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Associate Professor, Rutgers University School of Law-Newark. J.D., University of Chicago; M.A., Harvard University. I am indebted to numerous individuals and institutions for their advice and support in preparing this essay. To those who generously took the time to comment on earlier drafts presented to the Annual meeting of the Law and Society Association, to the New York University Legal History Colloquium, and to the Chicago Area Legal Historians, I am grateful. R.B. Bernstein, Marcia Blaine, Sherry Colb, Christine Desan, Michael Dorf, Christopher Eisgruber, Martin Flaherty, Michael Gerhardt, Sarah Barringer Gordon, Hendrik Hartog, Felicia Kornbluh, Larry Kramer, William Nelson, John Reid, Stephan Thernstrom, William Treanor, and James Wilson all read earlier versions of the essay and went out of their way to provide me with valuable comments and encouragement. Marcia Blaine, Sarah Gordon, and Philip Hamburger generously shared the fruits of their own research with me. Presentations of early drafts to the faculties of the Rutgers Law School-Newark, the Chicago-Kent College of Law, and the Cleveland-Marshall College of Law also helped me develop this essay. Bae Smith and Elizabeth Edinger, librarians with great patience and ingenuity, and Selena Castle, Catherine L. Fletcher, Amy L. Miller, and Jennifer Welch, superb research assistance, all made this a richer essay. My deepest debt is to the late Emma Lou Thornbrough, a model historian and staunch civil libertarian, who herself had to fight gender prejudice in order to practice her craft. She first made me aware ofthe controversies posed by petitioning in American history. I am proud to have been her student.

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-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

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1. U.S. Const. amend. I. The full text of the 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." *Id.*

a strikingly greater degree of hierarchy, deference, and group identity than we observe in our 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 perfomed 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.

The story of the right to petition is thus, in many ways, a cautionary tale. On the one hand, we should be extremely careful about legal anachronism. Petitioning was a vital element in a political and constitutional culture that is not coming back. Attempts to revivify it—to make its unmediated politics the hallmark of the constitutional order—would be fraught with both theoretical and practical difficulties. On the other hand, we should be equally careful about our constitutional teleology, both as a matter of doctrine and interpretation. Corseting the current understanding of petition and assembly in seventeenth and eighteenth century formalisms would mock our own politics. Restricting speech and press rights because of a misguided originalism about the functioning of petitions as the core of political

speech would be absurd in a culture of pluralism and mass politics—to do so would be, paradoxically, to stifle the very expression that the right to petition was meant to protect. Constitutional theorists, including members of the judiciary called upon to examine the meaning of the constitutional text, would do well to remember that the vestiges of a constitutional culture now past are as much a part of the whole constitutional text as are today's most meaningful sections. Understanding the vestiges tells us a great deal about the fears and aspirations, as well as the blinders, of the Constitution's original authors. Like the colonists who insisted on replicating the rights of Englishmen on the continent they were to conquer, we should understand the full constitutional legacy, vestiges and all, the better not just to adopt, but to adapt the constitution that a culture not our own bequethed to us.

To say that the right is today moribund is grossly to understate the case. The Petition Clause, though orginally 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.[2] Moreover, the right to petition in America has received little serious attention from academics.[3] If the Supreme Court has rightly

2. *See, e.g.*, McDonald v. Smith, 472 U.S. 479, 488-90 (1985) (Brennan, J., concurring) (noting the interrelatedness of all the protections contained within the First Amendment and concluding that no greater protection attaches to defamatory speech contained in a petition than is afforded defamatory speech conveyed through other modes).

The doctrinal history of the right is set out in Jean F. Rydstrom, Annotation, *The Supreme Court and the First Amendment Right to Petition the Government for a Redress of Grievances*, 30 L. Ed. 2d 914 (1973).

One of the few areas in which the right to petition is regularly invoked and has force paradoxically demonstrates how peripheral it has become to mainstream constitutional discourse. The Noerr-Pennington doctrine in antitrust law holds that the antitrust statutes should not be construed to limit associational activity undertaken to persuade the executive and legislative branches to take actions that might have the effect of restraining trade or creating a monopoly. *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

3. For example, the most widely used treatise on constitutional law does not even discuss the right to petition. *See* Laurence H. Tribe, American Constitutional Law (2d ed. 1988). The only mention of this right in Tribe's treatise is in a footnote appended to the discussion of defamation. *Id.* at 866 n.31 ("The Court has nonetheless held, not surprisingly, that the petition clause of the first amendment does not provide absolute immunity for statements made to government officials about candidates for appointed federal office." (citing McDonald v. Smith, 472 U.S. 479 (1985))). Nowak and Rotunda's hornbook, however, does devote two sections to discussing the history and legal principles surrounding the right to petition. John E. Nowak & Ronald D. Rotunda. Constitutional Law §§ 16.53, 16.54 (5th ed. 1995). Only one of the current casebooks on constitutional law discusses the right, and then only in the briefest terms. *See* William W. Van Alstyne, First Amendment: Cases and Materials 29-32 (2d ed. 1995) (providing a brief historical discussion of the right to petition, as well as a short discourse on its relation to the other rights secured by the First Amendment and their link to the Fourteenth Amendment's Privileges and Immunities Clause). Given

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-

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the recent rise in both the theoretical and historical consciousness among some casebook authors, see, for example, Geoffrey R. Stone et al., *Constitutional Law* (2d ed. 1991), this failure of coverage is all the more intriguing.

In addition, the law review literature is staggeringly thin. No member of a law school faculty has written a purely analytic or historical article on the right. Indeed, only two such articles exist, both historical, one by a non-academic and the other by a student. *See* David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 L. & Hist. Rev. 113 (1991); Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142 (1986). Frederick's illuminating article is a highly focused piece with a limited subject matter. Higginson's note is a politically sophisticated and historically conscious study of the right, though, as his title modestly suggests, it too is a limited study. These notes have been supplemented by one, extremely brief, historical discussion of the Olive Branch Petition. Alice Tanner Boyer, *The "Olive Branch" Petition*, 22 U. Kan. City L. Rev. 183 (1953-1954) (outlining the social and political factors in colonial America that lead to the writing of the Olive Branch Petition, and providing the complete text and a short analysis of its content). Akhil Amar's discussion of the right to petition, while not purely historical, sheds light on the history of the right. *See infra* notes 228-30 and accompanying text. Political scientists and historians, even legal and constitutional historians, have, with but a few exceptions, not done much better in exploring the topic, as I will suggest throughout this article. Petitions have been discovered by social historians, who have mined them for evidence of other social phenomena. The social historians have, however, contributed nary a word about the development of petitioning itself or about the evolution of the right.

Finally, a number of other authors have employed the history of the right in arguing that the Supreme Court has misconstrued its history and therefore has embarked on a path of error in interpreting the constitutional guarantee. *See, e.g.*, Emily Calhoun, *Voice in Government: The People*, 8 Notre Dame J.L. Ethics & Pub. Pol'y 427 (1994) (arguing that the petition right protects wider participation in government than other First Amendment rights); Eric Schnapper, *"Libelous" Petitions for Redress of Grievances—Bad Historiography Makes Worse Law*, 74 Iowa L. Rev. 303 (1989) (arguing that the *McDonald* Court's historical analysis of the right to petition was incorrect); 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) [hereinafter Smith, *Shall Make No Law*] (same). Still others, including authors concerned with the Noerr-Pennington doctrine, have sought to explain or to revivify the right in one context or another. *See, e.g*, Gary Myers, *Antitrust and First Amendment Implications of Professional Real Estate Investors*, 51 Wash. & Lee L. Rev. 1199 (1994); 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); 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) (arguing that the Supreme Court incorrectly "collapsed" the right to petition into other First Amendment guarantees); Anita Hodgkiss, Note, *Petitioning and the Empowerment Theory of Practice*, 96 Yale L.J. 569 (1987) (suggesting that lawyers use petitioning as a vehicle to empower disadvantaged clients); Comment, *On Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules*, 132 U. Pa. L. Rev. 1515 (1984) (suggesting relaxation of the rules restricting litigation to lawyers); Comment, *The Right of Petition*, 55 W. Va. L. Rev. 275 (1953) (arguing against McCarthy-era attacks on civil liberties).

explored.[4] Its current desuetude, after all, seems an inappropriate measure of its importance in a different era.[5]

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.[6]

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4. At least two of the legal commentators concerned with the contemporary relevance of the clause have written explicitly to employ history as a basis for criticizing the Court's treatment of petitioning and to urge consideration of the petition clause separately from other First Amendment guarantees. *See* Schnapper, *supra* note 3, at 304-05; Smith, *Shall Make No Law*, *supra* note 3, at 1180-97. Others are more cautious, suggesting that historical examination "perhaps should spark a reconsideration" of the merger of the guarantees. Frederick, *supra* note 3, at 142; *see also* Higginson, *supra* note 3, at 165-66 (criticizing the Court and scholars' inconstancy in maintaining originalism generally while failing to follow the Framer's intent with regard to petitioning specifically).

5. Eighteenth-century constitutional rights, however, were not twentieth-century constitutional rights. For example, a right given much emphasis then—one of the most cherished and utilized that the British people possessed—was the right of petition. It is so unimportant now that it is seldom mentioned in treatises on American constitutional law.

John Phillip Reid, Constitutional History of the American Revolution: The Authority of Rights 4 (1986) [hereinafter Reid, Constitutional History].

6. I do not mean to suggest that historical analysis is objective. *See* Peter Novick, That Noble Dream: The "Objectivity Question" and the American Historical Profession (1988). Nonetheless, constitutional history is particularly vulnerable to being bent and historical analysis of a clause of minimal current relevance is least likely to be subject to such pressure.

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.[7] 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.[8] Other constitutional guarantees, because of their contemporary significance, today occupy center stage for scholars and advocates seeking to chronicle or explain their development.[9] 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.[10] That is, it is a phenomenon of considerable significance to its historical practitioners, but one that today apparently lacks immediate relevance.

Petition's historical significance is quite considerable. In this paper, I argue that the right to petition is a product of, and integral to, the polity of colonial and early national America. That polity can be characterized as far more corporate and hierarchical and less individualistic in its social and political organization than that of the liberal polity that has characterized most of the nineteenth and twentieth centuries.[11] Colonial society was characterized to a great extent by its

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Recently, Martin Flaherty has reminded the constitutional law community of the need to be attentive to the breadth and depth of historical scholarship when appropriating evidence from the past. *See* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 Colum. L. Rev. 523 (1995).

7. Other such institutions, especially voting and citizenship, have been studied on their own terms or as a means by which goals are achieved.

8. Higginson does by far the best job, noting the breadth on the social spectrum of those who did petition, granting that such participation gave every group a minimum amount of political power, and placing the right in a different historical era. Higginson, *supra* note 3, at 144-58. Nonetheless, even while acknowledging the importance of political culture, he minimizes it. Ultimately, Higginson argues that petitioning was "defeat[ed]" in the nineteenth century as a result of two factors—slavery and the flood of anti-slavery petitions. While he acknowledges changes in the underlying political culture, he is not explicit, apart from those two factors, about what those changes were or precisely how those changes in political culture altered the environment of the right to petition. *See id.* at 165-66.

9. *See generally* Reid, Constitutional History, *supra* note 5, at 4 (explaining the phenomenon by noting the transformation of the rights to trial by jury and freedom of the press).

10. *See generally* Frances A. Yates, The Rosicrucian Enlightenment (1972) (detailing the historical period between the Renaissance and the Scientific Revolution).

11. I hesitate to denominate the corporate components of the polity that I believe characterized the colonial and early national periods as republican for three reasons, though I think that such characterizations have great merit. First, I believe that academics these days use the term "republican" to mean two somewhat different, though perhaps complementary, things. Many modern academic lawyers, prominent among them Cass Sunstein, Bruce Ackerman, and Frank Michelman, use the term to describe an as yet unachieved political and governmental system in which reasoned de-

members' conscious and unconscious allegiances to groups, both formally[12] and informally[13] constituted. These groups, in turn, had recognized,[14] though not necessarily formal,[15] status in the political structure, both in relation to each other and to the state. Moreover, some groups had greater status than others, though no group was entirely excluded from participation in political matters. Put differently, every person, to the extent of membership in a group, played out political roles, even *sub silentio*.[16] The public arena of politics was not, so conceived, the realm only of the enfranchised, the wealthy, the white, or the male. Admittedly, of course, well-off white male voters occupied center stage. Nonetheless, as with the best of Elizabethan theater, politics contained plays within plays, many acted out off-stage but important to the center stage. The decline of that society, and the

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liberation rather than, for example, interest group politics, defines political conduct. While I believe that as I shall indicate, there is much in the history of the right to petition that supports a reasoned deliberation-forcing approach to politics, I am not comfortable with that as a description of the colonial world because it fails to capture that era's hierarchical and spiritual aspects. Second, while I am more comfortable with the way in which historians, especially some legal historians, use the term, I am not confident that the history of petitioning supports a conception of politics in which virtue, to put it grandly, or the public good, to put it somewhat less grandly, is put at the center of political practice. Nonetheless, the history of the right to petition has elements that support the contention that an elevated conception of the ends of politics was a mark of colonial society. Finally, republicanism is usually associated only with the late colonial and Revolutionary periods, and petitions' corporate and hierarchical aspects antedate America's republican moment. A brilliant full-blown critique of the republicanism of legal scholars from a historian's perspective is Laura Kalman, The Strange Career of Legal Liberalism (1996).

12. For example, the colonies had established churches, meaning that they were state supported. Indeed, even allegiance to one's colony was a hallmark of pre-Revolutionary America.

13. Much of the social history of the past thirty years has been devoted to exploring such identifications and allegiances.

14. The role of the "mob" is a prominent, if controversial, example. *Compare* Jesse Lemisch, *Jack Tar in the Streets: Merchant Seamen in the Politics of Revolutionary America*, 25 Wm. & Mary Q. 371 (1968), *with* Pauline Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 Wm. & Mary Q. 3 (1970). William Treanor extends the focus directly to the legal system. *See* William M. Treanor, *The People Against the Government: Essex County, New Jersey, Land Riots*, 1745-1754, *and the Restoration of Order* (October 16, 1991) (unpublished manuscript on file with author); *see also* John Phillip Reid, *In a Defensive Rage: The Uses of the Mob, the Justifications in Law, and the Coming of the American Revolution*, 49 N.Y.U. L. Rev. 1043 (1979) (discussing the legality of riots and their place in constitutional history).

15. The English Parliament, composed of the Lords on one hand and the Commons on the other, was the model for the upper and lower houses of colonial assemblies. Those assemblies, however, were but a shadow of England's, quite imperfectly replicating England in colonial societies whose political and social divisions were quite different from England's.

16. In very different contexts, this point has been made about slaves and women. *See, e.g.*, Eugene D. Genovese, Roll, Jordon, Roll: The World the Slaves Made 25-49 (1972) (explaining the legal and political role of slaves in the hegemonic culture of slave law); Mary P. Ryan, Women in Public: Between Banners and Ballots, 1825-1880 (1990) (discussing women's role in informal politics in the nineteenth century).

rise of a liberal polity,[17] gutted petition of its original constitutional and political meaning and left those persons not directly included in the liberal enfranchised polity with an even more tenuous toehold in formal politics than petition had provided.

This article begins by describing the development of the classic petition, that is, petition as it developed in colonial America. Part I traces the right to petition and its meaning from its English antecedents through the colonial experience. Petitioners in this era sought individual or collective redress of grievances from the government, usually the colonial assembly. The government, in turn, felt a socio-political obligation to hear those grievances, to provide a response, and often to act upon the complaints. To be sure, hearing often meant only referral to committee; acting, too, without question necessarily did not mean acting favorably. Nonetheless, the process reflected the seriousness of petitions to the constitution of government in colonial America. Reflecting upon that seriousness, Part I closes with a discussion of petition's significance as an emblem of the Revolution. Part II discusses the fate of petitioning in the Confederation. It analyzes the place of petitioning in the Articles of Confederation, as well as in the newly minted state constitutions. Part II also discusses the ultimate embodiment of the right to petition in the Constitution via the Bill of Rights. Part III then challenges the argument that petition disappeared in the nineteenth century, arguing that the conventional explanations for the decline of the right and its exercise are misplaced.

Petitioning did not disappear. Its character, however, changed dramatically. Distinctions in form and substance grew to distinguish personal from more general grievances. Consistent with the political changes wrought by the Revolution and the Constitution, petitions praying for remedies for the more general grievances ceased to be a vehicle whereby both the enfranchised and the disenfranchised were entitled to the ear of and consideration by the government. They came to be instead a tool of democratic mass politics, useful in creat-

17. Many law professors and some historians have seen a clear political development during the founding, in which a republican polity was rapidly displaced by a liberal one. I join most historians in rejecting so clear a dichotomy. Today, we see contradictions in thought where participants in the politics of the era saw compatibility. Similarly, legal academics are more apt to romanticize the era by taking only what is useful to today's discourse. *See* Kalman, *supra* note 11, at 174-76. While it is true that late colonial society was more organic, and republican, than America in the late twentieth century, I hope to demonstrate not just that a central political institution—petition—embodied not only liberal components in an organic era, and *vice versa*, but also that each era embodied its own constitutional ironies. For example, to pick but one irony, in an era (late colonial) in which women were excluded from voting, they nonetheless could wield power via petition, precisely the power that was diminished in an era (mid-nineteenth century) in which the franchise was extended—but not to women. Jan Lewis has written an excellent analysis of the constitutional status of women between those two periods. *See* Jan Lewis, *"Of Every Age Sex & Condition": The Representation of Women in the Constitution*, 15 J. Early Republic 359 (1995).

ing political dramas and highlighting legislative deadlocks, to the detriment of popularly-initiated deliberation on grievances. At the same time, petition proved to be a political training ground for the disenfranchised, who learned how to play a role in the new world of mass electoral politics without the ballot and who sought through that knowledge to gain the ballot. As petition's socio-political meaning changed, so did its constitutional status. From its place as a, if not the, universal form of political participation, which was protected first for its value in providing information to the sovereign and later as everyone's entry into political society, petition came to be just another form of political speech, worthy neither of heightened protection nor even special analysis. The political force of petitions was thereby transformed. The change in regard for petitions also meant that even a person or persons petitioning for remediation of a private grievance or for governmental favor lost the power to force the legislature to pay heed to the complaint. Private petitions continued to exist, of course, and continued to have utility for petitioners, sometimes enormous utility. Petitioners could, however, no longer rely on a constitutional politics that mandated legislative attention.

I. THE COLONIAL EXPERIENCE

The American colonies adopted and adapted the right to petition from petition's English precursors. In that respect, the right to petition differs little from other colonial forms of law, governance, and politics.[18] Modern petitioning differs in importance so wildly from petition's importance in the colonial era, however, that its salient features have been ignored, misunderstood, or unintentionally downplayed by modern analysts.[19]

In the colonial era, a petition was, in the words of one commentator, "an affirmative, remedial right which required governmental hear-

18. *See generally* William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830, at 8-10 (1975) (introducing his study of the adoption and adaption of the common law in Massachusetts).

19. Christine Desan is the legal academy's important exception. She places petitioning squarely within her discussion of the evolution of colonial legislatures. Petitioning was part of a governmental scheme in which,

> [t]he legislature acted . . . within a context that was supposed to produce *legality* as opposed to acts of will, power, or grace. Representatives used legal categories to recognize public obligations to citizens; rights existed and had force in the political arena. The assumption that the assembly could produce legality comported with a culture in which many actors participated in determining law.

Christine A. Desan, The Constitutional Commitment to Legislative Adjudication in the Early American Tradition, 111 Harv. L. Rev. 1381, 1463 (1998). In addition, at least two historians have identified petitions as key to understanding the legislature's role in colonial America and its relationship with the electorate. *See* Alison G. Olson, *Eighteenth-Century Legislatures and Their Constituents*, 79 J. Am. Hist. 543 (1992); Alan Tully, *Constituent-Representative Relationships in Early America: The Case of Pre-Revolutionary Pennsylvania*, 11 Can. Hist. J. 139 (1976).

ing and response."[20] Petitioning was a right enjoyed by all persons and one which all classes and strata exercised, at least to some degree, both individually and collectively.[21] 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.[22] Indeed, in a liberal and formally egalitarian society, that may be a proper understanding.[23] 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 history 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.

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20. Higginson, *supra* note 3, at 142 (emphasis omitted). Higginson's use of the modern legislative term "hearing" may overstate the case. In the colonies, petitions were received and, so far as we can tell, read and responded to. *See infra* notes 156-71 and accompanying text. In practice, those "ignored or rejected outright . . . were few in number." Tully, *supra* note 19, at 146-47.

21. While examples of the use of petitions by persons of the lowest social and political strata abound, any discussion of their right to petition is complicated by the terminology used in contemporary legal references. For example, while the Constitution itself refers to petition as a right "of the people," throughout the colonial and early national periods commentators often referred to the right as one belonging to a more limited class, such as "citizens" or "freemen." Without delving too deeply into the etymology of the terms, or their contemporary significance, political and legal practice was quite latitudinarian, allowing the widest spectrum of persons to participate, including those who were neither citizens nor free.

22. One prominent legal historian has claimed that the right to petition was, by the eighteenth century, exactly what the vote is to the twentieth century. *See* Reid, Constitutional History, *supra* note 5, at 23 ("The right of petition was both specific—to voice a particular complaint or solicit a particular favor—and general: the right's chief function was to protect all other rights.").

23. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 555 (1964). The Supreme Court is not alone in making such political assumptions. Distinguished students of politics agree. *See, e.g.*, Judith N. Shklar, American Citizenship: The Quest For Inclusion 25 (1991) ("[V]oting is central to our entire system of government. The simple act of voting is the ground upon which the edifice of elective government rests ultimately."). Even a study of the multifaceted forms of political participation in modern society grounds them all on voting. Advisory Commission on Intergovernmental Relations, Citizen Participation in the American Federal System 1 (1979) ("First of all, [citizens] vote. Voting for officials-both in the nominating and the electoral processes-and on ballot issues is the fundamental form of citizen participation upon which representative democracy rests."). The same survey does not even mention petition in its list of "Forms of Citizen Participation." *Id.* at 2 fig. 1.

Chronicling references to redress and petition as far back as possible in English legal history, that is to Magna Carta and somewhat beyond,[24] 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.[25] 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.[26] 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.[27]

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

24. *See, e.g.*, Don L. Smith, The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations 12-15 (1971) (unpublished Ph.D. dissertation, Texas Tech University) [hereinafter Smith, The Right to Petition] (tracing the development of petitioning at least to Edgar the Peaceful during the years 959 to 963 A.D.).

25. *See id.* at 10-15. The textual summary in this and the following paragraphs and footnotes dealing with pre-Magna Carta practice and law relies on Smith's review of primary and secondary sources.

26. The disputes for which petition for redress was possible and which were referred to in the codifications were disputes about property rights between individuals.

27. The limits on the right to petition that appear to be contained in the early codifications may not have stopped petitions that both sought original resolution of disputes by the king or petitions on more general matters. Nor should the codifications necessarily be taken to reflect a practice of petitioning for limited ends. Indeed, codifications may have embodied a reaction to petitions seeking original or general relief, or both. Nonetheless, we have little evidence to support such possible interpretations.

