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Downsizing the Right to Petition

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DOWNSIZING THE RIGHT TO PETITION

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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."[1] 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,[2] perhaps sparked by the Supreme Court's 1985 holding in *McDonald v. Smith*[3] that statements made in petitions to executive officials do not enjoy absolute immunity from libel actions. 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 contemporary 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.[4] A recent article by Professor James E. Pfander goes even further, insisting that the Petitions

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[1] U.S. CONST. amend. I.

[2] *See, e.g.*, Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153 (1998); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899 (1997); Carol M. Rice, *A Citizen's Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. (forthcoming 1999); Eric Schnapper, *"Libelous" Petitions for Redress of Grievances—Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303 (1989); Norman B. Smith, *"Shall Make No Law Abridging . . . ": An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153 (1986); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 HASTINGS CONST. L.Q. 15 (1993); Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 HARV. L. REV. 1111 (1993); Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986).

[3] 472 U.S. 479 (1985).

[4] *See, e.g.*, Spanbauer, *supra* note 2, at 51; Higginson, *supra* note 2, at 165-66. As Professor Pfander observes, "most scholars agree that the right to petition includes a right to some sort of considered response." Pfander, *supra* note 2, at 905 n.22.

Clause guarantees a right to pursue judicial remedies for unlawful government conduct.[5] In Professor Pfander's view, the Petitions Clause operates as "a constitutional antidote to the familiar doctrine of [federal] sovereign immunity."[6]

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.

In Part I, we analyze the textual and structural context of the right to petition in the federal Constitution. In Part II, we explore the historical meaning and development of the right to petition and identify the conditions that gave rise to that right. In Part III, we describe the obligations that the right imposes on the various institutions of the federal government.[7] In particular, drawing partly on history but primarily on inferences from the Constitution's text and structure, we demonstrate that the right to petition does not impose on Congress a general obligation to consider or respond to petitions, though other departments of the government do have such obligations. In Part IV, we briefly show that the right to petition does not contribute anything significant to the debate concerning the validity of the doctrine of federal sovereign immunity. In Part V, we reach a brief, profoundly un-

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[5] *See* Pfander, *supra* note 2.

[6] Pfander, *supra* note 2, at 899. Other scholars have also suggested links between the right to petition and the suability of the federal government. *See, e.g.*, John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1296-97 (1993) ("[T]he right to 'petition the Government for a redress of grievances' recalls the formal petition of right by which English subjects sought a waiver of their Monarch's sovereign immunity.") (quoting CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 6 (1972)). Professor Pfander's article, however, is the first work to advance systematically the Petitions Clause as a constitutional argument against sovereign immunity.

[7] We do not address the question that concerned the Court in *McDonald*, 472 U.S. at 479, which occupies much of the attention of the modern commentators: are statements made in petitions absolutely, or in any other respect, privileged against libel and other actions? Because the relevant tort actions arise under state law, a full answer to this question requires an understanding of whether the right to petition is properly "incorporated" against the states by virtue of the Fourteenth Amendment and how, if at all, such a right might be different from the right envisioned in the original Constitution. The incorporation of the First Amendment against the states is, of course, settled as a matter of contemporary doctrine, but it is far from settled as the correct understanding of the Constitution. We unabashedly duck all of those questions in this Article.

dramatic conclusion: the Petitions Clause means exactly what it says, and no more. It is a guarantee of an open channel of communication from citizens to the sovereign. It is not an assurance that communications sent through that channel will receive any particular reception or achieve any particular result.

I. THE RIGHT TO PETITION IN CONSTITUTIONAL CONTEXT

The right to petition boasts a distinguished pedigree, running from Magna Carta in 1215[8] through royal commitments in the Petition of Right of 1628 and the Bill of Right of 1689[9] to seventeenth- and eighteenth-century parliamentary guarantees of a general right to petition.[10] It is not surprising that the right would appear in the American Bill of Rights, though the story of its inclusion tells us little about its meaning. A number of the draft proposals for a bill of rights proposed by state ratifying conventions included a right to petition located amongst the other expressive rights.[11] It is easy to understand how Madison, attempting to consolidate the proposed lists while preparing a bill of rights in the first Congress, would have chosen the right to petition for inclusion and would have included it with the other expressive rights in what became the First Amendment.[12] As is generally the case with provisions of the Bill of Rights, however, we have little hard information with which to work: "[l]ike many other provisions in the bill of rights, the Petition Clause was not the subject of illuminating debate."[13]

An examination of the Constitution's background and structure, however, yields some important preliminary propositions about the right to petition. The most important such proposition is that the First Amendment's Petitions Clause did not *create* the right to petition the national government for a redress of grievances. That right existed before ratification of the Bill

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[8] *See* Smith, *supra* note 2, at 1154-55.

[9] Like Magna Carta, the Petition of Right contained a royal guarantee recognizing some rights, issued in response to a petition. *See id.* at 1156-57. The 1689 declaration of rights, agreed to by William and Mary as a precondition for their ascendancy to the English throne, provided "that it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning is illegal." *Id.* at 1162.

[10] For example, a 1648 ordinance recognized petitioning as a fundamental right: "it is the Right and Privilege of the Subjects of England, to present unto the Parliament their just Grievances, by Way of Petition." *Id.* at 1159. A 1702 resolution stated that the people have a right to petition the king for the redress of grievances. *See id.* at 1165.

[11] *See* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 140 (Neil H. Cogan ed., 1997) (identifying proposed amendments containing a right to petition from the New York, North Carolina, Rhode Island, and Virginia conventions).

[12] Of course, as originally proposed to the states for ratification, what is now the First Amendment was in fact the third amendment. *See* Akhil Reed Amar, *The Bill of Rights As a Constitution*, 100 YALE L.J. 1131, 1137 (1991).

[13] Pfander, *supra* note 2, at 954. This is actually an understatement; we are aware of no relevant debate concerning the inclusion of the right to petition in the Bill of Rights.

of Rights as a background principle of republican governance. The inclusion of the right to petition in the First Amendment reinforced this right, and perhaps expanded it to a few contexts in which it would not otherwise operate, but the right existed in 1789 and 1790 just as surely as it did in 1791.

This point is obvious but often overlooked. The Bill of Rights in general did not create new rights but simply reaffirmed that certain actions were beyond the enumerated powers of the national legislature.[14] The wording of the First Amendment's guarantees, including the right to petition, makes this power-limiting character of the Bill of Rights especially explicit: "Congress shall make no law . . . ." The constitutional guarantee of the right to petition is a guarantee against legislative interference with a preexisting, predefined right whose contours are assumed rather than created by the Constitution.

