
COMMENT

THE RIGHT TO PETITION AS ACCESS AND INFORMATION

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Our lobbying industry is widely criticized as a pay-for-play system that prioritizes powerful interests at the expense of the common good. Legislative efforts at lobbying reform, however, raise fundamental questions under the First Amendment, particularly where lobbying regulations operate to restrict lobbying activity directly. Recent scholarship into the First Amendment Petition Clause, however, offers new insights into what the First Amendment means for lobbying and public engagement with lawmakers more generally. As the history of petitioning in England, the American colonies, and Congress illustrates, the right to petition protected more than simply a form of political speech but rather a quasi-procedural right to equal participation in the lawmaking process.

This Comment adds to this growing literature by considering the history of petitioning from an institutional perspective and how the Petition Clause may serve as a guide for structuring the lawmaking process. The history of petitioning reveals two important interests that are central to petitioning's historical function: the allocation of government access between competing interests and the provision of information to lawmakers. This Comment traces these interests and describes how they drove the development of formal petitioning and how they have consistently informed the Supreme Court's Petition Clause jurisprudence. Moving forward, a renewed focus on access and information can help inform institutional efforts to reform our lobbying system, as well as doctrinal developments that recognize the government's interest in building a more open, equitable, and informed system of engagement with the public.

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“[I]t is essential to liberty that the government in general, should have a common interest with the people; so it is particularly essential that . . . [Congress] . . . should have an immediate dependence on, [and] an intimate sympathy with the people.”

—James Madison¹

“We had a hierarchy in my office, in Congress. If you were a lobbyist who never gave us money, I didn’t talk to you. If you were a lobbyist who gave us money, I might talk to you.”

—Mick Mulvaney, Former U.S. Representative.²

¹ THE FEDERALIST NO. 52 (James Madison).

² Mick Mulvaney, Acting Dir., Consumer Fin. Prot. Bureau, Remarks at the American Bankers Association Annual Conference 11 (Apr. 24, 2018), <https://www.documentcloud.org/documents/4446622-Transcript-Mulvaney-ABA-Conference-4-24-2018.html> [https://perma.cc/G67X-9LD9].

INTRODUCTION

In politics, access is everything. Who gets access to lawmakers and who doesn't drives the legislative agenda, defines the parameters of the debate, and decides policy outcomes.³ Over the last several decades, a widespread informal lobbying industry has emerged as a means of buying and selling access to lawmakers. This system has been criticized as a pay-for-play scheme that advances powerful interests at the expense of the public good,⁴ if not a perverse form of "legalized bribery,"⁵ and has contributed to historically low public faith in Congress.⁶ Attempts to regulate lobbying, however, raise fundamental questions under the First Amendment.

The First Amendment's Speech Clause prohibits laws "abridging the freedom of speech."⁷ With this in mind, several commentators have assumed that

³ A vast literature has emerged describing lobbying and influence in terms of access, including the role of access in legislative agenda-setting and in securing substantive outcomes. *See, e.g.*, David Austen-Smith, *Allocating Access for Information and Contributions*, 14 J.L. ECON. & ORG. 277, 277 (1998) (describing the link between campaign contributions, access to lawmakers, and policy outcomes); Christopher Cotton, *Pay-to-Play Politics: Informational Lobbying and Contribution Limits When Money Buys Access*, 96 J. PUB. ECON. 369, 369 (2012) (same); Frank R. Baumgartner, Jeffrey M. Berry, Marie Hojnacki, David C. Kimball & Beth L. Leech, *Money, Priorities, and Stalemate: How Lobbying Affects Public Policy*, 13 ELECTION L.J. 194, 201-05 (2014) (discussing the impact of lobbying on the agenda-setting stage of the lawmaking process and noting how access may amplify or foreclose certain voices); Laura Langbein, *Money and Access: Some Empirical Evidence*, 48 J. POL. 1052, 1053 (1986) ("Only access, or some other form of direct or indirect communication, can translate [campaign contributions] into influence."); David C. Kimball, Frank R. Baumgartner, Jeffrey M. Berry, Marie Hajnacki, Beth Leech & Bryce Summary, *Who Cares About the Lobbying Agenda?*, 1 INT. GRPS. & ADVOC. 5-25 (2012) (discussing the influence of lobbying access at the agenda-setting stage of the lawmaking process). *See also infra* Section I.A.

⁴ *See, e.g.*, *Fighting Special Interest Lobbyist Power over Public Policy*, CTR. FOR AM. PROGRESS (Sept. 27, 2017, 9:02 AM), <https://www.americanprogress.org/issues/democracy/reports/2017/09/27/439675/fighting-special-interest-lobbyist-power-public-policy> [<https://perma.cc/9HHT-7RDR>] ("[L]opsided lobbying and campaign spending undermines the democratic process . . . by aligning the congressional agenda with the special interest lobbyists' agenda . . .").

⁵ *See, e.g.*, Jimmy Williams, *I Was a Lobbyist for More than 6 Years. I Quit. My Conscience Couldn't Take it Anymore*, VOX (Jan. 5, 2018, 7:46 AM), <https://www.vox.com/first-person/2017/6/29/15886936/political-lobbying-lobbyist-big-money-politics> [<https://web.archive.org/web/20210314233118/https://www.vox.com/first-person/2017/6/29/15886936/political-lobbying-lobbyist-big-money-politics>] (describing the author's own lobbying experience as "[y]ears of legalized bribery" that "exposed [him] to the worst elements of our country's political workings").

⁶ *See* Justin McCarthy, *U.S. Confidence in Organized Religion Remains Low*, GALLUP (July 8, 2019), <https://news.gallup.com/poll/259964/confidence-organized-religion-remains-low.aspx> [<https://perma.cc/TT32-FXFS>] (reporting that only 11% of those surveyed reported having "a great deal" or "quite a lot" of confidence in Congress, which has remained at the bottom of the list of surveyed institutions since 2019); *Little Public Support for Reductions in Federal Spending*, PEW RSCH. CTR. (Apr. 11, 2019), <https://www.people-press.org/2019/04/11/little-public-support-for-reductions-in-federal-spending> [<https://perma.cc/3C4K-5SZ5>] (reporting that public trust in the federal government remains historically low, with just 17% of those surveyed reporting that they trust the federal government to do what is right "just about always" or "most of the time").

⁷ U.S. CONST. amend. I.

when lobbyists meet with lawmakers, their activity constitutes a form of political speech protected by the First Amendment.⁸ The Supreme Court, however, has yet to hold that this is the case.⁹ Nevertheless, lower courts considering lobbying reform laws have tended to apply strict scrutiny, often fatally so, following the Court's recent campaign finance decisions.¹⁰ But even if the speech of lobbyists is protected by the First Amendment, the issue is complicated by the fact that lobbying also involves the active participation of lawmakers who control access to themselves and make decisions about which political speech they will and will not listen to.¹¹ The Speech Clause is silent as to how these decisions should be made or whether individuals or lobbyists have any right to lawmaker access.

The First Amendment's Petition Clause, on the other hand, protects "the right . . . to petition the government for a redress of grievances."¹² On its face, this Clause protects both a form of political speech—petitions—and a particular process for communicating with the government. The precise nature and function of the Petition Clause, however, remains unclear. Compared to other First Amendment rights, the right to petition has received relatively little attention from scholars,¹³ and the Supreme Court's limited petition jurisprudence has largely conflated the right to petition with the right to speech, having gone so far as to describe the two as "cut from the same cloth."¹⁴ This view has contributed to claims that—like it or not—the First Amendment prohibits the government from regulating lobbying or access in any way.¹⁵ This

⁸ See, e.g., Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 Stan. L. Rev. 191, 196 (2012) (noting that "[s]peech aimed at influencing government action is core political speech" that implicates the First Amendment right to Free Speech); Alan B. Morrison, *Introduction: Lobbyists—Saints or Sinners?*, 19 STAN. L. & POL'Y REV. 1, 1 (2008) ("[T]he right to lobby is the right to petition the government for grievances, which is explicitly protected by the First Amendment.").

⁹ See Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1135 (2016) (noting that, despite dicta hinting at constitutional limits on lobbying regulation, the Supreme Court has not addressed the issue squarely).

¹⁰ See Hasen, *supra* note 8, 214–16 (discussing a series of recent cases in which the Supreme Court expressed skepticism about the "constitutionality of limits on the use of money to influence political outcomes," including *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)).

¹¹ See, e.g., JOHN MARK HANSEN, *GAINING ACCESS: CONGRESS AND THE FARM LOBBY*, 1919–1981, at 22–25 (1991) (laying out a theory of access as lawmaker behavior); McKinley, *supra* note 9, at 1201–02 (2016) (noting that Congress has established a "de facto" process for allocating access to itself).

¹² U.S. CONST. amend. I.

¹³ See, e.g., Anita Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569, 569 n.1 (1987) (noting the scarcity of commentary on the right to petition even within First Amendment scholarship); 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, 16 n.2 (1993) (same).

¹⁴ *McDonald v. Smith*, 472 U.S. 479, 482 (1985).

¹⁵ See, e.g., Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying*, 13 ELECTION L.J. 160, 163 (2014) ("Lobbying is an aspect of the freedoms of speech, press, association, and petition protected by the [C]onstitution."); Hasen, *supra* note 8, at 196 ("Speech aimed at influencing government action is core political speech, and it would certainly be . . . unconstitutional . . . to bar individuals from lobbying to change government action."); Morrison,

conflation, however, discounts the nearly eight-hundred-year history of the right to petition as it was exercised in England, in colonial governments, and in the United States Congress well into the twentieth century. In recent years, scholars have unearthed a wealth of historical evidence surrounding the right to petition.¹⁶ This history reveals that the right to petition protected not only the speech contained within a petition but also an individual right to equal and meaningful participation in the lawmaking process.¹⁷

This Comment builds upon this recent scholarship by considering the history of petitioning from an institutional perspective. Historically, petitioning played a central role in structuring the lawmaking process and provided important benefits to both the governed and the government.¹⁸ This history not only helps to distinguish petitioning from ordinary political speech, but it also reveals two distinct institutional interests that provide independent rationales for legislative efforts at lobbying reform.

First, petitioning provided a mechanism for allocating access to lawmakers. Unlike our current lobbying system, in which access to lawmakers is allocated informally, petitioning made use of formal and institutionalized processes to bring matters to the attention of lawmakers.¹⁹ And while today access often goes disproportionately to the economically or politically powerful, the historical right to petition was far more egalitarian, extending to all people—even the unenfranchised—without regard for their wealth or political power.²⁰ Any individual or group could, simply by drafting and filing a formal petition, have their grievances heard and considered on equal

supra note 8, at 1 (“[T]he right to lobby is the right to petition the government for redress of grievances, which is explicitly protected by the First Amendment.”).

¹⁶ See generally Stephen A. Higginson, Note, *A Short History of the Right to Petition the Government for Redress of Grievances*, 96 YALE L.J. 142 (1986) (looking to records from the legislature of the Connecticut Colony and the early U.S. Congress to detail the controversy over the interpretation of the right to petition); Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153 (1998) (examining documents from colonial legislature as well as the Declaration of Independence, the Articles of Confederation, the U.S. Constitution, state constitutions, and the Federalist Papers to interpret the right to petition); McKinley, *supra* note 9 (excavating colonial documents discussing the Magna Carta, papers from colonial legislatures, and other Revolutionary-era documents to interpret the right to petition); Eric Schnapper, “*Libelous*” *Petitions for Redress of Grievances—Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303 (1989) (arguing that the historical analysis contained in *McDonald v. Smith* is erroneous by examining the historical record that the Court did not include in its reasoning, including the English Bill of Rights and Revolutionary-era case law); Norman B. Smith, “*Shall Make No Law Abridging . . .*”: *An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153 (1986) (mining historical sources from medieval England, the English Civil War, the Glorious Revolution, as well as American colonial and Revolutionary-era documents); Spanbauer, *supra* note 13.

¹⁷ See *infra* Section II.A.

¹⁸ See *infra* Part II.

¹⁹ See *infra* Section II.A.

²⁰ See *id.*

footing.²¹ Petitioning thus allocated government access—a highly scarce and valuable public resource—by providing a quasi-procedural right to be heard.²²

Second, petitioning helped provide lawmakers with broad and inclusive information.²³ Historically, formal petitioning served as the primary means of information gathering in England, the colonies, and the early United States.²⁴ Petitions provided detailed information which lawmakers otherwise would have been unable to obtain, apprised lawmakers of the needs and desires of their constituents, and focused lawmaker attention on highly local or specialized issues they might otherwise have missed.²⁵ Today, however, lawmakers are faced with a deluge of information that is largely mediated by lobbyists and thus disproportionately reflects the interests of the politically powerful interests they represent.²⁶

This Comment seeks to bring these two interests—access and information—to the foreground and argues that the right to petition is best viewed not only as an individual right, but also as a guide for structuring the government’s engagement with the public. Part I begins by articulating what is at stake with respect to both access and information by identifying current challenges with each and discussing how our current lobbying system has proven insufficient. Next, Part II traces the history of the right to petition through the lenses of access and information. Part III then discusses how access and information have influenced the Supreme Court’s Petition Clause doctrine. Part IV discusses implications for institutional reform and how a renewed focus on the Petition Clause offers new doctrinal rationales for lobbying regulation.

I. ACCESS AND INFORMATION

In the Supreme Court’s most recent Petition Clause Case, *Borough of Duryea v. Guarnieri*, the Court recognized that the right to petition is distinct from the right to free speech and that “some effort must be made to identify

²¹ See *infra* notes 152–154 and accompanying text.

²² See *infra* Section II.A.

²³ See *infra* Section II.B.

²⁴ See *id.*

²⁵ See *id.*

²⁶ See LORELEI KELLY, NEW AM. FOUND., CONGRESS’ WICKED PROBLEM: SEEKING KNOWLEDGE INSIDE THE INFORMATION TSUNAMI 4 (2012) (“[Congressional] offices are overwhelmed with the noise of incoming information, including from constituents, non-profit advocacy, fact-sheets, lobbying and commercially sponsored analysis.”). It is worth noting the body of commentary on the role of lobbyists in providing information to lawmakers. See, e.g., FRANK R. BAUMGARTNER, JEFFREY M. BERRY, MARIE HOJNACKI, DAVID C. KIMBALL & BETH L. LEECH, LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY 55 (2009) (discussing how lobbyists help lawmakers sort through the bewildering complexity of major policy issues); Bertrall L. Ross II, *Addressing Inequality in the Age of Citizens United*, 93 N.Y.U. L. REV. 1120, 1150 (2018) (arguing that regulation of lobbying would reduce the information available to lawmakers).

the historic and fundamental principles that led to the enumeration of the right to petition.”²⁷ As the next Part illustrates, the history of petitioning reveals two vital interests that underly the right to petition: allocating access to lawmakers and providing lawmakers with broad and inclusive information.²⁸ As we will see, these interests drove the development of petitioning as a solution to the institutional challenges of democratic governance and later influenced the rise of our modern lobbying system as well.²⁹ Before turning to the history, however, it is worth pausing to examine these two interests—access and information—in today’s context.

This Part examines how access and information interests operate in the modern lawmaking process and under our current lobbying system. It begins by defining access in terms of the attention of lawmakers, a highly scarce resource that is necessary to achieve policy outcomes and discusses how that attention is allocated among competing groups. Next, it discusses the informational needs of lawmakers, the lack of institutional sources of information, and the reasons why lawmakers increasingly turn to expert but interested lobbyists for needed information.

A. *Allocating Government Access*

Public access to government is vital to representative democracy. Outside of formal elections, engagement with lawmakers is the primary means by which the public participates in the lawmaking process. Moreover, while elections decide who will govern and make policy, ongoing engagement with the public is necessary to ensure that the needs and desires of constituents—including political minorities and the unenfranchised—are represented. Demand for access, however, drastically exceeds supply, necessitating some system of allocation. But what does it mean to allocate access to government? What exactly is being allocated, what interests are implicated, and what method does the First Amendment favor?

When we speak of government access, what we are really referring to is the *attention* of lawmakers and other officials. As avenues for speech have become cheap and the amount of available information has exploded, economists have increasingly focused on attention as an increasingly scarce and thus valuable resource.³⁰ Much has been written on the implications of

²⁷ *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 394 (2011).

²⁸ See *infra* Part II.

²⁹ See *infra* Section II.C.

³⁰ See Herbert A. Simon, *Designing Organization for an Information-Rich World*, in *COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST* 37, 40-41 (Martin Greenberger ed., 1971) (“[I]n an information-rich world, the wealth of information means a dearth of something else: a scarcity of . . . the attention of its recipients. Hence a wealth of information creates a poverty of attention and a need to allocate that attention”).

attention scarcity for businesses and consumers,³¹ and for public discourse at large.³² The issue takes on a different character, however, when applied to lawmakers. A significant body of literature has developed to describe how interest groups compete for lawmaker attention and how lawmakers choose to allocate their own attention.³³ While some models of lobbying describe the process as an attempt to buy policy outcomes³⁴ or to provide lawmakers with information,³⁵ attention-based models of lobbying focus instead on the efforts of interest groups to capture a lawmaker's limited attention, which is often a necessary first step before any information exchange or policy consideration can occur.³⁶ Like any scarce resource, the attention of lawmakers is highly valuable, and interest groups continue to invest heavily in obtaining it.³⁷

The allocation of lawmaker attention has real consequences for the lawmaking process. The legislative agenda is largely driven by access and attention. Long before a vote can be had or a debate held, issues must first be defined and selected for serious consideration, and it is in these early agenda-setting stages that lawmaker attention is most significant.³⁸ By influencing

³¹ See generally, e.g., TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* (2016) (describing how shifts in technology and business practices have increasingly sought to consume human attention).

³² See generally, e.g., Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547 (2018) (discussing that accompanying the flood of speech on the Internet, attention of listeners is scarce).

³³ See, e.g., Austen-Smith, *supra* note 3, at 277 (describing a lobbying model in which lobbyists make political contributions in order to obtain access, whereupon they influence policy outcomes by providing valuable information); Cotton, *supra* note 3, at 369 (describing a lobbying model in which wealthier interest groups obtain greater access and in which lawmakers grant access strategically to engage in political rent-seeking).

³⁴ See, e.g., LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS AND A PLAN TO STOP IT* 88 (2011); Gene M. Grossman & Elhanan Helpman, *Protection for Sale*, 84 AM. ECON. REV. 833, 833 (1994).

³⁵ See, e.g., Richard Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 69 (2006) (laying out a model of lobbying as one of providing costly information to likeminded policymakers in order to promote desired outcomes); David Austen-Smith & John R. Wright, *Competitive Lobbying for a Legislator's Vote*, 9 SOC. CHOICE & WELFARE 229, 234 (1992) (describing lobbying as primarily a form of strategic information transmission to lawmakers).