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."[28] 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.[29]

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.[30] 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

28. J. C. Holt, Magna Carta and Medieval Government 292 (1985) [hereinafter Holt, Medieval Government].

29. After paragraphs securing the ends sought by the barons, Magna Carta provides, in part, in paragraph 61,

> Since, moreover, we have granted all the aforesaid things for God, for the reform of our realm and the better settling of the quarrel which has arisen between us and our barons, wishing these things to be enjoyed fully and undisturbed in perpetuity, we give and grant them the following security: namely, that the barons shall choose any twenty-five barons of the realm they wish, who with all their might are to observe, maintain and cause to be observed the peace and liberties which we have granted and confirmed to them by this our present charter; so that if we or our justiciar or our bailiffs or any of our servants offend against anyone in any way, or transgress any of the articles of peace or security, and the offence is indicated to four of the aforesaid twenty-five barons, those four barons shall come to us or our justiciar, if we are out of the kingdom, and shall bring it to our notice and ask that we have it redressed without delay.

Manuscript Cii of Magna Carta (1215) (translation from text compiled by C. Bemont, Chartes des libertes anglaises (1892)), *in* J. C. Holt, Magna Carta, at 448, 469-71 (2d ed. 1992) [hereinafter Holt, Magna Carta].

30. A fierce and now decades-old struggle exists among English legal historians concerning precisely whose liberties were secured by the Charter. On the one hand, emphasizing passages having to do with the nation, lore has it as securing the rights of the English nation. *See, e.g.*, 1 William Stubbs, The Constitutional History of England: In Its Origin and Development 569-72 (5th ed. 1891) (1874). On the other hand, revisionists note that Magna Carta is, after all, really an agreement between the King and the nation's elites, especially the barons. *See, e.g.*, Edward Jenks, *The Myth of Magna Carta*, 4 Indep. Rev. 260 (1902) (dispelling the myth that Magna Carta represented the will and power of the people). James Holt, perhaps the Great Charter's leading historian in our time, sidesteps that debate, rightly noting that the modern significance of the debate is not about the actual legal effect of the Charter then or today, though, amazingly, small portions of the text survive as law, *see* Holt, Magna Carta, *supra* note 29, at 1-2, but rather, for both historical and legal reasons, "why it rather than any other document came to play the role it did." *Id.* at 21.

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.[31] From the beginning, petitions were a formal and peaceful way to draw the attention of the King and his counsellors to grievances.[32] Given the difficulty of communicating with the government as well as the limited access to the King and his council,[33] petitions were also the most convenient and the most effective method of calling attention to a grievance. Petitions, by default, became a

31. A petition could embody a grievance that could be redressed by the King's favor or some form of administrative act. Petitions could also require judicial action, which came to be resolved through the royal appointment of triers of petitions from among the Lords. Many petitions, however, contained grievances requiring remedies that could only be described as legislative. Thus, when the King convened Parliament to obtain funds, Parliament conditioned the provision of funds on the granting of petitions. Thus the King was usually, though not always, left to devise methods to implement the requested redress. To effect redress, the King and his council often wrote statutes and those statutes, not surprisingly, were drafted to the advantage of the king. In 1414, King Henry V agreed not to enact laws contrary to the requests of the Commons without consent. The Commons, however, did not get into the business of drafting legislation for public bills as a general matter until the sixteenth century. *See* J. Harvey & L. Bather, The British Constitution 23 (4th ed. 1977). Norman Smith's interesting article thus confuses the claim his source, Harvey and Bather, makes when he cites it, suggesting, "It was not until the Sixteenth Century that legislation came to be enacted by statute rather than by petition." Smith, *Shall Make No Law*, *supra* note 3, at 1156; *see also* K. Smellie, Right of Petition, *in* 12 Encyclopedia of the Social Sciences 98, 98 (1934) ("The ordinary mode of legislation was by statute made on petition of the Commons. The words petition and bill were used interchangeably in legal and common speech down to Tudor times." (citation omitted)).

32. *See* J.E.A. Jolliffe, The Constitutional History of Medieval England: From the English Settlement to 1485, at 405 (4th ed. 1961); Smellie, *supra* note 31, at 98.

33. Quite apart from political distance, physical distance and rudimentary transportation made frequent or regular appearances before the King quite difficult for all but the most local. Moveover, the King quickly sought to avoid audiences with petitioners and required that petitions be in writing.

mechanism whereby the King and his counsellors[34] were informed of political complaints, asked to review actions of government officials, and through which individuals and groups suggested changes in policies.[35] That is, individuals and groups petitioned for redress of both public and private grievances.

For example, in 1301, the King was presented with a Parliamentary petition based on individual petitions to the king containing eleven articles concerning the prices of foodstuffs taken by the King's servants, taxes on various goods, the value of money, delays in justice resulting from writs of protection, the sale of pardons, illegal constabulary jurisdiction, jurisdiction of royal officers, improper escheatments by the King's officers, and inadequate mechanisms to handle petitions to the King in Parliament.[36] These grievances, reflecting concerns over the economy, the responsiveness of government, the administration of both judicial and executive matters, and the extent of government officers' authority, all addressed to the King via Parliamentary petition, suggest that early English jurisprudential consciousness did not reflect a belief that different fora or methods of resolution were either necessary or appropriate for each category of grievance.[37] The petitions did not recognize fine *a priori* distinctions in categories of judicial, legislative, or executive authority, nor did they recognize a

34. Hannah Pitkin, in her classic work on representation, has suggested that the King's council was key because "attendance at Parliament was a chore and a duty, reluctantly performed." Hannah Fenichel Pitkin, The Concept of Representation 3 (1967) (footnote omitted). Moreover, Parliament itself did not begin to have petitions addressed to it until the late fourteenth or early fifteenth century.

35. Raymond C. Bailey, Popular Influence Upon Public Policy: Petitioning in Eighteenth-Century Virginia 9-10 (1979); Smellie, *supra* note 31, at 98.

36. *See* 2 William Stubbs, The Constitutional History of England: In Its Origin and Development 338-39 (4th ed. 1896) (1876).

37. *See* Smellie, *supra* note 31, at 98. Parliament's rising power, a result of its control over taxation, gave it leverage in bringing any matter contained in a petition to the attention of the King and his counsellors and making those matters the subject of legislation. Moreover, because petitions, even individual petitions reflecting personal grievances, served as the basis for much legislation of general significance, *see* Bailey, *supra* note 35, at 10-12; Smith, The Right to Petition, *supra* note 24, at 21-30, distinctions between what appear to be public and what appear to be private concerns should not be treated as clear indications that a grievance was public or private in the modern sense.

The single exception appears to be a narrow judicial one. When the king appointed a trier of a petition, the trier would often refer the petition to the appropriate court if law existed to handle the complaint. Petitioners, however, were able to circumvent even that exception by addressing their petitions to the Commons rather than the King. So quickly did the private bill in the Commons supersede the judicial role of the Lords that, by the seventeenth century, "[the House of Lords] had not been required to exercise that authority for almost 300 years." James S. Hart, Justice Upon Petition: The House of Lords and the Reformation of Justice 1621-1675, at 2 (1991). Ironically, in 1621, the Lords—on the basis of petitions—began again to exercise their "broad[ ] legal authority . . . to act as the court of last resort for any party who had been victimized by failings in the legal system." *Id.*

deep theoretical gulf between public and private grievances.[38] A request from an individual or a community, for example, could be handled either administratively or through a statute.[39] Indeed, even the distinction between judicial and legislative matters could be quite opaque. After the accession of Henry IV, individuals often sought what would become known as private bills from the Commons, Parliament generally, or the king in council rather than turn to the King to appoint a trier from the Lords to resolve a grievance.[40] The evolution of the English system for handling petitions thus suggests caution in reading back into the colonial understanding any *a priori* conception of separation of powers, much less modern visions about the public/private distinction or the roles of any given governmental mechanism for handling a given grievance.[41]

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.[42] 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[43] or, after the beginning of the fifteenth century, that the House of Commons forwarded to him.[44] Parliament thus had an interest in considering all petitions be-

38. Nor should this be surprising. Separation of powers is a difficult subject which remains at the core of American jurisprudence and politics today. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 696-97 (1988) (finding that the Ethics and Government Act of 1978 did not violate separation of powers). As for the public/private distinction, it is a product of later eras in which the private realm became one in which the use of governmental power became suspect. *See* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1423, 1423-24 (1982). In this essay, "public" means "general interest" and "private" means "personal interest." I am, of course, aware that "general interest" legislation is often, some would say always, motivated by private interests. I mean here only a general/specific dichotomy, though I recognize the importance of the debate about the meaning of "general interest" legislation.

39. *See* 2 Stubbs, *supra* note 36, at 426-27.

40. Smellie, *supra* note 31, at 98.

41. Although Smellie notes that "public petitions for a change in the general law" appeared in the sixteenth and seventeenth centuries, petitions for changes in the general law that were not public—that is, not aired to the public, or, as he later puts it, "a method of propaganda"—had been "[t]he ordinary mode of legislation" since Magna Carta. *Id.*

42. *See, e.g.*, 2 Stubbs, *supra* note 36, at 603 ("[T]he commons make it a part of their business to see that the private petitions are duly considered . . . ."); Smellie, *supra* note 31, at 98. Parliament's responsiveness no doubt encouraged further petitioning. Eventually the House of Commons, which had become the receiver of most petitions, either receiving them directly or on referral from the monarch, instituted processes for considerng petitions in committee or referring them to the courts. Smellie, *supra* note 31, at 98; *see also* Bailey, *supra* note 35, at 11-12.

43. *See supra* note 31.

44. *Id.*

cause any given grievance could ground an attempt to increase Parliament's power at the expense of royal authority.

Parliament's interest in noticing all petitions quite quickly evolved into both a sense of obligation on the part of Parliament to consider all petitions and a corresponding sense of right to be heard on the part of petitioners.[45] While at first glance the sense of obligation on Parliament's part appears to be the most unusual feature of petitions, it can be explained in part by the quasi-judicial origins of the instrument[46] and the quasi-judicial role of Parliament. That is, a petition addressed to the King for redress of a grievance that had the quality of a dispute was handled by a trier selected from the Lords.[47] As that system came to be disfavored—no doubt because the trier would usually refer the dispute to a court where the petitioner could have gone anyway—petitioners sought private bills in the Commons.[48] Because the petitioner ultimately chose the forum—such as the King, the Commons, or the courts—to which he addressed his petition, to the extent that each forum guarded its power, each would act to receive the petition. Thus, because it had little incentive to refuse to hear a petition, in practice, Parliament had little discretion. Also, because petitions for general or public grievances took the same form as petitions for grievances that could be resolved by private bill, and because no mechanism existed to separate one from the other, they were treated in a similar fashion.[49]

While the King and his counsellors 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.[50] Nonetheless, mechani-

45. *See* Reid, Constitutional History, *supra* note 5, at 22.

46. Colin Leys, *Petitioning in the Nineteenth and Twentieth Centuries*, 3 Pol. Stud. 45, 49 (1955) ("It is clear that originally petitioning was a quasi-judicial institution.").

47. For the precise workings of the triers, including their capacity to refer a petition to Parliament, see 3 William Stubbs, *The Constitutional History of England: In Its Origin and Development* 469 (5th ed. 1898) (1878).

48. The practice of selecting triers "lingered until 1886." Smellie, *supra* note 31, at 98.

49. As early as the fourteenth century, the Commons asserted the power to hear any petition that required a "change of law." Smellie, *supra* note 31, at 98; *see also* 3 Stubbs, *supra* note 47, at 478 (noting the House of Commons's practice of hearing propositions for a change of law from a private party, a member of the House, or a general petition to the House); *cf. supra* note 30 (noting King Henry V's 1414 agreement not to exact laws contrary to petitions without the Commons's consent). Expansively understood, of course, that assertion of power left the Commons free to hear virtually any petition, as even private bills changed the law. The Commons apparently did not, however, use petitions that were referred to the courts as a basis for withholding an appropriation of funds. *See* 2 Stubbs, *supra* note 36, at 603.

50. Petitioners, of course, had to choose the forum they thought most likely to hear and act favorably upon their prayer. They could thus exploit the tendency of the king and Parliament jealously to guard their respective powers. Where no clear de-

cal 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 which defined English rights.[51] 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.[52] 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.[53]

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.[54] In the thirteenth and fourteenth centuries, for example, an extremely wide band of English society participated in politics by petitioning for redress of

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lineation of authority existed, as was often the case, petitioners could choose to address their petition to the most favorable authority.

51. James Wilson, relying on English constitutional law, has identified such practices as "conventions" and persuasively suggests that, especially outside the realm of what is judicially cognizable, such an understanding also informs American constitutionalism. James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules That Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 Buff. L. Rev. 645 (1992). The legislative use of petitions follows Wilson's analytic pattern.

52. *See* Smith, The Right to Petition, *supra* note 24, at 29-38.

53. The Petition of Right in 1628, for example, a Parliamentary petition assented to by the King in the form in which assent was given to *private bills*, affirmed that the King acknowledged the primacy of law. *See* Smellie, *supra* note 31, at 99.

54. *See id.* ("Petitions were a method by which the unfranchised could take part in politics.").

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, *e.g.*, those petitions signed solely by members of the nobility; by occupation, *e.g.*, those petitions expressing the grievances of merchants or scholars; by community, *e.g.*, those petitions sent from cities and shires; and in other ways clearly collective.[55] 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 acknowledgement 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.[56] 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. Because phrasings, however humble, are designed to attract attention to a petition's substance, they also necessarily invite attention to a more elementary inquiry: what phrasings were necessary to constitute and create a petition at all.

2. The Definition of a Petition

The seventeenth century, which witnessed numerous upheavals in English politics, including, of course, civil war, is key to understanding the centrality of petitioning in English constitutional thought. The century's upheavals included powerful and unfavorable responses to

55. *See* George L. Haskins, The Growth of English Representative Government 16 (1948); A.F. Pollard, The Evolution of Parliament 42, 117 (2d ed. 1926).

56. *See* Smith, The Right to Petition, *supra* note 24, at 43 ("In fact, whenever a petition offended [the King and Parliament], they simply ignored it or took years to grant settlement.").

certain petitions, including prosecutions for seditious libel among those unfavorable responses. In general, those reactions did not ultimately result in an impingement on the right to petition. Indeed, the reactions generally strengthened the right, especially insofar as petitioners' immunities were refined. What the cases also did, however, was to bring into sharp definition what a petition actually was. Of the cases, none is more instructive than that of the *Trial of the Seven Bishops* in 1688.[57]

In 1687, James II, a Catholic, issued a Declaration of Indulgence, styled as a "Declaration to all his loving subjects for Liberty of Conscience," which provided for freedom of worship.[58] James commanded that all clergy read and distribute copies of the Declaration in their churches.[59] The Archbishop of Canterbury and six other bishops then petitioned the King, asking to be excused from the duty.[60] The seven were arrested, charged with publishing a seditious libel.

One modern commentator, arguing that the Supreme Court has misunderstood the history of the right to petition, has explored the intricacies of the case to examine not just how well the right was secured by English courts, but also to tease out assumptions about what constituted publication of the libelous petition[61] and why the Crown might have valued the information contained in petitions.[62] Those issues are, obviously, of historical import and provide modern constitutional discussants with ammunition in arguing what the extent of the right might be.[63] They do not, however, answer the question of what a petition actually was.[64]

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. The Bishops' counsel wanted to ensure that the jury understood that the document containing the alleged libel was a petition and not a "pretended petition,"[65] that is, simply a document advanc-

57. 12 Howell State Trials 183 (1688).

58. The Declaration was read in Latin in court and reproduced in English in the reporter. *Id.* at 231-36.

59. The order is also part of the trial record. *Id.* at 237-39.

60. The petition itself is reproduced in the trial record. *Id.* at 318-19. The translation, with a minor omission, is reprinted in *The Case of the Seven Bishops* (1688). Sources of English Constitutional History: A Selection of Documents from A.D. 600 to the Present 583, 583-84 (Carl Stephenson & Frederick George Marcham eds. & trans., 1937).

61. *See* Schnapper, *supra* note 3, at 312-29.

62. *Id.* at 319-20.

63. Ultimately, the case simply strengthens the compilation of evidence drawn from other sources.

64. Without discussing what, precisely, made a document a petition and why, the commentator, Eric Schnapper, rightly assumed that the document in *The Case of the Seven Bishops* was a petition, *id.* at 316, and thus protected, whereas speech, even political speech, would have remained unprotected. *Id.* at 318.

65. 12 Howell State Trials at 321 (argument of Pollexfen).

ing a libel under subterfuge. The very argument, then, suggests that not all communications, nor just any document, could be regarded as a petition.

Other counsel sought to expand on the distinction between petitions and other communication, advancing somewhat formalist distinctions. Merely reading the information which contained only the allegedly libelous portions of a petition without reading the whole petition, they argued, obviated the entire defense that the form of communication was privileged:

> [T]his information and petition do not agree; for they have brought an information, and set forth, that my lords the bishops, under pretence of a petition, did make a libel, and they have set forth no petition at all; *all the petitionary part is omitted.* If I will take part of a man's words, and not the whole, and make a libel of that part, certainly that is very disingenuous and injurious: for that part that I omit may alter the sense of the whole. They here ought to set forth the petition, with the direction to the king, and the prayer at the end, whereby it will appear what the whole is, and, what was desired by their petition.[66]

The assertion that the "direction" and the "prayer" made a document "petitionary," however, was the subject of heated debate.[67]

On behalf of the bishops, Sir Robert Sawyer argued that, at a minimum, a petition required a "head" and a "tail," that is "[a] direction to [a] body" and a "prayer."[68] Or, as other counsel suggested, without "both top and bottom" a document "is called a pretended Petition."[69] The Attorney General, seeking to avoid the issue of petition's privileged status, argued that for purposes of a libel action only the libelous portion was material.[70] The Solicitor General, apparently more confident that the prohibition on seditious libel made irrelevant which kind of document contained the libel, argued that point at length:

> [I]f it be as the information says, then it is not the speaking of ill things in the body of a petition, and then giving it the good title of a petition, and concluding it with a good prayer. 'Tis not, I say, any of these that will sweeten this crime, or will alter or alleviate it . . . .[71]

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66. *Id.* at 320 (argument of Levinz, Serj.) (emphasis added).

67. *Id.*

68. *Id.* (argument of Sawyer); *see also id.* at 318 ("Read the whole petition . . . . Read the top first, Sir, to whom it was directed.").

69. *Id.* at 321 (argument of Pollexfen); *see also id.* at 323 (argument of Levinz, Serj.) ("It is quite another thing . . . by this leaving out a part . . . ."); *id.* at 360 (argument of Sir Robert Sawyer) (same).

70. *Id.* at 321 ("Sure these gentlemen have not forgot altogether the practice that has been so frequent in this court: if there be an information for a libel, is there any thing more frequent, than only to recite the material part?").

71. *Id.* at 322.

Even that argument, however, reinforced an understanding that a petition had to have certain formal components to be a petition—at least the "good title" and the "good prayer," a more auspicious phrasing of "head" and "tail."

The court ultimately agreed with the Bishops' counsel. In final argument, the members of the court made their position clear. The Recorder, Sir Bartholomew Shower, suggested that as "for the form of this paper, as being a petition, there is no more excuse in that neither: for every man has as much right to publish a book, or pamphlet, as they had to present their petition."[72] The response of the bench was curt: "Pray, good Mr. Recorder, don't compare the writing of a book to the making of a petition; for it is the birthright of the subject to petition."[73] Justice Powell was no less abrupt: "Mr. Recorder, you will as soon bring the two poles together, as make this petition to agree with Johnson's book. They are no more alike than the most different things you can name."[74] And, in his summary to the jury, the Lord Chief Justice sealed the issue, never once referring to the document as anything but a petition.[75] Before retiring to deliberate, the jury requested "the papers that have been given in evidence."[76] After having heard that the jury would receive a copy of the information, Sir Robert Sawyer prayed "they may have the whole petition."[77] Assured by Justice Holloway that they would have it with "the direction and prayer," bishops' counsel said no more.[78] Court adjourned for the day.[79] The next morning the jury acquitted the bishops.[80]

By the seventeenth century, then, what was a petition? A petition was a communication that, 1) had to be addressed to an authority such as the King, 2) had to state a grievance, and, 3) had to pray for relief.[81]

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72. *Id.* at 419.

73. *Id.* (Holloway, J.).

74. *Id.* at 420.

75. *Id.* at 421-26; *accord id.* at 426 (Holloway, J.); *id.* at 426-27 (Powell, J.); *see* also *id.* at 427-28 (Allybone, J.) (not disputing the form, but maintaining the irrelevance of the form).

76. *Id.* at 429.

77. *Id.* at 430.

78. *Id.*

79. *Id.*

80. *Id.*

81. Schnapper argues that, based on a hypothetical of bishop's counsel, a petition need "not rest on, or require the presence of, a prayer for relief; so long as a 'petition' provided the King with advice or information that might lead to the correction of 'mistaken' government action, the document served an important purpose." Schnapper, *supra* note 3, at 321 (citation omitted). The hypothetical's advice of a bishop to the King, however, was separate from the right to petition and rested on the duty of the *bishops* "as peers of the realm, and bishops of the Church of England" to advise the King that they "could not comply with his order" because his "declaration was founded upon that which the parliament declared to be illegal." 12 Howell State Trials 183, 368 (1688) (argument of Mr. Finch); *see also id.* at 369-70. Thus, where a bishop might be protected in giving advice to the King, whether in a petition or not, to be protected by the petitionary right, the petition must be from one "aggrieved." *Id.*

Petitions could be, and were, distinguished from other documents, even ones that were addressed to someone in authority and that stated a complaint.[82]

The rationale was far more than a formalism. A petition was the beginning of an official action, part of a "course of justice,"[83] not just a passing of information, even though the conveying of information *to the proper authority* was a powerful justification for petitions.[84] Just as a claim brought in court required submission in a certain manner, so did a complaint brought by petition, even if the forms required of petitioners never quite equalled in punctiliousness those required of plaintiffs at common law.[85]

The English colonists thus brought a dual heritage with them. On the one hand, they understood petitioning as the foundation of politics and of individual and collective participation in politics, warranting the highest degree of protection. On the other hand, they also knew that petitioning incorporated a certain type of constitutional politics and constitutional structure. It was a structure which replicated and reinforced a corporate hierarchy and which, while protected in its bounds, had clear formal bounds that embodied the deference and formalisms attendant on a relatively hierarchical community. Whether the heritage would survive, and if so, how it would survive so far removed from the epicenter of English political life, were among the constitutional questions facing settlers in America.

B. *Petition in the Colonies*

The American colonists brought with them English political culture[86] and sought to recreate what they perceived as its best features in their settlements. Their ambitions were tempered, however, by their fears that they might import aspects of English political life that they regarded as flawed or irrelevant. The difficulty that the colonists had in replicating their English political heritage is now well-known.[87] Their aspirations, however, were to create, if not replicate, the most important liberties of that heritage. The ideological underpinnings, even of revolutionary America, therefore evolved from the political

82. *See, e.g.*, Lake v. King, 85 Eng. Rep. 137, 139 n.2 (1668-1669) (discussing alleged libels in official reports and letters).

