1986).

THE EXPRESSIVE INTEREST OF ASSOCIATIONS

ERWIN CHEMERINSKY AND CATHERINE FISK

* * *

INTRODUCTION

Boy Scouts of America v. Dale was a hard case, and in this instance a hard case made very bad law.[1] The tension between freedom of association and antidiscrimination laws is inherently difficult. Freedom of association is unquestionably a fundamental right, and one of its core aspects is the right of a group to choose who is in and who is out. However, antidiscrimination laws seek to keep people from being excluded based on invidious characteristics such as race, gender, religion, disability, and sexual orientation. Enforcing antidiscrimination laws against groups that want to exclude on such grounds intrudes on associational decisions. Refusing to apply antidiscrimination laws on this basis compromises the commitment to equality.

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Prior to *Boy Scouts of America v. Dale*, the Supreme Court's cases concerning this conflict, such as *Roberts v. United States Jaycees*[2] and *Board of Directors of Rotary International v. Rotary Club of Duarte*,[3] emphasized the compelling interest in ending discrimination, even when it compromises freedom of association. *Dale*, however, held that the Boy Scouts has a First Amendment right to exclude gays, even though such discrimination is prohibited by New Jersey law.[4] The Court reached that conclusion without meaningful analysis of the expressive interest of the Boy Scouts or of the governmental interests in ending private discrimination.

It is tempting to see *Boy Scouts of America v. Dale* as just being about the justices' feelings about the Boy Scouts and their views about homosexuality. This, of course, would not excuse the ruling—the Boy Scouts' exclusion of gays is based on homophobia and the worst stereotypes about homosexuals. But seeing the case as limited in this way would lessen its impact on the ability to enforce antidiscrimination laws against others. Unfortunately, there is no way to cabin the Court's approach in *Dale* so that it applies only to the Boy Scouts, or only to sexual orientation, or only to New Jersey's law....

* * *

Boy Scouts of America v. Dale is a ruling in favor of discrimination and intolerance that is wrapped in the rhetoric of freedom of association. Those who want to discriminate can always invoke freedom of association; all enforcement of antidiscrimination laws forces some degree of unwanted association. It was not surprising that the five most conservative justices on the Court favored the Boy Scouts and its condemnation of homosexuality. This, though, does not make it any more right than other decisions throughout history that have upheld bigotry and discrimination. Someday, *Boy Scouts of America v. Dale* will be repudiated by the Court like other rulings that denied equality to victims of discrimination.[5]

OPENING THE DOOR TO DISCRIMINATION: THE IMPACT OF *BOY SCOUTS OF AMERICA V. DALE*

No one—not the Boy Scouts, not the New Jersey courts, and not a single justice on the Supreme Court—denied that James Dale was kicked out of the

Boy Scouts solely because he was gay. Dale was a lifelong scout who had reached the rank of Eagle Scout and had become an assistant scoutmaster. While in college he became involved in gay rights activities. Dale was quoted in a newspaper article after attending a seminar on the psychological needs of gay and lesbian teenagers and was identified in the article as the co-president of the Gay/Lesbian Alliance at Rutgers University. A scout official saw this article and then sent Dale a letter excluding him from further participation in the Scouts.

There was no dispute that, in every way, Dale was an exemplary member of the Boy Scouts. Dale was discriminated against solely because of his sexual orientation. Dale sued the Scouts under the New Jersey law that prohibits discrimination by places of public accommodation. The New Jersey Supreme Court found that the Boy Scouts is a "public accommodation" within the meaning of the law and rejected the Boy Scouts' claim that freedom of association protected its right to discriminate based on sexual orientation.

The Boy Scouts sought United States Supreme Court review on the ground that the New Jersey decision violated its freedom of association by forcing it to include gays whom it wished to exclude. Freedom of association is unquestionably a fundamental right. Although "association" is not enumerated as a right in the Constitution, the Supreme Court has nonetheless declared that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[6] The Supreme Court has explained that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[7]

Group membership is integral to all of the rights mentioned in the First Amendment. The Court has observed that an "individual's freedom to speak, to worship, and to petition the Government for the redress of grievances could not be vigorously protected from interference by the state unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." Association is also important as people benefit from being with others in many ways.

Boy Scouts of America v. Dale is not the first time that the Supreme Court has confronted the tension between freedom of association and laws advancing equality. The leading case articulating the Court's approach to this difficult issue is *Roberts v. United States Jaycees*.[8] The Jaycees, a national organi-

zation of young men between ages eighteen and thirty-five, challenged the application of the Minnesota Human Rights Act, which prohibited private discrimination based on characteristics such as race and sex, to its organization. The Jaycees claimed that freedom of association protected its right to exclude women and to be a place where men associated only with each other.

