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Voice in Government: The People

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ARTICLES

VOICE IN GOVERNMENT: THE PEOPLE

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"To maintain its legitimacy, a democracy must have both a unitary and an adversary face." Jane Mansbridge, Beyond Adversary Democracy 300 (1983).

INTRODUCTION

This article contributes to the effort to delineate a proper relationship between the First Amendment and the political process. In an earlier article, I explored the idea that many voting rights cases could be better explained as First Amendment "speech" cases than as equal protection "discrimination" cases.[1] The symposium on Voice in Government offers an opportunity to investigate whether the voice protected by the First Amendment encompasses more than the speech interests discussed in my earlier article.

I argue that the Petitions Clause of the First Amendment does protect a voice different from—but complementary of—mere speech. The voice protected by the Petitions Clause consists of speech synthesized and transformed through the processes of government. It is individual in its origins, but is ultimately collective in its weight, import, and resonance. One might think of it—in common parlance—as the voice of the people.[2]

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1. Emily Calhoun, *The First Amendment and Distributional Voting Rights Controversies*, 52 TENN. L. REV. 549 (1985).

2. It is important for readers to understand at the outset that I am making a different argument than that made by people like Stephen L. Carter, *Does the First Amendment Protect More Than Free Speech?*, 33 WM. & MARY L. REV. 871 (1992). Carter argues that the First Amendment protects debate in a relatively homogeneous community. *Id.* at 892. For that reason, and in the interest of "repairing bonds of community," he suggests that the First

The Petitions Clause protects the adversarial assertion of individual, special interests in the marketplace of ideas through familiar free speech principles, but the Petitions Clause should not be interpreted merely to guarantee a right of speech. A Petitions Clause analysis based solely on the right of speech—and the adversarial assumptions and metaphors associated with that right—are inappropriately limiting for a provision of the First Amendment that is said by the Court to be "a charter for government."[3]

The Petitions Clause is premised on assumptions about government itself that are at odds with those on which the special-interest, adversarial, marketplace of ideas is based. The government contemplated by the Petitions Clause—the government to which petitions for redress of grievances are directed and the government that will or will not take action—is a government whose charter has two fundamental features. Because these features enlist adversarial speech in service of a common end, a voice of the people is made possible.

The first feature of the charter for government secured by the Petitions Clause is accountability. The Petitions Clause embodies a certain distrust of representative government and contemplates some direct citizen access to and control of government. Accountability—an idea associated with popular sovereignty and reciprocity between government and citizen—ensures that the will of the people cannot be ignored by self-serving government officials or officials unduly influenced by special interests.

The second feature of the charter for government secured by the Petitions Clause is the protection of minority interests.

Amendment may support the elimination of some voices from debate. *Id.* at 887.

I am not an advocate of controlling or limiting speech in the interest of some predetermined communitarian value. I am an advocate of ensuring that government forums accommodate diverse citizen-speakers to enter into transactions for the benefit of the common good (i.e., the community). I am interested in structures that promote community thinking for the general good. I do not assume that relative homogeneity among debaters is needed in order for people with radically diverse views to enter into transactions for the common good.

My views are akin to those expressed in Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988). Michelman thinks of "politics as a process in which private-regarding 'men' become public-regarding citizens and thus members of a people." *Id.* at 1502. He rejects the idea that republicanism requires homogeneity or that the goal of politics is only to select winners and losers among competing ideas.

3. Thomas v. Collins, 323 U.S. 516, 537, *reh'g denied*, 323 U.S. 819 (1945).

The Petitions Clause provides access to government for ideas or groups that would otherwise be ignored by majority-endorsed laws and policies. It gives even those not entitled to vote some political access and an opportunity to be part of pacts created to serve the common good. It complements and reinforces the protections for minority interests that some believe inhere in a representative system of government.

These are not the majoritarian and counter-majoritarian features that typically come to mind when we think about the fundamental characteristics of our government. Government accountability to the people, for example, is not necessarily at odds with government responsibility to individuals or to minority groups. Both features characterize a government that is controlled by no interest—special or majoritarian—that would preclude transactions among the people for the benefit of all.

The Petitions Clause guards against a government, granted powers to serve the common good, which would choose to hear and respond to only some of the people. It guards against a government that would exclude some individuals from deliberations about the common good, and thereby prevent the people from making pacts among themselves that otherwise might be made. It guards against a government that would systematically ignore interests or speech needed to formulate policies for the common good. It guards against a government—majoritarian or nonmajoritarian, special-interest—that would obstruct the possibility that a voice of the people might emerge through government.

The charter for government secured by the Petitions Clause requires protection of two sets of interests. One is surely the set of free speech interests typically protected through application of a traditional free speech analysis to Petitions Clause claims. The free-speech aspect of Petitions Clause doctrine is appropriately responsive to the reality of how conflicting interests contend within the political process.

But the Petitions Clause embodies more than a purely adversarial view of politics. Through its guarantees, it creates conditions under which government can be responsive and accountable to all of the people. It creates conditions that maximize opportunities for a common voice to emerge from and to transcend adversary, free speech advocacy. In other words, the charter for government protects transactional as well as speech interests. Petitions Clause principles that protect these transactional interests are not well defined. Because there is no general acknowledgment that the Clause protects a voice of the people as well as adversarial free speech, the Clause is frequently considered superfluous or redundant.

The analysis in this article is offered in the hope of achieving a better constitutional balance between the reality of competing interests advanced by individual speech and the aspiration that there are opportunities for discovering in that speech—if government structures are not molded to preclude those opportunities—a voice of the people for the common good.[4] It draws on Alexander Meiklejohn's argument that the paramount value advanced by the First Amendment is planning for the general good, an endeavor which requires protection against "mutilation of the thinking process of the community."[5] It accepts the procedural notion advanced by some advocates of civic republicanism that politics is not "coercive communitarianism"[6] but an "opportunity for citizens to participate in a communal dialogue that identifies the common good."[7] It assumes that a primary privilege of citizenship is the ability to associate and to enter into pacts with others for common ends.[8]

To explore and illustrate my argument, I will first review some Petitions Clause history. I then consider Supreme Court opinions to illustrate how they suggest a rationale for protecting transactional as well as speech interests through the Petitions Clause. Next, I turn to a contemporary Petitions Clause debate about a Colorado constitutional provision, popularly known as Amendment 2, to illustrate the importance of articulating Petitions Clause protections for both speech and transactional interests. Finally, I identify a principle of non-corruption that might be used to protect the transactional interests at stake in Petitions Clause cases.

I. THE PETITIONS CLAUSE IN HISTORICAL PERSPECTIVE

A number of persons have reviewed the origins and historical appeals to the protection of the Petitions Clause.[9] It is not my

4. *Cf.* Michelman, *supra* note 2, at 1535 (discussing the reconciliation of principles of autonomy and association in government and constitutionalism).

5. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).

6. Michelman, *supra* note 2, at 1495.

7. Stephen M. Feldman, *Whose Common Good? Racism in the Political Community*, 80 GEO. L.J. 1835, 1836 (1992). *See also* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548-51 (1988).

8. Michelman, *supra* note 2, at 1503 (citizenship permits participation as an equal in public affairs in pursuit of a common good) and at 1518 (citizenship stands for the constant redetermination by the people for themselves of the terms on which they live together).

