The First Amendment Right to a Remedy

Benjamin Plener Cover[*]

Scholars and jurists agree that the First Amendment right "to petition the Government for a redress of grievances" includes a right of court access, but narrowly define this right as the right to file a lawsuit. This dominant view fails to meaningfully differentiate between the right to petition, the freedom of speech, and due process, missing the distinct significance of the Petition Clause when individuals petition courts. The most significant threats to court access today occur after the filing stage, when courts deny or limit remedies to legally injured persons — by enforcing a mandatory arbitration provision or an exhaustion requirement, granting an official qualified or absolute immunity from suit, or drastically reducing a damages award pursuant to a statutory cap. By defining court access too narrowly, the prevailing theory of the right to petition renders the First Amendment silent in the face of these threats.

This Article fills this gap in First Amendment theory by presenting the first systematic account of the right to petition the courts that expands the concept of court access from procedural forum access to substantive remedial access — guaranteeing the right of a legally injured person to obtain a meaningful remedy. This remedial theory best accounts for the history, text, and precedent of the Petition Clause. As a historical matter, this theory gains force from the insight that the First Amendment right to petition is best understood as the merger of the English right to petition and the English right to a remedy. These antecedent rights controlled

[*] Copyright © 2017 Benjamin Plener Cover. Visiting Associate Professor, University of Idaho College of Law. J.D., Yale Law School; MSc., London School of Economics. The author wishes to thank Gregory Mark, James Pfander, Judith Resnik, Richard Re, Sarah Haan, Mark Anderson, Katherine Macfarlane, and Sandy Mayson, as well as participants in the 2015 Junior Scholars Virtual Colloquium, and the University of Idaho College of Law Faculty Colloquium. Special thanks to Rebecca Cover for guidance on linguistic analysis, and to Aliza Plener Cover, my partner in all things, including this. Jeff Grieve, Joseph Dallas, and Monica Rector provided excellent research assistance.

petitioning practice directed at different institutional actors, but, when those petitions were legal in nature, there was a shared expectation that relief, where warranted, would follow. From a textual perspective, the remedial theory gives the Petition Clause meaning independent of the Speech Clause, and it explains why the Framers expanded the Petition Clause's recipient subclause from "the Legislature" to "the Government." Jurisprudentially, the theory garners a perhaps surprising degree of support from both early and modern Supreme Court precedent. This theory could translate naturally into a tiered scrutiny doctrinal framework for remedial access claims, with more deferential review for neutral time, place, and manner provisions, and heightened scrutiny when remedial burdens are based on the content of the lawsuit, the identity of the plaintiff, or the defendant's governmental status.

TABLE OF CONTENTS

INTRODUCTION 1743
I. THEORY 1750
A. *Historical Antecedents* 1751
1. The Rise of English Petitionary and Remedial Rights 1753
2. The Evolution of English Petitionary and Remedial Rights 1762
B. *Text and Drafting History* 1768
1. The Ambiguity of "Petition" 1770
2. The Recipient and Goal Subclauses 1774
a. "The Government" 1775
b. "For a redress of grievances" 1777
3. The Presumption Against Superfluity 1778
4. The Proposed and Rejected Right to a Remedy Provision 1783
C. *Precedent* 1787
1. Early Recognition of the First Amendment Right to a Remedy 1787
2. Modern Rediscovery of the First Amendment Right to a Remedy 1791
II. APPLICATION 1798
A. *A New Doctrinal Framework for Remedial Access Claims* 1799
B. *A Survey of Vulnerable Remedial Access Burdens* 1803
CONCLUSION 1805

INTRODUCTION

Ubi jus ibi remedium — "where there is a right, there should be a remedy."[1] This ancient legal maxim articulates a great aspirational ideal of Anglo-American legal culture.[2] But it is not an accurate description of the American legal system. Not every person who suffers (or fears) legal injury obtains a remedy from the courts. The person may lack the resources or sophistication to access the judicial forum in the first place. But even when a legally injured person files suit, a court may deny a remedy for a host of reasons. Perhaps the plaintiff failed to exhaust other remedies, or signed a contract of adhesion containing a mandatory arbitration provision, or filed after expiry of a statute of limitation or repose. Perhaps the plaintiff's constitutional rights were violated by a state judge or prosecutor who enjoys absolute immunity under the Court's interpretation of 42 U.S.C. § 1983, or by a police officer whose excessive force crossed no clearly established line for purposes of qualified immunity doctrine. For all these reasons — and more — the courthouse door may be open, but the remedial function of the courts may be closed. The gap between right and remedy is real, and possibly growing.

In the face of remedy denial, the critical question is whether a legally injured person enjoys an enforceable right to a remedy. Unlike an aspirational ideal, an enforceable remedial right would entail a correlative duty upon courts to provide redress and thereby impose meaningful constraints on remedy denial. There is significant disagreement on the source, scope, and very existence of a remedial right. State constitutional provisions in forty states[3] explicitly or implicitly codify a "right to a remedy,"[4] but interpretation of these

---

[1] Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1485-86 (1987) [hereinafter *Of Sovereignty*]. The equitable analogue of this legal maxim is "equity will not suffer wrong without a remedy." JOHN NORTON POMEROY, 2 A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA ADAPTED FOR ALL THE STATES AND TO THE UNION OF LEGAL AND EQUITABLE REMEDIES UNDER THE REFORMED PROCEDURE § 423 (Spencer W. Symons ed., 5th ed. 1941).

[2] *See* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 784-86 (2004) (referring to maxim as a "platitude").

[3] Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 n.6 (2003) (citing state constitutional provisions).

[4] *Id.* at 1310; *see also* John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237, 237 (1991); Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005, 1005 n.1 (2001); William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 340-42

provisions by state supreme courts has varied widely across jurisdiction.[5] In recent years, scholars have argued for a federal constitutional right to a remedy based on the Due Process Clause, the Equal Protection Clause, or the Privileges and Immunities Clause,[6] but cases analyzing remedy denial under the Fourteenth Amendment have generally applied rational basis review and upheld the restrictions.

Building on these prior efforts,[7] this article argues that the most compelling basis for a federal remedial right — as a matter of history,

(1997); Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 136 (1970); David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1198-99 (1992).

[5] For example, Article I, section 8 of the Minnesota Constitution states: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws." MINN. CONST. art. 1, § 8. But when Justice John E. Simonett of the Minnesota Supreme Court suggested that those words be carved into the granite wall of the Minnesota Judicial Center, Justice Glenn E. Kelley objected because "if [they] put that up on the wall, people are going to read it before they came into court and say, 'Here, I'm entitled to a remedy. Let's have it.'" Randall Tietjen, *"An Inarticulate Premise Intuitively Felt*," 39 WM. MITCHELL L. REV. 784, 793-94 (2013). The original architectural plans proposed to carve on the "Dedicatory Wall" the names of the state Supreme Court Justices, the Governor, legislative leaders, and the architect himself. *Id.* Justice Kelley cautioned that the provision is "inspirational [but] [y]ou can't take the language so literally." *Id.* So the façade engravers edited the language, replacing the first clause with ellipses: "Every person is entitled . . . to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the law." Hopefully, that would inspire those visiting the courthouse without raising unreasonable expectations.

[6] *See, e.g.*, John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 529 (2005); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 509-10 (1991); Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477, 1484 (2008); Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1634 (2004). Other provisions of the federal constitution relevant to remedial rights include Article III, the Guarantee Clause, the Habeas Corpus Clause, and the Supremacy Clause. Judith Resnik argues for a remedial imperative based on multiple state and federal constitutional provisions. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2822-24 (2015).

[7] These efforts resonate with one another, but emphasize different textual bases. Theories based on state constitutional provisions fail to recognize a *federal* constitutional right to a remedy and the close link between the First Amendment's Petition Clause and remedy-guaranteeing provisions in state constitutions. *See* Phillips, *supra* note 3, at 1310 (describing "the guarantee of a right of access to the courts to obtain a remedy for injury" as the "most widespread and important of . . . unique state provisions" that "contain[] rights and guarantees not found in the

text, and precedent — lies in the final clause of the First Amendment — the Petition Clause — which guarantees the "right of the people . . . to petition the Government for a redress of grievances."[8] Scholars,[9] lower courts,[10] and the Supreme Court[11] have repeatedly recognized

Federal Constitution"). Theories based on other provisions of the federal constitutional fail to ground the right to a remedy in the distinctive text, history, function, precedent, and doctrinal framework of the First Amendment.

[8] U.S. CONST. amend. I. The Petition Clause has long been overshadowed by its clausal kin. *See, e.g.*, Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 558 & n.4 (1999) [hereinafter *Right of Access*]; Anita Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569, 569 & n. 1 (1987); Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2155-57 (1998); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 16 & n.2 (1993) (citing William J. Brennan, Jr., *Why Have a Bill of Rights?*, 26 VAL. U. L. REV. 1, 1 (1991)) (omitting the right to petition from account of First Amendment rights). In recent decades, however, the right to petition has enjoyed a quiet renaissance of judicial and scholarly attention. Influential scholarship includes. *See* Andrews, *supra*, at 557; Mark, *supra*, at 2153; James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 899 (1997); Spanbauer, *supra*, at 16. Significant Supreme Court cases include: *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2491 (2011); *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 524-25 (2002); and *Christopher v. Harbury*, 536 U.S. 403, 409-10 (2002).

[9] *See, e.g.*, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.54, at 1378 (7th ed. 2004); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1156 & n. 120 (1991) [hereinafter *The Bill of Rights*]; Andrews, *Right of Access*, *supra* note 8, at 595-96, 589-92, nn.117, 119 (collecting scholarship); Pfander, *supra* note 8, at 900; Spanbauer, *supra* note 8, at 63; Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 HARV. L. REV. 1111, 1112 (1993).

[10] *See* Andrews, *Right of Access*, *supra* note 8, at 589-90 nn.117–18 (collecting cases).

[11] In more than twenty Supreme Court cases over the past five decades, one or more Justices has asserted or assumed that a lawsuit is a petition, without a single colleague disputing the premise. *See* Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1757 (2014); Woodford v. Ngo, 548 U.S. 81, 122-23 (2006) (Stevens, J., dissenting); *BE & K Constr. Co.*, 536 U.S. at 525; *Harbury*, 536 U.S. at 415 & n.12; Lewis v. Casey, 518 U.S. 343, 406 (1996) (Stevens, J., dissenting); Fla. Bar v. Went For It, Inc., 515 U.S. 618, 636 (1995) (Kennedy, J., dissenting); Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56-57 (1993); Hudson v. Palmer, 468 U.S. 517, 523 (1984); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 896-97 (1984); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741 (1983); Rhodes v. Chapman, 452 U.S. 337, 362 n.9 (1981) (Brennan, J., concurring in the judgment); Montanye v. Haymes, 427 U.S. 236, 244 (1976) (Stevens, J., dissenting); Pell v. Procunier, 417 U.S. 817, 828 n.6 (1974); Ortwein v. Schwab, 410 U.S. 656, 660 (1973); Cruz v. Beto, 405 U.S. 319, 321 (1972); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972); United Transp. Union v. State Bar of Mich., 401

lawsuits as petitions.[12] And there is a broad judicial and scholarly consensus — which I join — that the right to petition includes a negative right to be free from retaliation for, or suppression of, petitioning activity.[13] But scholars and jurists have generally assumed

U.S. 576, 580 (1971); United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217, 221-22 (1967); Bhd. R.R. Trainmen v. Va. *ex rel.* Va. State Bar, 377 U.S. 1, 7 (1964); NAACP v. Button, 371 U.S. 415, 444-45 (1963). I discuss many of these cases in Part II.D, *infra*, demonstrating the considerable and underappreciated support they provide, not only for treating lawsuits as petitions, but for recognizing a First Amendment right to a remedy.

[12] However, five years ago, in *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011), Justices Scalia and Thomas threw down the gauntlet on lawsuits' First Amendment status, attacking the proposition as "quite doubtful," *id.* at 2503 (Scalia, J., concurring in part and dissenting in part); *id.* at 2501 (Thomas, J., concurring), and dismissing prior opinions affirming it as "vague[]," *id.* at 2503 (Scalia, J., concurring in part and dissenting in part), "[u]nreasoned," *id.* at 2501 (Thomas, J., concurring), and "pure dictum," *id.* at 2502-03 (Scalia, J., concurring in part and dissenting in part). Though this attack was profoundly mistaken, see *infra* Part I, the majority added fuel to the fire with an equivocal rejoinder, alternatively characterizing lawsuits' First Amendment status as a principle that "precedents confirm," *Guarnieri*, 131 S. Ct. at 2494, and as a "premise" upon which the "parties litigated the case." *Id.* at 2494. Justice Scalia seized on the majority's ambivalence as a concession of lawsuits' uncertain First Amendment status. *Id.* at 2503 (Scalia, J., concurring in part and dissenting in part) ("The Court has never actually *held* that a lawsuit is a constitutionally protected 'Petition,' nor does today's opinion hold that. The Court merely observes that '[t]he parties litigated the case on the premise.'" (emphasis in original) (citation omitted)). The *Guarnieri* majority declined to dispute Justice Scalia's characterization of its holding. The confusion in *Guarnieri* suggests that the Court must and will authoritatively resolve this question in a future case.

[13] *See, e.g.*, *BE & K Constr. Co.*, 536 U.S. at 536-37; *Prof'l Real Estate Inv'rs, Inc.*, 508 U.S. at 56, 60-61; Norman B. Smith, *"Shall Make No Law Abridging. . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1195 (1986); Spanbauer, *supra* note 8, at 47-48. Most published opinions have involved claims of retaliation. The most common sanction challenged is adverse employment action. *See, e.g.*, *Guarnieri*, 131 S. Ct. at 2492; Gunter v. Morrison, 497 F.3d 868, 872 (8th Cir. 2007); Powell v. Alexander, 391 F.3d 1, 6 (1st Cir. 2004). Other sanctions include: liability under federal antitrust law, *e.g.*, Cal. Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972); liability under federal labor law, *e.g.*, Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731 (1983); permit denial or revocation, *see, e.g.*, Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1312-13 (9th Cir. 1989); adverse zoning decisions, *see, e.g.*, EJS Props., LLC v. City of Toledo, 698 F.3d 845, 864 n.14 (6th Cir. 2012); other official investigatory or enforcement actions, *see, e.g.*, Woodruff v. Mason, 542 F.3d 545, 547 (7th Cir. 2008); costs and attorneys' fees, *see, e.g.*, *Octane Fitness, LLC*, 134 S. Ct. at 1755; and retaliatory bad-faith counter-litigation or prosecution, *see, e.g.*, Hinds v. Dallas Indep. Sch. Dist., 188 F. Supp. 2d 664, 669-70 (N.D. Tex. 2002). Much of the disagreement about the right's scope has been internal to this purely negative framework, concerning the circumstances, if any, under which the state can legitimately punish petitioning activity. Compare the majority and concurring opinions in *BE & K Construction Co.*, 536 U.S. at 516;

that the right to petition is limited in all cases to this purely negative, procedural right: the right to petition means only and always the right to *ask for redress* — never to *obtain it* — even when a person petitions a court to enforce legal rights and redress legal injuries.[14] I call this assumption the supplicatory interpretation of the Petition Clause. In this article, I present an alternative reading, which I call the remedial interpretation: that the right to petition includes the limited right of a person who suffers legal injury (or a sufficient threat thereof) to obtain a minimally adequate remedy from the courts. In short, I argue that the First Amendment guarantees a right to a remedy.

The Article proceeds in two parts. Part I presents the case for a First Amendment right to a remedy, as a matter of history, text, and precedent. First, I explore the historical roots of the Petition Clause. I emphasize a point that has been overlooked in Petition Clause scholarship to date: that the original codification of a right to petition in Magna Carta was framed in strong mandatory, not supplicatory terms. And, while other scholars assume that the English petitionary right is the original antecedent to the Petition Clause, I argue that its

Professional Real Estate Investors, Inc., 508 U.S. at 49; and *California Motor Transport Co.*, 404 U.S. at 508.

[14] *See, e.g.*, Minn. Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 285 (1984) ("Nothing in the First Amendment . . . suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individual communications on public issues."); Smith v. Ark. State Highway Emps., Local 1315, 441 U.S. 463, 465 (1979) (commission's refusal to respond to employee grievances did not violate the First Amendment); EJS Props., LLC v. City of Toledo, 698 F.3d 845, 864 (6th Cir. 2012) ("[I]n all of the cases addressing meaningful *access*, the focus is on the access to the court, not the court's response or behavior upon receiving the petition."). For example, one of the nation's leading Petition Clause scholars, Carol Rice Andrews, concludes that the right to petition the courts "is very narrow: it protects a person's right only to *file* winning claims within the court's jurisdiction." Andrews, *Right of Access*, *supra* note 8, at 562 (emphasis added). According to Andrews, the right to petition the courts is mostly a negative right to be free from unjustified governmental retaliation or suppression; the only positive duty the right imposes is the limited obligation to *receive* a lawsuit in the minimal sense of permitting its filing. *See id.* at 646-47. But according to Andrews, at the moment of filing, the work of the Petition Clause concludes and Due Process takes over to regulate how the court responds to the filed petition. *Id.* at 633-34, 646-47. In short, Andrews defines the court access right narrowly as a procedural right of initial access to the judicial forum. *But see, e.g.*, Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 142-43 (1986); Pfander, *supra* note 8, at 905 & n.22 (citing scholarship); Spanbauer, *supra* note 8, at 33. Most have assumed the right is both exclusively procedural and exclusively negative. Other have explored possibility that the right to petition includes a positive procedural component, imposing affirmative duties on government to receive, consider, or respond to certain petitions.

origins must be traced *both* to the English petitionary right *and* to the English right to a remedy. I explain that the English legal system distinguished between the "right to petition" the King and "the right to a remedy" from the courts because of structural features of the British monarchy that the Framers rejected, but these two English rights worked in tandem to ensure redress of legal injuries. The Framers adapted these interlocking rights to the American political system by merging them into a unified right to "petition *the Government* for a redress of grievances," which included the right of legally injured persons to obtain a meaningful remedy from the separate and coequal judicial branch.[15]

Next, I closely analyze the text and drafting history of the Petition Clause. I explain that the word "petition" is a semantically polysemous and pragmatically ambiguous term: Whether it is best understood to be supplicatory or mandatory depends on contextual factors. I point to four contextual features of the text and its drafting history that favor a mandatory connotation: (1) the unprecedented redefinition of the petition recipient — in stark contrast to all previous and extant codifications and to the original language proposed — from "Legislature" to "Government"; (2) the explicit specification of the goal as "a redress of grievances"; (3) the separate enumeration of the right to petition and the freedom of speech; and (4) the proposal and consideration of more explicit right-to-a-remedy language by state ratifying conventions and the U.S. Senate. Through this analysis, I problematize the two primary assumptions made by proponents of the supplicatory interpretation: that the word "petition" has a single, unambiguous, supplicatory meaning synonymous with "beg," "beseech," or "supplicate"; and that the enumeration of "the right to *petition the Government for* a redress of grievances" rather than "the right to a redress of grievances" necessarily confines the right to one of

[15] Note that the Petition Clause, like the First Amendment as a whole, originally applied only to the federal government, and was only incorporated against the states after Reconstruction via the Fourteenth Amendment. Thus, the First Amendment directly prohibits federal abridgment of the right to petition the federal courts, and through the doctrine of incorporation prohibits state abridgement of the right to petition state or federal courts. The Court has recognized this implicitly, but not explicitly. *Compare* Borough of Duryea v. Guarnieri, 564 U.S. 379 (2011) (applying the Petition Clause to conduct of a state's local political subdivision) *with* McDonald v. City of Chicago, 561 U.S. 742, 765 at n.12 (2010) (citing cases incorporating every First Amendment right except the right to petition). A complete analysis of the present-day right to petition would consider Reconstruction, and how the meaning of the Petition Clause may have been modified by the Due Process, Equal Protection, and Privileges & Immunities Clauses of the Fourteenth Amendment. That project lies beyond the scope of this article.

supplication. I also explain why a purely supplicatory interpretation of the Petition Clause would render it superfluous in light of the Speech Clause.