An example will make the point clear. Suppose that in 1790, prior to ratification of the Bill of Rights, Congress passed a law prohibiting any person from soliciting any kind of action from federal officials in connection with, let us say, the subject of trade with the Indian tribes. Congress certainly has constitutional power to "regulate Commerce . . . with the Indian tribes,"[15] but a statute prohibiting petitions with respect to the regulation of such commerce is not itself a law "regulat[ing] Commerce." Such a law could be authorized, if at all, only by Article I's Sweeping Clause, which provides that Congress has power "to make all Laws which shall be necessary and proper for carrying into Execution" the national government's enumerated powers.[16] A prohibition on petitioning, however, is probably not "necessary," and certainly would not be "proper." As one of us, in conjunction with Patricia B. Granger, has previously demonstrated at length, the word "proper" in the Sweeping Clause significantly limits the enumerated power of Congress under that clause.[17] A law that would violate well-understood background rights of the people, such as the right to petition the government for a redress of grievances, would clearly not be "proper," and therefore would not be within the enumerated power of Congress under the Sweeping Clause. In the absence of any other plausible constitutional authorization for such a law, Congress lacks the constitutional power to restrict the right to petition.

There is no reason to think that the First Amendment alters or expands the right to petition that existed in 1789. Some provisions of the Bill of Rights, such as the Seventh Amendment's twenty dollar minimum amount

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[14] For an extended discussion of this point, see Gary Lawson, *The Bill of Rights As an Exclamation Point*, 33 U. RICH. L. REV. (forthcoming May 1999).

[15] U.S. CONST. art. I, § 8, cl. 3.

[16] *Id.* art. I, § 8, cl. 18.

[17] *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

for civil jury trials, may have clarified somewhat the precise contours of pre-1791 rights, but the articulation of the right to petition in the First Amendment contains no such clarification. The principal effect of the articulation of the rights of the people in the Bill of Rights was perhaps to extend those rights to the territories and the District of Columbia.[18] The primary textual vehicle for protecting background rights from legislative interference by Congress is the requirement in the Sweeping Clause that executory laws be "proper."[19] Congress does not need to use the Sweeping Clause to legislate for the territories and the District of Columbia; it has the power of a general legislature in those contexts. Accordingly, the Bill of Rights, which applies to all exercises of congressional authority, including those arising from the Territories Clause and the District Clause, extends the Sweeping Clause's limitations on congressional power to legislation concerning the territories and the District of Columbia.[20] But this extension does not alter or extend the substantive character of the relevant rights. The First Amendment thus confirms, but does not alter, the pre-1791 scope of the right to petition.

II. THE RIGHT TO PETITION IN HISTORICAL CONTEXT

So what exactly is this "right to petition" that the First Amendment confirms? At a minimum, it is a right to make requests of the government, but what exactly does this mean? Is the right to petition satisfied if at least one institution of the government is available to receive petitions, or must all institutions, or certain specific institutions, be available to receive petitions in all circumstances? Does it matter what form the petition takes? Once a petition is received, does the government have an obligation to treat or respond to the petition in any particular fashion? As we will demonstrate in Part III, the Constitution's text and structure go a long way towards answering these questions. A full answer, however, requires some detailed understanding of the historical and political context in which petitioning arose in England and was adopted in America.

In a modern political democracy, citizens and the government communicate—in the broad sense of the term—quite extensively. Formal channels of communication include presidential and congressional elections, judicial or administrative proceedings, and congressional or administrative investigations and hearings in which citizens participate. More informally, citizens can communicate with government through media outlets ranging from national or international media centers to local newspapers to talk radio. In view of the myriad forms of direct and indirect communication with

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[18] *See* Lawson, *supra* note 14.

[19] For a detailed defense of this claim, see Lawson & Granger, *supra* note 17.

[20] *See* Gary Lawson, *Who Legislates?*, 1995 PUB. INTEREST L. REV. 147, 151 (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)).

the government that are now available to citizens, the mere right to petition the government seems quite meager.

It did not, however, seem meager or mere to earlier generations. The modern network of communication between citizens and government is a relatively recent phenomenon. It is an artifact of modern developments in communications technology and in theories of government. In order to grasp the original meaning of the right to petition contained in the Constitution of 1789 and affirmed in the Bill of Rights of 1791, one must understand the right in the context in which it arose nearly one thousand years ago, untainted by modern preconceptions.

A. Petitioning the Crown

The right to petition was a product of social, legal, and economic conditions peculiar to medieval England. Petitioning emerged as a form of communication between the crown and its subjects in a period when the political and social institutions of modern governance were either nonexistent or in their infancy. At a time when the crown was sovereign and held enormous powers, English subjects vitally needed the petition as a vehicle for economic and political discourse with the king.[21] The king, by the same token, needed political and financial support from important subjects in order to rule effectively or, in extreme cases, to rule at all. The right to petition emerged from this context of conflict and cooperation.

Medieval English law fully recognized the moral concept that a wrong ought to be made right.[22] Moreover, jurists of that time believed that the king was subject to the law rather than above it.[23] At their coronation, Eng-

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[21] The king had a dominant role in medieval England's private law, especially with respect to rights to real property, which economically were the most important rights for centuries. The Norman conquest entrenched a feudal system in which all land was initially vested in the king; and even after the king had granted away portions of the land, the king remained at the top of the feudal pyramid. In technical terms, feudal ownership was tenurial rather than allodial; under the feudal structure of land tenure, "all land is still held of the king mediately or immediately." F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 155 (2d ed. 1968); *see also* 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 18-21 (1926). Moreover, royal grants or charters formed the basis for many economic, political, and educational activities. Since the time of Henry III (1216-1272), all franchises were generated from the express words of royal charters. Every liberty not warranted by charter had to be sued for to the king, and, in addition, all redress not obtainable in the common course of law could be obtained only by his grace and favor. Petition and grant in the king's council became one of the busiest functions of the crown. *See* J.E.A. JOLLIFFE, THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND—FROM THE ENGLISH SETTLEMENT TO 1485, at 336-37 (1937). Many private rights granted by royal charter could be broken by the king and had to be confirmed by every new king. *See* Ludwik Ehrlich, *Proceedings Against The Crown (1216-1377), in* 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 1, 10-11 (Paul Vinogradoff ed., 1921).

[22] *See* Ehrlich, *supra* note 21, at 9.

[23] Thinkers such as Bracton, in the early thirteenth century, conceived of the king and his servants as ruling according to a law that bound all the members of the kingdom, high and low alike. The king's servants did their work not merely as agents of the king's will, but as dispensers of a law that bound

lish kings took, by oath, certain obligations to their subjects in return for obedience.[24] At the same time, however, these views had to be integrated with seemingly contradictory feudal concepts that were of critical importance following the Norman conquest of 1066.

