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

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INTRODUCTION

The right of petitioning is an ancient right. It is the cornerstone of the Anglo-American constitutional system. Petitioning is the likely source of the other expressive rights—speech, press, and assembly. The development of petitioning is inextricably linked to the emergence of popular sovereignty. Under the Magna Carta, the nobility used petitioning to secure their rights against the king. Under the Petition of Right, parliament used petitioning to gain popular rights from the king. Finally, in the struggle over the Kentish petition, the people used petitioning as the means to secure their own rights against parliament. The critical importance of the right of petition in our constitutional scheme cannot be fully appreciated without an awareness of its extraordinarily rich history. Holmes's pronouncement that "[t]he life of the law has not been logic: it has been experience"[1] applies with particular force to the right of petition.

The Supreme Court's recent decision in *McDonald v. Smith*[2] reflects an inadequate understanding of the history and purpose of the right to petition and placed inappropriate limitations on this right. A comprehensive examination of this fundamental right is therefore appropriate.

Part I of this article traces petitioning from its origins in Medieval England. Part II studies petitioning during the turbulent years of the Civil War, Interregnum, Restoration, and Glorious Revolution, a time when petitioning was used with great frequency on all manner of subjects and involved masses of people.

Part III shows how petitioning became a fully matured, absolute

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1. O.W. HOLMES, JR., THE COMMON LAW 1 (1881).

2. 105 S. Ct. 2787 (1985) (holding exercise of right to petition confers qualified, not absolute, immunity in suits for defamation).

right in England by 1702, as a result of the Kentish Petition and the intervention of Daniel Defoe. Part IV presents the contrasting status in the Eighteenth Century of speech, press and assembly, which were subjected to repeated governmental interference. Part V discusses the history of petitioning in the American colonies, where in the years preceding the Revolution, petitioning activity was vigorous and widespread and seldom met with interference. Part VI traces the development of the petition clause in the first amendment and discusses the popular reaction to the suppression of petitioning, speech, and press rights under the Sedition law. The interests served by the right of petition are enumerated in Part VII, foremost among which are the vital interests of keeping the government informed of the peoples' needs and learning of the peoples' reactions to the actions of government. Part VIII studies the history and text of the first amendment petition clause and concludes that petitioning should be deemed a nearly absolute right.

Parts IX and X discuss the several limitations that have grown into the freedoms of speech and press and consider their applicability to petitioning. Also, the Supreme Court's recent decision in *McDonald v. Smith*[3] is criticized because the court failed to differentiate between petitioning and other forms of expression and placed an inappropriate limitation on the right to petition.

I. Origins of the Right to Petition

Petitioning, like most other contemporary human liberties, first arose as a practice in response to political needs of the time, later became regularized and institutionalized, and finally became a fixed right. The earliest petition recorded in our Anglo-American constitutional history is the English leaders' petition in 1013 to Aethelred the Unready. The king had fled to France during an invasion of the Danes, and the nobles' petition listed grievances and summoned Aethelred to appear in council. He responded by promising not to retaliate against them for setting forth their complaints and for the other actions they had taken, and by promising that he would remedy their grievances.[4] These same two points—whether petitioners will be punished for their statements, and whether petitioners have the prerogative of instructing

3. *Id.*

4. Marsh, Documents of Liberty 13-14 (1971).

or commanding action of the government—have been the central features of the history of petitioning. Over the course of time, the former has been resolved in petitioners' favor, and the latter against them.

Magna Carta of 1215, the fundamental source of Anglo-American liberties, was the king's response to the barons' petition. This was one of several royal charters granted by Medieval English kings to guarantee baronial privileges and, to a lesser extent, popular rights. Petitioning as a right was specifically recognized in Magna Carta: "[I]f we, our justiciar, or our bailiffs or any of our officers, shall in anything be at fault toward anyone, or shall have broken any one of the articles of the peace or of this security, and the offences be notified to four barons of the five-and-twenty, the said barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, *petition to have the transgression redressed* without delay."[5] The breakdown of feudalism and the emergence of a strong sovereign with a centralized bureaucracy during the reigns of Edwards I, II, and III provided the conditions under which petitioning developed its modern characteristics and in turn shaped the growth of the institutions of government that we know today. Fourteenth Century England moved away from the "feudal habit of amendment or redress by royal prerogative under threat of diffidation."[6] Instead, the legislative power was emerging. "Common and frequent petition, without the threat of force, took the place of prolonged discontent and abrupt presentation of a complex cahier of grievances at the point of the sword."[7] Under Edward III, it became established practice at the opening of every session of parliament for the chancellor to declare the king's willingness to consider petitions of the people.[8]

The different treatment accorded to different types of petitions led to the development of the separation of the legislative and judicial powers from each other and from royal prerogative. By the reign of Edward I, individuals made numerous petitions to the king for grants of privileges. The granting of privileges, in effect, was the making of law. The greater the group of benefi-

5. W. McKechnie, Magna Carta, A Commentary on the Great Charter of King John 467 (2d ed. 1914) (emphasis added).

6. J.E.A. Jolliffe, The Constitutional History of Medieval England 404 (4th ed. 1961).

7. *Id.* at 405.

8. D.H. William, A History of England 174-78 (1967).

ciaries and more generalized and typical the grant of privilege, the nearer this process came to being legislation. The more particularized petitions, on the other hand, had to be referred for trial by auditors.[9] Later, petitions on private matters seeking resolution of disputes or attacking practices of the courts were referred to the chancellor, thereby relieving the royal council of its judicial business.[10] The royal council and parliament had the equal right to legislate in the Fourteenth Century; generations passed before parliament became the exclusive means by which legislation was initiated.[11] In this period, laws proposed by parliament, just like individual grievances, were presented in the form of petitions to the king.[12] It was not until the Sixteenth Century that legislation came to be enacted by statute rather than by petition.[13]

The preceding facts demonstrate that petitioning emerged as the medium for both individual and general requests for legal change and adjustment. A series of Fourteenth Century petitions illustrates how both the people and the Commons, as the branch of government most responsive to the popular will, sought to protect the valuable process of petitioning. To urge government attention to petitions of the people, a petition of 1310 asked that properly constituted authority be present to receive petitions.[14] In 1344 and again in 1377, parliament petitioned against statutes the king and clergy had enacted without consulting parliament.[15]

The Petition of Right of 1628 is reminiscent of Magna Carta; it resulted from a constitutional crisis and embodied personal rights that have become central to the Anglo-American system. Also, like Magna Carta, the Petition of Right contained a royal guarantee issued in response to a petition. At this point in English constitutional history, however, the struggle that initiated the petition was between parliament and the king rather than between

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9. J.E.A. JOLLIFFE, *supra* note 6, at 336, 365 ("If the commons of all the counties united to petition, the king's grant of what they ask will make law of general application.").

10. *Id.* at 467-68.

11. G.B. ADAMS, CONSTITUTIONAL HISTORY OF ENGLAND 205-06 (1934).

12. J.E.A. JOLLIFFE, *supra* note 6, at 376-77. "Grievances of the Commons" were accepted features of parliamentary procedure. Deliberations of the commons were recorded separately on the rolls as "Petitions of the Commons and Responses to them." *Id.*

13. J. HARVEY & L. BATHER, THE BRITISH CONSTITUTION (2d ed. 1968).

14. J.E.A. JOLLIFFE, *supra* note 6, at 370.

15. G.B. ADAMS, *supra* note 11, at 206.

the nobility and the king. The king had advised that he would never consent to a statute on the proposed terms of the Petition of Right. Parliament chose the "petition of right" as its vehicle to secure the desired guarantees because the form "assumed the justice of the petitioner's case and went on the supposition that all that was necessary was to bring it to the king's attention and justice would at once be done."[16] The king's answer did not agree to the demands, but it did recognize them as rights he was bound to uphold.[17] The Petition of Right condemned certain abuses such as arbitrary imprisonment, forced billeting of troops, forced loans, and commissions of martial law.[18]

II. Petitioning Gains a Protected Status: The Civil War, Interregnum, Restoration, and Glorious Revolution

During the era of the Civil War and the Interregnum in England, petitioning reached enormous popularity. In 1622, King James I issued a proclamation that granted "the Right of his subjects to make their immediate Addresses to him by Petition."[19] His successor, Charles I, as late as 1644, invited any subjects with grievances to freely address themselves by petitions and promised that their complaints would be heard.[20] John Pym's speech in the House of Commons in 1640 explained the constitutional necessity of frequent sessions of parliament for providing subjects with an opportunity to present their petitions.[21] Petitions of unprecedented number and size, often accompanied by tumultuous crowds, were laid before parliament. The Root and Branch petition from London, said to have been signed by 15,000

16. *Id.*

17. *Id.* at 293-94. In the Protestation of 1621, the House of Commons had insisted that "redress of mischief and grievances" was properly for parliament's consideration. The Stuart Constitutions: Documents and Commentary 47-48 (J.P. Kenyon ed. 1966) [hereinafter cited as Stuart].

18. D.L. Keir, The Constitutional History of Modern Britain Since 1485, 191-92 (6th ed. 1960). The critical inducement to the king to act on the Petition was his need for supply for the army and navy, which parliament withheld until he assented to the Petition. *Id.* As appears from the discussion of the Kentish Petition, *infra* notes 48-71 and accompanying text, the king's need for supply had the capacity to precipitate a constitutional crisis, the resolution of which depended upon the exercise of petitioning. In fact, as early as the reign of Elizabeth I, constituents said to members of parliament that "Redress of grievances must precede supply." Brown, *Ideas of Representation from Elizabeth to Charles II,* 11 J. Mod. Hist. 23 (1939).

19. 5 Parl. Hist. Eng. App. ccxiv (1701) (Proclamation 10 July, 19 Jac.).

20. 5 Parl. Hist. Eng. App. ccxiv (1701).

21. Stuart, *supra* note 17, at 197-203.

people, was presented in December 1640. The following month, petitions of a similar nature, all asking for abolition of episcopacy, were presented from several districts of the country.[22] Also in 1640, several counties complained of the injustice of ship money, monopolies, the Star Chamber, and other matters. By 1641, there was a constant flow of petitions asking for peace, dispersal of the army, and other relief.[23] Some of the petitions appeared to have been forged, and others were altered after the signatures had been obtained.[24] During 1641-42, petitions were often delivered by riotous assemblies, some plainly for the purpose of trying to coerce or intimidate parliament and other officers of the government.[25] The Grand Remonstrance, drawn up in 1641 by a committee that had received numerous petitions, contained two revolutionary features: the idea of appealing to the people rather than the king, and the concept of parliamentary control over the executive.[26]

The anti-clerical and anti-royalist petitions, which were characteristic in the early stages of the Civil War, appear not to have resulted in criminal prosecutions or parliamentary contempt proceedings, but this seems to have been more the result of political considerations than of legal principles. During this period, the law accorded petitioners no immunity.[27] Thus, Justice Malet of the King's Bench was committed to the Tower of London in 1642 for petitioning on behalf of the conservative gentry of Kent against the militia ordinances and the threatened elimination of the Book of Common Prayer.[28]

In response to the number and size of petitions and the disorderly manner in which they were presented, in 1648 Parliament enacted

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22. 1 J.W. ALLEN, ENGLISH POLITICAL THOUGHT 1603-1660 346-47 (1939). *See generally* 4 H. BROOM & E. HADLEY, COMMENTARIES ON THE LAWS OF ENGLAND 171 (1869).

23. C.S. EMDEN, THE PEOPLE AND THE CONSTITUTION 74 (2d ed. 1959).

24. 1 J.W. ALLEN, *supra* note 22, at 346.

25. Higgins, *The Reactions of Women, with Special Reference to Women Petitioners,* in POLITICS, RELIGION AND THE ENGLISH CIVIL WAR 179-88 (C.B. Manning ed. 1973). "The activities of the London citizens in petitioning and intimidating parliament had made members aware of the immense political power that could be wielded by use of a popular following." Coates, *Some Observations on "The Grand Remonstrance,"* 4 J. MOD. HIST. 1, 2-3 (1932).