Finally, I show how the remedial interpretation is consonant with prior Supreme Court cases. In *Chisholm v. Georgia*,[16] and *Marbury v. Madison*,[17] cases decided in the decade following the ratification of the First Amendment, there was clear judicial recognition of a right to a remedy, linked to a right to petition the courts in the new American constitutional order. More modern lines of doctrine also provide substantial — and often-undervalued — support for the principle that the Petition Clause entails a remedial component for legal petitions.

In Part II, I explain the practical significance of recognizing the remedial Petition Clause. I begin the task of translating the remedial theory into a coherent doctrinal framework by sketching a tentative tiered scrutiny approach to remedial access claims that flows naturally from other areas of First Amendment jurisprudence. Neutral time, place, and manner limitations on remedial access would enjoy judicial deference. Limitations based on the content of a lawsuit, the identity of the plaintiff, or the governmental status of the defendant would trigger heighted scrutiny. This tiered scrutiny approach would impose meaningful constraints on remedy denial, but it would not upend every rule that affects remedial access. It would not eliminate the gap between right and remedy, but it would narrow it, and demand justification for it. This doctrinal framework could have numerous, significant real-world implications. Rules and practices vulnerable to challenge under my theory include congressional restrictions on individuals' access to judicial remedies under the Antiterrorism and Effective Death Penalty Act, the Prison Litigation Reform Act, and the Federal Arbitration Act; judicial refusals to reach the merits of lawsuits or impose remedies when applying qualified and absolute immunity doctrines; and state legislation capping tort damage awards.[18]

---

[16] 2 U.S. 419 (1793).

[17] 5 U.S. 137 (1803).

[18] Access to the remedial function of federal courts is also implicated by many rules of federal courts jurisprudence, including the availability of and limitations on federal court jurisdiction, Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005), the 42 U.S.C. § 1983 statutory cause of action, Monroe v. Pape, 365 U.S. 167 (1961), *partially overruled by* Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658 (1978), and the *Bivens* implied cause of action, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 407 (1971). Some of these rules reflect Supreme Court interpretations of federal constitutional provisions such as the Eleventh Amendment, U.S. CONST. amend. XI, and Article III, U.S. CONST. art. III., § 1 (Judicial Vesting Clause), U.S. CONST. art. III., § 2 ("Cases"

Ultimately, I conclude that the history, text and judicial interpretation of the Petition Clause all support my proposed remedial interpretation.[19]

The proper interpretation of the Petition Clause will not be settled by any one article or scholar — it will emerge from a process of scholarly and judicial inquiry over time. My goal here is not to end the debate about whether the Petition Clause includes a right to a remedy, but to introduce a new perspective. I readily acknowledge that the case for a Petition Clause right to a remedy — like any competing interpretation — is imperfect and subject to valid critique. My objective is to share a novel but plausible theory of the Petition Clause, and to invite others to examine and build upon it.

I. THEORY

This section makes the case for a First Amendment right to a remedy as a matter of history, text, and precedent. Subpart A argues that the First Amendment right "to petition the Government" represents the merger of the historically related rights to petition the King and to obtain a remedy from the courts. Subpart B argues that the remedial theory best accounts for the precise language and drafting history of the Petition Clause and the First Amendment as a whole.

and "Controversies" provisions and Appellate Jurisdiction Clause). Others, like doctrines of prudential standing, absolute judicial and prosecutorial immunity, and qualified immunity for executive branch officials, do not. Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014) (prudential standing); Camreta v. Greene, 563 U.S. 692 (2011) (qualified immunity); Stump v. Sparkman, 435 U.S. 349 (1978) (absolute judicial immunity); Imbler v. Pachtman, 424 U.S. 409 (1976) (absolute prosecutorial immunity).

Ultimately, courts must synthesize the First Amendment right to a remedy with federal courts jurisprudence, which would require an intratextual analysis of the First Amendment, the Eleventh Amendment, and Article III, along with the Suspension Clause, U.S. CONST. art. I., § 9, the Supremacy Clause, U.S. CONST. art. XI. and the Fourteenth Amendment. U.S. CONST. amend. XIV. Two competing principles will inform this synthesis. The first is that the First Amendment right to a remedy is not absolute, and permits remedy denial if adequately justified. Constitutional limitations expressed in Article III and the Eleventh Amendment would constitute such justification. On the other hand, when trying to figure out the proper scope of Article III and the Eleventh Amendment, courts must recognize that there is a competing constitutional imperative contained within the Petition Clause that favors a narrow construction of these limitations on federal court jurisdiction. Beyond these preliminary observations, a complete intratextual synthesis lies beyond the scope of this paper, but I hope to pursue this project in subsequent articles.

[19] *See infra* Conclusion.

Subpart C shows that this remedial theory enjoys substantial support from both Founding-era and modern Petition Clause case law.

A. Historical Antecedents

The Petition Clause protects "the right of the people . . . to petition the Government for a redress of grievances."[20] In analyzing the historical roots of this constitutional protection, Petition Clause scholars have focused their attention on the English right to petition the King and, later, Parliament, tracing that right from its earliest origins in the centuries preceding its first codification in Magna Carta to the time of the Founding of the United States.[21] Another set of scholars, attempting to understand state constitutional provisions codifying a right to a remedy, have separately traced the historical development over this same time period of the English right to a remedy from the courts.[22] These two lines of historical inquiry have been treated as distinct projects, rather than elements of an interrelated whole.

However, as I will describe in more detail in Part I.B, the text of the Petition Clause modified the traditional right to petition in an important way: it expanded the recipient subclause of the right and in so doing expanded the right's scope. Whereas previous codifications protected the right to petition the King, Parliament, or the Legislature,[23] the new American guarantee protected the right to petition *the Government*[24] — thus encompassing petitions to the courts. I argue that this substantive textual modification mandates a wider lens for the historical inquiry. The historical antecedent to the Petition Clause is not only the English right to petition, but also the English right to a remedy, which governed petitions addressed to courts.

These two English rights predate modern separation of powers. They developed at a time when executive, legislative, and judicial powers were diffused across multiple institutional actors in ways that were complex and evolving. In this era of blended or conflated powers, the English petitionary and remedial rights were differentiated

---

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

[21] *See, e.g.*, Higginson, *supra* note 14, at 142-49; Mark, *supra* note 8, at 2163-70; Spanbauer, *supra* note 8, at 22-33.

[22] *See, e.g.*, Hoffman, *supra* note 4, at 1009-20; Koch, *supra* note 4, at 349-57; Phillips, *supra* note 3, 1319-24; Schuman, *supra* note 4, at 1199-01.

[23] *See infra* Section I.B.4.a (discussing the intention underlying "the government" in the Petition Clause of the Constitution).

[24] U.S. CONST. amend. I (emphasis added).

primarily according to the *institutional recipient* of the petition, rather than the *function* of the petition. The right to petition constrained the King and Parliament, and the right to a remedy constrained the courts. This separate treatment according to institutional recipient made sense in light of features of the English political system that the Founders decisively rejected — the sovereignty of the King, the inferiority of the courts, and the subjecthood of the citizenry. Yet there was substantial overlap between the function of petitions to the King or Parliament and petitions to the courts. As English petitioning practice emerged and evolved, there was substantial conflation between petitions addressed to the different institutional bodies. Courts, as they developed, received legal petitions designed to redress individual legal grievances. But so, too, did the King and Parliament. Some petitions addressed to the King and Parliament were in function *political* petitions: they sought a change in or clarification of the law. Others, however, were in function *legal* petitions, which sought to enforce extant legal rights.

Thus the "right to a remedy" concerned legal petitions directed to courts; the "right to petition" concerned *both* legal *and* political petitions directed to the King and to Parliament. The American codification of a right to petition the Government encompassed *both* of these petitioning traditions, including legal and political petitions addressed to all three branches of government in the new constitutional order.

Expanding the historical lens of my analysis to include both the English "right to a remedy" and the English "right to petition" bears significant consequences. Conventional accounts of petitioning practice that define petitioning with atextual institutional constraints implicitly limit the scope of their inquiry in four related ways: (1) they focus narrowly on a subset of institutional petition recipients that excludes courts, based on recipient subclauses rejected by the Framers;[25] which leads to (2) overemphasizing political petitions and underemphasizing legal petitions — sometimes to the point of ignoring legal petitions completely, even those addressed to the political branches; which leads to (3) conceptualizing the function of petitioning exclusively in terms of participation, political responsiveness, and information provision, and erasing the distinct function of enforcing pre-existing rights; and (4) emphasizing the supplicatory, discretionary character of the

[25] *See, e.g.*, Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2503 (2011) (Scalia, J., concurring in part and dissenting in part) ("[T]here is abundant historical evidence that 'Petitions' were directed to the executive and legislative branches of government, not to the courts.").

petitioning relationship and concluding that the right to petition was just a negative right to be free from retaliation but not a positive entitlement to a favorable response.[26] In other words, by limiting the inquiry in terms of (1) recipient, (2) goal, and (3) function, they (4) limit the scope of the right.

My approach, consistent with the textual and functional innovation of the First Amendment, addresses each of these four limitations, by recognizing that (1) courts must be counted among the recipients of historical petitions; (2) petitions to the King and Parliament included both political and legal petitions; (3) legal petitions served a distinct rights-protecting function irrespective of recipient; and (4) legal petitions involved claims of remedial right and imposition of corresponding remedial duties upon the petition's recipient.

In relating the history of English petitioning practice, I necessarily provide an extremely brief summary of a vast historical record that has been exhaustively explored by other scholars. My primary purpose is not to capture each detail of centuries of English history, but to illuminate what more detailed treatments sometimes obscure: the co-evolution of English remedial and petitionary practices which laid the foundation for a new American right.

1. The Rise of English Petitionary and Remedial Rights

Scholars trace the right to a remedy from the courts and the right to petition the King to separate provisions of Magna Carta codified eight centuries ago.[27] But the practices of petitioning the King and accessing remedies from his courts developed centuries before.[28] Indeed, Magna

[26] Some argue there is a duty to receive, consider, or respond to petitions. *See* Higginson, *supra* note 14, at 142-43, 155; Hodgkiss, *supra* note 8, at 572-73, but nobody argues there is a right to a favorable response to legal petitions. Andrews, *Right of Access*, *supra* note 8, at 644 ("[N]o one contends that the mere right to petition guarantees that the government will grant the petitioner's request.").

[27] Scholars recognize Chapter 40 of the 1215 charter as the original codification of the right to a remedy. *See* Heyman, *supra* note 6, at 535; Hoffman, *supra* note 4, at 1006 n.4; Koch, *supra* note 4, at 341; Phillips, *supra* note 3, at 1319-20; Schuman, *supra* note 4, at 1199; Thomas, *supra* note 6, at 1638; Shannon M. Roesler, Comment, *The Kansas Remedy by Due Course of Law Provision: Defining a Right to a Remedy*, 47 U. KAN. L. REV. 655, 657-58 (1999). Scholars recognize Chapter 61 of the 1215 charter as the original codification of the right to petition. *See Guarnieri*, 131 S. Ct. at 2499 (citing WILLIAM MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 467 (rev. 2d ed., 1958); Andrews, *Right of Access*, *supra* note 8, at 596 n.135; Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 746 (1999); Smith, *supra* note 13, at 1155.

[28] Koch, *supra* note 4, at 351-53; Mark, *supra* note 8, at 2163.

Carta itself was the King's response to a petition seeking redress of baronial grievances,[29] designed in part to address dissatisfaction with how courts and the King had been responding to petitions.[30]

In their earliest form, petitions to the King had a distinctly legal — and specifically appellate — character: they sought resolution of a claim, usually related to a private dispute over property rights,[31] which an inferior tribunal had already adjudicated.[32] These appeals reflected a dynamic of supplication rather than entitlement.[33] In this way, early petitioning practice served as a mechanism through which parties dissatisfied with judgments of the ordinary judicial system could seek extraordinary, discretionary relief from the King himself. It developed as judicial power shifted from local feudal courts to a unified system of royal courts.[34]

With that shift came increasing concern about how adequately royal courts remedied legal injuries.[35] The barons intended to use Magna Carta to redress these abuses and to ensure that justice would be dispensed based not on royal whim but on the "law of the land."[36]

Magna Carta, promulgated over eight centuries ago,[37] codified the right to a remedy and the right to petition in separate provisions.[38]

---

[29] Smith, *supra* note 13, at 1155.

[30] *See infra* notes 34–35 and accompanying text.

[31] Mark, *supra* note 8, at 2163 n.26.

[32] *Id.* at 2163.

[33] *See id.*

[34] In the centuries before Magna Carta, feudal justice was dispensed by a patchwork of local courts competing for influence and fees, with most lords providing a court for persons residing on their land. Koch, *supra* note 4, at 351. Henry II, who ruled from 1154 to 1189, launched a campaign to centralize the judicial system. *Id.* at 352. By the time of King John's reign (1199–1216), the balance of judicial power had shifted decisively to royal courts. *Id.* at 352-53.

[35] The system of royal writs was complicated and tightly controlled, denying a remedy to those who failed to purchase the correct writ, at a price the King could vary on a case-by-case basis, often in proportion to the value of the claim or the wealth of the petitioner. *Id.* at 352-53.

[36] *Id.* at 353.

[37] The original Magna Carta was issued by King John in 1215, but the final version was issued in 1225. In the intervening decade, King John died, his minor son (King Henry III) ascended to the throne, issued three abridged versions, came of age, and then finally issued the 1225 version, which became the basis for all subsequent reaffirmations by later Plantagenet and Lancastrian monarchs. *See id.* at 354-56 (citing A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE, MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 8 (1968); WILLIAM S. MCKECHNIE, MAGNA CARTA, A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 45-46, 139, 141-43, 145-154, 376-83, 385, 386, 396 (2d ed. 1914); WILLIAM F. SWINDLER, MAGNA CARTA, LEGEND AND LEGACY 98, 100-02, 104, 105, 107, 112-16, 241 (1965)). The 1225 version differed

The right to a remedy from the courts was codified in Chapter 40 of the original 1215 charter and read as follows: "To no one will we sell, to no one deny or delay right or justice."[39] This language — recognized as the first codification of the right to a remedy[40] — was a capstone provision in a document designed in significant part to secure a judicial system that would respect and enforce individual rights.[41] We can readily trace this language from its codification in Magna Carta to its elaboration by Sir Edward Coke in his Second Institutes,[42] to Blackstone's restatement in his Commentaries,[43] and ultimately to state constitutional provisions operative today.[44]

from the original 1215 versions in two respects relevant here: (1) while the 1215 version codified due process rights in chapter 39 and a right to a remedy in chapter 40, the 1225 version combined these two chapters into a single chapter 29; and (2) the baronial right to petition codified in Chapter 61 was omitted from the 1225 version. Yet the baronial right to petition continued in practice, evolving into a universal right to petition. *See infra* Section I.A.2. For clarity, I refer to the 1215 version, with the understanding that the critical inquiry here is not which rights were codified by which versions of Magna Carta, but rather how Magna Carta informed the subsequent development of petitionary and remedial rights, as practiced and codified, first in England, and then in America.

[38] In this Article, I refer to the English translation of the 1215 version of Magna Carta available through the British Library. MAGNA CARTA (Eng. 1215) (translated by British Library), http://www.bl.uk/magna-carta/articles/magna-carta-english-translation. Other scholars also rely on this version. *See* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3107 n.59 (2015); Vincent R. Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015*, 47 ST. MARY'S L.J. 1, 4 n.8 (2015); *see also* HOWARD, *supra* note 37, at 42. Other translations exist — notably those used in J.C. HOLT, MAGNA CARTA (2d ed., 1992), and MCKECHNIE, *supra* note 37.

[39] Chapter 29 of the 1215 charter, addressing abuses in the criminal justice system, was the precursor to due process. *See* Kerry v. Din, 135 S. Ct. 2128, 2132 (2015); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 596-97 (2009). When King Henry III reaffirmed and reissued Magna Carta a decade later, Chapters 39 and 40 had been combined into Chapter 29. *See* Koch, *supra* note 4, at 356.

[40] *See supra* note 27.

[41] Other provisions in Magna Carta complemented Chapter 40 in securing an accessible, competent royal court system that would ably perform its function of judicial remediation and rights enforcement. *See* MAGNA CARTA, chs. 18-19, 24, 45 (Eng. 1215). Other provisions recognize that the King and his predecessors had violated individuals' legal rights and guaranteed restoration of these rights and "full justice" for these grievances (either immediately or upon conclusion of the crusades). *See id.* at chs. 52-53, 57.

[42] *See* SIR EDWARD COKE, 2 INSTITUTES OF THE LAWES OF ENGLAND 45, 55 (1642); Roesler, *supra* note 27, at 657-58 & n.18 (quoting Coke).

[43] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *32-33.

[44] *See* Phillips, *supra* note 3, at 1310-11 (describing state constitutional

Separate from the right to a remedy provision, there is another provision of the 1215 charter — Chapter 61 — that scholars and courts unanimously recognize as the original codification of the right to petition.[45] But Petition Clause jurisprudence and scholarship fail to appreciate the remedial and mandatory character of this provision.[46] This right to petition is in fact a right to a remedy. Chapter 61 of the 1215 charter — the baronial right to petition — reads, in part, as follows:

> If we . . . offend in any respect against any man, or transgress any of the articles of the peace or of this security, and the offence is made known to four of the . . . twenty-five barons, they shall come to us . . . to declare it and claim immediate redress. If we . . . make no redress within forty days . . . the four barons shall refer the matter to the rest of the twenty-five barons, who may distrain upon and assail us in every way possible, with the support of the whole community of the land, by seizing our castles, lands, possessions, or anything else saving only our own person and those of the queen and our children, until they have secured such redress as they have determined upon. Having secured the redress, they may then resume their normal obedience to us.[47]

This baronial right to petition was not supplicatory but remedial — its purpose was to preserve the legal status quo established by Magna Carta.[48] Chapter 61 used the term "redress" four times[49] and specified what would happen if the redress was not promptly supplied: the

provisions).

[45] *See supra* note 27.

[46] *See infra* notes 54, 55 and accompanying text.