9. *See, e.g.*, CHARLES A. BEARD & BIRL E. SHULTZ, DOCUMENTS ON THE STATE-WIDE INITIATIVE, REFERENDUM, AND RECALL (1912); THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL

intent here to repeat their detailed historical accounts. Nor should my brief comments on history be taken as an attempt to construct an interpretation of the Petitions Clause that is founded on a definitive and undisputed historical account. Rather, I simply want to highlight four points which most of these accounts suggest are valid: (1) the Petitions Clause is associated with the notion that the government (direct or representative) acts for the common good; (2) the Petitions Clause protects speech interests; (3) the Petitions Clause protects transactional interests; and (4) political structures and processes have changed in significant ways since the Petitions Clause was adopted, a fact that may bear on the way the Clause is interpreted.

A. *The Petitions Clause and the Common Good*

The Petitions Clause is frequently discussed in conjunction with a debate over two competing notions about the constitutionally-preferred character of government in the United States. These competing notions are that government is necessarily representative or, conversely, that a government in which the people are sovereign requires processes of direct democracy. James Madison is typically cited as the proponent of the first idea and Thomas Jefferson as the proponent of the second.

The representative/direct democracy debate, although providing information critical to an understanding of the Petitions Clause, can obscure a point of agreement between key proponents of these contending ideas. Both Madison and Jefferson, for example, believed that government should act on behalf of all of the people, not merely the people who happen to be in control of government at the time (be they kings or elected majorities). Both, although in different contexts, associated the petition for redress of grievances with this idea.

Petitioning was linked to Madison's beliefs about representative government and the common good in a rather straightforward way. Madison drafted the Petitions Clause.[10] He defended

(1989); Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986); Anita Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569 (1987); 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, 1166-75 (1986); Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 HARV. L. REV. 1111, 1113 (1993).

10. Madison's draft of what came to be the First Amendment read: "freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed." Smith, *supra* note 9, at 1175.

its guarantees as preferable to a proposed constitutional provision that would have required representatives to vote as instructed by the electorate.[11] His defense was premised on a trusteeship view of government in which representatives "owed their constituents mature judgment and enlightened conscience" in service of the common good, an obligation which required that representatives have discretion to exercise their judgment after deliberation and debate.[12]

As interpreter for the general public of the meaning of the Constitution, Madison had a lot to say about these ideas. He clearly believed in representative democracy as a guard against potential dangers of majority rule and as a mechanism for promoting the common good.[13] He believed it would minimize the divisive forces of faction,[14] which he defined as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens or to the permanent and aggregate interests of the community."[15] He rejected a pluralist or adversarial view of politics in which interests compete to be the winner.[16] Rather, he wanted to neutralize factional interests so that the public interest might emerge.[17]

Jefferson was also a believer in the common good. In part, Jefferson's ideas about the common good were based on moral-sense philosophy and the idea of public virtue.[18] They were also arguably related to a concept of government-as-trustee similar to

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11. *See* CRONIN, *supra* note 9, at 24-25; BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1026 (1971); GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 42-43, 223-24 (1981) [hereinafter WILLS, EXPLAINING AMERICA]; Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1523 (1990).

12. *See*, CRONIN, *supra* note 9, at 27 (Edmund Burke was the "intellectual godfather of the trustee or independence position").

13. *See, e.g.*, CRONIN, *supra* note 9, at 7-20, 40; WILLS, EXPLAINING AMERICA, *supra* note 12, at 213-14; Sunstein, *supra* note 8, at 1558-59; *cf.* Akhil R. Amar, *The Bill of Rights as Constitution*, 15 HARV. J.L. & PUB. POL'Y 99 (1992) (government structures were intended to protect individual rights); Eule, *supra* note 11, at 1530 (Bill of Rights is a fallback protection for filtering systems gone awry).

14. WILLS, EXPLAINING AMERICA, *supra* note 11, at 214.

15. *Id.* at 193-94.

16. *Id.* at 202.

17. *Id.* at 205-07.

18. GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 190, 215-16, 251-55 (1978) [hereinafter WILLS, INVENTING AMERICA]. Madison also shared some of these beliefs. *Id.* at 236, 305. The ideas of civic republicanism that have recently been much debated attest to this orientation. *See, e.g.*, Sunstein, *supra* note 7, at 1560-61.

that which influenced Madison.[19] In Jefferson's view, government is to act for the general public good and abuses its powers if it acts in a partial or self-serving manner.[20]

> When it came to discussing the working relationship between governed and government, Jefferson understood that Locke relied on the analogy of equitable trust, not contract. . . . The right of the people to create and abolish governments was analogous to their right to create and abolish a trust for their own benefit. The inherent and inalienable rights Jefferson cited were the terms of that trust.[21]

The concept of government trusteeship familiar to Jefferson rested on analogies to the trust concepts developed through courts of equity.[22] Courts of equity were enjoined to do "equal right to all manner of people, great and small, high and low, right and poor . . . ."[23] In doing so, these courts worked in the interstices of the law to respond to those who would otherwise be omitted from legal concepts of justice and fairness.[24] And these courts were interested in communal justice.[25]

Jefferson's commitment to the idea of trusteeship and the common good was directly associated with petitioning the government for redress of grievances. His assertion of popular sovereignty in the Declaration of Independence[26] in form and

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19. *Compare* PETER L. HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA (1990) *with* WILLS, INVENTING AMERICA, *supra* note 18, at 167-81, 229-30 (arguing that Jefferson did not rely on Locke's ideas, but interprets Locke's ideas very differently than does Hoffer).

20. HOFFER, *supra* note 19, at 66-71. The concept of government-as-trustee was widely accepted and incorporated into state charters of government after the Revolution. *Id.* at 78-79.

21. *Id.* at 73. Note, however, that Jefferson did not include as an inherent right the right of property, as one would have expected from Locke. *See* WILLS, INVENTING AMERICA, *supra* note 18, at 229-30.

22. HOFFER, *supra* note 19, at 71-79.

23. *Id.* at 81 (quoting W.W. HENING, ED., STATUTES AT LARGE OF VIRGINIA (Richmond, 1809-23), 9:389 (1777)).

24. *Id.* at 8-10, 16.

25. *Id.* at 14.

26. Jefferson, along with others among the Founding Fathers, was somewhat less enamored than Madison of the argued virtues of representative democracy. He seemed to have more faith than Madison in the ability of the people to represent themselves and more concern for the ability of the people directly to control their own destiny. *See, e.g.*, BEARD & SHULTZ, *supra* note 9, at 26-29; CRONIN, *supra* note 9, at 7-20, 25; Eule, *supra* note 11, at 1530.

Contemporary debate mirrors the differences of opinion between Jefferson and Madison in this regard. Some persons believe that Madison's assumptions about representative democracy are so far removed from reality as to be unworthy of serious discussion. BEARD & SHULTZ, *supra* note 9, at 32-33. Others

language draws on the tradition of equity.[27] For Jefferson, the British government's refusal to respond to repeated, prior petitions for redress of colonial grievances constituted a breach of trust obligations that was ground for dissolution of the trust and government itself.[28] In fact, the statement of grievances, "applied to a private trustee, might have sustained a complaint in chancery."[29]

Madison and Jefferson shared a commitment to an idea of government for the benefit of all of the people rather than a particular special interest. In different contexts, each linked the petition for redress of grievance to the notion that government

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find contemporary validation for his views. JANE MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1983).