Feudalism brought into England the concept of *rex gratia dei*—"king by the grace of God." This suggested that, once anointed, the king received divine power as the vicar of God. As the king received his power to rule from God, not from the people, he was obliged to abide by God's law,[25] but he was not subject to any earthly power of control.[26] Operationally this meant that there was no legal procedure by which the king could either be punished or compelled to make redress for wrongs.[27] The procedure that English law devised to mediate this conflict between norms of legality and feudal structures was the petition.[28] "If the king breaks the law," explained Maitland, "then the only remedy is a petition addressed to him praying that he will give redress."[29] In principle, the medieval petition was a request rather than a command. In rare cases, however, petitioners had the strength to force acceptance of their petitions. Magna Carta in 1215 was the result of one such episode in which King John had no choice but to accede to the petition of the powerful barons, who formally stood just beneath the king in the feudal hierarchy.

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both rulers and subjects. *See* 2 HOLDSWORTH, *supra* note 21, at 254; *see also* Ehrlich, *supra* note 21, at 14-15.

[24] These promises were limitations that medieval men commonly supposed distinguished kings from tyrants. *See* BRYCE LYON, A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND 140 (2d ed. 1980). While some of these oaths were vague—consisting of promises to observe peace, abolish evil laws and customs, and to maintain the good—others had more bite. Henry III apparently promised that he would "hold the laws and customs of the realms which the people shall have made and chosen and will maintain and uphold them and will put out all bad laws and customs." MAITLAND, *supra* note 21, at 99; *see also* COLIN RHYS LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY: A SURVEY 73-74 (1962) (noting that the Coronation Charter was "of fundamental importance in English constitutional history because it placed the king under law," and observing that "[a]lthough Henry I ignored the charter at his convenience, the fact remained that a formal document had declared that certain things, even when done by the king, were illegal.").

[25] *See* LEON HURWITZ, THE STATE AS DEFENDANT: GOVERNMENTAL ACCOUNTABILITY AND THE REDRESS OF INDIVIDUAL GRIEVANCES 10 (1981).

[26] *See id.* at 10-11 (describing the view that the king cannot be held accountable in any temporal tribunal, as this would essentially be a revolt against God).

[27] The feudal system did not allow feudal inferiors to complain about the actions of those hierarchically above them in the feudal pyramid. The feudal lord of each rank established a court to adjudicate disputes and enforced, possibly as judge, the legal codes that applied to his serfs. A lord could obviously not be tried in his own court without his consent, though he was subject to proceedings in his superiors' court. But there was no court above the king's, and thus no temporal forum that had jurisdiction over him. *See id.* at 11; Homer Allen Walkup, *Immunity of the State from Suit by its Citizens—Toward a More Enlightened Concept*, 36 GEO. L.J. 310, 313 (1948).

[28] *See* Ehrlich, *supra* note 21, at 21-26.

[29] MAITLAND, *supra* note 21, at 100. For, as Bracton explained, "[t]he king is below no man, but he is below God and the law . . . though if he breaks it, his punishment must be left to God." *Id.* at 100-01.

Magna Carta recognized many rights, including the right to petition.[30] But this right was very limited in scope, as it applied only to barons, and the petitioner could meet with punishment for exercising the right. More fundamentally, Magna Carta did not recognize petitioning as an end in itself, but viewed it instead as the procedural vehicle for enforcing the rest of the Charter. If the barons thought that the king had failed to comply with the substantive provisions of Magna Carta, they could ask him by petition to remedy the grievance; if he failed to do so, the barons were given what amounts to a legal right of revolution.[31] The king, in return, received assurances that his government would be appropriately financed.

Although the right to petition was initially granted in Magna Carta only to the king's barons, the circle of people who were given access to the monarch steadily widened, as did (not at all coincidentally) the royal government's financial needs. Eventually, other segments of society, including knights and burgesses, were customarily granted audiences by the crown.[32]

By the thirteenth century, Englishmen sent petitions to the highest levels of government, including the king and council, long before Parliament assumed its ultimate organization and importance.[33] Petitions became especially significant during the fourteenth century, which saw the gradual breakdown of feudalism, the consolidation of political institutions, and the emergence of a strong sovereign with a centralized bureaucracy.[34] English monarchs openly encouraged petitions[35] and did not ignore them when they were received.[36] Petitions became frequent, reaching enormous popularity during the tumultuous seventeenth century.

In early times, petitioners did not enjoy any immunity from prosecution or persecution for their petitioning activities. One could be, for example, sentenced to death for complaining in a petition about the expenses of

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[30] *See* MAGNA CARTA ch. 61.

[31] King John conferred on 25 of the barons, almost all of them declared enemies, a legal right to organize a rebellion whenever in their opinion he had broken any one of the provisions of Magna Carta. Violence might legally be employed against him until he redressed their alleged grievances. Opposition leaders at the time apparently considered this a practicable scheme of government. *See* WILLIAM SHARP MCKECHNIE, MAGNA CARTA 468-77 (2d ed. 1914); *cf.* LOVELL, *supra* note 24, at 117 (suggesting the clause contained elements of considerable sophistication for its time).

[32] *See* Spanbauer, *supra* note 2, at 23.

[33] And before there was a clear demarcation among executive, legislative, and judicial functions. *See* RAYMOND C. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 9 n.1 (1979).

[34] *See* Smith, *supra* note 2, at 1155.

[35] *See* David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 LAW & HIST. REV. 113, 114 (1991) ("Official requests for petitions by Edward I (1272-1307) encouraged the widespread practice of petitioning."); Smith, *supra* note 2, at 1155, 1157 (noting the encouragement to petition provided by Edward III (1327-1377), James I in 1622, and Charles I in 1644).

[36] *See* Frederick, *supra* note 35, at 115 ("Historians are quick to point out that the English king showed no trepidation in rejecting petitions he found distasteful, but he did not simply ignore them.").

the king's household.[37] Following the Glorious Revolution of 1688, however, the 1689 Declaration of Rights proclaimed that "it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning is illegal."[38]

B. Petitioning Parliament

Beginning with the reign of Edward I, an increasing number of petitions were sent to Parliament.[39] Indeed, consideration of petitions became one of the main functions of medieval parliaments,[40] occupying a great deal of their time. By the end of the thirteenth century, Parliament was receiving several hundred petitions per session.[41] Parliament took these petitions very seriously and made a determined effort to assure that they received appropriate consideration and responses. Although many petitions required action or redress by the king in Parliament, Parliament appointed receivers and auditors to sort through the petitions and refer as many as possible to the courts and administrative departments. Parliament initially allowed these appointees to answer petitions on its behalf.[42] Later in the fourteenth century, the appointees were deprived of power to answer petitions if the answer involved the determination of any matter of law. The result was an overflow of petitions awaiting action that passed, unanswered, from one Parliament to the next.[43]

Parliament struggled to deal with the flood of petitions by dividing responsibility or referring matters to committees.[44] This practice suggests that it clearly intended to maintain control over petitions, even at the price

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[37] *See* Smith, *supra* note 2, at 1158.