[47] MAGNA CARTA, ch. 61 (Eng. 1215). In this Article, I use the British Library translation of the Latin text, as do other legal scholars outside the Petition Clause context. *English Translation of Magna Carta*, BRIT. LIBR., http://www.bl.uk/magna-carta/articles/magna-carta-english-translation (last visited Dec. 14, 2016); *see* HOWARD, *supra* note 37, at 42; Jackson, *supra* note 38, at 3107 n.59; Johnson, *supra* note 38, at 14. As I will discuss further below, other scholars use different translations of the Latin text.

[48] McKechnie describes the baronial right to petition as the "machinery for enforcing all that precedes it," "the only executive clause of the Charter, the sole constitutional machinery," "the procedure devised for enforcing the Charter," and the "procedure for redressing grievances." MCKECHNIE, *supra* note 37, at 468.

[49] MAGNA CARTA, ch. 61 (Eng. 1215) ("to declare it and claim immediate redress"); *id.* ("If we . . . make no redress within forty days . . . . "); *id.* ("until they have secured such redress as they have determined upon"); *id.* ("Having secured the redress, they may then resume their normal obedience to us.").

barons would be relieved of their obligation of loyalty to the King and legally entitled to wage war against him.[50] Only when the King redressed their grievances would war end and loyalty resume. To make this threat of war credible, Chapter 61 subsequently provides that

> Any man who so desires may take an oath to obey the commands of the twenty-five barons for the achievement of these ends, and to join with them in assailing us to the utmost of his power. We give public and free permission to take this oath to any man who so desires, and at no time will we prohibit any man from taking it. Indeed, we will compel any of our subjects who are unwilling to take it to swear it at our command.[51]

Thus the baronial right to petition was not a mere procedural right, but a substantive entitlement to redress. The petitions it contemplated were not political petitions seeking discretionary policy change, but legal petitions seeking enforcement of pre-existing legal rights. Moreover, it established an explicitly mandatory relationship between petitioner, recipient, and this rights-enforcing goal. The mandatory redress of the baronial right to petition was the mechanism Magna Carta selected to secure the underlying rights it established.[52] For this reason, Chapter 61 is also recognized as a precursor to the right of revolution.[53]

---

[50] *See* MCKECHNIE, *supra* note 37, at 468 ("John conferred upon twenty-five of his enemies a legal right to organize rebellion, whenever in their opinion he had broken any one of the provisions of Magna Carta. Violence might be legally used against him, until he redressed their alleged grievances 'to their own satisfaction.'"); *id.* (calling this committee of twenty-five barons a "Committee of Rebellion"); *see also* SAMUEL RAWSON GARDINER, A STUDENT'S HISTORY OF ENGLAND 184 (1892) (describing these barons as "a permanent organization for making war against the King.").

[51] MAGNA CARTA, ch. 61 (Eng. 1215).

[52] The term "security," or a derivative term ("secured"), is used four times, just like the term "redress." Other provisions of the 1215 charter refer to Chapter 61 as the "clause for *securing* the peace." MAGNA CARTA, ch. 52, 55 (Eng. 1215) (emphasis added).

[53] *See* ROSCOE POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 90 (1957) ("Th[e] idea [of a right of revolution] has a long history. Chapter 61 of Magna Carta recognizes a right of revolution or rebellion and provides for an orderly exercise of it . . . ."); George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 845 (1992) (noting "the great right of revolution dramatically exercised in Magna Carta"); Lawson & Seidman, *supra* note 27, at 746 ("[T]he barons were given what amounts to a legal right of revolution."); Jordan J. Paust, *The Human Right to Participate in Armed Revolution and Related Forms of Social Violence: Testing the Limits of Permissibility*, 32 EMORY L.J. 545, 561 n.67 (1983). The logic of the baronial right to petition is also reflected in the

Petition Clause jurisprudence and scholarship recognize Chapter 61 as the original codification of the right to petition, but characterize Chapter 61 in procedural, supplicatory terms, by translating the Latin text as guaranteeing the right to "ask" for redress,[54] and then omitting or de-emphasizing the latter portion of the Chapter addressing what happens if the King fails to timely provide that redress.[55]

The relevant Latin word — *petent*[56] — is a conjugated form of the verb *peto*,[57] which has multiple related meanings — some more supplicatory, some more obligatory. *Peto* could be interpreted as to "beg, beseech, ask, request, desire, entreat."[58] But it could alternatively be interpreted as to "demand, seek, require,"[59] or more specifically to "demand or claim at law, to bring an action to recover, to sue for any

Declaration of Independence, a document drafted to justify to the world the Founders' decision to rebel against Britain. After enumerating grievances against the Crown, the Declaration of Independence states, "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury." THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776); Smith, *supra* note 13, at 1173; Higginson, *supra* note 14, at 155 n.92.

[54] *See infra* note 62 (citing to authorities that follow the "right to 'ask'" translation).

[55] *See, e.g.*, Mark, *supra* note 8, at 2164 & n.29 (characterizing baronial petitions as "*notifying* [the King] of his failure to observe the pledges contained in the Great Charter," and failing to quote the portion of Chapter 61 describing legal consequence of royal failure to timely provide redress (emphasis added)). In one of her four articles identifying Chapter 61 as the first codification of the right to petition, Carol Rice Andrews acknowledges that if the King failed to redress a baronial petition, "the barons could seize the King's property until the wrong 'has been redressed.'" Andrews, *Right of Access*, *supra* note 8, at 639 n.279 (quoting HOLT, *supra* note 38, at 471). But the relevant language is not quoted, no mention is made of the legal right to rebellion, the provision is characterized as imposing only a "duty to respond," *id.*, and *petent* is translated as *ask* in a separate footnote. *Compare* Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665, 669 & n.13 (2000) [hereinafter *Motive Restrictions*] (describing the petitionary right as a "procedure" by which barons could "ask" for redress (quoting HOLT, *supra* note 38, at 471)), *with* Andrews, *Right of Access*, *supra* note 8, at 639 n.279 ("[T]he King apparently did have a duty to respond under the original 1215 Magna Carta: the barons had a right to petition the King for redress of the King's breaches of the other provisions of the Magna Carta, and, if he did not, the barons could seize the King's property until the wrong 'has been redressed.'" (quoting HOLT, *supra* note 38, at 471)).

[56] The critical Latin phrase is: "proponentes nobis excessum; *petent* ut excessum illum sine dilacione faciamus emendari." *Magna Carta*, LATIN LIBR. (emphasis added), http://www.thelatinlibrary.com/magnacarta.html (last visited Dec. 14, 2016).

[57] *Peto*, OXFORD LATIN DICTIONARY (P. G. W. Glare ed., 1st ed. 1982). *Petent* is the third-person plural, future, indicative form of the verb. The present infinitive is *petere*. *Id.*

[58] *Peto*, A LATIN DICTIONARY (Charlton T. Lewis & Charles Short eds., 1879), http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0059:entry=peto.

[59] *Id.*

thing."[60] Sir James Clarke Holt, an English medieval historian renowned for his work on Magna Carta, favored the supplicatory reading and translated *petent* as "ask."[61] Petition Clause scholars in turn have favored the Holt translation.[62] But other translations of Magna Carta translate *petent* as "claim"[63] or "demand."[64] Legal

[60] *Id.*

[61] *See* HOLT, *Manuscript Cii of Magna Carta*, *in* MAGNA CARTA, *supra* note 38, at 448, 469-71 ("[The] barons . . . shall bring it to our notice and ask that we have it redressed without delay.") (translation from text compiled by C. Bemont, Chartes des libertes anglaises (1892)).

[62] *See, e.g.*, Carol Rice Andrews, *After BE & K: The "Difficult Constitutional Question" of Defining the First Amendment Right to Petition Courts*, 39 HOUS. L. REV. 1299, 1303 n.14 (2003) (relying on Holt's translation of *petent* to *ask*); Carol Rice Andrews, Jones v. Clinton*: A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 BYU L. REV. 1, 49 n.214 (2001) (same); Andrews, *Motive Restrictions*, *supra* note 55, at 669 n.13 (same); Andrews, *Right of Access*, *supra* note 8, at 598 n.135 (same); Mark, *supra* note 8, at 2164 n.29 (same). Courts have also favored this interpretation. *See, e.g.*, San Filippo v. Bongiovanni, 30 F.3d 424, 443 n.22 (3d Cir. 1994), *abrogated by* Borough of Duryea v. Guarnieri, 564 U.S. 379 (2011); Lahmann v. Grand Aerie of Fraternal Order of Eagles, 121 P.3d 671, 680 n.6 (Or. 2005) (quoting SOURCES OF OUR LIBERTIES 21 (Richard L. Perry, ed., 1959)).

[63] *See, e.g.*, CLAIRE BREAY, MAGNA CARTA: MANUSCRIPTS AND MYTHS 54 (2002) (translating "petent" as "claim"); Shruti Rajagopalan, *Magna Carta Revisited: Parchment, Guns, and Constitutional Order*, 47 INT'L REV. L. & ECON. S53, S58 (2016) (same); *English Translation of Magna Carta*, BRIT. LIBR., http://www.bl.uk/magna-carta/articles/magna-carta-english-translation (last visited Dec. 14, 2016) ("[T]o declare it and claim immediate redress."). Claire Breay leads the medieval manuscripts section of the British Library, which has had in its repository since 1753 two of the four surviving original manuscripts of the 1215 Magna Carta. *See Making History: Four Original Surviving Magna Carta Manuscripts Are Brought Together for the First Time*, BRIT. LIBR. (Feb. 2, 2015), https://www.bl.uk/press-releases/2015/february/four-original-surviving-magna-carta-manuscripts-are-brought-together-for-the-first-time; *see also People: Claire Breay*, BRIT. LIBR. (Dec. 29, 2015), https://www.bl.uk/people/experts/clairebreay. Claire Breay also serves as a co-investigator for the Magna Carta Project. *Personnel: Historical Researchers*, MAGNA CARTA PROJECT, http://magnacartaresearch.org/about/personnel (last visited Dec. 15, 2016).

[64] *See, e.g.*, AM. BAR ASS'N, MAGNA CARTA AND THE RULE OF LAW 397 (Daniel Barstow Magraw, Andrea Martinez & Roy E. Brownell II eds., 2014); THOMAS WOOD STEVENS, MAGNA CARTA: A PAGEANT DRAMA 70 (1928) ("declaring the offence, and shall demand speedy amends for the same."); *Magna Carta 1215: Suffix A*, MAGNA CARTA PROJECT, http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Suffix_A (last visited Dec. 15, 2016) (noting the barons' duty to "set[] forth the transgression, and demand that we have it reformed without delay"). The Magna Carta Project is a collaboration between the British Library and British universities launched to freely disseminate "texts, translations and expert commentaries" on Magna Carta in preparation for its 800th anniversary. *See About the Magna Carta Project*, MAGNA CARTA PROJECT, http://magnacarta.cmp.uea.ac.uk/about/aboutproject (last visited Dec. 15, 2016). The Magna Carta Project refers to Chapter 61 as Suffix A.

scholarship outside the Petition Clause context favors these more obligatory translations and characterizes Chapter 61 in more mandatory, remedial terms.[65] That Chapter 61 is interpreted in procedural, supplicatory terms when analyzed in conjunction with the Petition Clause suggests the power of the prevailing supplicatory framing of the First Amendment right to petition. This may be a case where modern framing is informing our reading of historical practice, rather than historical practice informing our interpretation of the Petition Clause. The better reading of *petent* is surely "claim" or "demand," because Chapter 61 clearly contemplates the barons presenting demands, not mere requests. This textual ambiguity regarding the Latin term *petent* in Magna Carta is analogous to the textual ambiguity regarding the English term "petition" in the First Amendment. For while some translate *petent* as "ask," and others translate *petent* as "claim" or "demand," a third set of scholars simply translate *petent* as "petition."[66] This interpretive dissensus powerfully demonstrates that the verb "petition," like its Latin ancestor *peto*, is an instance of polysemy, where a single term bears multiple distinct but related meanings.[67]

Magna Carta thus contained two related but distinct provisions: Chapter 40's right to a remedy from the courts, and Chapter 61's baronial right to petition the King. Note that the difference between

[65] *See, e.g.*, Sally E. Hadden, *Magna Carta for the Masses: An Analysis of Eighteenth-Century Americans' Growing Familiarity with the Great Charter in Newspapers*, 94 N.C. L. REV. 1681, 1721 (2016) ("The right of petition that men believed was protected in Magna Carta was more correctly the right to 'claim immediate redress' should the king give offense (chapter 61) . . . ." (quoting DAVID CARPENTER, MAGNA CARTA 44-45 (2015))); Robert E. Hall, *Remonstrance — Citizen's Weapon Against Government's Indifference*, 68 TEX. L. REV. 1409, 1427 (1990) ("Chapter 61 insured the enforcement of the rights granted by establishing an enforceable right of petition." (citing MCKECHNIE, *supra* note 37, at 545, 547)); Del Wright, Jr., *Bogus Refunds & Bad Penalties: The Feckless and Fixable Refund Penalty System*, 48 AKRON L. REV. 547, 583 n.156 (2015) (barons had a duty to "declare [the offence] and claim immediate redress") (translation source unclear); Steven M. Richman, *Magna Carta — Its Essence and Effect on International Law*, N.J. LAW. MAG., June 2015, at 5, 6 ("Chapter 61 (Suffix A) provided the remedies section, so to speak, setting forth a procedure for remedying default by the king . . . .").

[66] *See, e.g.*, RANDY J. HOLLAND, MAGNA CARTA: MUSE & MENTOR 246 (2014) ("[L]aying open the grievance, [the barons] shall petition to have it redressed without delay."); MCKECHNIE, *supra* note 37, at 467 ("[L]aying the transgression before us, [the barons shall] petition to have that transgression redressed without delay."); RAY STRINGHAM, MAGNA CARTA: FOUNTAINHEAD OF FREEDOM 241 (1966) ("[M]aking known to us the excess committed, [the barons shall] petition that we cause that excess to be redressed without delay.").

[67] I return to this critical point in my textual analysis. *Infra* Section I.B.1.

these two rights was *not* that the right to petition was procedural while the right to a remedy was substantive. Both were substantive, obligatory, and remedial in character; both provided mechanisms to protect other underlying rights, and both emphasized a speedy remedy.[68] If anything, the right to petition was more remedial than the right to a remedy because only the baronial right to petition entailed a corresponding legal right of rebellion if the King failed to provide redress. The difference between the two rights concerned who could exercise them and whom they constrained. The right to a remedy was universal and individual. Any single person could exercise it. The right to petition, however, was baronial and representative. Only selected barons, acting together, could exercise it. Though both provisions use the royal "we," the right to a remedy was intended and understood only to constrain the royal courts within their limited sphere of operation, while the right to petition directly constrained the King. The right to a remedy was designed to redress violations by neighbors, while the right to petition was designed to redress transgressions by the King or his agents.

These distinctions reflected the power dynamics inherent in the relationships between the King, the barons, the courts, and the people. The courts were subordinate to the King and their power was limited. For that reason, the right to a remedy was inadequate for the barons — they wanted direct access to the King. The barons, who could withhold taxes or rebel, posed the real political threat to the King, and they therefore enjoyed greater remedial rights. In terms of Albert Hirschman's framework of voice, exit, and loyalty,[69] Magna Carta's two-tiered remedial system, with a baronial right to petition stronger than the universal right to a remedy from the courts, reflected the greater threat of exit posed by barons as opposed to common subjects.[70]

---

[68] *Compare* MAGNA CARTA, ch. 40 (Eng. 1215) ("To no one will we sell, to no one deny or *delay* right or justice." (emphasis added)), *with* MAGNA CARTA, ch. 61 (Eng. 1215) ("[The barons] shall come to us . . . to declare it and claim *immediate* redress. If we . . . make no redress *within forty days*, . . . the twenty-five barons . . . may distrain upon and assail us . . . ." (emphasis added)).

[69] *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970) (presenting influential framework suggesting three fundamental options available to a citizen facing government oppression: exit (rebellion or expatriation), voice (protest, lobbying, and voting) or loyalty (hopeful attachment)).

[70] Magna Carta, and the baronial right to petition, came about because the barons, dissatisfied with their voice and loyalty options, elected to withhold taxes and go to war against the King. The barons successfully used this exit option to extract Magna

From this starting point, the right to petition the King and the right to a remedy from the courts would evolve along with the English political system and legal culture. The explicit *quid pro quo* between baronial loyalty and baronial rights would evolve into a broader legal theory of royal legitimacy predicated on the King's protection of the rights of all his subjects. The expectation that the King would enforce rights and redress legal injuries would evolve from the explicit consideration for baronial loyalty to the philosophical justification for every subject's allegiance to the King. As John Locke would put it four centuries after Magna Carta, the diminution of liberty that accompanies man's departure from a state of nature is compensated for by the greater security afforded by government's obligation to enforce natural rights.[71] The right to petition the King would evolve from a baronial and representative right to a universal and individual right. From their differentiated origins, the right to petition the King and the right to a remedy from the courts would co-evolve into what Blackstone would later characterize as a tightly linked pair of "auxiliary subordinate"[72] rights that worked in tandem to protect every Englishman's primary rights to personal security, liberty and property. The First Amendment would complete this co-evolution by merging the two rights into one.

2. The Evolution of English Petitionary and Remedial Rights

The centuries following Magna Carta saw evolution in petitioning practice, in the structure of the courts, and in the King's response to petitions, with the effect that remedial responses to legal petitions became increasingly universal, regularized, and mandatory. This history suggests that it is problematic to analyze petitioning practice based on the *recipient* of the petition; it must be analyzed based on the *function* of the petition. One of the key features of this evolutionary period was a continued conflation of powers between governmental

Carta from the King as the price of their loyalty. *See generally* MCKECHNIE, *supra* note 37. In this way, the baronial right to petition merely formalized the pre-existing political dynamic between the King and the barons.

[71] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 267-68 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); *see also* Goldberg, *supra* note 6, at 541 (discussing Locke's contributions to social contract theory). Locke's theory heavily influenced Blackstone and the Founders. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 22-54 (1967); GARY ROSEN, AMERICAN COMPACT: JAMES MADISON AND THE PROBLEM OF FOUNDING 5, 108 n.40 (1999); Goldberg, *supra* note 6, at 547-48.

[72] 1 WILLIAM BLACKSTONE, COMMENTARIES *140-41.

actors: judicial powers were exercised by courts, King, and Parliament; quasi-judicial procedures were implemented in Parliament and by the King; and due to a changing court system, petitions once addressed to the King were later addressed to his Courts of Equity.

In the six centuries following Magna Carta, there was a vast history of political petitioning concerned not with remedying legal injury or enforcing preexisting rights, but rather with changing the law and communicating the public will to the King and, later, to Parliament.[73] Such political petitions often received favorable responses, but such responses were not guaranteed.[74]

But the analysis changes when we shift our focus to legal petitions. If an individual believed that someone violated his legal rights, what would he do? To which institutional actor would he turn? What was the common understanding of an individual's second-order right to enforce his primary rights — in other words, to obtain a remedy for legal injury?