On the other hand, contemporary proponents of representative democracy invoke Madison to argue that direct democracy is either constitutionally suspect or invalid. *See, e.g.*, Eule, *supra* note 11; *see also* Douglas H. Hsiao, *Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic*, 41 DUKE L.J. 1267 (1992); Hans E. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993).

Although my Petitions Clause analysis shares many of the views expressed by proponents of representative democracy, I do not assume that representative processes necessarily are more rational or more immune to special interests than direct democracy. Neither do I assume the contrary. The Petitions Clause analysis assumes that all forms of government present the danger (although certainly in different degrees) that government will either be captured by special interest or ignore minority interests. It proposes that all forms of government should be evaluated by their capacity to permit transactions among citizens for the common good.

For example, the trusteeship idea is not necessarily restricted to representative forms of democracy, see CRONIN, *supra* note 9, at 39 (citing Rousseau), and does not preclude direct democracy. *Cf.* Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984) (rejecting a constitutional claim for direct citizen participation in government policy-making), which should not be read to mandate representative decisionmaking but rather as a determination that direct participation is not constitutionally required. *Cf.* Am. Constitutional Law Found. v. Meyer, No. 93-1467 (D. Colo. filed July 14, 1993), which argues that the state's initiative process is a formalized/codified version of the right of petition embodied in the First Amendment and should be given special protection. This article does not address the strength of claims that, once a state has established a process for direct citizen participation, that process is given special First Amendment protections.

27. *See* WILLS, INVENTING AMERICA, *supra* note 18, at 57-65 (Jefferson treated the first Congress as a committee for petition of redress); *see also*, Smith, *supra* note 9, at 1156 (describing how petitions were associated with the concept of equity).

28. HOFFER, *supra* note 19, at 66.

29. *Id.* at 73-74.

for the benefit of all the people is required by a concept of government trusteeship.

B. *The Petitions Clause and Speech Interests*

In the original view, protecting speech interests was seen as a way of protecting other interests served by the Petitions Clause.[30] For example, speech was critical to the ability of petitioners to use the petition device to control legislative agendas, to bring problems to the attention of government, or to provide information to government.[31]

In practical terms, however, the Petitions Clause has come to be associated primarily with free and equal speech. This is a natural consequence of the fact that many prominent government reactions against unwanted petitioning against private and public injustice have taken the form of penalties and restrictions on speech.[32] For example, government attempts to impose restrictions on speech about labor or civil rights issues have been resisted through claims based on the Petitions Clause.[33]

The early link made between the right of petition and the protection of speech is commonly associated with the adoption of the Sedition Act of 1798, which criminalized "false, scandalous and malicious writings against the government of the United States, or either House of Congress . . . or the President . . . with intent to defame . . . or to bring them . . . into contempt or disrepute."[34] The link was carried into contemporary conscious-

30. *See* Higginson, *supra* note 9, at 142 (noting that Madison saw the two rights as separate and distinct and presented them in different amendments in his original draft); Smith, *supra* note 9, at 1153 (recognition of petitioning as an unqualified right helped to foster recognition of rights of press and assembly and other speech rights). According to Sheldon Novick, some widely consulted commentaries like JAMES KENT, COMMENTARIES ON AMERICAN LAW (1873), and THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS (1868), were "far more strongly worded when they came to the right of petition than they were concerning the right of free speech more generally." Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression*, 1991 SUP. CT. REV. 303, 333 n.135,

31. For examples of how petitioning was used, see Higginson, *supra* note 9 and Smith, *supra* note 9.

32. *See, e.g.*, the early litigation involving petitions and libel actions. Higginson, *supra* note 9, at 149 (describing punishments of petitioners who got out of line); Hodgkiss, *supra* note 9, at 573 n.22; Smith, *supra* note 9, at 1168-75 (discussing eighteenth-century prosecutions for treason and seditious libel).

33. *See, e.g.*, Adderly v. Florida, 385 U.S. 39 (1966); Bridges v. California, 314 U.S. 252 (1940); Thomas v. Collins, 323 U.S. 516, *reh'g denied*, 323 U.S. 819 (1945). *See generally infra* notes 48-51, 103-07, 113-16, 121-46, 152-64, 177-80 and accompanying text.

34. 1 Stat. 596 (1798). Seventeen cases were prosecuted under the Act before it expired in 1801, and popular indignation over the Act contributed

ness in the case of *New York Times Co. v. Sullivan*[35] and other similar cases.[36]

C. *The Petitions Clause and Transactional Interests*

Speech interests have not always predominated in debates implicating the Petitions Clause. The assumption that the Petitions Clause involves much more than speech interests, for example, was a focal point of the 1836 debate on Senator John C. Calhoun's motion not to receive three petitions requesting Congress to abolish slavery in the District of Columbia.[37]

On a conceptual level, the senatorial debate invoked the ideas of government for the common good to which Jefferson and Madison were committed. Debate on Calhoun's motion implicated the responsibility of government to act for the common good, in ways that would not divide the country. All debaters professed to share this common frame of reference, although they disagreed as to what action—receipt or rejection of the abolitionist petitions—would serve the ends.[38]

For example, some argued that the abolitionist petitions should not be received because of the divisive nature of their substance.[39] Others responded that to refuse the petitions would be inherently divisive, as denying a basic political right of petition that pre-existed the formation of the government itself.[40] Still others reminded the Senate that, in considering whether to receive or reject the petitions, senators were bound to act for the

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substantially to the demise of the Federalist Party. *See* Smith, *supra* note 9, at 1175-77.

35. 376 U.S. 254 (1964).

36. *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64 (1964); *see also* Novick, *supra* note 30, at 330-47 (discussing the sedition cases of the early twentieth century).

37. For a review of the many debates respecting abolitionist petitions, see Higginson, *supra* note 9, at 158-65.

38. The main speeches recorded in the Congressional Globe are replete with appeals to senators to debate and decide on the petitions in ways that will serve the common good. *See* CONG. GLOBE, 24th Cong., 1st Sess. 75-80, 233-35 (1836); CONG. GLOBE APP., 24th Cong., 1st Sess. 87-93, 108-12, 117-22, 132-36, 138-40, 140-42, 142-44, 147-50, 167-70, 181-85, 214-17, 218-20, 220-23, 223-26, 271-73, 291-93, 299-300, 321-23, 619-620 (1836).

39. This objection was one of the bases for Calhoun's original motion not to receive the Ohio petition. CONG. GLOBE, *supra* note 38, at 75, 81. The objection was echoed by other southern senators. *Id.* at 76, 118; CONG. GLOBE APP., *supra* note 38, at 144, 220-22, 321. *See also id.* at 223-26.