[38] 1 W & M, Sess. 2, ch. 2 (1689).

[39] Parliament initially included the king, council, other powerful lords and churchmen and, on occasion, elected representatives from the shires and boroughs. *See* BAILEY, *supra* note 33, at 9. The king's council was the "core and essence" of the Parliament, its working body consisting of the king's great officers of state and the judges. *See* 1 HOLDSWORTH, *supra* note 21, at 352-53. Eventually, of course, power shifted from the council to elected representatives (the Commons).

[40] Early parliaments pursued two other activities. First, they transacted business of state, sometimes including taxation measures and other legislation, and second, they functioned as a judicial body. *See* 1 HOLDSWORTH, *supra* note 21, at 351.

[41] *See* BAILEY, *supra* note 33, at 9 & n.2.

[42] In 1305, clerks were appointed to receive and classify the petitions, and committees were appointed to receive and reply to them. In 1316, groups of receivers, who were usually clerks of the Chancery, were appointed to receive and classify the petitions, while the duty to hear them was turned over to persons called triers, auditors, or examiners, who were "bishops and barons with only a few of the judges and officers to aid them." 1 HOLDSWORTH, *supra* note 21, at 359 & n.2.

[43] *See id.* at 359 & n.7.

[44] In the fifteenth century, Parliament turned petitions over to the Council, and in the sixteenth century the task was divided between Council, Star Chamber, and Chancery. *See id.* at 359. By 1571, the House of Commons often considered petitions and grievances in a committee, generally a committee of the whole house. *See* BAILEY, *supra* note 33, at 12 & n.11.

of delaying consideration of important public business.[45] In 1780, the House of Commons passed a resolution, stating that its duty was "to provide, as far as may be, an immediate and effectual redress of the abuses complained of in the petitions."[46] From then on, petitioning became increasingly frequent.

As did the king, Parliament attempted from time to time to punish or regulate petitioning. A 1661 statute made it an offense to obtain more than twenty signatures to a petition,[47] though enforcement of the law since 1689 has not been vigorous.[48] One final attempt by Parliament in the early eighteenth century to assert its power to penalize petitioners dissolved in the face of popular protest.[49]

C. Petitioning Colonial Assemblies

Most of the royal charters founding new colonies contained provisions guaranteeing colonists the same rights that they had enjoyed in England,[50] and, by implication, this probably included the right to petition.[51] The right was assumed to exist from the earliest colonial times.

Colonists began to petition their authorities virtually as soon as they left their boats,[52] and in due course they pressed for explicit recognition of the right to petition. The circumstances of colonization in the seventeenth century, most notably the character of the migrating colonists, their distance from the motherland, and the relatively liberal, representative nature of

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[45] *See id.* at 12.

[46] *See* Smith, *supra* note 2, at 1167.

[47] *See id.* at 1159.

[48] *See id.* at 1162.

[49] In 1701, the grand jury of Kent presented a respectfully worded petition that fully complied with all of the requirements of the 1661 statute to the House of Commons requesting that the king be granted money urgently needed for prosecuting the war against France. Viewing the petition as a Whig political maneuver, the House voted the petition "scandalous, insolent and seditious" and committed the petitioners to prison. *See* MAITLAND, *supra* note 21, at 323; Smith, *supra* note 2, at 1162-63. A tract by Daniel Defoe defended the right to petition and protested against the imprisonment of the Kentish petitioners. Parliament retreated, the money bills requested by the king were soon passed, and the Kentish petitioners were released. *See* Smith, *supra* note 2, at 1163-65.

[50] *See* Frederick, *supra* note 35, at 116.

[51] There is actually some debate among historians concerning whether the rights protected by these charters included political rights or only legal, tenurial and private rights. *See* BAILEY, *supra* note 33, at 14.

[52] The first recorded instance of petitioning in Virginia occurred very early in the original settlement's history. The initial group of settlers disembarked on the site that became Jamestown on May 24, 1607, where they were governed by a president and council. On June 6, 1607, some gentlemen petitioned the council for "Reformatyon." *See id.* at 14-15. Similarly the first recorded act of business in the colony of Connecticut concerned a petition against trading firearms with the local Indians. *See* Higginson, *supra* note 2, at 144.

government that evolved in the colonies,[53] ensured that such recognition would be forthcoming.

In 1642, the Massachusetts Body of Liberties became the first colonial charter to provide explicit protection to the right to petition, and by the time of the American revolution, five other colonies—Delaware, New Hampshire, North Carolina, Pennsylvania, and Vermont—had followed suit.[54] All of the colonies recognized petitioning as a method by which individuals participated in government and voiced views to the local governing bodies.[55]

In time, colonists petitioned all branches of government, but the focus of petitioning became colonial assemblies as they grew in stature, power, and jurisdiction relative to the colonial authorities.[56] With both colonial governors and judges appointed by the Crown, the settlers, not unlike their fellow Englishmen, came to trust their elected representatives.[57] The assemblies, in turn, recognized that responsiveness to petitioning would enhance their prestige and authority.[58]

Faced with a vast number of petitions, colonial assemblies often referred petitions to committees to investigate, consider, and make decisions.[59] The concentration of legislative and judicial authority in one governing body,[60] the need for extensive factual examination of some peti-

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[53] Colonization was a voluntary act. To attract people to the colonies, recipients of royal grants had to offer generous terms, which could include land grants, a share in government, or both. Many colonists seeking to escape oppression in England were keenly concerned about migrating to a colony that would respect their personal rights. During the tumultuous seventeenth century, "many looked to the American wilderness as the only asylum in which they could enjoy civil and spiritual freedom." 1 T.B. MACAULEY, HISTORY OF ENGLAND 27 (1881), *quoted in* Smith, *supra* note 2, at 1170. The colonial marketplace responded accordingly. Thus, in an attempt to stimulate new migration and offer additional incentives to those already there, the Virginia company adopted more liberal policies in 1618, including the establishment of a representative assembly. *See* BAILEY, *supra* note 33, at 15; EDMUND S. MORGAN, INVENTING THE PEOPLE—THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 128 (1988). The Virginia assembly became the first representative assembly to convene in the New World. On its first gathering, in July 1619, it considered petitions presented by citizens of the colony and adopted several petitions to be dispatched to London. *See* BAILEY, *supra* note 33, at 15.

[54] *See* Spanbauer, *supra* note 2, at 27-28.

[55] *See id.* at 28.

[56] For example, in Virginia during the eighteenth century, far more petitions were presented to the legislature than to other branches of government, as colonists increasingly chose to petition their elected representatives in the lower house rather than the governor and council. *See* BAILEY, *supra* note 33, at 25.