The answers to these questions were complex and fluid. The procedural mechanisms for legal petitioning were multi-institutional: they included petitioning the courts, the King, and, later, Parliament. And these procedural mechanisms were also dynamic. The relevant institutional actors, and the manner in which they responded, underwent significant evolution. Consider one prominent example of this dynamism. In response to increasing numbers of petitions, the

[73] *See* Mark, *supra* note 8, at 2166-67 ("The petitions did not recognize fine a priori distinctions in categories of judicial, legislative, or executive authority, nor did they recognize a deep theoretical gulf between public and private grievances."). Special interest groups would petition the King, not to enforce preexisting legal rights, but to request changes in law. *See* Spanbauer, *supra* note 8, at 22-23 ("[T]he barons, as representatives of the nobility, were granted a personal audience with the King . . . to present their written petition in exchange for their promise to finance the government."). Linkages — explicit and implicit — developed between the King's response to these petitions and the willingness with which special interest groups pledged taxes and military service to the King. *See id.* at 22-23, 25. This dynamic of political petitioning may have evolved into the British Parliament. *See id.* at 23 n.44.

When Parliament became institutionalized, people started petitioning Parliament as well. Mark, *supra* note 8, at 2166 n.34. The lines between political and legal petitions remained blurred. *See id.* at 2166-69. Sometimes Parliament concluded that the petitioner was not entitled to relief under extant law, but that the law itself should be changed or clarified. In this case, Parliament asked the King to change the law. Parliament began bundling these requests to the King, and preconditioning funds on adequate responses. *Id.* at 2167-68. This was the beginning of an institutionalized process of legislation. *See* Smith, *supra* note 13, at 1156.

[74] *See* Mark, *supra* note 8, at 2170-71 ("The [seventeenth] century's upheavals [in English politics] included powerful and unfavorable responses to certain petitions . . . .").

King began referring legal, appellate petitions to his Chancellor, who began developing a routinized system for addressing them.[75] Eventually, this system evolved into the Chancery Court,[76] which in turn became increasingly independent from the King.[77] In this way, petitions once addressed directly to the King were later addressed to a court of equity — a court that was subject to the norm that, absent adequate justification, the violation of a right necessitated a remedy.[78]

The multi-institutional character of legal petitioning practice generated procedural complexity, institutional choice, and institutional competition. Petitioners asserting legal grievances could often select among multiple fora — for example, Parliament, a court of law, or one of multiple courts of equity — and they made that choice based on an estimation, depending on the particular claim, of which forum would offer the most advantageous relief.[79] Intense jurisdictional competition between different institutional recipients promoted receptiveness to individual petitioners. From this multi-institutional competitive dynamic emerged a remedial imperative — an increasingly broad and robust recognition that, absent adequate justification, a meritorious legal claim triggers a petitioner's right to a remedy and government's duty to provide one. Parliament's competitive institutional interest in resolving petitions developed into an institutional obligation to do so, particularly in the case of legal petitions, for which Parliament exercised quasi-judicial functions and adopted quasi-judicial procedures.[80] Courts of law captured this remedial imperative in the legal maxim of *ubi jus, ibi remedium* — "where there is a right, there should be a remedy."[81] Courts of equity developed the analogous equitable maxim that "equity will not suffer a wrong without a remedy."[82] And in the centuries-long turf war waged between courts of law and courts of equity,[83] the most fundamental

[75] *See* Spanbauer, *supra* note 8, at 23-24.

[76] *Id.* at 24.

[77] *See* POMEROY, *supra* note 1, at 3-4.

[78] *Id.* at 200-01 (discussing the equitable maxim that "equity will not suffer a wrong without a remedy").

[79] Mark, *supra* note 8, at 2168 n.50.

[80] *See id.* at 2167 n.42, 2168 n.46.

[81] Amar, *Of Sovereignty*, *supra* note 1, at 1485-86 ("Few propositions of law are as basic today — and were as basic and universally embraced two hundred years ago — as the ancient legal maxim, *ubi jus, ibi remedium*: Where there is a right, there should be a remedy.").

[82] POMEROY, *supra* note 1, at 200-01.

[83] *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 6 (concise 4th ed. 2012) ("The line between law and equity is largely the result of a

principle to emerge aligned jurisdictional scope with remedial efficacy: courts of equity would only intervene where the petitioner could demonstrate that there was no adequate remedy in the courts of law.[84] By 1642, Sir Edward Coke had elaborated upon Magna Carta's protection of the right to a remedy in the following terms:

> We will sell to no man, we will not deny or defer to any man either justice or right. . . . And therefore, every subject of this realme, for injury done to him *in bonis, terris, vel persona,* by any other subject, be he ecclesiasticall, or temporall, free, or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.[85]

Six decades later, the famous case of *Ashby v. White* emphasized the reciprocity of rights and remedies:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for . . . want of right and want of remedy are reciprocal. . . . Where a man has but one remedy to come at his right, if he loses that he loses his right.[86]

The remedial right extended even, in somewhat altered form, to petitions against the King himself. The "petition of right" emerged as a mechanism by which English subjects would petition the King directly to redress legal wrongs and ask him, as matter of mercy or conscience, to consent to suit in the courts of equity.[87] Royal consent to suit became increasingly fictionalized over time, and English subjects were increasingly able to get a remedy from the King's officers or even from

bureaucratic fight for turf; each court took as much jurisdiction as it could get.").

[84] *See, e.g.*, Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 694 (1990); Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 212 (2000).

[85] SIR EDWARD COKE, SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 45, 55 (1642). The Supreme Court has noted that Coke's Institutes "were read in the American Colonies by virtually every student of law." Kerry v. Din, 135 S. Ct. 2128, 2133 (2015) (quoting Klopfer v. North Carolina, 386 U.S. 213, 225 (1967)).

[86] Ashby v. White (1703) 92 Eng. Rep. 126, 137.

[87] Pfander, *supra* note 8, at 909.

the King himself.[88] Chief Justice Marshall explicitly recognized this tight link between petitioning practice and mandatory remedies when he stated in *Marbury v. Madison*, "[i]n Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."[89] As petitioning practice matured, the royal response to these legal petitions moved away from royal whim and towards regularity and rights enforcement.[90]

While the English legal system distinguished between the right to a remedy from the courts and the right to petition the King and Parliament, these rights worked in tandem to vindicate legal rights in the English context of dynamic, multi-institutional choice and competition. This unified and complementary relationship between the English right to a remedy and the English right to petition is captured most explicitly in Blackstone's Commentaries, a treatise that profoundly influenced the Founders.[91] Blackstone described both rights as "auxiliary subordinate" rights, which "protect and maintain inviolate" the primary rights to personal security, liberty, and property.[92]

Blackstone enumerated five "auxiliary subordinate" rights: (1) the constitution, powers, and privileges of Parliament; (2) the limitation of the King's prerogative; (3) the right to a remedy from the courts; (4) the right to petition the King or either house of Parliament for the

[88] *See id.* at 909-12 (providing a history of the types of remedies available from the king or the king's officers). The famous line "the King can do no wrong," 3 WILLIAM BLACKSTONE, COMMENTARIES *254, was both a limitation on the King's prerogative and a constraint on suing the King directly instead of his ministers; it did not mean that the King could act with impunity, no matter how oppressive or illegal his actions. *See* Goldberg, *supra* note 6, at 553 n.143. For a discussion of how a First Amendment right to a remedy would apply to the Eleventh Amendment and non-constitutional governmental immunity doctrines, see *supra* note 18.

[89] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

[90] *See* Pfander, *supra* note 8, at 909-21 (describing the evolution for different types of remedies).

[91] *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 226 (1998) ("Even more significant, members of the Thirty-ninth Congress regularly linked the Bill of Rights with the classic common-law rights of individuals exemplified in Blackstone . . . ."); ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 16 (1975) ("No one could avoid the influence of Blackstone. Even Jefferson, distrusting the commentator's politics, had to concede that the work excelled in its lucid, almost too easy, exposition of the common law."); Goldberg, *supra* note 6, at 550-51, 560 ("With certain heresies excised, the Commentaries provided the basic text for late-colonial and early-American legal education and practice.").

[92] 1 WILLIAM BLACKSTONE, COMMENTARIES *136, *137-39.

redress of grievances; and (5) the right to bear arms.[93] Blackstone's last three rights are conceptually related. The interlocking rights to a remedy, to petition, and to bear arms reflected the same political logic of voice and exit that animated the baronial right to petition in the original charter of 1215.[94] They were based on a conception of the political order that linked the legitimacy of government to the adequacy of its rights-enforcing capacity. If a person's underlying primary rights were threatened or violated, the person's first step was to seek a remedy from the courts. If for some reason, the courts were unable to adequately perform this function, the person could petition the King or Parliament:

> 4. If there should happen any uncommon injury, or infringement of the rights beforementioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances.[95]

Petitioning was designed to secure remedies in the rare cases where the courts could not. Significantly, Blackstone characterized the right to petition in explicitly legal terms, as an extension to Parliament and the King of the right to a remedy in the courts. Finally, if petitioning itself did not vindicate a person's primary rights, the person could bear arms — to protect himself directly or to rise up against the government. This final auxiliary subordinate right is obviously a precursor to the Second Amendment and the concept of an armed militia as a guarantor of liberty and bulwark against oppression.[96]

If we accept a supplicatory reading of the Petition Clause, each of these auxiliary subordinate rights is reflected in the federal Constitution — except the right to a remedy. [97] Under my remedial theory of the

---

[93] *Id.* at *136-39.

[94] *See supra* notes 69, 70 and accompanying text.

[95] 1 WILLIAM BLACKSTONE, COMMENTARIES *138-39.

[96] *See* Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1009-11 (1995) (reviewing JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994)).

[97] The first two are structural features of the English system that find parallels in the law-making power of Congress, U.S. CONST. art. I, and the constitutional limitations on executive power. *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 634-38 (1952) (Jackson, J., concurring); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259 (2009). The last three rights are individual, with the fifth right analogous to the Second Amendment, U.S. CONST. amend II.

Petition Clause, however, all five auxiliary subordinate rights are reflected in the federal Constitution, with the First Amendment Petition Clause incorporating both the third and the fourth rights. When the Framers changed the recipient subclause of the Petition Clause from "the Legislature" to "the Government,"[98] the rights to two types of petitions directed at two different recipients, *including the remedial expectations attached to them*, were merged into one.

***

These historical roots of the petitionary and remedial rights, pre-dating Magna Carta and traceable forward to Blackstone's Commentaries, demonstrate a co-evolution of two closely linked rights, both of which served at least a partially remedial function, but each of which was directed at a different institutional actor. Early American codifications of these rights mirrored the British practice. Prior to the ratification of the First Amendment, colonial charters and then state constitutions often contained protections for the right to petition the Legislature and a separately enumerated right to a remedy from the courts.[99]

When the Framers merged the institutional recipient of the Petition Clause — changing it from "the Legislature" to "the Government" — they encompassed petitions to the judiciary, which were previously governed by the English right to a remedy. In so doing, the Framers acted against the backdrop of a deep-seated understanding that petitions directed toward the courts would, absent adequate justification, result in a remedy, and that even petitions directed toward the King or Parliament, when legal or appellate in nature, would result in remedial action where merited, as well. This historical co-evolution provides substantial support for the remedial interpretation of the Petition Clause, which placed duties on all branches of a now co-equal government in the new American Republic.

B. Text and Drafting History

With this historical background in mind, I now turn to analyze the constitutional text ultimately adopted by the Framers of the First

[98] *See infra* Part I.B.

[99] *See* Borough of Duryea v. Guarnieri, 564 U.S. 379, 403 (2011) (Scalia, J., concurring in part and dissenting in part) (citing Andrews); Andrews, *Right of Access*, *supra* note 8, at 604 n.159 (citing constitutional provisions from Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire).

Amendment: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."[100]

As I conduct this analysis, I recognize that one intuitive reading of these words — and, indeed, the prevailing interpretation of the text to date — is that they guarantee a right that is supplicatory and procedural in nature: that the right to petition means only and always the right to *ask for redress*, without any assurance that redress will be forthcoming. I call this interpretation the *supplicatory interpretation*. A proponent of the supplicatory interpretation would assert — or assume — that the word "petition" is a synonym of "ask," "beg," or "beseech"; that "petition" entails an entreaty rather than an

[100] U.S. CONST. amend. I. I focus my reading on the heart of the Petition Clause, the final nine words that protect the right "to petition the Government for a redress of grievances." Read as a whole, however, the first eleven words — "Congress shall make no law . . . abridging . . . the right of the people . . ." — suggest three additional interpretive principles I use in other portions of my analysis. The specification of "Congress" as the restrained institution reminds us of the federal orientation of the Bill of Rights. *See infra* Section I.B.6 (suggesting federalism concerns with a stand-alone right-to-remedy provision). The phrase "shall make no law . . . abridging" applies not only to the petitionary right, but to the right of assembly, the freedom of speech, and the freedom of the press, suggesting a coherence among all First Amendment protections. *See infra* Part II.A (suggesting the need for a doctrinal framework for the remedial right to petition that coheres with other First Amendment doctrines). The phrase "the right of the people" suggests an adaptation of pre-existing historical rights. *See supra* Part I.A (looking to the historical development of the petitioning practice).

The First Amendment refers to "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances," U.S. CONST. amend. I. For this reason, some refer not to two distinct clauses — the Assembly Clause and the Petition Clause — but to a unitary "Petition and Assembly Clause," Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 113 (2000), or the "assembly/petition clause," Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 713 (2002). Mazzone has argued that "we should understand assembly and petition to belong together," *id.* at 712, given the singular "right of the people" and the conjunctive "and," *id.* at 712-13, and the historical link between petitioning and assembly, *see id.* at 721-29. However, John Inazu has demonstrated that this conflation of petition and assembly is unpersuasive as a matter of text and drafting history. *See* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 574-77 (2010). The First Amendment "does not limit assembly to the purposes of petitioning the government." *Id.* at 576. Just as people can assemble without petitioning, an individual can petition without assembling, most obviously by petitioning a court to redress a legal grievance. The two linguistically distinct clauses protect two conceptually distinct rights. The impulse to conflate assembly and petitioning into a single right suggests how powerfully the right to petition is associated with political petitions addressed to legislatures as opposed to legal petitions addressed to courts.

entitlement. Such a proponent would further argue that the choice of indirect language, guaranteeing a "right to *petition the Government for* a redress of grievances" rather than a "right to a redress of grievances," renders it a *procedural* right to *ask* for a remedy and not a *substantive* right to *get* a remedy.

There is, however, a competing interpretation of the text: that in the specific context of legal petitions, these words encompass the substantive right of a legally injured person to ask for *and obtain* redress. I call this interpretation the *remedial interpretation*. In elucidating the remedial interpretation, I explain that the word "petition" bears two ambiguities — one semantic and one pragmatic — that make it supplicatory in some contexts and mandatory in others. I then identify four contextual factors that point to a mandatory, remedial reading of the word "petition" as it is used in the First Amendment: the deliberate and unprecedented broadening of the petition recipient from "the Legislature" to "the Government" (thus encompassing courts); the specification of "the redress of grievances" as the petition goal; the enumeration of a separate Speech Clause that already protects supplicatory communications; and the Framers' consideration (and ultimate rejection) of more explicit remedy-guaranteeing language.

1. The Ambiguity of "Petition"

Whether the word "petition" in the Petition Clause has a supplicatory or mandatory meaning depends on two linguistic ambiguities. First, as a matter of semantics, the word "petition" presents a case of *polysemy*. It is a single term that bears multiple, related meanings. One of these meanings is supplicatory (as in "beg"), but one is mandatory (as in "claim").

Take the various entries for the verb "petition" in the Oxford English Dictionary. Some are supplicatory: "[t]o make a request or supplication to"; "to ask humbly"; "[t]o solicit, ask, or beg for."[101] Others connote formality as opposed to supplication: "to address a written petition to (an authority) in respect of a particular cause"; "to make a formal application to (a court)"; "[t]o address or present a petition"; "to file a petition with a court."[102] Note that two of these latter four definitions explicitly contemplate a court as the petition's

[101] *Petition*, v., OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/141859 (last visited October 20, 2016).

[102] *Id.*

recipient, and three of them define the verb "petition" in terms of the noun "petition."

Turn to the entries for the noun "petition" and you will find even starker evidence of polysemy. Again, some entries are supplicatory: "[a] supplication, entreaty, or prayer"; "[a] solemn and humble prayer to God"; "[a] supplicatory clause in a prayer"; "an entreaty, esp. to a sovereign or superior."[103] But another entry, focusing specifically on petitions to courts, emphasizes formality and redress instead of supplication: "[a] formal written application made to a court, setting out facts on the basis of which the petitioner seeks to some legal remedy or relief."[104] Still other entries are themselves subject to multiple related interpretations, occupying some intermediate and indeterminate point along the supplicatory–obligatory continuum: "[t]he action of formally asking, supplicating, or requesting; the action of submitting a petition. to make petition: to ask, supplicate, or request formally"; "a formal written request or supplication, (now) esp. one signed by many people, appealing to an individual or group in authority (as a sovereign, legislature, administrative body, etc.) for some favour, right, or mercy, or in respect of a particular cause."[105] Notably, one entry defines the noun petition as "the thing asked or petitioned for" as in "to have (also receive) one's petition."[106]

The polysemy of "petition" is further revealed by its etymology and listed synonyms. The English verb "petition" derives from the Latin verb "peto," a conjugated form of which is used in the very first codification of the right to petition in the 1215 Magna Carta.[107] In that document, the Latin verb is clearly used to refer to a demand rather than a request, and the best English interpretation is "to claim" or "to demand," but some scholars of Magna Carta have instead interpreted the verb as "to ask." The synonyms for the verb "petition" listed by the Oxford English Dictionary span the entirety of the supplicatory–obligatory continuum: address; ask; beseech; bid; conjure; crave; desire; entreat; implore; imprecate; invoke; mendicate; move; nurn; plead; pray; request; require; requisite; seek; solicit; speer; supplicate; tell; wish; and yearn. So do the listed synonyms for the noun "petition."

---

[103] *Petition,* n., OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/141858 (last visited January 19, 2017).

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *See supra* Section I.A.1.

Thus, "petition" is a member of a group of conceptually-related words that describe an action taken by an individual who is trying to obtain something from another individual or institution. This group of words is a particularly rich source of polysemy: The effort to obtain the goal sought could be characterized alternatively as a request or a demand. At one end of the supplicatory–obligatory continuum are words such as "beseech" and "pray,"[108] which connote a low level of enforcement power; at the other end are words such as "command" and "require" which clearly place an obligation on the recipient to obey. Words such as "petition" and "claim" lie somewhere in the middle; they might plausibly signify either a request or a demand. The extent to which these words entail an expectation of obtaining what is being asked for depends on the context. Take the word "claim." One meaning is akin to an assertion: "The politician claimed that she was the best candidate." Another meaning suggests a right to obtain the thing sought: "She claimed her prize." The meaning varies with context.

The meaning of the word "petition" thus varies depending on the context; to petition a court of law signifies something distinct and less obviously supplicatory than to petition another individual or institution. Sometimes, whether the word "petition" entails an entitlement to the petition goal depends on the entity to whom the petition is addressed (the petition recipient). When one petitions the gods, the word has an obviously and necessarily supplicatory meaning. When one petitions a court — an institution bound by the rule of law and designed to consider and resolve questions of individual legal right — the word often takes on a mandatory significance.