³⁶ See, e.g., Christopher Cotton, *Competing for Attention: Lobbying Time-Constrained Politicians*, 18 J. PUB. ECON. THEORY 642, 643 (2016) (noting that “[d]rafting, introducing, and promoting legislation are time consuming” and that lawmakers are “constrained . . . in their ability to learn about and implement policy proposals”).

³⁷ See, e.g., Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, 60 AM. J. POL. SCI. 545, 553 (2016) (finding that lawmakers are three to four times more likely to grant access to political donors than to non-donors); Langbein, *supra* note 3, at 1059-61, 1061 tbl.3 (finding that the cost of lawmaker time ranged from \$6,400 for less than twenty-five minutes to \$72,300 for an hour); Richard Hall & Frank Wyman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797 (1990) (assessing the relationship between PAC contributions and access).

³⁸ See Baumgartner et al., *supra* note 3, at 201 (“Lobbying may have a stronger impact on the agenda-setting stage of the policy process, when government officials determine which issues merit

how lawmaker attention is allocated, it is possible to amplify certain voices and foreclose others.³⁹ Indeed, the priorities of Congress tend to show a greater correlation with those of lobbyists than with those of the general public.⁴⁰ Moreover, because lawmaker attention is a prerequisite for change, a lack of attention to a given topic operates to entrench the status quo.⁴¹

The attention of individual lawmakers is a highly scarce resource. First and foremost, lawmakers are human beings subject to the same constraints and demands on attention as the rest of us. Each has only twenty-four hours in a day, only a fraction of which can reasonably be directed to the business of lawmaking.⁴² The largest constraint on lawmaker attention, however, is the constant need to fundraise.⁴³ The 2020 election was the most expensive in U.S. history, with spending more than doubling that in 2016.⁴⁴ The average costs of winning an individual House or Senate race were \$1.3 million and \$10.4 million, respectively.⁴⁵ The need to raise ever-increasing amounts of money each election cycle means that lawmakers must spend more and more of their time and attention soliciting donations.⁴⁶ There has been no comprehensive survey of exactly how much time lawmakers spend on fundraising, but various anecdotal sources place the figure for members of Congress at anywhere from twenty to eighty percent of a lawmaker's work week.⁴⁷

significant attention and which issues can be safely ignored. Attention is a critical but limited resource in the policymaking process.”).

³⁹ *Id.* (“Lobbying may affect whose voices are amplified and whose voices are simply not heard when vying for the attention of government officials.”).

⁴⁰ *Id.* at 201-02.

⁴¹ *Id.* at 205 (“[D]efenders of the status quo are not trying to attract attention to the policy they hope will remain unchanged. . . . In contrast, inattention from members of Congress . . . provides few if any benefits for sides challenging the status quo.”).

⁴² *See id.* at 204. (“[E]ven if . . . government ha[s] significant resources of time, staff, and money at [its] disposal, these resources are inadequate to the many demands . . . placed upon them. All actors in Washington are faced with more issues they could spend time on than they have hours in the day.”).

⁴³ *See* Ciara Torres-Spelliscy, *Time Suck: How the Fundraising Treadmill Diminishes Effective Governance*, 42 SETON HALL LEGIS. J. 271, 272 (2018) (discussing in detail the pressures of congressional fundraising).

⁴⁴ *2020 Election to Cost \$14 Billion, Blowing Away Spending Records*, OPENSECRETS.ORG, (Oct. 28, 2020, 1:51 PM), <https://www.opensecrets.org/news/2020/10/cost-of-2020-election-14billion-update> [<https://perma.cc/H54N-9U4A>].

⁴⁵ *See, e.g.,* Soo Rin Kim, *The Price of Winning Just Got Higher, Especially in the Senate*, OPENSECRETS.ORG, (Nov. 9, 2016, 5:10 PM), <https://www.opensecrets.org/news/2016/11/the-price-of-winning-just-got-higher-especially-in-the-senate> [<https://perma.cc/VU2X-XZGH>].

⁴⁶ *See generally* Torres-Spelliscy, *supra* note 43.

⁴⁷ *See* CONG. MGMT. FOUND. & SOC'Y FOR HUMAN RESOURCE MGMT., *LIFE IN CONGRESS: THE MEMBER PERSPECTIVE* 19 (2013), https://www.congressfoundation.org/storage/documents/CMF_Pubs/life-in-congress-the-member-perspective.pdf [<https://perma.cc/V9TD-FFDB>] (surveying twenty-five House members and finding that these members spent approximately 20% of their time on campaign fundraising activities); Ryan Grim & Sabrina Siddiqui, *Call Time For Congress Shows How Fundraising Dominates Bleak Work Life*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/call-time-congressional-fundraising_n_2427291 [<https://perma.cc/KFV2-4CMX>] (discussing a memo to incoming House democrats describing a ten-hour workday with

Time and attention spent fundraising come at the expense of all other legislative tasks.⁴⁸ Members of Congress, for example, are prohibited from fundraising in the congressional offices,⁴⁹ requiring them to physically move to separate office spaces to solicit donations.⁵⁰ More fundamentally, lawmakers engaged in fundraising are limited in their ability to multi-task or pay any meaningful attention at all to other matters.⁵¹ Fundraising thus reduces the total amount of attention that can be devoted to other legislative tasks, such as drafting legislation, participating in hearings and debates, and spending time with constituents.⁵² The pressure to raise funds also offers those with money a way to cut to the front of the attention line and speak directly with lawmakers.⁵³ And when lawmakers run out of time to fundraise themselves, lobbyists often step in to organize fundraisers on their behalf or to bundle donations from

four hours dedicated to “call time” and another hour dedicated to fundraisers and other campaign work); Shane Goldmacher, *Former Senate Leader Says Senators Spent Two-Thirds of Time Asking for Money*, NAT'L J. (Jan. 16, 2014), <https://www.nationaljournal.com/s/63463/former-senate-leader-says-senators-spent-two-thirds-time-asking-money> [perma.cc/FP2F-E6HE]; Paul Blumenthal, *Leaked Memo Tells Senate Candidate to Spend 80 Percent of Her Time Raising Money*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/michelle-nunn-fundraising_n_5628018 [https://perma.cc/QR8E-688G] (discussing a leaked memo advising Georgia Democratic Senate candidate Michelle Nunn to spend up to 80% of her time fundraising); Memorandum from Diane Feldman, President, Feldman Grp. to The Nunn Team (Michelle Nunn, Candidate for U.S. Senate) (Dec. 9, 2013), <https://www.scribd.com/fullscreen/235287519?accesskey=key7XLZhUImcqs8zboft3xs&allowshare=true&escape=false&viewmode=scroll> [https://perma.cc/BWP3-VX3E].

⁴⁸ See Torres-Spelliscy, *supra* note 43, at 293-96 (describing the inability of lawmakers to multitask and observing that “expecting someone to legislate and talk on the phone at the same time seems a tall—if not impossible—order”).

⁴⁹ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 302, 116 Stat. 81, 96 (2002) (codified as amended at 18 U.S.C. § 607).

⁵⁰ See, e.g., Nick Penniman & Wendell Potter, *Nation on the Take: Dialing for Dollars in “D.C.’s Sweatshops”*, HUFFPOST (Apr. 28, 2017), https://www.huffingtonpost.com/nickpenniman/nation-on-the-take-dialin_b_9787106.html [https://perma.cc/BER2-YS3C] (“Former representative Dennis Cardoza, a California Democrat, compared his party’s call center to a sweatshop with thirty-inch-wide cubicles set up for the sole purpose of begging for money.”).

⁵¹ See Torres-Spelliscy, *supra* note 43, at 293-296 (discussing the ability of lawmakers to multi-task based on recent cognitive science literature).

⁵² See, e.g., Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1312 (1994) (noting that candidates would be able to spend more time in their home district were it not for fundraising pressures); Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL’Y REV. 21, 33 (2014) (“The main problem of campaign money on the federal level—aside from the huge time commitment for Members of Congress, who spend so much time dialing for dollars that there is little time for legislative business—is that it skews legislative priorities.”).

⁵³ See MARTIN SCHRAM, SPEAKING FREELY: FORMER MEMBERS OF CONGRESS TALK ABOUT MONEY IN POLITICS 4 (1995) (quoting Representative Romano Mazzoli) (“People who contribute get the ear of the member and the ear of the staff. They have the access—and access is it. Access is power. Access is clout. That’s how this thing works.”).

clients.⁵⁴ Thus fundraising both exacerbates the scarcity of lawmaker attention and operates to allocate that attention disproportionately to the wealthy.

It is not only the attention of each individual lawmaker that is scarce, but also the total amount of available lawmaker attention. As of 2018, the U.S. House of Representatives had one voting member per roughly 747,000 Americans, by far the greatest discrepancy among industrialized democracies.⁵⁵ As the number of constituents-per-representative increases, so too does the demand for attention, while supply in both the House and Senate have remained static since 1929.⁵⁶ Moreover, as new technologies, industries, and social challenges have emerged, the number and complexity of issues faced by Congress has also increased.⁵⁷ Thus there are demands on lawmakers' attention from both an increasing number of constituents and an increasing number of issues.

Under our current system, the task of allocation is largely left to lawmakers themselves, who control their own offices and staffs and decide which meetings to take and which issues to consider.⁵⁸ How, then, should individual lawmakers or a body such as Congress allocate access to themselves? While our current lobbying system allocates lawmaker attention informally and disproportionately in favor of the wealthy and politically powerful, the history of formal petitioning offers an alternative vision in which the legislative agenda is driven by the public, the process is largely facilitated by formal channels and institutions, and access is allocated on an equal basis to all parties without regard to political power.⁵⁹ If the First Amendment is to be considered a guiding principle, then the Constitution seems to favor the latter.

B. *Lawmakers' Need for Information*

Lawmaking is a complicated process, and in order to do their jobs effectively, lawmakers require and constantly seek out information.⁶⁰

⁵⁴ See, e.g., LESSIG, *supra* note 34, at 113 ("As one lobbyist put it expressly, 'I spend a huge amount of my time fundraising . . . A huge amount.' That behavior has been confirmed to me by countless others, not so eager to be on the record.").

⁵⁵ See Drew DeSilver, *U.S. Population Keeps Growing, but House of Representatives is Same Size as in Taft Era*, PEW RSCH. CTR.: FACT TANK (May 31, 2018), <https://www.pewresearch.org/fact-tank/2018/05/31/u-s-population-keeps-growing-but-house-of-representatives-is-same-size-as-in-taft-era> [https://perma.cc/4UQD-SWPT].

⁵⁶ *Id.*; see also DAVID C. HUCKABEE, CONG. RSCH. SERV., 95-791 GOV, HOUSE OF REPRESENTATIVES: SETTING THE SIZE 435 (1995).

⁵⁷ See *infra* Section II.C.

⁵⁸ See McKinley, *supra* note 9, at 1201 (noting that under our current lobbying system Congress "spend[s] resources and afford[s] informal process to the public").

⁵⁹ See *infra* Part II.

⁶⁰ See Paul Burstein & C. Elizabeth Hirsh, *Interest Organizations, Information, and Policy Innovation in the U.S. Congress*, 22 SOCIO. F. 174, 177 (2007) (noting lawmakers' "constant search for information").

Generally speaking, lawmakers need two kinds of information: information about the political consequences of policy decisions—political information—and substantive information about particular policy issues—policy information.⁶¹ In order to effectively represent constituents and to improve reelection chances, lawmakers have a vested interest in understanding the policy preferences of those they represent. This includes knowing which issues matter to constituents, how intensely they matter, and which positions on those issues the lawmaker ought to take.⁶² This is true whether a lawmaker is interested in representing the interests of their entire constituency or simply those of their donors. In order to achieve policy success, lawmakers also require technical and policy expertise, particularly in the context of novel or highly complex topics.⁶³ Such policy information may take the form of data and statistics, but also facts, arguments, and predictions.⁶⁴

In order to obtain such information, lawmakers have three options: they may obtain the information themselves, request it from a public information-gathering institution, or rely on outside parties to provide it.⁶⁵ Given the relatively limited resources of lawmakers and their staffs, the first option is likely not feasible.⁶⁶ The second option is more promising, particularly for bodies such as Congress, which has at its disposal a bureaucratic workforce of thousands of specialized experts spread across various institutions including the Congressional Research Service, the Congressional Budget Office, and the Government Accountability Office.⁶⁷ Such bodies are publicly funded and provide nonpartisan expert information on a wide variety of topics and are frequently utilized by Members and Congressional committees.⁶⁸ The capacity of these bodies, however, has dramatically decreased since their

61 See Bryan S. McQuide, *Information & Interest Group Lobbying in Congress: Policy vs. Political Information 2* (2007) (Ph.D. dissertation, University of Illinois at Urbana-Champaign).

62 See Burstein & Hirsh, *supra* note 60, at 177 (“[Lawmakers] want to know their constituents’ policy preferences, how much particular issues matter to them, and whether their own actions are likely to affect constituents’ votes at the next election.”) (internal citations omitted).

63 See John M. De Figueiredo, *Lobbying and Information in Politics*, 4 BUS. & POL. 125, 125 (2002).

64 *Id.*

65 See, e.g., Lee Drutman and Steven Teles, *Why Congress Relies on Lobbyists Instead of Thinking for Itself*, ATLANTIC (Mar. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/03/when-congress-cant-think-for-itself-it-turns-to-lobbyists/387295> [<https://perma.cc/GQ7D-R6UB>] (observing that government can either invest in internal resources to obtain its own knowledge or rely on external experts for information).

66 See Hall & Deardorff, *supra* note 35, at 72 (noting the assumption that lawmakers and their staffs have limited capacity to advance their legislative goals).

67 For a thorough exploration of the Congressional bureaucracy and its role in providing Congress with nonpartisan expert information, see Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1544-45 (2020).

68 See KELLY, *supra* note 26, at 10-12.

heyday in the 1970s, due in no small part to drastic reductions in legislative support staff in the 1990s, and have largely not recovered.⁶⁹

This leaves the third option—outside support. As the history of formal petitioning demonstrates, for hundreds of years the primary means of information-gathering by Parliament, colonial assemblies, and Congress was the petition process, through which interested parties provided both political and policy information to lawmakers.⁷⁰ More recently, the Administrative Procedure Act⁷¹ retains a version of this function in the form of notice-and-comment rulemaking procedures, which serves as an invaluable source of information for administrative agencies.⁷² Outside of these formal channels, however, the majority of outside information is provided by lobbyists and privately-funded research, both of which have grown dramatically over the past several decades.⁷³ As Hall and Deardorff explain, one way that lobbyists may influence the lawmaking process is by identifying friendly lawmakers and “subsidizing” their efforts by providing valuable information related to specific policy goals.⁷⁴ Because interest groups tend to be better-resourced and more highly specialized than generalist lawmakers or legislative support bodies, lawmakers increasingly rely on these groups for information.⁷⁵ By

⁶⁹ See BRYAN D. JONES & FRANK R. BAUMGARTNER, *THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS* 285-286 (noting that Congress’ capacity to address issues reached its apex in the 1970s, plateaued, and then declined dramatically following Republican control in the early 1990s); KELLY, *supra* note 26, at 11 (noting that Congressional support offices such as CRS have failed to fully replenish “top level, substantive staff”); Drutman & Teles, *supra* note 65 (noting that during this period, legislative support staff was cut by a third, along with the entire Office of Technology Assessment, thus reducing the capacity of Congress to “acquire, process, and analyze information”).

⁷⁰ See Section II.B.

⁷¹ 5 U.S.C. §§ 551-59.

⁷² For a thorough discussion of formal petitioning’s influence on the historical development of the Administrative Procedure Act and notice and comment rulemaking, see Maggie McKinley, *Petitioning and the Administrative State*, 127 *YALE L.J.* 1538, 1538 (2018).

⁷³ See, e.g., Drutman & Teles, *supra* note 65 (noting that lobbying expenditures had increased six-fold from 1983 to 2013, while the number of private Washington-based think tanks tripled from 1970 to 1996).

⁷⁴ See Hall & Deardorff, *supra* note 35, at 72-76 (2006) (outlining a lobbying model in which lobbyists influence policy by providing costly information to strategically selected lawmakers in order to reduce information-gathering costs and thus subsidize their efforts).

⁷⁵ See Clare Brock, *Partisan Polarization and Corporate Lobbying: Information, Demand, and Conflict*, 10 *Int. Grps. & Advoc.* (forthcoming 2021) (noting lawmakers’ increased demand for information from lobbyists); TIMOTHY M. LA PIRA & HERSCHEL F. THOMAS III, *REVOLVING DOOR LOBBYING: PUBLIC SERVICE, PRIVATE INFLUENCE, AND THE UNEQUAL REPRESENTATION OF INTERESTS* 51 (2017) (describing lawmakers’ increased reliance on lobbyists for information and observing that “the government has essentially outsourced its brainpower to the lobbying community”); Beth L. Leech, Frank R. Baumgartner, Timothy M. La Pira & Nicholas A. Semanko, *Drawing Lobbyists to Washington: Government Activity and the Demand for Advocacy*, 58 *Pol. Rsch. Q.* 19, 30 (2005) (noting that lobbying activity has increased in response to the expansion of government activity); Drutman & Teles, *supra* note 65 (“Government can invest in resources that would allow it to acquire . . . specialized knowledge, or it can rely on externally provided experts with a material stake to help it draft and enact laws. For decades, we have chosen the second.”).

providing information favorable to their desired outcomes, interests groups are able to exert considerable influence on the lawmaking process,⁷⁶ particularly where nobody is funding information in support of the opposing viewpoint.⁷⁷ This is possible because both political and policy information are often difficult and costly to obtain. Constituent preference data, for example, is often limited or nonexistent at the local level,⁷⁸ and detailed technical information, economic modeling, or empirical studies may require substantial investment to produce.

Due in no small part to the increasing demands on their attention, lawmakers find themselves subjected to a constant deluge of information from a range of interest groups vying for influence. Because of their limited attention, however, it is impossible to fully consider all or even most of this information, and the task of lawmakers quickly becomes one of sorting through massive amount of information—much of it produced by groups with a vested interest—in order to determine policy priorities and make substantive decisions.⁷⁹ Missing or lost in this information tsunami are the voices of groups with fewer resources and the judgment of disinterested experts, both of which are highly relevant to policy decisions. The increasing reliance of lawmakers on lobbyists undermines their ability to represent constituents and make well-informed decisions by forcing them to operate on skewed and incomplete information.

As this Part illustrates, access and information interests have significant implications for democratic government and the lawmaking process. How lawmakers allocate their own attention affects whose voices are heard and what issues are addressed.⁸⁰ Likewise, what information lawmakers obtain and who they obtain it from affects legislative outcomes and provides key opportunities for influence.⁸¹ These are institutional issues in need of institutional solutions. At present, however, those solutions are lacking. The task of allocating lawmaker attention is largely left to lawmakers themselves,⁸²

⁷⁶ See Hall & Deardorff, *supra* note 35, at 76 (“Lobbyist’s [provision of information] are the very mechanism of their influence.”).