83. *Id.* at 140 (referring to a petition to a Committee of Parliament).

84. *Cf.* Hare v. Millows (1586-1587), *reprinted and translated in* Select Cases on Defamation to 1600, at 84 (R.H. Helmholz ed., 1985) (holding that slander in a petition to the Queen is not actionable "unless it is published before it is delivered").

85. *Cf.* Lake v. King, 86 Eng. Rep. 729, 729 (1670) ("[I]f a man make a complaint in a legal way, no action lieth against him for taking that course . . . .").

86. *See* Jack P. Greene, Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788, at 22-23 (1986).

87. *See* Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 3-90 (1969) [hereinafter Wood, Creation].

structure that preceded it.[88] The history of petition is emblematic of the complexity of that evolution.

1. Participation—The Law

Colonial experience appears not only to have replicated England's widespread use of the petition, it likely extended it in both law and practice.[89] Not only did the colonies explicitly or implicitly affirm the right to petition, they did so repeatedly.[90] In no case did the colonial affirmation of the right narrow the English right.[91] The language of letters patent and similar instruments authorizing the establishment of colonies usually granted colonists the rights of Englishmen.[92]

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88. *See, e.g.*, William Michael Treanor, *Taking the Framers Seriously*, 55 U. Chi. L. Rev. 1016, 1018 (1988) (reviewing Walter Berns, Taking the Constitution Seriously (1987)) ("While the revolutionary era witnessed a new concern with individual rights and a greater acceptance of the value of commerce, older notions of communitarianism, of public good, and of civic obligation remained powerful.").

89. *See*, e.g., Bailey, *supra* note 35, at 41 ("[A] survey of the petitions presented to the [Virginia] legislature both before and after Independence reveals that all classes utilized petitions to express their requests and grievances."); Ruth Bogin, *Petitioning and the New Moral Economy of Post-Revolutionary America*, 45 Wm. & Mary Q. 391, 392 (1988) (discussing pre- and post-Revolutionary America); Higginson, *supra* note 3, at 153 ("Not only [colonial Connecticut's] enfranchised population, but also unrepresented groups . . . represented themselves and voiced grievances through petitions.").

90. *See* Smith, The Right to Petition, *supra* note 24, at 46 ("A content analysis of the colonial charters shows that petition appears, either specifically or as one of the 'ancient liberties' of Englishmen, in over fifty provisions.").

91. Smith's argument that New Jersey limited the scope of petition is incorrect. Quoting the "Concession and Agreement of the Lords Proprietors of the Province of New Jersey," which states, "It shall be lawful for the representatives of the Freeholders, to make any address to the Lords touching the Governor and Council, or any of them, concerning any grievances whatsoever, or any other thing they shall desire, without the consent of the Governor and Council, or any of them," he argues that "address for the redress of grievances is limited to representatives of free-holders." *Id.* at 51. Smith's error is to read the Concession and Agreement as a limit on the right of petition, rather than as a grant of power to the freeholders' representatives to act on, that is, to address concerns to, the proprietary lords, regarding any grievance without first obtaining the consent of the Governor and Council. It is, in that sense, simply an emphatic statement of the petition of right.

92. *See* Letters Patent to Sir Humfrey Gylberte (June 11, 1578), *reprinted in* 1 The Federal and State Constitutions: Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 49, 50-51 (Francis Newton Thorpe ed. and compiler, Scholarly Press 1909) [hereinafter 1 Federal and State Constitutions].

> And wee doe graunt to the sayd sir Humfrey, his heires and assignes, and to all and every of them, and to all and every other person and persons, being of our allegiance, whose names shall be noted or entred in some of our courts of Record, within this our Realme of England, and that with the assent of the said sir Humfrey, his heires or assignes, shall nowe in this journey for discoverie, or in the second journey for conquest hereafter, travel to such lands, countries and territories as aforesaid, and to their and every of their heires: that they and every or any of them being either borne within our sayd Realmes of England or Ireland, or within any other place within our allegiance, and which hereafter shall be inhabiting within any the lands,

> countreys and territories, with such license as aforesayd, shall and may have, and enjoy all the priveleges of free denizens and persons native of England, and within our allegiance: any law, custome, or usage to the contrary notwithstanding.

Id.; Charter to Sir Walter Raleigh (March 25, 1584), *reprinted in id.* at 53, 55 ("all the priuiledges of free Denizens, and persons natiue of England"); Third Charter of Virginia (March 12, 1611), *reprinted in* 7 The Federal and State Constitutions: Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 3802, 3806 (Francis Newton Thorpe, ed. and compiler 1909) (Scholarly Press, 1909) (similar) [hereinafter 7 Federal and State Constitutions]; Ordinances for Virginia—July 24-Aug. 3, 1621), *reprinted in id.* at 3810, 3812 (binding General Assembly to English "Form of Government, Laws, Customs . . . and other Administration of Justice . . . ."); A Grant of the Province of Maine to Sir Ferdinando Gorges and John Mason, Esq., (August 10, 1622), *reprinted in* 3 The Federal and State Constitutions: Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 1621, 1624 (Francis Newton Thorpe, ed. and compiler 1909) (Scholarly Press, 1909) [hereinafter 3 Federal and State Constitutions] (Gorges and Mason "covenant . . . [to] establish such government . . . as neere as may be to the laws and customs of the realme of England . . . ."); Charter of the Colony of New Plymouth Granted to William Bradford and His Associates (1629), *reprinted in id.* at 1841, 1844 ("[T]he said lawes and orders [of the colony shall not be] repugnante to the lawes of Englande . . . ."); Charter of Massachusetts Bay (March 4, 1629), *reprinted in id.* at 1846, 1853, 1857 (similar); Sir Robert Health's Patent 5 Charles 1st (October 30, 1629), *reprinted in* 1 Federal and State Constitutions, *supra*, at 69, 71-72 (similar); Grant of New Hampshire to Capt. John Mason (November 7, 1629), *reprinted in* 4 The Federal and State Constitutions: Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 2433, 2436 (Francis Newton Thorpe, ed. and compiler 1909) (Scholarly Press, 1909) (similar) [hereinafter 4 Federal and State Constitutions]; Charter of Maryland (June 20, 1632), translation *reprinted in* 3 Federal and State Constitutions, *supra*, at 1677, 1680-81 (similar); Grant of the Province of Maine (April 15, 1639), *reprinted in id.* at 1625, 1628, 1630 (similar); Patent for Providence Plantations (March 14, 1643), *reprinted in* 6 The Federal and State Constitutions: Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 3209, 3210-11 (Francis Newton Thorpe, ed. and compiler 1909) (Scholarly Press, 1909) (similar) [hereinafter 6 Federal and State Constitutions]; Charter of Connecticut (April 20, 1662), *reprinted in* 1 Federal and State Constitutions, *supra*, at 529, 533 ("[T]he Subjects . . . and every of their Children . . . shall have and enjoy all Liberties and Immunities of free and natural Subjects . . . as if they and every of them were born within the realm of *England* . . . ." (emphasis in original)); *id.* at 533-34 (non-repugnancy clause); Charter of Carolina (March 24, 1663), *reprinted in* 5 The Federal and State Constitutions: Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 2743, 2746 (Francis Newton Thorpe ed. and compiler, Scholarly Press, 1909) [hereinafter 5 Federal and State Constitutions] (non-repugnancy clause); Charter of Rhode Island and Providence Plantations (July 8, 1663), *reprinted in* 6 Federal and State Constitutions, *supra*, at 3211, 3215 (similar); Grant of the Province of Maine (March 12, 1664), *reprinted in* 3 Federal and State Constitutions, *supra*, at 1637, 1639 (similar); The Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New Jersey, to and with All and Every the Adventurers and All Such as Shall Settle or Plant There (February 10, 1664), *reprinted in* 5 Federal and State Constitutions, *supra*, at 2535, 2537-38 (similar); Concessions and Agreements of the Lords Proprietors of the Province of Carolina (1665), *reprinted in id.* at 2756, 2758 (similar); Charter of Carolina (June 30, 1665), *reprinted in id.* at 2761, 2764-65 (similar); Grant of the Province of Maine (June 26, 1674), *reprinted in* 3 Federal and State Constitutions, *supra*, at 1641, 1642 (similar);

The colonists, however, did not rely solely on charters to guarantee their right to petition. To the contrary, many of the colonial assemblies explicitly affirmed the colonists' right to petition for redress. The colonial affirmations of their chartered rights took various forms. Read literally, these affirmations were neither consistent in their language nor in the persons to whom the right apparently adhered. In every case, however, they presented some statement of the right.

When it adopted the Body of Liberties in 1641, Massachusetts was among the first colonies explicitly to affirm the right. The stated breadth of the right is, moreover, indicative of the extent to which petition was regarded as a key political right.

> Every 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 move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it [can] be done in convenient time, due order, and respective manner.[93]

By its terms, the Body of Liberties opened the governing bodies not just to residents, but to anyone who had reason to communicate with the colonial authorities, even those who were not free. The rigid dichotomy of slave and free that would come to characterize America was still on the horizon at this early point in colonial history. Because slavery was not a condition embodied in contemporary English domestic practice, not excluding slaves implicitly included them in the right to petition—at least in theory. As Winthrop Jordan has noted, however, not only was chattel slavery known to inhabitants of the Bay Colony, they "codified their ambivalence" about it in that same Body of Liberties, on the one hand prohibiting slavery in the colony and on the other allowing it.[94] The authors of the Body of Liberties therefore

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Charter or Fundamental Laws, of West New Jersey, Agreed Upon (1676), *reprinted in* 5 Federal and State Constitutions, *supra*, at 2548, 2548 (similar); Commission of John Cutt (September 18, 1680), *reprinted in* 4 Federal and State Constitutions, *supra*, at 2446, 2446 ("Our loving Subjects . . . may be protected and Defended in their respective rights, liberties & properties . . . ."); Charter for the Province of Pennsylvania (1681), *reprinted in* 5 Federal and State Constitutions, *supra*, at 3035, 3038 (non-repugnancy clause); Commission of Sir Edmund Andros for the Dominion of New England (April 7, 1688), *reprinted in* 3 Federal and State Constitutions, *supra*, at 1863, 1864 (same); Charter of Massachusetts Bay (October 7, 1691), *reprinted in id.* at 1870, 1882 (same); Charter of Georgia (June 9, 1732), *reprinted in* 2 Federal and State Constitutions, *supra*, at 765, 770 (same); *see also* Smith, *Shall Make No Law*, *supra* note 3, at 305-07 (listing in two appendices colonial charter protections for "ancient liberties" and enjoyment of "All Rights and Liberties of Englishmen").

93. A Coppie of the Liberties of the Massachusetts Collonie in New England (December 1641), *reprinted in* 1 Documents on Fundamental Human Rights: The Anglo-American Tradition 122, 124 (Zechariah Chafee, Jr., ed. & compiler, 1963) (1951) [hereinafter 1 Documents on Fundamental Rights].

94. Winthrop D. Jordan, White Over Black: American Attitudes Toward the Negro, 1550-1812, at 67 (1968).

knew of slavery among other forms of servitude, but did not explicitly exclude slaves from the right. And, as Oscar and Mary Handlin have noted, slavery was a condition, albeit an extreme one, on a continuum describing forms of labor in America: "[T]he antithesis of 'free' was not 'slave' but unfree; and, within the condition of unfreedom, law and practice recognized several gradations."[95] Thus, in Massachusetts at least, slaves, as well as, for example, indentured servants, had the right to petition—again, at least in theory.

Not all colonies were so explicit or so liberal with political rights. In 1639, for example, when the Maryland General Assembly passed an "Act for the Liberties of the People," it did so in terms both more general and less generous: "[A]ll Christian inhabitants of the colony, slaves excepted, shall have and enjoy all such rights and privileges and free customs . . . as any natural born subject of England hath or ought to have and enjoy."[96] In some places and at some times, therefore, the universality of the right was sometimes compromised, although, yet again, that compromise may also have been only theoretical. Nonetheless, many years later, Maryland's neighbor, Virginia, in a confrontation with British authorities over Virginia's support of Massachusetts in its opposition to the Townshend Acts, affirmed what had, in practice, been the right widely exercised virtually everywhere in the colonies. "[I]t is the undoubted privilege of the inhabitants of this colony, to petition their sovereign for redress of grievances . . . ."[97] The term "inhabitants" accurately reflected the breadth of participation by that point.[98]

2. Participation—The Practice

The enfranchised—property-owning adult white males—made the most vigorous use of petitions.[99] Even the better off, who had both

95. Oscar & Mary F. Handlin, *Origins of the Southern Labor System, in* Colonial America: Essays in Politics and Social Development 341, 343 (Stanley N. Katz ed., 1971).

96. An Act for the Liberties of the People, *collected in* 1 Archives of Maryland: Proceedings and Acts of the General Assembley of Maryland, January 1637/8 - September 1664, at 41 (William Hand Browne ed., 1883). Because slavery as a legal condition was an American, not an English, domestic institution, the exclusion of slaves did not mean that the right was theoretically narrower in Maryland than England—the class of individuals excluded did not exist, as such, in England. Of course, to the extent Maryland's implicit prohibition was enforced, a portion of the population would not enjoy the right.

97. Virginia Resolutions (May 16, 1769), *reprinted in* 1 Documents on Fundamental Rights, *supra* note 93, at 176, 176.

98. *See* Bogin, *supra* note 89, at 395 (describing her examination of petitions presented from 1762 until 1794 in New Hampshire, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, and South Carolina).

99. In discussing the use of petitions in the colonies, I have relied on Bailey's monograph on Virginia, which is based on a thorough study of unpublished primary sources (manuscript petitions), Higginson's note on Connecticut, which surveys pub-

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."[100] 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.[101] In short, the well-born and well-off sought governmental assistance to maintain and enhance their social position.[102]

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.[103]

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lished primary sources (petitions printed or mentioned in official records), and other secondary literature which examines similar published and unpublished sources in several colonies, though for purposes other than surveying the use of petitions. I have supplemented these materials by examining all references to petitions, including copies of and excerpts from petitions in the published records of Pennsylvania, Georgia, and New Jersey. The quality of published colonial records varies widely, though they have been collected and microfilmed as "Published Colonial Records of the American Colonies," available from Research Publications. (Title Listing on file with author.) Philip Hamburger generously shared his microfilm of religious petitions in Virginia with me. Although manuscript petitions are available, the quality of the collections in official state files, state libraries, historical societies, and elsewhere varies enormously from state to state. Record-keeping policies, both formal and informal, as well as the ravages of time—including fire, floods, insects, vermin, and the Revolutionary and Civil Wars—have made the collections spotty. Moreover, modern libraries are just that, modern, designed for modern concerns. The decline of petitioning means, among other things, that petitions have not been collected, saved, and categorized as have statutes, appellate cases, and the like. For these reasons, as well as reasons of the economy of time and the difficulties in verifying source materials, I do not cite to unpublished petitions. I urge others to make more detailed inquiries than I have been able to make.

100. Bailey, *supra* note 35, at 41-42.

101. *Id.* at 42.

102. *See id.* (noting a petition calling for economic privileges in colonial Virginia); Tully, *supra* note 19, at 144 (discussing Pennsylvania); Higginson, *supra* note 3, at 151 (noting the same in colonial Connecticut).

103. Ruth Bogin set out to find such groups in her examination:

> The vast scope of petitioning far exceeded my expectations and precluded full analysis. For close reading I made a selection of fifty-eight petitions to state or colonial legislatures (in addition to eight others reprinted or analyzed in secondary sources) in order to study the tone and language that poor and middle-class Americans were using in the late eighteenth century to press for redress of economic grievances, and to ferret out the ideological arguments they made or implied in support of their claims. One or more of

Eighteenth century Virginia, for example, witnessed passage of legislation suggested by petition that served perceived economic needs of different groupings within the political economy. Not all such petition-based legislation was mere interest group politics of the dominant group, however. At times, the Virginia government acted to control one economic group for the benefit of another. Nonetheless, as when it "forb[ade] the exportation or engrossing of staple foodstuffs during periods of domestic shortage,"[104] the resulting legislation had a genuine public character. Such regulation tempered the profits, if not the avarice, of the planting and commercial classes, while at the same time reinforcing the state's role as the enforcer of reciprocal obligation among society's constituent elements.[105]

Eighteenth century Pennsylvania saw similar petition-prompted regulation, which tempered the gain of one occupational group to preserve spheres of operation for others. In Pennsylvania, for example, petitions regularly called for regulation of tanners to limit exportation and thus preserve the work of cordivariners and sadlers. The tanners, not surprisingly, counterpetitioned—apparently unsuccessfully—in their own defense. Nonetheless, the Pennsylvania example is an excellent cautionary tale concerning overreading the ideological component of petitions, for the tanners were, simultaneously, the topic of petitions complaining of the quality of their product.[106] In the quality complaint it is difficult to discern the same radical ideological component as one might tease out of the exportation complaint. The complaints do, however, identify a clear occupational basis for the petitions.

As the Pennsylvania example suggests, while the petitions of groups and strata could carry ideologically charged messages, most of the

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the following criteria guided my choice of documents: legibility, inclusion of a date or indication of probable timing, numerous signers, lower-class occupations, references to ideology, and the substance of the petitions. *I concentrated on petitions endorsing price control and related measures for equal access to scarce necessities, advocating paper money and other forms of debtor relief, protesting regressive tax policies, and demanding widened access to landownership.*

Bogin, *supra* note 89, at 395-96 (emphasis added). Her source selection led her to overstate the ideologically radical element of the components of society she identifies. Other studies, such as Bailey's, suggest that, while radical ideology did on occasion characterize the demands of certain groups, radicalism was rarely dominant. *See* Bailey, *supra* note 35, at 43-45. Indeed, as the *unstudied* petitions left out of Bogin's own survey appear to suggest, even in the Revolutionary era, an important period of radicalism in America, petition-based radical expression was sporadic. Nonetheless, Bogin's work makes quite clear that petition did serve overtly political ends of certain societal components. *See* Bogin, *supra* note 89, at 395-97.

104. Bailey, *supra* note 35, at 90.

105. *See id.*

106. Joan de Lourdes Leonard, *The Organization and Procedure of the Pennsylvania Assembly 1682-1776*, 62 Pa. Mag. of Hist. & Biography 376, 377 n.3 (1948) (discussing the role of petitions in compelling change in the tanning industry).

time they simply reflected the background ideological assumptions of a society that recognized as legitimate both individual and collective grievances. Components of society had the right to call on society at large for assistance because colonists "conceived of a properly ordered society as an organic whole, a conception which implied the existence of interests common to both rulers and ruled."[107] The reciprocal component of such assistance was not necessarily overtly redistributional, but could also be developmental; that is, the requested aid could be seen simply as a subsidy. Just as uncompensated takings reflected colonial desire for general prosperity,[108] even as they were redistributing wealth, most petitions, even those clearly identifiable by class or occupational group, usually sought uncontroversial regulation that might benefit the economy or polity generally.[109]

Although they are more difficult to identify than the enfranchised, disenfranchised white males also exercised the right to petition.[110] 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.[111] In keeping with the quasi-judicial nature of petitions, most of these petitions have a *habeas*-like quality to them.[112] Inherent in the broader capacity to alter court judgments via legislative act,[113] of course, was a legislative power to alter not just the judgment itself, but also sentences.[114] Debt prisoners, for example, filed many such petitions,[115] a phenomenon that, not surprisingly,

107. Tully, *supra* note 19, at 140.

108. *See* William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 695-96 (1985).

109. *See, e.g.*, Bailey, *supra* note 35, at 90-108 (discussing subjects of petitions and economic legislation in eighteenth century Virginia); Leonard, *supra* note 106, at 370-78 (discussing economic subjects of "universal concern" in colonial Pennsylvania); Higginson, *supra* note 3, at 150-52 (discussing developmental and economic concerns, among others, in colonial Connecticut).

110. Professor Tully links petitioning to "long-term electoral confidence," Tully, *supra* note 19, at 142, thus allowing the inference that petitioning's power was linked to the exercise of the franchise. Elsewhere in his excellent article, however, he notes that women, clearly non-voters, *id.* at 143, and "lower levels of society," likely non-voters, *id.* at 144, also petitioned. He does not, therefore, attribute independent political and constitutional significance to petitioning, despite an understanding of colonial society and petitioning that parallels mine. *Id.* at 154. His view is thus closer to one which identifies petitioning as significant only insofar as it relates, even indirectly, to electoral politics.

111. *See* Higginson, *supra* note 3, at 146.

112. *Cf.* Olson, *supra* note 19, at 546 ("In their response to constituents' appeals, the assemblies intermixed legislative and judicial functions.").

113. *See* Higginson, *supra* note 3, at 146 ("Regularly, the reply to a petitioner was legislation reversing a lower court's judgment.").

114. *See id.* at 146 nn.20-21.

115. *See, e.g.*, Leonard, *supra* note 106, at 380 n.16 (discussing the example of the petition of John Ryan, a debt prisoner).

accelerated during times of economic hardship.[116] 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,[117] they also led to such legislative actions as the investigation of the treatment of prisoners.[118]

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,[119] namely, women, blacks (whether free or slave), Native Americans, and, perhaps, even children.[120]

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.[121] 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[122] greatly heightens the constitutional significance of the right.[123]

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116. *See* Bogin, *supra* note 89, at 407-12 (discussing debtors' efforts during the post-Revolutionary War period).

117. *See id.* at 410-11.

118. *See* Higginson, *supra* note 3, at 147 n.27.

119. *See* Gregory A. Mark & Christopher L. Eisgruber, *Introduction: Law and Political Culture*, 55 U. Chi. L. Rev. 413, 425 & n.37 (1988) (discussing the status of blacks, women, and children as embodied in the Constitution).

120. While I have no evidence of children signing petitions, many petitions were filed to obtain something for a child or children.

121. We have only recently had our attention drawn to the political significance of the individual's capacity to seek the employment of public power. *See, e.g.*, Allen Steinberg, The Transformation of Criminal Justice: Philadelphia, 1800-1880 (1989) (discussing, among other things, the significance of the demise of private prosecution of criminal offenses).

122. *See* Bailey, *supra* note 35, at 6; Bogin, *supra* note 89, at 392 ("Petitions, although used by all levels of American society, give us the voice of people who seldom if ever proclaimed their social goals and political opinions in other written forms."); Higginson, *supra* note 3, at 153.

123. *See* Bogin, *supra* note 89, at 421 n.124 ("The 'many' needed the instrument of the petition especially because they had few other opportunities to reach government officials."); Higginson, *supra* note 3, at 145 ("The dialogue of petition and response

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.[124] 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.[125] "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.[126] The following January 16, the Council entertained Susannah Haselfoot's petition *"on behalf of her Husband,"*[127] asking to swap a lot in Savannah for a one hundred fifty acre plot "as near as may be to some River or Island."[128] As with Mary Bateman,

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between inhabitants and colonial assemblies was intimately related to the structure of colonial politics.").