[57] *See* Pfander, *supra* note 2, at 933-34. Voting requirements, of course, generally excluded women, blacks, and the very poor—for whom petitioning served, at times, as a substitute for suffrage. For an extensive discussion of this oft-overlooked role for petitions, see Mark, *supra* note 2.

[58] *See* Higginson, *supra* note 2, at 145.

[59] *See* Smith, *supra* note 2, at 1173.

[60] The primary function of colonial assemblies was often judicial: "[m]ost petitions in the early colonies involved private disputes that the assemblies . . . would investigate and resolve." Higginson, *supra* note 2, at 146.

tions, and the growth of the colonies combined to generate a backlog of petitions.[61] Petitions were thus occasionally held over to the next session, "but petitions were always answered."[62]

As in England, petitions were a major source for legislative initiatives.[63] Petitions were also a major source of information, presenting local concerns or complaints before the assembly, which could react by quasi-judicial or legislative remedies. "In communities that lacked developed media or party structures and that provided limited suffrage, petitioning supplied vital information to assemblies."[64]

In colonial America, local assemblies ceased attempting to punish petitioners more than fifty years before the framing of the Constitution,[65] though the right to petition "was never completely devoid of restrictions."[66]

D. Petitioning the United States

The first Continental Congress in 1774 recognized the right to petition,[67] and four of the state conventions called to ratify the Constitution required that the right to petition be guaranteed.[68] Finally, it became part of the First Amendment.

"The practice of petitioning flourished in the fledgling national legislature."[69] In the late eighteenth century, petitioning may well have enjoyed

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[61] *See id.* at 147.

[62] Spanbauer, *supra* note 2, at 33. For a description of how one colony, Connecticut, sought to address even an "oppressive number of petitions" through quasi-adjudicatory proceedings, see Higginson, *supra* note 2, at 147-49.

[63] In 1770, Connecticut's general assembly promulgated only 15 laws on its own initiative, while acting on more than 150 causes brought by petitioners. *See* Higginson, *supra* note 2, at 146. In Pennsylvania, 52% of the acts passed between 1717 and 1775 originated in petitions, *see* MORGAN, *supra* note 53, at 229 & n.58, and the Virginia legislature also "proved extremely receptive, as far more eighteenth-century laws originated directly in response to . . . petitions than from any other source." BAILEY, *supra* note 33, at 6. *See generally* Frederick, *supra* note 35, at 116 ("Just as in England, much colonial legislation resulted from petitions.").

[64] Higginson, *supra* note 2, at 153; *see also* Mark, *supra* note 2, at 2178-87 (stressing that not only the enfranchised population, but also unrepresented or underrepresented groups, such as women, felons, Indians, and even slaves, occasionally, represented themselves and voiced grievances through petitions).

[65] *See* Spanbauer, *supra* note 2, at 20-21, 30-32 (describing the development of effective immunity for petitions).

[66] *Id.* at 31; *see also* Higginson, *supra* note 2, at 149 (colonial assemblies retained the threat of contempt proceedings as a restraint on meritless petitioning).

[67] The Declaration and Resolves of October 14, 1774, held that colonists had "a right peaceably to assemble, consider of their grievances, and petition the king." 5 THE FOUNDERS' CONSTITUTION 199 (Philip B. Kurland & Ralph Lerner eds., 1987).

[68] *See supra* note 11.

[69] *See* Frederick, *supra* note 35, at 117. "By 1795, congressmen spent so much time dealing with petitions that one . . . newspaperman commented that '[t]he principal part of [Congress's] time has been taken up in reading and referring petitions.'" *Id.*

its apex in America, embracing both individual and collective written requests to the executive, legislative, and judicial branches.[70]

With respect to petitions addressed to Congress, the normal procedure in 1790 was to refer the petition to a select congressional committee,[71] much in keeping with early parliamentary practice. This elaborate treatment of petitions continued to be routine until the 1830s, when an onslaught of anti-slavery petitioning sparked heated debate about Congress's duties to receive and respond to petitions.[72] The so-called gag rule, which prohibited receipt of petitions concerning slavery, brought this era of petitioning to an end.

By the time the Supreme Court began interpreting the Petitions Clause, the eighteenth-century importance of the petition as a means of communicating grievances to government had significantly waned. In this century, the Supreme Court has tended to collapse the right to petition into the rights of free speech and expression.[73] The Court has granted only limited immunity to petitioners[74] and has concluded that the government is under no correlative duty to listen or respond to petitions.[75]

E. Why Petitioning?

The right to petition, considered in the abstract, has limited utility. It would not have amounted to much, were king, and later Parliament, disinclined to receive, discuss, and act on petitions. Yet they were consistently willing to do so, at substantial cost, over a long stretch of time. The explanation for this phenomenon, and its significance for the right to petition embodied in the American Constitution, lies in the distinctive characteristics of English political structure and constitutional law.

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[70] *See* Spanbauer, *supra* note 2, at 17-18.

[71] *See* Frederick, *supra* note 35, at 117-18.

[72] *See id.* at 118.

[73] *See, e.g.*, McDonald v. Smith, 472 U.S. 479 (1985):

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

Id. at 485 (citations omitted).

[74] The Court has afforded petitioning only a qualified immunity from libel laws. *See McDonald*, 472 U.S. at 479. In the context of the antitrust laws, the Court grants absolute immunity to legitimate petitioning. *See* United Mine Workers v. Pennington, 381 U.S. 657, 669-70 (1965); Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961). The courts do not grant such immunity to so-called "sham" petitioning that is merely an attempt to use the machinery of government to harm competitors. *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972).

[75] *See* Spanbauer, *supra* note 2, at 49-51.

English monarchs enjoyed wide authority, but never as wide as that enjoyed by the Continental absolutist kings.[76] Some early restrictions on royal authority were not very effective, such as the king's obligations to abide by God's law and to observe the oaths taken at coronation. But other limitations on the crown's power, embedded in customary and feudal law, proved more substantial. The focal point concerned control over taxation and general legislation during the time when England developed a strong central government and turned into a homogenous nation-state.

As matters evolved, the king shared power with an ever-widening circle of politically empowered subjects, who in time came to represent popular elements. Thus, government and subjects alike had an interest in addressing popular agitation peaceably. Petitioning was a vehicle—by no means the only possible vehicle, but one vehicle—through which agitation could be channeled and addressed. At most times, English monarchs fully comprehended the need for popular support of their rule. Such support lent legitimacy to their monarchies, and eventually the king needed parliamentary consent to legislation and taxation. This account, which we elaborate below, tends to explain how kings and parliaments—and, subsequently, colonial assemblies—all allowed, and indeed encouraged, petitioning by imposing few limits of substance on its practice and by demonstrating a willingness to examine petitions carefully and to grant them often enough to make them effective and attractive to citizens.