⁷⁷ See Drutman & Teles, *supra* note 65 (arguing that even lawmakers who are suspicious of information provided by lobbyists may be unlikely to push back due to a lack of information).

⁷⁸ See Philip J. Ardoin & James C. Garand, *Measuring Constituency Ideology in U.S. House Districts: A Top-Down Simulation Approach*, 65 J. POL. 1165, 1166 (2003) (“[D]ata on constituency policy preferences in legislative districts below the state level are almost impossible to obtain.” (citations omitted)); Benjamin G. Bishin, *Constituency Influence in Congress: Does Subconstitutionality Matter?*, 25 LEGIS. STUD. Q. 389, 393 (2000) (“For many issues, constituent preference data is nonexistent.”).

⁷⁹ See, e.g., KELLY, *supra* note 26, at 4 (noting the sharp increase in the information that Members of Congress must sort through and the challenges faced by legislative staff in trying to make sense of it).

⁸⁰ See *supra* Section I.A.

⁸¹ See *supra* Section I.B.

⁸² See McKinley, *supra* note 9, at 1138 (“Today, Congress affords individuals access to lawmakers and the lawmaking process only on an informal basis”).

and the capacity of public information-gathering institutions is unable to keep pace with the informational needs of lawmakers.⁸³ As a result, lawmakers continue to rely on and provide access to lobbyists whose interests do not align with those of the public.⁸⁴ With these contemporary issues in mind, we now turn to history to examine how petitioning and the right to petition emerged as an institutional solution to address these same issues.

II. THE HISTORICAL RIGHT TO PETITION

The challenges associated with allocating government access and obtaining lawmaker information are not new. Long before lawmakers and the public turned to lobbyists, the formal petition process was the primary means by which both needs were met.⁸⁵ This Part explores the historical background of the right to petition through the lenses of allocation and information and argues that both have played pivotal roles in the development and evolution of the right.

Historically, the right to petition was a highly egalitarian civil right that was extended nearly universally, even to the unenfranchised, and established a formal mechanism by which individuals and groups could submit their concerns to lawmakers with the expectation that those concerns would be heard and considered on equal footing.⁸⁶ The right to petition was also justified and defended for its value as a source of information to the government, and for centuries was one of the primary means by which lawmakers obtained the political and policy information necessary to govern effectively.⁸⁷ These interests drove the development of formal petitioning, and when the formal institutions that supported petitioning faltered in the late nineteenth and early twentieth centuries, they also spurred the rise of the lobbying industry, which has unfortunately failed to meet these needs.⁸⁸

A. *Historical Petitioning as Access*

Access to lawmakers is a valuable and scarce resource, and its allocation has important implications for the lawmaking process. While today interested parties struggle to be heard amidst a cacophony of other voices, historically

⁸³ See KELLY, *supra* note 26, at 4.

⁸⁴ See, e.g., Kimball et al., *supra* note 3, at 10 (comparing the public's policy priorities with those of organized lobbying interests and finding the two "largely unrelated"); BAUMGARTNER ET AL., *supra* note 26, at 55 (same).

⁸⁵ See, e.g., McKinley, *supra* note 9, at 1154 (noting that at the time of the First Congress, "the petition process constituted the primary means by which individuals and loose associations engaged in the lawmaking process").

⁸⁶ See *infra* Section II.A.

⁸⁷ See *infra* Section II.B.

⁸⁸ See *infra* Section II.C.

those seeking redress from their government had to contend not only with competing interests, but also with the physical obstacle of transporting one's message—either personally or in writing—to the proper authority.⁸⁹ Then, as now, it was not enough to merely bring a grievance; for it to have any effect a petition also had to be heard, which required some affirmative action on the government's part. This Section traces how Parliament, the colonial assemblies, and the early Congress addressed the challenge of allocating lawmaker attention by formalizing access, adopting policies of receiving and hearing all petitions on equal footing, and establishing institutional mechanisms to support the steady flow of petitions.

The right to petition arose out of a crisis of access. In 1213, a group of English barons, displeased with King John's reign,⁹⁰ sought an audience to air their grievances and to petition the King to confirm the charter of rights issued by his predecessor, Henry I.⁹¹ Over the next two years, negotiations were marked by stalemate and threats of rebellion by the barons, culminating in the barons' capture of the city of London in 1215.⁹² Backed into a corner, King John agreed to meet with the barons a few weeks later, whereupon he signed the Magna Carta in exchange for the barons' promises of loyalty and financial support.⁹³

The Magna Carta established the right to petition in two senses. The first is that the document was itself a petition,⁹⁴ one that by its very signing set a precedent that the King could be compelled by his subjects to listen and to act.⁹⁵ The second is that the Magna Carta explicitly granted the barons a right to petition the King for grievances.⁹⁶ Realizing the Magna Carta's promise of

⁸⁹ See Mark, *supra* note 16, at 2165 n.33 (“Quite apart from political distance, physical distance and rudimentary transportation made frequent or regular appearances before the King quite difficult for all but the most local.”).

⁹⁰ See BRYCE LYON, *A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND* 312-15 (2d ed. 1980) (laying out the more salient reasons for the barons' displeasure).

⁹¹ J.C. HOLT, *THE MAKING OF MAGNA CARTA* 37-39 (1965).

⁹² The specific details of this period are understandably murky, and the historical literature is extensive. For two detailed accounts, see *id.*; LYON, *supra* note 90, at 310-15. For a more concise treatment, see NICHOLAS VINCENT, *MAGNA CARTA: A VERY SHORT INTRODUCTION* 54-71 (2012).

⁹³ See Spanbauer, *supra* note 13, at 22-23 (“In June of 1215 the barons, as representatives of the nobility, were granted a personal audience with the King at Runnymede to present their written petition in exchange for their promise to finance the government.”).

⁹⁴ See *id.* at 23 n.41 (“[The Magna Carta] was itself a petition. It established the framework for petitioning and formalized the procedure by which petitioning would occur.”).

⁹⁵ See LYON, *supra* note 90, at 323 (noting that “John's capitulation proved that kings could be brought to terms” and that “the importance of the Magna Carta was due chiefly to its enunciation of the fundamental principle that there was a body of law above the king”).

⁹⁶ *MAGNA CARTA*, para. 61 (1215) (Eng.), *reprinted and translated in* ARTHUR E. SUTHERLAND, *CONSTITUTIONALISM IN AMERICA: ORIGIN AND EVOLUTION OF FUNDAMENTAL IDEAS* 26 (1965) (“[I]f we [the Royal household] shall break any one of the articles of the peace or of this security, and, notice of the offense be given to four barons . . . the said four barons shall . . . petition to have that transgression redressed without delay.”)

access, however, would prove more difficult, in part because the only mechanism for enforcement was for the barons to take up arms and compel the King by force for every violation.⁹⁷ In the absence of a clear mechanism for obtaining access, money filled the void, and by the early fourteenth century a sort of pay-for-play system had emerged in which the Crown considered petitions in exchange for offers to fund the government.⁹⁸ As the financial needs of the Crown increased, the number of petitions that were accepted increased as well,⁹⁹ and promises of funding soon became a standard practice by which nobility and burgesses alike obtained access.¹⁰⁰

These petitions were heard by the King's counselors and other nobles who were called together periodically in what were then referred to as "parliaments."¹⁰¹ As the volume of petitions increased, this institutional apparatus grew in size and complexity, eventually culminating in the formal and independent Parliament familiar to us today.¹⁰² By the early fourteenth

⁹⁷ See Spanbauer, *supra* note 13, at 22 ("[T]he only method of enforcing the Magna Charta [sic] was baronial seizure of royal land and possessions each time John refused or delayed redress."); LYON, *supra* note 90, at 322 (observing that the Magna Carta had "no adequate enforcement" and that its "ultimate resort to arms was clumsy and all but legalized the right to rebel"); WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 129 (2d ed. 1914) ("The only expedient for compelling the King to keep his promises was clumsy and revolutionary . . . devised not so much to prevent the King from breaking faith as to punish him when he had done so.").

⁹⁸ See BERNARD SCHWARTZ, *THE ROOTS OF FREEDOM: A CONSTITUTIONAL HISTORY OF ENGLAND* 53-54 (1967) ("The king summoned a Parliament when he needed money. On the other hand, the king's subjects always had grievances for which they desired redress. What was more natural than for the two to be tied together . . . ?").

⁹⁹ See LYON, *supra* note 90, at 429-30 ("[T]he earliest function of the representatives was consent to taxation, that this continued as the chief function, and that through the right of consent to taxation the representatives won control over the crown."); Spanbauer, *supra* note 13, at 23 ("[T]he petitions these representatives presented on behalf of individuals and their communities were granted in exchange for commitments to make payments to the crown.").

¹⁰⁰ See LYON, *supra* note 90, at 424 (noting that the first documented parliament was attended by nearly seven hundred men including "approximately 50 of the king's council, 200 spiritual and lay barons, 150 representatives of the clergy, 74 knights from the counties, and 200 burgesses from the boroughs"); Spanbauer, *supra* note 13, at 23 ("Over time, this became the customary practice, and various segments of society, including knights and burgesses, were also granted audiences by the Crown . . .").

¹⁰¹ See 2 WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 285 (1880) ("[Petitions] furnished abundant work to the permanent council, and the special parliaments were probably the solemn occasions on which they were presented and discussed.").

¹⁰² See RONALD J. KROTOSZYNSKI, JR., *RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES* 85 (2012) ("As England transitioned from feudalism toward a centralized bureaucracy, coupled with the emergence of Parliament as a governing institution independent of the Crown, the status and frequency of petitioning blossomed."); Smith, *supra* note 16, at 1155 ("The breakdown of feudalism and the emergence of a strong sovereign with a centralized bureaucracy . . . provided the conditions under which petitioning developed its modern characteristics and in turn shaped the growth of the institutions of government that we know today."); Spanbauer, *supra* note

century under King Edward III, it was common practice to open Parliament by declaring the King's willingness to consider petitions,¹⁰³ and clear mechanisms were developed for sorting petitions and referring them to different parts of the government for resolution.¹⁰⁴ By the sixteenth century, petitions largely drove the legislative agenda in the House of Commons¹⁰⁵ with distinct processes mediating consideration and referral of petitions,¹⁰⁶ along with a Committee of Grievances tasked with this express purpose.¹⁰⁷ Increased demands for access to lawmakers were thus resolved through the creation of formal procedures and institutional supports.

Through formalization and institutionalization, the right to petition became concrete, affording petitioners real and meaningful access.¹⁰⁸ While the King could refuse to act on a petition, he and his counsellors were nonetheless obliged to read all petitions that were received.¹⁰⁹ This guarantee of consideration—of attention—was a defining characteristic of the right to petition as understood by the King and his subjects.¹¹⁰ One reason this came to be was the quasi-judicial nature of petitions.¹¹¹ Because petitions sought redress for both public and private grievances,¹¹² many took the form of

13, at 23 (“[The petitioning process] ultimately led to the development of Parliament, whose advice and consent was often sought by the royal government before it took action of any magnitude.”).

¹⁰³ See Smith, *supra* note 16, at 1155 (“Under Edward III, it became established practice at the opening of every session of parliament for the chancellor to declare the king’s willingness to consider petitions . . .”).

¹⁰⁴ See 2 RUDOLPH GNIEST, *THE HISTORY OF THE ENGLISH CONSTITUTION* 14-15 (Philip A. Ashworth trans., G.P. Putnam’s Sons, 1886) (noting that as early as Henry IV, petitions would be “directed sometimes to the King, sometimes to the King in council, sometime to the King, Lords, and Commons, sometimes to the Lords and Commons, and sometimes to the Commons alone.”); STUBBS, *supra* note 101, at 286, 623 (noting that “the machinery for receiving and considering such petitions as came from private individuals or separate communities was perfected” under Edward I, who had established a system of delegating certain petitions to those courts “to which the matter in question properly belonged”).

¹⁰⁵ See Mark, *supra* note 16, at 2167 (“[Petitions] quickly came to dominate Parliament’s calendar—indeed, they often became the legislative agenda.”)

¹⁰⁶ See *id.* at 2167 n.42 (noting that the house of Commons “had become the receiver of most petitions” and had “instituted processes for considering petitions in committee or referring them to the courts”)

¹⁰⁷ See 1 WILLIAM R. ANSON, *THE LAW AND CUSTOM OF THE CONSTITUTION* 311 (1886) (noting the 1571 appointment of “[a] Committee of Grievances, to which petitions were referred”).

¹⁰⁸ See Mark, *supra* note 16, at 2165 (noting that petitions were “the most convenient and the most effective method of calling attention to a grievance”).

¹⁰⁹ *Id.* at 2168 (noting that “subjects came to expect that their petitions would be received and heard”).

¹¹⁰ See *id.* at 2168-70 (discussing the expectation that all petitions would be received and heard and how this reflected a “web of mutual obligation” by which the people recognized the legitimate authority of the Crown to grant petitions in exchange for the King’s acknowledgment of his own duty to hear his subjects).

¹¹¹ See Colin Leys, *Petitioning in the Nineteenth and Twentieth Centuries*, 3 *POL. STUD.* 45, 45 (1955) (“It is clear that originally petitioning was a quasi-judicial institution.”); Mark, *supra* note 16, at 2168 (noting that Parliament’s sense of obligation to hear all petitions “can be explained in part by the quasi-judicial origins of the instrument and the quasi-judicial role of Parliament”).

¹¹² See Mark, *supra* note 16, at 2166-67 (describing both public and private petitions in England).

disputes which might be resolved by either a court or a private bill.¹¹³ Parliament, however, drew no formal distinctions between petitions for public grievances and those seeking private redress, and so treated all the same.¹¹⁴ Another reason was that Parliament had come to condition funding on the King's consideration and redress of petitions.¹¹⁵ As a result, not only did the King have a financial incentive to respond to petitions,¹¹⁶ but Parliament also had a political incentive to accept more petitions to expand its own power.¹¹⁷ Over time, the consistent practice of considering all petitions evolved into a sense of obligation on the part of the government.¹¹⁸

As petitioning became more formal and institutionalized, the access it provided became more egalitarian. While the first petitions were largely secured by nobility,¹¹⁹ by the thirteenth and fourteen centuries a wide range of players participated in the petitioning process, including merchants, scholars, and even groups who lacked the right to vote, such as prisoners.¹²⁰ In the seventeenth century, the right to petition was designated as an individual right by King James I,¹²¹ and subsequently affirmed as a constitutional right by the English Bill of Rights following the Glorious Revolution of 1688.¹²² Unlike political rights—such as voting—which were reserved to certain classes, the right to petition was a civil right which was extended to all.¹²³ Thus, through the petition process, the attention of

¹¹³ See *id.* at 2168 (describing the quasi-judicial nature of petitions, including those seeking private redress).

¹¹⁴ See *id.* (noting that public and private petitions “took the same form” and “were treated in a similar fashion”).

¹¹⁵ See *id.* at 2165 n.31 (“[W]hen the King convened Parliament to obtain funds, Parliament conditioned the provision of funds on the granting of petitions.”). Moreover, King Henry V agreed in 1414 to refrain from enacting legislative responses to petitions contrary to Parliament’s wishes. *Id.*

¹¹⁶ See *id.* at 2165, n.31 (“Thus the King was usually, though not always, left to devise methods to implement the requested redress.”).

¹¹⁷ See *id.* at 2167-68 (“Parliament thus had an interest in considering all petitions because any given grievance could ground an attempt to increase Parliament’s power at the expense of royal authority.”)

¹¹⁸ See *supra* note 110.

¹¹⁹ See *supra* notes 98–100 and accompanying text.

¹²⁰ See Mark, *supra* note 16, at 2169-70 (listing several groups that engaged in petitioning during this period and noting that “an extremely wide band of English society participated in politics by petitioning for redress of grievances, without question a wider spectrum of society than that with the franchise”).

¹²¹ See 5 PARLIAMENTARY HISTORY OF ENGLAND app. ccxiii (1809) (Proclamation of July 10, 1624) (granting “the Right of his Subjects to make their immediate Addresses to him by petition”).

¹²² See Smith, *supra* note 16, at 1160 (noting that the Glorious Revolution of 1688 led to “the Bill of Rights that fully confirmed the right of petition as an element of the British constitution”); BILL OF RIGHTS of 1689, para. 23 (Eng.) (“That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal”)

¹²³ See McKinley, *supra* note 9, at 1182 (noting the distinction between political and civil rights and observing that in nineteenth-century America, political rights included “the rights to votes, to hold public office, and to serve on juries,” while civil rights included “a broad range of rights and freedoms, including the freedom of speech, freedom to worship, the right to contract, the right to hold property,

Parliament and the Crown could be captured, at least momentarily, by nearly any subject of England, regardless of wealth or political power.

The story of the right to petition in England offers insights into contemporary efforts to allocate government access. Initially, the right was abstract and unenforceable, accompanied by neither a way to oblige the King nor a clear system for how access would be granted or obtained.¹²⁴ From there, an informal and money-driven system of influence emerged, one that disproportionately favored elites (the parallels to our current lobbying system should be apparent by now).¹²⁵ Over time, however, as formal channels and institutions were established to support the petitioning process, the right to petition grew more egalitarian, resulting in a quasi-procedural right of access accompanied by guarantees of consideration and response.¹²⁶

It was this version of petitioning that crossed the Atlantic and took root in America. Colonial charters secured the right to colonists¹²⁷ and colonists regularly petitioned colonial assemblies,¹²⁸ which in turn received and referred these petitions to committees on equal footing.¹²⁹ More importantly, the colonies—themselves an unenfranchised minority unrepresented in Parliament—depended on petitioning as a means of securing access to the Crown.¹³⁰ To understand the importance the colonists placed on the right to

and the right to sue and be sued”); Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 *LOY. L.A. L. REV.* 1207, 1208-10 (1992) (noting the same distinction).

¹²⁴ See *supra* notes 97-100 and accompanying text.

¹²⁵ See *supra* Section I.A.

¹²⁶ See *supra* notes 108-123 and accompanying text.

¹²⁷ See Mark, *supra* note 16, at 2174 (“[English colonists] understood petitioning as the foundation of politics and of individual and collective participation in politics, warranting the highest degree of protection.”); Don L. Smith, *The Right to Petition for Redress of Grievances: Constitutional Development and Interpretation 46* (August 1971) (Ph.D. dissertation, Texas Tech University), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.899.7179&rep=rep1&type=pdf> [<https://perma.cc/7Z9H-DZSV>] (“[C]ontent analysis of the colonial charters shows that petition appears, either specifically or as one of the ‘ancient liberties’ of Englishmen, in over fifty provisions.”).