40. This view was expressed by senators from both northern and southern states. *See, e.g.*, CONG. GLOBE, *supra* note 38, at 79, 120-23; CONG. GLOBE APP., *supra* note 38, at 48, 88, 90, 92, 111, 140-41, 149, 182, 185, 214, 234, 272.

common good.[41] Others refined the latter notion: the petitioners deserved a respectful response rather than rejection precisely because they must, as citizens, be considered part of the common good.[42]

Within the debate's professed frame of reference—that government is chartered to act on behalf of the common good—senators engaged in a vigorous debate about which people would be allowed to participate in the transactions and processes from which the common good would be derived. The right to petition was seen by some as inseparable from a duty of government to receive and respond to petitions.[43] Senators were reminded that they were agents of the people and that they required petitions in order to fulfill their responsibilities to the people.[44] It was argued that infringing the right of petition would change the vital spirit of the Senate as a political institution.[45] The Petitions Clause was said to protect a free and unobstructed intercourse between government and people, not merely a one-way avenue for speech.[46]

Appeals to transactional interests and the responsibility of government to all the people—rather than assertions of rights of

41. These appeals are made throughout the speeches cited in *supra* note 39. Some, for example, argued for the need for a unified vote. CONG. GLOBE, *supra* note 38, at 76, 241-42, 247-48. Others argued that the senators and their constituents should respect the original pact (and compromises on slavery) on which the Union was founded and should recall the common interests and bonds forged in the Revolutionary War. *Id.* at 77, 79, 80; CONG. GLOBE APP., *supra* note 38, at 110, 111, 134, 140, 182. Again, others argued that the best way to show unity was to reach the merits of the abolitionist petitions so that northern and southern senators together could vote to deny them. CONG. GLOBE, *supra* note 38, at 239; CONG. GLOBE APP., *supra* note 38, at 121-22, 218, 239, 620. One senator argued that citizens effectively lost their right to have a petition received when they petitioned for divisive purposes. CONG. GLOBE APP., *supra* note 38, at 322-23.

42. *Id.* at 83, 638.

43. CONG. GLOBE, *supra* note 38, at 147, 336; CONG. GLOBE APP., *supra* note 38, at 108-11, 122-23, 183, 218, 234, 618. *See* Hodgkiss, *supra* note 9; Higginson, *supra* note 9, at 155 n.92 (arguing that the Petitions Clause imposes a constitutional, inescapable duty to respond on the part of government.) *Contra* Smith, *supra* note 9, at 1179 n.164, 1190. *Cf.* Note, *supra* note 9, at 1119-22 (arguing that the government owes a duty to respond); Comment, *On Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules*, 132 U. PA. L. REV. 1515, 1518 (1984).

44. CONG. GLOBE APP., *supra* note 38, at 122, 133-34, 169, 182, 300.

45. *Id.* at 182.

46. *Id.* at 148, 149. *See also id.* at 133 (people enjoy more than the mere liberty of hearing the senate's voice); CONG. GLOBE, *supra* note 38, at 239 (the right of petition is a right of being heard, which carries with it a right to have the servants of the people examine, deliberate, decide, and to give reasons for its decisions).

free speech—characterized this part of the debate. The debate was about who was entitled to enjoy the reciprocal relationship between government and people, and about who was entitled to enter into the transactional setting from which the common good would emerge.[47]

Ostensibly, this part of the debate was about the petitioners, who were not slaves but members of the Society of Friends or other groups opposing slavery. In reality, however, as all Senators knew, the debate was about African-Americans themselves and their status as citizens. The debate was about whether interests of African-Americans could be asserted through the petition, a device intended to ensure that government would not neglect its obligation to act—and to enter into pacts—for the benefit of all people.

Slavery as an institution was justified, in part, with reference to the assertion that African-Americans were incapable of discerning the common good and, for that reason, they could be excluded from participation in government constituted for the common good.[48] As was said by Justice Daniel in Dred Scott v. Sanford,[49] slaves can "be no party to . . . the association of those possessing free will, power, [and] discretion."[50] As a practical matter, preservation of the institution of slavery was secured by maintaining barriers that effectively precluded pacts from being made even among African-Americans themselves.[51]

It is no wonder that defenders of slavery feared that mere reception of the 1836 and similar petitions would threaten the foundations of slavery. Receipt of the petitions would acknowledge—even though only indirectly—the right of African Americans to demand inclusion in the common good. Receipt of the petitions would acknowledge a transactional right of African Americans to be part of processes of political exchange through

47. A central aspect of Jefferson's philosophy was that development of the common interest required mechanisms of exchange. WILLS, INVENTING AMERICA, *supra* note 18, at 231-35 (arguing that the right to alienate property was more important to the moral sense philosophers than the right to retain property).

48. Feldman, *supra* note 7, at 1852-53. *See also,* Sunstein, *supra* note 7, at 1539-40 (discussing the fact that republicanism is associated with exclusion).

49. 60 U.S. (19 How.) 393, 477 (1856).

50. *Id.*

51. *See, e.g.*, ROBERT FOGEL, WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY 396-400 (1989) (family members were physically separated from each other, education was restricted, slaves were not permitted to engage in or even to speak of collective action, opportunities to develop a collective sense of history were removed).

which pacts among the people would be formed for the benefit of all the people.

D. *The Petitions Clause and Contemporary Political Structures*

As historical accounts of the Petitions Clause demonstrate, contemporary political structures and processes differ in many ways from those that existed at the time the Petitions Clause was adopted. For example, the franchise has been widely conferred on previously disqualified groups.[52] The power of the judiciary to protect minority interests against majoritarian excess has been expanded. Mechanisms for promoting direct democracy, like the initiative, referendum, and recall, have been adopted by many states.[53]

These changes may affect what we think about competing forms of representative or direct democracy,[54] but they do not affect the contemporary urgency of the historical Petitions Clause concern for a charter of government that permits a voice of the people to emerge from adversarial interests.[55] That concern is even more urgent as both representative and direct democratic processes come to serve primarily adversarial interests and therefore tend to work against the charter of government guaranteed by the Petitions Clause.[56] Contrary to what some may think,[57] we are "starved for [the]unitary democracy"[58] that the

52. Petitioning was not restricted to qualified voters and, in fact, was viewed as a necessary political mechanism given the limited electoral franchise. Higginson, *supra* note 9, at 145, 153; Smith, *supra* note 9, at 1172.

53. CRONIN, *supra* note 9, at 47.

54. For example, some might question whether direct democracy is practically wise. Eule, *supra* note 11. Compare what happened to the practice of petitioning itself when legislatures became flooded with abolitionist petitions, each demanding some action. Higginson, *supra* note 9, at 158.

55. *Cf.* Higginson, *supra* note 9, at 165-66 (suggesting that changed conditions might warrant a different approach to petitioning, but calling for candor in interpretations of the Clause).

56. Direct democracy typically is adversarial in orientation, at least in its purest forms. *See, e.g.*, MANSBRIDGE, *supra* note 26, at 245, 301. Many persons seem to believe that representative government will only be legitimate and effectively respond to non-majority interests if it is conceived along adversarial lines. Sunstein, *supra* note 7, at 1585-89, presents an argument that proportional representation, which is frequently characterized as an adversarial approach to representative government, actually is a device that serves the common good by ensuring that minorities at least have a voice in representative deliberations.

57. *E.g.*, WILLS, EXPLAINING AMERICA, *supra* note 11, at 234 (cautioning that the commitment to public virtue and government officials who act for the common good seems "sappy" to twentieth-century individuals).

58. MANSBRIDGE, *supra* note 26, at 301.

transactional interests of the Petitions Clause were intended to promote.