1. The Road to Magna Carta.—The ninth and tenth centuries witnessed the transformation of the Anglo-Saxon chief into a king, who, with his council of advisers—the Witan—became the central government.[77] The Norman equivalent of the Witan was the Great Council,[78] but its meetings were mainly ceremonial occasions, and it was not an effective instrument of central government. Instead, Norman kings devised the king's court, or Curia Regis, to perform administrative and executive functions.[79]

The next three centuries saw substantial growth in royal power. The greatest restraint on that power, both then and for many centuries to come, was the crown's limited financial resources. There was no distinction at

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[76] This was particularly noticeable during the reign of the House of Stuart; the policies of James I and Charles I, if successful, would have led to "royal absolutism on the Continental pattern." LOVELL, *supra* note 24, at 283.

[77] *See id.* at 9. In early times, the Witan felt free to name anyone king and could depose him as well, though this latter action was rare and usually in response to outside pressure. *See id.* at 11-12. The Witan's basic functions were advisory. *See id.* at 16. As its final act, the Witan named William the Conqueror king in 1066. *See id.* at 11, 52.

[78] Or Magnum Concilium: a meeting of all the great lords of the land, held three times a year. *See id.* at 61.

[79] The nucleus of this court was a body of 10 to 30 people who belonged to the royal household, with a number of lay and ecclesiastical barons also present. It performed many functions, including feudal court and advisor to the crown on all kinds of public business. *See id.* at 61-63.

that time between national and royal revenue or between national funds and the king's personal funds,[80] and "like everyone else the king was expected to 'live of his own.'"[81] English kings had substantial income from various sources,[82] but often made strenuous efforts to increase their revenue.[83] The difficulties lay both in the strict feudal nature of their sources and in the absence of taxes, which were established to raise state income much later.[84] English kings tapped all available sources of income to the limit and beyond.[85] They devised forms of taxation, stretched feudal incidents, and increased the user price of the judicial system.

The royal drive for power and revenue eventually produced a violent baronial reaction and a desire to confine monarchy within its feudal limits. The result was Magna Carta, a manifesto of feudalism designed to end royal encroachments on the hitherto unwritten feudal law.[86]

The simple moral of the story is that in a battle of either wills or swords with other elements of society, it was entirely possible for the king to lose.

2. Petitioning and Representation.—Feudalism had no concept of representation, in the sense that certain men can speak for and bind others. But feudal theory required bilateral consent between lord and vassal to any modification of the terms of their tenures. Magna Carta codified this principle by stating that the king could not seek to collect extraordinary aids or

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[80] *See* MAITLAND, *supra* note 21, at 94.

[81] LOVELL, *supra* note 24, at 13.

[82] These sources included their vast landholdings, which often expanded through escheats and forfeitures; feudal rights; the operation of the king's courts; the sale of proprietary rights; and the sale of offices. *See* MAITLAND, *supra* note 21, at 92-94. The king had also become entitled to some customs duties, recognized later in Magna Carta as certain "ancient and right customs . . . which merchants can be called upon to pay." *Id.* at 94. They were enough to create vast incomes. In the twelfth century, Henry II "outdistanced all other European rulers in wealth," and John "had enormous wealth and the most efficient administrative machine in Europe." LOVELL, *supra* note 24, at 84, 111.

[83] Much of the criticism of English monarchs concerned their actions in pursuit of higher income, starting as early as the reign of William II (1087-1100), who raised the value to the crown of feudal incidents. Increasing the revenues was the main preoccupation of Henry II's administration. Later kings followed suit. *See* LOVELL, *supra* note 24, at 71, 83, 100-01; *see also* LYON, *supra* note 24, at 313-14 (describing the pre-Magna Carta Angevin kings' increasingly arbitrary methods for increasing revenue used to provide for their fiscal needs).

[84] *See* MAITLAND, *supra* note 21, at 92. The only national tax in Anglo-Saxon England was the Danegeld—literally Dane money—first levied in 991 to finance defense against the Danish threat. It was accepted as a temporary measure to meet a dire emergency. *See* LOVELL, *supra* note 24, at 13-14.

[85] Among the more questionable devices used at later times were forced loans and benevolences, which were "gifts" from loyal subjects given upon threat of incarceration. *See* LOVELL, *supra* note 24, at 249.

[86] *See id.* at 111-13.

scutages, probably the closest feudal analogues to taxes,[87] "except by the common counsel of the realm."[88]

The victory of the barons in 1215 definitively established "that the king was not practically absolute," and that forces within the nation "had both the desire and the power to exercise some sort of control upon the government."[89] While later kings tried to evade the promises of Magna Carta, circumstances always compelled them to return to it.[90]

The thirteenth century saw major power struggles between king and barons, from which the monarch emerged supreme. The conflict highlighted the significance of the lesser social classes—knights, burgesses, and proctors[91]—whose support both king and barons now sought. The king and barons summoned members of these classes to meetings of Parliament, in order both to flatter them and to obtain their consent for money grants.

Magna Carta provided that knights be summoned to attend Curia Regis in order to give their assent to extra aids and scutages, but this was hardly practical. The solution was the emergence of the representative principle as a way of securing the consent of the relevant classes, which later came to include the merchants and lower clergy. This led, in turn, to an understanding among the governing classes of the need for public support[92] and, finally, to the formation of Parliament.

The general understanding was that the king did not need approval of all groups, summoned together, for new taxes. Rather, the consent of each separate affected group, summoned at the king's pleasure, met the require-

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[87] Aids, which obliged feudal tenants to provide financial assistance to their lords, were among the "incidents" of feudal landholding: rights that were held by feudal lords simply by virtue of their position in the landholding hierarchy. Custom, however, limited the imposition of aids to certain specified events—for example, the need to ransom the lord from his enemies. Extraordinary aids and scutages were essentially royal demands for revenue that fell outside the customary obligations that attached to feudal landholding.

[88] *See* LOVELL, *supra* note 24, at 113.

[89] 1 HOLDSWORTH, *supra* note 21, at 351.

[90] And, indeed, to reissue and reaffirm Magna Carta: "[t]he reissue of 1225 later became one of the first statutes in English law in 1297." *See* LOVELL, *supra* note 24, at 118, 170-71. The edict against royal taxation without the common counsel of the realm was in fact observed. *See* LYON, *supra* note 24, at 310-11, 314; MAITLAND, *supra* note 21, at 92-96.

[91] Knights were lower feudal tenants; traditionally allies of the king, they had an essential role as local administrators for the crown. Burgesses were the nonfeudal mercantile class—wealthy merchants were willing to pay the king for charters, giving their particular locality borough status, and removing it from shire control. Proctors were the representatives of the lower clergy. Some parts of the population, like Jews and serfs, were not represented and their consent was not required. *See* LOVELL, *supra* note 24, at 159-60, 165, 167, 171 n.11.