¹²⁸ See KROTOSZYNSKI, *supra* note 102, at 105-07 (noting the prevalence of petitioning and their central role in the lawmaking process); Mark, *supra* note 16, at 2176-78 (noting that “many of the colonial assemblies explicitly affirmed the colonists’ right to petition” and citing examples of contemporary exercise of the right); Higginson, *supra* note 16, at 145 n.10 (noting the prevalence of colonial petitioning and observing that “between 1750 and 1800 the [Virginia] legislature received on average over 200 petitions per session”).

¹²⁹ See RAYMOND C. BAILEY, *POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA* 32-34 (1979) (noting that from 1700-1800 the membership on the Virginia Committee of Propositions and Grievances increased dramatically from ten members to 173, constituting nearly every member of the legislature); MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 210 (1943) (“All assemblies expected petitions, and many resorted to the committee as a method of dealing with them.”).

¹³⁰ See Smith, *supra* note 127, at 57-68 (noting repeated petitions from colonial government to Parliament in response to, among others, the Sugar Act of 1764, the proposed Stamp Act of 1765, the Townshend Acts of 1767, and the Intolerable Acts of 1774, the last of which would eventually lead to the first Continental Congress).

petition, one need look no further than the Declaration of Independence, which concludes its list of grievances by noting that “[i]n 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.”¹³¹ Indeed, prior to the Declaration, the Continental Congress twice petitioned King George III and was twice ignored.¹³² The colonists’ outrage reflects both the importance of petitioning during this period and the contemporary understanding that the right did not merely protect a particular form of political expression but also included an expectation of consideration and response—i.e., access.¹³³

Following independence, the right to petition persisted. While the Articles of Confederation mention the right only with respect to states,¹³⁴ the individual right was expressly protected by a majority of state constitutions¹³⁵ and was included among the amendments proposed by James Madison in 1789 that ultimately became the Bill of Rights.¹³⁶ The right to petition produced relatively little debate during discussions in Congress over the First Amendment, so entrenched was it by that point that its inclusion as a component of the new representative structure would have been obvious and non-controversial.¹³⁷

Two elements stand out from the historical record, however, and provide some insight into the right’s intended scope and function. The first was the decision to protect the right to petition the entire government, as opposed to

¹³¹ The Declaration of Independence para. 4 (U.S. 1776).

¹³² See 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 115-22 (Oct. 25, 1774) (Worthington Chauncey Ford ed., 1904) (petition to King); *id.* at 63-72 (Oct. 14, 1774) (resolution protesting Parliament’s interference with right of petition); 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 158-62 (July 8, 1775) (Worthington Chauncey Ford ed., 1905) (petition to King). The first of these petitions was “neglected” by Parliament, while the second, the “Olive Branch Petition,” was formally refused by the King. See PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 23-25 (1997).

¹³³ See Higginson, *supra* note 16, at 155-56.

¹³⁴ ARTICLES OF CONFEDERATION of 1781, art. IX, paras. 2-3.

¹³⁵ See Smith, *supra* note 127, at 67-68 (locating an explicit right to petition in the original state constitutions of North Carolina, Pennsylvania, Vermont, New Hampshire, Massachusetts, Maryland, New Jersey, Georgia, as well as the protection of the right by Virginia, Rhode Island, and Connecticut, noting that only Delaware, New York, and South Carolina “failed to make provision for the protection of petition”).

¹³⁶ See 1 ANNALS OF CONG. 440-68 (1789) (Joseph Gales ed., 1834).

¹³⁷ See KROTOSZYNSKI, *supra* note 102, at 109 (noting that the right to petition “would have been viewed at the time as self-evident, a total non-issue”); Richard R. John & Christopher J. Young, *Rites of Passage*, in THE HOUSE AND SENATE IN THE 1790S: PETITIONING, LOBBYING, AND INSTITUTIONAL DEVELOPMENT 103 (Kenneth R. Bowling & Donald R. Kennon eds., 2002) [hereinafter HOUSE & SENATE] (“In the Federalist era, the right to petition was relatively non-controversial—enjoying, as it did, an honored place in English constitutional law.”); McKinley, *supra* note 9, at 1147 (2016) (“Given the ubiquity of the practice in eighteenth-century America, it was taken for granted that the U.S. Constitution would include the right to petition in its later-added Bill of Rights.”).

merely the legislature.¹³⁸ This choice reflected British and colonial practice and also provided a means of petitioning government officials not otherwise accountable to citizens via the electoral process.¹³⁹ The second was Congress' rejection of a right to instruction, which would have bound representatives to the will of the electorate.¹⁴⁰ While this rejection was likely motivated in part by practical considerations and the desire for legislative independence,¹⁴¹ its effect was to distinguish the right to petition from the electoral process: while electoral majorities would determine representation, all petitioners had a right to reception and consideration of their petitions, regardless of political power or majority status.¹⁴²

During the early years of the Republic, the right to petition was considered highly important,¹⁴³ and from the beginning petitioning operated to allocate lawmaker attention and drive the legislative agenda. Even before the passage of the First Amendment, Congress received hundreds of petitions,¹⁴⁴ and by 1795 the number of petitions had swelled such that one contemporary newspaper remarked that "[t]he principal part of [Congress's] time has been taken up in reading and referring petitions."¹⁴⁵ These petitions went far beyond private grievances and addressed matters including commerce,¹⁴⁶ public credit,¹⁴⁷ the organization of the federal government,¹⁴⁸ and the institution of slavery.¹⁴⁹ Each was formally received by Congress and

¹³⁸ See Spanbauer, *supra* note 13, at 40 ("The most significant change to the amendment for the right to petition was the substitution of the word 'government' for the word 'legislature.'").

¹³⁹ See *id.* (discussing "a broad vision of petitioning").

¹⁴⁰ See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1154-56 (1991) (noting the First Amendment's rejection of a right to instruction and distinguishing instruction from petitioning).

¹⁴¹ See McKinley, *supra* note 9, at 1152 (noting that a right to instruction would "disrupt[] the deliberative and independent lawmaking process envisioned by Article I.>").

¹⁴² See *id.* at 1193 ("The history of petitioning and the specific text of the Petition Clause counsel against conflation of the electoral and the legislative processes.>").

¹⁴³ See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 25 (1994) ("First and foremost was the right to vote Next in importance . . . was the right to petition").

¹⁴⁴ See William C. diGiacomantonio, *Petitioners and Their Grievances: A View from the First Federal Congress*, in *HOUSE & SENATE*, *supra* note 137, at 31 (noting that the first Congress received "more than six hundred petitions").

¹⁴⁵ See David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 LAW & HIST. REV. 113, 117 (1991).

¹⁴⁶ See diGiacomantonio, *supra* note 144, at 31 (noting various petitions submitted to Congress regarding trade policy, including the very first petition, which was submitted by the "tradesmen, manufacturers, and others of Baltimore").

¹⁴⁷ See *id.* at 35 (noting several petitions concerned with Congress's management of the national debt).

¹⁴⁸ See *id.* at 44-46 (describing petitions regarding the location of the federal capital and the federal courts, the management of the post office, and an investigation into the actions of a sitting member of Congress).

¹⁴⁹ See *id.* at 36-38 (noting several abolitionist petitions submitted to the first Congress).

then referred to particular committees or to the executive branch.¹⁵⁰ As in England and the colonial assemblies, the first Congress heard and considered petitions from all, including unenfranchised groups such as women, Blacks, and Native Americans.¹⁵¹

The right to petition was not just formally egalitarian; it was practically so. The only requirement to be heard was the cost of drafting and filing a petition, and while there were certain formal requirements not unlike court filings,¹⁵² and lawyers were occasionally hired to assist with drafting and filing,¹⁵³ these minor obstacles likely did not exclude would-be petitioners from exercising their rights.¹⁵⁴ For decades, it was standard procedure for petitions to be formally presented to Congress and then referred to an appropriate committee¹⁵⁵ or to an appropriate executive agency.¹⁵⁶ This process continued well into the 1830s and 1840s, whereupon a Congress divided upon the issue of slavery passed a series of resolutions limiting

¹⁵⁰ See STAFF OF H. COMM. ON ENERGY & COM., 99TH CONG., PETITIONS, MEMORIAL AND OTHER DOCUMENTS SUBMITTED FOR THE CONSIDERATION OF CONGRESS, MARCH 7, 1789 TO DECEMBER 14, 1795, at 361-362 (Comm. Print 1986) (listing various committees and executive offices to which petitioners were referred).

¹⁵¹ See McKinley, *supra* note 9, at 1152-53 (noting that women and Native Americans were among the petitioners heard by the first Congress); Mark, *supra* note 16, at 2182 (describing various unenfranchised groups, including men, women, Blacks and Native Americans, who made use of the petition process).

¹⁵² See, e.g., Mark, *supra* note 16, at 2171 (describing the formal requirements of seventeenth century petitions, including address specifications).

¹⁵³ See Jeffrey L. Pasley, *Private Access and Public Power: Gentility and Lobbying in the Early Congress*, in HOUSE & SENATE, *supra* note 137, at 62 (providing examples of attorneys hired to assist with various petitions).

¹⁵⁴ It is worth noting that it would have been easy for lawmakers to make petitioning more difficult and thus exclude certain groups from participating. See Mark, *supra* note 16, at 2220 (noting a nineteenth century requirement that conditioned Congress' consideration of petitions on them being "signed only or primarily by those legitimately allowed to request a redress of grievances," a requirement whose practical effect was to "delimit the sphere of individuals" who could participate, including free Blacks, women, and other marginalized groups during the "gag-rule" period of congressional backlash to a wave of anti-slavery petitions). The general trend, however, has been towards fewer requirements. *Id.* at 2228 (describing how petitions grew less formal during the twentieth century).

¹⁵⁵ See Frederick, *supra* note 145, at 118 ("[T]he normal practice in the decades between the ratification of the first amendment and the debates of the 1830s was for Congress to receive petitions and refer them to committees."); John P. Nields, *Right of Petition*, in LECTURES ON HISTORY AND GOVERNMENT: SERIES ONE 1923-1924, at 135 (Univ. of Del. Dep'ts of Hist. & Pol. Sci. 1924) ("[D]own to 1834 the custom or procedure in Congress was to receive, hear and then refer petitions to appropriate committees.").

¹⁵⁶ See RALPH VOLNEY HARLOW, THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825, at 135 (1917) (noting that "Congress seemed to feel that the head of a department would answer [petitions] just as well as a committee" and providing examples of petitions referred to cabinet members in the 1790s).

consideration of petitions on the subject.¹⁵⁷ While some point to these so-called “gag rules” as the end of the formal petition process,¹⁵⁸ more recent scholarship reveals that Congress continued to receive and respond to petitions well into the twentieth century.¹⁵⁹

The formal petition process addressed the challenge of allocating access to lawmakers by extending the right to petition as broadly as possible and by receiving and considering all petitions on equal footing. This practice generated an enormous volume of petitions,¹⁶⁰ and the petition process time and again responded by establishing formal institutions such as committees to manage the workload.¹⁶¹ As we will see, it was only when these institutions were no longer able to support the needs of the government that formal petitioning began to decline.¹⁶²

B. *Historical Petitioning as Information*

While petitioning’s ubiquity and longevity may in part be explained by its value to petitioners, petitioning also functioned as a primary means of gathering information, highlighting important issues, and facilitating effective governance. In the thirteenth century, King Edward I embraced petitions as a means of exercising greater authority over local affairs,¹⁶³ and

¹⁵⁷ See CONG. GLOBE, 26th Cong., 1st Sess. 150 (1840) (noting the House of Representatives statement that it would no longer receive petitions or resolutions “praying the abolition of slavery”); Higginson, *supra* note 16, at 158-162 (describing Congress’s response to aggressive abolitionist petitioning and the passage of the “gag rules”).

¹⁵⁸ See Higginson, *supra* note 16, at 165 (ascribing the “abrupt defeat” of petitioning to its “misfortune [of becoming] inextricably entangled in the slavery crisis”); Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 751 (1999) (“The so-called gag rule . . . brought this era of petitioning to an end.”).

¹⁵⁹ See Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 32-35 (2011) (noting the gag rule’s overstated impact); John & Young, *supra* note 137, at 137-38 (noting that from the 1830s to the 1910s, “the papers of the House and Senate contain hundreds of thousands of petitions on an extraordinary range of topics”); Benjamin Schmeer, *Representation Replaced: How Congressional Petitions Substitute for Direct Elections* 18 (Sept. 12, 2015) (unpublished manuscript) (on file with author) (analyzing data on petitioning rates from 1881–1949).

¹⁶⁰ See, e.g., Mark, *supra* note 16, at 2214-15 (noting several accounts of the massive number of petitions filed in colonial assemblies while also noting that these figures have perhaps been overstated by historians).

¹⁶¹ See *id.* at 2214 (noting that solutions to increased petitioning “replicate themselves from body to body, from medieval Parliament through late eighteenth-century colonial assemblies” and noting committees in particular).

¹⁶² See *infra* Section II.C.

¹⁶³ See GWILYM DODD, *JUSTICE AND GRACE: PRIVATE PETITIONING AND THE ENGLISH PARLIAMENT IN THE LATE MIDDLE AGES* 32 (2007) (noting that Edward I is likely to have viewed petitioning “in positive terms, as an opportunity to promote royal interests and significantly increase his own personal authority”).

under his reign Parliament began to convene regularly to hear them.¹⁶⁴ By providing redress to local grievances, the Crown could keep tabs on its servants, increase its legitimacy, and govern effectively at a local level.¹⁶⁵ The Crown's interest in local information is evident not only from its ongoing acceptance of petitions but also from its direct solicitation of information on local matters.¹⁶⁶ As Gwilym Dodd observes, "It was not enough for a petitioner simply to state that he had a grievance to be resolved; he had to provide enough detail to make it incumbent upon the Crown to pursue the case and reach a judgement [*sic*]."¹⁶⁷ To this effect, petitions during this period often contained specific details as to persons, times, dates, geographical details, land transactions, legal claims, and judicial proceedings.¹⁶⁸

Over time, the informational dimension of petitioning became a major justification for treating petitioning as a civil right, rather than a mere practice.¹⁶⁹ The 1688 *Trial of the Seven Bishops*—a case that was itself a precursor to the Glorious Revolution and the inclusion of the right to petition in the English Bill of Rights—is instructive on this point. King James II, the Catholic head of the Protestant Church of England, issued a Declaration of Indulgence suspending religious penal laws and ordered the clergy to read the Declaration from the pulpit.¹⁷⁰ This order was widely protested,¹⁷¹ and the Archbishop of Canterbury, along with six other bishops, submitted a petition

¹⁶⁴ See *id.* at 22-23 (noting that under Edward I, Parliament "fitted into a set pattern of regular meetings" to handle the "constant stream" of petitions from localities). Under King Henry III, these meetings had been carried out on an ad-hoc basis, usually prompted by the need for taxation or information. *Id.* (noting that these meetings "were determined by the crown's occasional need for taxation and/or its intermittent desire to consult the political community on important matters of policy" (citing R. F. TREHARNE, *SIMON DE MONTFORT AND BARONIAL REFORM: THIRTEENTH-CENTURY ESSAYS* 209 (E.B. Fryde ed., 1986)). Notably, the first recorded gathering of elected knights by Henry III at Oxford in 1227 was called to gather information on local sheriffs. See LYON, *supra* note 90, at 416 ("The main purpose of the meeting seems to have been to secure information.").

¹⁶⁵ See DODD, *supra* note 163, at 33 ("[B]y introducing a legal channel by which men (or women) of lesser status could seek redress . . . Edward not only made local government more accountable, but in doing so significantly increased the power and control that the Crown wielded over its servants.").

¹⁶⁶ See *id.* at 32-33 (citing instances of Edward I soliciting information on local officials' misdeeds); *id.* at 295 (noting instances from later reigns of the Crown responding to petitions with requests for more information).

¹⁶⁷ *Id.* at 295.

¹⁶⁸ See *id.* at 296.

¹⁶⁹ See David Zaret, *Petitions and the "Invention" of Public Opinion in the English Revolution*, 101 *AM. J. SOC.* 1497, 1515 (1996) (noting that the right to petition was regularly defended in the seventeenth century as "freedom of information," as a means of "[c]onveying information," and as providing for the government's "better information," while criticizing those who would refuse to hear petitions as "scorn[ing] information" (internal quotes omitted)).

¹⁷⁰ See His Majesty's Gracious Declaration to All His Loving Subjects for Liberty of Conscience (given at Court of Whitehall April 1687 and May 1688), reprinted in 12 *Howell St. Tr.* 234, 234-39 (1812).

¹⁷¹ See Schnapper, *supra* note 16, at 313 ("That directive was widely disobeyed . . .").

explaining why they felt the King's order was unlawful and requesting that they be excused from it.¹⁷² The bishops were arrested and charged with seditious libel for their petition.¹⁷³

It is noteworthy that at this time in England there was no general right to freedom of speech.¹⁷⁴ The Bishops' counsel therefore rested its defense on the distinct right to petition.¹⁷⁵ They raised two rationales for why petitions ought to be afforded greater protection. First, they argued that petitioning was the primary, if not sole, means by which aggrieved citizens might seek redress—a matter of access.¹⁷⁶ Second, they argued that petitions were a fundamental source of information to facilitate policymaking and prevent the Crown from taking wrongful action. In their petition to King James II, for example, the Bishops had provided information about a 1558 statute¹⁷⁷ that they claimed made the King's Declaration unlawful.¹⁷⁸ The Bishops' counsel cautioned that infringing upon the right to petition threatened the free flow of information to the Crown, asking Parliament to “suppose that there might be a king of England that should be misled . . . should be environed with counselors that had given him evil advice . . . [and] would not permit . . . the great men of the kingdom to offer the king their advice”¹⁷⁹ In such a situation, the bishops' counsel argued, it was the duty of the Bishops to provide correcting information to prevent the King from taking wrongful action.¹⁸⁰ The Bishops were ultimately acquitted,¹⁸¹ and King James II's attempt to infringe upon the right to petition led both to the right being enshrined in the 1689 bill of rights¹⁸² and

¹⁷² See *The Trial of the Seven Bishops for Publishing a Libel*, 12 Howell St. Tr. at 420-28.

¹⁷³ *Id.* at 369-70.

¹⁷⁴ See Schnapper, *supra* note 16, at 318 (“In the late seventeenth century, although the existence of a right to petition was widely accepted and understood, there was no comparable recognition of any general right of freedom of speech.”).

¹⁷⁵ 12 Howell St. Tr. at 369-70 (arguing that it was “the right of all people that apprehend themselves aggrieved, to approach his majesty by petition”).

¹⁷⁶ See *id.* at 393-94 (arguing that without the right to petition, “men must have grievances upon them, and yet they not to be admitted to seek relief”).