The Supreme Court reaffirmed that freedom of association is a fundamental right and agreed that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."[9] However, the Court said that freedom of association is not absolute and that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[10] The Court concluded that the state's goal of prohibiting discrimination was unrelated to the suppression of any message and "plainly serves compelling state interests of the highest order."[11] The Court found no evidence that requiring the Jaycees to include women would undermine its expressive activities, and the Jaycees obviously was too large to be considered an "intimate association."

Similarly, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Court held that it did not violate the First Amendment rights of the Rotary Club to force it to admit women in compliance with a California law that prohibited private business establishments from discriminating based on characteristics such as gender.[12] In *New York State Club Association, Inc. v. City of New York*, the Court upheld the constitutionality of a city's ordinance that prohibited discrimination by clubs that have more than four hundred members and that provide regular meal service.[13]

The Court in these cases recognized, however, that freedom of association would protect a right to discriminate in two limited circumstances. First, if the activity is "intimate association"—a small private gathering—freedom of association would protect a right to discriminate. Second, the Court said that freedom of association would protect a right to discriminate where discrimination is integral to expressive activity. For example, the Klan likely could exclude African Americans or the Nazi Party could exclude Jews because discrimination is a key part of their message.

Thus, the issue in *Boy Scouts of America v. Dale* was whether the Boy Scouts' desire to exclude gays fit within either of these exceptions. Since the Boy

Scouts is a large national organization, it could not realistically claim to be an "intimate association." Instead, its central argument was that it had an expressive message that was anti-gay and that forcing it to include homosexuals undermined this communicative goal.

The key question, then, was how to determine the expressive message of the Boy Scouts and whether forced inclusion of gays harms this First Amendment right. In answering this question, the Supreme Court greatly expanded the ability of groups to discriminate, in violation of antidiscrimination laws like New Jersey's, in two separate ways. First, the Court held that courts must accept the group leadership's characterization of the group's expressive message, even if the message was articulated nowhere except by the lawyers in litigation. Second, the Court found that forced association undermines the expressive message of any group that wishes to exclude certain categories of people. Together, these holdings likely will allow any group that wants to discriminate to do so by claiming, once challenged in court, a desire to exclude based on any characteristics that it chooses.

NOTES

1. 530 U.S. 640, 120 S.Ct. 2446 (2000).
2. 468 U.S. 609 (1984).
3. 481 U.S. 537 (1987).
4. See *Dale*, 120 S.Ct. at 2446.
5. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (allowing the state-imposed racial segregation of railway passengers); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1856) (holding that neither a slave of African origin, nor his descendants, could ever become United States citizens).
6. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).
7. Ibid.
8. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).
9. Ibid., 623.
10. Ibid.
11. Ibid., 624
12. 481 U.S. 537 (1987).
13. 487 U.S. 1 (1988).

THE NEGLECTED RIGHT OF ASSEMBLY

TABATHA ABU EL-HAJ

* * *

For at least a generation after the founding, American politics relied heavily on open access to public streets and squares. Political assemblages were considered ordinary uses of public places, and one was not required to obtain permission from local authorities prior to engaging in street politics. Legal regulation was limited to responding to breaches of the peace. The prevailing understanding of the right of assembly reinforced this regulatory minimalism.

While the reasons for instituting what has become our regulatory approach remain unclear, we do know that as late as the 1880s many large American cities lacked permit requirements and that the first state supreme courts to review permit requirements for public assemblies struck them down.

This nineteenth-century history stands in sharp contrast to contemporary

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practices with respect to gatherings on public streets and in public parks. Today the state regulates virtually all assemblies, including those that are peaceful and minimally inconvenient. To demonstrate, parade, or make a speech in public, individuals and organizations must often obtain a permit from government officials well in advance. In fact, even where permits are not required, assemblies may be dispersed for actual and anticipated obstructions of traffic, including pedestrian traffic.

This regulatory shift, and judicial approval of it, amounts to a narrowing of the substance of the right of peaceable assembly. The nineteenth-century right was one of assembly without needing to ask permission and of going forth without restriction unless and until one breached the one condition of access, namely that one be peaceable. Today, by contrast, we have a right to assemble on the streets, so long as we obtain permission from officials (if that is required), abide by the terms of the permit issued, and are peaceable. Moreover, the definition of peaceable has been narrowed: An assembly may be dispersed for actually or potentially obstructing traffic (including pedestrian traffic), even where no permit is required.

Aside from the above, the history presented is itself significant. First, it indicates that this narrowing was largely unconsidered and has gone largely unnoticed. Second, and more importantly, it gives us insight into the social and political practices that the right of peaceable assembly was meant to protect as well as the value of them. Specifically, it suggests that the right is meant foremost to protect an avenue of democratic politics. It protects both the people's ability to influence and check government and a space for the formation, reconsideration, and consolidation of political preferences and, by implication, for the formation of an autonomous people.

Thus, we should be extremely wary of complacence in the face of government regulation of public assemblies. In fact, there is good reason to think that current regulatory choices are undermining the meaningfulness of public assemblies for participants as well as their effectiveness as a mechanism to influence and check government. Since the former harm is likely to be the less appreciated, it is worthy of particular comment.