[92] In 1297, popular dissatisfaction with the king's taxation, combined with effective passive resistance, persuaded the king that without the positive backing of the realm his policies were doomed to failure; the result was confirmation of previous charters, including Magna Carta. The barons found that with the support of knights and burgesses in the Parliament of 1311, they were able to secure widespread popular assent for the ordinances they passed. *See id.* at 169-70, 179-80.

ment of "consent of all the realm."[93] In time, it became convenient to secure the required separate assents simultaneously at a single meeting, which logically took place at Parliament.

Early Parliaments served mainly judicial functions, handling pleas and petitions. Parliament was, essentially, the supreme court,[94] and legislation was not part of its business, as it would become in Tudor days. Parliament was essentially an enlarged royal council with a judicial agenda. By the end of the fourteenth century, however, the ground rules that would govern apportionment of power between king and Parliament for centuries were in place. Parliament obtained a monopoly on taxation and the power of the purse, and it came to be generally accepted that statutes could come only from the king, Lords, and Commons.

By the early fourteenth century, elected representatives were regularly included in meetings of Parliament. Individuals and communities soon began entrusting their representatives with carrying petitions to Parliament, since "Englishmen viewed their representatives almost as attorneys, charged with presenting local requests and grievances before the central authority."[95] Thus, "[w]hen the king . . . summoned representatives to his Parliament, they frequently carried with them petitions from individuals or groups in their locality for presentation to him[,] [a]nd while sitting they sometimes formulated petitions of their own, requesting relief from grievances affecting the whole realm."[96]

The House of Commons soon realized that its assent to taxation was a very effective bargaining weapon, and that by combining important petitions and complaints about taxation into common petitions, it could apply greater pressure upon the king and the House of Lords.[97] By the mid-fourteenth century, the House of Commons began drafting the common petitions in the form of statutes, and in this fashion secured the power of initiating legislation. A majority of fourteenth- and fifteenth-century laws were enacted directly in response to the private petitions brought by the elected representatives and to the common petitions that the House of Commons framed from those petitions.[98]

3. Lessons from History.—A number of points concerning the evolution of the right to petition bear emphasis. First, the right to petition

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[93] *See id.* at 170-71.

[94] Petitions to the king were sent to the courts or the chancellor, and only the most difficult ones were reserved for Parliament. The judicial function became the defining feature of Parliament: when not engaged in judicial activities, it was just another meeting of Curia Regis. *See id.* at 161, 165-66.

[95] BAILEY, *supra* note 33, at 10.

[96] MORGAN, *supra* note 53, at 223-24.

[97] *See* BAILEY, *supra* note 33, at 10.

[98] *See id.* at 11; *cf.* Frederick, *supra* note 35, at 114 ("By the seventeenth century, much of England's legislation originated in the pleas contained in petitions.").

emerged and was formed in a period before anything resembling modern notions of representative government gained any prominence. During this time, petitions were the primary channel of communication between governor and governed and a primary source of information concerning legislation. Second, the right to petition antedated modern notions of separation of powers; early English governments and, to a lesser extent, modern English governments as well, did not have clear demarcations between legislative, executive, and judicial powers. They certainly did not recognize the kind of demarcations reflected in the American Constitution. The same was largely true of colonial governments; pre-1789 legislative bodies often spent much of their time on what today we would consider judicial functions. Petitions sent to governmental bodies thus often sought what today we would regard as judicial relief. Third, and most importantly, the various governing institutions throughout history frequently had sound pragmatic reasons for taking petitions seriously. Kings recognized, especially in the face of successful opposition to their measures by powerful groups such as the barons, that they needed popular, and ultimately parliamentary, support for their activities, and in particular for their revenue. This became especially important as Parliament acquired formal power over money matters. Other important governing bodies also recognized that it was often better to receive complaints from the point of a pen than from the point of a bayonet. These insights are crucial for understanding the role of petitioning under the American Constitution and, in particular, for understanding the federal government's responsibilities to consider and respond to petitions that are addressed to it.

III. 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.[99] 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

[99] *See supra* note 2.

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,[100] "[t]he executive Power" in a President,[101] and "[t]he judicial Power of the United States" in the federal courts.[102] 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,[103] 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.[104]

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[100] U.S. CONST. art. I, § 1.

[101] *Id.* art. II, § 1.

[102] *Id.* art. III, § 1.

[103] *See* Part I, *supra.*

[104] That notification need not necessarily include a written opinion explaining the court's reasoning, *see* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1328 (1996), but it must at least include a statement of the disposition.

There is no "smoking gun" evidence to establish any of these propositions,[105] 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.[106] 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.[107]

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 con-

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[105] Indeed, there is no smoking gun evidence to establish *any* propositions about the original meaning of "[t]he judicial Power." The founding generation said virtually nothing on the subject, perhaps because "[t]he judicial Power" had not traditionally been viewed as a government function separate from the executive and legislative powers.

[106] Such a law clearly would not be "proper" and hence would not be constitutionally authorized. *See generally* Lawson & Granger, *supra* note 17 (discussing the constitutional meaning of the word "proper" in the Sweeping Clause).

[107] The same considerations, of course, explain and justify certain limitations on one's ability to petition the courts, such as requirements of form and the payment of filing fees. It is more doubtful, however, whether Congress or the courts can impose penalties or punishments based on the act of petitioning or the content of petitions. *See generally* Note, *supra* note 2 (suggesting that the Petitions Clause might call into question many applications of Rule 11 of the Federal Rules of Civil Procedure, which calls for sanctions against frivolous filings). For an extensive discussion of the obligations of the federal courts to receive and respond to petitions, see Rice, *supra* note 2.

sequences 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."[108] Each house must "keep a Journal of its Proceedings, and from time to time publish the same."[109] 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."[110] The Senate may not originate revenue bills.[111] 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,"[112] 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.[113] While many of the arguments in favor of the gag rule were simply ridiculous, the argument that each house of Congress has the

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[108] U.S. CONST. art. I, § 4, cl. 2; *see also id.* amend. XX, § 2 (reaffirming this obligation but altering the default date for commencement of the session).

[109] *Id.* art. I, § 5, cl. 3.

[110] *Id.* art. I, § 5, cl. 4.

[111] *See id.* art. I, § 7, cl. 1.

[112] *Id.* art. I, § 5, cl. 2.

[113] *See* Higginson, *supra* note 2, at 158-65 (detailing the debates over the gag rule).

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 assures 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.[114] There is no reason to think that petitions stand in a better position than treaties or presidential appointments.[115]

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 . . . ."[116] 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. As was explained in Part I, the 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.

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[114] *See* John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371 (1988).

[115] Or, for that matter, than presidential legislative recommendations. The Constitution obliges the President to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient," U.S. CONST. art. II, § 3, but does not oblige Congress to act on those recommendations.