¹⁷⁷ See An Act for the Uniformity of Common Prayer and Service in the Church, and Administration of the Sacraments, 1 Eliz. 1 ch. 2 § 15 (1558), reprinted in 6 Statutes at Large 117, 120 (Danby Pickering ed., 1763) (requiring the clergy to “endeavour themselves to the uttermost of their knowledges, that the due and true execution [of the Act] may be had throughout their diocese and charges”).

¹⁷⁸ 12 Howell St. Tr. at 364 (noting that the 1558 Act made the bishops “special guardians” and that James II's Declaration commanded them to “do an act relating to their ecclesiastical function . . . and how could they in conscience do it, when they thought part of the declaration was not according to law?”)

¹⁷⁹ *Id.* at 368-69

¹⁸⁰ *Id.* at 365 (arguing that the Bishops had “done nothing but [their] duty”); *id.* at 369 (asking, if the Bishops “humbly apply themselves to the king, and offer him their advice, where is the crime?”); *id.* at 371 (“For I never thought it, nor hath it ever, sure, been thought by any body else, to be a crime to petition the king: for the king may be mistaken . . .”).

¹⁸¹ *Id.* at 430.

¹⁸² See Schnapper, *supra* note 16, at 313 (noting that the drafters of the 1689 Bill of Rights were well-acquainted with the trial, as five of the drafters had themselves served as defense counsel for the bishops.)

James II's deposition.¹⁸³ In acquitting the Bishops, Parliament recognized the role that the right to petition played in preventing the government from making decisions based on limited information or information skewed by a small circle of counsellors.¹⁸⁴ These institutional concerns, prominent in seventeenth-century England, remain pressing today.¹⁸⁵

While Parliament relied on petitions to complement its own knowledge and expertise, for legislatures in colonial America, petitions played an even more essential role as a primary source of information for lawmakers. In contrast to members of Parliament, colonial representatives in the early eighteenth century were mostly volunteer farmers untrained in law or policy who had neither the time nor the expertise to gather information on important issues or to develop policies.¹⁸⁶ Because they lacked sources of knowledge or examples of well-crafted laws from which to work,¹⁸⁷ early assemblies often produced poorly worded and unworkable legislation.¹⁸⁸ Over time, however, petitioning became a valuable source of information,¹⁸⁹ and as the number of petitions increased,¹⁹⁰ they began to drive the legislative agenda.¹⁹¹ By incorporating information provided in petitions, colonial legislatures gauged constituent opinion and facilitated legislation covering a

¹⁸³ *Id.* at 313-14 (noting that the case was “a major step towards the Glorious Revolution and the deposing of James II”).

¹⁸⁴ See Schnapper, *supra* note 16, at 344 (describing Parliament’s recognition of the “institutional problem” presented by the restriction of information provided by petitions).

¹⁸⁵ See *id.* (noting the dangers that might have arisen if libel actions could have been brought by “racist southern officials” against those complaining of racial discrimination, or if a nominee for federal office could have brought a similar action against statements made in testimony during Senate confirmation hearings).

¹⁸⁶ See Higginson, *supra* note 16, at 153 (“Few representatives were trained as legislators; most were farmers, holding short terms of office and busy with private responsibilities. They had neither time nor expertise to discover independently the colony’s woes or to determine solutions.”).

¹⁸⁷ See Alison G. Olson, *Eighteenth-Century Colonial Legislatures and Their Constituents*, 79 J. AM. HIST. 543, 549 (“There were few trained lawyers in early colonial society, and hence in the legislatures, assemblymen had few precedents to guide them . . . [or] sources of information outside the capital cities.”).

¹⁸⁸ See *id.* (“Accordingly, they bungled issues by writing impractical or incomprehensible laws. Towns were legislated into existence at inappropriate sites; wages were regulated in areas where laborers easily moved out onto available farmland; the price of bread was assigned on sizes the bakers did not sell.”).

¹⁸⁹ See *id.* at 556-58 (noting the increasing role played by petitions and the information provided); Higginson, *supra* note 16, at 153 (“In communities that lacked developed media or party structures and that provided limited suffrage, petitioning supplied vital information to assemblies.”).

¹⁹⁰ See BAILEY, *supra* note 80, at 62 tbl.5; Olson, *supra* note 187, at 556-58

¹⁹¹ See Olson, *supra* note 187, at 556 (estimating that approximately half of all laws passed by colonial assemblies during the eighteenth century originated as petitions); BAILEY, *supra* note 80, at 64; THOMAS L. PURVIS, PROPRIETORS, PATRONAGE, AND PAPER MONEY: LEGISLATIVE POLITICS IN NEW JERSEY, 1703-1776, at 178 tbl.7.1 (1986); ALAN TULLY, WILLIAM PENN’S LEGACY: POLITICS AND SOCIAL STRUCTURE IN PROVINCIAL PENNSYLVANIA, 1726-1755, at 99 (1977).

wide range of issues.¹⁹² Petitioning also played a significant role in shining a light on corruption and official misconduct.¹⁹³

Petitions continued to be a source of vital information at the first Congress, providing significant levels of detail, and included supporting documents, maps, and other data.¹⁹⁴ Importantly, the egalitarian nature of petitioning directly impacted the information that was available to lawmakers at the Founding. Because the right to petition extended further than the right to vote, petitions included information from disenfranchised and unrepresented groups such as women, Native Americans, prisoners, and enslaved persons.¹⁹⁵ Likewise, without information in petitions, Congress and colonial legislatures would have been unaware of and thus unable to address the needs of poor localities or marginalized groups such as orphans, debtors, and the mentally ill.¹⁹⁶ The fact that petitions were considered irrespective of their source meant that the information available to legislators—both the issues raised and perspectives on those issues—was also inclusive, reflecting the views of the politically powerful and the unenfranchised alike. Thus, the allocation of government access and the information available to lawmakers are linked. Parliament, colonial assemblies, and the early Congress provided a near-universal right to petition and considered all petitions on equal footing. In exchange, petitions provided these governments with broad and inclusive information.

¹⁹² See Higginson, *supra* note 16, at 154 (“Information from petitions also led to foundings of new towns and counties, settlements of boundary disputes and efforts at internal improvements.” (footnotes omitted)).

¹⁹³ See *id.* (“Maladministration or corruption among public agents, excessive taxation, injustices perpetrated by courts and misconduct by local officials . . . were brought to public attention by petitioners’ ire.”).

¹⁹⁴ See diGiacomantonio, *supra* note 144, at 46 (noting the use of additional information in petitions). One illustrative example was a petitioning campaign led by Abolitionist Quakers that submitting so many petitions that a full House committee was created specifically to receive them. See William C. diGiacomantonio, “For the Gratification of a Volunteering Society”: *Antislavery and Pressure Group Politics in the First Federal Congress*, 15 J. EARLY REPUBLIC 169, 179 (1995) (“[M]ore is known about the House committee on the Quaker petitions than about any other committee in the First Congress.”). This committee requested “all the [i]nformation they [could] obtain,” and the Quakers in response provided a “small library of antislavery literature.” *Id.* at 179-80 (quoting Letter from John Pemberton to James Pemberton, Feb. 15, 1790, Pennsylvania Abolition Society Collection). *Id.* at 180 n.17 (detailing the many volumes delivered to the House committee). Quaker petitioners also crafted and presented their arguments directly to the committee through oral testimony, supplemental documents, and feedback on an unpublished draft of the committee’s report. See *id.* at 181; Pasley, *supra* note 153, at 64-65.

¹⁹⁵ See Higginson, *supra* note 16, at 153 (“[U]nrepresented groups—notably woman, felons, Indians, and in some cases, slaves—represented themselves and voiced grievances through petitions.”).

¹⁹⁶ See *id.* at 153 (“Public funds to reimburse those who cared for orphans, the sick, or the insane, assistance to towns in times of hardship, and protection of debtors all depended upon the continual flow of petitions from individuals and towns.” (citation omitted)).

C. Petitioning's Decline and the Rise of Lobbying

Beginning in the late nineteenth century, the formal processes and institutions that were characteristic of petitioning gradually eroded, providing an opening for the rise of our modern system of lobbying.¹⁹⁷ But where the old system allocated access on equal footing, the new system picked as its winners those with wealth or political power.¹⁹⁸ Similarly, while petitioning provided lawmakers with information that was broad and inclusive of all voices, the information provided by lobbyists disproportionately reflected powerful interests.¹⁹⁹ The most significant change, however, was the failure of those institutions within Congress that had facilitated petitioning by receiving, referring, and resolving petitions to scale alongside the expansion of the federal government.²⁰⁰ Without these formal mechanisms for allocating lawmaker access, our modern pay-for-play system of informal lobbying emerged to fill the void.

This Section tracks the decline of formal petition and the rise of lobbying through the lens of access and information and highlights both the post-Civil War expansion of the federal government and the inability of antebellum institutions to scale accordingly.²⁰¹ This expansion of government facilitated lobbying's rise in two ways: first, an increase in the sheer volume of government business created allocative pressures which antebellum institutions couldn't accommodate; second, the complexities of a growing nation and economy increased the informational needs of lawmakers who came to rely on well-resourced and expert lobbyists.

One reason why petitioning was so effective at allocating government access was that, prior to the Civil War, the government's workload was relatively light and there were fewer demands on lawmaker attention.²⁰² After

¹⁹⁷ See McKinley, *supra* note 9, at 1156 (noting that “[t]he rise of our modern, ubiquitous lobbying culture did not occur until the mid- to late-nineteenth century” and that lobbying only fully supplanted petitioning “likely some time during the Progressive Era”); Schneer, *supra* note 159, at 13-14 fig.1 (tracking the gradual decline of petitioning during the nineteenth and twentieth centuries).

¹⁹⁸ See, e.g., Pasley, *supra* note 153, at 61 (“Since only the wealthiest institutions and individuals could afford such extra representation, the polity seemed to be losing some of its democratic character.”).

¹⁹⁹ See, e.g., David J. Rothman, *Politics and Power: The United States Senate 1869-1901*, at 202-04 (1966).

²⁰⁰ See *infra* notes 204–211 and accompanying text.

²⁰¹ Several scholars have identified this period as one in which the petition process began to decline. See, e.g., Pasley, *supra* note 153, at 60. Other scholars, however, note how petitioning persisted in a diminished form well into the twentieth century and how petitioning was incorporated into the emerging administrative state. See, e.g., El-Haj, *supra* note 159, at 32-35 (noting the persistence of petitioning into the twentieth century); John & Young, *supra* note 137, at 137-38 (same); McKinley, *supra* note 9, at 1201 n.465 (highlighting how the emergence of the administrative state might factor into the historical analysis).

²⁰² See Pasley, *supra* note 153, at 60 (“[T]he congressional workload was small enough in the 1790s that a mere paper petition often really was enough to get the government’s attention.”).

the Founding, members of Congress had attention to spare, and could thus devote meaningful consideration to all manner of petitions, even those from individual citizens.²⁰³ The workload of Congress following the Civil War, however, was vastly different from that of the First Congress; while Congress considered just 147 bills in the 1790s, by the turn of the century it faced more than 28,000.²⁰⁴ This increase can be attributed to several factors. First, the country was growing both in population and landmass, and Congress' routine responsibilities scaled accordingly.²⁰⁵ Second, the rise of new technologies and industries, including railroads, demanded federal entry into areas previously handled by state and local governments due to their complexity and increasingly interstate nature.²⁰⁶ Third, during this time Congress turned its attention to social issues such as education, labor, Native rights, and the interests of freedmen, which further expanded its workload.²⁰⁷

The expansion of the federal government meant not only that Congress had more to do, but also that more of it was likely to affect the everyday lives of constituents who, in turn, sought greater access.²⁰⁸ As a result, members of Congress began to face unprecedented demands on their time and attention.²⁰⁹ The mechanisms of the formal petition process designed to allocate access, however, failed to scale with the increased scope of

²⁰³ *Id.* (“A brief glance through the records shows that Congress was willing to give serious consideration to all manner of petitioners, be they major business leaders or obscure citizens . . .”).

²⁰⁴ See Margaret Susan Thompson, *Corruption—or Confusion? Lobbying and Congressional Government in the Early Gilded Age*, 10 CONG. & PRESIDENCY 169, 172-73, 173 tbl.1 (1983) (noting the various phenomena that led to the increase in Congressional activity).

²⁰⁵ See *id.* at 173 (noting that increases in population and the addition of new territories and states “led to skyrocketing demands for routine services: post offices; law enforcement and judicial personnel; revenue, land, pension, and customs agents; internal improvements; and so on”).

²⁰⁶ See *id.* at 174 (noting that “Washington had no choice” but to assume oversight of the railroad industry given its size and impact).

²⁰⁷ See *id.* at 174-75 (noting that the Civil War and Reconstruction expanded the “boundaries of acceptable public action” and inspired a “popular enthusiasm for public solutions to what formerly had been considered private problems,” leading to the creation of the Freedman’s Bureau and the Education Department).

²⁰⁸ See MARGARET SUSAN THOMPSON, *THE “SPIDER WEB”: CONGRESS AND LOBBYING IN THE AGE OF GRANT* 128 (1985) (noting that during the Gilded Age people “felt the effects of government more acutely than in the past and consequently cared about and watched its operation more closely” and that members of Congress were “deluged with constituent demands” in the form of letters, petitions, and direct access).

²⁰⁹ See *id.* (noting that pressures facing members of Congress in the Gilded Age “were more numerous and probably more intense than those that confronted earlier generations of House members”); *id.* at 130 (“All in all, hundreds of messages would inundate each man in the Capitol. . . . [A]ll would be competing for shares of the finite resources of time, energy, and clout and the individual legislator’s command.”).

government,²¹⁰ prompting the aggrieved to seek other means of obtaining access—namely, lobbyists.²¹¹

It has often been claimed that lobbying is “probably as old as government.”²¹² As Jeffrey Pasley notes, however, formal petitions, like letter-writing and the publication of newspaper articles, are “not the kinds of influence . . . that the political term *lobbying* was invented to describe.”²¹³ Indeed, as he explains, if we set aside petitions for individual private claims and confine our definition of lobbying to the practice as we know it today—that is, efforts at influencing public policy by obtaining direct, personal access to lawmakers—we find relatively few instances of “lobbying” at the time of the First Congress.²¹⁴ While some petitioners hired attorneys to assist them in drafting petitions,²¹⁵ this sort of agent-based petitioning was largely confined to petitions for individual claims, rather than questions of public policy.²¹⁶ Likewise, while some early petitioners sought direct access to lawmakers to advance their claims, there is little to suggest that petitioners enjoyed the type of consistent personal access typical of lobbyists today²¹⁷ or that these efforts at personal access had significant influence on the lawmaking process.²¹⁸

Lobbying persisted, however, and by the time of the Civil War professional lobbyists had been around for some time. Their profession, however, was marked, then as now, by intense public disdain.²¹⁹ As early as 1856, the poet Walt Whitman counted “lobbyers” [sic] alongside “bribers, compromisers, . . . sponges, . . . policy backers, [and] monte-dealers” and

²¹⁰ See Henry Brooks Adams, *The Session*, 111 N. AM. REV. 29, 59-60 (1870) (“[N]ew powers, new duties, new responsibilities [and] new burdens of every sort, are incessantly crowding upon the government at the very moment when it finds itself unequal to managing the limited powers it is accustomed to wield. . . . The amount of business has become so enormous as to choke the channels provided for it.”).

²¹¹ See Thompson, *supra* note 204, at 180 (noting that “[t]raditional channels of communication, especially those between legislators and their constituents, were clogged” and that “[i]n their impatience, people began to look for ways of breaking through the logjam” and found in lobbyists “a marked improvement in their chances for substantive satisfaction”).

²¹² Pasley, *supra* note 153, at 57 n.1 (quoting LESTER W. MILBRATH, *THE WASHINGTON LOBBYISTS* 12 (1963)); see also *id.* (identifying various other authors making the same assertion).

²¹³ *Id.* at 58-59, 65.

²¹⁴ See *id.*

²¹⁵ See *id.* at 62 (noting examples of attorneys hired to assist with petitions across a variety of topics).

²¹⁶ *Id.*

²¹⁷ See *id.* at 63-64 (noting that, despite some “temporary lobbyists” following Congress to seek support for their petitions, “there is little evidence of extensive or meaningful contact with members of Congress”).

²¹⁸ *Id.* at 65 (“[T]here is not enough evidence in the petition histories to conclude that much of the government’s work or the general direction of public policy was being directed or even heavily influenced by avowed lobbyists.”).

²¹⁹ See Conor McGrath & Phil Harris, *The Creation of the US Lobbying Industry*, in *ROUTLEDGE HANDBOOK OF POLITICAL MANAGEMENT* 407, 408 (Dennis W. Johnson ed., 2008) (describing various nineteenth-century accounts of professional lobbyists); 2 ROBERT C. BYRD, *THE SENATE: 1789-1989*, at 491, 497 (Wendy Wolff ed., 1991) (describing more negative contemporary accounts).

described them as “crawling, serpentine men, the lousy combings and born freedom sellers of the earth.”²²⁰ Even where lobbyists had been employed, their efficacy was uncertain at best,²²¹ and their methods questionable.²²² With petitioning’s decline, however, aggrieved parties were left without an effective means of obtaining access, and thus had little choice but to turn to lobbyists,²²³ whose costly services made them a viable option only for those able and willing to pay.²²⁴

At the same time that Congress’s docket grew larger, it also grew more varied and complex, requiring lawmakers to obtain ever more information to deal with the issues before them. Members of Congress, however, lacked the resources, staff, or expertise to obtain this information.²²⁵ The need for information drove members of Congress to embrace lobbyists, who quickly became indispensable experts on complex matters, just as it had driven the English Crown to embrace petitioning centuries before.²²⁶ Indeed, it was through the provision of information that lobbyists gained valuable influence in Washington, with lawmakers seeking out lobbyists for facts to support their positions and lobbyists offering such information at every opportunity.²²⁷

220 WALT WHITMAN, *THE EIGHTEENTH PRESIDENCY!* 28–29 (Edward F. Grier, ed.) (1856); *see also* Pasley, *supra* note 153, at 61.

221 *See* ROTHMAN, *supra* note 199, at 192 (noting that during the 1870s, lobbyists appeared “careless and haphazard, neither especially benefitting nor endangering Senate proceedings”); *id.* at 198 (noting that the use of lobbyists was “no guarantee of satisfaction”); *id.* at 201 (“Despite significant expenditures and efforts, from the most legitimate to the most questionable, business interests could not efficiently prejudice the legislative process.”); BYRD, *supra* note 219, at 494 (describing how Tom Scott, a railroad operator, employed two hundred lobbyists for the 1876–1877 Congressional session but nevertheless was unable to win support for his railroad and noting how businessmen at the time were “not always certain that a lobbyist possessed the influence he claimed”).

222 *See* ROTHMAN, *supra* note 199, at 196–202 (noting that, while “bribery was neither permiss[ible] nor desirable, there were other methods for bestowing favors on potential supporters” and describing how lobbyists provided members of Congress with loans, railroad passes, inexpensive stock, and jobs).