Moreover, whether the word "petition" entails an entitlement to the petition goal also varies depending on the goal sought. Sometimes the word "petition" is used in a context in which the agent has a right not only to *ask* the recipient for some goal, but the underlying substantive right to *obtain the goal* if certain criteria are satisfied. Someone who "petitions" for a writ of mandamus or for a writ of habeas corpus is *entitled to that writ* if her petition has legal merit.[109] Other examples

[108] Note that sometimes even these highly supplicatory words are used non-literally and function as commands.

[109] *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 11.15 (2016) ("The writ of habeas corpus shall be granted without delay by the judge or court receiving the petition, unless it be manifest . . . that the party is entitled to no relief whatever."); *In re* Stake Ctr. Locating, Inc., 731 F.3d 949, 951 (9th Cir. 2013) ("In reviewing a CVRA mandamus petition, we . . . '*must issue* the writ whenever we find that the district court's order reflects an abuse of discretion or legal error.'" (emphasis added) (citing Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1017 (9th Cir. 2006))); Weaver v. Foltz,

abound.[110] By contrast, consider a petition for *certiorari* lodged in the Supreme Court. Because *certiorari* is discretionary, there is no mandatory obligation upon the Court to grant the petition. But note that this discretion is suggested by the qualification "for *certiorari*" and does not follow ineluctably from the term "petition" alone; it flows from the contextual marker following it.

Second, as a matter of pragmatics, the connotation of the word "petition" may depart from its semantic meaning when used in certain cultural contexts. Like many other conceptually-related terms, the word "petition," even when it is unambiguously supplicatory on a semantic level, may be used in a context where it is pragmatically understood as a demand.

For example, when a boss says to an employee, "Could I ask you to take care of that by the end of the day?" or when a police officer says to a motorist, "I'm asking you to please step out of the car," we understand these sentences not as supplicatory requests but as polite commands made by individuals in higher positions of authority in a manner that de-emphasizes the power inequity between those making and those receiving the instruction. The ubiquitous cultural memes "I wasn't asking" and "That wasn't a question" are necessary and commonly arise because of the inherent uncertainty in determining whether a particular request is supplicatory or mandatory — particularly when higher authorities couch demands as requests.

Similar pragmatic ambiguities inhere when the individual seeking a favorable action is less powerful than the person being asked, due to conventions of respect owed to certain authority figures. As discussed above,[111] as petitioning practice evolved in England over time, and as petitions that were once resolved as a matter of grace became increasingly routinized and necessitated a resolution as a matter of right, it remained of the utmost importance to phrase these demands

888 F.2d 1097, 1099 (6th Cir. 1989) ("A writ of habeas corpus *must issue* to any habeas petitioner whose conviction falls short of this standard." (emphasis added)).

110 *See, e.g.*, 12 U.S.C. § 1731b(h) (2012) ("Whenever he finds a violation . . . , the Attorney General shall petition [a court] . . . for an [injunction], and upon a [proper] showing . . . [an injunction] . . . *shall be granted* . . . ." (emphasis added)); *id.* § 5382(a)(1)(A)(v) (2012) ("If the Court does not make a determination within 24 hours . . . the petition shall be granted by operation of law . . . ."); United States v. Atchison, Topeka, & Santa Fe Ry. Co., 234 U.S. 476, 490 (1914) ("[T]he right to petition the Commission conferred by the statute is positive, and while the refusal to grant it may be in one sense negative, in another and broader view it is affirmative, since it refuses that which the statute in affirmative terms declares *shall be granted* if only the conditions which the statute provides are found to exist." (emphasis added)).

111 *See supra* Part I.A.

as respectful and humble requests, due to the power dynamics between subject and King. This tendency of formally supplicatory language to suggest respect — but not absolute discretion — for the recipient is particularly relevant in the legal context. Our modern legal system retains supplicatory terms of art that are vestiges of historical practice developed in earlier political eras defined by royal sovereignty and subjecthood[112] and that remain meaningful as a cultural attitude of respect due to the honorable court. To take but one example, a "prayer for relief" is not literally a "prayer" — it is a demand, couched in respectful terminology to a judicial authority. Yet it is boilerplate language in modern complaints.

Thus the word "petition" is ambiguous along two dimensions. On a semantic level, it is polysemous: the word itself has different meanings that vary with context. On a pragmatic level, even if we understand it to be supplicatory on a semantic level, it may be used as a respectful term of art to soften a formal demand.

There is, thus, an ambiguity whether the term "petition" takes on a supplicatory or mandatory meaning in the Petition Clause. This ambiguity casts doubt on the prevailing supplicatory interpretation. In the sections below, I explore other contextual features of the Petition Clause and its drafting history that, to the contrary, suggest that a remedial interpretation is both plausible and more satisfying in the context of a meritorious legal petition.

2. The Recipient and Goal Subclauses

The verb "petition" contemplates a relationship among three concepts[113]: (1) a *petition agent (the petitioner)*, the subject of the verb, the person doing the petitioning; (2) a *petition recipient*,[114] the direct object of the verb, the person or entity to whom the petitioner addresses her petition; and (3) a *petition goal*, the indirect object of the

[112] *See supra* Part I.A.; *see also* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.").

[113] In linguistic terminology, the verb "petition" is *trivalent* because it expects three core arguments, or more specifically *ditransitive*, because these three core arguments are, respectively, a subject, a direct object, and an indirect object. *See* R.M.W. DIXON, 1 BASIC LINGUISTIC THEORY 229 (2010); P.H. MATTHEWS, THE CONCISE OXFORD DICTIONARY OF LINGUISTICS 415 (2d ed. 2007).

[114] In linguistic terminology, this thematic role is patient. *See generally* David Dowty, *Thematic Proto-Roles and Argument Selection*, 67 LANGUAGE 547, 563 (1991) (illustrating the traditional thematic roles of agent, patient, and goal).

verb, the thing the petitioner seeks from the recipient.[115] In the final version of the Petition Clause, the petition recipient is identified as "the Government" and the petition goal is identified as "a redress of grievances."

Note that, though the act of petitioning necessarily involves agent, recipient, and goal as a *conceptual* matter, the verb "petition" does not require the overt specification of recipient or goal as a *linguistic* matter.[116] Each of the following phrases is grammatically sound:

> The right to petition
> The right to petition the Government
> The right to petition for a redress of grievances

The Framers elected to forgo each of these options and instead embrace a phrase that specifies both recipient and goal. Thus, it is appropriate to focus carefully on both of these constituent components of the Petition Clause. To better understand whether the word "petition" is, in context, supplicatory or remedial, I turn next to the recipient subclause[117] — "the Government"; and the goal subclause — "for a redress of grievances."

a. "The Government"

The Petition Clause is one of the few clauses in the Constitution to refer to "the Government" as a whole, as opposed to an individual institution or actor within it.[118] The rarity of the term "Government"

---

[115] *See supra* Part I.A.

[116] In linguistic terminology, the verb "petition" is not strictly ditransitive because neither the direct object/patient nor the indirect object/goal are necessary. Contrast the verbs "put" or "give." Both are ditransitive because they require a direct object and indirect object in addition to a subject. One can say "he puts the car in the garage," but not "he puts the car," "he puts in the garage," or "he puts."

[117] I use the term "subclause" not in a technical linguistic sense but only to refer to a constituent phrase within a single clause of the constitution.

[118] Two provisions of the original constitution refer to the District of Columbia as "the Seat of the Government of the United States," U.S. CONST. art. I, § 8; art. II, § 1, as does the Twelfth Amendment. U.S. CONST. amend. XII. The Guaranty Clause guarantees "to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4. The Necessary and Proper Clause refers to "all other Powers vested by this Constitution in the Government of the United States . . . ." U.S. CONST. art. I, § 8. Thus, the term "Government" occurs a total of six times in the Unites States Constitution — four times in the original constitution, U.S. CONST. art. I § 8, cl. 14, 17–18 & art. II, § 1, once in the First Amendment, and once in the Twelfth Amendment. The Petition Clause is the only provision in the Bill of Rights to use the term "Government," and the only provision in the entire constitution to refer to the "Government" as opposed to the "Government of the United States."

in the Constitution suggests the significance of its use in the recipient subclause.

But if it was rare to use the term "Government" in the Constitution, it was unprecedented to use the term "Government" in the recipient subclause of a codification of a petitionary right. Its use here suggests the expansion of the traditional petitionary right to the judicial context.

The historical record concerning the drafting and ratification of the Petition Clause is limited. Historians do, however, know some critical information. When James Madison penned the first draft of the Petition Clause, his initial version read: "The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to *the legislature* by petitions, or remonstrances for redress of their grievances."[119] A drafting committee then amended the draft language and substituted the term "Government" into the recipient subclause.[120] This final version was approved on July 28, 1789.[121]

Unfortunately, no record survives of the debates that led to the drafting change. Yet this amendment from "Legislature" to "Government" was a novel and therefore significant innovation. When the Founders drafted the First Amendment, seven state constitutions codified a right to petition, and all used the term "Legislature" in the recipient subclause.[122] And in virtually all prior British and colonial codifications of a petitionary right, the recipient was identified as "King" and/or "parliament."[123]

---

[119] CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 12 (Helen E. Veit et al. eds., 1991) (emphasis added).

[120] *See id.* at 30; s*ee also* Pfander, *supra* note 8, at 958-59 (discussing the drafting history).

[121] *See* Pfander, *supra* note 8, at 957.

[122] *See* Borough of Duryea v. Guarnieri, 564 U.S. 379, 403 (2011) (Scalia, J., concurring in part and dissenting in part) (citing Andrews); Andrews, *Right of Access, supra* note 8, at 604 n.159 (citing constitutional provisions from Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire).

[123] *See, e.g.*, Bill of Rights 1688, 1 W. & M. c. 2 (Eng. & Wales) ("That it is the right of the subjects to petition the King . . . ."); STAMP ACT CONGRESS, DECLARATION OF RIGHTS AND GRIEVANCES art. 13 (1765), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 195, 198 (1971) (stating "[t]hat it is the right of the British subjects in these colonies to petition the King or either House of Parliament"); 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 70 (Worthington Chauncey Ford ed. 1904) (Declaration and Resolves of the First Continental Congress, stating the "right peaceably to assemble, consider of their grievances, and petition the King . . . ."); MAGNA CARTA, ch. 61 (Eng. 1215). Although it did not use the term "Government," the colonial Massachusetts Body of Liberties was an outlier in

The conscious decision of the Framers to depart from virtually all historical and contemporaneous codifications of the petitionary right and to explicitly amend the draft text to expand the petitionary recipient from "Legislature" to "Government" strongly suggests that the scope of the Petition Clause was expanded with the textual change.[124] The new language encompasses petitions made to all three branches of government. It therefore covers not only petitions to the legislative or executive branches, but also *legal petitions* by legally injured persons seeking individualized relief from the courts. By expanding the petitionary right to the judiciary, the Framers incorporated into the Petition Clause the traditional understanding that meritorious legal claims filed in court triggered an entitlement to redress.

b. "For a redress of grievances"

The remedial theory of the Petition Clause receives further support from the goal subclause — "for a redress of grievances."[125] Note that the terms "redress" and "grievances" appear only in the Petition Clause and nowhere else within the original Constitution or Bill of Rights.[126] And, as previously stated, this subclause is grammatically unnecessary, suggesting that its inclusion in the text is deliberate and significant.[127]

The goal subclause informs both the purpose and the scope of the petitionary right, and speaks explicitly in terms of remediation. The Court's consideration of the Second Amendment's prefatory clause in defining that Amendment's purpose and scope provides a useful analogy. In the Second Amendment, the operative clause is preceded by a prefatory clause which "announces [the] purpose" of the Amendment, and the Court has recognized that this specification of purpose informs the Amendment's meaning: "Logic demands that

guaranteeing the right to petition any "publique Court, Councel, or Towne meeting." MASSACHUSETTS BODY OF LIBERTIES cl. 12 (1641), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 69, 72 (1971).

[124] Other scholars agree. *See* Andrews, *Right of Access*, *supra* note 8, at 615-16; Pfander, *supra* note 8, at 957.

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

[126] These terms do appear in another Founding document, THE DECLARATION OF INDEPENDENCE (U.S. 1776), which enumerated a list of grievances, *see id.* paras. 3–28, and then stated: "[W]e have Petitioned for Redress in the most humble terms. Our repeated Petitions have been answered only by repeated injury," *id.* ¶ 29. The Founders clearly expected, and were aggrieved by the absence of, a remedy for their petitions to England. *See supra* note 53.

[127] *See supra* text accompanying notes 111–12.

there be a link between the stated purpose and the command. . . . That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause."[128]

The Petition Clause is distinct from the Second Amendment in that it is not separated into prefatory and operative clauses. But the Petition Clause is similar in that it contains additional language — the goal subclause — that specifies the purpose of a "petition" and hence of the petitioning right guaranteed by its operative language. "Logic demands . . . a link between the stated purpose and the command," and that "requirement of logical connection may cause" the purpose-specifying language "to resolve an ambiguity" in the operative language.[129]

By expanding the recipient subclause to "the Government," the Framers extended the right to petition to the judicial forum, where the goal subclause takes on specialized meaning in light of the distinctive democratic function of legal petitions. When an individual petitions a *court*, the grievance she asserts is legal injury, and the redress she seeks is individualized rights-vindication. In this context, the goal subclause "for a redress of grievances" connotes the purpose of ensuring individualized redress, rather than participatory interests, and logic demands a link between this purpose and the scope of the command. Thus, the right to petition the courts logically entails a right to a remedy.

In sum, the remedial interpretation accounts for and draws support from the precise words the Framers selected — the right "to *petition* the *Government* for a *redress* of *grievances*."

3. The Presumption Against Superfluity

The remedial interpretation offers the best account for how the Petition Clause bears a distinct meaning from the separately-enumerated Speech Clause. Proponents of the supplicatory interpretation, by contrast, struggle to distinguish between the two guarantees, for purely supplicatory communications fall squarely within the protections of the Speech Clause, thus rendering the Petition Clause mere surplusage.

Start with a fundamental principle of constitutional interpretation — the presumption against superfluity:

[128] District of Columbia v. Heller, 554 U.S. 570, 577 (2008).

[129] *Id.*

> All constitutional provisions have equal dignity, and each subsection, sentence, and clause of a constitution must be read in light of the others to form a congruous whole so as not to render any language superfluous. The presumption and legal intendment is that every clause in a written constitution has been inserted for some useful purpose, and courts should avoid a construction which would render any portion of the constitution meaningless, idle, inoperative, needless, or nugatory.[130]

Now consider the First Amendment as a whole. The First Amendment separately enumerates "the freedom of speech" and "the right . . . to petition the Government for a redress of grievances."[131] If the right to petition is merely the right to *ask*, how can it be distinguished from the already-enumerated freedom of speech? A petition to the government generally involves written and oral communication and necessarily entails expressive conduct already protected by the Speech Clause, because by definition a petition is intended to express a grievance.[132] Thus, the Supreme Court has

---

[130] 16 C.J.S. *Constitutional Law* § 99 (2016). The Court has repeatedly affirmed this principle. *See* Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 759 (1978); Rhode Island v. Palmer, 253 U.S. 350, 407 (1920) (Clarke, J., dissenting); Knowlton v. Moore, 178 U.S. 41, 87 (1900); *see also* Marbury v. Madison, 5 U.S. 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."). This principle of constitutional interpretation goes by different names: alternatively styled a principle, rule, or canon against or anti superfluity, superfluities, surplusage or superfluousness. *See, e.g.*, Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 TEX. REV. L. & POL. 1, 13 n.44 (2011) (citing cases using alternative formulations).

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

[132] For example, when a person files a lawsuit, both the words written on the physical piece of paper (the complaint), and the expressive act of filing it at the clerk's office, are already protected by the Speech Clause. *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 4 (2010) ("Even if the material-support statute generally functions as a regulation of conduct, as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message."); Texas v. Johnson, 491 U.S. 397, 406 (1989) ("A law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." (quoting Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 622-23 (D.C. Cir. 1983) (Scalia, J., dissenting))). The Court in *Guarnieri* almost, but not quite, recognized that petitioning entails expressive conduct protected by the Speech Clause. "Petitions are a form of expression, and employees who invoke the Petition Clause in most cases could invoke as well the Speech Clause of the First Amendment." Borough of Duryea v. Guarnieri, 564 U.S. 379, 382 (2011). It is not clear why the Court said "most cases" instead of "all cases." Since petitioning

recognized that a citizen who writes a letter to the President critical of a public official or a government employee who files a grievance or lawsuit against his employer enjoys protection under both the Petition Clause and the Speech Clause.[133] But if the Petition Clause provides no greater protection, it has no practical effect independent of the Speech Clause.

The presumption against superfluity is neither absolute nor determinative. But it is relevant here, in a way that supports the remedial interpretation over the supplicatory interpretation. Some have critiqued the presumption on the ground that communication frequently involves repetition and drafters may add language for emphasis.[134] But despite this criticism, the presumption remains an accepted tool of constitutional interpretation.[135] And while communication may involve repetition and emphasis, this is a particularly egregious violation of the anti-superfluity principle: eviscerating an entire nine-word Clause of a constitutional amendment that the Founders modified shortly before passage.[136]

This superfluity problem has not gone unnoticed. Initially, the Court ignored it, emphasizing the unity of the First Amendment.[137] In

by definition constitutes a subset of expressive activity, it is difficult to imagine conduct that would be protected by the Petition Clause but not the Speech Clause.

[133] *Guarnieri*, 564 U.S. at 387 ("Guarnieri just as easily could have alleged that his employer retaliated against him for the speech contained within his grievances and lawsuit."); McDonald v. Smith, 472 U.S. 479, 489 (1985) ("A citizen who criticizes a public official is shielded by the Speech and Press Clauses . . . ." (Brennan, J., concurring)).

[134] Loving v. Internal Revenue Serv., 742 F.3d 1013, 1019 (D.C. Cir. 2014) ("[L]awmakers, like Shakespeare characters, sometimes employ overlap or redundancy so as to remove any doubt and make doubly sure."); *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 934-35 (2013).

[135] Furthermore, the surplusage in *Loving* was a provision of a tax statute, not a Clause in the Bill of Rights. *Loving*, 742 F.3d at 1014-19.

[136] Finally, one can argue that the Petition Clause is superfluous only because the Speech Clause has been expanded beyond its original intended meaning. Perhaps the original intention was for the Speech Clause to cover certain oral communications, the Press Clause to cover certain written communications, and the Petition Clause to cover certain formal communications. But the more relevant question for present-day jurists and scholars is how best to address the superfluity problem within the context of modern First Amendment jurisprudence. Even if the superfluity problem has arisen in such stark terms because of the Court's expanding speech doctrine, the superfluity problem remains.