124. Historians have made this claim for other eras in American history as well. *See, e.g., "Placed in the Power of Violence" The Divorce Petition of Evelina Gregory Roane, 1824*, 100 Va. Mag. Hist. & Biography 29, 29-30 (Thomas E. Buckley, ed., 1992) (discussing the importance of petitions in "explain[ing] a multitude of social, political, and economic developments"); Betty Wood, *White Women, Black Slaves and the Law in Early National Georgia: The Sunbury Petition of 1791*, 35 Hist. J. 611, 613 (1992) [hereinafter Wood, *Sunbury Petition*].

125. Hendrik Hartog has suggested to me that a woman's status as *feme covert* might have affected her legal capacity to petition. I have found no explicit law to that effect, nor have I found any instance of a petition from a woman being rejected on such grounds. The records, insofar as I have examined them, make no distinction between petitions from married and unmarried women. Nonetheless, Professor Hartog raises a critical and interesting question about women's rights and the right to petition. It is certainly possible, and at first glance seems likely, that marriage might have disabled women from petitioning in the same manner as other rights were subsumed within marriage. Nonetheless, that does not seem to have been the case, though no evidence exists, so far as I am aware, that anyone claimed prior to the nineteenth century that the petition right transcended marriage.

126. 2 The Colonial Records of the State of Georgia 99 (Allen D. Candler compiler, 1904).

127. *Id.* at 140 (emphasis added).

128. *Id.* at 141.

Susannah Haselfoot got what she prayed for.[129] 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."[130] The Council dealt with other petitions for assistance or recompense for losses over the years.[131]

Local authorities received similar prayers. For example, on October 16, 1741, the President and Assistants for the County of Savannah had to deal with several matters, including two petitions from women. The first petition, from two couples, "Samuel Lyon and his Wife, and John Erinxman and his Wife," is all the more interesting in that the Erinxmans and Mrs. Lyon (though not apparently her husband) "had been indentured Servants." The President and Assistants granted the request for "a certain Donation" owed them.[132] The second petition, from the widow Elizabeth Bowling, recited "her bad State of Health" and prayed for financial assistance, which was granted.[133] That the authorities would entertain petitions of female indentured servants and destitute women suggests something of the legitimate breadth of the right as it was understood by the colonists, even if the claims seem narrow in scope and private in nature.

By the Revolutionary period in Virginia, however, women joined with men in some petitions of clearly public character, especially those involving issues of religion.[134] Those obviously public petitions should not be too neatly distinguished from more classically private matters. Virginia women's petitions concerning their widow's pensions for their husband's military service,[135] a seventeenth-century Connecticut women's grievance concerning a minister's inappropriate behavior,[136] or other individual grievances, however private they may seem at first glance, were also of public significance. At a minimum, they suggest failures within the larger political realm to provide for the deserving or to police the powerful.

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

129. *Id.* (conditioning the swap on James (the husband) having made improvements to the town lot if that had been a condition of the original grant and requiring James otherwise to forfeit the lot).

130. *Id.* at 287-88 (quotation at 288).

131. *See, e.g., id.* at 346-423 (November 19, 1740); 449-67 (May 23, 1745).

132. 6 The Colonial Records of the State of Georgia 13 (Allen D. Candler compiler, 1906).

133. *Id.; see also id.* at 28 (petition of the "Widow Keeler" for relief, meeting of April 3, 1742); *id.* at 176 (petition of the "Widow Nongazer" for relief to the President and Assistants for the Colony of Georgia, meeting of March 26, 1747).

134. *See* Bailey, *supra* note 35, at 44.

135. *See id.*

136. *See* Higginson, *supra* note 3, at 153 n.74.

felt they had a right to appeal to public authority for help.[137] 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.[138]

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.[139]

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)[140] or in legal and political terms[141]—obviously raised issues concerning the most profound of public matters. In the Revolutionary

137. Others have also made this point. *See* Wood, *Sunbury Petition*, *supra* note 124, at 615 & n.16.

138. *See* Linda K. Kerber, Women of the Republic: Intellect and Ideology in Revolutionary America 98-99 (1980) (discussing the petition of Charleston seamstresses seeking increased duties for imported clothing).

139. Bailey, *supra* note 35, at 44 (citation omitted).

140. *See, e.g.*, Bailey, *supra* note 35, at 44 (noting "dozens" of such petitions); George Fishman, *Taking a Stand for Freedom in Revolutionary New Jersey: Prime's Petition of 1786*, 56 Sci. & Soc'y 353, 353-56 (1992) (including "Text of Prime's Petition to the State Legislature, November 6, 1786"); Higginson, *supra* note 3, at 153 n.77 (approving the emancipation petition of a male slave of a Tory slaveowner).

141. *See* Sidney Kaplan, The Black Presence in the Era of the American Revolution 1770-1800, at 11-14, 22-29, 184, 186-90 (1973).

era, some of the petitioners were bold enough to claim "a naturel 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."[142] 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[143] 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.[144] 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.[145]

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,[146] while at

142. Petition to Governor Thomas Gage and the Massachusetts General Court, May 25, 1774, *quoted in* Kaplan, *supra* note 141, at 13.

143. *See, e.g.*, 14 Minutes of the Supreme Executive Council of Pennsylvania, from Its Organization to the Termination of the Revolution 637 (1853) (summarizing petitioners' desire to set aside a portion of "the Negroes burial ground, for the purpose of burying their dead exclusively," February 10, 1786).

144. *See* Higginson, *supra* note 3, at 153 n.76.

145. *See, e.g.*, 16 Minutes of the Supreme Executive Council of Pennsylvania from Its Organization to the Termination of the Revolution 853 (1853) (assigning a date "for the consideration of the petition of the Cornplanter and others, Chiefs of Six Nations of Indians," May 5, 1790).

146. Several historians have explored the political meaning of deference in colonial society. *See, e.g.*, James A. Henretta, The Evolution of American Society, 1700-1815, at 92-95, 112-14, 169 (1973); Jackson Turner Main, The Sovereign States, 1775-1783, 103-04 (1973) (describing the role deference played in the control of the legislatures by the upper classes); Roy N. Lokken, *The Concept of Democracy in Colonial Political Thought*, 16 Wm. & Mary Q. 568 (1959); J.R. Pole, *Historians and the Problem of Early American Democracy*, 67 Am. Hist. Rev. 626 (1962) (discussing the role of deference in the relationship between the different classes). They neither used petitions as evidence, however, nor discussed petitions as examples of inherently deferential political participation. Alan Tully sees petitions as embodying a functional role, as "reliable communication lines" in a system characterized by deference. Tully, *supra*

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.

3. Pervasiveness

Among the most important distinctions between a modern, liberal state and an older, more corporate and hierarchical society is the degree to which state participation in the lives of component social groups, as well as intervention into the lives of individuals, was both more common and more legitimate. Unlike in a liberal society, in which individual autonomy is paramount,[147] identity in a more organic society, group, or community is—or in colonial America was—of greater importance. In such societies, like the colonies, membership in a group came about both by choice and by default. Membership carried with it, at least to some extent, the mores of that group. And, in a hierarchical society, the state (or the church), as the ultimate entity, had the capacity, indeed the right and the duty, to intervene in matters concerning its component units, for the stability and good of the whole.[148] As Bernard Bailyn has noted,

> All of the settlers in whatever colony presumed a fundamental relationship between social structure and political authority. Drawing on a common medieval heritage, continuing to conceive of society as a hierarchical unit, its parts justly and naturally separated into inferior and superior levels, they assumed that superiority was indivisible; there was not one hierarchy for political matters, another for social purposes.[149]

One can, of course, carry Bailyn's observation too far. Especially in American history, excluding the individual as an independent agent, whether moral, political, or economic, would be a profound mistake.[150] Nonetheless, elements of the corporate identity appeared clearly in colonial America. Although erosion of corporate identity is part of this country's history, echoes, at least, persisted in one form or

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note 19, at 144. While they were that, they were also much more—they were the form of political participation. As I suggest elsewhere, petitioning was important not just for its communicative content—else why encrust it with formalistic requirements when any speech or writing could keep lines of communication open—but also for the character of the communication.

147. *See, e.g.,* Treanor, *supra* note 14, at 694 n.2 (contrasting a liberal society as "atomistic" and a republican society as organic for the purpose of understanding the historical constitutional significance of just compensation).

148. Bernard Bailyn, *Politics and Social Structure in Virginia*, *in* Colonial America: Essays in Politics and Social Development 135, 136 (Stanley N. Katz ed., 1971).

149. *Id.*

150. *See* Robert E. Shalhope, The Roots of Democracy: American Thought and Culture, 1760-1800, at 9-11 (1990).

another through the Revolution, if not later, most prominently in the animating concept of the common good.[151]

Petitions were key vehicles for maintaining the balance in colonial society, for they enabled one individual or group to appeal to the state formally to maintain not just the political, but the social balance, as well.[152] Corporate identity, of course, existed not just in formal political communities and economic entities,[153] but also where religious, moral, and other matters were concerned.[154] Petitions were a powerful and effective means for expressing those concerns to the organs of the community—the governing bodies—that could do something about them. Petitions were, as we have seen, the formal method for expressing grievances and obtaining relief when avenues such as lawsuits were unavailable.[155]

Petitioners in colonial America constantly made evident their concerns about the structure and acts of local government. Creation of new local and county governments was an object for which settlers regularly petitioned as they moved into unsettled regions. When settlement patterns altered the makeup of existing counties, residents demonstrated no hesitancy in petitioning to alter boundary lines. Settlers petitioned to move the location of county courthouses to facilitate community endeavors. The colonial authorities received, and acted upon, petitions to strengthen the authority of the newly formed communities. In all these matters, the colonial authorities often received counterpetitions, requiring them to investigate and consider their options. Petitions were the key vehicle for creating and regulating local communities.[156] The importance of the division and formation of these communities should not be underestimated, for even the

151. *See, e.g.*, Wood, Creation, *supra* note 87, at 53-65 (discussing the sacrifice of individual interest for the common good).

152. Part of the balance was between the state and members of society, not just in petitions for assistance, *see supra* notes 126, 133 and accompanying text, but also in pressing both acknowledged and unacknowledged debts that the state owed its members. *See* Desan, *supra* note 19, at 1463-75.

153. *See* Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. Chi. L. Rev. 1441, 1443-55 (1987) (summarizing the organic view of municipal and business corporations in the early republic).

154. *See, e.g.*, Olson, *supra* note 19, at 553, 558.

155. In both English and American history another vehicle existed for identifiable groups to seek redress, namely litigation. Group litigation, however, was an activity that was severely limited in its scope, both in defining what constituted a "group" and in defining the legitimate subject matters of litigation. Group litigation also fell in and out of favor—sometimes for hundreds of years at a time. *See* Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action (1987).

156. *See, e.g.*, Bailey, *supra* note 35, at 68-69 (describing the indispensible role of petitions in establishing and regulating local communities in Virginia); Tully, *supra* note 19, at 148 (describing petitioning's role in presenting local concerns in colonial Pennsylvania).

suggestion that new communities be recognized or created could lead to violence.[157]

In other matters, where subsidiary groups were not formally constituted, petitions still played an instrumental role in determining the direction of law. For example, the enslaved were never formally constituted as a unit. The enslaved's coherence as a component of the larger community is, however, beyond question.[158] Certainly the law regulating them came to treat them as having commonalities sufficient to create a group identity.[159] Indeed, "[a]s slavery became an increasingly significant institution in eighteenth-century Virginia, citizens sent a number of petitions to the house concerning the slave codes and *the position of blacks in society*."[160] Not only did slaves and free blacks excite the deepest fears of criminal disruption, their increased presence was seen literally to threaten the organic unity of the dominant racial community, hence such petitions as those for ever greater vigilance against miscegenation.[161]

Finally, nowhere is the organic aspect of society reflected in petitioners' demands more prominently than in the interpenetration of the political and religious realms. While religious doctrine itself appears not to have been directly the subject of petitions,[162] virtually every other facet of the organization of religious affairs was.[163] In Virginia, for example, the history of the established church, itself not an insignificant indicator of an organic aspect of society, is replete with the constituting, reconstituting, and regulating of religious communities via petitions.[164] Parish boundaries, as with those of political communities, were the subject of petitions. Resolution of contested vestry elections, reversal of unpopular vestry actions, and even disestablishment itself—reaching its peak with the famous "Ten-thousand Name" petition of 1776—were objects of petitioners.[165] More telling, dissent-

157. *See, e.g.*, Henretta, *supra* note 146, at 37 (noting the 1724 disruption of a town meeting in Dedham, Massachusetts occasioned by a petition to divide the town); Shalhope, *supra* note 150, at 13 (discussing cultural tension and petitioning in New England in the 1760s).

158. *See* Gerald W. Mullin, Flight and Rebellion: Slave Resistance in Eighteenth-Century Virginia x-xi (1972) (discussing the role of slaves in a "slave society").

159. *See* Handlin & Handlin, *supra* note 95, at 341.

160. Bailey, *supra* note 35, at 121 (emphasis added). Slaves and free blacks acted and reacted conscious that their racial identity served to constitute them separately within society. Signatories signed not just for themselves, but "in behalf all thous who by divine Permission are held in a state of slavery, within the bowels of a free Country." Kaplan, *supra* note 141, at 13 (quoting a June, 1773 petition to Governor Thomas Hutchinson and the Massachusetts general court).

161. Bailey, *supra* note 35, at 121-22.

162. I, at least, have seen no such petitions.

163. Doctrinal schisms, of course, could well have been the unspoken bases on which arose other conflicts that split parishes.

164. *See* Bailey, *supra* note 35, at 137-58 (discussing "Petitions and Religious Affairs").

165. *Id.*

ers used their right to petition to require that central authority attend to their demands to create their own communities within the larger body of Christ.[166]

The list of topics that were the subjects of petitions could be elongated. The point, however, is that few topics were considered out of bounds by petitioners; that petition could be and was an effective instrument for participating in public affairs of all types; and that petitions themselves quite often by way of the group represented by the signatories, by the objects sought, or both, demonstrated the importance of group identity in colonial society. One should not, however, overread the petitions. In some ways the groups represented by signatories can be seen simply as interest groups pressing for selfish ends, the individuals who petitioned no less so. Moreover, for a historical claim to be worth making, the evidence ought to admit of at least a hypothetical alternative that might falsify the claim that group identity and petition are connected. Evidence for such an alternative explanatory claim exists. Colonial society had organic components, but the individual mattered. Any thesis about the nature of colonial society must therefore take both group identity and individual wants into account. Petitions served to facilitate individual and group participation in public affairs. Petitions did so within the structures of a pre-liberal polity. The organic aspects of the polity—deference based on status within an organic hierarchy—resulted in the reciprocal obligation of attention and consideration.

4. Power

The most important indicator of the existence of a political culture of reciprocal obligation is not the success petitioners had in achieving legislative embodiment of their objects, though that is not an inconsequential indicator. What is more striking is the absence of a particular type of reaction, a reaction that one would expect today in other contexts; that is, the historical record appears to be devoid of colonial authority denying that a person had the right to petition based on any of the factors associated with disenfranchisement. Put another way, petitions might have been rejected on the merits; they might have been ignored for failure of sufficient supplication; they might have been dismissed as absurd; but, they were not rejected on any ground akin to standing. Indeed, their reception and reading was largely automatic.[167]

The process of reception, reading, and consideration has been well-described elsewhere.[168] Higginson has contributed an important in-

166. *Id.*

167. *See id.* at 29; Higginson, *supra* note 3, at 143.

168. *See, e.g.*, Leonard, *supra* note 106, at 376-90 (describing the process in colonial Pennsylvania); Higginson, *supra* note 3, at 146-47 (describing the process in colonial Connecticut).

sight, however, about that process. He suggests that colonial legislators may well have accepted petitions on a wide variety of topics to expand their own jurisdiction,[169] just as Parliament had used petitions to increase its power. That extremely valuable insight, and the long-standing observation that petitions provided useful information to legislators,[170] especially on subjects where petitions were followed by counterpetitions,[171] have served to explain why colonial authority tolerated the breadth of topics mentioned by petitioners. While plausible, and perhaps even fully satisfactory, in explaining legislative acceptance of the subjects raised, those explanations fail to account for legislative tolerance of expressions by, much less legislative attention to, the grievances of the disenfranchised who were otherwise powerless, the dispossessed who were otherwise politically penurious, and the despised.

A conception of politics that takes group identity seriously can explain that reaction. A conception of politics that contains such an organic component also can explain the seriousness with which petitions were treated. That is, any explanation that relies for its power on explication of the process of reception, reading, and consideration of petitions presupposes a political culture in which all petitions are considered constitutionally legitimate in the first instance.

5. The Declaration of Independence

Other than the near universal acceptance of petitioning in colonial society, the breadth of participation by petitioners, and the almost unlimited scope of the subject matter of petitions, the evidence for the constitutional legitimacy of the right to petition is secondary—petitioning was a constitutional right because people thought it was one and defended it as one.[172] Indeed, unless we take the odd position that the enumeration of complaints contained in the Declaration of Independence is little but revolutionary rhetoric,[173] rather than a list of actual complaints, even if overwrought, we must conclude that petitioning was a, if not the, key vehicle providing protection for subjects of the crown. The Declaration, after all, lists the King's "injuries and

169. Higginson, *supra* note 3, at 150-53.

170. *See* Bailey, *supra* note 35, at 31; Higginson, *supra* note 3, at 153-55; *see also* Bogin, *supra* note 89, at 392 n.4 (describing petitions as the principal channel of communication from inhabitants to government).

171. *See* Bailey, *supra* note 35, at 31.

172. *See supra* note 51 (discussing conventions of constitutional politics).

173. Pauline Maier has recently demonstrated that it is much more. *See* Pauline Maier, American Scripture: Making the Declaration of Independence 105-23 (1997). One reviewer, himself a prominent historian, declares that Maier's book "immediately takes its place as the definitive statement of the Declaration of Independence as the embodiment of the American mind and historical experience." Richard Alan Ryerson, *An Expression of the American Mind: Pauline Maier Cautions Us Against Misinterpreting the Significance of Our Most Treasured National Relic,* N.Y. Times Book Rev., July 6, 1997, at 9, 9.

usurpations,"[174] including among them his purported undermining of the legitimate processes of colonial government, and only then notes:

> In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.[175]

These words bear close scrutiny.[176]

That petitions were a legitimate vehicle by which to complain of the broadest spectrum of grievances is evident from the enumeration preceding the ultimate complaint, that the colonists' petitions fell on the king's deaf ears. The Declaration's litany runs the gamut from political usurpations to having "plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people."[177] The public character of the grievances is immediately apparent, as is the colonists' felt view that petition was an appropriate remedy, indeed a remedy available, "[i]n every stage" of a grievance.[178]

The capstone of the list of grievances makes clear that the king's ultimate violation, however, was his sundering of the bonds of political society, especially the bonds of deference and obligation on which hierarchial legitimacy rested. Having met the sole precondition for reception by petitioning "in the most humble terms," the colonists felt entitled to consideration.[179] Part of the Declaration's drama, not to say its literary license, is in the answer sent by the king: "repeated Injury," indeed "*only by* repeated Injury."[180] That more was expected, even required, in contemporary politics may be inferred even from the sentence's structure. The clause in which the United States complains that its citizens' petitions have been ignored ends not with a period, but a colon.[181] No form of punctuation available can more closely cement clauses.

What, in the minds of the colonists, was the only real alternative? They held that tyranny marked a society in which the rulers ignored "a free People."[182] What would they have expected? What in the meaning of petitions and the process of reception made it the cap-

174. The Declaration of Independence para. 2 (U.S. 1776).

175. *Id.* para. 30.

176. These words survived intact through each edit of the text, save for the addition of "free" before "people." *See* Maier, *supra* note 173, app. C, at 240.

177. The Declaration of Independence para. 26 (U.S. 1776).

178. *Id.* para. 36.

179. *Id.*

180. *Id.* (emphasis added).

181. *Id.*

182. *See generally* Bernard Bailyn, The Ideological Origins of the American Revolution (1967). Note also the conspicuous addition of "free" to the petition clause of the Declaration. *See supra* note 176. Note also, however, the ambiguity—without the addition of "free," the presumed scope of the right of petition can be read to include even those people not free.

stone grievance in the Declaration and ultimately underlay the inclusion of the right to petition in the First Amendment?

Representative government, always an imperfect mechanism for reflecting the desires of the people, was the subject of great and public reflection in the Revolutionary and early national periods. The English view was that "[m]en did not actually have to vote for members of Parliament to be represented there."[183] Against this view the colonists ultimately, though not completely, rebelled.[184] Any system of actual representation could not, after all, fully and completely replicate the communities represented. Only society as a whole reflected the whole society. That problem, however, was not the one that permeated the debates over representation.

For the colonists, a move toward greater actual representation, with which they were relatively more familiar in their local assemblies than were the English in Parliament, meant both an assurance that local problems received consideration as well as the fear that the legislative body would succumb to the forces of parochialism.[185]

Petitions remedied some of the imperfections of virtual representation, while embodying some of the principles of actual representation.[186] A less mandatory form of address than an instruction,[187]

183. Wood, Creation, *supra* note 87, at 174.

184. *See* Shalhope, *supra* note 150, at 88; *see also* Wood, Creation, *supra* note 87, at 188 (describing acceptance of both actual and virtual representation by Americans in the new republic).

185. *See generally* Wood, Creation, *supra* note 87, at 184-85 (describing the colonists' views on representation).

186. Petitioning embodied actual representation in the sense that the precise desires of a clear portion of the population were laid before the representative, who in turn took the prayer to the legislature and championed it as best he could. In that sense, petitioning was as near an unmediated form of actual representation as possible.