26. Coates, *supra* note 25, at 4-5.

27. *See* 1 Z. CHAFEE, JR., DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 311-17 (1963). For example, in 1397, Thomas Haxey had been convicted of treason and sentenced to death for complaining in a petition to parliament that the expenses of the king's household were too high. However, as a result of protests by the Archbishop of Canterbury and others, Haxey was pardoned. *Id.*

28. T.P.S. WOODS, PRELUDE TO CIVIL WAR, 1642: MR. JUSTICE MALET AND THE KENTISH PETITIONERS (1980).

an ordinance limiting the exercise of petitioning by allowing no more than 20 persons to present a petition to parliament and by requiring that the presentation be in a peaceful and orderly manner. The ordinance reflected that there had been tumultuous assemblies in connection with drawing up petitions, that petitions had been presented in a riotous manner, and that there had been bloodshed and danger to the government. However, this ordinance also was the first statute of England to recognize petitioning as a fundamental right: "[I]t is the Right and Privilege of the Subjects of England, to present unto the Parliament their just Grievances, by Way of Petition, in a due Manner; and they shall be always ready to receive such Petitions . . . ."[29]

With the restoration of the Stuarts, Parliament annulled the enactments made during the Interregnum. However, the essential features of the ordinance of 1648 were reenacted in 1661, as the Act 13 Car. II, Stat. I, c. 5, which is still on the statute books of Great Britain. This statute made it an offense to obtain more than 20 signatures to a petition addressed to either king or parliament for any alteration in the church or state, unless with sanction of three county justices of the peace or a majority of the grand jury at assizes or at quarter session or, if from London, with approval of the Lord Mayor, aldermen, and common councilors. In any event, no petition was to be presented by more than ten persons.[30] While this statute did not contain an express statement of the right to petition as set forth in the ordinance of 1648, its enumeration of limitations implies the existence of the right itself. Although the statute was passed in reaction to the extensive popular demonstrations that occurred during the civil war and interregnum, the fact that parliament curbed only the

29. 1 C. FIRTH & R. RAIT, ACTS AND ORDINANCES OF THE INTERREGNUM 1642-1660, 1139 (W. Gaunt ed. 1972).

30. 1 C. FIRTH & R. RAIT, *supra* note 29, at 1139. A proviso added that nothing is to debar persons from presenting petitions to the king or to any member or members of parliament after their election and during the continuance of parliament. *Id.* The statute's purpose was expressly recited:

> Whereas it has been found by said experience that Tumultuous and other Disorderly solliciting and procuring of Hands by private persons to Peticons Complaints Remonstrances & Declarations and other Addresses to the King or to both or either Houses of Parliament for alteracon of matters established by Law redress of p'tended grievances in Church or State or other publique Concernments have beene made use of to serve the ends of Factions & Seditious persons gotten into power to the violation of the publique peace and have beene a great meanes of the late unhappy Wars Confusions and Calamities in this Nation. . . .

Id.

manner of petitioning and not the contents of the petitions also supports the conclusion that a right of petition had emerged. Indeed, within the space of a quarter of a century, a king would be forced to abandon his throne for having disregarded the right to petition.

In 1669, the Commons resolved: "[I]t is an inherent right of every commoner of England to prepare and present Petitions to the house of Commons in case of grievance . . . ."[31] Shaftesbury organized the Green Ribbon Club in 1679 and undertook a vast campaign to collect signatures to petitions favoring an assembly of parliament. The petition from London was on a roll of over 100 yards in length.[32] A royal proclamation issued in response prohibited the promotion of petitions for "specious ends" as tending to "raise sedition and rebellion."[33] Parliament rejoined in 1680 with a resolution that "it is and ever hath been the undoubted right of the subjects of England to petition the King for the calling and sitting of Parliament and the redressing of grievances," and a further resolution "[t]hat to traduce such petitioning as a violation of duty, and to represent it to his majesty as tumultuous and seditious is to betray the liberty of the subject, and contribute to the design of subverting the ancient legal constitution of this kingdom, and introducing arbitrary power."[34] Parliament then proceeded against those persons who had advised or promoted the royal proclamation "in abhorrence of petitioning," expelling Sir Francis Wythens from the House as "a betrayer of the undoubted rights of the subjects of England," holding in contempt the foremen of the grand juries of Somerset and Devon, and ordering the impeachment of Sir Francis North, chief justice of the common pleas.[35]

The Case of the Seven Bishops led directly to the Glorious Revolution of 1688 and to the Bill of Rights that fully confirmed the right of petition as an element of the British constitution. James II published a declaration called Liberty of Conscience on April 17, 1688, which he commanded to be read in the churches

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31. The resolution went on to say, however, that the House had the right to judge and determine the petitions, and that no court had the power to judge or censure them, leaving the implication that unwelcome petitions could be punished by parliament's contempt power. 4 Parl. Deb. (1st ser.) 432-33 (1669).

32. 5 PARL. HIST. ENG. APP. ccxvii (1701).

33. C.S. EMDEN, *supra* note 23, at 75.

34. 4 PARL. HIST. ENG. 1174 (1700); *see* C.S. EMDEN, *supra* note 23, at 75.

35. 5 PARL. HIST. ENG. APP. XVIII (1701).

at divine services.[36] Bishops and clergy met and concurred in a resolution not to read the declaration. The bishops drew up and signed a humble petition to the king, expressing the view that the declaration was founded upon a dispensing power (to abrogate laws enacted by parliament) that parliament had declared illegal. They asked to be relieved from reading it. The king prosecuted the seven bishops for seditious libel. As the bishops were carried to the Tower, the people came in crowds, applauding their courage and wishing them a happy deliverancey.[37]

The bishops' counsel argued that it was no crime to petition the king: "[T]he subjects have a right to petition the King in all their grievances; so say all our books of law; and so says the statute of the 13th of the late King."[38] Lord Chief Justice Sir Robert Wright expressed the view that the king could be rightfully petitioned only in parliament, and because they petitioned out of parliament, the bishops were subject to the libel law.[39] Justice Holloway disagreed; he stated that it was the right of every subject to petition, and petitioning could not be a crime unless done with such ill intention as to raise sedition.[40] Because the petition was held libelous as a matter of law, the jury only had to decide whether the bishops had presented it to the king, of which there was ample evidence. The jury, after remaining in deliberation all night without fire or candle, but supplied with wine at their own request, returned a verdict of not guilty. The people rejoiced and the "army . . . made the air ring with their shouts."[41]

The king discovered that the clergy refused to read his declaration. He appealed to the army to enforce it. He told the first regiment that all those who did not think fit to subscribe to the royal order should lay down their arms, and nearly all did. However, before the king could make substantial progress in this matter, he received news of the Prince of Orange's intended invasion.[42]

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36. This declaration was designed to aid Catholics in their struggle with the Church of England, but was a source of comfort to the dissenting sects as well. 3 CELEBRATED TRIALS AND REMARKABLE CASES OF CRIMINAL JURISPRUDENCE 144, 164 (1825) [hereinafter cited as CELEBRATED TRIALS].

37. 3 CELEBRATED TRIALS, *supra* note 36, at 146; *see* Case of the Seven Bishops, 12 Howell's State Trials 183 (1688).

38. 3 CELEBRATED TRIALS, *supra* note 36, at 155-56.

39. *Id.* at 157.

40. *Id.* at 160.

41. *Id.* at 161.

42. *Id.* at 162.

A convention of the peers and representatives of the realm resolved on January 28-29, 1689, that James II had broken the "original contract between King and people."[43] The crown was offered to William and Mary upon the condition that they accept the Declaration of Rights; acceptance was given on February 13, 1689.[44] The Declaration of Rights provided "that it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning is illegal."[45] The Convention declared itself to be Parliament and enacted the declaration in its statutory form, the Bill of Rights. The statute's expressed purpose manifests that the law declared in the Case of the Seven Bishops had been rejected.[46]

III. Petition Becomes an Absolute Right: The Kentish Petitioners and Daniel Defoe

The signatory and presentational numerical requirements of the statute 13 Car. II, Stat. I, c. 5, seem not to have been rigorously enforced, at least after the passage of the Bill of Rights. The silk weavers of London and Canterbury in August, 1689, initiated a tumultuous petition against a bill to require that woolen garments be worn at certain times of the year, but none of the petitioners appear to have been punished. The House of Lords, to whom the petition was addressed, simply ordered the crowds to go home and requested the assistance of the royal guard for the enforcement of its order. However, the lords unanimously rejected the bill.[47]

Maitland reports that in 1701 the grand jury of Kent presented a respectfully worded petition to the House of Commons, begging that the king be granted money urgently needed for prosecuting war against France. The house voted the petition scandalous and committed the petitioners to prison.[48] From this account, it would

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43. M.A. Thomson, Constitutional History of England 1642-1801, 172 (1938). Parliament had been dissolved in 1687. The Convention consisted of the peers, members of Commons in the last parliament of Charles II, and aldermen and common councillors of London. *Id.* at 171-74.

44. *Id.* at 171-74.

45. Sources of English Constitutional History 599 n.2, 601 (C. Stephenson & F.G. Markham eds. 1937).

46. Bill of Rights, 1 W. & M. Stat. 2, ch. 2 (1689).

47. 5 Parl. Hist. Eng. 400 (1689).

48. F.W. Maitland, The Constitutional History of England 323 (1968). The petition is reproduced in full in 5 Parl. Hist. Eng. 1251 (1701). In the spring of 1701 England was not yet at war, although in alliance with the Dutch she was ready to go

seem that the right of petitioning so recently guaranteed by the Bill of Rights was merely a nominal right and not a right in practice. However, upon closer inquiry we learn that the case of the Kentish petitioners ultimately confirmed and secured the unfettered right of petition to the people of England for all time.

The Kentish petitioners had followed to the letter the Act of 13 Car. II., Stat. I, c. 5. Although the petition was such a popular statement that it was subscribed with many more signatures than the 20 allowed by the statute, it came within the statutory exception as having been sanctioned by justices of the peace or the grand jury.[49] Five petitioners presented it to the house, exactly half the maximum allowed by the statute.[50] The Kentish petition was delivered to parliament on May 8, 1701.[51] The House of Commons reacted wrathfully, regarding the petition to be a Whiggish political maneuver.[52] The petitioners were given an opportunity to recant, which they refused to do, relying on their "right to petition this honourable House, according to the Statute of 13 Car. II."[53] After a five-hour debate on May 9, the House voted the mildly and respectfully worded petition "scandalous, insolent and seditious," and ordered the petitioners committed.[54]

Daniel Defoe's courageous and resourceful action of May 14, 1701 led to the vindication of the right to petition. He wrote and delivered to the House of Commons a remarkable tract entitled "Legion's Memorial,"[55] in which he defended the right to petition

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to war against France. France had repudiated the Partition Treaty, expelled the Dutch garrisons from Belgium, and recognized the son of James II as the rightful king of England. The war, known as Queen Anne's War, began in May 1702. M. ASHLEY, ENGLAND IN THE SEVENTEENTH CENTURY 190-194 (2d ed. 1954).

49. The support of freeholders of Kent for the petition was on account of their fear that "they had sowed their corn, and the French were a-coming to reap it!" Defoe, *History of the Kentish Petition,* in AN ENGLISH GARNER: LATER STUART TRACTS 159 (G.A. Aitken ed. 1903), *reprinted in* 5 PARL. HIST. ENG. APP. XVI [hereinafter cited as Defoe, *Kentish Petition*]. In fact, it was signed by all 21 of the grand jurors, not just the required majority, and by 23 of the justices of the peace, even though three would have been sufficient. Moreover, the signatures of either grand jurors or justices, not both, was all that was necessary. *Id.* at 159-60.

50. Defoe, *Kentish Petition, supra* note 49, at 161.

51. *Id.* at 163-66.

52. M. ASHLEY, *supra* note 48, at 194.

53. Defoe, *Kentish Petition, supra* note 49, at 165.

54. *Id.* at 166.

55. D. Defoe, *Legion's Memorial* in AN ENGLISH GARNER: LATER STUART TRACTS 179-186 (G.A. Aitken ed. 1903), *reprinted in* 5 PARL. HIST. ENG. 1252-55 (1809) [hereinafter cited as Defoe, *Legion*]. For another influential tract written in response to the imprisonment of the Kentish petitioners, see Somers, Jura Populi Anglicani or the Subjects' Right of Petitioning set forth (1701), *reprinted in* 5 PARL. HIST. ENG. APP. XVIII (1701).

and protested against the imprisonment of the Kentish petitioners. Defoe was as scrupulous to violate the Act of 13 Car. II, Stat. I, c. 5, as the Kentish petitioners were to obey this law. He claimed to act on behalf of two hundred thousand, not the statutory maximum of 20: "Our name is Legion, and we are Many."[56] He delivered it in the company of 16 armed men, defying the statutory limit of ten presenters.[57] In contrast to the deferential tone of the Kentish petition, "Legion's Memorial" was vitriolic. Defoe's tract repeatedly accused Parliament of acting illegally, told the House it had been "ridiculous and impertinent" to vote the Kentish petition insolent, and condemned the House as dishonorable, oppressive, neglectful of its duty, and "scandalously vicious."[58] In several passages, Defoe's statements forecast Madison's pronouncements a century later on popular sovereignty:[59] he refers to freeholders as the masters and superiors of parliament, adverts to the right of the people to proceed by "Convention, Assembly or Force" against a parliament that acts illegally, and declares "Englishmen are no more to be Slaves to Parliaments, than to a King!"[60]

Parliament retreated in the face of Defoe's attack. The money bills the king had requested were soon passed. The members "began to drop off, and get into the country."[61] Parliament was prorogued on June 23, 1701. The prorogation resulted in the release of the Kentish petitioners without further proceedings against them.[62] Upon their release, the petitioners were greeted with tremendous public acclaim. There was "a noble entertainment at Mercers Hall in Cheapside . . . where above two hundred Gentlement dined with them, together with several noble Lords

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56. Defoe, *Legion, supra* note 55, at 179, 186.