[137] *See* Thomas v. Collins, 323 U.S. 516, 530 (1945); De Jonge v. Oregon, 299 U.S. 353, 364 (1937); United States v. Cruikshank, 92 U.S. 542, 552 (1875).

the 1985 case of *McDonald v. Smith*,[138] the Court rejected greater Petition Clause protection from defamation liability, refusing to "elevate the Petition Clause to special First Amendment status."[139] *McDonald* sparked scholarly criticism emphasizing the superfluity problem inherent in the Court's refusal to distinguish petitioning from speech.[140] In the 2011 case of *Borough of Duryea* — the Court's most recent Petition Clause case — the majority once again rejected greater Petition Clause protection, this time in the context of government employer retaliation. Justice Scalia, with characteristically caustic wit, excoriated the majority's failure to resolve the superfluity problem: "The complexity of treating the Petition Clause and Speech Clause separately is attributable to the inconsiderate disregard for judicial convenience displayed by those who ratified a First Amendment that included *both* provisions as *separate* constitutional rights.[141] Acknowledging this critique, the *Guarnieri* majority clarified that *McDonald* should not be "interpreted to mean that the right to petition can extend no further than the right to speak,"[142] and suggested that the superfluity problem may be addressed in a future case.

> Courts should not presume there is always an essential equivalence in the two Clauses or that Speech Clause precedents necessarily and in every case resolve Petition Clause claims. . . . There may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis; and if that is so, the rules and principles that define the two rights might differ in emphasis and formulation.[143]

---

[138] 472 U.S. 479.

[139] *Id.* at 485.

[140] *See, e.g.*, Mark, *supra* note 8, at 2154-56 (discussing how the Supreme Court has merged the Petition Clause into other constitutionally protected speech); Eric Schnapper, *'Libelous' Petitions for Redress of Grievances — Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303, 305-312 (1989) (analyzing the various reasons the Supreme Court has given for not providing petitioning with greater protections than other protected speech); Smith, *supra* note 13, at 1188 (criticizing the *McDonald* court for making careless assumptions concerning the framer's intentions and whether the right to petition can be provided greater constitutional protections than other forms of speech); Spanbauer, *supra* note 8, at 52 (arguing that the Supreme Court ignored both the drafter's intent and the history of petitioning when refusing to grant it greater protection than that afforded to other protected speech).

[141] Borough of Duryea v. Guarnieri, 564 U.S. 379, 405 (2011) (Scalia, J., concurring in part and dissenting in part).

[142] *Id.* at 389 (majority opinion).

[143] *Id.* at 388-89.

Petition Clause scholars have tried, thus far unsuccessfully, to resolve the superfluity problem. Some have argued that all petitions — political and legal — enjoy more extensive immunity from punishment than ordinary speech, in light of the distinctive history of petitioning practice.[144] Others have suggested that all petitions — political and legal — trigger a governmental duty to respond, again based on historical petitioning practice.[145] These prior theories distinguish petitioning from speech without distinguishing among petitions. Thus, they call for greater constitutional protection for all petitions — whether legal or political, meritorious or otherwise. The Court has not embraced these theories. The Court has twice rejected greater petitioning immunity, first in the case of defamation liability for a political petition, and then in the case of government employer retaliation for a legal petition.[146] The Court has also twice rejected a duty to respond in cases involving political petitions,[147] and scholars have acknowledged its practical infeasibility.[148]

The remedial interpretation of the Petition Clause offers a new solution to the superfluity problem: petitioning is different from speech because lawsuits are not just petitions, but distinctive petitions that enjoy special First Amendment protection.[149] Unlike prior efforts, this approach is consistent with Supreme Court precedent and better

[144] *See* Schnapper, *supra* note 140, at 345; Smith, *supra* note 13, at 1188; Spanbauer, *supra* note 8, at 52.

[145] *See* Higginson, *supra* note 14, at 142-43, 155; Hodgkiss, *supra* note 8, at 572-73.

[146] *Guarnieri*, 564 U.S. at 389; McDonald v. Smith, 472 U.S. 479, 485 (1985).

[147] Minn. Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 285 (1984); Smith v. Ark. State Highway Emps., Local 1315, 441 U.S. 463, 465 (1979). *But c.f. Guarnieri*, 564 U.S. at 390 ("Unlike speech of other sorts, a lawsuit demands a response.").

[148] *See* Higginson, *supra* note 14, at 166; Mark, *supra* note 8, at 2214-15. Interestingly, the Obama Administration launched an online petitioning platform, but it only aimed to respond to the small subset of petitions that receive 100,000 signatures. *See Petition the White House on Issues That Matter to You*, WHITE HOUSE, https://petitions.whitehouse.gov/responses (last visited Dec. 19, 2016).

[149] James Pfander argues that the First Amendment right to petition includes a right to "pursue judicial remedies for government misconduct." Pfander, *supra* note 8, at 906. My theory draws on and resonates with Pfander's, but there are several key differences. My claims about the relationship between the right to petition, the Eleventh Amendment, and sovereign immunity are more modest than Pfander's. *Compare supra* note 18, *with* Pfander, *supra* note 8, at 899 & n.3. On the other hand, my theory is broader than Pfander's because, while I recognize the governmental status of the defendant as a factor triggering heightened scrutiny, *see infra* notes 257–59 & accompanying text, I claim a right to a remedy for any legal injury, whether caused by governmental or private misconduct.

coheres with the historical, textual, and functional distinctiveness of the Petition Clause.[150]

4. The Proposed and Rejected Right to a Remedy Provision

Proponents of the supplicatory interpretation may ask why the Framers were not *even clearer* by codifying explicit right-to-a-remedy language, either in the Petition Clause itself or in a separate constitutional provision. In this section, I argue that more explicit language *within* the Petition Clause would have been problematic. I then explain that the Founders considered, but ultimately rejected, a stand-alone, enumerated right to a remedy. The rejection, as explained below, is best understood as a recognition that adopting the proposed right-to-a-remedy provision would have raised substantial federalism concerns, and that the right to remedy was already encompassed by the right to petition.

First, there is a simple answer to the question why the Framers declined to replace the Petition Clause with the words "a right to a remedy." That hypothetical amendment cannot accommodate differential treatment of petitions based on whether they are political or legal, meritorious or frivolous.[151]

[150] The remedial interpretation also enjoys some support from the *Guarnieri* Court's discussion of the relationship between petitioning and speech, and between the Petition Clause and the Speech Clause. The Court emphasized that "[i]nterpretation of the Petition Clause must be guided by the objectives and aspirations that underlie the right." *Guarnieri*, 564 U.S. at 388. The Court distinguished petitioning from speech on the ground that "[a] petition conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns." *Id.* at 388-89. And the Court distinguished legal petitioning from speech on the ground that "[u]nlike speech of other sorts, a lawsuit demands a response." *Id.* at 390. The Court was likely referring to the duty of the governmental defendant, rather than the court, to respond to the lawsuit — but the two duties are related. If the court simply ignores a lawsuit, there is no need for the defendant to respond.

[151] The Framers could have codified: "A right to petition the Government for a redress of grievances, *and in the case of meritorious legal grievances, the right to redress*." I concede that this formulation achieves greater clarity and precision. Indeed, any constitutional provision could be clearer with additional language, but the absence of such language cannot determine the scope of the constitutional right without absurd consequences. Moreover, this formulation would be unnecessary if the right to a *legal* petition was already understood to include the right of a legally injured person to obtain a meaningful remedy. This is precisely the understanding that the Framers would have had, as was discussed in more depth in Part I.A above. Finally, any explicit codification of a right to a remedy either within the Petition Clause or in a separate provision triggers federalism concerns, discussed below.

However, even if the Framers for this reason chose to preserve the language of the Petition Clause as we see it today, why didn't they also include a separately enumerated constitutional right to a remedy? As discussed above,[152] a stand-alone right-to-a-remedy provision was codified in Magna Carta,[153] in Sir Edward Coke's Institutes,[154] in Blackstone's Commentaries,[155] and in five state constitutions extant at the time of the Founding.[156] And today, a stand-alone right-to-a-remedy provision is contained in forty state constitutions.[157]

In fact, three of the states that ratified the original Constitution formally proposed a stand-alone right-to-a-remedy provision for inclusion in the Bill of Rights.[158] James Madison declined to include this proposal in his draft, but the Senate on its own initiative proposed and considered a stand-alone right-to-a-remedy provision.[159] The Senate ultimately rejected the proposal, and unfortunately, we have no historical record of the Senate debate preceding that vote.[160] But there is good reason to interpret these drafting choices as consistent with — indeed supportive of — the remedial interpretation of the Petition Clause.

To begin, the proposal of a stand-alone right-to-a-remedy provision by three states and the Senate demonstrates the importance of a remedial right to many participants in the Framing process. Its ultimate failure, however, does not necessarily entail a rejection of the concept of a remedial right. Bear in mind that a specific separation-of-powers provision was also proposed and ultimately defeated during the Framing process.[161] Neither scholars nor jurists infer from this fact that the principle of separation-of-powers was thus rejected by the

---

152 *See supra* Part I.A.

153 MAGNA CARTA, ch. 40 (Eng. 1215).

154 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *45, 55 (1642).

155 1 WILLIAM BLACKSTONE, COMMENTARIES, *137.

156 Andrews, *Right of Access*, *supra* note 8, at 607 & n.166 (citing right-to-remedy provisions in Pennsylvania, Delaware, Maryland, Massachusetts, and New Hampshire).

157 Phillips, *supra* note 3, at 1310 & n.6.

158 *See* Koch, *supra* note 4, at 372.

159 *Id.* at 374-75.

160 *Id.* ("On September 8, 1789, the Senate considered and rejected an amendment, based on one of Virginia's proposed amendments, that would have specifically guaranteed an individual's right to a judicial remedy 'for all injuries or wrongs he may receive in his person, property, or character.' Available records provide no insight into the reasons for the rejection of this provision.").

161 *See* Pfander, *supra* note 8, at 959 & n.219.

Framers. Instead, the rejection of the specific separation-of-powers provision proposed is generally understood to reflect one or both of two things: (1) the provision was deemed superfluous because separation of powers was already established by other constitutional provisions;[162] and/or (2) there were objections to the specific language of the provision.[163]

An analogous analysis makes eminent sense when it comes to a remedial right and the ultimate defeat of the proposed stand-alone right-to-a-remedy provision. This provision was not defeated because the Framers rejected the right, but because the right was already embedded in the Petition Clause.[164]

This reading of original intent is substantially strengthened when we recognize a serious drawback to the rejected provision: the potential aggrandizement of federal jurisdiction. This danger is evident from the sheer breadth of the proposed language for a constitutional right to a remedy. Virginia's proposal, which was identical to North Carolina's proposal and similar to Rhode Island's version, read as follows:

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

[162] *See, e.g.*, Andrews, *Right of Access*, *supra* note 8, at 619 (positing that the Senate may have agreed with House Representative Sherman's argument that a separation of powers provision was unnecessary because the Constitution already provided for separation of powers); Ronald J. Krotoszynski, Jr., *The Shot (Not) Heard 'Round the World: Reconsidering the Perplexing U.S. Preoccupation with the Separation of Legislative and Executive Powers*, 51 B.C. L. REV. 1, 14-15 (2010) (hypothesizing that the Senate may have felt that the constitutionally mandated separation of powers were sufficient and wanted to maintain some malleability going forward when rejecting the separation of powers provision); Dennis G. LaGory, *Federalism, Separation of Powers, and Individual Liberties*, 40 VAND. L. REV. 1353, 1361 (1987) (arguing that Congress rejected a specific constitutional provision in favor of creating a government with a structure incapable of concentrating too much power in the hands of any one branch).

[163] *See, e.g.*, Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587, 590 (1990) (arguing that the reason why the separation of powers provision did not pass was that the version of the bill the Senate voted on was heavily revised from Madison's version and used objectionable language).

[164] Note that the Senate considered and rejected the right-to-a-remedy provision on September 8, 1789. Koch, *supra* note 4, at 374-75. This was only six weeks after the Petition Clause was finalized on July 28, 1789. *See* Pfander, *supra* note 8, at 957.

> regulations contravening these rights are oppressive and unjust.[165]

This proposed language has the virtue of containing the direct and mandatory language sought by the proponent of the supplicatory interpretation: The rights to "find a certain remedy . . . for all injuries and wrongs" and to "obtain right and justice freely . . . completely . . . [and] promptly" are substantive rights to obtain redress, not mere procedural rights to ask for redress. Contravention of these rights is prohibited as "oppressive and unjust." This language explicitly provides for a remedy in the case of a meritorious legal petition that establishes "injuries" through "recourse to the laws."

But this proposed language also has a fatal defect. A remedial right logically entails a correlative remedial duty on the part of the government, and a remedial duty logically entails remedial power. But the overriding objective of the Bill of Rights, as indicated by the very first word of the First Amendment, was to constrain — not to aggrandize — federal power.[166] The Framers understood rights enforcement and remedy provision as the primary realm of state courts. They drafted Article III carefully to circumscribe the jurisdiction of federal courts.[167] These federalism concerns were at the forefront at the Founding, but they were entirely absent in the prior political contexts from which this proposed right-to-a-remedy provision was adapted. Thus, the proposed provision was vulnerable to the objection that it would explode the jurisdiction of the federal courts, usurp the traditional role of the states, and dramatically alter the federal–state balance.[168]

---

[165] Koch, *supra* note 4, at 372 (citations omitted).

[166] *See, e.g.*, Amar, *The Bill of Rights*, *supra* note 9, at 1142 (arguing that proposed amendments concerning the size of government during framing period were aimed at limiting federal power).

[167] *See, e.g.*, Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 971-72 (2011) (describing how Article III was drafted to limit the ability of federal courts to adjudicate matters through standing requirements and often times leaving the power to issue remedies with state courts).

[168] Linde, *supra* note 4, at 138 n.38 ("But it would have made no sense to 'limit' this [federal] government by a demand that it afford every man 'remedy in due course of law for injury done him in his person, property or reputation' — matters of common law that were not among the powers delegated to Congress."); *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law . . . . And no clause in the Constitution purports to confer such a power upon the federal courts.").

The federalism objection renders the proposed amendment problematic. And the Petition Clause renders the proposed amendment unnecessary if it was already understood to codify a limited remedial right — and impose a correlative remedial duty — applicable when petitions were properly brought before the federal judiciary. If the design problem was to codify a remedial right without generating federalism concerns, the most elegant solution was to simply expand the petition recipient in the Petition Clause from "the Legislature" to "the Government." Which, of course, is precisely what the Framers did.

C. Precedent

The remedial interpretation of the Petition Clause enjoys significant support from Supreme Court precedent, including both early, Founding-era opinions, and decades of modern Petition Clause jurisprudence. *Chisholm* and *Marbury* provide strong evidence that the Founding generation understood the right to petition the Government to include the right of legally injured persons to obtain meaningful remedies. In the second half of the Twentieth Century, the Court began to more explicitly frame remedial rights in terms of the right to petition.

1. Early Recognition of the First Amendment Right to a Remedy

The earliest cases of the Court provide strong support for the remedial theory. Two years after the ratification of the Bill of Rights in 1791, the Supreme Court decided *Chisholm v. Georgia*,[169] a dispute between an individual seeking judicial redress for legal injury and a state invoking sovereign immunity from federal court jurisdiction. The English legal system had managed this clash between sovereign immunity and an individual's right to a remedy through centuries of intricate petitioning practice. *Chisholm* gave the Court its first opportunity to consider how to resolve these conflicting principles in the new American constitutional system. In a 4–1 decision, with five seriatim opinions, the Court came down decisively on the side of individual remedial rights, declaring that Article III gave federal courts jurisdiction to hear a lawsuit filed by a British subject against an unconsenting state.[170] Although the Court's holding focused on the

[169] Chisholm v. Georgia, 2 U.S. 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

[170] *See id.* at 466-67, 469 (opinion of Cushing, J.).

jurisdictional provisions of Article III, the case logically implicated the question of whether an individual could petition the federal judiciary for legal redress of unlawful state conduct.[171] This may be why Attorney General Randolph, arguing for Chisholm on behalf of the United States, insisted that the jurisdictional dispute "brings into question a constitutional right."[172]

Justice Iredell, the sole dissenter, based his opinion on a detailed examination of English petitionary practice to the King, which he characterized as supplicatory.[173] His colleagues had two responses. First, they disputed his characterization of English petitionary practice, which they deemed supplicatory in form but mandatory in substance.[174] Second, they disputed the legal significance of English petitionary practice to the new American constitutional order.[175] The Founders had struck a new balance between governmental power and individual rights, substituting popular sovereignty for royal sovereignty.[176] In this new order, "there are citizens, but no subjects," and even a state must "answer the fair demands of its creditor" according to "general principles of right."[177]

---

171 *See id.* at 466.

172 *Id.* at 420 (oral argument). I have been unable to identify an authoritative explanation of precisely which "constitutional right" Randolph referred to during oral argument. The underlying right Chisholm was seeking to enforce was contractual, not constitutional. It is possible that Randolph conceived of the right in constitutional terms in light of the Contracts Clause. U.S. CONST. art. I, § 10 cl. 1. It is also possible that Randolph was thinking of Article III as a "constitutional right," but this seems an unusual formulation for a structural provision, and in any event, if Article III codifies a right of court access, that right is incorporated by the First Amendment because the recipient subclause contains Article III courts as a branch of "the Government." The frequent discussion of English petitioning practice in the *Chisholm* opinions, see *infra* notes 222, 224 and accompanying text, suggests that a better view is that the "constitutional right" spoken of is the right to petition the Government for a redress of grievances. U.S. CONST. amend. I.

173 *See Chisholm*, 2 U.S. at 437-45 (opinion of Iredell, J.).

174 *See, e.g.*, *id.* at 460 (opinion of Wilson, J.) ("True it is, that now in England the King must be sued in his Courts by petition, but even now, the difference is only in the form, not in the thing.").

175 *See, e.g.*, *id.* at 466 (opinion of Cushing, J.) ("The point turns not upon the law or practice of England . . . but upon the Constitution established by the people of the United States[.]"); *id.* at 452 (opinion of Blair, J.) (arguing that the English petition of right "may have been established as the most respectful form of demand; but we are not now in a State-Court[.] . . . [A] State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States . . . [and] has, in that respect, given up her right of sovereignty.").

176 *See id.* at 454, 458 (opinion of Wilson, J.).

177 *Id.* at 456.

Chisholm thus supports a remedial theory of the right to petition. Just two years after the ratification of the Bill of Rights, confronted with a "question [of] constitutional right,"[178] the *Chisholm* Court decisively rejected a proffered limit on an individual's right to judicial redress for legal injury.

Though the Eleventh Amendment overruled *Chisholm*'s specific holding, limiting federal court jurisdiction in suits against the states,[179] the Court similarly linked petitionary practice and remedial rights a decade after *Chisholm*, in the 1803 case of *Marbury v. Madison*.[180]

Writing for a unanimous court, and citing Blackstone, Chief Justice John Marshall emphasized the individual's right to obtain — and the courts' corresponding duty to provide — meaningful judicial redress for a meritorious legal grievance. Marshall declared it "a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."[181]

Marshall made precisely the same functional distinction between political and legal grievances and accountability that underlies the remedial interpretation of the Petition Clause. On matters of discretionary policy, the President "is accountable only to his country in his political character . . . ."[182] But when it comes to individual legal rights, he "who considers himself injured, has a right to resort to the laws of his country for a remedy."[183] As noted above in Part II.A, Marshall linked this remedial right to the right to petition, specifically invoking English petitioning practice and emphasizing its mandatory and remedial character. "In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."[184] Marshall also linked this remedial guarantee to a form of individual democratic accountability fundamental to the American constitutional order. He characterized "the right of every [injured] individual to claim the protection of the laws" as "[t]he very essence of civil liberty" and affording such protection among "the first duties of government."[185] "[I]f the laws furnish no remedy for the violation of a vested legal right," Marshall warned, the United States

---

178 *Id.* at 420 (oral argument).