223 *See* Pasley, *supra* note 153, at 60–61 (noting that the post-Civil War expansion of government made it impossible for lawmakers to devote individual attention to petitions and was a “major cause” of the rise of lobbying during this period).

224 *See, e.g.,* BYRD, *supra* note 219, at 499 (describing how obtaining access was practically impossible except for those who could afford lobbyists); THOMPSON, *supra* note 208, at 165–73 (same).

225 *See* BYRD, *supra* note 219, at 497 (“Turnover of membership was high; levels of parliamentary expertise were correspondingly low. Neither house had formal floor leadership. There was practically no staff, either for committees or for individual members.”); THOMPSON, *supra* note 208, at 33–69 (making the same assertion).

226 *See* ROTHMAN, *supra* note 199, at 203 (noting that during the 1890s, lobbyists provided members of Congress with “information that only representatives of particular organizations could gather” and helped them “understand the increasingly technical legislation that came before the chamber”).

227 *See id.* at 203–04 (noting that Senators would often seek out pressure groups to bolster their arguments and describing a case in which Wyoming Senator Francis Warren solicited information on a wool tariff from lobbyists).

Over time, members of Congress came to trust that if there was information they needed a friendly lobbyist would be there to provide it.²²⁸

Formal petitioning was not eliminated by the rise of lobbying, but it did undergo fundamental changes. While in the Founding era petitions had sought specific forms of redress and might be accompanied by detailed information, post-Civil War petitions were often deliberately short—often omitting essential details or information for lawmakers, or even a specific request for relief.²²⁹ Instead, these petitions were tools of mass politics intended to focus attention on particular issues and to apply political pressure—the “sound bites” of the time.²³⁰ By the early twentieth century, petitions could no longer be relied upon to secure the attention of lawmakers,²³¹ and they no longer provided useful information to lawmakers, who had come to rely on lobbyists for expertise and public opinion polls to learn their constituents’ preferences.²³² The role of petitioning has since declined to the point where by the 1980s the House no longer had any formal mechanism for receiving or considering petitions.²³³

The history of formal petitioning demonstrates that the right to petition protects more than a form of political expression. Rather, it protects a particular mechanism of representative government and the right of all members of society to meaningfully participate in the lawmaking process and to be heard by their government. Petitioning made use of formal institutions to allocate the public’s access to lawmakers and to provide needed information to lawmakers. These interests—access and information—drove the

²²⁸ See *id.* at 205-06 (noting that “Senators expected lobbyists to supply the necessary facts” and that “Senators and lobbyists customarily joined together for their mutual benefit.”); Thompson, *supra* note 204, at 171 (noting that during the 1870s, lobbyists “could be relied upon to be informed thoroughly about the issues in the cases they accepted” and that lawmakers “could count on the substantive accuracy of what they were told”).

²²⁹ Mark, *supra* note 16, at 2226-27.

²³⁰ See *id.* at 2160-61 (describing petitions during this time as “a tool of democratic mass politics, useful in creating political dramas and highlighting legislative deadlocks”); *id.* at 2226 (noting that post-Civil War petitions “were not instruments of deliberation or persuasion in themselves, but rather instruments of mass politics”).

²³¹ See, e.g., Pasley, *supra* note 153, at 60-61 (observing that, while during the 1790s “a mere paper petition often really was enough to get the government’s attention . . . [but t]his kind of individual attention to petitions became less possible with the expansion of the government during the Civil War”); LEON WHIPPLE, *OUR ANCIENT LIBERTIES* 106 (1927) (noting that petitions to Congress “have proved of no great value in securing legislative action, even when the signers reached into the millions as in the case of certain petitions for woman’s suffrage”); Thompson, *supra* note 204, at 180 (noting that as a result of the expansion of the government, “many who tried to deal with Washington became frustrated by the lack of responsiveness they found there”).

²³² See John & Young, *supra* note 137, at 138 (noting that public opinion polls provided “more systematic techniques for registering public sentiment”).

²³³ See STAFF OF H. COMM. ON ENERGY & COM., *supra* note 150, at 9 (“The importance of petitioning in the federal legislative process has diminished to the extent that presently no mechanism exists for the presentation and consideration of petitions on the floor of the House.”).

development of the right to petition and help to distinguish it from the right to free speech. Moving forward, courts and Congress should take these interests seriously in crafting a distinct Petition Clause doctrine and new mechanisms for public engagement.

III. THE PETITION CLAUSE DOCTRINE

This Part excavates the Supreme Court's Petition Clause doctrine to illustrate the role that access and information interests have played in the Court's jurisprudence and to highlight where historical context may serve to further inform and develop the doctrine. Despite petitioning's long history and its central role in the lawmaking process for much of American history, the First Amendment right to petition did not receive serious attention from the Supreme Court until the 1950s.²³⁴ By this time, of course, informal lobbying had more or less displaced petitioning as the primary means of engaging with lawmakers,²³⁵ and it was against this background of informal access that these cases were decided.²³⁶ Scholars have observed that the Court's early Petition Clause Doctrine does not incorporate petitioning's historical context, and instead relies on textualism.²³⁷ As a result, the Court has struggled to distinguish petitions from other forms of political speech and eventually conflated the two.²³⁸

Even amidst this conflation, however, there remains hope for the right to petition. First, the Supreme Court signaled in its most recent Petition Clause case, *Borough of Duryea v. Guarnieri*, its willingness to consider the history of petitioning and to disaggregate the Speech and Petition clauses.²³⁹ Second, even without historical context, a close reading of the Court's Petition Clause doctrine reveals

²³⁴ See generally *United States v. Harriss*, 347 U.S. 612 (1954); *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961); see also *McKinley*, *supra* note 9, at 1163-65 (describing *Harriss* as "the Court's first opportunity for substantive analysis of the right to petition" and *Noerr* as "the first case to address the right to petition in any depth").

²³⁵ See *McKinley*, *supra* note 9, at 1156 (noting that lobbying likely overtook petitioning sometime during the Progressive Era); *Schneer*, *supra* note 159, at 16-17 (noting petitioning's decline during the early twentieth century and attributing this in part to the rise of lobbying).

²³⁶ See *McKinley*, *supra* note 9, at 1139 (arguing that the Court's Petition Clause doctrine assumes that "lobbying and petitioning are coextensive" in part due to its being crafted "against a background of changed circumstances" and a lack of historical context).

²³⁷ *Id.* at 1163 (noting that Justice Black, in crafting the *Noerr* decision and other "pillars of our Petition Clause doctrine," applied a textualist approach, rather than one grounded in history); see also *We the People Found., Inc. v. United States*, 485 F.3d 140, 149 (D.C. Cir. 2007) (Rogers, J., concurring) (noting that "[i]t remains to be seen" how the Court would respond to historical evidence of petitioning, and that it would "[n]o doubt . . . present an interesting question").

²³⁸ See *McKinley*, *supra* note 9, at 1164 ("In the absence of [historical] context, the Court has struggled to provide clear and fixed meanings to the Petition clause, often conflating practices historically distinct but termed similarly in modern parlance.").

²³⁹ *Borough of Duryea v. Guarnieri*, 564 U.S. 279 (2011).

that the Court's reasoning has consistently been informed by the same interests that drove the development of petitioning itself—access and information.

A. *The Petition Clause Doctrine as Access*

The Court first considered substantively the right to petition in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*²⁴⁰ *Noerr* involved a claim that the railroad industry was engaged in anticompetitive conduct in violation of the Sherman Act²⁴¹ when it sponsored a publicity campaign to drum up public opposition to laws that would have favored the trucking industry.²⁴² Justice Hugo Black, writing for the Court, dismissed the claims, finding that the Sherman Act, as written, did not apply to this sort of political activity.²⁴³ Justice Black, however, went on to express his concern that if the Sherman Act *were* read to reach political activity, it would “raise important constitutional questions” for the First Amendment and the Petition Clause.²⁴⁴ While the Court in *Noerr* never reached the question of whether the railroads' activity was protected under the First Amendment,²⁴⁵ Justice Black's words have been interpreted to suggest that petitioning includes a broad range of activities aimed at political advocacy.²⁴⁶

This view was later affirmed in another antitrust case—*California Motor Transport Co. v. Trucking Unlimited*.²⁴⁷ The *California Motor* plaintiffs claimed that their competitors had engaged in monopolization by flooding the courts and administrative agencies with petitions designed to undermine and drown out their own license applications.²⁴⁸ The Court first held that the right to petition extended to petitions submitted to courts and administrative agencies, and that, as in *Noerr*, the antitrust laws did not preclude groups from

²⁴⁰ 365 U.S. 127 (1961).

²⁴¹ Sherman Act §§ 1–2, 15 U.S.C. §§ 1–2 (1982).

²⁴² *Noerr*, 365 U.S. at 113.

²⁴³ *Id.* at 138 (“[W]e think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of government action with respect to the passage and enforcement of laws.”). This holding was affirmed four years later in *United Mine Workers v. Pennington*, where the Court found that the Sherman Act likewise did not reach political activity aimed at the Secretary of Labor and the Tennessee Valley Authority. *See* 381 U.S. 657, 660–61, 670 (1965). Notably, the *Pennington* court did not address the First Amendment or the right to petition.

²⁴⁴ *Noerr*, 365 U.S. at 137–38.

²⁴⁵ *Id.* at 132 n.6 (“Because of the view we take of the proper construction of the Sherman Act, we find it unnecessary to consider [the First Amendment] defenses.”).

²⁴⁶ *See* McKinley, *supra* note 9, at 1170 (“Justice Black again invoked his understanding of petitioning as a practice that spanned broadly to encompass any form of legislative advocacy and communication . . .”).

²⁴⁷ 404 U.S. 508 (1972).

²⁴⁸ *Id.* at 509.

using these channels.²⁴⁹ Next, however, the Court held that “First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.”²⁵⁰ Thus, attempts to abuse the formal administrative and judicial processes to anticompetitive ends were not immune from antitrust liability.²⁵¹ This has come to be known as the “sham” exception to the *Noerr-Pennington* doctrine under which courts decline to grant immunity to petitions “aimed at blocking a competitor’s access to government,”²⁵² rather than genuine efforts at advocacy.²⁵³

California Motor recognized the necessity of protecting equal access to both the courts and administrative agencies. In holding that the First Amendment protects “the right to access to agencies and courts, within the limits, of course, of their prescribed procedures,”²⁵⁴ the Court suggests that formal procedures regulating access are both permissible and often necessary to protect the right to government access. Moreover, the Court held that, in flooding the courts and administrative agencies, the highway carriers had sought to deprive their competitors of “free and meaningful access,”²⁵⁵ thereby drawing a distinction between “free” and “meaningful” access. While the carriers had not impeded the “free[dom]” of their competitors to petition the government, they prevented such petitions from being heard, thus rendering them futile and meaningless, no less an infringement of the right to petition.²⁵⁶ The Court made explicit its concern that powerful interests might seek to use the First Amendment’s protections to infringe upon those of others.²⁵⁷ It affirmed the principle that First Amendment freedoms do not “sanction repression of that [same] freedom by private interests.”²⁵⁸ In the lobbying context, where politically powerful interests compete for scarce lawmaker attention, this reasoning is particularly resonant and suggests inasmuch as massive lobbying

²⁴⁹ *Id.* at 510-11 (“We conclude that it would be destructive of rights of association and of petition to hold that groups . . . may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view . . .”).

²⁵⁰ *Id.* at 514.

²⁵¹ *Id.* at 513 (noting that such actions “cannot acquire immunity by seeking refuge under the umbrella of ‘political expression’”).

²⁵² McKinley, *supra* note 9, at 1173 (citing *Cal. Motor*, 404 U.S. at 515-16).

²⁵³ See *Cal. Motor*, 404 U.S. at 515-16.

²⁵⁴ *Id.* at 515.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* (“A combination of entrepreneurs to harass and deter their competitors from having ‘free and unlimited access’ to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another.”).

²⁵⁸ *Id.* at 514-15 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

efforts seek to foreclose meaningful access by other groups they may likewise be afforded less protection under the First Amendment.²⁵⁹

The Court has generally held that, where a formal channel exists, the right to petition protects equal access to it.²⁶⁰ Whether the government is under any obligation to provide a formal channel, and whether the Petition Clause affords a right to consideration or response, however, are different stories. The Court first addressed these questions in *Arkansas State Highway Employees, Local 1313 v. Smith*.²⁶¹ Two Arkansas State Highway Commission employees, having faced disciplinary action, asked their union to file a grievance on their behalf.²⁶² The commission refused to allow the union to file grievances on behalf of its members, and the union and employees sued, arguing that the commission had deprived the union of the right to petition under the First Amendment.²⁶³ Both the district and circuit courts found for the plaintiffs.²⁶⁴ The Supreme Court, however, reversed, concluding that “the complaint . . . is simply that the Commission refuses to consider or act upon grievances when filed by the union rather than by the employee directly,”²⁶⁵ and that, just as the First Amendment did not guarantee that any petition would be persuasive or effective,²⁶⁶ it imposed no obligation on the government to listen or respond to the union’s petition.²⁶⁷ The government, like individuals,²⁶⁸ was free to ignore whatever speech it wanted.

²⁵⁹ The Court has not addressed a situation in which one group has sought to use informal lobbying to impede another specific group’s right to free and meaningful access. Moreover, the Court has yet to address the question of whether lobbying is protected at all under the Petition Clause. However, assuming arguendo that lobbying is a protected form of petition, the “sham” exception suggests that groups would not be free to use lobbying efforts to foreclose competitor access. *Id.*

²⁶⁰ *See, e.g.*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 355 (2010) (discussing the right of corporations under the First Amendment to petition administrative bodies); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792, n.31 (“[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies.”); *Cal. Motor*, 404 U.S. at 510-511 (holding that the right to petition extends to administrative agencies and their “channels and procedures”).

²⁶¹ 441 U.S. 463 (1979).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Ark. State Highway Emps. Local 1315 v. Smith*, 585 F.2d 876, 877 (8th Cir. 1978) (citing *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222-23 (1967)) (holding that limitations on a union’s ability to seek the assistance of counsel restricts the right to petition).

²⁶⁵ *Smith*, 441 U.S. at 465.

²⁶⁶ *Id.* at 464-65 (“[The First Amendment] provides no guarantee that a speech will persuade or that advocacy will be effective.” (quoting *Hanover Twp. Fed’n of Teachers v. Hanover Cmty. Sch. Corp.*, 457 F.2d 456, 461 (1972))).

²⁶⁷ *Id.* at 465.

²⁶⁸ In the individual context, the Court has struck down attempts to restrict unwanted speech on the basis of an individual’s freedom to ignore it. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (“Recipients of objectionable mailings, however, may ‘effectively avoid further bombardment of their sensibilities simply by averting their eyes.’” (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971))); *accord id.* (“[T]he ‘short, though regular, journey from mail box to trash can . . .

The Court faced a similar set of facts years later in *Minnesota State Board for Community Colleges v. Knight*.²⁶⁹ This case, the converse of *Smith*, concerned a Minnesota statute that required public employers to *only* negotiate with union representatives on certain matters.²⁷⁰ The statute was challenged by a group of community college faculty who were barred from participating in “meet and confer” sessions in their individual capacities, which they alleged violated their right to petition.²⁷¹ Justice O’Connor, writing for the Court, upheld the statute and cited *Smith* for the proposition that the government is under no obligation to “listen to any specially affected class than it is to listen to the public at large.”²⁷² Justice O’Connor also considered what obligation, if any, the government had to listen to the public generally. Citing *Bi-Metallic Investment Co. v. State Board of Education*,²⁷³ Justice O’Connor argued that, just as it would be impractical to recognize a general due process right to be heard in all instances, requiring the government to consider all voices under the First Amendment would cause the government to “grind to a halt.”²⁷⁴ She also cited several instances in which the government had restricted or limited public participation, noting that “[p]ublic officials at all levels of government daily make policy decisions based only on the advice they decide they need and choose to hear.”²⁷⁵ Recognizing a constitutional right to be heard, in the Court’s view, would “work a revolution in existing government practices.”²⁷⁶

It is notable that Justice O’Connor’s opinion in *Knight* makes no reference to the history of petitioning or the fact that for hundreds of years the right to petition included a right to formal consideration and response.²⁷⁷ Indeed, a broader view of history suggests that the real revolution in government practices was the gradual erosion of formal participation and subsequent exclusion of the general public. Such context might also have provided the Court with a limiting principle to ensure both the public’s right to consideration and the ongoing functioning of government. Justice O’Connor’s reference to executive agencies not “permitting unrestricted public testimony”²⁷⁸ calls to mind perhaps the most widespread form of modern petitioning—the Administrative Procedure Act’s

is an acceptable burden” (quoting *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y.), *aff’d* 386 F.2d 449 (2d Cir. 1967), *cert. denied* 391 U.S. 915 (1968))).

²⁶⁹ 465 U.S. 271 (1984).

²⁷⁰ *Id.* at 273.

²⁷¹ *Id.* at 274.

²⁷² *Id.* at 286-87.

²⁷³ 239 U.S. 441, 445 (1915) (“Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption.”).

²⁷⁴ *Knight*, 465 U.S. at 285.

²⁷⁵ *Id.* at 284.

²⁷⁶ *Id.*

²⁷⁷ See *supra* Section II.A.

²⁷⁸ *Knight*, 465 U.S. at 284.

notice-and-comment requirements, which permit widespread public input limited by formal processes and channels.²⁷⁹ Without such context or a ready model for a formal means of public participation, however, the Court saw its choice as one between government efficiency and an unrestricted right to be heard and chose the former.²⁸⁰

Knight's sweeping holding is difficult, however, to reconcile with our emerging understanding of historical petitioning. In *We the People Foundation, Inc. v. United States*, the D.C. Circuit considered a claim by an organization which had engaged in a widespread effort to petition several government officials—including a member of Congress and various parts of the Executive—requesting “documented and specific” answers to questions regarding a variety of public matters, including the tax code, privacy issues, and the government’s war powers.²⁸¹ The plaintiffs claimed that, by ignoring their requests and failing to enter into “good faith exchanges,” these government actors infringed upon their right to petition.²⁸² While *Smith* and *Knight* arose out of the public employer context and arguably could have been decided on narrower grounds,²⁸³ *We the People* addressed petitioning in its broadest sense. Writing for the majority, then-Judge Kavanaugh began by citing *Smith* and *Knight* for the proposition that individuals have no right to consideration.²⁸⁴ In particular, Judge Kavanaugh noted that neither *Smith* nor *Knight* hinted at any limitation in their holdings to particular types of petition and thus they extended beyond the public employment context and governed here.²⁸⁵

Judge Kavanaugh proceeded, however, to discuss the wealth of historical evidence which had emerged in the years following *Smith* and *Knight* suggesting that the right to petition ought to be understood to include a right

²⁷⁹ See Administrative Procedure Act, 5 U.S.C. §§ 552–59.