57. The armed men "were ready to have carried him off by force." Defoe, *Kentish Petition, supra* note 49, at 169.

58. Defoe, *Legion, supra* note 55, at 181-83.

59. For a discussion of Madison's views, see *infra* text accompanying note 184.

60. Defoe, *Legion, supra* note 55, at 180, 182, 185-86.

61. Defoe, *Kentish Petition, supra* note 49, at 169. Although Smollett had an ill opinion of Defoe, he agreed that the latter's action had "intimidated" parliament. T. WRIGHT, THE LIFE OF DANIEL DEFOE (1931); *see also* 1 W. LEE, DANIEL DEFOE: HIS LIFE 51-52 (1869) (Legion's Memorial "seems to have struck terror" into the members). William Colepepper, one of the Kentish petitioners, escaped from custody. Based on a report that Colepepper had roused the whole county of Kent and they were following him back to London, a committee was appointed to draw an address to the king asking that he provide for public safety. However, the king never called for the report and the "whole affair was silently let fall." 5 PARL. HIST. ENG. 1251, 1256-57 (1702).

62. Defoe, *Kentish Petition, supra* note 49, at 170.

and Members of Parliament," and each of the petitioners was met by jubilant crowds as he journeyed homeward.[63]

The following year, on January 22, 1702, the House of Commons gave vent to its frustrations over the Kentish petition affair by imprisoning and ordering the prosecution of two persons for libelous petitions presented to the House on contested parliamentary elections.[64] One of those imprisoned, Theo. Colepepper, the House found was "one of the instruments in promoting and presenting the scandalous, insolent, and seditious Petition Commonly called the Kentish Petition. . . ."[65] A motion that the House set a day to consider its own rights, liberties, and privileges, interrupted the proceedings against Colepepper.[66] The day set for this purpose was February 16, 1702, when "many warm speeches" on the subject were made.[67] On February 24, the House passed two resolutions: first, that the people have a right to petition the king for redress of grievances,[68] and second, that it is an offense to publish any writings "reflecting upon the proceedings of parliament, or any member thereof . . . ."[69] These two resolutions highlight the opposite values placed on petition and press at the time: the right to petition was protected and the press was rigorously suppressed. However, none of the numerous other publications on petitioning, with which the press teemed, resulted in criminal prosecution, including "Legion's Memorial," and Defoe's pamphlet, "The History of the Kentish Petition," published in August, 1701.[70]

The tide of popular opinion that arose in favor of the Kentish petitioners, the impact of the tracts by Defoe and others, and the debate and petitioning resolution of February 1702, combined to bring about the demise of penalty for petitioning. In England, after 1702, there appear to have been no cases of criminal prosecution or parliamentary contempt proceedings on account of petitioning. Defoe, incidentally, became a great favorite of the government, first as a propagandist and later as the organizer of

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63. *Id.* at 170-171; *see* M.A. THOMSON, *supra* note 43, at 145 n.1.
64. 5 PARL. HIST. ENG. 1337-39 (1702).
65. *Id.* at 1339.
66. *Id.*
67. *Id.*
68. *Id.* at 1340. This was a re-enactment of a resolution adopted in 1680. *See supra* text accompanying note 34.
69. 5 PARL. HIST. ENG. 1340 (1702).
70. 1 W. LEE, *supra* note 61, at 51-52; Defoe, *Kentish Petition, supra* note 49.

Great Britain's first secret service.[71] The Kentish petition and "Legion's Memorial" represented the triumph of the people over parliament, just as the Petition of Right had marked the ascendancy of parliament over the king.

The case of Lord George Gordon best illustrates the extent to which the authorities and the public tolerated petitioning activity accompanied by serious disorder. In 1781, Gordon was tried for treason for assembling a great multitude of people and encouraging them to surround the houses of parliament and commit acts of violence, particularly the burning of Roman Catholic chapels. Gordon initiated these actions in an endeavor to repeal a statute regarded as being tolerant of Catholicism.[72] He invoked the right to petition to justify his conduct. The jury acquitted.[73] The court overruled the contentions of prisoner's counsel that the Bill of Rights had repealed the Act of 13 Car. II, Stat. I, c. 5;[74] yet, as a practical matter, the signatory and presentational numerical limits of that law had become dead letter.

By the time of the American Revolution, petitioning had become extremely popular in England; it was no longer checked or penalized and was frequently successful.[75] Indeed, it seems that

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71. E. HAMILTON, THE BACKSTAIRS DRAGON, A LIFE OF ROBERT HARLEY, EARL OF OXFORD 68-72 (1969). Robert Harley, later Earl of Oxford, was the Speaker of the House into whose hands Defoe had thrust "Legion's Memorial." In 1703, Defoe was pilloried and imprisoned for publishing an anonymous pamphlet that angered the Tories. *See The Shortest Way with Dissenters,* in AN ENGLISH GARNER: LATER STUART TRACTS 187 ff. (G.A. Aitken ed. 1903). For a discussion of how the press was regularly suppressed during the Eighteenth Century in contrast to petitioners, see *infra* text accompanying notes 89-92. Perhaps in remembrance of his service to the nation in 1701, the crowds pelted Defoe with flowers rather than the usual rotten eggs. Defoe's wife and children were in desperate straits, on the verge of starvation. Harley secretly intervened with Queen Anne and arranged for Defoe's release. Defoe was recruited to become an enthusiastic supporter of government policy with his pamphlets. He went on to become an organizer and agent in the government's secret service. Later, he published a vindication of Harley's person and conduct when the latter was impeached on charges of treason. E. HAMILTON, *supra,* at 59-60, 266.

72. *See generally* C. DICKENS, BARNABY RUDGE (1954) (describing mob passion and violence).

73. R. v. Lord George Gordon, 2 Doug. 590, 99 Eng. Rep. 372 (1781); 5 CELEBRATED TRIALS, *supra* note 36, at 19.

74. 5 CELEBRATED TRIALS, *supra* note 36, at 80-81.

75. To the solace of devotees of the traditional English fermented beverages cider and perry, petitions from all the "cider and perry counties" were instrumental in bringing about the repeal of a tax levied on these drinks in 1753. C.S. EMDEN, *supra* note 23, at 77.

Many petitions also were presented during the Middlesex Election crisis of 1769. E.N. WILLIAMS, THE EIGHTEENTH CENTURY CONSTITUTION 1688-1815 408 (1960); C.S. EMDEN, *supra* note 23, at 77. For a discussion of the Middlesex Election petitions, see

petitioning, which by now had become an unqualified right, helped to nurture the yet unrecognized rights of press and assembly: notice already has been given as to how publications concerned with petitioning were not subjected to prosecution in an era when punishment for seditious libel was commonplace,[76] and we shall see that public meetings widely developed as the means for preparing and subscribing to petitions.[77]

From 1780 on, petitioning became more and more frequent.[78] The House of Commons passed a resolution in 1780 that its duty was "to provide, as far as may be, an immediate and effectual redress of the abuses complained of in the petitions . . . ."[79] In the semi-revolutionary years of 1779-1780, the reform movement did not resort to violence. Instead, the movement made use of the press, public meetings, and petitions to parliament and the king.[80] Petitions for electoral reform in 1831-1832[81] and of the Cartists in 1848 were of great bulk and contained enormous numbers of signatures.[82] England, whose government gave due consideration to the petitions of its subjects, was at peace, while the Continent, where there was no similar acceptance to the

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infra text accompanying note 93. Fraser disagrees with this article's conclusion that government interference with petitioning ended in 1702, and opines that this practice did not begin to break down until the Middlesex election petitions in 1769. However, he ignores the influence of the tracts of Daniel Defoe and others and the absence of evidence that petitioners were punished after 1702. Fraser, *Public Petitioning and Parliament Before 1832,* 46 HIST. 195, 201 (1961).

76. For a discussion of publications concerned with petitioning, see *supra* text accompanying note 64-70.

77. For discussion of public meetings, see *infra* text accompanying note 96. The right of petitioning was not directly affected by repressive legislation, although some laws restricted association and public meetings. *See* C.S. EMDEN, *supra* note 23, at 77 (discussing effect of Seditious Public Meetings Bill of 1795 during end of Eighteenth and early Nineteenth Centuries).

78. The five year period ending in 1789 produced 880 petitions to parliament, while the five year period ending in 1831 produced 24,492. *See* E.N. WILLIAMS, *supra* note 75, at 408 (citing *Report from the Select Committee on Public Petitions* 10 (1832)).

79. 21 PARL. HIST. ENG. 367 (1780); C.S. EMDEN, *supra* note 23, at 77.

80. *See* 10 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 114, 118 (1938); Fraser, *supra* note 75, at 202.

81. The result was the Reform Act, which gave the people firmer control over parliament. *See* Fraser, *supra* note 75, at 195.

82. Before the late Eighteenth Century, parliament received few petitions on state affairs. By 1829 "both houses did little else" but debate such petitions. *See* Fraser, *supra* note 75, at 207. In 1816, Parliament recognized that voting should be postponed to allow time for meetings to be held and petitions to pour in. This was tantamount to the principle that the public had a right to intervene in the deliberations of the Commons. *Id.* at 209.

submission of popular views, burned with the revolutions of 1831 and 1848.[83]

IV. Petitioning Distinguished from Speech, Press, and Assembly in Eighteenth Century England

Petitioning's cognate rights, speech, press, and assembly, were late to emerge as constitutional liberties. As we have seen, the right to petition was upheld even when the rulers were generally regarded as the superiors of the people, when it was thought that to censure the rulers would dangerously diminish their authority.[84] Prior censorship of expression ended in 1695 when parliament refused to renew the Licensing Act of 1662.[85] Blackstone's view that freedom of the press was nothing more than absence of prior restraint and that expression properly could be punished once published[86] correctly reflected the state of the law in Eighteenth Century England. The government objected to some expression and subjected it to punishment under an expanded concept of treason or as seditious libel. A series of cases stretched the ancient law against treason to cover any attempt to put restraint on the king. In the Seventeenth Century, Twyn was executed for printing a seditious book, and Sydney was hanged for an unpublished manuscript discovered in his possession that said the king was under parliament and subject to deposition.[87]

Treason, as a purely verbal crime unconnected with any overt act, died out after the execution of Mathews in 1720.[88] Thereafter, unpopular political speech was prosecuted as seditious libel, a misdemeanor. In the period 1730-1760, juries revolted, and most prosecutions for seditious libel failed.[89] To overcome jury nullifi-

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83. C.S. Emden, *supra* note 23, at 77-78; J. Harvey & L. Bather, *supra* note 13, at 54.

84. Z. Chafee, Free Speech in the United States 18-19 (1941).

56. 6 W. Holdsworth, *supra* note 80, at 374-77. In another great advance, the Star Chamber was abolished by statute. 16 Car. I, c. 10 (1641).

86. 4 W. Blackstone, Commentaries 151-52.

87. R. v. Syndey, 9 Howell's State Trials 818 (1683); R. v. Twyn, 6 Howell's State Trials 513 (1663).

88. R. v. Mathews, 15 Howell's State Trials 1323 (1719); *see also* L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 11 (1963).

89. F. Siebert, Freedom of the Press in England 1476-1776 382 (1952). Prosecutors' bills of information rather than grand jury indictments could be used to institute these prosecutions. L. Levy, *supra* note 88, at 12; *see also* Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression,* 84 Colum. L. Rev. 91, 102-108 (1984).

cation, the House of Commons cited and imprisoned writers and publishers for seditious libel.[90] The authorities used general warrants to root out seditious libel. Thus, to suppress expression, they invaded personal privacy as well.[91] In addition, various acts regulating printing and imposing taxes severely curtailed the British press in the years before the American Revolution.[92]

The campaigns of John Wilkes, in which the right of petition was vigorously exercised, resulted in great strides toward the recognition of rights of expression. He stood for parliament in 1764-1765 and again in 1768, and although he won the election of 1768 overwhelmingly, the house seated his opponent. This gave rise to the celebrated Middlesex Election petitions to parliament, which became the focal point for the defense of fundamental liberties. Through the courts, Wilkes established the illegality of general warrants. He played a major role in events leading to a parliamentary vote that dismantled the machinery used to supress objectionable newspapers. The American colonies warmly supported Wilkes, embracing his cause as their own.[93]

What develops as an accepted or even tolerated practice often is transmuted into a right. Such appears to have been the case with public assembly, and petitioning likely was the activity that brought about the practice of publicly assembling. In the eighteenth century, the right of public meeting was not yet an envisaged constitutional right.[94] The law did not guarantee public assembly, but did not interfere with it either, unless a riot or rebellion came about.[95] Preparation of petitions often required public meetings. As petitioning became more frequent in the latter part of the Eighteenth Century, public meetings likewise became more common.[96]

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90. *See, e.g.*, R. v. Woodfall, 20 Howell's State Trials 895 (1770) (imprisoned by parliament after jury acquitted); *see also* L. LEVY, *supra* note 88, at 15-16; F. Seibert, *supra* note 89, at 371-72.