II. THE SUPREME COURT AND THE PETITIONS CLAUSE[59]

Although relevant Supreme Court opinions are read by some to stand for the proposition that the guarantees of the Petitions Clause are equivalent to—no more and no less than—free speech guarantees,[60] the Court has stated that rights of speech/press and petition/assembly are not identical.[61] The Court simply has not had many occasions to elaborate on how speech and petitioning rights differ. Because most Petitions Clause claims focus on speech rather than transactional interests, only a speech component of Petitions Clause analysis has been fully developed. The speech component does resemble free speech analysis, but even in Petitions Clause opinions focusing on speech interests the Court has indicated that the Clause protects something different from a right of free speech.[62] One element that differenti-

59. The Court's Petitions Clause opinions are few and far between. The opinions discussed in this article include those directly based on Petitions Clause analysis and those merely referring to the Clause as embodying concepts and policies relevant to the analysis of other provisions of law. *See* McDonald v. Smith, 472 U.S. 479 (1985); Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984); Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983); Smith v. Arkansas Highway Employees, Local 1315, 441 U.S. 463 (1979); California Motor Trans. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); Adderly v. Florida, 385 U.S. 39 (1966); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, *reh'g denied*, 365 U.S. 875 (1961); Thomas v. Collins, 323 U.S. 516, *reh'g denied* 323 U.S. 819 (1945); Bridges v. California, 314 U.S. 252 (1941); De Jonge v. Oregon, 299 U.S. 353 (1937); United States v. Cruikshank, 92 U.S. 542 (1875). Most opinions do not go into the history of the Clause or its purposes in any depth. *But see* McDonald v. Smith, 472 U.S. 479 (1985); Adderly v. Florida, 385 U.S. 39, 49 n.2 (1966) (Douglas, J., dissenting) (offering a somewhat more complete analysis of the purposes of the Petitions Clause).

60. *See* Smith, *supra* note 9, at 1183-88; Note, *supra* note 9, at 1111-12.

61. Thomas v. Collins, 323 U.S. at 530. In *Thomas*, which involved both speech and petition/assembly claims but focused on speech interests, the Court suggested that the usual requirement of strict scrutiny of restrictions on speech may be even more important when the speech claim is associated with an assembly claim. *Id.* Typically, however, the Court states that free speech and petition rights are cognate, thereby implying equality of status of rights. *See, e.g.*, De Jonge v. Oregon, 299 U.S. 353 (1937). In one instance, the Court has explicitly rejected an argument that speech to government ought to be given greater, Petitions Clause immunity from defamation actions than ordinary speech is given under the free speech guarantees of the First Amendment. McDonald v. Smith, 472 U.S. 479 (1985). Smith, *supra* note 9, questions this decision.

62. Throughout this article, the term "speech right" is used to refer to speech that does not implicate the Petitions Clause and that is protected only

ates free speech guarantees from petitioning guarantees is the Court's concern for non-adversarial transactional interests.

A. *The Non-Market Transactional Context*

In Petitions Clause cases, one indication that the Court differentiates free speech guarantees from petitioning guarantees is that the Court does not locate speech solely in the context of an adversarial marketplace of ideas where it is expected and desired that the best ideas should win. There is a transactional context in Petitions Clause cases, but it is not the transactional context of the marketplace.

The move away from a marketplace metaphor is most evident in *Thomas v. Collins*,[63] in which the Court explained that the Petitions Clause protects more than speech for the sake of debate, the development of knowledge, or philosophical discussion of abstract principles.[64] The Clause does not exist solely for persons engaged in intellectual pursuits.[65] Rather, the Clause is

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by the speech/press provisions of the First Amendment. The term "speech interest" is used to refer to the set of interests protected by the petition right of the First Amendment. My intent is to maintain a distinction between the right that protects speech and the right that protects petitioning, an activity that implicates both speech and transactional interests.

63. 323 U.S. 516 (1945). In *Thomas*, the move away from the metaphor is relatively direct. In other cases, it is more subtle. See, e.g., Bridges v. California, 314 U.S. 252 (1941), in which the metaphor was explicitly rejected for use in discussions of some petitioning by dissenting Justice Frankfurter, *id.* at 279, and implicitly by the majority. Justice Frankfurter argued that the claimed right of private parties and the press to comment on an on-going judicial proceeding should not be resolved by relying on a marketplace metaphor. *Id.* at 283 ("a trial is not a 'free trade in ideas,' nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market'"). *But see id.* at 293 (a marketplace metaphor is appropriate for discussing speech in the democratic political process). The majority disagreed with Frankfurter's conclusions about the merits of the constitutional claim, but it avoided a marketplace metaphor to help resolve the claim. The majority never adverted to the marketplace metaphor as a justification for protecting petitioning speech, but it provided no substitute metaphor. *Cf.* Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) (petitioning activity was actually conducted in court and a stronger sense of a marketplace metaphor characterizes the opinion).

64. Thomas v. Collins, 323 U.S. at 535. Compare to the concurring opinion of Justice Jackson, which does link the protection of speech to ideas associated with the marketplace metaphor. *Id.* at 545-46 (Jackson, J., concurring).

65. *Id.* at 537.

a charter for government;[66] speech under the Clause is directed toward government action.[67]

Other than the idea that the Petitions Clause constitutes a charter for government, there is in the Petitions Clause decisions no easily identifiable or neatly contrived metaphor that explicitly takes precedence over that of the marketplace-of-ideas.[68] But the marketplace metaphor is subordinated to non-adversarial transactional concerns. These non-adversarial transactional concerns are revealed in the descriptive context in which the Court locates speech.

According to the Court's Petitions Clause decisions, speech to government officials is protected because government requires speech to act accountably and effectively.[69] Effective and intelligent popular government depends on speech.[70] Speech is an important aspect of self-government[71] and is required if representative government is to work.[72] The Petitions Clause gives government officials the ability to receive information from all sources so that they can fulfill their obligations.[73]

The Petitions Clause protects speech so as to ensure that the people can make their will known to the government and government can be responsive to that will.[74] The Court invokes the concept of the people's will on behalf of speakers holding

66. *Id.*

67. *Id.*

68. Novick says that Justice Brennan's opinion in New York Times v. Sullivan, 376 U.S. 254 (1964), provides an alternative metaphor of a town meeting of equals, Novick, *supra* note 30, at 377 ("Brennan's vision was of a community of equals: a town meeting."), but the metaphor is not fully developed in that case.

69. De Jonge v. Oregon, 299 U.S. at 365 (speech serves peaceful change); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. at 137 (speech of the two competing parties is directed toward government action); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. at 510.