²⁸⁰ See McKinley, *supra* note 9, at 1177 (“[T]he [*Knight*] Court was unable to envision a more limited form of formal public engagement with the lawmaking process. Consequently, the Court may have stripped the petition right of one of its core distinctive characteristics—that is, the right to formal consideration and response . . .”).

²⁸¹ *We the People Found., Inc. v. United States*, 485 F.3d 140, 142 (D.C. Cir. 2007).

²⁸² *Id.* at 141–42.

²⁸³ The *Smith* Court discussed the public employment dimension of the case when considering the state’s obligations and noted that, while bypassing a union and dealing directly with employees might constitute an unfair labor practice under federal law, “[t]he First Amendment is not a substitute for the national labor relations laws.” *Ark. State Highway Emps., Local 1313 v. Smith*, 441 U.S. 463, 464–65 (1979). Moreover, as Justice Scalia’s concurrence in *Guarnieri* suggests, it may have been possible to distinguish between petitions submitted to the government as an employer and petitions submitted to the government as a sovereign. See *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 407 (2011) (Scalia, J., concurring).

²⁸⁴ *We the People*, 485 F.3d at 143.

²⁸⁵ *Id.* at 144 (“Nothing in [*Smith* or *Knight*] hints at a limitation on their holdings to *certain* kinds of petitions or *certain* levels of Government. In short . . . *Smith* and *Knight* govern this case.”).

to response or official consideration.²⁸⁶ Ultimately, however, both Judge Kavanaugh and Judge Rogers agreed that the circuit court was bound by *Smith* and *Knight*.²⁸⁷ The task of reconciling the Petition Clause doctrine with historical evidence, as Judge Rogers's concurrence observed, would pose "an interesting question" for the court.²⁸⁸

At first blush, it is difficult to reconcile the *Noerr* line of cases, which identify a right to meaningful access which can be infringed upon by preventing petitions from being heard, with *Smith* and *Knight*, which suggest that the government is free to infringe upon that right essentially at will. Indeed, if the carriers in *California Motor* could collude to deny their competitors "free and meaningful access" by keeping petitions from being heard, it seems clear that the government in *Smith* and *Knight*, by ignoring petitions altogether based on their source, had likewise denied the petitioners "free and meaningful access."

One important distinction between these cases, however, is the existence and nature of formal channels. In *California Motor*, at issue was the carrier's free and meaningful access to the courts and administrative agencies, the formal and appropriate channels for their grievances. In *Smith* and *Knight*, however, the issue was whether the government was obligated to consider grievances submitted through alternative or informal channels. As Justice O'Connor noted, in *Smith* "the government listened only to individual employees and not to the union," while in *Knight* the government met only "with the union and not with individual employees."²⁸⁹ Per *California Motor*, individuals have a right of access to formal channels, while per *Smith* and *Knight*, there is no general right of access that would require the government to hear and consider petitions submitted outside those channels.

B. *The Petition Clause Doctrine as Information*

The Supreme Court has also recognized the important role that petitions play in providing information to both government officials and the public at large.²⁹⁰ In *Noerr*, the conduct complained of was a public advocacy campaign

²⁸⁶ *Id.* at 144 (noting several examples of commentary on this point, as well as certain commentators arguing to the contrary); *see also id.* at 147 (Rogers, J., concurring) (echoing this sentiment and further emphasizing the "emerging consensus of scholars" embracing a historically informed interpretation of the right to petition (quoting Lawson & Seidman, *supra* note 158, at 756)).

²⁸⁷ *Id.* at 145 (Rogers, J., concurring) ("As the court points out, we have no occasion to resolve the merits of appellants' historical argument given the binding Supreme Court precedent . . .").

²⁸⁸ *Id.* at 149.

²⁸⁹ *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 286-87 (1984).

²⁹⁰ *See generally* *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 129-31 (1961); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 516 (1972) (Stewart, J., concurring); *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 376-80 (2011).

aimed at promoting certain laws which would have been unfavorable to the trucking industry.²⁹¹ The truckers sued under the Sherman Act, seeking in part to enjoin the railroads from “disseminating any disparaging information about the truckers without disclosing railroad participation” and from “attempting to exert any pressure upon the legislature or Governor.”²⁹² In response, the railroads asserted their rights under the First Amendment to “inform the public and legislatures of the several states.”²⁹³ While *Noerr* held only that the Sherman Act did not reach this sort of political activity, Justice Black’s majority opinion noted the informational interests at stake, stating that “the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives” and that “[t]o hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes . . . would raise important constitutional questions.”²⁹⁴

Justice Black’s majority was not merely concerned with an individual’s rights, but with the value of information generally. The Court noted that even if the railroad’s “sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors,” this would not alter the analysis, as “[t]he right of the people to inform their representatives in government of their desires . . . cannot properly be made to depend upon their intent in doing so.”²⁹⁵ Indeed, even petitions made purely to secure personal advantage “provide much of the information upon which governments must act.”²⁹⁶ Accordingly, construing the Sherman Act to restrain political advocacy would “deprive the government of a valuable source of information.”²⁹⁷ Years later, *California Motor* reaffirmed this view of petitions as promoting both individual rights and government interests, with Justice Stewart observing that *Noerr*’s holding was necessary both to “protect the right of petition guaranteed by the First Amendment” and to “preserve the informed operation of governmental processes.”²⁹⁸

More recently, the Court has observed how depriving individuals and groups of the right to petition affects the information available to lawmakers and the public. In *Borough of Duryea v. Guarnieri*, the Court considered whether a union grievance submitted by police officer Charles Guarnieri to his employer was

²⁹¹ See *Noerr*, 365 U.S. at 129-130.

²⁹² *Id.* at 131.

²⁹³ *Id.*

²⁹⁴ *Id.* at 137-38.

²⁹⁵ *Id.* at 138-39.

²⁹⁶ *Id.* at 139.

²⁹⁷ *Id.* at 139.

²⁹⁸ *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 516 (1972) (Stewart, J., concurring).

protected under the Petition Clause.²⁹⁹ Lower courts were split over whether the Petition Clause protected only communications about public matters or whether it also protected communications that addressed purely private matters, such as Guarnieri's employment.³⁰⁰

After reviewing the history of the right to petition,³⁰¹ Justice Kennedy clarified the distinction between the right to free speech and the right to petition, stating that while the right to free speech "fosters [a] *public exchange* of ideas," the right to petition "allows citizens to express their ideas, hopes, and concerns *to their government* and their elected representatives."³⁰² As the Court in *Guarnieri* observed, the right to petition not only protects the voice of political minorities but also ensures that ideas and information from minorities and other groups are disseminated to the public and to lawmakers.³⁰³ Moreover, the Court noted that public employees like Charles Guarnieri were "the members of a community most likely to have informed and definite opinions" about issues relating to their employment, and that the public at large "has a right to the benefit" of public employees' participation in petitioning.³⁰⁴ In particular, the Court noted, petitions may "allow the public airing of disputed facts" and "promote the evolution of the law by supporting the development of legal theories."³⁰⁵

Petitioning, in other words, has value both to the petitioner and to the lawmaking process at large, and such value "may not accrue if one class of knowledgeable and motivated citizens is prevented from engaging in petitioning activity."³⁰⁶ While the *Guarnieri* Court here referred specifically to public employees, this reasoning applies with equal force to all groups,

²⁹⁹ 564 U.S. 379, 382-83 (2011).

³⁰⁰ *Id.* at 385 (noting that, while courts in other circuits required an employee's petition to relate to a matter of public concern to be protected under the Petition Clause, the Third Circuit Court of Appeals below had rejected this view). Specifically, Guarnieri alleged that his employer had retaliated against him in response to his grievance, and several lower courts had adopted a "public concern" requirement for retaliation claims. This requirement has its origins in the Court's Free Speech doctrine. *See id.* at 386 ("If an employee does not speak as a citizen, or does not address a matter of public concern, 'a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.'" (quoting *Connick v. Meyers*, 461 U.S. 138, 147 (1983))).

³⁰¹ *Id.* at 396.

³⁰² *Id.* at 388 (emphasis added).

³⁰³ *See id.* at 397 (noting that access to the courts under the Petition Clause provided for the "contribution of a minority group to the ideas and beliefs of our society" (citation omitted)); *In re Primus*, 436 U.S. 412, 431 (1978) (noting that such groups may also "engag[e] in litigation as a vehicle for effective political expression . . . as well as a means of communicating useful information to the public.>").

³⁰⁴ *Guarnieri*, 564 U.S. at 397 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968)).

³⁰⁵ *Id.* at 397-98 (quoting *BE&K Constr. Co. v. Nat'l Labor Rels. Bd.*, 536 U.S. 516, 532 (2002)).

³⁰⁶ *Id.* at 398.

particularly political minorities.³⁰⁷ Whenever any segment of society is excluded from participation in government—whether prevented from petitioning, ignored by their government, or foreclosed by powerful interests—the information that group might have provided is excluded as well, to the public’s detriment.

IV. IMPLICATIONS

The history of formal petitioning shows that the Petition Clause does more than guarantee an individual right to participate in the lawmaking process. It also serves as a guide for how the government should structure participation in that process, including how to allocate lawmaker access and how lawmakers should obtain necessary information. Moreover, as the previous Part illustrates, the historical interests in access and information are consistent with the Supreme Court’s Petition Clause jurisprudence.³⁰⁸ While past legislative efforts at lobbying reform have largely focused on regulating lobbyists themselves, such as through registration or disclosure requirements,³⁰⁹ a focus on access and information as important Petition Clause values suggest a path forward via institutional reforms. In this Part, I argue that Congress and other legislatures should take affirmative steps to formalize access, increase institutional support, and bolster public information gathering mechanisms. Moreover, while past legislative efforts have struggled to pass constitutional muster under the Speech Clause,³¹⁰

³⁰⁷ *NAACP v. Button*, 371 U.S. 415, 420-30 (1963) (holding that the right to petition may be essential to political minorities who might otherwise be “unable to achieve their objectives through the ballot [box]” and for whom petitioning “may well be the sole practicable avenue open . . . for redress of grievances”). While *Button* was specifically concerned with the right to access to courts provided under the Petition Clause, the history of petitioning suggests that minority participation via petitioning is equally characteristic in the legislative and executive branches.

³⁰⁸ See *supra* Part III.

³⁰⁹ See, e.g., *50 State Chart: Lobbyist Activity Report Requirements*, NAT’L CONF. OF STATE LEGISLATURES (May 15, 2018), <https://www.ncsl.org/research/ethics/50-state-chart-lobbyist-report-requirements.aspx> [<https://perma.cc/JX8K-ZAXX>]; *Lobbyist Registration Requirements*, NAT’L CONF. OF STATE LEGISLATURES (Sept. 8, 2020), <https://www.ncsl.org/research/ethics/50-state-chart-lobbyist-registration-requirements.aspx> [<https://perma.cc/T65V-WYEP>].

³¹⁰ See, e.g., *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010) (striking down a Connecticut law barring campaign contributions by lobbyists); *Brinkman v. Budish*, 692 F. Supp. 2d 855 (S.D. Ohio 2010) (striking down an Ohio law barring former legislators from lobbying for one year after leaving service); *Lavin v. Husted*, 689 F.3d 543 (6th Cir 2012) (striking down an Ohio statute requiring candidates to refuse campaign contributions from Medicaid providers); *Dep’t of Tex., Veterans of Foreign Wars of U.S. v. Tex. Lottery Comm’n*, 760 F.3d 427 (5th Cir 2014) (striking down a Texas law prohibiting charities from using bingo proceeds for lobbying purposes); *Citizens Union of New York v. Att’y Gen. of N.Y.*, 408 F. Supp. 3d 478 (S.D.N.Y. 2018) (striking down a New York statute imposing greater disclosure requirements on organizations engaged in lobbying efforts); *Mkay Inc. v. City of Huntington Park*, No. 17-01467, 2018 WL 3830011 (C.D. Cal. June 15, 2018) (granting summary judgment and holding unconstitutional a city ordinance that prohibited lobbying

institutional reforms such as these would be more easily defended under an independent Petition Clause doctrine rooted in historical context. Such a doctrine, I argue, should more explicitly affirm the government's interests in promoting equitable access to government and in providing lawmakers with broad and inclusive information and should also recognize these as important rationales for regulation under the Petition Clause

A. *Implications for Institutional Reform*

To fully realize the right to petition's promise, institutional reform is necessary. A lack of institutional support for petitioning helped contribute to the rise of our current lobbying system.³¹¹ Creating new formal mechanisms for engagement would not only better comport with the history of the right to petition, but it would also help to draw a distinction between those formal processes which the right to petition protects and those informal attempts at access not protected.³¹² A focus on petitioning's historical context also provides lawmakers with an opportunity to develop new systems of public engagement to account for the dramatic changes in attention scarcity and lawmakers' information needs that have occurred since the Founding.

1. Avenues for Institutional Change

First and foremost, Congress and state legislatures should establish, either by rule or by statute, formal procedures for petitioning and public engagement with lawmakers. While these procedures would likely differ in some ways from their historical counterparts—they might not, for example, insist upon a formal prayer for relief—they should be crafted with access and information interests in mind. Access should be egalitarian, with submissions received on equal footing without respect to their source, and in keeping with the history of petitioning, all submissions should be guaranteed consideration, if not also response.

Such a system would provide a way to allocate government access by regulating the procedures through which individuals and groups communicate with government officials without restricting the content of those communications or who may submit them. Creating a formal system would also draw a clear distinction between a formal channel protected by the

members of the city regarding applications for medical marijuana permits); *Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014) (striking down a Department of Commerce regulation banning lobbyists from serving on certain advisory commissions).

³¹¹ See *supra* Section II.C.

³¹² See McKinley, *supra* note 9, at 1199 (arguing that, by embracing our current lobbying system, which does not provide for meaningful procedural guarantees and does afford a meaningful voice for minorities in the lawmaking process, Congress has violated the right to petition); see also *supra* Section III.A.

Petition Clause and informal attempts at access which could be further regulated to the extent that they seek to circumvent or undermine formal procedures.³¹³ A formal system would also have the added benefit of collecting all submissions in one place and creating a record to which lawmakers could refer as a source of information.

Second, to ensure equitable access given limited lawmaker attention, new mechanisms must be created to manage the volume of petitions. History offers several methods for dealing with a large number of petitions. Congress has established administrative agencies and specialized courts in part to receive and consider petitions within specific subject areas.³¹⁴ Inside Congress, large numbers of similar petitions historically were consolidated, and frivolous petitions were summarily dismissed.³¹⁵ Those petitions which did reach the congressional floor would then be referred to committees in order to grant them due consideration without occupying the attention of the entire body.³¹⁶

New approaches will also be necessary in order to realize the right to petition's promise of equal access and consideration, including the use of new technology to make petitioning more widely and easily available. Since the early 2000s, for example, administrative agencies have increasingly shifted notice and comment rulemaking online,³¹⁷ greatly expanding the public's ability to participate in the rulemaking process.³¹⁸ This has, in turn, impacted the decisionmaking process. In 2014, for example, e-rulemaking enabled the public to submit 3.9 million comments as part of the Federal Communications Commission's proposed Net Neutrality order.³¹⁹ The resulting 2015 Open Internet Order³²⁰ was heavily influenced by those

³¹³ See McKinley, *supra* note 9, at 1200 (suggesting that informal lobbying efforts could be regulated "through disclosure and ethics rules, including recusal rules similar to those that govern judges").

³¹⁴ See McKinley, *supra* note 9, at 1200 ("Congress dealt with problems of volume historically by creating much of the administrative state and specialized courts, including the Patent and Trademark Office and the Court of Claims . . .").

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ See, e.g., John M. de Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 969, 992 (2006) ("[T]his analysis has found . . . a long-term trend from paper to electronic filings.").

³¹⁸ See Cass R. Sunstein, *Democratizing Regulation, Digitally*, DEMOCRACY J., Fall 2014, <http://www.democracyjournal.org/34/democratizing-regulation-digitally> [<https://perma.cc/2D2U-N3H2>] (noting that "[d]emocratic participation is built into the very idea of notice-and-comment rule-making" and that, thanks to electronic rulemaking, "we are finally starting to realize the full potential of the rule-making process").

³¹⁹ See Lauren Moxley, *E-Rulemaking and Democracy*, 68 ADMIN. L. REV. 661, 690 (2016) (noting that this number of comments was made possible due to the ability to submit comments online).

³²⁰ See Protecting & Promoting the Open Internet, 30 FCC Rcd. 5601 (2015) (codified at scattered sections of 47 C.F.R.).

comments.³²¹ Several proposals for a similar online system for petitioning Congress have been made,³²² and while an online petition system would no doubt bring its own technical challenges,³²³ it is likely that such a system would be necessary in order to handle the volume of petitions submitted and to ensure that they are organized in such a way as to be capable of receiving meaningful consideration.

Finally, the government should actively encourage and facilitate public participation as part of an active information-gathering process, as opposed to taking participation as a given. Congress and state legislatures should support and expand public information-gathering sources in order to provide nonpartisan independent expertise on complex policy issues. The administrative state provides ready examples of agencies filled with highly specialized career experts who are tasked with providing independent research and information to policymakers.³²⁴ Similarly, Congress's internal bureaucracy of nonpartisan expert institutions—including the Congressional Research Service and the Office of Budget and Management, among others³²⁵—was developed in part to provide lawmakers with a similar source of independent expertise as the executive branch, but has in recent years seen support dwindle.³²⁶ Reinvesting in and expanding public information-gathering institutions such as these would help provide lawmakers with more complete information and thus reduce the need to rely on private interests.

³²¹ See Moxley, *supra* note 319, at 685-93 (describing in detail how the 2015 Open Internet Order incorporated multiple elements and views from the comments received).

³²² See, e.g., Lee Drutman, *A Better Way to Fix Lobbying*, 40 ISSUES IN GOVERNANCE STUD. 1, 6-10 (2011) (proposing JAMES, an online petitioning system which would permit members of the public to submit comments to pieces of draft legislation); Richa Mishra, *Frontiers of Democracy Research: A Fresh Perspective on Lobbying and Political Access*, HARV. ASH CTR. FOR DEMOCRATIC GOVERNANCE & INNOVATION: CHALLENGES TO DEMOCRACY (Aug. 5, 2014), <https://medium.com/challenges-to-democracy/frontiers-of-democracy-research-a-fresh-perspective-on-lobbying-and-political-access-b1c552e09a4b> [<https://perma.cc/R8R8-EXBV>] (discussing the Madison Project, a legislative engagement platform developed as part of a “hack-a-thon” held within the House of Representatives which was used to crowd-source amendments to a bill as part of the first ever “crowdsourced” markup process).