91. L. LEVY, *supra* note 88, at 12.

92. *See* F. SIEBERT, *supra* note 89, at 381-82.

93. J. CARSWELL, FROM REVOLUTION TO REVOLUTION: ENGLAND 1688-1776, 138-140 (1973); Rude, *Wilkes and Liberty,* 7 HIST. TODAY 571-79 (1957).

94. W. HOLDSWORTH, *supra* note 80, at 701.

95. Treason had been stretched to cover participation in a riot. The Riot Act of 1715, 1 Geo. I, Stat. 2, ch. 6, clarified the subject, providing that if 12 or more tumultuously assemble and create a public disturbance, an officer may command them to disperse by reading the prescribed proclamation, and they must disperse within an hour. E.N. WILLIAMS, *supra* note 75, at 408.

96. W. HOLDSWORTH, *supra* note 80, at 701; D.L. Keir, *supra* note 18, at 397.

V. PETITIONING IN THE AMERICAN COLONIES

The experience with petitioning, speech, press, and assembly in colonial America was somewhat different from that in England. Some of the American immigrants were political dissidents who came to the New World to escape the Old World restrictions on expression.[97] England did not have the ability to impose firm and consistent political control on the colonies because America was so distant. Also, political habits and attitudes differed greatly among the several colonies. At least in some parts of America, these circumstances led to the toleration of a greater liberty of expression than was enjoyed in England, but also created some aberrational limitations on the right to petition that would have been unacceptable in contemporary England.

Chronologically, the adoption of the Body of Liberties by the Massachusetts Bay Colony Assembly in 1642 was the first significant event touching upon the rights of expression in America. During this time, according to Macauley, the liberties of the English nation were in their greatest peril, and "many looked to the American wilderness as the only assylum in which they could enjoy civil and spiritual freedom."[98] In Massachusetts, people were concerned about the lack of a legal code and the exercise of excessive discretion by the magistrates. Governor Winthrop appointed men to "frame a body or ground of laws in resemblance to a *magna charta,* which . . . should be received for fundamental laws."[99] A proposed code was drafted, sent to the town meetings for their views, and adopted by the General Court.[100] The resulting body of 100 laws codified for the first time in any legal system the right to petition:

> [E]very man whether Inhabitant or Foreigner, free or not free, shall have liberty to come to any public Court, Council

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97. At the Restoration, a number of men who had campaigned for universal manhood suffrage sought refuge on our shores. "Our eighteenth-century ancestors read Harrington [Oceana] and know [sic] the ideas of the constitutional documents of the Interregnum." Brown, *Ideas of Representation from Elizabeth to Charles II,* 11 J. MOD. HIST. 23, 40 (1939).

98. 1 T.B. MACAULEY, HISTORY OF ENGLAND 27 (1881).

99. 1 COMMONWEALTH HISTORY OF MASSACHUSETTS 116 (A. Hart ed. 1966).

100. 2 COMMONWEALTH HISTORY OF MASSACHUSETTS 159-61 (A. Hart ed. 1966). Rev. Nathaniel Ward's proposed code, containing the right to petition and other rights such as equal and speedy justice and prohibitions of double jeopardy and cruel and unusual punishment, was chosen over the largely ecclesiastical code submitted by Rev. John Cotton. *Sources of Our Liberties* in SOURCES OF OUR LIBERTIES 2-3 (R. Perry ed. 1959) [hereinafter cited as Perry].

> or Town meeting, and either by speech or writing, to move any lawful, seasonable or material Question, or to present any necessary Motion, Complaint, Petition, Bill or Information, whereof that Meeting hath proper cognizance, for it be done in convenient time, due Order and respective Manner.[101]

While numerous seditious libel prosecutions took place in England in the years before the American Revolution,[102] no more than half a dozen prosecutions occurred in the colonies during this period, and all of them resulted in acquittals or convictions reversed on appeal.[103] However, licensing of the press lasted until the early 1720's in Massachusetts, Pennsylvania, and other colonies, 30 years longer than it had in England.[104] Scores and probably hundreds of persons were punished by the colonial assemblies for offensive political speech.[105] These included at least two instances after 1702,[106] both in New York, in which a colonial assembly proceeded against petitioners.[107]

An excellent record of petitioning in colonial Virginia has been reconstructed. In Virginia, unlike New York, every effort to place limitations on the right to petition was successfully challenged.[108] Petitioning became a vital part of the legislative process in Eighteenth Century Virginia. More than half of all statutes that were enacted originated in the form of popular petitions,[109] and

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101. THE COLONIAL LAWS OF MASSACHUSETTS, REPRINTED FROM THE EDITION OF 1672, 90 (1887).

102. J. SMITH, FREEDOM'S FETTERS 424 (1956); 2 T. MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 113-14 (1889).

103. L. LEVY, *supra* note 88, at 19-20, 65-66.

104. Id. at 34-36, 49. For a discussion of the Licensing Act, see *supra* text accompanying note 85.

105. L. LEVY, *supra* note 88, at 20-23; M. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 117 (1943).

106. In 1702, the year following the Kentish petition and Legion's Memorial, the British Government no longer punished petitioning. *See supra* text accompanying notes 63-70.

107. In 1758, the New York assembly committed Samuel Townsend, a justice of the peace, for contempt for writing a letter to the speaker of the house requesting relief for certain refugees quartered on Long Island. 2 JOURNAL OF THE GENERAL ASSEMBLY OF NEW YORK 487-89, 551-55 (1758) [hereinafter cited as JOURNAL]. During the Stamp Act crisis. an anonymous letter signed by the Sons of Liberty came to the New York house, accusing the members of not supporting public liberty. The letter was voted to be libelous, scandalous, and seditious, and a reward was offered for the author. JOURNAL, *supra,* at 787; C. BECKER, THE HISTORY OF POLITICAL PARTIES IN THE PROVINCE OF NEW YORK 1760-1776, 39 (1909); L. LEVY, *supra* note 88, at 66-67.

108. R.C. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH CENTURY VIRGINIA (1979).

109. R.C. BAILEY, *supra* note 108, at 64.

the number of petitions per session more than doubled during the second half of the century.[110] The celebrated "Ten Thousand Petition" seeking disestablishment of state religion was accompanied by 125 pages of signatures.[111] The disenfranchised, including women, free blacks, and even slaves, were allowed to petition.[112] The Virginia assembly, through two formal statements (1642 and 1664) on record, declared its primary purpose was for redress of grievances.[113] Petitions on highly controversial topics were read in the assembly. The assembly deemed that it possessed the right to reject petitions worded in an insulting or obnoxious way, but there is no evidence that the assembly ever punished petitioners.[114]

Three colonial governors were thwarted in their efforts to interfere with the petitioning process. Governor Beckley received many petitions during the Indian War of 1675 requesting that he appoint a commander and undertake an active campaign against the Indians. He issued a proclamation forbidding further petitioning to the governor on that subject; complaints were made against the governor for the action, and the British government sent an investigatory commission.[115] Governor Effingham became very angry over petitions complaining of unauthorized fees being charged by some officers; he threatened petitioners and demanded all petitions be given directly to him instead of to the legislature. The assembly refused to comply, sent an agent to England to protest his conduct in this and other matters, and secured his recall.[116] Governor Spotswood, in contravention of a law passed in 1705 eliminating any discretionary powers the county judges may have had not to certify petitions they deemed improper,[117] issued a proclamation in 1715 instructing county courts to refuse to certify "scandalous and seditious" petitions. The assembly ordered the judges to appear before the house, declaring their action to have been "Arbitrary and Illegal and a Subverting of

110. *Id.* at 32.

111. *Id.* at 45, 153.

112. *Id.* at 43-44.

113. *Id.* at 17; 1 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 127 (W.W. Hening ed. 1809).

114. R.C. BAILEY, *supra* note 108, at 30, 39.

115. Beckley did not make any effort to interfere with petitions to the assembly, however. R.C. BAILEY, *supra* note 108, at 38.

116. *Id.* at 38.

117. 3 Stats. at Large of Va. 245-46 (Hening's 1705); *see* R.C. BAILEY, *supra* note 108, at 39.

the Rights and Libertys of the People . . . ," and proceeded to act upon uncertified petitions.[118] By the late Seventeenth Century, the assemblies of Virginia, New York, Pennsylvania, and Maryland had established committees to deal with the increasing number of petitions.[119] In the years preceding the Revolution, as the concept of popular sovereignty gained acceptance, petitioning activity dramatically increased.[120] As the Revolution approached, the colonial assemblies themselves engaged in vigorous petitioning campaigns directed both to parliament and to the king. The assemblies protested the Stamp Act, Molasses Act, and other laws affecting the colonies.[121] At least two of these petitions drew punitive responses, but the mother country imposed these sanctions against the colony or its officers, not against any person in his individual capacity.[122]

The Declaration of Independence, which accused the king of trampling upon many liberties of the colonists, did not claim that petitioning itself had been punished, only that the petitions had not met with favorable response: "In every state of these Oppressions we have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury."[123]

The right of petitioning in America was expressly affirmed in both pre-Revolutionary declarations and pre-union state constitutions. The Stamp Act Congress of 1765 set forth in its Declaration of Rights and Grievances that "it is the right of the British subjects in these colonies to petition the King or either House of Parliament."[124] In 1774, the Declaration and Resolves of the First

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118. R.C. BAILEY, *supra* note 108, at 40-41.

119. M. CLARKE, *supra* note 105, at 210-14.

120. R.C. BAILEY, *supra* note 108, at 35.

121. Rhode Island petitioned to protest the Molasses Act of 1733. Virginia, New York, and Rhode Island all submitted petitions against the Stamp Act of 1765. Massachusetts petitioned against the Townshend Act in 1768. D. SMITH, THE RIGHT TO PETITION FOR REDRESS OF GRIEVANCES: CONSTITUTIONAL DEVELOPMENT AND INTERPRETATIONS 56-63 (1971) (University Microfilms, unpublished thesis).

122. D. JARRETT, BRITAIN 1688-1815 304 (1965). In one instance, when the assembly of Massachusetts petitioned the Privy Council for removal of Governor Hutchinson, the Council rejected the petition as false, scandalous, and seditious, and Benjamin Franklin, who had assisted with publication of a number of Hutchinson's purloined letters, was dismissed as Postmaster General of the colonies. *Id.* In the other instance, the secretary of state for the colonies demanded that the assembly of Massachusetts rescind its petition against the Townshend Acts, and when the assembly refused, he dissolved that body. Perry, *supra* note 100, at 279-80.

123. The Declaration of Independence para. 1 (U.S. 1776).

124. 1 B. SCHWARTZ, THE BILL OF RIGHTS—A DOCUMENTARY HISTORY 196-98 (1971);

Continental Congress stated that the colonists "have a right peaceably to assemble, consider of their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal."[125] Declarations of rights by state conventions, including Pennsylvania (1776),[126] Delaware (1776),[127] North Carolina (1776)[128] Vermont (1777)[129] Massachusetts (1780),[130] and New Hampshire (1783),[131] expressly included the right to petition. Except for North Carolina, Pennsylvania, and Vermont, which included no restrictions whatever upon the right to petition, these declarations qualified the right by specifying that it must be exercised in an "orderly and peaceable manner."[132]

In their ratifying conventions for the proposed federal constitution, four of the American republics, Maryland,[133] New York,[134] North Carolina,[135] and Virginia,[136] specified that the right of petition should be guaranteed. Of these, only Maryland included the requirement of "peaceable and orderly manner."[137]

Before considering the Bill of Rights, it is useful to examine briefly the conditions of speech and press in post-Revolutionary America. During these years, a robust freedom of speech clearly prevailed, and the press was persistently critical of the government.[138] Nevertheless, with the possible exceptions of Virginia and Pennsylvania, the concept of seditious libel was not aban-

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SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 1764-1788 AND THE FORMATION OF THE FEDERAL CONSTITUTION 32-34 (S.E. Morrison ed. 1923).

125. 1 B. SCHWARTZ, *supra* note 124, at 217; 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, 63-74 (1904).

126. 5 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND THEIR ORGANIC LAWS 3081-92 (1909).

127. 1 DEL. LAWS 1700-1797, app. 79-81 (1797).