70. Thomas v. Collins, 323 U.S. at 530.

71. McDonald v. Smith, 472 U.S. at 483.

72. Thomas v. Collins, 323 U.S. at 545-46 (Jackson, J., concurring).

73. Bridges v. California, 314 U.S. at 277.

74. New York Times v. Sullivan, 376 U.S. 254, 269 (1964) (speech and assembly are protected so that government can be responsive to the will of the people and peaceful change can occur); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. at 137-39 (the whole concept of representative government depends on the ability of the people to make their wishes known so government can act on behalf of the people); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. at 510 (quoting *Noerr*); De Jonge v. Oregon, 299 U.S. at 365 (petitioning maintains "the opportunity for free political discussion, to the end that government may be responsive to the will of the people").

demonstrably non-majoritarian or special-interest views.[75] The Petitions Clause decisions suggest that—by definition—a will of the people cannot be formed if some speakers are excluded from government processes and public debate, even if those speakers demonstrably cannot command adherence of a majority of citizens to their views. They embody a concept of a will of the people that transcends adversarial minority, special, or even majority interests.[76]

According to the Court, the Petitions Clause protects the assertion of minority views as a vehicle for peaceful change,[77] as a way of kindling public interest in new issues,[78] and as a means of ensuring that changed conditions of society will not be neglected by government.[79] It serves as a check on a government that might otherwise seek to limit the search for knowledge or to become the dogmatic guardian of the public mind.[80]

Petitioning is a right of all citizens because government has the power to act for the benefit of the common good and to require all citizens (not simply the majority who voted for an

75. *See, e.g.*, Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (special interests); Thomas v. Collins, 323 U.S. 516 (1945); De Jonge v. Oregon, 299 U.S. 353 (1937) (minority interests as against majority-endorsed laws). In fact, there are no Petitions Clause cases in which plaintiffs claim to represent a majority of voters whose will has been ignored by a legislative body.

76. The "will of the people" protects people with extreme minority or special-interest views that not only will not "win" in a political contest conducted at the moment of decision but, in all probability, will never be accepted by a majority. City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 379 (1991) (it would be hard to sustain restrictions on citizen advocacy of any form of governmental action, however disfavored, in light of the Petitions Clause). Thus, the Court's "will of the people" is something more than a mere artifact of accessible procedures through which majority preferences are registered. It is, in this respect, at odds with how people conventionally understand the concept. The conventional will of the people is typically considered to be no more and no less than a majority preference (self-interested or not) on a particular issue. The Petitions Clause "will of the people" is something other than a descriptive label identifying the outcome of a particular electoral competition.

77. *See* Garrison v. Louisiana, 379 U.S. 64, 68 (1964); New York Times v. Sullivan, 376 U.S. 254, 269 (1964); De Jonge v. Oregon, 299 U.S. at 353, 365; *see also* Bill Johnson's Restaurants v. NLRB, 461 U.S. at 741 (petitioning to courts is linked to peaceful resolution of disputes); *cf.* Meyer v. Grant, 486 U.S. 414, 420-21 (1988) (limitations on initiative petitioning, which is said to serve peaceful change, are discussed in terms of free speech rights).

78. Bridges v. California, 314 U.S. at 268-69; De Jonge v. Oregon, 299 U.S. at 366.

79. Thomas v. Collins, 323 U.S. at 532.

80. *Id.* at 545 (Jackson, J., concurring).

action) to contribute to that action.[81] It is a necessary, reciprocal incident of citizenship in a government that acts for the common good.[82]

The Petitions Clause protects the ability of people to persuade others to join cause with them.[83] Rights of assembly are intertwined with the discussion of petitioning rights.[84] The right to discuss matters of public interest is protected not only as part of free speech but as part of free assembly.[85] Both are inherent in citizenship.[86]

Speech under the Petitions Clause is said to be "communication with one another which constitutes the basis of all common achievement."[87] Petitioning speech is linked to the right to consult with others respecting public affairs.[88] Speech serves the ability of people to enter into transactions with other people, which is important to government and to citizenship.[89]

It would be a mistake to read too much into the Court's frequently cryptic statements about the Petitions Clause and petitioning speech. But it would be an equal mistake to ignore the Court's repeated placement of speech in a non-adversarial context. In Petitions Clause decisions, speech is linked to effective,

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81. Crandall v. Nevada, 73 U.S. 35, 44 (1867).

82. *Id.* at 43-45. The requirement of reciprocity between government and citizen is repeated in other decisions. United States v. Cruikshank, 92 U.S. at 555. It embraces all citizens, minority as well as majority. *See infra* notes 147-80 and accompanying text. A weaker notion of reciprocity pertains to the information needs of government. Government needs information to act responsibly and citizens have a right of speech to further responsible government action. *See infra* notes 91-97, 109 and accompanying text.

83. In *Thomas v. Collins*, the speech threatened was that of a union leader who was attempting to persuade workers to join with unionized workers. The majority recognized this fact as a reason to protect speech. 323 U.S. at 526, 532-34. *See also* New York Times v. Sullivan, 376 U.S. at 279; California Motor Transport Co. v. Trucking Unlimited, 404 U.S. at 510-11 (petitioning protects groups with common interests).

84. *See, e.g.*, De Jonge v. Oregon, 299 U.S. at 365; Thomas v. Collins, 323 U.S. at 544 (Jackson, J., concurring).

85. Thomas v. Collins, 323 U.S. at 532.

86. United States v. Cruikshank, 92 U.S. at 552.

87. Thomas v. Collins, 323 U.S. at 546 n.1 (Jackson, J., concurring) (quoting Woodrow Wilson, Address at the Institute of France (May 10, 1919) *reprinted in* SELECTED LITERARY AND POLITICAL PAPERS AND ADDRESSES OF WOODROW WILSON 333 (1926)).

88. United States v. Cruikshank, 92 U.S. at 552; De Jonge v. Oregon, 299 U.S. at 364 (citing *Cruikshank*).

89. Crandall v. Nevada, 73 U.S. at 44. Arguably, the idea that petitioning rights serve the people's ability to enter into transactions for the common good is at the heart of the concern for peaceful change, also invoked in Petitions Clause decisions. *See supra* notes 74-76 and accompanying text.

representative, and responsive government rather than to abstract philosophical debate. Speech serves transactions for common achievement and the formation of pacts among people rather than a competition among citizens in which the most powerful self-interest will win. Petitioning guarantees for all citizens are explicitly linked to the power of government to act on behalf of, and in ways affecting, all of the people. The people to whom government is accountable and on whose behalf government acts are all of the people, not merely a dominant interest group. The Court's assertions about speech and the Petitions Clause reflect a normative view of a government chartered to act in the capacity of trustee for the common good.[90] They put speech in a non-adversarial context.

B. *Procedural Protections for Petitioning*

Although one finds much rhetoric in the Petitions Clause decisions placing speech in a non-adversarial context, the procedural protections afforded through the Clause seem remarkably similar to those deemed appropriate to protect speech competing in a marketplace of ideas. Procedures ensure, for example, equal access for all speakers and freedom from penalty or restraint of disfavored views. Simple speech protections typically serve the petitioner's interests because the petitioner is complaining only about restrictions or penalties on speech itself.

In two cases relevant to the Petitions Clause, however, petitioners sought protection of something other than mere speech. In one, the Court's analysis responded adequately to the petitioners' concerns. In the other, it did not. The decisions illustrate that, although non-adversarial transactional concerns are potentially present in Petitions Clause claims, they are not always fully recognized. When the Court affords protections appropriate only to an adversarial marketplace, the analysis is unsatisfactory.