The imperfections of virtual representation are clear, even if one puts aside the question of whether only a woman can represent the concerns of women, a poor person the concerns of the impoverished, an African-American the concerns of free blacks and slaves, and so on. What was really at stake was whether those voting, rather than the representatives, really represented the population as a whole. Americans simply wanted to ensure that those with the franchise be represented in the bodies that made law. In that sense, voters collectively represented their communities, including those who were unattached and could not vote, including not just disenfranchised men, but also single women and free blacks. Voters individually represented smaller units of society—husbands and fathers exercised their vote on behalf of the household, whose members held at least some interests in common as members of the household. Even slaves maintained some interest in common with their masters, and post-Revolutionary petition gives us an example of even this perverse organic connection. Owners, for example, could and did petition for relief for slaves convicted of crimes, even when slave codes provided for compensation when slaves were executed. Thus, even when a master's property interest in a slave was protected by compensation, some other nexus than ownership could connect master to slave. *See, e.g.*, Wood, *Sunbury Petition*, *supra* note 124, at 611-12 (discussing the clemency petition of Thomas Stone to Georgia's Governor Edward Telfair on behalf of his slave Billy).

petitions nonetheless, in colonial political custom, required a locality's representative to present, if not champion, the document.[188] Petitions thus ensured that topics of concern to the unrepresented were raised in a body that purported to represent all the people, even a body lacking representatives of all segments of the population. The procedure, whereby a locality's representative ensured presentation and usually more—such as support for the petition's claim—meant that even in a system of virtual representation an element of actual representation preserved the ideal of a body devoted to deliberation on, and resolution of, concerns to the populace.[189]

In turn, by their very nature, petitions were a more active form of participation than voting. Petitions signified both an unambiguous statement that an issue was important to the signer and a clear point of view on the issue. Often petitions included suggested legislative language. In any case, because they were neither instructions—at one extreme—nor merely a vote for a representative—at the other extreme—they were also documents intended to persuade. They sometimes contained "learned and eloquent discourses, articulately expressed with meticulous handwriting upon fine quality paper."[190] Moreover, to convey the depth of sentiment within a community, petitions were often posted in public places, advertised in newspapers, and duplicated for simultaneous circulation.[191] The result of the combination of publicity and argument, especially when combined with their quasi-judicial status, was to ensure that a grievance was heard, usually investigated, and often discussed and acted upon in the legislatures. When controversial—especially when subject to counterpetition—petitions were regularly the object of lengthy discussion and consideration in these bodies.[192]

To the extent that petitioning gave a voice, however limited, to the unattached nonvoters and the attached but socially subordinate, it theoretically and potentially remedied the problem of misrepresentation in a system of virtual representation. Thus, even a private grievance—such as a destitute widow praying for poor relief—gave voice to concerns not otherwise represented. And, of course, the structure of the culture ensured that the prayer would be heard. Of course, it goes without saying that this vision of the right to petition left an enormous amount to be desired in practice, but it fits well with a society that conceived of itself ideally, at least, more in organic terms than we today conceive of our own society.

187. *See* Bailey, *supra* note 35, at 31-32; *see also* Wood, Creation, *supra* note 87, at 189-92 (discussing the use of instructions and the difficulties in their use in matters beyond local concern).

188. *See* Bailey, *supra* note 35, at 29-31 (explaining that all petitions were presented, but that most were "sponsored," i.e., explained and sheparded, by a locality's representative to the House of Burgesses).

189. *See id.* at 27 (noting that "[d]uring the late seventeenth century the house developed a standard procedure for the transmitting of petitions, and in the eighteenth century the procedure was amended slightly to insure that petitioners had ready access to their elected representatives").

190. *Id.* at 26.

191. *See id.* at 26-27.

192. *See id.* at 27-46 (describing eighteenth century petitioning procedure).

II. The Confederation and Constitution

If experience guided expectations, then the right to petition that was embodied in the First Amendment was a particular tool in republican government. It gave the unrepresented a voice, one limited to that of a supplicant to be sure, but a voice that nonetheless required a hearing. The class of grievances that could be heard was wide, if not unlimited. Moreover, as a political tool, the right to petition was both emblematic and expressive of a society in which group identity was significant. By their nature and in their language, petitions embodied deference. In their content they conveyed community sentiment. In their reception was embodied part of the colonial understanding of representation: that a sufficiently serious grievance, however and wherever generated, merited and would receive due consideration.

Given the English and colonial heritage, dramatized by Revolutionary claims culminating in the Declaration of Independence, it is unsurprising to find the right to petition unequivocally claimed by the people in the earliest state constitutions. What is surprising, at least at first glance, is that the claim was not universally made explicit in every constitution, state or federal.

A. *Confederation*

1. Federal Authority

As the document embodying the confederal powers of the rebellious colonies, the Articles of Confederation might have been expected to claim the right of petition in some fashion, even if limiting it to the constituent states of the confederation. That expectation was fulfilled, but in a very curious manner.

Read most generously, the Articles of Confederation deal with petitioning in three articles, numbers II, IV, and IX. The first two can be read to embody, in very general language, preservation of the right for both individuals and groups. Article IX, by contrast, sets up petitioning as a method for resolving interstate conflict.

Article II, following an article the only function of which was to name the confederation, was a reservation clause. It provided: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[193] Because the Articles mentioned petitioning only in Article IX, expressly delegating certain tasks to the United States in Congress,[194] the general power to receive petitions, and to send them, was retained by the states. Similarly, the jurisdictional reservation meant not only that states could act on petitions insofar as their power allowed, but

193. Articles of Confederation art. II.
194. *Id.* art. IX.

also that states had the authority to speak in the name of their entire population to the states assembled in confederation. While, in this context, the reservation of rights is more ambiguous, substantially overlapping the reservations of power and jurisdiction, at a minimum the reservation of rights would prohibit the United States in Congress from penalizing a state or its delegates for petitionary activity.

Of greater importance than the place of petitioning for the states' relation to the confederation—in the event a non-issue, as it turned out—was Article IV's reservation of rights to individuals. By comparison with the later statement of rights in the Constitution, or even in comparison with the statements set out in contemporary state constitutions, the clause was narrowly written:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States . . . .[195]

The first aspect of note is that this Article appears to check both state and federal power, at least insofar as it applies to "free inhabitants" of any state. That is, a "free inhabitant" of Delaware would be entitled (at a minimum) to the rights of free citizens of Delaware, even if the inhabitant were a free citizen of, for example, New Jersey. On this reading, neither a state nor the confederation could discriminate against alien residents. As we have seen, petitioning had come to be regarded as a right, one which entailed an immunity from prosecution if exercised. Thus, Delaware could not prosecute a free resident alien for petitioning if, at a minimum, it could not prosecute its own citizens or if the immunity was one of "free citizens in the several States,"[196] which, of course, it was. Article IV, of course, never mentioned the right to petition explicitly—it did not create a right where none had previously existed. Nonetheless, to the extent that the right to petition was recognized by any state, that state could not then discriminate in its application of the right by limiting application of the right to its own "free citizens."

From the point of view of the Confederation, the virtues of non-discrimination were considerable. Through petition, non-discrimination gave free alien residents access to the mechanisms of government, with all the political protection and access to redress of private grievances and claims that the right to petition entailed. Moreover, given the social reality of a relatively fluid population and the stated goal of "mutual friendship,"[197] this clause was designed to prevent state actions that might precipitate violent conflict among the confederated

195. *Id.* art. IV.
196. *Id.*
197. *Id.*

republics. As the historian Jack Greene has noted, "longstanding fears of internal division and disunion . . . and the perceptions of diversity that underlay them were not quickly dissipated once united resistance had begun in the mid-1770s."[198] Those fears and perceptions were palpable. Even the dedicated proponent of the union, John Adams, betrayed both his own parochialism and his fear of parochialism in November of 1775, writing, "The Characters of Gentlemen in the four New England Colonies differ as much from those in the others . . . as much as [in] several distinct Nations almost. Gentlemen, Men of Sense, or any Kind of Education in the other Colonies are much fewer in Proportion than in N. England . . . ."[199] The non-discrimination clause thus protected free inhabitants from retaliation when their exercise of rights, including the petitionary right, might provoke such a parochial response, one which might in turn trigger interstate conflict.

Nonetheless, the class of individuals protected was, at least on paper, far more circumscribed than the actual body of petitioners had been in the colonies or continued to be in the states. While all "free citizens" of the "several States" could consider themselves possessed of the right to petition, of aliens only the "free" and actual "inhabitants"[200] could claim the right under the Articles. Presumably, in addition to the deliberately excluded "paupers, vagabonds and fugitives from justice,"[201] at a minimum, slaves and transients could not claim protection under the Articles should states discriminate and prosecute them for their petitions. The implications for interstate commerce and comity on the delicate issue of slavery are obvious.

Where the Articles directly mention the right to petition rather than subsuming it in with rights generally, it is neither a matter of individual freedom nor state activity, but rather a peculiar quasi-judicial mechanism for resolution of "all disputes and differences . . . between two or more States concerning boundary, jurisdiction or any other cause whatever."[202] The historical significance of this clause is enor-

198. Greene, *supra* note 86, at 159.

199. Letter from John Adams to Joseph Hawley (November 25, 1775), *quoted in* Greene, *supra* note 86, at 159.

200. Articles of Confederation art. IV. While the term "free" would, on its face, appear to have excluded slaves, dependent status did not necessarily deprive one of the protection. The definition of citizenship was a matter for the states, as was the definition of the status of freedom and degree of residency. Nonetheless, as James Kettner has noted, states made "allowances for married women and infants," whose dependency, while not exactly rendering them unfree, enormously complicated any understanding of the choice to become a citizen or inhabitant of a given state. James H. Kettner, The Development of American Citizenship, 1608-1870, at 198 (1978). Kettner does not address the status of free blacks in the Confederation.

201. Articles of Confederation art. IV.

202. *Id.* art. IX. The Articles thus stand in striking contrast to the Constitution, which completely judicializes such disputes in Article III, Section 2. U.S. Const. art. III, § 2.

mous. Several states—New York, Massachusetts, Connecticut, Virginia, North and South Carolina, and Georgia—claimed land west of the Appalachians. Those claims conflicted. Moreover, the interests of the six states without such claims was, of course, in preventing the ones with claims from gaining wealth and population, hence power, to the diminution of their own influence. The petitioning mechanism for resolving a given state's grievance had the benefit of providing a familiar device as a solution to a novel problem, the peaceful resolution of territorial claims within a confederation. It obtained the additional benefit of the imprimatur of legitimacy conveyed by a mechanism the violation of which was so firmly at the center of Revolutionary passion. And, of course, the elaborate mechanism set up to resolve the disputes—embodied in the longest paragraph in the longest article in the entire document—was scrupulously designed to give the grievance fair hearing.[203]

The Articles of Confederation was, of course, a charter for a government of extremely limited powers. Hence, it should be unsurprising that few would have concerned themselves with federal encroachment on the right to petition—the Articles provided few such opportunities—much less with a federal guarantee that the states honor such a right where their own citizens or inhabitants were concerned. While the state constitutions were considered the guarantors of the rights of the citizens and inhabitants of the states, they had no effect beyond their own jurisdictions. Nonetheless, the cession of claims of western lands left many Americans citizens of the United States, but not of any particular state. How could they then claim their rights? And, how important was petition among them, especially if residents of the western lands forfeited the protection of the states?

Securing the frontier settlers' rights was, in part, a matter of negotiation between the states and the federal government. By resolution, the Congress pledged in October, 1780 that the western lands would become republican states, receiving the same guarantees of sovereignty that each of the original thirteen had obtained. That year, New York relinquished its claims, though not until 1800 did Connecticut, the last to give up a claim, cease to claim the Western Reserve. In 1784, Thomas Jefferson, following Virginia's cession, introduced an ordinance providing for the governance of ceded territories. The resolution failed, in part because it provided for the abolition of slavery in ceded lands after 1800. It was, however, the first precursor to the

203. The same article required that "[a]ll controversies concerning the private right of soil claimed under different grants of two or more States . . . shall on the petition of either party to the Congress of the United States" be decided by the same type of mechanism. Articles of Confederation art. IX. As with interstate disputes, such "controversies" are also completely judicialized in the Constitution, in Article III, Section 2. U.S. Const. art. III, § 2.

Northwest Ordinance of 1787, which established the system of territorial government for ceded land northwest of the Ohio River.

The Northwest Ordinance, while embodying a bill of rights which in some ways prefigured the Bill of Rights, and which contained many provisions that were also in contemporary state constitutions and declarations of rights, contained no provision for the right to petition. The preamble to the Ordinance's "articles of compact" consisted of fourteen sections which provided "for extending the fundamental principles of civil and religious liberty"[204] through the "unalterable"[205] provisions of the Articles.

Articles I and II laid out the rights that "person[s]"[206] and "inhabitants"[207] could claim, petition not among them. The exclusion of the right to petition from the governing ordinance of the territory, juxtaposed with the language of Section 13 of the preamble, suggests that in little more than a decade the right to petition had moved from the core to the periphery, if not beyond, in the universe of American political thought. Even, if that observation overstates the case, and I think it does,[208] it is nevertheless indicative of the changes in political reality that would transform the right in the years after the adoption of the Constitution.

2. The State Constitutions

Gordon Wood has suggested that "Nothing — not the creation of th[e] confederacy, not the Continental Congress, not the war, not the French alliance — in the years surrounding the Declaration of Independence engaged the interests of Americans more than the framing of these separate [state] governments."[209] The fantastic intensity that the colonists brought to the project of developing their republics was focused not just on the creation of the machinery of government, but also, if not more so, on the articulation of mechanisms that would ensure the participation of the citizenry in the activities of government. Thus, the clauses designed to preserve freedom and promote reasoned decisions by the government were drafted amidst an unprecedented

204. An Ordinance For the Government of the Territory of the United States Northwest of the River Ohio paras. 13-14 (July 13, 1787), *reprinted in* 2 Federal and State Constitutions, *supra* note 92, at 957 [hereinafter Northwest Ordinance].

205. Northwest Ordinance, *supra* note 204, § 14.

206. *Id.* art. I.

207. *Id.* art. II.

208. In part, the observation overstates the case because, in their first state constitutions, the states formed from the ceded lands all provided for the right either directly or in synonymous terms. *See* Ill. Const. of 1818, art. VIII, § 19; Ind. Const. of 1816, art. I, § 19; Mich. Const. of 1835, art. I, § 20; Minn. Const. of 1857, art. I, § 16; Ohio Const. of 1802, art. VIII, § 19; Wis. Const. of 1848, art. I, § 4. Of course, the political and constitutional centrality of the right and its exercise changed dramatically, at least at the federal level, over those decades.

209. Wood, Creation, *supra* note 87, at 128.

popular discussion of the ideas of representation, sovereignty, power, and the public good.

It would, of course, overstate the case to suggest that in that atmosphere the right to petition was the foremost concern of the drafters of the state constitutions. Nonetheless, petitioning presented the drafters with not just its own history on which to draw, but also with new and subtle wrinkles in the theoretical constitutional fabric.

Some of the states, such as Delaware, set out the guarantee early and simply: "That every man hath a right to petition the Legislature for the redress of grievances in a peaceable and orderly manner."[210] This simple declaration in Section 9, however, embodied a number of understandings about politics key to the new state government. First, the clause is apparently universal in application: Everyone in Delaware enjoyed the right.[211] This universality reflected not just colonial experience and Delaware's relatively flattened social hierarchy (compared to England), but also the aspirations of popular participation[212] and widespread protection[213] that the colonists expected in and of their government.

As important as the breadth of the class of individuals in which the right was recognized is the body named to receive the petitions. That the right extended to petitions to "the Legislature" did not mean that the petitioning of other branches of the state government was barred or left unprotected.[214] Rather, the Delaware Declaration's provision

210. Delaware Declaration of Rights § 9 (1776), *reprinted in* 1 Bernard Schwartz, The Bill of Rights: A Documentary History 276, 277 (1971) [hereinafter Delaware Declaration]. Maryland adopted an identically worded provision in its Declaration of Rights on August 14, 1776. Constitution of Maryland, A Declaration of Rights, & C. § XI (August 14, 1776), *reprinted in* 3 The Federal and State Constitutions, *supra* note 92, at 1686, 1687. The state constitution itself was adopted the same day. *Id.* at 1701.

211. The use of the term "man" should probably not be taken to mean only males. While several other sections of the Declaration of Rights define their scope by using the terms "people," "persons," or "every member" rather than "every man," *see, e.g.*, Delaware Declaration, *supra* note 210, §§ 1, 3, 4, 5, 6, 10, the term "man" is in this context ambiguous. Section 2 of the Declaration, for example, provides "That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings . . . ." *Id.* § 2. Reading that clause to apply only to males would cut against all colonial experience. On the other hand, to read section 6, which provided for "the right in the people to participate in the Legislature" as allowing women to hold elective office would be equally out of sync with experience. Suffice it to say that the clause should be read as if the drafters knew a world of overwhelmingly male participation in politics, but that the colonists had experienced female petitioners. That is, the drafters did not think in gender categories, but their assumptions are clear. Those assumptions, however, should not be read to obviate the, albeit limited, experiences at odds with their assumptions.

212. *See, e.g., id.* § 6.

213. *See, e.g., id.* § 10.

214. Indeed, the Constitution of Delaware, adopted within a few days by the same convention that adopted the Declaration, provided in Article 25:

> The common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force, unless they shall be altered by a future law of the legislature; such parts only

represents both the republican faith in the legislature and the central role accorded that body in republican thought.[215] Indeed, the Delaware Consitution suggests just how central the state legislature was. Section 8 of the Declaration of Rights provides, "That for redress of grievances, and for amending and strengthening of the laws, the Legislature ought to be frequently convened."[216] The Delaware convention thus saw the legislature as the primary governmental body for resolving the people's grievances. That the legislature need meet often to amend existing law appears as a secondary matter. Moreover, the juxtaposition of sections 8 and 9 and the echo in wording allow the inference that petition would be the key mechanism, because no others are mentioned, to trigger a core legislative function.

Delaware was hardly unique in this respect. Pennsylvania, in 1776, and Vermont, in 1777, adopted identically worded—though differently punctuated—provisions guaranteeing the right to petition.[217] Drafted more broadly than Delaware's, each constitution recognized the right in the "people" of the state. The right to petition was bundled with other, correlative rights, notably assembly and consultation. Of the two state constitutions, Vermont's is the more emphatic and less susceptible to disaggregation of the bundled rights. Whereas the Pennsylvania declaration used a comma to separate popular assembly and consultation from the rights to "instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance,"[218] Vermont did so with a dash,[219] suggesting that assembly and consultation would be preserved in service to communication with governing officials, allowing a more overtly political cast to the rights. Also important, when compared with the Delaware constitution, was the breadth of communications covered in the other two constitutions. Delaware, it should be recalled, mentioned only "petition," and petition "in a peaceable and orderly manner" at that.[220] By contrast, Pennsylvania and also Vermont, in addition to providing for the right to instruct representatives, provided for communication by

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excepted as are repugnant to the rights and privileges contained in this constitution, and the declaration of rights, &c., agreed to by this convention.

Constitution of Delaware (1776), *reprinted in* 1 Federal and State Constitutions, *supra* note 92, at 562, 566-67. Reading the non-repugnancy clause, much less the provisions continuing English law, as limiting the right to petition would be nonsense in the context of the Revolution. Maryland also adopted a similarly worded clause. *See* Constitution of Maryland, a Declaration of Rights, &c. § III (August 14, 1776), *reprinted in* 3 Federal and State Constitutions, *supra* note 92, at 1686, 1686-87.

215. *See* Shalhope, *supra* note 150, at 88; Wood, Creation, *supra* note 87, at 162-63.

216. Delaware Declaration, *supra* note 210, § 8.

217. Pennsylvania Declaration of Rights, 1776, *reprinted in* 1 Bernard Schwartz, The Bill of Rights: A Documentary History 262 (1971) [hereinafter Pennsylvania Declaration]; Vermont Declaration of Rights, 1777, *reprinted in* Schwartz, *supra*, at 319, 324 [hereinafter Vermont Declaration].

218. Pennsylvania Declaration, *supra* note 217, § XVI.

219. Vermont Declaration, *supra* note 217, § XVIII.

220. Delaware Declaration, *supra* note 210, at § 9.

"address" and "remonstrance" and required, at least constitutionally, neither peace nor order in delivery.[221]

Under English common law and statute, only documents that qualified as petitions were protected from formal political retaliation by governmental authorities. And, at various times, the number of persons who could gather or sign the document was limited. And, too, petitions were a particular kind of communication and embodied expectations of hierarchical deference. This historical baggage was jettisoned by Pennsylvania and Vermont. They allowed not just petitions, but addresses and even remonstrances, often the very antithesis of polite, deferential, political communication. While both Pennsylvania, with its large Quaker population, and Vermont, with its peculiar relationship with the constituted political authority of Massachusetts and New York, might be suspected of countenancing a wary attitude towards authority generally, these constitutions represent the first clear statements of the inversion of political hierarchy that would transform the right to petition.

Those who governed the people, most of all the legislators, were to be not the people's "betters," but their servants. The old hierarchy of deference should, therefore, no longer obtain. To be sure, elected representatives were due respect, but not obeisance.[222] Hence, petition—a prayer to superior authority—was augmented twice. It was augmented not just by address—speech among equals—but also remonstrance—reproof. Reproof, of course, was not on the order of a

221. Pennsylvania Declaration, *supra* note 217, at § XVI, Vermont Declaration, *supra* note 217, at § XVIII. North Carolina's Declaration of Rights, however, was less explicit, protecting the right "to apply to the Legislature," but omitting the requirements of peace and order. Constitution of North Carolina, A Declaration of Rights, &c. § XVIII, *reprinted in* 5 Federal and State Constitutions, *supra* note 92, at 2787, 2788.

222. The New Hampshire and Massachusetts constitutions provide the strongest evidence that respect had replaced deference. Massachusetts provided in 1780:

> The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

Constitution or Form of Government for the Commonwealth of Massachusetts, pt. I, art. XIX (1780), *reprinted in* 3 Federal and State Constitutions, *supra* note 92, at 1888, 1890. Massachusetts required order and peace, but provided for "instruction" and styled the objects sought in communication with the legislature "requests," rather than prayers. *Id.* The capacity both to instruct and request suggests an equality of position, but also a recognition of the need for legislatures to deal with many issues, including requests (which might sometimes conflict). That the requests could be delivered in addresses or remonstrances reinforces the inference of equality between the public and the legislator. New Hampshire's provision is identical, save for a minor punctuation change and the omission of "address." Constitution of New Hampshire Pt. I, art. 1, § XXXII (1784), *reprinted in* 4 Federal and State Constitutions, *supra* note 92, at 2453, 2457. The New Hampshire constitution of 1776 had no bill of rights. *See id.* at 2451, 2451-53.

reproof to one's houseservant, but was not in any sense a sign of servility. Buried in these terms, however, was the end of classic petitioning. For, if petition depended not on the hierarchical bonds of political society for its effect, but on the capacity to deal with one's representative as an equal, or even to treat the representative as a servant, then some mechanism other than hierarchy must make the members of government responsive to the petitioner. If equality, embodied in address, or superiority, embodied in instruction and remonstrance, correctly described the relationship, exactly what gave that power to the addressor, the instructor, or the remonstrator? Only one source gave an individual that power, the franchise.

B. *Constitution—Creation and Adoption*

Perhaps, by 1787, revolutionary romanticism and rhetoric having faded with the draining realities of lengthy war and state building, the concerns embodied in the Declaration passed into memory.[223] Perhaps the limited legislative powers of the Confederation Congress minimized the focus on the role petitions had played in creating legislation in the minds of the Constitution's drafters. Perhaps, following the structure of many of the state constitutions, petitionary activity was considered a right which, while integral to governing, was not actually part of the structure of government and was therefore not included in the mechanisms created by the original Constitution. Perhaps the protections embodied in both the state constitutions and the Northwest Ordinance rendered mention of petition superfluous in their minds.[224] Whatever the reason, and there are no clues available in our records of the Constitutional Convention,[225] petitioning was not mentioned in the text of the original Constitution presented for ratification.[226]

The Declaration was revived as a partisan weapon during and after the ratification.[227] The connection between the Declaration and the Anti-Federalist opposition to a Constitution without a Bill of Rights may be more than a matter of revolutionary rhetoric on the one hand and partisan polemic on the other. As far as the right to petition is concerned, however, it at least may be said to have come to have prominence of place. It is the capstone grievance of the Declaration, as well as the capstone right of our First Amendment, the one that leads the amendments that were eventually ratified and became known as the Bill of Rights.