128. 2 B. POORE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 1409-11 (1878).

129. 6 F. THORPE, *supra* note 126, at 3737-41.

130. JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY, 1779-1780, 191-97 (1832).

131. 4 F. THORPE, *supra* note 126, at 2453-57.

132. *See supra* notes 126-31.

133. *See* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 547-56 (J. Elliot ed. 1866) [hereinafter cited as DEBATES IN STATE CONVENTIONS].

134. *See* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 190-203 (1905).

135. *See* 4 DEBATES IN STATE CONVENTIONS, *supra* note 133, at 55-251.

136. *See* 3 DEBATES IN STATE CONVENTIONS, *supra* note 133, at 21-663.

137. *See* 2 DEBATES IN STATE CONVENTIONS, *supra* note 133, at 547-56.

138. Mayton, *supra* note 89, at 96.

doned, even though most state constitutions contained provisions for freedom of the press.[139] In contrast, evidence of limitations placed upon the right to petition during this period is nonexistant.

VI. The First Amendment and the Sedition Law

Madison drafted the provision of the first amendment guaranteeing the right to petition. The House of Representatives debated extensively over the provision, and the Senate amended the language to its present form. The original proposed text of the first amendment provided that "[t]he freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed."[140] Congressman Sedgwick moved to strike out "assemble and" because that was encompassed within the concept of free speech. Opponents of the motion stated that all the enumerated rights were separate rights inherent in the people and should be specifically protected against infringement by the government. The motion to strike was defeated.[141]

Congress debated and rejected a motion to require representatives to submit to instructions of the electorate. Congress generally agreed, however, that popular opinion should be received and considered, and that the right to petition for redress of grievances must be respected.[142] This action amounted to a formal acceptance of the tacit understanding that petitioners can command the government's reception of, but not its acquiescence in, their petitions.

The Senate rewrote the petition language to essentially its present form; after insignificant amendments in both House and Senate, it emerged in its present form: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances."[143]

Less than ten years after its adoption, the first amendment was tried and tested by the Sedition Act in 1798. This act made it a crime to "write, print, utter or publish . . . any false, scandalous

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139. L. Levy, *supra* note 88, at 182, 190-200, 204-212.

140. 1 Annals of Congress 685-92 (1789); 2 B. Schwartz, *supra* note 124, at 1089.

141. 2 B. Schwartz, *supra* note 124, at 1091-1105.

142. *Id.* at 1093-94.

143. History of Congress Exhibiting a Classification of the Proceedings of the Senate and the House of Representatives from March 4, 1789, to March 3, 1793, 155-59, 160-68, 169-70, 171-73 (1843).

and malicious writing or writings against the government of the United States, or either House of Congress . . . or the President . . . with intent to defame . . . or to bring them . . . into contempt or disrepute."[144] The Sedition Act, therefore, decided against the people any question of whether the Revolution and the adoption of the Constitution had eliminated restraints on speech and press.[145] The government prosecuted only 17 cases under the Sedition Act before the Act expired in 1801.[146] Jedediah Peck, one of the persons charged under the Sedition Act, was indicted for petitioning activity. Peck, a member of the New York Assembly, circulated among his neighbors for signature a vehemently worded petition to Congress advocating repeal of the Alien and Sedition laws. He had voted with the minority in an unsuccessful effort to pass a resolution declaring these laws unconstitutional.[147] Crowds of supporters turned out to cheer for Peck following his arrest.[148] He was released on bail and continued to serve in the state assembly. The prosecution finally dropped the case due to pressure from popular demonstrations in Peck's favor.[149]

Citizens and aliens alike petitioned Congress against the Alien and Sedition laws, but no others were indicted for doing so.[150] The Federalists attempted to reject all petitions on this subject. Congressman Gallatin accused the House of unconstitutionally claiming a "power of defining the nature of petitions," of determining "there are certain points which the people may not touch."[151] Upon Gallatin's motion, the House voted not to reject these petitions but to refer them to a select committee.[152] Virginia

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144. 1 Stat. 596 (1798).

145. *Compare* Z. CHAFEE, *supra* note 84, at 20 (Sedition law reduced speech and press in United States to condition in England before American Revolution), *and* J. SMITH, *supra* note 102, at 424 (same), *with* L. LEVY, *supra* note 88, at 190-212 (prosecution for seditious libel continued during post-Revolutionary period despite freedom of press provided in state conventions).

146. J. SMITH, *supra* note 102, at 187.

147. 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 41-42 n.3 (1919); J. SMITH, *supra* note 102, at 391-98.

148. J. SMITH, *supra* note 102, at 395. "Peck's five days' journey as a prisoner from Cooperstown to New York City in the fall of 1799 became a triumphal processional, . . ." *Id.* One Republican newspaper, referring to Peck's indictment, declared "George the Third's rule was gracious and loving compared to such tyranny." *Id.*

149. 2 H. RANDALL, THE LIFE OF THOMAS JEFFERSON 420 (1858).

150. D. SMITH, *supra* note 121, at 117-18; *see* 9 ANNALS OF CONG. 2934-35, 2957-58, 2959 (1799) (statements of Rep. Livingston, Rep. Bard, and Rep. Gallatin respectively).

151. 9 ANNALS OF CONG. 2958-59 (1799).

152. *Id.*

and Kentucky passed resolutions by which these states petitioned Congress to repeal the Alien and Sedition laws as being plainly unconstitutional.[153] Madison condemned the Sedition law as "retreating toward the exploded doctrine that the administrators of the Government are the masters and not the servants of the people."[154]

Jefferson pardoned all prisoners convicted under the Sedition Act once he became President, and Congress repaid their fines. The popular indignation over the law wrecked the Federalist Party.[155] More than 150 years later, in *New York Times Co. v. Sullivan,*[156] the Supreme Court confirmed that the Sedition law was unconstitutional. Also, in 1812, the Supreme Court held that there was no federal common law criminal action for seditious libel, a question which the court stated had "been long since settled in public opinion."[157]

Surely Chafee is right when he says that the meaning of speech and press crystallized in the controversy over the Sedition Act.[158] Until this controversy was resolved, opinions were divided as to whether free speech and press meant anything more than absence of prior restraint. The right to petition, with a much firmer historical basis for protection than the other forms of expression, commanded a far greater consensus of respect; yet, even the integrity of petitioning was threatened by the Sedition law, as shown by the case of Jedediah Peck. The force of public opinion rather than congressional or judicial action extinguished the Sedition law and elevated press and speech rights to their position of constitutional preference. However, the exercise of the right to petition channelled and focused this great upswelling of public opinion. Thus, in our own constitutional history, like England's, exercise of the right of petitioning nurtures and supports other freedoms of expression.

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153. 4 ELLIOTT'S DEBATES ON THE FEDERAL CONSTITUTION 429, 578 (1876).

154. Address of the General Assembly to the People of the Commonwealth of Virginia, Jan. 23, 1799, 6 MADISON'S WRITINGS 338 (Hunt ed. 1910), and 4 ELLIOTT'S DEBATES ON THE FEDERAL CONSTITUTION 596 ff. (1876).

155. Z. CHAFEE, *supra* note 84, at 27.

156. 376 U.S. 254, 276 (1964) (public figures can prevail in defamation actions against publishers only by establishing deliberate falsehood or reckless disregard of truth).

157. United States v. Hudson & Godwin, 11 U.S. (7 Cranch) 32 (1812) (holding no federal common law criminal action for seditious libel exists).

158. Z. CHAFEE, *supra* note 84, at 29.

VII. Purposes of, and Interests Served By, Petitioning

The purposes of the right to petition and the interests it serves can be garnered from its history:

1. Petitioning is the means by which peoples' problems that need governmental response are brought to the attention of the government.[159]

2. Petitioning is a principal source of the government's information on popular attitudes concerning the way it has conducted public business.[160]

3. Petitions often disclose and consequently remedy incompetence, corruption, waste and other government misconduct.[161]

4. In a popular sovereignty, petitions can measure the degree of public approval enjoyed by the incumbent government and its prospects for being kept in office.

5. The right of petitioning is commonly of such great value that (a) disregard of this right has provoked popular uprisings,[162] and (b) efforts to place "time, place, and manner" restraints upon it have been unsuccessful.[163]

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159. Before universal suffrage, those who did not possess the franchise frequently resorted to petitioning as a means of influencing governmental action. This group included those who did not meet the property qualifications, slaves and free blacks, women, and aliens. *See, e.g.*, the discussion of petitioning in Eighteenth Century Virginia, *supra* notes 108-14.

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold at the same time, that the people cannot freely inform the government of their wishes . . . would raise important constitutional questions.

Eastern R.R. Conference v. Noerr Motor Freight, 365 U.S. 127, 137-38 (1961).

160. Osborn v. Pennsylvania Delaware Service Station Dealers Assoc., 499 F. Supp. 553 (D. Del. 1980).

161. Without petitioning being respected, "a wholesome restraint upon official corruption, extravagance, and mal-administration, would be removed and the public would suffer." Ambrosius v. O'Farrell, 119 Ill. App. 265, 270 (1905) (denying recovery for libel for petition to city council that alleged in good faith that city official committed crime).

162. For a discussion of popular uprisings associated with the right of petitioning, see *supra* notes 27 (Thomas Haxey), 36-42 (the Seven Bishops), 47-51 (Kentish petitioners), and 147-48 (Jedediah Peck) and accompanying text.

163. The statute 13 Car. II, Stat. I, c. 5, which placed signatory and presentational numerical limits on petitioning, never was enforced successfully. Recall that Defoe in "Legion's Memorial" committed an open and provocative violation of these limits and that no action was taken against him. *See supra* text accompanying notes 55-64.

6. Extensive petitioning activity preceded a number of popular constitutional reforms, the most important of which was popular sovereignty.[164]

7. The availability of petitioning as a popular right allows public feelings to be expressed in a peaceful, orderly way and may be a foil to revolution.[165]

8. Petitioning, in a sense, is the fountain of liberties, because historically it was the first popular right to be recognized. Vigorous exercise of the right to petition has been associated with forward strides in the development of speech, press, and assembly.[166]

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164. Popular sovereignty developed first by establishing the legislative supremacy of parliament in the course of the English Civil War and ensuing events, and second by gaining universal manhood suffrage through electoral reform in the Nineteenth Century. *See supra* text accompanying notes 22-29 (legislative supremacy of parliament) and 81-82 (electoral reform). Also, massive petition campaigns preceded the abolition of slavery in both the British Empire and the United States. Anti-slavery petitions with over one million signatures in 1814 and 1833 preceded the abolition of slavery in the British colonies during 1830-1840. C.S. EMDEN, *supra* note 23, at 77-78. In 1790, the first petition seeking the abolition of slavery was presented to the House of Representatives. 2 ANNALS OF CONG. 1182-83 (1790). Abolition petitions were filed in increasing number as the years passed. Petitions containing over 300,000 names were presented in the 1837-1838 session of Congress in a massive campaign to abolish slavery in the District of Columbia. H. VON HOLST, THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES 284 (1888). The House of Representatives responded by passing rules under which petitions concerning slavery "without being either printed or referred . . . [were] laid upon the table and . . . no further action whatever [could] be had thereon." Register of Debates 4052 (May 26, 1836). Congressman and former President John Quincy Adams vigorously attacked these rules, which were passed by successive Congresses until 1844. Adams called the rules "a direct violation of the Constitution of the United States, of the rules of this House, and of the rights of my constituents." Register of Debates 4053 (May 26, 1836). Senator Calhoun thought these petitions were a great threat to the institution of slavery:

> The Senators from the slaveholding States, who most unfortunately have committed themselves to vote for receiving these incendiary petitions, tell us that whenever the attempt shall be made to abolish slavery, they will join us . . . . They are now called upon to redeem their pledge . . . . The war which the abolitionists wage against us . . . is a war of religious and political fanaticism . . . . We must meet the enemy on the frontier, on the question of receiving [the petitions]; we must secure the important pass—it is our Thermopylae.

Register of Debates 774-75 (Mar. 9, 1836). *See generally* D. SMITH, *supra* note 121, at 81-96.

165. A comparison of the events in England and on the Continent in 1831 and 1848 evidences the peace keeping effect of the right of petition. *See supra* text accompanying note 83.