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90. In early Petitions Clause analysis, the idea that government is constituted to act for the common good is tied—as it was for Madison—to representative forms of democracy, in which representatives use their power for the benefit of the people as a whole. *E.g.*, United States v. Cruikshank, 92 U.S. at 554 (government has an obligation to all its citizens); Thomas v. Collins, 323 U.S. at 546 (Jackson, concurring) (representatives are chosen for their temperament, judgment, and abilities to receive and act on information from a variety of sources, including those advocating special and minority interests). This idea is different from the more limited idea that all branches of government—including the legislature—have an obligation to protect the constitutional rights of minorities as well as the interests of majorities, although the two ideas converge when the right to petition the judiciary is at stake. *See, e.g.*, Protect Our Mountain Env't, Inc., v. Jefferson County, 677 P.2d 1361 (Colo. 1984).

Consider, first, the decision in which non-adversarial transactional concerns were not recognized. In *Minnesota State Board for Community Colleges v. Knight*,[91] faculty members complained that they were unconstitutionally excluded from exchanges of views with college administrators by a statute requiring those administrators to "meet and confer" only with a single designated faculty representative. The majority treated the claim primarily as one implicating the free speech guarantees of the First Amendment.[92] It therefore looked at whether the faculty plaintiffs' speech was cut off entirely or whether only one, formal forum for speech was restricted.[93] Using broad language, it concluded that the First Amendment does not guarantee a right to direct participation in government decisionmaking, a right to have government listen to particular advisers, or a right to have government respond to a particular speaker.[94] Faculty were found to be "free to communicate to the State Board and to local administrations their views"[95] outside the formal context of "meet and confer" sessions,[96] and that their

> speech and associational rights . . . have not been infringed by . . . restriction of participation in "meet and confer" sessions to the faculty's exclusive representative. The State has in no way restrained [the plaintiffs'] freedom to speak on any education-related issue or their freedom to associate or not to associate with whom they please, including the exclusive representative. Nor has the State attempted to suppress any ideas.[97]

Justice Stevens, in dissent, argued that the ability of the plaintiffs to speak in other forums was not an adequate substitute for participation in "meet and confer" sessions.[98] He noted that college administrators wanted to meet formally with faculty other than those for whom the exclusive statutory representative spoke but were prohibited from doing so, regardless of the merits of the views that might be expressed by those faculty.[99] He objected

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91. 465 U.S. 271 (1984).

92. The majority discussed both rights of speech and association, and cited Smith v. Arkansas Highway Employees, Local 1315, 441 U.S. 463 (1979), a case which did rest on a Petitions Clause analysis, but the focus of the majority's opinion was on speech.

93. Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. at 288.

94. *Id.* at 284-85, 288.

95. *Id.* at 276.

96. *Id.* at 277.

97. *Id.* at 288.

98. *Id.* at 301, 322.

99. *Id.* at 313.

that the challenged statute gave one voice a monopoly in the formation of policy.[100]

Justice Stevens's description of the situation identified a familiar organizational problem that went beyond speech. Complaining faculty in Minnesota were upset because they were deprived of equal participation with other faculty in a process of decisionmaking. They knew that their exclusion affected their ability to be included in negotiations and compromises in which competing views would be transformed into policy affecting all faculty. Administrators were upset because they knew that their ability to formulate policy responsive to the interests of all faculty—not simply a single interest group—was compromised. Neither complaining faculty nor administrators saw speech in alternative forums as an adequate substitute for participation in the policy-making forum. Their problem—maintaining a decisionmaking structure that would enable people from different professional backgrounds, as well as strong, conflicting opinions and considerable autonomy, to work together—required something other than a free speech analysis.

Unfortunately for the would-be petitioning faculty, the majority saw only a speech issue. And Justice Stevans, who accurately assessed the true nature of the faculty complaint, adopted a marketplace of ideas, free speech metaphor for use in his analysis.[101] That metaphor—inherently inappropriate for resolving non-adversarial transactional claims—weakened Stevans's argument and effectively precluded an appropriate response to the faculty's complaint.

Problems like those created by the Minnesota statute cannot be adequately addressed by a procedural construct focused only on the ability of people with competing views to speak about their views and to associate to further their ends. I am not arguing here that the complaining Minnesota faculty should have prevailed.[102] I am simply saying that their interest in being part of a decisionmaking forum structured to produce policies based

100. *Id.* at 314.

101. *Id.* at 314 (First Amendment guarantees "that decision[s will] be made in an open marketplace of ideas").

102. For example, one might conclude that the decisionmaking forum created by the Minnesota statute was more like typical employer-employee forums for exclusive bargaining than like governmental processes by their nature intended to serve the general welfare and the common good. If so, a Petitions Clause charter-for-government analysis would not necessarily apply. *See infra* notes 113-16 and accompanying text (suggesting that procedural claims pertaining to government employer-employee relations are outside the scope of the Petitions Clause).

on compromise and responsive to more than one faculty group's concerns was not—and could not be—adequately addressed through an analysis that relied solely on a free speech, adversarial metaphor.

In a second decision, *California Motor Transport Co. v. Trucking Unlimited*,[103] the Court implicitly acknowledged that, under appropriate circumstances, the Petitions Clause protects interests like those unsuccessfully asserted by the Minnesota faculty. In *California Motor Transport*, the Court was required to construe the Clayton Act. Truckers had charged business competitors with illegally invoking state judicial proceedings to deprive the truckers of access to state regulatory processes. The defendant competitors argued that their use of state proceedings was immune from penalty or restraint.

The Court construed the Clayton Act to recognize an immunity defense that would be compatible with First Amendment petition rights.[104] It recognized that the right of petition protects the ability of people with common interests, like defendants, to "use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view. . . ."[105] In other words, the Petitions Clause protects adversarial, special interest speech. The Court also held, however, that adversarial, special interest speech would be protected only insofar as it did not abuse or "corrupt" the governmental processes to which the speech was directed.[106]

The Court did not articulate a detailed test for determining when petitioning speech activity would so corrupt governmental processes that Petitions Clause speech interests would lose their immunizing capacity. It only said that a colorable argument of

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103. 404 U.S. 508 (1972). *See also* Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

104. In similar antitrust cases, the Court purports simply to construe the federal statute so as not to attribute to Congress an intent to violate the Petitions Clause. *See, e.g.*, Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). In *California Motor Transport*, the Court seems to rely more directly on the Petitions Clause itself, especially in the way the Court talks about the plaintiffs and their interest in access to government. To paraphrase the Court in *California Motor Transport*, the defendants' freedom to petition government for redress of grievances might be constitutionally protected, but that does not mean that their freedom to keep others from petitioning is protected. 404 U.S. at 514-15 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

105. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. at 510-11.

106. *Id.* at 513.

corruption was raised by allegations that the defendants had used their power and resources to

> harass and deter [the plaintiffs'] use of administrative and judicial proceedings so as to deny them 'free and unlimited access' to those tribunals. The result . . . was that the machinery of the agencies and courts was effectively closed to [plaintiffs] and [defendants] indeed became 'the regulators of the grants of rights, transfers and registrations' to [plaintiffs] . . . [and] usurp[ed] that decisionmaking process.[107]

Special interest usurpation of government processes might be corruption for a variety of reasons.[108] It might, for example, arguably be corruption because it deprives government of information needed for action on behalf of the people.[109] This view of corruption would hinge on a belief that usurpation is bad because it interferes with speech. Because of the Court's decision in *Minnesota State Board for Community Colleges v. Knight*, however, it is difficult to see why the opportunity to speak in unofficial forums would not be a constitutionally adequate substitute for the protection of the speech interests in *California Motor Transport*. Together, the decisions in *California Motor Transport and Minnesota State Board of Education* suggest that corruption of process must entail more than mere obstruction of speech in a particular forum.