The very need to ask permission renders the people supplicant in the democratic process while the conditions that can be placed on permits issued can turn participation in a public gathering into nothing more than a symbolic performance, an imprecise measure of preferences....

We seem to have forgotten that the right of assembly, like the right to

petition, was originally considered central to securing democratic responsiveness and active democratic citizens. We now view it instead as simply another facet of the individual's right of free expression, focusing almost exclusively on the question of whether the group's message will be heard.

... [T]he right of assembly should not be collapsed into the right of free expression. It should not be forgotten that when Madison first proposed the bill of rights amendments in 1789, he separated the collective rights of assembly and petition from those of speech and press. The right of assembly protects collective action—political and social. It protects the people and their aspirations for collective public deliberation on issues of public importance.... Freedom of speech, by contrast, protects individuality. It protects the individual's right as a democratic citizen to challenge political and social institutions. Both clearly have important political uses in a democratic society, but this shared political function has obscured essential distinctions in the traditions and fundamental purposes underlying the two rights.

APPENDIXES

CONSTITUTION OF THE UNITED STATES OF AMERICA

PREAMBLE

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section I

1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section II

1. The House of Representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each

State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

2. No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three; Massachusetts, eight; Rhode Island and Providence Plantations, one; Connecticut, five; New York, six; New Jersey, four; Pennsylvania, eight; Delaware, one; Maryland, six; Virginia, ten; North Carolina, five; South Carolina, five, and Georgia, three.

4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

Section III

1. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six years; and each Senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The

seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.

3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice-President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided.

5. The Senate shall choose their other officers, and also a President pro tempore, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall all be on oath or affirmation. When the President of the United States is tried, the chief-justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

Section IV

1. The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make of alter such regulations, except as to the place of choosing Senators.

Section V

1. Each House shall be the judge of the election, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide.

2. Each House may determine the rule of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any questions shall, at the desire of one fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

Section VI

1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from same; and for any speech or debate in either house, they shall not be questioned in any other place.

2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

Section VII

1. All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered; and if approved by two thirds of that House it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment, prevent its return; in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and the House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Section VIII

1. The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

2. To borrow money on the credit of the United States.

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

4. To establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States.

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

6. To provide for the punishment of counterfeiting the securities and current coin of the United States.

7. To establish post offices and post roads.

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.

9. To constitute tribunals inferior to the Supreme Court.

10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.

13. To provide and maintain a navy.

14. To make rules for the government and regulation of the land and naval forces.

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

17. To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dry docks, and other needful buildings.

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Section IX

1. The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

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.

3. No bill of attainder or ex post facto law shall be passed.

4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

5. No tax or duty shall be laid on articles exported from any State.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States. And no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state.

Section X

1. No state shall enter into any treaty, alliance, or confederation, grant letters of marque and reprisal, coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts, pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

Section I

1. The Executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows:

2. Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative or person holding an office of trust or profit under the United States shall be appointed an elector.

3. [The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify and transmit, sealed, to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed, and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the vote shall be taken by States, the representation from each State having one vote. A quorum, for this purpose, shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.]*

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*This clause is superseded by Article XII.

4. The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States.

5. No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years and been fourteen years a resident within the United States.

6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

7. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

8. Before he enter on the execution of his office he shall take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

Section II

1. The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions, which shall expire at the end of their next session.

Section III

He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measure as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Section IV

The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

Section I

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 judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.

Section II

1. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

2. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State the trial shall be at such place or places as the Congress may by law have directed.

Section III

1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attained.

ARTICLE IV

Section I

Full faith and credit shall be given in each State to the public acts, records, and judicial preceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Section II

1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the Executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State, under the laws thereof, escaping into another shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Section III

1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

Section IV

The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the Ninth Section of the First Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

1. All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation.

2. This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution of laws of any State to the contrary notwithstanding.

3. The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be

required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the Conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

THE AMENDMENTS TO THE CONSTITUTION*

The Conventions of a number of the States having, at the time of adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the Government will best insure the beneficent ends of its institution;

Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of both Houses concurring, that the following articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States; all or any of which articles, when ratified by three-fourths of the said Legislatures, to be valid to all intents and purposes as part of the said Constitution, namely:

AMENDMENT I

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 a redress of grievances.

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*The Bill of Rights consists of the first ten amendments to the Constitution.

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT 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, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT 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.

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as Presi-

dent, and of all persons voted for as Vice-President and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII

1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

AMENDMENT XVIII

1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

3. This article shall be inoperative unless it shall have been ratified as an

amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX

1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT XXI

1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

3. The article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XXII

1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President, when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

AMENDMENT XXIII

1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators

and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXIV

1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXV

1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as

Acting President. Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty eight hours for that purpose if not in session. If the Congress, within twenty one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty one days after Congress is required to assemble, determines by two thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

AMENDMENT XXVI

1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXVII

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

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