166. The first statement of the principle of freedom of conscience was put forward by the Levellers during the English Civil War, a time of unprecedented petitioning. M. ASHLEY, *supra* note 48, at 110. For a discussion of petitioning during the English Civil War, see *supra* text accompanying notes 22-25. The campaigns of John Wilkes for freedom of expression involved vigorous exercise of the right to petition. *See supra* text accompanying note 92. The efforts in pre-Revolutionary America to achieve free

Conversely, when petitioning has been attacked, as under the Sedition law, the other expressive freedoms likewise have been suppressed.[167]

Petitioning is a distinct right. It is independent of, and not subsumed under, freedom of speech and press. The state of affairs in Eighteenth Century England manifest that petitioning was in practice an absolute right while speech and press were the constant subjects of seditious libel prosecutions and other restraints.[168] Also, although freedom of assembly may owe much of its development to petitioning, these two rights are separable. Thus, public order regulations concerning meetings for framing and signing petitions and meetings for presentation of petitions to the government do not infringe upon the right to petition itself.[169]

VIII. Whether Limitations on the Right to Petition Are Historically or Textually Justified

The nature and extent of any limitations that the first amendment contemplates be placed upon petitioning must be considered. This analysis requires taking into account the history of petitioning, the textual development of the first amendment petition clause, the views of the draftsman of the first amendment and of the members of Congress who debated the first amendment, and the interests served by petitioning. These inquiries are interrelated. For example, the history of petitioning doubtless had a great influence on the men who drew up and debated the first amendment.

The historical aspect of the analysis is critical because, as the Supreme Court has stated, rights under the Bill of Rights must be preserved as they existed in 1791.[170] History instructs that petitioning predated and was an important antecedent to the other

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speech, press, and assembly, were contemporaneous with waves of petitioning from the people to their popular assemblies and from the assemblies to the government in England. For a discussion of petitioning in pre-Revolutionary America, see *supra* text accompanying notes 108-22.

167. For a discussion of the sedition law, see *supra* text accompanying notes 144-55.

168. For a discussion of petitioning and seditious libel prosecutions, see *supra* text accompanying notes 69, 88.

169. For a further discussion of public order regulations, see *infra* text accompanying note 217.

170. Curtis v. Loether, 415 U.S. 189, 193 (1974) (holding statutory damage suit sounding in tort was action to enforce legal, as opposed to equitable claims, entitling parties to jury trial under Seventh Amendment).

rights of expression. The most important lesson of history, however, is that in England after 1702 the right to petition in practice was an absolute right against the government.[171] In contrast, prior to the American Revolution, several of the other rights guaranteed by the Bill of Rights, including the cognate rights of speech, press, and assembly, were subjected to widespread suppression.

Textually, the first amendment petitioning clause should be compared to the way this right was treated in prior constitutions and the fundamental documents available to the framers of the Constitution, and to its own original and various amended forms. The English Bill of Rights states the right of petition in absolute, unqualified terms: "it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning is illegal."[172] The framers of the Constitution were familiar with the English Bill of Rights and used the English document as a model for the petition clause of the first amendment.[173]

The earliest American codification of petitioning, in the Massachusetts Body of Liberties of 1642, contained at least four restrictions and limitations on the right: (1) relevant to a proper public question, (2) subject matter within the jurisdiction of the body to whom the petition is addressed; (3) submitted at a convenient time; and (4) submitted in an orderly and respectful manner.[174] None of these limitations, except "peaceable and orderly manner," are found in any of the later colonial declarations of rights and the early state constitutions. Neither the Stamp Act Congress nor the First Continental Congress qualified the right of petitioning in any way.[175] In the declarations of rights, three of the six state conventions attached the requirement of "orderly and peaceable manner" to petitioning.[176] Four resolutions ratifying

171. The common law also granted an absolute privilege to petitioners against suits by private persons claiming they were defamed by the contents of petitions. Lake v. King, 1 Wms. Saund. 131, 85 Eng. Rep. 137 (1680). For further discussion of the defamation issue, see *infra* text accompanying notes 223-31.

172. 1 W. & M. stat. 2, ch. 2 (1689).

173. A. WEINBERGER, FREEDOM AND PROTECTION—THE BILL OF RIGHTS 10 (1962).

174. For further discussion of the first American codification of petitioning, see *supra* text accompanying note 101.

175. For a discussion of the Stamp Act Congress and the First Continental Congress, see *supra* text accompanying notes 124-25. The Declarations and Resolves of the First Continental Congress employed the word "peaceably," but just as in the first amendment, this term modified "to assemble," not "petition."

176. For a discussion of the declaration of rights, see *supra* text accompanying notes 126-31.

the federal constitution specified the right to petition, but only one of these imposed the limitation of "orderly and peacable manner."[177]

Only one amendment of the text of the first amendment significantly affected the petition clause: the word "petition" was substituted for the words "apply to."[178] Although no statement of intent accompanied this change of language, the substituted term's well established common law and historical meaning as an absolute right is properly incorporated into the first amendment.[179] Moreover, the text of the first amendment omitted the qualifications and restrictions found in earlier fundamental documents. This omission also supports the view that the framers intended to express petitioning as an absolute right.[180] The defeat of the motion to strike assembly as a specific right,[181] perhaps to have been followed by a motion to strike petitioning if successful, further evidences congressional intent that petition be regarded as a unique right, a right entirely distinct from speech and press. Finally, when Congress rejected the right of voter instruction of representatives, the reliance stressed in the debate on the alternative of petitioning as a means of making known the public will indicates that petitioning should be accorded the status of a preferred right.[182]

In addition, the views of Madison, the draftsman of the first amendment, support the view that petition is a preferred and distinct right. For example, regarding the proposed electorate's right to instruct representatives, Madison stated that "[t]he people may therefore publicly address their representatives, may privately advise them, or declare their sentiment by petition to the whole body; in all these ways they may communicate their will."[183] Madison's views also are disclosed in his address to the people of Virginia in opposition to the Sedition law, where he declared that government must be the servant, not the master, of the people.[184]

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177. For a discussion of resolutions ratifying the federal constitution, see *supra* text accompanying notes 133-36.

178. For a discussion of the original text of the first amendment, see *supra* text accompanying notes 140, 143.

179. Bradley v. United States, 410 U.S. 605 (1973) (affirming mandatory minimum criminal sentences under savings clause of statute abolishing mandatory sentences where statute enacted after criminal conduct but before trial and sentencing).

180. 82 C.J.S. *Statutes* § 371 (1953).

181. For a discussion of the motion to strike assembly as a specific right, see *supra* text accompanying note 141.

182. For a discussion of voter instruction, see *supra* text accompanying note 142.

183. 1 ANNALS OF CONG. 738 (1789).

184. For a discussion of Madison's views, see *supra* note 154 and accompanying text.

Because the Sedition law was invoked against petitioning as well as speech and press, Madison's condemnation of the Sedition law as contrary to popular sovereignty places him on record as standing for an unrestricted right of petition. Thus, the concept of popular sovereignty mandates that petitioners have the same absolute immunity for their petitions that the common law accords to their *servants* —the members of the legislative, executive, and judicial branches —for all statements made within the "outer perimeter" of their area of responsibility, even if the statements are malicious and false.[185]

Eighteenth Century political philosophers, including Montesquieu and Spinoza, influenced the framers of the Constitution. These philosophers espoused principles of broad, uninhibited expressive rights.[186] The framers also were aware of important events in the history of petitioning, including the Case of the Seven Bishops, the struggle to secure the Bill of Rights in England,[187] and doubtless the Kentish petition and "Legion's Memorial."

Neither history, the text of the first amendment, the views of the draftsmen and members of the First Congress, nor the interests served by petitioning, justify any limitations or qualifications being placed on this fundamental right. An absolute right of petition must be preserved to fulfill adequately the purposes and interests of petitioning.

IX. The Supreme Court's Careless Assumption that Petitioning is Subject to the Restrictions Applicable to Speech and Press

The Supreme Court first considered the right to petition in two Nineteenth Century cases, *Crandall v. Nevada*[188] and *United States*

185. *See, e.g.,* Gravel v. United States, 408 U.S. 606 (1972) (speech or debate clause protects Senator from criminal liability for releasing classified documents in legislative committee but not for non-legislative act of arranging publication with book publisher); Barr v. Matteo, 360 U.S. 564 (1959) (holding in libel action that statements of Acting Director of Rent Stabilization relating to official business were absolutely privileged); Spalding v. Vilas, 161 U.S. 483 (1896) (finding Postmaster General not liable for communications relating to official business); *see also* W. Prosser & W. Keeton, The Law of Torts § 114 (5th ed. 1984) (absolute immunity for statements made by government officers).

186. *See* Mayton, *supra* note 89, at 109-111.

187. *See* Harris v. Huntington, 2 Tyl. 129, 141-42 (Vt. 1802).

188. 73 U.S. (6 Wall.) 35, 44 (1867) (right of interstate travel precludes state's levy of tax on persons departing state).

v. Cruikshank.[189] In the former, the Court expounded a privilege of interstate travel that is derived from the right to petition the national government.[190] In the latter, the Court decided that petitioning itself, as related to matters within the concern of the federal government, is a fourteenth amendment privilege and immune from both federal and state government action.[191] Later, in *De Jonge v. Oregon,* the Court broadened the right of assembly and made it clear that assembly is not dependent on the right of petition; this case conversely emphasizes the status of petitioning as an independent right.[192] Then, in *Thomas v. Collins,* the Court declared that grievances for which the right to petition was created are not solely religious or political and are not confined to any particular field of interest.[193] The *Thomas* Court also stated that the first amendment expressive rights of petition, speech, press, and assembly are inseparable.[194]

The Court first placed a limitation on the right to petition in the 1961 decision of *Eastern Railroad Conference v. Noerr Motor Freight.*[195] In *Noerr* the Court developed the "sham exception," holding that liability can be imposed on one who makes a pretense out of petitioning to cloak an ulterior purpose of injuring the private interests of another.[196] The sham exception, although without common law or historical basis, is appropriate in a system where the right to petition is broader than other expressive rights, because one should not be able to evade constitutionally acceptable limitations on speech and press by disguising a communication as a petition.

Until its 1985 decision in *McDonald v. Smith,*[197] the Supreme

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189. 92 U.S. 542 (1876) (limiting federal civil rights criminal conspiracy statute punishing interference with public assemblies to situations where some right of national citizenship such as petitioning Congress is exercised).

190. *Crandall,* 73 U.S. (6 Wall.) at 43-44.

191. *Cruikshank,* 92 U.S. at 554-55. In *Cruikshank,* the Court stated that "[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *Id.* at 552. In United Mine Workers Union v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967), the Court said, "[t]he rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights."

192. 299 U.S. 353, 364 (1937).

193. 323 U.S. 516, 531 (1945).

194. *Id.* at 530.

195. 365 U.S. 127 (1961).

196. *Id.* at 144. For a discussion of *Noerr* and its progeny, see *infra* text accompanying notes 234-38.

197. 105 S. Ct. 2787 (1985).

Court had not considered whether the right to petition was subject to any of the limitations that had been engrafted on the cognate rights of free speech and press.[198] In *McDonald,* a lawyer, who had unsuccessfully sought appointment to a United States attorney's position, brought a libel suit against an individual who wrote to the President claiming that the plaintiff had violated individuals' civil rights while a state judge, had committed fraud and blackmail, and had violated professional ethics. The complaint alleged that these charges were knowingly false. In a unanimous decision, the Supreme Court held that the right to petition did not accord the defendant an absolute privilege against liability for defamation and that the *New York Times* standard of known falsity or reckless disregard for truth applies to the contents of petitions, just as it does to speech and press generally.[199]

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198. The Court has held that the following categories of speech and press activity are subject to limitation in various forms, such as criminal prosecution, suits for damages, and administrative sanctions: (1) unreasonable as to time, place, and manner, *see, e.g.,* Greer v. Spock, 424 U.S. 828 (1976); Police Dept. of Chicago v. Moseley, 408 U.S. 92 (1972) (so long as restriction is content-neutral); (2) inciting a breach of the peace, *see, e.g.,* Hess v. Indiana, 414 U.S. 105 (1973); Feiner v. New York, 340 U.S. 315 (1951); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); (3) advocating immediate violent action to overthrow the government that is likely to succeed, *see, e.g.,* Brandenburg v. Ohio, 395 U.S. 444 (1969); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951); (4) interfering with the war effort during wartime, *see, e.g.,* Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); (5) releasing classified security information, *see, e.g.,* Snepp v. United States, 444 U.S. 507 (1980); (6) governmental employees criticizing their superiors, *see, e.g.,* Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Educ., 391 U.S. 563 (1968); (7) governmental employees engaging in election activity, *see, e.g.,* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); (8) false, deceptive, or misleading commercial speech, *see, e.g.,* Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); N.L.R.B. v. Gissell Packing Co., 295 U.S. 575 (1969) (holding unprotected employer's potentially deceptive statements to employees); (9) obscenity, *see, e.g.,* New York v. Ferber, 458 U.S. 747 (1982) (less exacting standard if directed to children); Miller v. California, 413 U.S. 15 (1973); (10) sexually oriented speech, *see, e.g.,* F.C.C. v. Pacifica Found., 438 U.S. 726 (1978); Young v. American Mini-Theatres, 427 U.S. 50 (1976); (11) defamation, *see, e.g.,* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347, 349-50 (1974) (non-public figure can recover against media defendant as long as liability isn't imposed without fault; no punitive damages against media defendant without knowledge of falsity or reckless disregard of truth); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (public figure must prove defendant recklessly disregarded truth or knew publication was false); (12) possibly group libel, *see, e.g.,* Beauharnais v. Illinois, 343 U.S. 250 (1952). *But see* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 7-65 (1966) (*Beauharnais* now of doubtful validity); (13) criminal conspiracies and solicitations, *see, e.g.,* Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 126 (1961).