[116] *Id.* art. V (emphasis added).

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 consideration. As Part II demonstrates, the 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.[117] 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.[118] 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.[119]

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[117] Except, of course, when the Senate is trying an impeachment.

[118] *See* Harrison, *supra* note 114, at 373-74; Randy Barnett, An Originalism for Nonoriginalists 8-9 (Mar. 23, 1999) (unpublished manuscript, on file with author).

[119] Professor Mark's account of the rise and fall of petitioning, *see* Mark, *supra* note 2, at 2230-31, rests largely on the displacement of petitioning by enfranchisement.

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.[120] 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.[121] 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 factfinding, legislative-like rulemaking, and foreign affairs functions that Locke would have described as part of the federative power.[122] 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.[123] The Constitution also attaches legal consequences to the President's inaction if proposed legislation is presented for his signature.[124] 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

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[120] *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1246-47 (1994).

[121] *See id.* at 1246.

[122] *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 199-200 (1996) (discussing Locke's conception of the federative power).

[123] U.S. CONST. art. II, § 3. The appointment power in article II, § 2 is also phrased in mandatory terms ("he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint"), but the immediately preceding context of the grant of the treaty power ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties") suggests that the Appointments Clause is best read as a grant of power rather than an affirmative duty.

[124] *See id.* art. I, § 7.

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.

IV. 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."[125]

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.[126] Our position is simply that the right to petition does not contribute anything significant to that debate.

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[125] Pfander, *supra* note 2, at 990.

[126] The consensus of modern commentators calls for the abolition of the doctrine of sovereign immunity. *See* Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions From The Public-Lands Cases*, 68 MICH. L. REV. 867, 867 (1970) ("Since the end of the last century, learned members of the legal profession have been continuously attacking the roots and branches of that judicially planted growth."). Indeed, "[n]o scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years." Roger C. Cramton, *Nonstatutory*

We will not summarize in detail Professor Pfander's lengthy and complex argument, largely because it defies easy summarizing. The argument ranges broadly across English history, American constitutional history, and normative political theory. As far as the link between sovereign immunity and the right to petition is concerned, however, the argument can be reduced to four basic propositions: (1) the Petitions Clause guarantees a right to petition any of the three departments of the federal government, including the federal courts; (2) by 1789, in England, "the right to petition had long been seen . . . as a solution to the sovereign immunity of the Crown"[127] via the so-called petition of right; (3) the concepts behind the petition of right had generally made their way into the statutes of the pre-constitutional states; and (4) there is good evidence that the federal Constitution, through Article III, makes the government amenable to suit by citizens, at the very least through suits against government officers. This is enough, Professor Pfander maintains, to warrant concluding that the Petitions Clause negates the doctrine of federal sovereign immunity.

Proposition (1) is correct: the Constitution guarantees a right to petition the federal courts. As we have seen, this even includes an obligation on the part of the courts to consider and respond to the petitions. But that says nothing about whether courts must reach the merits of any particular set of petitions. That is a question that concerns the jurisdictional reach of the federal judicial power: if sovereign immunity is a limitation on that jurisdictional reach, then it accordingly limits the power and duty of courts to address petitions seeking redress against the federal government. The heart of Professor Pfander's argument is therefore propositions (2)-(4), which attempt to establish that a right to seek redress against the government is part of the design of Article III of the Constitution and the Petitions Clause of the Bill of Rights.

One can grant all the rest of Professor Pfander's propositions, however, and they still do not add up to the conclusion that the Petitions Clause rules out a doctrine of federal sovereign immunity. Consider, for example, proposition (2), which suggests that the petition of right—a petition that asserts a legal right to redress[128]—was a vehicle for mandating judicial reme-

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Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, 68 MICH. L. REV. 387, 419 (1970). We are inclined to believe that these criticisms of sovereign immunity rest, at least in part, on a misunderstanding of sovereign immunity's role in the overall scheme of government accountability, but that is a story for another day.

[127] Pfander, *supra* note 2, at 901.

[128] As Professor Pfander explains it:

> Although some [petitions] sought the grant of a royal favor as a matter of pure grace, many petitions grounded their claims in legal right. Such "petitions of right" sought royal consent to the litigation of legal claims in the courts of justice, consent necessitated by the inability of the common law courts routinely to entertain suits or proceedings against the Crown. Assuming that the King supplied the proper endorsement ("let right be done to the parties"), the petition went to Chancery for an investigation. If seemingly well-founded, then the action proceeded to litigation in the

dies against the state. Assume that Professor Pfander is correct that by 1789, there was no longer a legal requirement of consent by the king to suit under a petition of right, so that the filing of a petition itself gave the courts power to adjudicate the claim. That is a direct argument that, in 1789, there was simply no law or tradition of sovereign immunity for the American Constitution to incorporate by silent reference. The existence vel non of a right to petition, however, is simply irrelevant to that argument. *If there is in fact no sovereign immunity*—if a sovereign is indeed subject to redress in the sovereign's own courts as a matter of law—then a petition to the courts is an appropriate vehicle for enforcing legal rights. But one must not confuse the vehicle for enforcement of a right with the right itself. A right to petition may prevent Congress from interfering with the right to seek judicial redress for governmental wrongs, but it would not itself be the source of the right to seek redress. One can have a perfectly meaningful right to petition even in a regime in which petitions seeking redress from the government need not be granted as a matter of law. As we saw in Part II, there is value, and in earlier times this value was considerable, in having open channels of communication for citizen grievances even if there is no guarantee that those grievances will be addressed. Further, it can be in the ruler's interest to address those grievances enough of the time to make petitioning a useful activity. The existence of a right to petition, including a right that incorporates the traditions of the petition of right as Professor Pfander understands them, simply does not say anything about whether that right confers jurisdiction on the sovereign's courts to adjudicate claims against the sovereign. The issue of jurisdiction requires a straightforward interpretation of the language and structure of Article III; any conclusions about the scope of the right to petition will be consequences rather than premises of this analysis.

Propositions (3) and (4) similarly function as direct arguments against the incorporation through Article III of a doctrine of federal sovereign immunity. Professor Pfander may be right about that argument, but if so, it is not by virtue of anything contributed by the right to petition—either the right contained in the original Constitution or the right articulated in the First Amendment.[129]

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

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proper court with the attorney general appearing for the Crown. The endorsement authorized the court to hear the case, to decide it on legal principles, and to render a judgment against the Crown.

Id. at 909 (citations omitted).

[129] We have some doubts about the soundness of these aspects of Professor Pfander's argument, but to air those doubts here would take us too far afield. For instance, a full assessment of Professor Pfander's argument would require a careful study of the interplay between official and sovereign immunity—a project that we hope to develop in the future.

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.

V. 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.