223. One historian describes this as "a period of almost total neglect" of the Declaration. *See* Ryerson, *supra* note 173, at 9; see also Maier, *supra* note 173, at 160-70.

224. This possibility, however, seems unlikely. *See* Maier, *supra* note 173, at 196.

225. At least I have found none.

226. All of which is not to say it was not considered by some, including George Mason and James Madison. *See* Maier, *supra* note 173, at 194-96.

227. *Id.* at 170.

Akhil Amar has recently reminded us that our First Amendment was not the first one proposed.[228] And, while the amendments adopted protect rights, hence the name, they may have been written with more in mind. As Amar puts it, the original first amendment, for example, "sounds primarily in structure."[229]

If, as Amar believes, the juxtaposition of the phantom first two amendments and our current First Amendment suggests that our First Amendment speaks not just to rights but to issues of "attenuated representation,"[230] we ought to be attentive to the concepts of representation embodied in the petition clause. Moreover, we should be open to an historical explanation that involves not just a modern process-based understanding of the structure of government, but also one that suggests the substantive breadth of the right.

The period from the Revolution through the adoption of the Constitution, and especially the Bill of Rights, reflects debate about participation in government, a debate which is relevant to understanding the evolution of the right to petition. At one end were some thorough-going democrats, who ended by generally siding with the Anti-Federalists. Closer to the core of American politics were the Anti-Federalists who opposed the Constitution, especially in its unamended form, and were vigorous proponents of amendments to secure the people's rights. Their arguments for including the right to petition among the enumerated rights protected by the amendments sketch out some of the tensions inherent in the inclusion of the petition right in a regime of popular sovereignty. Those closest to a democratic sen-

228. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1137 (1991).

229. *Id.* He argues that the assembly and petition clauses while "obviously protect[ing] individuals and minority groups . . . [are] 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." *Id.* at 1152 (emphasis omitted). I agree with Professor Amar that "the clauses contain a majoritarian core that contemporary scholarship has virtually ignored." *Id.* What scholars have ignored, however, is not just the potential for peaceful revolution by convention, which Amar emphasizes, but the day to day expectation of potential involvement in the governmental process and structure embodied in the petitioning process, at which he only hints. *Id.* at 1156.

If Amar is right—as I think he is in some very important ways—that we must think not just metaphorically, but literally and pervasively about the sovereign constitutional authorship of We the People, then the key historical question is why the opening words of our First Amendment are aimed at the legislative branch of the government: "Congress shall make no law . . . ." I have argued, thus far, that the right to petition was seen as protecting the constitutive contributions of potentially all elements of society. Given that the Confederation period concluded with a backlash against the excesses of state legislatures, where disproportionate power had been lodged by state constitutions, we should not be surprised that the amendment explicitly singles out the legislative branch of the new (and more powerful) federal government for its prohibition for it was the legislature which, during the Confederation, acted contrary to the rights of the people.

230. *Id.*

sibility were, not surprisingly, from Pennsylvania, the state with the most radical of all the state constitutions.

Paradoxically, it was the Pennsylvanian Anti-Federalists who noted most eloquently that the Revolution had upset the symmetry in social and political hierarchy. For the Anti-Federalists, petitions—and their reception by the Pennsylvania ratifying convention—served as both a cautionary example and a subject of constitutional controversy. Philadelphiensis, in a broadside to the citizens of the state, began by noting that the convention "rejected the petitions of the people . . . against the adoption of the new constitution" with "contempt and obloquy," its members seeming, among other things, "lords and masters" rather than "servants of the people."[231] Rejection of the petitions in this manner foretold that

> days of a cruel Nero approach fast; the language of a monster, of a Caligula, could not be more imperious. I challenge the whole continent, the *well born and their parasites*, to show an instance of greater insolence than this, on the part of the British tyrant and his infernal junto, to the people of America, before our glorious revolution.[232]

From this cautionary tale of apparent tyranny Philadelphiensis drew a clear lesson. He opposed a return to the deferential order of the colonial era and sought to preserve the popular sovereignty born of the Revolution.

How, then, did petitions fit into this new order? They became not the prayers of supplicants, but the missives "of a free people [to] their servants."[233] While in presenting petitions "[p]ropriety requires that the people should approach their representatives with a becoming humility," the "governors . . . as their servants . . . are . . . bound to observe decency towards them, and to act according to their instructions and agreeably to conscience."[234] Respect replaced deference and it ran both ways, as befitted a free people communicating among themselves.

Anti-Federalists in other states echoed such sentiments. Thus, a Maryland Farmer could put a decidedly egalitarian spin on English history, rejecting the assertion that "bills of rights have always originated from, or been considered as grants of the King or Prince, and that the liberties which they secure are the gracious concessions of the sovereign," such an assertion "betray[ing] an equal ignorance of history and of law."[235] Rather, English rights were part of the English

231. Philadelphiensis, No. 5, *reprinted in* 3 The Complete Anti-Federalist 116 (Herbert J. Storing ed., 1981).

232. *Id.* at 117.

233. *Id.*

234. *Id.*

235. Essays by a Farmer (February 15, 1788), *reprinted in* 5 The Complete Anti-Federalist 5, 10 (Herbert J. Storing ed., 1981); *see also* To the Citizens of the State of

constitution, the "rights of the people to be coeval with the government" having been asserted by petition, "[t]he petition of right, which came forward in the reign of Charles 1st."[236]

While the Maryland Farmer waxed eloquent on the nature of rights, others, repeating the general complaint that rights were insufficiently secured by the Constitution,[237] added some specificity. In New England, Samuel objected that it contained no "provision . . . for the people or States, to petition or remonstrate, let their grievances be what they will."[238] Centinel, too, noted that "petitioning or remonstrating to the federal legislature ought not to be prevented . . . ."[239]

While the failure to include protection for the right of petition was not a concern over which the Anti-Federalist spilled much ink, as evidenced by the relatively few mentions it specifically received, it was integral to the general scheme of rights they sought. After all, general discussions of rights can hardly be fairly read to exclude the right to petition, given English and colonial history, not to mention its eventual inclusion in what became the First Amendment. The failure of the Anti-Federalists to discuss the right at length indicates not its irrelevance, but rather quite the opposite—everyone assumed it was part and parcel of the rights to be preserved. Certainly the Federalists, those at the other end of the debate about representation, did not go so far as to suggest a curb on the right. In the most famous pro-constitutional propaganda of all, *The Federalist Papers*, the right receives but one mention, and that mention is not negative.[240] There is, so far as I know, no evidence that opposition to the right reared up in the ratifying conventions. Indeed, the evidence suggests, as I have noted, an assertion of the right in a new key.

The democratic experience of the Confederation period led not to a belief that petitioning was irrelevant, but instead renewed the question of whether, as it were, the ante should be upped. Should petitions become instructions rather than mere prayers? That is the tenor of at least some Anti-Federalist rhetoric, as when Philadelphiensis asked and answered his own question: "Is it improper for freemen to

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New York (June 13 and 14, 1788), *reprinted in* 6 The Complete Anti-Federalist 108-09 (Herbert J. Storing ed., 1981). Note also that petition was the subject of an amendment proposed within the Maryland ratifying convention. *See* Address of a Minority of the Maryland Ratifying Convention (May 6, 1788), *reprinted in* 5 The Complete Anti-Federalist, *supra*, at 98.

236. Essays by a Farmer, *supra* note 233, at 11.

237. *See, e.g.*, Centinel, *To the People of Pennsylvania*, *reprinted in* 2 The Complete Anti-Federalist 143, 152 (Herbert J. Storing ed., 1981).

238. *Essay by Samuel* (January 10, 1788), *reprinted in* 4 The Complete Anti-Federalist 191, 193 (Herbert J. Storing ed., 1981).

239. *See* Centinel, *supra* note 237, at 153.

240. *See* The Federalist No. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing the Petition of Right as resecuring the rights guaranteed by Magna Carta).

petition for their rights? If it be; then I say that the impropriety consisted only in their not *demanding* them."[241]

The debate about instruction of representatives had, as Gordon Wood has shown, its own rich history, one in which the distinction between petition and instruction could end up being no more than political choice.[242] As with instruction, petition also raised important questions about the nature of representation. The distinctions between instruction and petition emphasize key aspects of the debate.

Implicit in an instruction was its power to bind the representative upon pain that "his constituents would most deservedly forfeit their regard and all pretension to their future confidence."[243] That forfeiture of confidence meant that the representative would forfeit his office. A petition had no such binding force. Unlike petitions, perhaps (indeed, quite probably) instructions emanated only from voters or official bodies, hence their binding authority.

Although petitions, like instructions, "were confined largely to parochial and local concerns,"[244] thus "inevitably blurr[ing]" the line between public and private,[245] their legacy was quite different. Unlike instructions, not only could they actually embody the voice of the unenfranchised, rendering the obedience of the representatives problematic, their form spoke to a different type of representation. The colonial experience had been one in which the petition presented arguments and often the text for proposed legislation. Presentation of argument and legislative proposals presupposes the possibility of debate and amendment; instruction admits of neither possibility. Even the success of petitioning as a legislative vehicle did not calcify the process into rigid instructions. Given the particular legacy of the petition and counter-petition, it is hard to see how petitioning could have merged permanently with instruction. Petitioning presumed a form of virtual representation, quite apart from the notions of deference that were so much a part of its history. Nonetheless, when Anti-Federalist pressure made amendments to the Constitution inevitable, the relation between petition and instruction and the theories of representation they embodied was at the core of the debate over the meaning of the final clause of the First Amendment.

The first Congress framed the amendments submitted to the states for ratification. Its debates over the amendments are extraordinarily intelligent, informed, dense, and allusive, as befits a Congress comprising many of the delegates to the Constitutional Convention and

241. Philadelphiensis, *supra* note 231, at 116; *see also supra* text accompanying note 234 ("to act according to their instructions").

242. Wood, Creation, *supra* note 87, at 189.

243. Daniel Dulany, *Considerations, in* I Pamphlets of the American Revolution 608 (Bernard Bailyn ed., 1965), *quoted in* Wood, Creation, *supra* note 87, at 190.

244. *Id.*

245. *Id.* at 191.

other luminaries of the period. Particularly is this true of the debate over the Petition Clause, a rich distillation of theoretical and experiential concerns.

The most striking aspect of that debate is how much it concerns the efficacy of government and how little it concerns protecting the exercise of the right—ample confirmation of Amar's observation about the structural component of the amendment. Federalists, Madison chief among them, sought to preserve the character of the government created by the Convention in the face of the more democratic Anti-Federalist sentiment. The Federalist task was the continual hair-splitting required of those who sought to preserve a government rooted in the demos without turning over every governmental structure to popular control. Thus, the distinctions between ultimate and immediate authority were wrought exceedingly fine. The issues of sovereignty—popular sovereignty—and representation that had animated more than twenty years' discussions of the relationship between citizen and government replicated themselves in miniature in the debate over the right to petition.

Reading the debates that took place on a Saturday in mid-August in New York[246] makes abundantly clear how centrally regarded the right and the activity of petition were to American government. Paradoxically, the clarity comes not from a minute discussion of the place of petitioning in the constitutional order, but rather from the absence of that debate. Some of the various ratifying conventions had suggested amendments to the Constitution that included versions of the petitionary right. Indeed, the text presented for debate was a proposal that the Fifth Amendment read, "The freedom of speech, and of the press, and of the rights of the people peaceably to assemble and consult for their common good, and to apply to government for the redress of grievances shall not be infringed."[247] It does not use the term "petition," substituting instead "apply." While I have found no explana-

246. Congress, though mandated to keep a journal, *see* U.S. Const. art. I, § 5, did not keep an official transcript of its debates until much later (1873). We rely on what has become an unofficial record, Gales & Seaton's *History of Debates in Congress*, and other renditions of the debates published contemporaneously in newspapers. Through the good offices of the First Federal Congress Project, we have had those sources collected and printed in the *Documentary History of the First Federal Congress of the United States of America*. The degree to which the sources differ, not just in detail, but in emphasis and tone, suggests an equivalent degree of caution in treating any single version as authoritative. In my discussion, I will cite to the most detailed version and, where other versions differ materially, shall include those also in my references, indicating the difference.

247. *Gazette of the United States*, 19 August 1789 [hereinafter *Gazette*], *reprinted in* 11 Documentary History of the First Federal Congress of the United States of America, March 4, 1789 - March 3, 1791, at 1257 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter Documentary History]. Both *The Daily Advertiser* and Gales & Seaton's *History of Debates in Congress* render the proposed amendment with a comma between "grievances" and "shall." Gales & Seaton's History of the Debates in Congress 759 (Aug. 15, 1789) [hereinafter Gales & Seaton]; *The Daily Advertiser*, 17

tion for the substitution, at least three possibilities suggest themselves. First, consistent with the character of Anti-Federalist ideology and politics, the substitution could represent a rejection of the deferential and hierarchical legacy of petition and an infusion of a more democratic and egalitarian tone. Second, and not exclusive of the first, "apply" could be meant to encompass a wider sphere of communication than simply petitions. As we have seen, the contemporary understanding was that a petition was a particular and formal type of communication. Had the drafters sought protection for all types of communication with the government without jettisoning the narrower legacy that protected only petitions, arguably "apply" accomplished that goal. Third, "apply" could signal not an Anti-Federalist, but a Federalist, politics. As we shall see, the Anti-Federalists simply assumed the right of petition and sought to constitutionalize the power to instruct the representatives. "[A]pply" could simply be Federalist language designed to preempt that move by expanding and democratizing the right to petition.[248]

In any case, within minutes that question was shunted aside as Representative Tucker from South Carolina moved to amend by inserting "to instruct their representatives."[249] The real debate was on. As the reporter for the *Daily Advertiser* noted, though he rendered a highly truncated version for his readers, "On this motion a long debate ensued."[250]

Opponents to the amendment rose immediately. Representative Hartley of Pennsylvania, calling instruction a "problematical subject," and alluding both to English and to recent local experience with instructions, worried about instructions arising from "the popular mind . . . in a state of fermentation and incapable of acting wisely."[251] The editors at the First Federal Congress project clarify the allusion: "The right of county conventions to instruct members of the legislature had been an issue in the early stages of Shay's Rebellion."[252]

August 1789, *reprinted in* 11 Documentary History, *supra* at 1254 [hereinafter *Daily Advertiser*].

248. Of course, a fourth possibility exists. The change in language could have no meaningful content whatsoever. For obvious reasons, I deeply doubt that possibility.

249. Cong. Reg. (15 August 1789), *reprinted in* 11 Documentary History, *supra* note 247, at 1263. Gales & Seaton render it "Representatives." Gales & Seaton, *supra* note 247, at 761. *The Daily Advertiser,* 17 August 1789, noted where to insert the amendment, between "common good" and "to." *Daily Advertiser, supra* note 247, at 125.

250. *Daily Advertiser, supra* note 247, at 1254.

251. *Id.*

252. *Id.* at 1264 n.13. Their clarification is partially confirmed by the version of the debate in Gales & Seaton in which Elbridge Gerry says, following Tucker's announcement that he will move to amend to include instruction, "[I]t had been abused in the year 1786 in Massachusetts . . . ." Gales & Seaton, *supra* note 247, at 760. Although "it" may refer to the right to assemble, the timing of the remarks assists our understanding of Hartley's allusion. Professor Olson has summarized the colonial experience:

Representative Hartley spoke for all Federalists, who, also alluding to instruction's troubled history,[253] sought to avoid making the legislature captive to the "passions"[254] of the people, especially when that passion was momentary or fleeting.[255] Passion, explicitly specified and embodied in instruction, could become and often was the instrument of "party" and faction, thus divisive of the common good.[256] Specifically, on some issues, how could local instructions, emanating from one state, or worse, one district,[257] be thought to be commensurate with the good of the nation as a whole?[258] Almost as bad, instruction could also embody "error"[259] with similar negative results.

With that legacy, and with such attendant potential for trouble, why should the "wisest" be "embarrass[ed]" by such instructions?[260] The answer, said instruction's proponents, was simple and involved both theoretical and practical concerns. They argued that instruction was

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> Instructions were attempts by local meetings or by institutions claiming to represent the community to bind the community's representative to vote one way on an issue. Town meetings could vote instructions; so could informal, ad hoc caucuses, even county courts. When instructions were issued, the instructors expected their assembleymen to give up his right to independent consideration of the issue, his right, as one legislator put it, to follow the dictates of my own conscience and understanding. Instructions were therefore controversial; they allowed legislators to claim direct representation of the people, but they took from the legislators the ability to decide their vote on the basis of wider information than was available to their constituents. Earler, local institutions might instruct a representative on a purely local question on which he was serving as "attorney" for the community. But in the eighteenth century, instructing might involve binding a representative's vote on a colonywide issue before he had heard arguments from the rest of the colony. Exactly when and how the second kind of instruction developed is not clear. Certainly Pennsylvania and Massachusetts voters were so instructing by the 1720s. In 1727, Morris was defeated for reelection from Philadephia, supposedly for defying instructions . . . . By the early 1750s, the Virginia Burgesses were debating instruction as if their existence had long been taken for granted.

Olson, *supra* note 19, at 554-56 (footnotes omitted).

253. *See* Gales & Seaton, *supra* note 247, at 761-62; *see also* Cong. Reg., *supra* note 249, at 1265 (noting that the question of instruction "has been considerably agitated . . . [i]n England"); *Gazette*, *supra* note 247, at 1258 (illustrating disagreement between representatives); *Daily Advertiser*, *supra* note 247, at 1254 (observing that instruction was "a problematical subject").

254. Gales & Seaton, *supra* note 247, at 761; Cong. Reg., *supra* note 249, at 1265; *see also Gazette*, *supra* note 247, at 1258 ("[T]his was a dangerous article . . . ."); *Daily Advertiser*, *supra* note 247, at 1255.

255. *See* Gales & Seaton, *supra* note 247, at 762; Cong. Reg., *supra* note 249, at 1266.

256. *See* Gales & Seaton, *supra* note 247, at 761; Cong. Reg., *supra* note 249, at 1265; *Gazette*, *supra* note 247, at 1257-58; *Daily Advertiser*, *supra* note 247, at 1255.

257. *See* Gales & Seaton, *supra* note 247, at 761; Cong. Reg., *supra* note 249, at 1265; *Gazette*, *supra* note 247, at 1257-58; *Daily Advertiser*, *supra* note 247, at 1255.

258. *See* Gales & Seaton, *supra* note 247, at 761; Cong. Reg., *supra* note 249, at 1265.

259. Cong. Reg., *supra* note 249, at 1265; *Daily Advertiser*, *supra* note 247, at 1255.

260. Gales & Seaton, *supra* note 247, at 762; Cong. Reg., *supra* note 249, at 1266.

intimately connected with representation, the very embodiment of what popular sovereignty was all about.[261] And, to twist the patriotic knife, they added that, while instructions might be incompatible with monarchicalism, as found in England, surely those sentiments animating Revolutionary America could not be the same as in England.[262] Furthermore, instructions were a way, perhaps the best way, to convey information from the populace to the representatives,[263] and, as Elbridge Gerry noted, the sarcasm fairly dripping from his words, "I hope we shall never shut our ears against that information which is to be derived from the petitions and instructions of our constituents."[264]

Wrong theory and wrong practice, retorted the Federalists. Representation was a more complex matter than merely reflecting the popular will. Were that the case, why the need for a bicameral legislature?[265] Indeed, why multiple representatives at all?[266] Multiple representatives and bicameralism exist, the argument went, to protect against the evils of error and passion and instructions would confound both of those institutional mechanisms. Representatives, after all, know the "interests and the circumstances of their constituents,"[267] but are collected into two bodies not just to slow the legislative process to combat passion and to check error, but to deliberate and to check each other's deliberations.[268]

Instruction, then, was the enemy of deliberation, and not just because each state's or each district's parochialism might subvert the common, national good.[269] Instruction also rendered deliberation superfluous because the representative could do only what his instructions mandated.[270] Better, said the Federalists, to avoid this problem and take the advice and wisdom of the people through their speech and the press, and, when they assembled among themselves and conveyed their grievances, through the time-honored method of peti-

261. *See* Gales & Seaton, *supra* note 247, at 762-63; Cong. Reg., *supra* note 249, at 1266-67.

262. *See* Gales & Seaton, *supra* note 247, at 762-63; Cong. Reg., *supra* note 249, at 1266-67.

263. *See* Gales & Seaton, *supra* note 247, at 765-66; Cong. Reg., *supra* note 249, at 1269-70.

264. Gales & Seaton, *supra* note 247, at 765-66; Cong. Reg., *supra* note 249, at 1269-70.

265. *See* Gales & Seaton, *supra* note 247, at 763; Cong. Reg., *supra* note 249, at 1267; *Daily Advertiser, supra* note 247, at 1255; *see also* Gales & Seaton, *supra* note 247, at 761; Cong. Reg., *supra* note 249, at 1265 (Representative Hartley).

266. *See* Gales & Seaton, *supra* note 246, at 763; Cong. Reg., *supra* note 248, at 1267; *Daily Advertiser, supra* note 247, at 1255; *see also* Gales & Seaton, *supra* note 247, at 761; Cong. Reg., *supra* note 249, at 1265 (Representative Hartley).

267. Gales & Seaton, *supra* note 247, at 761; Cong. Reg., *supra* note 249, at 1265.

268. Gales & Seaton, supra note 247, at 761; Cong. Reg., *supra* note 249, at 1265.

269. *See* Gales & Seaton, *supra* note 247, at 766; Cong. Reg., *supra* note 249, at 1270.

270. *See* Gales & Seaton, *supra* note 247, at 763-64; Cong. Reg., *supra* note 249, at 1267.

tion.[271] Congress was meant to be not a "mere passive machine," but rather a "deliberative body."[272] Petition would serve that end, instruction would destroy it.[273] And, in the end, the amendment was defeated.[274] While the amendment proffered to the states and then ultimately adopted included the right to petition, and not the rights to "apply" or "instruct," the rejection of both terms suggests that the traditional view of popular participation in governing had triumphed, one in which widespread participation, even that of non-voters, was anticipated, indeed welcomed, and taken as a foundational part of the legislative process.[275]

III. Petition's Premature Death Notice

With such experience as a guide, the early congresses naturally "attempted to pass favorably or unfavorably on every petition."[276] Such consideration did not last. Historians and other scholars have thus concluded that petitioning met its demise soon after (or at least within a few decades after) it was secured in the First Amendment. The volume of petitions Congress received may have contributed to the transformation of the right.[277] Indeed, the traditional explanation is that

271. Gales & Seaton, *supra* note 247, at 766-67; Cong. Reg., *supra* note 249, at 1270; *Gazette, supra* note 247, at 1259; *Daily Advertiser, supra* note 247, at 1255-56.