179 See *supra* note 18 for a discussion of the relationship between the Eleventh Amendment and the Petition Clause.

180 5 U.S. 137 (1803).

181 *Id.* at 147 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *109).

182 *Id.* at 165-66.

183 *Id.* at 166.

184 *Id.* at 163.

185 *Id.*

government "will certainly cease to deserve [the] high appellation" of being "emphatically termed a government of laws, and not of men."[186]

Marshall ultimately concluded that the federal court could not provide a remedy in this particular case because of Article III limits on federal court jurisdiction.[187] This case-specific remedy denial is consistent with the theory that the First Amendment includes a meaningful, but non-absolute, right to a remedy, and the tiered scrutiny doctrinal framework proposed *infra*, which presumes that burdens on the remedial right may be permissible if justified by a sufficiently compelling governmental interest. Constitutional limits on federal court jurisdiction, articulated in Article III and the Eleventh Amendment, necessarily entail a judgment that the structural interests they serve justify the remedial burden they impose. But while *Marbury* does not stand for an absolute remedial right, it does provide powerful support for a limited but meaningful First Amendment right to a remedy — the "right [of an individual] to resort to the laws of his country for a remedy"[188] through "the respectful form of a petition"[189] — for a redress of a legal grievance — the "proper redress" for a legal injury.[190]

Twenty years after Marbury, Justice Bushrod Washington, sitting as circuit justice, listed among the privileges and immunities of national citizenship protected by Article IV, Section 2 the right to "institute and maintain actions of any kind" in state courts.[191] And in 1838, the Supreme Court emphasized the importance of remedial access to the courts without the same type of link to petitioning practice evidenced in Chisholm and Marbury.[192] The Court repeatedly reaffirmed the characterization of the court access right as a privilege and immunity of national citizenship in four cases between 1870 and 1907.[193] During

---

186 *Id.*

187 *See id.* at 176, 180 ("The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution . . . . [A] law repugnant to the constitution is void; and . . . *courts,* as well as other departments, are bound by that instrument.").

188 *Id.* at 166.

189 *Id.* at 163.

190 *Id.* at 147.

191 Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230).

192 *See* Kendall v. U.S. *ex rel.* Stokes, 37 U.S. 524, 624 (1838) (It would be a "monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist").

193 *See* Chambers v. Balt. & Ohio R.R. Co., 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts . . . is one of the highest and most essential privileges of

this time, and going forward, the Court also began to analyze remedial rights and remedy denials in terms of Due Process and Equal Protection.[194] As the Court shifted its focus to other textual bases of remedial rights, it also began to ignore the legal, rights-enforcing half of the dual Petition Clause, recasting the right to petition as a purely political right directed exclusively to Congress.[195] In this way, the First Amendment right to a remedy, after its early recognition in Chisholm and Marbury, entered a period of neglect and erasure, lying dormant in Supreme Court jurisprudence, waiting to be rediscovered in modern times.

2. Modern Rediscovery of the First Amendment Right to a Remedy

Neither the Court's most recent Petition Clause case[196] nor Petition Clause scholarship has recognized the extent to which modern Petition Clause precedent supports the remedial theory. This failure of recognition is revealed vividly by the attack Justice Scalia penned in *Guarnieri*,[197] which misunderstood even the scope of precedential support for the more basic principle that lawsuits are petitions. Yet a full and fair reading of all the relevant precedent provides substantial

citizenship . . . ."); Blake v. McClung, 172 U.S. 239, 252 (1898) (noting that previous decisions, which held that the right to maintain actions was an essential privilege guaranteed by the Constitution, had not been modified or overruled); Cole v. Cunningham, 133 U.S. 107, 113-14 (1890) ("The intention of section 2, art. 4, was to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances; and this includes the right to institute actions."); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870) ("[T]he [privileges and immunities] clause plainly and unmistakably secures and protects the right of a citizen of one State to . . . maintain actions in the courts of the State . . . .").

194 *See, e.g.*, Goldberg, *supra* note 6, at 568-80 (citing multiple cases analyzing the remedial access right through a due process lens between 1875 and 1976). For other recent equal protection cases, see *Douglas v. California*, 372 U.S. 353 (1963); *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959); *Griffin v. Illinois*, 351 U.S. 12 (1956).

195 *See, e.g.*, Twining v. New Jersey, 211 U.S. 78, 97 (1908) ("Thus, [included] among the rights and privileges of national citizenship recognized by this court [is] . . . the right to petition Congress for a redress of grievances . . . ."); *In re* Quarles, 158 U.S. 532, 535 (1895) (suggesting that the authority to protect rights conferred by the Constitution is reserved exclusively to Congress); United States v. Cruikshank, 92 U.S. 542, 552 (1875) ("[The First Amendment] was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone.").

196 Borough of Duryea v. Guarnieri, 564 U.S. 379 (2011). This is the most recent Supreme Court Petition Clause case at the time of publication.

197 *See supra* note 12.

support for the premise that lawsuits are petitions that trigger special First Amendment protection in the form of a remedial right.

The most commonly recognized precedential support for the claim that lawsuits are petitions is a line of cases — what I call the economic litigation line — which limited the application of federal antitrust and labor laws when businesses petition courts by suing competitors or employees — a petitioning immunity.[198] Yet the remedial thrust of these cases is often overlooked, partly because they involved interpretation of federal statutes, and partly because the alleged Petition Clause infringements mostly consisted of retaliation — in the form of antitrust or labor law liability — imposed for litigation activity.

Consider *Bill Johnson's Restaurants, Inc. v. NLRB*,[199] in which the Court invoked the Petition Clause in limiting the NLRB's ability to enjoin a state lawsuit as an unfair labor practice under the NLRA absent a determination that the suit was baseless and motivated by retaliatory intent.[200] The Court explicitly framed the NLRB's prior restraint as an absolute remedy denial, emphasizing that enjoining a meritorious lawsuit "totally deprive[s] [the employer] of a remedy for an actual injury,"[201] stripping the employer of "local judicial protection from tortious conduct."[202] The Court, moreover, explained that "knowingly frivolous" claims do not advance "[t]he first amendment interests involved in private litigation," which the court identified as "public airing of disputed facts," "*the psychological benefits of vindication*," and "*compensation for violated rights*."[203] In a concurring opinion, Justice Brennan recognized a constitutional "right to file *and to prosecute* a lawsuit"[204] and distinguished between prior restraints and subsequent sanctions.[205] This case provided strong

198 *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), and *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), concerned the scope of the Sherman Act. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984), and *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), concerned the scope of the National Labor Relations Act. This was the sole line of cases cited by the *Guarnieri* majority in support of the proposition that lawsuits are petitions. *Guarnieri,* 564 U.S. at 387.

199 461 U.S. 731 (1983).

200 *Id.* at 748-49.

201 *Id.* at 742.

202 *Id.* at 741-42.

203 *Id.* at 743 (emphasis added) (citation omitted).

204 *Id.* at 753 (Brennan, J., concurring) (emphasis added).

205 *See id.* (Brennan, J., concurring).

support for the remedial theory: it recognized that the right to petition the courts is particularly threatened by prior restraints that would "totally deprive[] [a litigant] of a remedy for an actual injury."[206]

The economic litigation line was neither the only nor the first line of modern case law recognizing lawsuits as petitions — and providing often-overlooked support for a remedial access right. Less attention[207] has been paid to two other lines of cases: what I call the group litigation line — in which the Court struck down state regulations that interfered with the legal efforts of groups like the NAACP and labor unions;[208] and what I call the prisoner access line — in which the Court developed an increasingly broad right of prisoners to access the courts.[209] Each case in each of these lines is a mixed drink, not a pure shot of Petition Clause analysis, for the Petition Clause inquiry was bound up with other interpretative questions. Just as the economic litigation line involved federal statutes, the group litigation cases involved other First Amendment rights,[210] and the prisoner access line implicated federal habeas, due process, and equal protection.[211] But

[206] *Id.* at 742. Although less explicitly concerned with the remedial function of the right to petition, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), another economic litigation case, is also relevant to my theory. The Court in this case embraced an exception to immunity from retaliation for petitioning activity in the case of "sham litigation." Citing prior First Amendment precedent, *see id.* at 514-15, it explained that the burden antitrust liability imposed on the *defendant's* First Amendment right to petition the courts was justified precisely because it was necessary to protect the *plaintiff's* First Amendment right to petition the courts. *Id.* at 511-12, 515. I incorporate this insight into my doctrinal approach. *See infra* notes 260–61 and accompanying text.

[207] *See* Borough of Duryea v. Guarnieri, 564 U.S. 379, 386 (2011) (in majority opinion, omitting mention of these lines of doctrine); *id.* at 402 & n.1 (Scalia, J., concurring in the judgment in part and dissenting in part) (dismissing some of these cases as "advert[ing] vaguely" to lawsuits as petitions or as "habeas corpus cases," and ignoring others); Andrews, *Right of Access*, *supra* note 8, at 571-76 (failing to consider important cases such as *Cruz v. Beto*, 405 U.S. 319 (1972), in her analysis of the prisoner access line).

[208] *See* United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971); United Mine Workers, Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217 (1967); Bhd. of R.R. Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

[209] *See infra* notes 220–41 and accompanying text.

[210] *See United Transp. Union*, 401 U.S. at 578-79 ("First Amendment guarantees of free speech, petition, and assembly give railroad workers the right to . . . act collectively to secure good, honest lawyers to assert their claims against railroads."); *United Mine Workers*, 389 U.S. at 222, 225 ("free speech, press, petition, or assembly" and "associational rights"); *Trainmen*, 377 U.S. at 2, 5-6, 8 ("freedom of speech, petition and assembly" and "associational rights"); *Button*, 371 U.S. at 428-29, 444-45.

[211] *See* cases discussed *infra* at notes 220–41 and accompanying text.

instead of distilling out their Petition Clause insights, courts and scholars tend to dismiss these cases altogether.

Take the group litigation line, in which the Justices agreed and repeatedly insisted that lawsuits are petitions for redress designed to enforce preexisting rights.[212] The Court itself stated that the "common thread running through [all these] decisions . . . is that that collective activity undertaken to obtain *meaningful* access to the courts is a fundamental right within the protection of the First Amendment."[213] In *NAACP v. Button*,[214] which struck down on First Amendment grounds a Virginia statute criminalizing the referral of prospective litigants to the NAACP, the Court stressed the remedial purpose of litigation[215] and the functional importance of legal petitions in protecting political minorities.[216] In *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, which upheld unions' First Amendment right to recommend attorneys to their members,[217] the Court focused on the importance of competent counsel to individuals' right to petition the courts.[218] This emphasis reflected a concern with *meaningful* access to courts — not the mere technical ability to lodge a complaint, but the practical opportunity "to vindicate their legal rights."[219]

---

[212] *See Trainmen*, 377 U.S. at 7 ("A State could not . . . infringe in any way the right . . . to be fairly represented in lawsuits . . . . The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped."); *see also Button*, 371 U.S. at 429-30 ("[L]itigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."); *id.* at 455 (Harlan., J, dissenting) ("[T]he State surely may not broadly prohibit individuals . . . from joining together to petition a court for redress of their grievances . . . .") Some Justices rejected the extension of *Button* to cases involving personal injury litigation. *Trainmen*, 377 U.S. at 10 (Harlan, J., dissenting). However, others agreed that "[t]he grievances for redress of which the right of petition was insured . . . are not solely religious or political ones." *United Mine Workers*, 389 U.S. at 223 (quoting Thomas v. Collins, 323 U.S. 516, 5310 (1945)).

[213] *United Transp. Union*, 401 U.S. at 585 (emphasis added).

[214] 371 U.S. 415 (1963).

[215] *See id.* at 453 (Harlan, J., dissenting) ("Litigation is often the desirable and orderly way . . . of obtaining vindication of fundamental rights.").

[216] *See id.* at 429-30 ("[U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.").

[217] *Trainmen*, 377 U.S. at 8.

[218] *See id.* at 7 ("Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries . . . .").

[219] *Id.*

It is the prisoner access line, however, which constitutes the most intriguing and least considered modern line of precedent that, properly understood, supports a remedial reading of the Petition Clause.[220] In *Cruz v. Beto*, the Supreme Court required, pursuant to the First Amendment, a full adjudication of a Buddhist inmate's allegation of religiously discriminatory prison practices.[221] The First Amendment violation here was neither retaliation for litigation activity nor denial of forum access, but rather the trial court's refusal to adjudicate, and, if warranted, *remedy*, Beto's claim of legal injury.[222] Subsequently, in *Bounds v. Smith*,[223] the Court held "that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[224]

[220] The origins of this doctrinal line are four cases between 1941 and 1971, in which the Court struck down state prison rules that burdened court access for prisoners. *See* Younger v. Gilmore, 404 U.S. 15 (1971); Johnson v. Avery, 393 U.S. 483 (1969); White v. Ragen, 324 U.S. 760 (1945); *Ex parte* Hull, 312 U.S. 546 (1941). These four cases developed this court access right with an emphasis on federal habeas, due process, and equal protection, but its precise textual basis was unclear. In the 1972 case of *Cruz v. Beto*, however, the Court explicitly identified this court access right as a component of the Petition Clause. *See* 405 U.S. 319, 321 (1972) ("[P]ersons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes 'access of prisoners to the courts for the purpose of presenting their complaints.'" (quoting *Avery*, 393 U.S. at 485)). In three prisoner cases over the next three years, lawsuits were treated as First Amendment petitions without any Justice disputing the premise. *See* Montanye v. Haymes, 427 U.S. 236, 244 (1976) (Stevens, J., dissenting); Pell v. Procunier, 417 U.S. 817, 828 (1974); Ortwein v. Schwab, 410 U.S. 656, 660 n.5 (1973).

[221] *See Cruz*, 405 U.S. at 321-22 (discussing a Buddhist inmate's Constitutional right to remedial court access based on allegations of religious discrimination).

[222] *See id.* at 321 (the lower court "denied relief without a hearing or any findings").

[223] Bounds v. Smith, 430 U.S. 817 (1977).

[224] *Id.* at 828. Though *Bounds* reaffirmed the court access right as fundamental, and conceptualized the right in remedial terms, it failed to specify the right's textual basis. *See id.* at 821-833. Though *Bounds* approvingly cited *Beto*, 405 U.S. 319 — and the three cases *Beto* cited as support for a First Amendment right of court access (*Gilmore*, 404 U.S. 15; *Avery*, 393 U.S. 483; and *Hull*, 312 U.S. 546) — *Bounds* never mentioned the First Amendment framework embraced so explicitly in *Beto* and twice repeated by the Court in the four-year period between *Beto* and *Bounds*. *See Pell*, 417 U.S. at 828; *Ortwein*, 410 U.S. at 660 n.5. Two months after *Bounds* was decided, Justice Stevens explicitly invoked a First Amendment right to petition the Courts without any Justice disputing the premise. *See Montanye*, 427 U.S. at 244 (Stevens, J., dissenting). And in the years after *Bounds*, Justices continued to recognize without objection a First Amendment right to petition the courts. *See* Hudson v. Palmer, 468 U.S. 517, 523 (1984) ("Like others, prisoners have the constitutional right to petition the

The *Bounds* majority insisted that the "inmate access to the courts [must be] adequate, effective, and meaningful"[225] and conceptualized meaningful access as something broader than mere forum access, observing that judges might "overlook meritorious cases" without effective litigation,[226] and emphasizing the remedial dynamic of legal petitions, judicial relief, and protection of individual rights.[227] Four years later, in *Rhodes v. Chapman*,[228] the Court rejected an Eighth Amendment challenge to prison conditions, but emphasized that the federal courts have a duty to remedy constitutional violations.[229] In concurrence, Justice Brennan linked a prisoner's right to petition to a court's "obligation to take steps to remedy the violations,"[230] and no Justice disputed Brennan's suggestion that the right to petition entails this remedial duty.[231]

More recently, there has been dissensus on the Court as to the remedial scope of prisoners' court access right. In *Lewis v. Casey*,[232] the Court limited the *Bounds* right to access legal materials — but did so

Government for redress of their grievances, which includes a reasonable right of access to the courts."); Rhodes v. Chapman, 452 U.S. 337, 362 & n.9 (1981) (Brennan, J., concurring in the judgment) (discussing the "constitutional minima" to which prisons must conform, including permitting the constitutional right of access to judicial remedies). Finally, in *Lewis v. Casey*, where the Court limited but reaffirmed *Bounds*, both the respondents and Justice Stevens framed the *Bounds* court access right in terms of the right to petition. *See* 518 U.S. 343, 346 (1996) (describing respondents' claim); *id.* at 405-06 & n.1 (Stevens, J., dissenting).

225 *Bounds*, 430 U.S. at 822-23.

226 *Id.* at 826.

227 *See id.* at 824-25 (assuming that prisoners must have "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts"); *id.* at 827-28 (emphasizing that "original actions seeking . . . vindication of fundamental civil rights . . . are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights" (citations omitted)); *id.* at 828 ("[T]he prisoner petitions here are the first line of defense against constitutional violations.").

228 452 U.S. 337 (1981).

229 *See id.* at 352 ("[F]ederal courts will discharge their duty to protect constitutional rights." (citing *Beto*, 405 U.S. at 321) (other citations omitted)).

230 *Id.* at 362 (Brennan, J., concurring in the judgment).

231 Indeed, every opinion recognized the important role of the courts in enforcing rights — particularly those of political minorities. *See id.* at 352; *id.* at 359 ("Insulated . . . from political pressures, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied . . . ."); *id.* at 369 (Blackmun, J., concurring in the judgment); *id.* at 377 (Marshall, J., dissenting) ("[W]hen conditions are deplorable and the political process offers no redress . . . the federal courts are required by the Constitution to play a role.").

232 518 U.S. 343 (1996).

mostly in dicta.[233] Justice Stevens in dissent cast the court access right in terms that were both based on the Petition Clause and explicitly remedial.[234] The majority, in dicta, sought to limit the right's scope to forum access[235] and to petitions challenging confinement or the conditions of confinement.[236] However, three justices would have embraced a right to "research, consult about, file, or litigate"[237] a broader class of claims.[238]

A decade after *Lewis*, in the 2006 case of *Woodford v. Ngo*,[239] Justice Stevens, joined by Justices Ginsburg and Souter, dissented from the Court's strict construction of an exhaustion requirement in the Prison Litigation Reform Act, calling for application of the constitutional avoidance canon because the Court's interpretation may violate the "fundamental right" to "access the courts" guaranteed by the "First Amendment right to petition the Government for redress of grievances."[240] Note that the inmate in this case was allowed to file a lawsuit but denied a remedy on exhaustion grounds.[241] The majority did not dispute Justice Stevens' implicit assertion that the First Amendment entailed a remedial duty, but rather did not engage with the constitutional question at all. In sum, the prisoner access line provides substantial support for a First Amendment right to a remedy, as a matter of both source and scope.