199. *McDonald,* 105 S. Ct. at 2791.

The *McDonald* Court failed to give adequate consideration to the history, textual development, and draftsmen's intent of the right to petition and to the purposes and interests it serves.[200] The Court failed to refer to the lengthy history by which petitioning developed as an essentially unlimited right in advance of and separate from the other expressive rights. The majority and concurring opinions contained only two historical references. The Chief Justice, writing for the majority, mischaracterized a parliamentary enactment in "the 1790's" as an "attack" on the right to petition. The statute made public meetings of more than 50 persons illegal if assembled for the purpose of petitioning and if a magistrate was not present.[201] This statute controlled the assembly incidental to petitioning, not the core petitioning activity itself.[202] This law imposed no penalty or damages upon the content

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200. At the time the Constitution was adopted, the common law of England, as had been set out in Lake v. King, 1 Wms. Saund. 131, 132, 85 Eng. Rep. 137, 138 (1680), held that the right to petition conferred absolute immunity against civil liability based on contents of petitions to the government. In 1845, failing to take the constitutional issue into account, the Supreme Court inexplicably rejected this common law doctrine in a decision that dealt only with District of Columbia libel law. White v. Nicholls, 44 U.S. (3 How.) 266 (1845). *Lake v. King* is the only pre-Revolutionary case cited in *White v. Nicholls*. *See White,* 44 U.S. at 289. The Court relied on several cases that involved purely private issues rather than governmental functions, such as whether an action can be brought by an employee against his employer for comments about his quailfications. 44 U.S. at 287 (citing Cockayne v. Hodgkisson, 5 Car. & P. 543, 172 Eng. Rep. 1091 (1835); Child v. Affleck, 9 Barn. Cress. 406, 109 Eng. Rep. 150 (1829); Wright v. Hawkins, 1 T.R. 110, 99 Eng. Rep. 1001 (1786)).

Subsequent to the *Noerr Motor Freight* case, a number of lower federal courts held that any common law limited privilege in libel cases implicating the right to petition had been overridden by *Noerr,* and that only petitions that were mere shams were actionable regardless of the presence of malice. Webb v. Fury, 282 S.E.2d 28 (W. Va. 1981) (state law defamation case based on environmental group's request for action by federal agency); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980) (civil rights action challenging efforts to enact allegedly unconstitutional zoning amendment); Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir. 1977) (civil rights action challenging allegedly knowingly false complaints about government employee); Sawmill Prods., Inc. v. Town of Cicero, 477 F. Supp. 636 (N.D. Ill. 1979) (civil rights action against persons protesting presence of sawmill in community dismissed as to private persons to avoid chilling right to petition); Weiss v. Willow Tree Civic Ass'n, 467 F. Supp. 803 (S.D.N.Y. 1979) (civil rights action challenging defendants' efforts to oppose zoning permit); Aknin v. Phillips, 404 F. Supp. 1150 (S.D.N.Y. 1975), *aff'd.,* 538 F.2d 307 (2d Cir. 1976) (civil rights action against persons urging enforcement of allegedly vague noise ordinance); Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Cal. 1972) (injunctive action seeking to prohibit logging in certain area did not constitute interference with advantageous relationship because right to petition protected such action).

201. *McDonald,* 105 S. Ct. at 2790.

202. "No one would venture to deny the right of the people to express their opinions on political men and measures and to discuss and assert their right of petitioning all

of a petition, unlike the civil suit that was before the Court. Moreover, the statute, the Seditious Public Meetings Act of 1795, was enacted four years after 1791, the year in which the common and constitutional law of England had become fixed for the purposes of American constitutional law.[203]

The other historical reference, which appears in both the majority and concurring opinions, is a claim that American libel cases decided prior to adoption of the first amendment reveal conflicting positions regarding privilege afforded to petitioners.[204] In fact, there appear to have been no cases of this description. It must be assumed, therefore, that the English common law of absolute immunity, as set out in the 1680 case of *Lake v. King,* was the law in America.[205] The first reported American case dealing with this issue is *Harris v. Huntington,*[206] an 1802 Vermont case. The *Harris* opinion relied upon the English common law and the history of the right to petition and ruled that petitioners had absolute immunity from defamation claims.

The majority and concurring justices in *McDonald v. Smith* made only one reference to the intent of the draftsmen of the first amendment. Both opinions refered to Madison's speech in the First Congress about how people can communicate with their

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branches of the legislature . . . a most valuable privilege, of which nothing should deprive them." 32 PARL. HIST. ENG. 274-75 (1795) (quoting Pitt, whose government proposed Seditious Public Meetings Act of 1795).

203. *See, e.g.,* Curtis v. Loether, 415 U.S. 189, 193 (1974). Chief Justice Burger used "1790's" to refer to the 1795 enactment. Since common law development for the Bill of Rights cuts off in 1791, the year of its enactment, this 1795 statute is not pertinent other than as comparative law.

204. *McDonald,* 105 S. Ct. at 2790, 2793.

205. 1 Wms. Saund. 131, 132, 85 Eng. Rep. 137, 138 (1680).

206. 2 Tyl. 129 (Vt. 1802). This court demonstrated a familiarity with the *Case of the Seven Bishops* and other events leading up to the adoption of the British Bill of Rights. *Id.* at 141-42. The court stated:

> [a]n absolute and unqualified immunity from all responsibility in the petitioner is indispensable, from the right of petitioning the Supreme Power for the redress of grievances; for it would be an absurd mockery in a government to hold out this privilege to its subjects and then punish them for the use of it . . . . But if this right of petitioning for a redress of grievances should sometimes be perverted to the purpose of defamation, as the right of petitioning with impunity is established both by the common law and our declaration of rights, the abuse of the right must be submitted to in common with other evils in government, as subservient to the public welfare.

Id. at 140-41, 146.

In later cases, however, some state courts held petitioning to be subject only to qualified immunity. *See, e.g.,* Gray v. Pentland, 2 Serg. & Rawle 23, A. (Pa. 1815); Commonwealth v. Clapp, 4 Mass. 163, 169 (1808); Reid v. Delorme, 4 S.C.L. (2 Brev. 76) (S.C. 1806).

representatives by speech, press, and petition.[207] Both opinions failed to mention that Madison made this speech during a debate on whether the people should have a right to give binding instructions to their representatives.[208] Madison's statement taken in context attaches considerable importance to petitioning as a separate and unique right, as an alternative to the right of instruction, not as a redundancy to the rights of speech and press.

The concurring opinion made the only reference to the interests served by petitioning. In a generalized comment, the opinion stated that the "self-governance" function is as fully served by speech and the press as it is by petition.[209] Moreover, the Court in *McDonald v. Smith* failed altogether to discuss the textual development and draftsmen's intent of the right to petition.

Undoubtedly, in the future, citizens will be deterred from alerting government officials to the unsuitability of prospective appointees for public office and of wrongful conduct on the part of officeholders. They must face the prospect of a defamation action that will be costly to defend, of doubtful outcome as all litigation is, and in which, as a practical matter, the burden of proving the truth of their statements will be on themselves. This result is completely at odds with the crucial petitionary interest of informing the government. Ironically, when malice is the applicable test, expression of the very kind of passionate, deeply-held opinions that the right to petition was designed to protect likely would expose the petitioner to liability.[210]

The fundamental weakness in the Court's opinion in *McDonald v. Smith* is its careless assumption that the right to petition can never be accorded higher protection than the cognate expressive rights. The Court should reconsider this assumption. Most of the limitations that have been imposed on speech and the press, whatever their justifications in the contexts of these expressive rights, are inappropriate restrictions upon petitioning.[211]

X. Scope and Limitations of the Right to Petition

This part discusses the conduct properly classified as coming

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207. *McDonald,* 105 S. Ct. at 2790, 2793.

208. For a discussion of Madison's speech, see *supra* text accompanying note 183.

209. *McDonald,* 105 S. Ct. at 2793 (Brennan, J., dissenting).

210. *See* St. Amant v. Thompson, 390 U.S. 727 (1968) (indicating plaintiff must cross relatively low threshold of proof to go to jury on question of malice in defamation case).

211. For a discussion of limitations on speech and press, see *supra* note 205.

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

A. The conduct properly embraced within petitioning

Preparing a written communication and sending it to the government are the essentials of petitioning.[212] Whether there are other activities that by necessary implication are embodied in the right to petition is a key question.[213] Thus, perhaps the concept of petitioning should be broadened to include meetings for the purpose of formulating and signing petitions, public gatherings for the purpose of presenting them, and disclosure of their contents to the press for the purpose of publicizing the cause.

The question of what ancillary activities are embodied in the right to petition arose in *Bridges v. California* .[214] Bridges, a labor leader, sent a telegram to the Secretary of Labor calling a judge's decision in a labor dispute outrageous and saying that any attempt to enforce the court order would tie up the entire port of Los Angeles. Bridges released the telegram to the press. Referring to the lower court decision, the Court stated, "[T]he Supreme Court of California recognized that, publication in the newspaper aside, in sending the message to the Secretary, Bridges was exercising the right to petition . . . protected by the First Amendment."[215] The Court held that release of the telegram to the newspaper was protected as an exercise of free speech, not as an implied extension of the right to petition.[216]

The scope of petitioning issue also is encountered when riot, unlawful assembly, and trespass laws are invoked against disorderly crowds present on the occasion of some demand made upon

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212. People v. Gottfried, 64 Misc. 2d 305, 314 N.Y.S.2d 725 (1970) (holding right to petition comprehends not only filing with government but also circulating for signature); Yancey v. Commonwealth, 135 Ky. 207, 122 S.W. 123 (1909) (same).

213. *See, e.g.*, United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 222 (1967) (holding decree preventing union from hiring attorneys on salary basis to assist its members in asserting legal rights violates freedom of speech, assembly, and petition guaranteed by first amendment).

214. 314 U.S. 252 (1941).

215. *Id.* at 277 (citing Bridges v. Superior Court, 14 Cal. 2d 464, 94 P.2d 983 (1939)).

216. *Id.* at 276-77.

the government. The cases unanimously hold that the first amendment does not preclude the government from enforcing public order and safety just because petitioning is involved.[217]

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

A related problem is whether there is an implied right to have the governmental body consider or act upon the petition addressed to it.[218] During the congressional controversy in the 1830's over whether to act upon petitions seeking abolition of slavery, John Qunicy Adams strongly opined that the right of petition comprehended the right to have the petition duly considered.[219] Such an extension of the right of petition, however, could exceed the practical limitations of our system of government; with our present

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217. *See, e.g.*, Daniel v. State, 231 Ga. 270, 201 S.E.2d 393 (1973); Jalbert v. District of Columbia, 221 A.2d 94 (1966), *vacated on other grounds*, 387 F.2d 233 (D.D.C. Cir. 1967); *In re* Bacon, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966); State v. Givens, 28 Wis. 2d 109, 135 N.W.2d 780 (1965); Kelly v. Page, 335 F.2d 114 (5th Cir. 1964); Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964); Griffon v. Congress of Racial Equity, 221 F. Supp. 899 (D. La. 1963); State v. Brown, 240 S.C. 371, 126 S.E.2d 1 (1962).

218. It is beyond the scope of this article to discuss the right of petition in terms of access to the courts. Although petitioning historically was considered in the context of addressing the legislative and executive branches of government, the Supreme Court has held that the right to petition applies to the courts as well. *See, e.g.*, California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972) (holding motor carriers had right to petition courts as well as administrative agencies against competitors' applications). Apart from the right to petition, federal and state constitutional principles, such as habeas corpus and access to the courts, apply and in some instances place a duty on the courts to hear and decide cases. Also, a well-developed body of law on malicious prosecution applies to "petitions" to the courts but is inapplicable to petitioning the political branches of government. *See, e.g.*, Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983) (holding N.L.R.B. may not halt prosecution of state court lawsuit unless suit lacks reasonable basis in fact or law).