272. Gales & Seaton, *supra* note 247, at 763; Cong. Reg., *supra* note 249, at 1267 (Representative Clymer).

273. The debate was punctuated by a discussion concerning whether instructions would be binding and, if election were not the sole method to enforce the instructional mandate, whether the vote of a representative contrary to instruction would count. Gales & Seaton, *supra* note 247, at 767; Cong. Reg., *supra* note 249, at 1270-71. Interestingly, at least one member felt that judicial review of the vote would be appropriate. Gales & Seaton, *supra* note 247, at 768 (Representative Stone); Cong. Reg., *supra* note 249, at 1272 (same).

274. *See* Gales & Seaton, *supra* note 247, at 777 (stating that the Congress adjourned); Cong. Reg., *supra* note 249, at 1280; *Gazette, supra* note 247, at 1260; *Daily Advertiser, supra* note 247, at 1257.

275. Professor Amar has argued that the Petition Clause, read in conjunction with other parts of the Constitution, empowers a majority of *voters* to require that a constitutional convention be called. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1044, 1065 & n.81 (1988). While I believe that members of Congress would ignore such an obvious outpouring of public sentiment at their peril, whether expressed through petition or otherwise, I also believe that the legacy of petition counsels against an interpretation that would theoretically *require* Congress to do anything. The distinction is, however, likely entirely academic, because any such expression of public sentiment would be unlikely to be ignored.

276. Higginson, *supra* note 3, at 143.

277. On the other hand, nothing in the records of the first few Congresses suggest anything of the kind. The editors of the *Documentary History of the First Federal Congress of the United States of America* have compiled every petition submitted to that Congress and chronicled the history of each one. *See* 7, 8 Documentary History of the First Federal Congress of the United States of America (unpublished typescript on file with author). Nothing in those records indicates that Congress was in any way unable to deal with the flow of petitions. Similarly, a recent compilation by congressional researchers suggests that the committee system as it developed was adequate to

volume debased the right, precipitating its demise. So, no doubt, did the flow of business generated in other manners contribute to the transformation. Reasons exist, however, to doubt whether such mechanical factors alone explain the eclipse of the right. Similarly, while the controversy surrounding the antebellum gag rule covering petitions dealing with slavery demonstrated that the right had lost its central political importance, even slavery's inflammatory topicality seems an insufficient basis on which to ground a claim for the demise of the right.

Thomas Paine, revolutionary firebrand and thorough-going democrat, presciently articulated what a democracy might come to think of the right to petition. His invective came via indirection, however, in his *Rights of Man*, which appeared in the early 1790s.[278] His view of the peripheral political nature of petitioning is, to twentieth century ears, thoroughly modern. His apparent contempt seems a bit jarring, however, only because political petitioning is of so little concern today. In discussing English constitutionalism, Paine noted,

> The act, called the Bill of Rights, comes here into view. What is it but a bargain, which the parts of government made with each other to divide powers, profits and privileges? You shall have so much, and I will have the rest; and with respect to the nation, it said, for *your share*, YOU *shall have the right of petitioning.*
>
> This being the case, the Bill of Rights is more properly a bill of wrongs, and of insult.[279]

Paine's faith was in democracy. The issues, to which he only alluded, lie at the core of the transformation of petitioning's constitutional meaning. Paine's sentiments about democracy put him at the edge of American political thought, to be sure. Still, his vision of petition in a more democractic political order was realized even before political actors were fully aware themselves of the change.[280]

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handle the flow for the first few congresses. Indeed, the committee system was based, at least in part, on the petitions submitted. *See* Staff of House of Representatives Comm. on Energy and Commerce, 99th Cong., 2d Sess., Petitions, Memorials and Other Documents Submitted for the Consideration of Congress March 4, 1789 to December 14, 1795 (Comm. Print 1986).

278. 2 Thomas Paine, Rights of Man (1792), *reprinted in* VI The Life and Works of Thomas Paine 213, 296 (William M. Van der Weyde ed., 1925).

279. *Id.* at 296.

280. For example, the prosecution of Jedidiah Peck under the Sedition Act of 1798 for circulating a seditious petition was dropped not on constitutional grounds, but because of its electoral effect. As one historian has noted, "[T]he Federalists realized their blunder in arresting the popular Republican leader. Indeed, the Otsego Federalists feared making the minister [Peck] a martyr, as his conviction could only strengthen his prospects in the April election." James Morton Smith, *The Sedition Law of 1798 and the Right of Petition: The Attempted Prosecution of Jedidiah Peck*, 35 N.Y. Hist. 63, 69 (1954).

A. *Paper Flow*

The history of petitioning everywhere is marked by the efforts of legislatures to deal with the flow of paper. The solutions replicate themselves from body to body, from medieval Parliament through late eighteenth century colonial assemblies. At first, the entire body received and heard the petition, often in multiple readings. When, as quickly became apparent, the volume of petitions both delayed reading and constrained business generally, the number of readings diminished. Then the full body's initial hearing was eliminated and real reception, following nominal reception by the full body, was given over to a committee.[281] Other efforts—to cover expenses, authenticate the petition, and the like—also followed.

The volume of petitions perpetually appears to astonish historians. Not only, as I have noted, did petitions "dominate" the legislative agendas, they were always, to judge from the descriptions of historians, about to overwhelm it. Like the perpetually rising middle class, the ever-increasing "flood" of petitions is a truism to be treated with some skepticism. In Connecticut, we are told, "commercial and demographic expansion" led to a "concomitant explosion of petitions."[282] In Pennsylvania, the 1720s saw a "notably large amount of petitioning,"[283] while throughout the century, at least one subject "called forth a tremendous amount of petitioning."[284] Indeed, one researcher, whose expectations were "far exceeded" by the "vast scope" of petitions in various pre- and post-Revolutionary era colonies/states, says the volume was so great that she was "precluded [from] full analysis."[285] Why historians should not assume, and instead be surprised that, in a relatively affluent, literate, and politically aware world, one also populated with more than its share of dissenters and apparently restless malcontents, petitions seeking redress would not be widely used is not clear.

What is clear is that the rhetoric of inundation overstates the case.[286] The only monographical work dealing with petitions concerns Virginia. Colonial Virginia did experience a rise in the average number of petitions per legislative session, amounting to more than a tripling in number from 1701 until 1830.[287] The rise, however, was far

281. *See, e.g.*, Bailey, *supra* note 35, at 23-64 (discussing the petition procedure in colonial Virginia); Leonard, *supra* note 106, at 376-80 (discussing the petition procedure in colonial Pennsylvania); Higginson, *supra* note 3, at 146-49 (discussing the petition procedure in colonial Connecticut); Smith, The Right to Petition, *supra* note 24, at 28 (discussing the origins of procedures for private bills).

282. Higginson, *supra* note 3, at 148.

283. Leonard, *supra* note 106, at 377.

284. *Id.* at 377 n.4.

285. Bogin, *supra* note 89, at 395-96.

286. *See* Tully, *supra* note 19, at 143.

287. Bailey, *supra* note 35, at 62 tbl. 5 (presenting the "Number of Petitions Per Session").

from steady. And, for all the adjectives, the greatest number of petitions never exceeded 317 (in 1790), of which 178 were of matters of "Individual Concern."[288]

Like the claims that an ever-rising docket threatens the imminent overload and collapse of the Supreme Court, claims that legislatures were about to be overwhelmed should be treated with a jaundiced eye,[289] even—perhaps especially—when such claims were propounded by contemporary legislators (who might well have had other axes to grind).[290] As the Court has developed mechanisms to handle its load, however imperfect they may be, so legislatures appear to have coped with the strains imposed by various sources of work.[291]

B. *Slavery*

More significant than volume, however, is subject matter. Even Higginson, who attends to political context, stresses subject matter, while alluding to volume, in his conclusion:

> The abrupt defeat of a right so indispensable to the colonial legislative process has two explanations: first, the frailty of the right of petition, a right uprooted from the social and political context in

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288. *Id.*

289. *See, e.g.*, John E. Nowak & Ronald D. Rotunda, Constitutional Law 1129 (4th ed. 1991) ("The United States House of Representatives, having found itself *inundated* with abolitionist petitions, adopted in 1836 a gag rule that limited acceptance of those petition [sic]." (citing A.H. Kelly & W.H. Harbison, The American Constitution: Its Origins and Development 357-58 (4th ed. 1970) (emphasis added)).

290. Frederick relies on Russell B. Nye, *Fettered Freedom: Civil Liberties and the Slavery Controversy, 1830-1860* (1963), for the claim that "the number of [abolitionist] petitions increased from 23 to 300,000." Frederick, *supra* note 3, at 132 & n.91. Nye misread his source, however. Nye's error was picked up and repeated in Samuel Flagg Bemis, *John Quincy Adams and The Union* 340 (1956). Nye and Bemis, both eminent historians, thus gave currency to a vision of a petition flood of Biblical proportions. Dwight Lowell Dumond, also an eminent historian, caught and corrected their error. I defer to Dumond's correction of Messrs. Nye and Bemis:

> These are the figures for the number of petitioners given by Birney in *Correspondence Between the Hon. F. J. Elmore, One of the South Carolina Delegation in Congress, and James G. Birney, One of the Secretaries of the American Anti-Slavery Society* (New York, 1838), p. 65. These figures are incorrectly cited as petitions instead of petitioners in Russell B. Nye, *Fettered Freedom: Civil Liberties and the Slavery Controversy* (East Lansing, 1949), p. 37, and are repeated by Samuel Flagg Bemis in *John Quincy Adams and the Union* (New York, 1956), p. 340, with the statement that they "indicate only the number of petitions, not the millions of signatures to them." There were, of course, no such numbers of signatures on any petitions.

Dwight Lowell Dumond, Antislavery: The Crusade for Freedom in America 398-99 n.7 (1961). William Lee Miller also discusses the effort to calculate the actual number of petitions and signatories. *See* William Lee Miller, Arguing About Slavery: The Great Battle in the United States Congress 305-09 (1996).

291. Parliament, for example, coped. The nineteenth century saw many petition campaigns directed to Parliament. While it received 33,898 petitions in 1843, it received nearly as many in 1893, with yearly totals between half and two-thirds as many occurring during each decade in between. *See* Leys, *supra* note 46, at 54 fig. 1.

> which its use had flourished, and second, more broadly, the assailability of any principle, however fundamental, when confronted by interests as entrenched as slavery. Transport a right from an altogether different political culture into a period of intense political antagonisms, and constitutional language and purpose are readily subverted. The right to petition was ill-fitted to lawmaking in the national legislature; but, perhaps more decisively, it had the misfortune to become inextricably entangled in the slavery crisis.[292]

He may be right. His work, however, like that of all other analysts, points not to the "frailty" of the right, but its robustness. Moreover, while petition may have been "ill-fitted to lawmaking in the national legislature,"[293] his work provides no evidence for that, rather than the subject matter, claim. Slavery, it seems, was the juggernaut that crushed the right.

Under Article I, Section 5 of the Constitution, "Each House may determine the Rules of its Proceedings."[294] The First Amendment, however, provides that, "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."[295] Those two sections of the Constitution came into direct conflict in the years 1836 to 1844, as the House of Representatives attempted to quell the rising number of abolition petitions its members had been receiving. The attempts to stifle the petitions became known as the gag rule or gag law. For eight years, the existence of the rule was a source of tremendous controversy in the House and the nation.[296]

The gag rule reveals, however, not that the debate concerning the abolition of slavery doomed the right, but rather that the right had already lost its earlier significance in American political culture.[297] Representative Pinckney, of South Carolina, the man who was to be the chairman of the select committee which reported the first gag rule,

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292. Higginson, *supra* note 3, at 165; *see also* Gilbert Hobbs Barnes, The Antislavery Impulse 1830-1844, at 118 (reprint ed. 1957) (1933) ("Behind the windy, unreal issues of constitutional abstractions were the living issues of party malevolence and sectional conflict.").

293. Higginson, *supra* note 3, at 165.

294. U.S. Const. art. I, § 5.

295. U.S. Const. amend. 1.

296. The story of the debate over the gag rule has been meticulously chronicled recently. *See* Miller, *supra* note 290. For a sophisticated treatment of the petition's role in the controversies that led to the Civil War, see William W. Freehling, *1 The Road to Disunion: Secessionists at Bay, 1776-1854* (1990). The story of the gag rule was once treated as a classic part of American constitutional history. *See* 2 H. von Holst, The Constitutional and Political History of the United States, 1828-1846 (John J. Lalor trans., 1888).

297. Slavery was a topic of concern to petitioners from the earliest Congresses. *See* William C. diGiacomantonio, *"For the Gratification of a Volunteering Society": Antislavery and Pressure Group Politics in the First Federal Congress*, 15 J. Early Republic 169, 170 (1995) (describing Quaker antislavery petitioners in the First Congress not in ways in which petitioners were regarded in the colonies but "as [an example of] the first pressure group activists in the modern sense" (footnote omitted)).

was not alone in voicing what was to be the position of the House of Representatives for nearly a decade: "Hitherto we have been fighting about mere abstractions. Hitherto we have been contending about the right of petition, and other minor and unimportant points."[298] He made his comment, notably, in 1836, when the constitutional controversy *began*, not when it ended.

Abolitionism was, however, the reason for the gag rule. The rule was the reaction of southern congressmen who felt that the South could no longer bear the insults contained in the language and content of abolition petitions. Designed to staunch the flow of such petitions to the House, it was sweeping in its breadth. As first adopted on May 26, 1836, the rule and its preamble were to signal abolitionists that the House of Representatives was not going to consider the subject of the abolition of slavery and therefore it was superfluous to continue the attempts to agitate the matter.

> 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.[299]

This seminal resolution was to be re-adopted in nearly identical forms during the beginning of each session of Congress until finally made a standing rule in 1840.[300] The standing rule was not repealed until the opening of the second session of the Twenty-eighth Congress, on the resolution offered by John Quincy Adams.[301]

Unfortunately for the participants in the controversy, precious little congressional precedent existed for the actions that were taken. What precedent there was often had only minimal or tangential relevance to the particulars of the adoption of a gag-rule. Nonetheless, the proponents of the gag rule felt it incumbent upon them to forward some precedent, lest they be regarded as constitutional innovators, with all the dire consequences they felt such innovation might have when applied to slavery itself. As Southerners tended to lead the assault on petitions, it was only natural that they would look to one of their heroes, Thomas Jefferson, for some guidance on the matter. Representative Glascock, of Georgia, noted that as Vice-President, while

298. 12 Cong. Deb. 2494 (1836).
299. *Id.* at 4052.
300. Barnes, *supra* note 292, at 110-11.
301. 12 John Quincy Adams, Memoirs of John Quincy Adams 116 (Charles Francis Adams ed., 1877) [hereinafter Memoirs of John Quincy Adams].

presiding over the Senate, Jefferson had allowed the question, "Shall the petition be received?"[302] Glascock reasoned that if Jefferson allowed the question, then surely a legitimate, hence constitutional, rejection might be allowed. Indeed, "This question being adopted and considered by Mr. Jefferson as a proper one," said Glascock, "left him no ground on which even to doubt; and he felt no disposition to look for right authority to sustain him in the views he had taken, or to justify him in the course which he had pursued in relation to these petitions."[303] What Glascock unfortunately ignored was that Jefferson's position dealt only with a single petition and the gag rule he and his colleagues were then debating would provide for the automatic tabling of an entire class of petitions, not allowing the House to consider the question of reception.

In a similar vein, the Speaker of the House, James K. Polk of Tennessee, used a Senate precedent to grant the propriety of considering such a rule. Responding to Adams' query on the House's authority to reject and thus refuse to consider a petition, the Speaker cited a standing eighteen-year precedent in the Senate allowing just such action.[304] Then, in a rather chauvinistic display, the Speaker rhetorically questioned Adams, asking if the House were a lesser assemblage than the Senate, unable to set rules equivalent to those of the upper chamber.[305] As with Glascock's argument, however, the Speaker's decision dealt only with single petitions, and not with a rule.

A strong case was made by Representative Cushing, of Massachusetts, that even the precedents cited by the Speaker and by Glascock ran afoul of the meaning of the right of petition in its historical and contemporary legal contexts. Beginning with the premise that petition for redress of grievances was a right that inhered with the people, he began his rather lengthy discourse.[306] That the right could even be questioned was to him unimaginable. Citing the First Amendment, he explored contemporary legal thought. While noting that *Tucker's Notes on Blackstone* complained that the defense of the right was not worded strongly enough within the amendment, he also acknowledged that *Story's Commentaries* insisted that the right could not be denied "until the spirit of liberty had wholly disappeared, and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen."[307] That fundamental legal thinkers would agree that non-reception was unconstitutional appeared to Cushing as obvious.

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302. 12 Cong. Deb. 2319 (1836).
303. *Id.*
304. *Id.* at 2132.
305. *Id.*
306. *Id.* at 2325.
307. *Id.* (quoting Story's Commentaries).

Not satisfied with what he may have assumed others would regard as transitory thoughts, he insisted that proper understanding of the right of petition could be obtained only by exploring the "anterior political history of the country."[308] Reminding the House that the right of petition was embodied in an amendment, he reviewed the states' demands at the time of the adoption of the Bill of Rights.[309] Massachusetts, he said, required an express declaration that powers not specifically delegated to the federal government be reserved to the states.[310] That she did not demand the inclusion of a bill of particulars was due to the wording of her own constitution, which included a strongly worded guarantee of the right of petition.[311] Virginia, New York, North Carolina, and Rhode Island, however, all insisted upon inclusion of a clause guaranteeing the right.[312] Believing that the history of the United States was insufficient to impress the House, however, Cushing went one step farther. The tenets of Anglo-Saxon law all required that a legislative assembly acknowledge the right of petition. In reviewing the history of Great Britain, Cushing even went so far as to note that never had either of the Houses of Parliament refused to receive petitions.[313] It mattered not that many petitioners had extreme prayers, even praying for "downright revolution in the Government."[314] Their petitions had been received. Wondered Cushing,

> And shall the people in republican America, with its written constitution for the protection of the public rights, and by a body of strictly limited powers, shall the people here be forbidden to do that which they may freely do in the monarchy of England, having no guarantees for the public liberty except laws and prescriptive usages, all of them confessedly at the will of an omnipotent Parliament? Forbid it reason! Forbid it justice! Forbid it liberty! Forbid it the beatified spirits of the revolutionary sages, who watch in heaven over the destinies of the republic![315]

Cushing, of course, was not naive enough to believe that simply being correct in his historical interpretation would persuade the House. If any precedents were to be at all relevant, they had to be ones directly from the House and squarely to the point. Only two direct precedents had been cited in the debate and, while unable to point to previous actions supporting the guarantee that petitions be received, Cushing successfully eliminated the opposition's precedents. The first, which had been cited by Representative Garland, of Virginia, pur-

308. *Id.* at 2326.
309. *Id.* at 2325.
310. *Id.* at 2326.
311. *Id.* at 2326-27.
312. *Id.* at 2327.
313. *Id.* at 2328.
314. *Id.*
315. *Id.*

ported to affirm that in 1790 the House had rejected a memorial from a group of Quakers that dealt with the slave trade.[316] Research by Cushing clearly showed that, in fact, the petition had been referred to committee, and that the House journal was in error.[317] Garland courteously admitted his error.[318] The only other precedent for rejecting a petition was that of Vincente Pazos, of New Granada, in 1818.[319] Cushing correctly noted what a weak precedent it was, pointing out that Pazos was an agent of a foreign government and that his petition constituted an appeal to the Congress from a decision of the Executive.[320]

Because the House conflated its own history with the history of the right, this aspect of the debate was resoundingly inconclusive. More telling, however, were the ways in which all sides in the controversy ignored the history of petition generally.

A prerequisite for serious consideration of a prayer had come to be that the petition be signed only or primarily by those legitimately allowed to request a redress of grievances. What "legitimately" meant, of course, was the key question. The tendency, especially promoted by the gag rule's proponents, was to delimit the sphere of individuals whose prayers could properly be considered. In only one case, however, that of slaves themselves, did the House actually resolve that a group did not have the right of petition. In all other cases, the petitions signed by those considered illegitimate were disparaged or ignored. Not only free blacks, but women and children were variously assailed for stepping out of what was considered their proper role in society, and they were especially assailed for stepping into a political role.[321] Many in the House of Representatives felt that only those

316. *Id.* at 2328-29.
317. *Id.* at 2329.
318. *Id.*
319. *Id.*
320. *Id.*
321. Historians interested in women's history have begun to explore the history of women and petition in some detail. *See, e.g.*, Lori D. Ginzberg, Women and the Work of Benevolence: Morality, Politics, and Class in the Nineteenth-Century United States (1990); Deborah Bingham Van Broekhoven, *"Let Your Names Be Enrolled": Method and Ideology in Women's Antislavery Petitioning, in* The Abolitionist Sisterhood: Women's Political Culture in Antebellum America 179 (Jean Fagan Yellin & John C. Van Horne eds., 1994); Judith Wellman, *Women and Radical Reform in Antebellum Upstate New York: A Profile of Grassroots Female Abolitionists, in* Clio Was a Woman: Studies in the History of American Women 113 (Mabel E. Deutrich & Virginia C. Purdy eds., 1980) (chronicling the rise of women in the anti-slavery movement). It is certainly true that some early feminists were conscious of the overtly political character of women's role in abolition petitioning. *See, e.g.*, Jean Fagan Yellin, Women & Sisters: The Antislavery Feminists in American Culture 38-39 (1989) (quoting and discussing Angelina Grimke's views on petitioning). It is a commonplace observation in women's history that involvement in petition campaigns culminated in the suffrage movement. As Grimke noted, petition campaigns were a training ground, at least at first, that made women conscious that they were and ought to be playing an overt role in politics. *Id.*

legally entitled to vote held the right of petition and further implied that a petition signed by those unable to meet that qualification ought to be ignored in direct proportion to the number of illegitimate signatures on it.[322]

The issue of petitions made by blacks must necessarily be divided into its two component parts, free blacks and slaves. Very few representatives were willing to stand with Adams in his regard for African-Americans as human beings, fully entitled to basic human rights.[323] Most members of the House accepted the position that black persons were inferior to whites and, as a natural consequence, it was thus perfectly acceptable to deny them some political rights. Representative Bouldin, of Virginia, was hardly atypical in his racism. Not only did he analyze in detail the physical differences of "race," but he went a step or two further, reciting the commonly referred to condemnation of Canaan in the *Old Testament*, using it as proof for his assertions that blacks were, as a group, naturally ignorant and indolent.[324] As for any hope of blacks ever being brought up to the stature of the white man, he said, "I cannot feel any serious hope of their ever being brought up to that condition by man's agency. . . . Leave it to God."[325] In response to arguments by northern congressmen, Representative Pinckney, of South Carolina, author of the first gag resolution, summed up the point and addressed one northern congressman, "Does not the gentleman know that the right of petition only attaches to the free white people of the Union . . . ?"[326]

Despite assertions that the right of petition did not inhere in the black population, the House nonetheless received petitions signed by blacks. The representatives were forced, despite claims that blacks could not petition, to deal with the fact that some had petitioned and that the petitions were presented by a handful of willing members of the House. One member, Bouldin, said that a free black was no better than a slave,[327] which would have put free blacks in the position of having their petitions not even received by the House. Another member, Hammond, having envisioned the then fanciful proposition of granting black men full political rights, said, "to see them placed at the heads of your Departments; or to see, perhaps, some Othello, or Toussaint, or Boyer, gifted with genius and inspired by ambition, grasp the presidential wreath, and wield the destinies of this great republic?," "[f]rom such a picture I turn with irrepressible disgust."[328] Such was

322. 12 Cong. Deb. 2531 (1836).
323. *See* Marie B. Hecht, John Quincy Adams: A Personal History of an Independent Man 552-54 (1972) (discussing Adams's regard for the humanity of blacks).
324. 12 Cong. Deb. 2231 (1836).
325. *Id.* at 2232.
326. 13 Abridgment of the Debates of Congress, From 1789 to 1856, at 273 (T. H. Benton ed., 1860) [hereinafter Abridgement].
327. 12 Cong. Deb. 2234 (1836).
328. *Id.* at 2458.

the attitude of many members of the House. Representative Robertson closed the question in the debates of the first session of the Twenty-fourth Congress when he claimed that emancipated slaves were not citizens, ruling out an entire group of free blacks from ever obtaining the full panoply of political rights.[329]

While the positions of the House in regard to free blacks may have been ambivalent and its members' opinions divided, its position vis-à-vis slaves was made emphatically clear. The great bulk of argumentation came in the debate on the censure of Adams, which followed his attempts to question the Speaker about a "Petition from 22 Slaves."[330] A large number of arguments were quickly advanced, most of them not addressing whether slaves had petition rights. Representative Alford immediately suggested that the petition be removed from the House and burned.[331] That suggestion was to set the violent tone of the debate which followed. Representative Thompson, of South Carolina, said that Adams's attempt to present the petition was designed to engender insurrection and mentioned that to do so was illegal, intoning that there were grand juries in the District of Columbia which could handle such matters.[332] Representative Granger, of New York, merely advanced the assertion, without much explanation, that the attempt to present the petition cheapened the right of petition.[333] His was the least vituperative attack.[334]

Following rancorous debate, the House adopted the position that slaves, as property, lacked the right. Having failed on the Thursday before to censure Adams, on Saturday, February 11, 1837, the House adopted measures to prevent being forced to deal with such an uncomfortable spectacle again. First, they disposed of the petition which had been the basis for the uproar:

> An inquiry having been made, by an honorable gentleman from Massachusetts, whether a paper, which he held in his hand, purporting to be a petition from certain slaves, and declaring themselves slaves, came within the order of the House of the 18th of January, and the said paper not having been received by the Speaker, he stated that, in a case so extraordinary and novel, he would take the advice and counsel of the House.
>
> *Resolved*, That this House cannot receive the said petition without disregarding its own dignity, the rights of a large class of citizens of the South and West, and the Constitution of the United States.[335]

329. *Id.* at 4028.
330. 13 Abridgment, *supra* note 326, at 266.
331. *Id.* at 267.
332. *Id.* at 268.
333. *Id.* at 268-69.
334. *Id.* at 267-68.
335. *Id.* at 296.