³²³ In particular, online systems for submitting comments have struggled to address fake comments submitted by automated processes. These often make use of stolen identities to attempt to influence policymaking, and in some cases extremely large volumes of comments are sent in an attempt to overload the system and disrupt the notice and comment process. See, e.g., STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 116TH CONG., REP. ON ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS, <https://www.hsgac.senate.gov/imo/media/doc/2019-10-24%20PSI%20Staff%20Report%20-%20Abuses%20of%20the%20Federal%20Notice-and-Comment%20Rulemaking%20Process.pdf> [<https://perma.cc/PD8Z-8LB4>].

³²⁴ See, e.g., Cross & Gluck, *supra* note 67, at 1544-45 (noting nine nonpartisan legislative institutions, including the Congressional Research Service, that provide such information).

³²⁵ *Id.* at 1544-45, 1573

³²⁶ *Id.* at 1546; Drutman & Teles, *supra* note 65 (describing how support for these institutions has declined in recent decades).

Expertise, however, is not a silver bullet. As the history of petitioning illustrates, the public itself is a vital source of information that can help supplement expert advice and draw attention to important issues that might otherwise be overlooked.³²⁷ Moving forward, any new system of public engagement should strive to solicit information from the public and incorporate it into the decisionmaking process. The Administrative Procedure Act's notice-and-comment procedure, for example, leverages public participation as a source of valuable information that often serves to correct agency errors and oversights.³²⁸ Creating a similar system for public participation in the legislative process would help fill information gaps, with petitions raising new concerns and comments supplementing independent expertise.

2. Objections

The reforms suggested above may be subject to two general criticisms. First is the question of feasibility—whether given the demands on lawmaker attention, the ever-increasing torrent of information from competition interest groups, and the expansion of the government's role a formal mechanism of public engagement is even possible. Indeed, as discussed above, formal petitioning declined in part because formal mechanisms were unable to keep up with the sheer volume of petitions.³²⁹ As Professor Blackhawk notes, however, such feasibility concerns have been resolved before in the lower federal courts and in administrative agencies, both of which have successfully scaled alongside the growth of the American population and the expansion of federal jurisdiction.³³⁰ Moreover, she observes, our current lobbying system is already a multi-billion dollar industry, and Congress and other legislatures every day invest resources into allocating access and obtaining information.³³¹

Second is the question of efficacy. That is, even if formal channels were established, what is there to stop lawmakers from simply ignoring them and continuing to engage with lobbyists informally? One response is that a formal system could be accompanied by stricter regulations on informal access, including disclosure requirements and ethics rules. Another is that the creation of a formal system of public engagement would make clear the distinction between appropriate and inappropriate means of access and thus make it much easier for the public to hold accountable any lawmakers who choose to

³²⁷ See *supra* Section II.B.

³²⁸ See Sunstein, *supra* note 318 (observing that “[d]emocratization of the regulatory process, through public comment, has an epistemic value” and that where an “agency has inaccurately assessed costs and benefits, public participation can and often will supply a corrective”).

³²⁹ See *supra* Section II.C.

³³⁰ See McKinley, *supra* note 9, at 1201-02.

³³¹ *Id.*

circumvent formal procedures.³³² But even accepting the cynical position that some lawmakers would continue to afford lobbyists informal access, establishing formal procedures would still ensure that some lawmaker access is allocated more equitably and that more of the information lawmakers act upon is obtained from sources other than lobbyists.

B. Doctrinal Implications

The most significant obstacle facing any attempt at lobbying reform is a potential First Amendment challenge. As Professor Hasen has noted, where lobbying is treated as a form of political speech, legislative approaches to lobbying reform are often subject to strict scrutiny under the First Amendment, requiring that measures be narrowly tailored to advance a compelling government interest.³³³ Traditionally, lower courts have upheld a variety of lobbying regulations under the First Amendment, even under strict scrutiny, based on either an anticorruption or an antidistortion rationale.³³⁴ Following the Supreme Court's sweeping campaign finance decision in *Citizens United* in 2010, however, these rationales have struggled in the lower courts.³³⁵ The Supreme Court's invitation in *Guarnieri* to more fully consider

³³² *Id.* at 1200-01.

³³³ See Hasen, *supra* note 8, at 214-16 (discussing various applications of the strict scrutiny standard in First Amendment cases regarding legislation banning or regulating lobbyists).

³³⁴ See, e.g., *N.C. Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) (upholding a North Carolina ban on lobbyist contributions to legislators under strict scrutiny); *Preston v. Leake*, 743 F. Supp. 2d 501 (E.D.N.C. 2010) (upholding a ban on lobbyist contributions under closely drawn scrutiny), *aff'd* 660 F.3d 726 (4th Cir. 2011); *Inst. of Governmental Advocs. v. Fair Pol. Pracs. Comm'n*, 164 F. Supp. 2d 1183 (E.D. Cal. 2001) (upholding a ban on lobbyist contributions to candidates for certain offices under closely drawn scrutiny); *State v. Alaska C.L. Union*, 978 P.2d 597 (Alaska 1999) (upholding a ban on lobbyist contributions to legislators outside of the lobbyist's home district under closely drawn scrutiny); *Kimbell v. Hooper*, 665 A.2d 44 (Vt. 1995) (upholding a Vermont ban on lobbyist contributions to legislators during legislative sessions); *Fla. League of Prof'l Lobbyists v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996) (upholding a ban on lobbying contingency fees); *Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 951 (Ky. 1995) (same); *United States v. Nasser*, 476 F.2d 1111, 1115 (7th Cir. 1973) (upholding a statute imposing restrictions on former lawmakers entering the lobbying industry); *Md. Right to Life State Political Action Comm. v. Weathersbee*, 975 F. Supp. 791, 797 (D. Md. 1997) (upholding a ban on lobbyists serving on political fundraising committees after applying strict scrutiny). *But see* *Fair Pol. Pracs. Comm'n v. Superior Court*, 599 P.2d 46 (Cal. 1979) (striking down a ban on lobbyist contributions to all state elected officials under closely drawn scrutiny); *Mont. Auto. Ass'n v. Greely* 632 P.2d 300, 308 (Mont. 1981) (striking down a Montana statute barring lobbying contingency fees under the First Amendment); see also Hasen, *supra* note 8, at 210-12 (discussing three different opinions on the intersection between tax law and lobbying law).

³³⁵ See, e.g., *Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010) (striking down portions of a Connecticut law barring lobbyists from contributing to lawmakers or collecting funds on their behalf after rejection an anti-corruption rationale); *Brinkman v. Budish*, 692 F. Supp. 2d 855 (S.D. Ohio 2010) (applying strict scrutiny and striking down a law barring former state assembly members from lobbying after rejecting an anti-corruption rationale); see also Hasen, *supra* note 8, at

the right to petition in its historical context, however, suggests an alternative path forward under an independent Petition Clause doctrine. The history of formal petitioning suggests that the government may have a compelling interest in allocating government access and in providing lawmakers with information. Thus, while direct restrictions on lobbying might implicate the Speech Clause, the structural and institutional reforms described above would be much more easily defended under an independent Petition Clause doctrine informed by this history.

1. Distinguishing the Right to Petition from the Right to Free Speech

In *Guarnieri*, the Supreme Court recognized that the right to petition is distinct from the right to speech and should be interpreted according to its underlying “objectives and aspirations.”³³⁶ Since then, lower courts have struggled to divine those objectives and aspirations and the extent to which traditional speech clause analysis should apply to petition cases.³³⁷ But as the history of petitioning demonstrates, speech and petition implicate wholly different sets of values which, if taken seriously, would form the foundation of a distinct Petition Clause doctrine.

Many of the core values of the Court’s Free Speech doctrine are a poor fit for the concerns raised by petitioning and government access. For example, a major concern of much of the twentieth century’s speech jurisprudence was

213-16 (describing the post-*Citizens United* treatment of lobbying regulations in the lower courts). It is worth noting, however, that it is unclear to what degree the Court’s campaign finance jurisprudence is a good fit with lobbying. For an in-depth discussion on this point, see McKinley, *supra* note 9, at 1190-93.

³³⁶ *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011).

³³⁷ While lower courts have generally accepted *Guarnieri*’s holding that speech doctrine is not *per se* applicable to the petition context, the relatively narrow holding of that case has provided little guidance. *See, e.g., Mirabella v. Villard*, 853 F.3d 641, 654-55 (3d Cir., 2017) (noting that, while *Guarnieri* clarified that courts may not “automatically” apply Speech Clause precedent to petition cases, the case did not “forge new ground under the Petition Clause”). Taking guidance from the *Guarnieri* Court’s decision to nonetheless apply the public concern doctrine, some lower courts have continued to import speech doctrine to petition cases. *See id.* at 655 (applying free speech precedent “as the Supreme Court did in *Guarnieri*” to a petition case and noting that its analysis would be “identical if [the plaintiffs] had framed their argument as a free speech claim, rather than a violation of their right to petition the government”). Other courts, however, have declined to import other tests from the free speech doctrine based on *Guarnieri*’s limited discussion of the differences between speech and petition. *See Sandvig v. Sessions*, 315 F. Supp. 3d 1, 31-32 (D.D.C. 2018) (holding that the right to gather facts and to speak in the process of preparing a petition is “more naturally the province of the Speech and Press Clauses than of the Petition Clause”); *see also Leuthy v. LePage*, No. 17-00296, 2018 WL 4134628, at *16 (D. Me. 2018) (quoting from *Guarnieri* that “[p]etitions to the government assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole” and holding that individuals blocked from a government official’s social media count had successfully stated distinct claims under both the Speech and Petition Clauses).

the role that free speech played in promoting public debate and democratic deliberation.³³⁸ In the “marketplace of ideas” model, the First Amendment’s protection of free speech fosters discussion and deliberation, allowing ideas to rise or fall on the basis of their truth and persuasiveness alone.³³⁹ Famously, in such a model, the remedy for false or objectionable speech is not regulation, but deliberation—that is, “more speech.”³⁴⁰

As Professor Wu has observed, however, this vision of political speech relies on the flawed assumption that listeners have the time and ability to hear and be influenced by the different ideas in the market.³⁴¹ With the rise of the Internet and the explosive proliferation of speech, however, there is simply too much information for any individual to consume, let alone consider.³⁴² In a finite body such as Congress, this effect is magnified.³⁴³ If scarce lawmaker attention is the problem, then “more lobbying” simply cannot be the remedy, and indeed it is already the case that lawmakers pick and choose whom to listen to and whom to ignore, albeit informally. Likewise, if information-gathering is a core Petition Clause value, this suggests that the information lawmakers have available to them should not be left up to market-like forces.

The “marketplace of ideas” model also assumes that government intervention is the primary threat to the free flow of ideas and that, left alone, the marketplace will take care of itself.³⁴⁴ In the context of petitioning or lobbying, this assumption fails on two grounds. First, as *California Motor* and the *Noerr-Pennington* line of cases demonstrates, private parties are quite able to infringe upon the exercise of the right to petition.³⁴⁵ Indeed, given the scarcity of lawmaker attention, every successful effort to have one’s client heard necessarily comes at the expense of other groups. Second, the government cannot stay out of the “marketplace” of lobbying and petitioning because it is the government’s attention that is being sought. Whether the

338 See, e.g., Rodney Smolla, *The Meaning of the “Marketplace of Ideas” in First Amendment Law*, 24 COMM. L. & POL’Y 437, 438-42 (2019) (noting that “[t]he marketplace of ideas metaphor has been invoked constantly by the Supreme Court justices in First Amendment cases” and noting several examples).

339 See, e.g., Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 1-7 (summarizing the “marketplace of ideas” metaphor as attributed to Justice Oliver Wendell Holmes); *United States v. Abrams*, 250 U.S. 616, 630 (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

340 See *United States v. Alvarez*, 567 U.S. 709, 727 (“The remedy for speech that is false is speech that is true.”); *Whitney v. California*, 274 U.S. 357, 377 (1927) (J. Brandeis, concurring) (“If there be time to expose through discussion the falsehood and fallacies . . . the remedy to be applied is more speech . . .”).

341 See Wu, *supra* note 32, at 553-54.

342 *Id.* at 554-55.

343 See *supra* notes 42-57 and accompanying text.

344 See Wu, *supra* note 32, at 554.

345 See *supra* notes 240-259 and accompanying text.

government uses a formal and institutionalized petition process or an informal lobbying system, it nonetheless makes decisions about how to allocate its attention, which unavoidably results in winners and losers.

If we take seriously the right to petition's allocative and informational dimensions, it becomes apparent that the right to petition not only permits some government intervention, but may in fact require it.³⁴⁶ Just as protecting one's procedural right of due process in a court of law requires the government to afford access and to define a process by which parties may be heard, so too would a proceduralist right to petition require the government to establish a formal mechanism and to take steps to ensure that mechanism is not circumvented.³⁴⁷ The right to petition's interests in access and information distinguish it from the right to free speech and should inform the development of a distinct Petition Clause doctrine that would delineate between expressions protected by the Free Speech Clause and those protected by the Petition Clause.³⁴⁸

2. New Rationales for Regulation

Even if petitions continue to be considered under the Speech Clause, or if the Court decides to incorporate Speech precedents into the Petition Clause doctrine, access and information interests could still inform the Court's analysis as new rationales for government regulation and reform. Moreover, while past attempts at restricting lobbying directly have struggled under strict scrutiny,³⁴⁹ the institutional reforms advocated here would not restrict speech and would likely be easier to defend under these new rationales.

First, the history of petitioning suggests that the government has a compelling interest in the equitable allocation of government access. That is, the government has an interest in ensuring that the lawmaking process remains open to political minorities and that powerful interests are not able to foreclose access to others by virtue of their wealth or influence.

In the campaign finance context, the Supreme Court has rejected attempts to justify restrictions on political spending in the interest of "leveling the playing field," or otherwise combatting the distorting effect of money in politics.³⁵⁰ At first blush, then, it would seem odd to suggest that the right to

³⁴⁶ See McKinley, *supra* note 9, at 1184 n.384 (arguing that a proceduralist view of petitioning would require "rights-based limitations" and also "mechanisms of participation . . . in the lawmaking process").

³⁴⁷ *Id.* at 1133 (illustrating how the informality of our current lobbying system, if exhibited in our court system, would "deeply offend our notions of the right to due process").

³⁴⁸ *Id.* at 1188 n.402 (laying out one potential model for this disaggregation in which advocacy directed at the public would fall under the Speech Clause, while advocacy directed to government through formal channels would fall under the Petition Clause).

³⁴⁹ See *supra* note 333 and accompanying text.

³⁵⁰ See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 364-66 (2010) (overruling past precedents which had recognized a compelling antidistortion interest).

petitioner's access interest should pass constitutional muster. But these two interests differ in three ways. First, while the anti-distortion rationale rejected in *Citizens United* was focused on the "political marketplace" of elections,³⁵¹ the right to petition is by definition confined to the lawmaking context, where the "marketplace of ideas" model is a poor fit.³⁵² Second, while the anti-distortion rationale focused on limiting campaign spending and thus expression, this rationale focuses on access, not expression. *Smith* and *Knight* are illustrative here: in both cases, the statutes upheld in no way infringed upon the petitioner's ability to spend money on petitions or the content of those petitions and focused instead on which petitions the government would agree to consider.³⁵³ Third, the right to petition's access interest is procedural, and as the Court in *Citizens United* affirmed, cases like *Noerr* and *California Motor* expressly protect the quasi-procedural right to meaningful access to courts and administrative bodies where formal channels exist.³⁵⁴ A legislative approach that seeks to ensure equal access by all parties could hardly be seen to run afoul of the First Amendment, even if it would have the practical effect of reducing the share of lawmaker attention that goes to politically powerful interests.

The history of petitioning also suggests that the government has a compelling interest in providing lawmakers with broad and inclusive information. Information is a prerequisite to effective lawmaking, and the Supreme Court has generally favored disclosure requirements in part because they contribute to, rather than restrict, the flow of information.³⁵⁵ This has been the case both with respect to lobbying and campaign finance.³⁵⁶ The Court has also upheld the ability of Congress to issue subpoenas and hold hearings to collect information.³⁵⁷ And cases like *California Motor* and *Guarnieri* affirm the role that petitions play in providing lawmakers with information. Perhaps more important than the doctrinal precedent here is the legislative precedent. The Administrative Procedure Act's notice and

³⁵¹ See *id.* at 350.

³⁵² See *supra* notes 338–345 and accompanying text.

³⁵³ See *supra* notes 260–276 and accompanying text.

³⁵⁴ See *Citizens United*, 558 U.S. at 355 (“[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies.” (quoting *First Nat’l Bank of Bos. v. Bellottii*, 435 U.S. 765, 792 n.31 (1978))); *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–38 (1961)); see also *supra* notes 241–253 and accompanying text.

³⁵⁵ See, e.g., Trevor Potter, Buckley v. Valeo, *Political Disclosure and the First Amendment*, 33 AKRON L. REV. 71, 71 (1999) (“Generally, disclosure enjoys a favored position, and is said by the Supreme Court to advance, rather than restrict, the information available in the marketplace of ideas.”).

³⁵⁶ Compare *United States v. Harriss*, 347 U.S. 612, 625–26 (1954) (upholding a lobbying disclosure regime because it provided information to lawmakers without prohibiting speech), with *Citizens United*, 558 U.S. at 366–67 (upholding a campaign finance disclosure regime because it provided information to voters without prohibiting speech).

³⁵⁷ See, e.g., *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491 (1975).

comment provisions, for example, do more than simply provide the public with a way to give input on proposed regulations; they also generate a broad and inclusive record upon which decisions are to be made.³⁵⁸ Similar structural reforms aimed at Congress or other legislatures would likewise further lawmakers' interest in information-gathering.

CONCLUSION

The history of formal petitioning reveals that the right to petition protects more than simply a form of political expression. Rather, it protects a right to participate in the lawmaking process. The formal procedures that characterized petitioning in Parliament, colonial governments, and Congress provided individuals and groups with a quasi-procedural right to access legislative bodies and to have their petitions considered on equal footing. In return, petitions provided lawmakers with broad and inclusive information necessary for effective governance. These two interests—access and information—were central to petitioning, and as the institutions that supported formal petitioning declined, these same interests spurred the rise of our modern lobbying system.

Attempts to reform our lobbying system raise foundational questions under the First Amendment, requiring foundational solutions. Whereas past efforts at regulating lobbying have focused on the speech and activity of lobbyists themselves, the history of petitioning invites us to view the problem from an institutional perspective. Moving forward, Congress and state legislatures should consider the history of the right to petition as a guide for allocating government access and as a mechanism for generating broad and inclusive information. Likewise, the Supreme Court should employ this history in developing a distinct Petition Clause doctrine that recognizes the ongoing importance of access and information. By taking seriously these interests, the right to petition's vision of a formal, equal, and informative system of public engagement can be more fully realized.

³⁵⁸ 5 U.S.C. § 553.

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