219. For a discussion of petitions seeking abolition of slavery, see *supra* note 167 and accompanying text.

capacity for multiplying documents, the business of government could be halted if each paper produced in a massive petition campaign is addressed. The government would become acutely aware of such petitions from a variety of sources and would be no better informed if required to digest every word of every paper that is presented. The Supreme Court correctly decided this issue in *Smith v. Arkansas Highway Employees Local 1315* when it held that "[t]he public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so . . . . But the First Amendment does not impose any affirmative obligation on the government to listen [or] to respond . . . ."[220]

In sum, the petition clause of the first amendment protects only the core petitioning activities—preparing and signing a written petition and transmitting it to the government—either individually or in concert with others but without the involvement of public meetings. Any protection of activities beyond this scope is derived from other constitutional rights. The important lesson from this analysis is that no need can be established to impose time, place, and manner restrictions on petitioning because no legitimate government interest such as maintaining public order could be affected by the exercise of the core petitioning activities themselves.[221]

B. Permissible limitations on petitioning

1. Where private interests are affected

An important distinction must be drawn between government acting to protect itself and government acting to protect private interests. The latter is often justified in situations when the former

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220. 441 U.S. 463, 465 (1979) (per curiam); *accord* Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271 (1984) (holding valid state public employment labor statute restricting participation in "meet and confer" sessions to public employees' exclusive representative); Richards Furniture Corp. v. Board of County Commissioners, 233 Md. 249, 196 A.2d 629 (1964) (constitutional right to petition affords no right to hearing).

221. Thus, the constitutionality of regulating lobbyists, for example, 2 U.S.C. §§ 261-70 (1982), is suspect to the extent that their right to petition is in any way constrained. One court has held unconstitutional the provision that prohibits convicted violators of lobbyist regulations from attempting to influence legislation for three years. United States v. McGrath, 103 F. Supp. 510 (D.D.C. 1951), *vacated on other grounds sub nom.* McGrath v. National Ass'n of Manufs., 344 U.S. 804 (1952). However, mere registration and disclosure requirements have been held not to violate the right of petitioning. *See* United States v. Harris, 347 U.S. 612 (1954).

is not.[222] Consider, for example, the distinction between seditious libel, which has been rejected under the American constitutional system,[223] and private libel, which has been retained with limitations.[224]

To give some protection to the private interests safeguarded by the antitrust laws, namely the interests not to have one's business and property destroyed by a conspiracy in restraint of trade or a monopoly, and to preserve with minimal limitations the constitutional right to petition, the Supreme Court developed the sham exception in the *Noerr-Pennington* cases. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight,* a group of trucking companies sued a group of railroads to restrain them from an alleged conspiracy to monopolize.[225] The conspiracy included attempts to pass laws and to secure their enforcement by the executive branch. The latter conduct was held protected by the petition clause of the first amendment unless established that the activity "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor . . . ."[226] The Court held that the sham exception did not apply, and liability could not be imposed even though the railroads' sole purpose in seeking passage and enforcement of the laws was to destroy the truckers as competitors.[227] The Court stated that the right of the people to petition the government cannot depend on their intent in doing so.[228] Thus, the railroads use of "deliberat[e] dece[ption]" in their campaign was not relevant.[229] The sham

222. Mayton, *supra* note 89, at 113.

223. For a discussion of seditious libel, see *supra* text accompanying notes 153-56.

224. For a discussion of private libel, see *supra* note 198.

225. 365 U.S. 127 (1961).

226. *Id.* at 144.

227. *Id.* at 525.

228. *Id.* at 139.

229. *Id.* at 145. The doctrine was reaffirmed in United Mine Workers v. Pennington, 381 U.S. 657 (1965) (holding concerted effort by union and employers to influence public officials does not violate Sherman Act regardless of intent or purpose), and California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (holding motor carrier had right to petition courts and administrative agencies against competitors applications). However, it was limited somewhat in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (holding in effect that private proponents of economic regulation who succeed in having proposal adopted by state may be liable if regulation is later deemed anti-competitive). *See also* Holzer, *Analysis for Reconciling the Antitrust Laws with the Right to Petition: Noerr-Pennington in Light of Cantor v. Detroit Edison,* 27 EMORY L.J. 673 (1978); Walden, *More About Noerr—Lobbying, Antitrust and the Right to Petition,* 14 U.C.L.A. L. REV. 1211 (1967); Note, *The Quagmire Thickens: A Post-California Motor View of the Antitrust and Constitutional Ramifications of Petitioning the Government,* 42 U. CIN. L. REV. 281 (1973).

exception provides enough protection to the private interests implicated in petitioning without unduly impairing the constitutional right.

2. Where only public interests are affected

Where the petitioner's grievance is against a government officer or body and private interests are not subject to injury, the right to petition should be preserved in a more nearly absolute form. A review of the restrictions in speech and press where purely public interests are at issue indicates that only a few of these are appropriate bases for limiting the right to petition.[230] For instance, any offense a member of government might take on account of petitions containing obscenity or sexually oriented speech, inaccurate statements on commercial matters, or criticisms and political statements by subordinates, obviously would not be of sufficient gravity to justify an encroachment on the right of petitioning. The remaining areas of restriction on speech and press have more serious implications for the right of petitioning because they have to do with public order and national security.[231] Inciting speech, speech advocating overthrowing the government, and speech interfering with the war effort are all measured by the clear and present danger test that Justice Holmes developed in *Schenck v. United States*.[232] In light of the different historical backgrounds and interests served by the rights of speech and of petition, there is no justification for imposing more onerous restrictions on petitioning than on other forms of expression.[233] Nevertheless, because of the gravity of the concerns for national security and public order, a restriction less demanding than the clear and present danger test would be difficult to accept.[234] The circumspect

230. For a discussion of the restrictions on speech and press, see *supra* note 198.

231. For a discussion of defamation and conspiracy, see *supra* notes 222-29 and accompanying text. For a discussion of time, place, and manner restrictions, see *supra* notes 212-21 and accompanying text. For a discussion of group libel, *see infra* notes 236-49 and accompanying text.

232. 249 U.S. 47 (1919). "[T]he words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils." *Id.* at 52. This became the generally accepted standard. *See, e.g.*, Bridges v. California, 314 U.S. 252, 262-63 (1941) (expounding great variety of cases that relied on clear and present danger standard).

233. For a discussion of the interests served by petitioning, see *supra* notes 159-69 and accompanying text.

234. During World War I, at least two unfortunate cases invoked the Espionage Act against petitioners in a manner inconsistent with the analysis suggested in the text. In

petitioner could circulate and publicize the petition in a war calculated to reduce or eliminate any likelihood that the activity validly could be proscribed. Thus, an incendiary petition, which would probably create a riot if presented at a public meeting, should be privately circulated in a manner not apt to disturb the peace.[235]

C. *Cases where due regard for the right of petitioning should have altered the outcome*

In our representative democracy with universal adult suffrage and constitutional guarantees of free speech and press, the separate and vital right of petitioning is often overlooked or is assumed not to differ from speech and press rights.[236] In a variety of situations, this tendency has resulted in expressive rights being suppressed when they should have been upheld. In some instances, counsel never raises the right of petitioning; in other cases, the courts do not give it serious attention.

In *Beauharnais v. Illinois,* the Supreme Court upheld convictions for group libel under a state law that forbade racist propaganda.[237] The prosecution was based on a document that was in the form of a petition. The five member majority's analysis was based on

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United States v. Baltzer, 248 U.S. 593 (1919), some farmers believed that an unusually high draft quota was exacted from their county. They petitioned various state officers asking for a new arrangement, a referendum on the war, and a repudiation of war debts. They were convicted and sentenced to prison. On appeal, however, the Attorney General confessed the convictions were erroneous. Thus, the Supreme Court reversed the convictions. *Id.* In United States v. Steene, 263 F. 130 (1920), a group of men were convicted and given active sentences for distributing a circular requesting that letters be written to the President and members of Congress concerning the ill-treatment of political prisoners. Unfortunately, they did not raise the right to petition or appeal their conviction. *See* Z. CHAFEE, *supra* note 84, at 58-59. *Baltzer* and *Steene* should be compared to cases during the Vietnam War that were decided consistently with the approach advocated in the text. *See, e.g.,* Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975) (upholding arrest of servicemen for undertaking without prior approval public solicitation of signatures on petition calling for immediate cessation of hostilities in Vietnam, where soliciting was conducted on bases occupied by combat troops that had been subject to enemy attack); Glines v. Wade, 401 F. Supp. 127 (N.D. Cal. 1975) (overturning as violating right to petition Air Force regulation requiring prior approval for circulating, while on base or when in uniform, petitions addressed to members of Congress requesting assistance in obtaining relaxation of hair length rules).

235. A petition containing classified matter would be protected under this analysis if circulated and presented only to persons with the requisite security clearance.

236. *See, e.g., In re* Airport Car Rental Antitrust Litig., 474 F. Supp. 1072 (S.D. Cal. 1979) (stating right to petition not generally distinguished from other first amendment rights and is subject to same restrictions as speech).

237. 343 U.S. 250, 264 (1952).

the free speech and press rights, not on the right to petition.[238] The dissenters emphasized that group libel is dangerously close to the rejected concept of seditious libel, and the continuing validity of *Beauharnais* is suspect.[239] Justice Black, in his separate dissenting opinion, recognized that *Beauharnais* was a right to petition case, and that the values protected by that right required reversal of the convictions, regardless of how the case should have been decided on free speech and press grounds.[240]

The right of public employees to petition openly without fear of retaliation is embedded firmly in the law.[241] Yet, in all of its major public employee rights cases, the Supreme Court has focused exclusively on the right of free speech, and has failed to consider the right to petition even when clearly raised by the facts. For example, in *Perry v. Sindermann,* the Court held that a state college violated the first amendment by refusing to rehire a teacher because of his testimony before a committee of the state legislature.[242] Both the parties and the Court treated this obvious petitioning case as involving only free speech.[243] In *Connick v. Myers,* an assistant district attorney was fired for having prepared and distributed a questionnaire seeking views of fellow staff members on office transfer policy, morale, and the need for an office grievance committee.[244] She was collecting the views of her fellow workers to present to her superiors—classic petitioning activity. The parties and the courts at all levels treated this as a free speech case and did not mention petitioning.[245] The Supreme Court ruled in favor of the employer on the theory that all of the items covered by the questionnaire were matters of personal interest rather than public concern, except for an item dealing with pressure to work on political campaigns.[246] The communication on the latter subject was held to be constitutionally unprotected as too disruptive of the office and destructive of the working

238. *Id.* at 253, 266.

239. *Id.* at 267-73 (Black, J., dissenting) For further discussion of *Beauharnais* and its doubtful validity, see H. KALVEN, *supra* note 198.

240. 343 U.S. at 268 (Black, J., dissenting).

241. Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 465 (1979).

242. 408 U.S. 593, 598 (1972).

243. *Id.* at 596.

244. 461 U.S. 138 (1983).

245. *See generally* Myers v. Connick, 461 U.S. 138 (1983); Myers v. Connick, 507 F. Supp. 752 (E.D. La. 1981).

246. *Connick,* 461 U.S. at 147.

relationship.[247] If *Connick v. Myers* had been regarded as a petitioning case, it would have been decided differently because the absolute character of the right of petition does not permit inquiries into the propriety or appropriateness of the communications presented.[248] Further, because no private interests were adversely affected, even the sham exception would have been inapplicable.[249]

The foregoing discussion illustrates that peoples' expressive rights often are forfeited because of the failure of counsel and courts alike to give due recognition to the presence of petitioning activity. In future cases, the first amendment right to petition should be recognized when involved and should be accorded a much higher level of protection than either speech, press, or assembly.

CONCLUSION

Petitioning historically and textually is a separable right from speech and press, and the interests served by petioning go to the very heart of the principle of popular sovereignty. For these reasons, petitioning must be regarded as an extremely valuable right. Exceptions imposed on free speech and press must be critically examined before being held applicable to petitioning. However, only the core petitioning activities of drafting, circulating, and presenting petitions are subject to the higher degree of protection; other conduct, including holding public assemblies and publicizing the contents of petitions, should be judged under the less exacting standards that apply to speech, press, and assembly.

In addition, where private interests are affected, such as the reputational interest protected by the law of defamation, petitioning should be absolutely privileged, save where the conduct is merely a sham. Thus, the Supreme Court's recent decision in

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247. *Id.* at 154.

248. For a discussion of the absolute character of the right to petition, see *supra* text accompanying notes 174-87.

249. For a discussion of the sham exception and a comparison between private interest and public interest cases, see *supra* text accompanying notes 222-35. Another case that failed to consider the right to petition is U.S. Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (upholding Hatch Act restrictions on federal employees' political activity). The Hatch Act prohibited the circulation of nominating petitions, yet the Court's analysis was in terms only of free speech and association. *See id.* at 564-67, 575-76.

McDonald v. Smith[250] incorrectly holds that the right to petition does not accord the petitioner with an absolute privilege against liability for defamation. On the other hand, where only the public interest is affected, no restrictions whatever should be placed upon petitioning, except in instances of clear and present danger to public order or national security.

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250. 105 S. Ct. 2787 (1985).