Immediately thereafter the House categorically denied slaves the right of petition: "*Resolved*, That slaves do not possess the right of petition secured to the people of the United States by the constitution."[336]

Adams was not, however, to be defeated by a mere rule adopted for reasons he felt unacceptable. He was to make reference to the fact that the House had acted to deny one-sixth of the population of the country the right of petition in his lengthy discourse on the right of petition in the debate on the Texas question in 1838.[337] Later he was to claim that much could be lost by ignoring that large a section of the population.[338] Ultimately, he would deny the House resolution itself, warning the body that "he should have no hesitation in presenting a petition from a slave, if his memorial was properly couched, and on a proper subject, or something to this effect."[339]

There was one ground upon which even Adams was willing to reject petitions, the protection of the dignity of the House. Even he felt that offensively worded petitions might be rejected.[340] The question of language was, however, a very complicated one. To many, at least to many other than Adams, the perception of some language as offensive was often more a matter of the subjects the language referred to than of the language itself. The distinction between the subject of the petition and its language was the object he sought. Therein lay the real protection of the House. He did, however, use the language issue to needle his opponents.

> If objection to the reception of these petitions was placed upon the ground that the language was disrespectful, as was intimated by the gentleman from Georgia, [Mr. Glascock,] that objection should be entered on the journal. If the people should be apprized that this was the objection, there would be petitions enough sent here, where no objection of this sort could be urged.[341]

Adams thus tried to make the only exception he would allow into an argument for the right of petition.

The problem with allowing rejection of offensively worded petitions was that, in the view of gag proponents, all abolition petitions were so

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336. *Id.*

337. The Anti-Slavery Crusade in America: Speech of John Quincy Adams upon the Right of People to Petition 58-59 (James M. McPherson & William Loren Katz eds., Arno Press, Inc. 1969) (1838) [hereinafter Speech of John Quincy Adams]. The effect of the speech has been carefully analyzed by historians and rhetoriticians. At least one rhetoritician has disputed the importance that historians have attributed to the address. *See* Jerald A. Banninga, *John Quincy Adams on the Right of a Slave to Petition Congress*, 38 S. Speech Comm. J. 151 (1972).

Adams was, however, playing a game, albeit a deadly, serious one, with the House. The petition from the slaves was a "trick," calling not for slavery's abolition, but its continuation. *See* Miller, *supra* note 290, at 256.

338. Speech of John Quincy Adams, *supra* note 337, at 63-64.

339. Cong. Globe, 25th Cong., 2d Sess. 474 (1838).

340. Speech of John Quincy Adams, *supra* note 337, at 24.

341. 12 Cong. Deb. 2321 (1836).

worded.[342] In their view, it was simply superfluous to present abolition petitions, as they would have to be rejected because the language used in them was insulting.[343] Representative Bynum, of North Carolina, with typical fiery oratory, "hoped the House would never consent to bind up its own hands, so as to be incapable of defending itself, by refusing to consider any insulting or otherwise dangerous communication, that might be incompatible with either its dignity or safety."[344] It was evident that neither Adams nor the gag rule's proponents were willing to let even the question of language be a neutral position. It became simply another weapon with which to attack the opposition's viewpoint.

The final question involved in the petition controversy was the duty of representatives vis-à-vis the petitions they received. The Constitution does not specify that when petitioning for a redress of grievances the petition be of a personal nature. Nonetheless, a large number of members of the House felt it was not their duty either to present or receive petitions of one class of people for another. While the derivative of such an idea would be that no one would ever be able then to petition to aid slaves, as they were barred from petition themselves, such niceties were ignored. Members were thus heard to argue fervently that,

> every people knew their own grievance best, and he thought it a most extravagant claim, under this article, to assert that it gave the right to one set of people to interfere with the rights of another, and that Congress was bound to receive such petitions, and gravely act upon them. The constitution meant (said Mr. G[arland]) no such absurdity.[345]

If Garland's was the position of the House, and his position was not formally made so, then the members had a duty to screen the contents of all petitions and judge whether the grievance was particular to the signers. Few congressmen would have assumed such a burden.

A large number were willing to assume quite another burden, that of simply not presenting petitions they did not like. Adams, of course, felt obliged to present all petitions, except the offensively-worded ones.[346] His colleague from Massachusetts, Representative Cushing, however, was one of the very few who agreed with him.[347] No one actually articulated the position that there was a duty not to present petitions of some types. The papers of the members of the House contain many petitions which were not presented and it is not unreasonable to assume that many more, received by congressmen un-

342. *See, e.g., id.* at 2320, 2338-39, 2462.
343. *Id.* at 2131, 2338.
344. *Id.* at 2132.
345. *Id.* at 2335.
346. *See, e.g.*, 9 Memoirs of John Quincy Adams, *supra* note 301, at 376.
347. 12 Cong. Deb. 2323 (1836).

friendly to abolition, were simply discarded.[348] If, however, a petition was actually presented, the gag rule absolutely prevented any further action on that petition. As so many of the abolition petitions after 1836 were merely political tools, that is probably all the consideration the signers thought or hoped to receive.

Many others, however, actually wanted a response. The normal course of petitions had been halted. They could not be debated, printed, referred to committee, acted upon, or even read in full. George Grennell, Jr., a Massachusetts congressman, wrote Robert Leavitt on February 20, 1837, explaining to him the reality of the gag rule's effects. He indicated that the gag rule "plays the hypocrite, — pretending to respect the right of petition, it renders it nugatory and worthless."[349]

In the debate over the gag rule, the House thus thoroughly revealed its members' political preconceptions. Gone long before the debate began were the latitudinarian precepts of widespread participation, openness of topic, and duty to hear. Only Adams, exemplar of the old order, maintained such views.[350]

After the House adopted the first gag rule, many abolitionists altered the form of their petitions. These altered petitions departed significantly from the classic petitions of the colonial era. In the first place, they embodied none of the language that set forth the petitioner's deferential attitude toward the legislature. In the second place, they were short, deliberately short. They sought no real redress as such. Rather, they were a publicity vehicle for the antislavery cause and designed as such. Signers recognized that the petitions existed for the purpose of linking antislavery, the crusade for human rights for a class of individuals, to opposition to the gag rule, the fight to retrieve a right once guaranteed to all. The linkage was designed to temper abolition's radical image by contrasting it with the lengths to which slavery's supporters might go to preserve the institution. It was also, of course, an attempt to bring into abolition's fold political moderates who might have had reservations about abolition, but whose support for the right to petition was unreserved. Finally, the abolitionists worked in concert with friendly congressmen to make certain that the wording of a petition was brief enough that it could be read in its entirety before a gag rule proponent could rise in objection to its re-

348. *See* Dumond, *supra* note 290, at 245.

349. Letter from George Grennell, Jr. to Robert Leavitt (Feb. 20, 1837), *quoted in* James M. McPherson, *The Fight Against the Gag Rule: Joshua Leavitt and Antislavery Insurgency in the Whig Party, 1839-1842*, 48 J. Negro Hist. 177, 178 (1963).

350. The Senate had undergone a similar, though less dramatic, conflict concerning abolition petitions. *See* Miller, *supra* note 290, at 116-29. One reason it was less dramatic was that the Senate's leading players included no one like Adams. *See generally* William L. Van Deburg, *Henry Clay, the Right of Petition, and Slavery in the Nation's Capital*, 68 Reg. Ky. Hist. Soc'y 132 (1970) (discussing the abolition controversy in Congress).

ception. Petitions had thus become prototypes of the tools of mass politics. Rather than vehicles for specific redress of grievances, they were tools used to unite different political groupings, while at the same time they were vehicles for political theater in the House. In short, they were the sound bites of the early nineteenth century.

What is also apparent is that the classical conception of petition had severely waned before debate on the gag rule began. Save for Adams and Cushing, no member of the House championed the classical conception of universal participation and unrestrained subject matter requiring consideration for petitions so long as the petition was sufficiently deferential. In its place, the gag rule proponents substituted a thoroughly liberal vision. They argued that the right was coextensive with voting. For its force, petitioning depended on the number of potential voters who signed, hence the willingness to deny the right to slaves and to ignore completely the petitions of free blacks, women, and children. Brute political power grounded in the franchise, rather than reciprocal obligation rooted in social and political cohesion, underlay this vision. That vision enabled gag proponents to field the corollary argument that, to the extent the House lacked power to deal with slavery, the topic itself was outside the scope of the right's protection, ignoring petition's English and American heritage as a legislative vehicle for expanding legislative power.

C. *Transformation*

In spite of the "flood" of petitions and even in spite of the corrosive effects of slavery, petitioning was far from dead in the United States. Like the demise of Samuel Clemens, reports of its death have been greatly exaggerated. Nonetheless, during and after the nineteenth century, distinctions between public petitions and private petitions become more pronounced, and the role of petitioning at the state and federal levels diverged somewhat. The nineteenth century witnessed the continued use of petitions, and indeed witnessed other petition drives. To be sure, none reached the sustained size of the abolition drive, but the controversies surrounding women's suffrage, Mormonism and the admission of Utah to statehood, and other similar issues motivated tens of thousands of individuals to sign thousands of petitions to Congress. These public petitions generally took the form of those in the abolition controversy. Their wording was usually brief, often abrupt. They were not instruments of deliberation or persuasion in themselves, but rather instruments of mass politics. Their signers did not seriously believe that the petitions really alerted Senators and Representatives to a new issue or problem, nor did they believe that the petitions really provided new information. Rather, they conveyed a political sentiment and not much else. When signed by voters, the political pressure was obvious. When not, as when signed by women, the political pressure was of a different order and more indirect,

though the moral appeal from the guardians of the archetypal family was all the greater.[351]

The federal government received many petitions, however, on purely private matters, especially if the records of the first few Congresses is indicative. By the middle of the nineteenth century, these ranged from sophisticated prayers for the granting of interstate railroad charters to the more traditional prayers for relief, especially from veterans, war widows, and those who had been harmed in some dealing with the government.[352]

At the state level, petitions also played important roles. Students of the history of the ideology of states' rights would do well to note, for example, that in the late eighteenth and even into the nineteenth century, as attitudes towards slaves and free blacks hardened in the South, the South's state legislatures continued to entertain abolition petitions, as well as petitions from free blacks.[353] These were, of course, the same states whose representatives were so fiery in their denunciations of such petitions in Congress, claiming the inappropriateness of abolition as a topic for the federal legislature.[354]

At the private level, petitioning continued apace. Two of the most prominent examples of the use of private petitions—ones which raised ultimately more general public issues—were petitions for divorce and petitions for the creation of corporations. In most states, for part of the nineteenth century, divorce was a legislative matter, to be granted (or not) on the petition of one party to the marriage. As the petitions became numerous and as divorces raised issues of public morality,

351. Women petitioners had been consciously trading on that moral authority for sometime. *See* Wood, *Sunbury Petition*, *supra* note 124, at 613, 619.

352. After all, because sovereign immunity requires that the government specifically allow a lawsuit, where that waiver has not been granted, only a private bill can settle matters. Christine Desan argues that the legislature had long adjudicated the monetary demands of claimants. *See* Desan, *supra* note 19, at 1430-34. Both Lori Finkelstein and Marcia Blaine elaborate on the significance of widows' petitions in their work. *See* Marcia Blaine, *War Widows: Women and the Consequences of War* (forthcoming) (on file with author); Lori Finkelstein, *Cashing in on the Revolution: Widows and Lawyers in the Early Republic* (paper presented to the New York University Legal History Colloquium, November 12, 1997) (on file with author).

353. *See, e.g.*, Suzanne Lebsock, The Free Women of Petersburg: Status and Culture in a Southern Town, 1784-1860 (1984); Frederika Teute Schmidt & Barbara Ripel Wilhelm, *Early Pro-slavery Petitions in Virginia*, 30 Wm. & Mary Q. 133 (1973); Henry J. Reske, *Following Slavery's Legal Trail: History Professor Finds Untold Stories in the Records of Southern Courthouses*, ABA J., Aug. 1994, at 38, 38 (1994) ("The 2,150 petitions to legislatures . . . focus on changing laws to improve control of or to free slaves.").

354. Petitions for reform of state institutions also continued apace. *See, e.g.*, Marilyn S. Blackwell & James M. Holway, *Reflections on Jacksonian Democracy and Militia Reform: The Waitsfield Militia Petition of 1836*, 55 Vt. Hist. 5 (1987) (discussing working class attempts at militia reform in Vermont).

family structure, and the like, divorce became the subject of general statutes to be administered by the courts.[355]

Similarly, to obtain a corporate charter, corporators were required, until the advent of more general incorporation laws—laws which came on the books in fits and starts and in a piecemeal fashion—to petition state legislatures for the charter sought. As with divorce, both the volume of the particular petitions and the issues of political economy and legislative corruption raised by the petitions pushed the states to prohibit individual charter grants and to make incorporation an administrative matter.[356]

Petitioning did not die. General subject matter petitions—political petitions—were transformed from instruments that were parts of the deliberative process to, in their nadir, marginal instruments of mass politics, often fringe politics.[357] "Impeach Earl Warren" was not just a screed for billboards, it was also the introduction to a sustained petition drive in the late twentieth century. Private petitions continued to serve private needs though. As we have seen, in sufficient and regular numbers, they took over for the older form of public petition, though only indirectly—that is, by their presence, not their prayers—raising issues of public concern. Petitions for public grievances were taken less seriously, of course, but then they were taken less seriously by *both* signatories and legislators. Other vehicles better suited public grievances in a changed political culture. Also, with the change in the formal appearance of petitions and the decline of deference, it became more difficult to distinguish petitions from political speech generally—and, it mattered less to do so.[358]

355. *See* Richard H. Chused, Private Acts in Public Places: A Social History of Divorce in the Formative Era of American Family Law 109-24 (1994); Buckley, *supra* note 124, at 33 & n.12.

356. *See, e.g.*, John W. Cadman, Jr., The Corporation in New Jersey: Business and Politics, 1791-1875 (1949).

357. For a powerful example of how the right was understood, with little comprehension of its history and meaning, see *Citizens' Petition for the Redress of Grievances: Hearing on S. Res. 94 Before the Senate Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 84th Cong. (1955).

358. One of the great ironies of petition's jurisprudence comes from the *McDonald* case, *McDonald v. Smith*, 472 U.S. 479 (1985), which has been criticized for not properly understanding the history of the right to petition. The criticism amounts to the claim that petitions historically enjoyed greater protection than speech or press. *See generally* Schnapper, *supra* note 3 (arguing that the historical analysis in *McDonald* is flawed); Smith, *Shall Make No Law*, *supra* note 3 (suggesting that *McDonald* misunderstood the history and purpose of the right to petition and placed inappropriate limitations on this right). While that claim is true, of course, it also ignores the independent expansion of the protection of speech and press. Moreover, had historical understandings been fully extended, the plaintiff would have had his claim dismissed by the trial court at the outset. Mr. McDonald's "petitions" were not actually petitions at all, but rather letters to President Reagan (copied to others). In the language of classic petitioning, they had no "petitionary parts." *See McDonald*, 472 U.S. at 479, Pl's Ex. A, Pl.'s Ex. B, *in* J.A. at 8, 14. Indeed, though not necessarily dispositive, one of the letters even refers to the documents as "letters" and not petitions. *Id.* at 14.

D. *A Cross-Cultural Note*

Americans fondly seek a particular and peculiar uniqueness in their political history. Comparative history serves to define the parameters of topics that were uniquely within a country's political culture and those which were not. Petitioning's transformation was not a phenomenon limited to the United States. Britain's experience with petitions in the nineteenth century belies the claim that slavery alone explains the changes in petitioning in that era. Rather, Britain's experience also suggests that petitioning and the right to petition changed as a liberal conception of politics came to replace the political culture that preceded it.

Britain, too, witnessed a mid-nineteenth century petition controversy. As did American abolitionists, British radicals seized upon petitions as their instrument.[359] British radicals sought both political and economic reform, egalitarian objects as charged in Britain as abolition was in the United States. Moreover, the volume of petitions in Britain was proportionally similar to that in the United States.[360] In both cases, the number of petitions was in the thousands, the number of signatures, of course, a large multiple of that number. Britain, also, implemented limits on petitions, though Britain's gag rule limited debate, not reception.[361] Where the United States contravened the right, Britain did not. British radicals consciously adopted mass petitioning for legislative redress of large political grievances. In the nineteenth century, the petition served those political ends well, demonstrating powerful electoral support on key issues such as public health and sanitation, Sabbath laws, and the like.[362] British restrictions on the right to petition heralded not petition's demise, but its contextual historical transformation.

CONCLUSION

In the nineteenth century, both Britain and the United States transformed their political cultures. America and Britain, societies characterized by mixed organic and liberal political cultures in the

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Lest anyone think such formalisms are mere excresences of the past, consider *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (holding that failing to specify the parties to the appeal as required by Federal Rule of Appellate Procedure 3(c), barred the petitioner's appeal).

359. *See* Leys, *supra* note 46, at 47; Robert L. Nicholls, *Surrogate for Democracy: Nineteenth Century British Petitioning,* 5 Md. Hist. 43, 44-47 (1974).

360. *See* Leys, *supra* note 46, at 47, 54, 57 (compiling British data); Robert P. Ludlum, *The Antislavery 'Gag-Rule': History and Argument,* 26 J. Negro Hist. 203, 222-43 (1941) (reviewing the debate over the number of signatures); Nicholls, *supra* note 359, at 46 (same).

361. *See* Nicholls, *supra* note 359, at 45 ("In 1842, they suceeded in imposing a gag rule, which provided that a petition could be debated only in case of extreme emergency.").

362. *Id.* at 51.

eighteenth century, became the paradigmatic liberal societies in the nineteenth. Extended franchise (more dramatically in Britain), dissolution of organic bonds (more dramatically in the United States), and massive economic transformation were hallmarks of this shift.

With an extended franchise, accompanied by a greater degree of actual representation, came a decreased need to make one's views known to unrepresentative representatives. The vote became the master. Moreover, as the market made occupational and local loyalties ever more tenuous, the structure of political loyalties and politics changed. Mass politics was on the rise. Petitioning fell victim not to the tensions of slavery—one can easily imagine that the House could have altered its procedure and sent petitions to a stacked committee, there to die, as did Parliament—but to a political culture in which deference and obligation were no longer hallmarks.[363] For their importance, petitions depended on the petitioners' belief that they would be heard. The mass petitions of a few lines belie that understanding. Indeed, in both countries, such petitions were consciously made instruments of agitation, not deliberation. Conversely, those who received the petitions well understood that change in the game of politics and they already knew the importance of the issues raised, such as slavery. Therefore, they also knew that any obligation to deliberate upon each petition no longer obtained.[364] Paradoxically, therefore, liberalism, with its emphasis on the universal franchise, thus helped to deprive those with a vote of a participating voice, not only because those with a vote were more closely represented and because more were actually represented, but also because the vote's only reciprocal obligation was, theoretically, to be responsive—a matter of some difficulty to determine in practice.[365] Petitioning, conceived of as a right with real political content, had a role in a more organic society. Petitioning, now in its public guise just another electoral tool, had a more limited role in a liberal one. As political culture changed,

363. That petition's transformation was not a result of the gag rule controversy specifically, or the abolition movement generally, becomes clearer when one asks a question that would have been second nature in the nineteenth century, but would be far less so in the late twentieth century: How could a ban on reception of petitions by the Houses of Congress stifle the right at the state level? The answer, of course, is that it could not and did not. Constitutional culture comprehended the states as well as the federal government—state constitutions embodied the right as well as the First Amendment. Thus, something else, something deeper, was at work in constitutional politics.

364. Any such obligation would lead to chaos in a system of mass politics. One can imagine lobbying efforts so great, resulting in patterns of submission so large, that the only conceivable object of the efforts would be to tax congressional staffs to the breaking point.

365. As if to emphasize just how tentative reciprocal obligations in modern liberal politics are, modern administrative law schemes require by statute that commentators on proposed regulations receive responses, since organic bonds and electoral power have little place in a bureaucractic state. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 553 (1994).

the included were no longer every person to some degree, but only the enfranchised, now formally equal.