Outside of these three lines of doctrine, the Court considered a remedial access claim in the 2002 case of *Christopher v. Harbury*.[242]

---

[233] *Id.* at 350-56.

[234] *See id.* at 404-06, 405 n.1 (Stevens, J., dissenting) (citing prisoner access and economic litigation cases to establish that the right of court access is part of the right to petition, and noting that "[w]ithout the ability to access the courts . . . all of us — prisoners and free citizens alike — would be deprived of the first — and often the only — 'line of defense' against constitutional violations").

[235] *See id.* at 354-55 (majority opinion); *see also id.* at 409 n.6 (Stevens, J., dissenting) (noting that the Court's "conclusion regarding the scope of the right is purely dicta").

[236] *Id.* at 355 (majority opinion). *But see id.* at 404 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) ("This case does not require us to consider . . . and I would not address such issues here."); *id.* at 409 n.6 (Stevens, J., dissenting) ("This statement is also largely unnecessary.").

[237] *Id.* at 401 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[238] *See id.* at 403-04. Both sides of this debate recognize that court access vindicates underlying rights.

[239] 548 U.S. 81 (2006).

[240] *Id.* at 122-23 (Stevens, J., dissenting) (quotations omitted).

[241] *Id.* at 87 (majority opinion).

[242] 536 U.S. 403 (2002).

The Guatemalan government captured, tortured, and executed Harbury's husband, a Guatemalan rebel leader. Among other allegations, Harbury claimed that State Department officials intentionally misled her about her husband's whereabouts, preventing her from obtaining a meaningful remedy; had the officials revealed to her that her husband was in Guatemalan custody, she would have pursued emergency injunctive relief, which could have saved his life.[243] The Court recognized that some of its prior cases had "grounded the right of access to courts in . . . the First Amendment Petition Clause,"[244] among other textual sources. The Court then emphasized the link between right and remedy:

> [T]he very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong . . . . [T]he right [of court access] is ancillary to the underlying claim [of legal wrong], without which a plaintiff cannot have suffered injury by being shut out of court.[245]

For this reason, the Court held that a "backward-looking access claim" like Harbury's must identify both "the underlying cause of action *and its lost remedy*."[246] The Court ultimately rejected Harbury's access claim because it could not uniquely "address any injury she has suffered."[247] Thus, instead of rejecting this remedial access claim, the Court imposed a pleading requirement that embraced the claim's remedial logic.

Taken together, *Harbury* and the three lines of court access cases provide strong, yet heretofore under-appreciated, precedential support for a remedial theory of the Petition Clause.

II. APPLICATION

In this Part, I sketch how the remedial interpretation of the Petition Clause might translate into a workable doctrinal framework. I suggest a framework of tiered scrutiny that coheres with other strands of First Amendment jurisprudence. Finally, I suggest how this new framework

---

[243] *Id.* at 409-10.

[244] *Id.* at 415 n.12.

[245] *Id.* at 414-15.

[246] *Id.* at 415-16 (emphasis added); *see also id.* at 416 ("[B]ecause these backward-looking cases are brought to get *relief* unobtainable in other suits, the remedy sought must itself be identified . . . ." (emphasis added)).

[247] *Id.* at 422.

might change the analysis and outcomes of challenges to a wide variety of real-world remedial access barriers.

A. A New Doctrinal Framework for Remedial Access Claims

The remedial interpretation of the Petition Clause translates naturally into a tiered scrutiny doctrinal framework for remedial access claims, whereby legally injured persons could challenge, and courts would scrutinize, rules or practices that denied, limited, or delayed access to meaningful judicial remedies. While full development of this framework lies beyond the scope of this article, this section begins the process by presenting the essential features of this framework, so as to suggest in more concrete terms the theory's primary doctrinal significance.

Under this proposed framework, a successful remedial access claim would entail: (1) a particularized legal injury (which would trigger a presumptive remedial entitlement); (2) a deprivation of a minimally adequate remedy (which would constitute a remedial burden); and (3) the absence of a sufficient governmental interest justifying the remedial burden (which would elevate the remedial burden into an impermissible infringement of the remedial right). I discuss each of these elements below.

First, the remedial component of the Petition Clause only applies to legal petitions as opposed to political petitions. Thus the petitioner must show that she seeks redress of an individualized, legal grievance concerning the alleged violation of a pre-existing legal right. The petitioner must generally show that, pursuant to valid extant substantive and procedural law,[248] she established legal injury or likely would have established legal injury but for the challenged burden.[249]

---

[248] The seemingly simple requirement masks an array of related definitional challenges centering upon one primary question: which legal rules should be understood as *burdening litigants' access to extant legal remedies*, and which legal rules can be said to *validly define whether they have suffered a cognizable legal injury at all*? Answering this question requires some effort to distinguish between substantive, procedural, and remedial rules. We might say, for example, that a legislative repeal of a statutory cause of action does not deny a remedy; it rather denies a right. On the other hand, we might say that an exorbitant filing fee without any opportunity to file *in forma pauperis* would deny a remedy to those who suffered legally cognizable injuries. The line between the repeal of a right and the denial of a remedy, however, is not always clear, and the way in which judges draw it would have serious consequences for the scope of the First Amendment right to a remedy. On the one hand, if all procedural and substantive rules could be challenged as violations of remedial access under the Petition Clause, there would be an explosion of claims and a threat to legislatures' ability to define the law. This was one of the primary reasons

Next, the petitioner must show her right has been burdened by demonstrating a remedial deprivation. Note that the right to a remedy is only the right to a minimally adequate remedy, not the right to the petitioner's preferred remedy, or the maximal remedy. Minimal adequacy must be defined objectively in terms of the underlying purposes of remediation — vindication, retrospective compensation, and prospective protection of legal rights through deterrence of future violations.[250] To satisfy the adequacy element, the petitioner will generally have to show complete denial of any remedy, or that the remedy was so severely limited as to fall below an objective minimum standard — to fail to meaningfully serve the vindicatory, compensatory, and deterrent functions of judicial remedies such that it effectively undermines the underlying legal right.[251]

The final element of a remedial access claim is *abridgement*: the absence of a sufficient governmental reason for burdening the remedial right. The first two elements — an inadequate remedy for the violation of a legal right — only show that the right to a remedy has been implicated or burdened. But implication does not necessarily mean violation; not every burden is an impermissible abridgement. Instead, the government must proffer reasons for the burdening law or practice. The court would then consider the character and severity of the remedial burden and assess both the strength of the asserted

why Professor Andrews eschewed a remedial definition of court access. *See* Andrews, *Right of Access*, *supra* note 8, at 560. On the other hand, if no procedural or substantive law could ever be challenged, the right to a remedy could easily be circumvented by the simple expedient of characterizing limits on remedies as substantive or procedural rules — as new defenses, limitations on causes of actions, and so forth.

Consider, for example, the Protection of Lawful Commerce in Arms Act, which provides for immediate dismissal of any lawsuits against gun manufacturers based on third-party misuse. *See* 15 U.S.C. §§ 7902(b), 7903(5)(A) (2012). Does this provision limit rights or remedies? *See* City of N.Y. v. Beretta U.S.A. Corp., 524 F.3d 384, 397 (2d Cir. 2008) (concluding — I would argue, incorrectly — that the Act does not implicate the right to petition because it provides a substantive defense). Whether specific types of rules should be categorized as changing rights or burdening remedies deserves considerable further attention that goes beyond the scope of the paper.

249 There is an additional definitional question of what standard of likelihood of success would apply.

250 *See* Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983) ("The first amendment interests involved in private litigation [include] compensation for violated rights and interests [and] the psychological benefits of vindication . . . ." (internal quotation marks omitted)).

251 *See, e.g.*, Lucas v. United States, 757 S.W.2d 687, 688-89, 691, 718 (Tex. 1988) (invalidating, on state right-to-a-remedy grounds, the application of a statutory damages cap "[i]n the case of a permanently and catastrophically injured infant").

governmental interest and the closeness of fit between this interest and the challenged law or practice.[252]

Courts should apply this balancing test using a tiered scrutiny framework familiar to First Amendment jurisprudence, under which certain factors would trigger heightened scrutiny. For example, borrowing from the speech context, a burden that is *petitioner-based* is more suspect than one that is *petitioner-neutral*.[253] If the burden depends on the identity of the rights-holder — for example, a rule limiting access to the courts for prisoners only[254] — heightened scrutiny is appropriate. Similarly, if the burden is *content-based* rather than *content-neutral*, heightened scrutiny should apply.[255] Thus, if the burden only applies when a *particular type of grievance is asserted*, or when a *particular class of defendants is involved* — for example, doctors or gun manufacturers[256] — the burden is more suspect and should be subjected to more exacting scrutiny. Furthermore, just as First Amendment protection is greater for core political speech,[257] heightened scrutiny should apply if the burden is imposed only where the *government itself*, rather than a private party, is the defendant in a lawsuit. This means that governmental immunity doctrines outside of the sovereign immunity context,[258] such as absolute immunity for judges and prosecutors and qualified immunity for executive officials

---

[252] *Cf., e.g.*, McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1445 (2014) ("[W]e must assess the fit between the stated governmental objective and the means selected to achieve that objective."); Davis v. Fed. Election Comm'n, 554 U.S. 724, 744 (2008) ("[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.").

[253] *Cf., e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 315 (2010) ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity.").

[254] *See, e.g.*, Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified in scattered sections of 18, 28, & 42 U.S.C. (2012)); Woodford v. Ngo, 548 U.S. 81, 84 (2006) ("Congress enacted the [PLRA] . . . in the wake of a sharp rise in prisoner litigation in the federal courts . . . [and] contains a variety of provisions designed to bring this [prison] litigation under control."); Katherine A. Macfarlane, *A New Approach to Local Rules*, 11 STAN. J.C.R. & C.L. 121, 144-48 (2015) (describing local rules setting restrictions that apply only to prisoners).

[255] *Cf., e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000) (describing strict scrutiny standard for content-based restrictions in the speech context).

[256] *See supra* note 248 (discussing Protection of Lawful Commerce in Arms Act).

[257] *See, e.g.*, *Citizens United*, 558 U.S. at 339 ("The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." (quotations omitted)).

[258] The Eleventh Amendment qualifies the applicability of the Petition Clause to sovereign immunity. *See supra* note 18.

including police officers and school administrators, would be subjected to heightened scrutiny. However, "reasonable time, place, and manner restrictions" would be permissible.[259]

Finally, particular categories of asserted governmental interests may warrant either heightened solicitude or heightened skepticism. Where a burden on remedial access is imposed in order to preserve the integrity and efficacy of the judicial system and to ensure its availability to all, the burden may have a particularly strong justification because, *in globo*, it *enhances* remedial access to the courts.[260] By contrast, courts may refuse to credit an asserted governmental interest in suppressing petitions or their efficacy as a mechanism of citizen influence and governmental accountability.[261]

Beyond this tiered scrutiny framework, a First Amendment right to a remedy may also impact the proper application of the constitutional avoidance canon,[262] equal protection principles,[263] and the Eleventh

[259] Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009).

[260] *See* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 514 (1972) ("Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not"); *see also supra* note 206.

[261] The Roberts Court has invoked this anti-suppression principle to reject asserted justifications for campaign finance regulation based on limiting the influence of wealthy donors. *See, e.g.*, McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1450-51 ("[T]he possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties . . . [does not allow] the Government . . . to seek to limit the appearance of mere influence or access".). However, the Court has not yet recognized the First Amendment significance of the fact that non-constitutional official immunity doctrines are explicitly justified as mechanisms to limit the influence of rights-holders on official decision-making. *But see* Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 704-05 (1st Cir. 1993) ("A primary purpose of providing officials with qualified immunity is to ensure that fear of personal liability will not unduly influence or inhibit their performance of public duties."). I intend to consider this disconnect in a future article.

[262] When choosing between reasonable interpretations of a statutory provision, the avoidance canon combined with a First Amendment right to a remedy would favor the one that imposed a lesser burden on the ability of a legally injured person to obtain a meaningful remedy. *See, e.g.*, Woodford v. Ngo, 548 U.S. 81, 122 (2006) (Stevens, J., dissenting); BE & K Constr. Co. v. NLRB, 536 U.S. 516, 518-19 (2002) (construing NLRA provision narrowly to avoid "the difficult constitutional question whether a class of petitioning may be declared unlawful when a substantial portion is subjectively and objectively genuine"); Alexander H. Schmidt, *Challenging the Supreme Court's American Express Decision Under the First Amendment Petition Clause*, 28 ANTITRUST 39, 43 (2014).

[263] In addition to the heightened scrutiny I contemplate under the First Amendment, courts may also apply heightened scrutiny under the Equal Protection Clause if a rule or practice *differentially* burdens an individual's exercise of her fundamental right — here, to obtain an adequate remedy for legal injury. San Antonio

Amendment.[264] Together, these doctrinal innovations would provide legally injured persons with powerful tools with which to challenge remedial access barriers.[265]

B. A Survey of Vulnerable Remedial Access Burdens

These new doctrinal tools would have far-reaching practical implications, calling into question a wide array of state and federal laws.

One way to gauge how a First Amendment right to a remedy would operate in practice is to consider those remedial access barriers invalidated by state courts pursuant to state constitutional provisions guaranteeing a right to a remedy. Such barriers include preconditions to filing suit, statutes of repose, statutes of limitations when applied against minors or with no discovery rule exception, and limits on compensatory damages.[266] Each of these barriers denies, limits, or delays remedies for a particular class of plaintiffs, defendants, or claims. A First Amendment right to a remedy would bring much

Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

[264] The First Amendment right to a remedy does not trump the later-ratified Eleventh Amendment. As a result, there are cases in which a federal court will not have jurisdiction over a lawsuit filed by an individual against a state, despite the remedial burden. However, there is great debate over the meaning of the Eleventh Amendment, and current Eleventh Amendment doctrine goes farther than the literal text requires. *See* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1672 (2004). *See generally* Amar, *Of Sovereignty*, *supra* note 1. A First Amendment right to a remedy would inform this debate, because the proper interpretive inquiry would be how to strike the correct balance between two constitutional values, rather than how to interpret the Eleventh Amendment against a constitutional abyss. This is a more moderate approach than James Pfander takes, in arguing that the Petition "clause's affirmation of government suability operates as a constitutional antidote to the familiar doctrine of sovereign immunity[.]" Pfander, *supra* note 8, at 899.

[265] Moreover, the set of laws or practices courts may invalidate or require pursuant to the right to a remedy is not the full measure of its potential impact. *See* Aliza Plener Cover, *Archetypes of Faith: How Americans See, and Believe in, Their Constitution*, 26 STAN. L. & POL'Y REV. 555, 573 (2015) ("[C]ombination of deep faith and relatively unschooled knowledge allows people to make claims about the Constitution that have important political consequences, without being fully bound by precedent or text."). For example, even if judges conclude that a First Amendment right to a remedy does not empower them to mandate appointed counsel in civil cases, federal or state lawmakers may elect to provide attorneys in certain cases, and public discourse about a right to a remedy may affect these policy choices by framing certain priorities in terms of constitutional values. *See* Fair Day in Court for Kids Act of 2016, S. 2540, 114th Cong. (proposed bill that would provide counsel in immigration proceedings to children, persons with disabilities, and victims of abuse, torture, or violence).

[266] Phillips, *supra* note 3, at 1311-12 (citing cases).

needed uniformity to this area of law, calling into question similar rules in any state, irrespective of differences in state constitutional text and interpretation.[267]

Moreover, a First Amendment right to a remedy would call into question a host of federal statutory provisions as judicially construed, including the Antiterrorism and Effective Death Penalty Act,[268] the Prison Litigation Reform Act,[269] the Federal Arbitration Act,[270] the Protection of Lawful Commerce in Arms Act,[271] and doctrines of qualified and absolute immunity.[272]

To take but one of these examples, suppose a police officer fatally shoots an unarmed man. Even if the officer violated the victim's Fourth Amendment rights, under the Supreme Court's increasingly aggressive qualified immunity doctrine, the federal courts may provide no remedy. Qualified immunity prevents injured individuals from obtaining a remedy even for an admitted violation of a constitutional right if that right has not yet been articulated with sufficient clarity.[273] Indeed, the petitioner may not even get the remedial benefit of declaratory relief.[274] This remedy denial applies only when the defendant is a governmental actor, and thus a remedial access challenge would trigger heightened scrutiny. Whether the doctrine survives that scrutiny would depend on the strength of interests

[267] State right-to-a-remedy provisions have been interpreted in remarkably different ways by different state courts. Scholars have struggled to explain these divergent approaches. *See, e.g.*, Bauman, *supra* note 4, at 244 ("[B]oth [of the major] variations have been expansively and narrowly interpreted."); Phillips, supra note 3, at 1314-15.

[268] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S. Code).

[269] Pub. L. No. 104-134, 110 Stat. 132 (1996) (codified in scattered sections of 18, 28, & 42 U.S.C.).

[270] Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2012)).

[271] Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901–7903 (2012)).

[272] Note that I am referring here to non-constitutional immunity doctrines, rather than the constitutionally-driven sovereign immunity doctrine. U.S. CONST. amend. XI; Hans v. Louisiana, 134 U.S. 1, 10 (1890).

[273] Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1244-48 (2015).

[274] *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009) (overruling *Saucier v. Katz*, 533 U.S. 194 (2001), and permitting judges to dispose of a case on qualified immunity grounds without resolving the merits of the constitutional claim).

proffered in its defense, and the closeness of fit between the immunity and those interests.

CONCLUSION

The scope and independent significance of the First Amendment's Petition Clause are important doctrinal questions presently steeped in uncertainty. I address these questions by proposing an alternative theory of the Petition Clause's meaning: the right "to petition the Government for a redress of grievances" guarantees not only the right to *ask* for redress from any of the three branches of government, but, in the special case of meritorious legal petitions, a right to *obtain* a minimally adequate remedy. This theory enjoys supports from the Clause's history, text, and judicial interpretation. Historically, the co-evolution of the English right to a remedy and right to petition, which together provided strong protections for individuals to receive remedies in response to legal petitions addressed to the King, Parliament, and courts, support the idea that *legal* petitions would have been understood to entail a correlative right to a remedy. The text and drafting history of the Clause, including its linguistic structure and the unprecedented extension of the recipient subclause from "the Legislature" to "the Government," strongly support the remedial interpretation. Finally, early American and more modern case law provide under-appreciated confirmation of the notion that the petitionary right entails a remedial component in the case of legal petitions. All of this evidence, which supports elevated expectations and requirements of obtaining the redress sought in the context of legal petitions, makes sense when we understand that both petitioning practice and the Petition Clause itself serve a dual function within a democratic society: to protect *majoritarian participatory interests* through political petitions, and to protect *minoritarian rights vindication* through legal petitions.

The remedial interpretation of the Petition Clause, if accepted, would have immediate and far-reaching consequences. It would lead to increased judicial scrutiny into burdens placed on individuals' remedial rights in such varied contexts as governmental immunity doctrines, caps on tort damage awards, and legislative limitations on prisoners' ability to enforce their constitutional rights. The time has come to resolve the ongoing state of confusion surrounding the meaning of the Petition Clause, and to vindicate the Framers' intent to provide remedial protections to legally injured persons petitioning the courts.