Another possibility, consistent with the Petitions Clause concern for non-adversarial transactional interests, is that special

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107. *Id.* at 511-12.

108. For example, in Bill Johnson's Restaurants v. NLRB, 461 U.S. at 741, the Court, relying on *California Motor Transport*, held that Petition Clause interests in private litigation consist of "compensation for violated rights and interests, the psychological benefits of vindication, [and] public airing of disputed facts." *Id.* at 743 (quoting Thomas A. Balmer, *Sham Litigation and the Antitrust Laws*, 29 BUFF. L. REV. 39, 60 (1980)). If the state has recognized a legal injury, a person has a right not to be totally deprived of the state-prescribed remedy. *Id.* at 742. Although these interests exist only if the state-court plaintiff has a real grievance under state law, and there is no real grievance if "litigation is based on intentional falsehoods or on knowingly frivolous claims," *id.* at 743-44, a plaintiff must be accorded a lot of leeway in stating his factual and legal case. *Id.* at 745, 746-47. In other words, a person has a right of access to state judicial processes for purposes other than vindication of speech interests, but the process right is conditioned on truthful speech. *Cf.* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (intentionally false information is not protected because it is "at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected").

109. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. at 510.

interest usurpation of government processes is corruption because it affects transactional opportunities sought through access to government agencies. Special interest usurpation is corruption not only because it deprives others of equal speech access to government but because government may be disabled from including the interests of all people in the formulation of policies that represent pacts among citizens. It is corruption because it changes essential features of a process of government chartered for non-adversarial ends.

This view might explain not only *California Motor Transport*, but also the Court's approach to petitioning issues in cases like *Bridges v. California*.[110] In *Bridges*, the state argued that it should be able to restrict speech in order to prevent disruption and disturbance of judicial processes and to preserve the dignity of the bench. These arguments were not viewed favorably by the Court.[111] When, however, the state argued that its restrictions on

110. 314 U.S. 252 (1941). *Bridges* is primarily a free speech decision. Petitioning rights entered into the analysis because one of the published items which allegedly violated an order restraining comment on an on going judicial proceeding was originally sent as a telegram to the Secretary of Labor.

111. When a state argues that a concern for the integrity of state processes justifies state restrictions on individual petitioning, the Court appropriately views the argument with some skepticism. In these cases, it is quite likely that the state is asserting its own self-interest rather than the transactional interests of the people. *See, e.g.*, Meyer v. Grant, 486 U.S. 414 (1988); Thomas v. Collins, 323 U.S. 516, *reh'g denied*, 323 U.S. 819 (1945); Bridges v. California, 314 U.S. 252 (1941); De Jonge v. Oregon, 299 U.S. 353 (1937). Adderley v. Florida, 385 U.S. 39 (1966), is an exception to the usual skepticism. In Adderley, the majority upheld prosecutions of individuals who had peacefully demonstrated outside a jail. It accepted the arguments of the state that prosecutions should be permitted to enable the state to protect public property and to prevent disruption of an essential government function. Justice Douglas dissented, arguing that the prosecutions offended the Petitions Clause, *id.* at 49-51 & n.2, and that government should not be given the ability to decide what persons have access to public places to air grievances. *Id.* at 54-55.

When an individual claims that the Petitions Clause protects the integrity of government decisionmaking processes, there is not the same reason for skepticism. The only case in which individuals arguably made such a direct claim is Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984), an argument which probably did not prevail because of the employer-employee setting in which the claim was made.

Compare other cases in which a state invokes the integrity of its own processes as a justification for restricting speech, e.g., patronage cases like Elrod v. Burns, 427 U.S. 347 (1976), in which a state argued that, because patronage serves government efficiency and accountability, representative government, and democratic process, it should be permitted despite its impact on political speech and belief. *See also, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976), in which states attempted to justify infringements on speech by arguing that they serve state interests. But compare cases like United Pub. Workers v. Mitchell, 330

speech were intended to protect the transactional integrity of a government forum and its ability to render impartial justice, the majority—although ultimately not persuaded—viewed the state's argument with more seriousness.[112]

Smith v. Arkansas State Highway Employees, Local 1315[113]—in which the Court rejected a procedural Petitions Clause argument—is also consistent with the possibility that the Court is concerned with corruption. In *Smith*, the plaintiffs challenged a state regulation that precluded unions or other employee associations from filing grievances on behalf of government employees; employees were required to file on their own behalf. The Court held that individuals have no constitutional right to require government to listen to any particular person or to respond to complaints.[114] Some have read *Smith* as a decision that significantly undercuts the scope and force of the Petitions Clause,[115] but the Court's refusal to entertain complaints about specific modes of procedural participation for government employees should not be taken to reflect a decision that structures of government are immune from constitutional scrutiny even if they run up against Petitions Clause transactional interests. *Smith* simply reflects the Court's reluctance, expressed in many other cases, to constitutionalize all aspects of the government employer-employee relationship.[116] Employer-employee relations are not a concern of the Petitions Clause charter for government.

The Petitions Clause protects against corruption of processes that interfere with transactional interests important to citizens,[117] not procedures that affect transactional interests in minor ways, if at all. It protects against procedures that prevent some citizens from being part of transactional settings in which decisions on behalf of the general welfare are made. Whereas the discovery of "truth" requires only procedural protections for equal, adversarial competition among speakers, preservation of the charter of government contemplated by the Petitions Clause requires different procedural protections. It requires protec-

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U.S. 75 (1947), and United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), in which a state takes a position that is against its own self-interest.

112. Bridges v. California, 314 U.S. at 271.

113. 441 U.S. 463 (1979).

114. *Id.* at 465.

115. *See* Smith, *supra* note 9, at 1153; Higginson, *supra* note 9, at 143 n.2.

116. In Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. at 464, the Court saw the complaint as an attempt to use the First Amendment as a source of a national labor relations law. *Cf.* Collins v. City of Harker Heights, 112 S. Ct. 1061 (1992); Connick v. Meyers, 461 U.S. 138 (1983).

117. United States v. Cruikshank, 92 U.S. at 552-53.

tions against devices that would prevent formation of a will of the people reflecting the common good and based on transactions among all citizens.

III. AMENDMENT 2: ITS ADOPTION AND INTERPRETATION

At this point, it might be useful to depart from historical or case analysis to look briefly at a contemporary example of a Petitions Clause claim. The contemporary Petitions Clause claim challenges a state constitutional provision popularly known in Colorado as Amendment 2. Amendment 2 was added to the Colorado Constitution through the state's initiative process.[118]

Amendment 2 states that neither the:

> State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall . . . adopt or enforce any . . . policy whereby homosexual . . . orientation [or] conduct . . . shall . . . be the basis of, or entitle any person or class of persons to . . . any . . . claim of discrimination.[119]

Arguments about the constitutionality of Amendment 2 involve debates about the proper interpretation of a number of federal constitutional provisions in addition to the Petitions Clause.[120] In the public mind, however, the arguments tend to boil down to a confrontation between two views: (1) Amendment 2 is the quintessentially legitimate product of direct, popular democracy that countered government captured by a special interest group; and (2) Amendment 2 excludes an unpopular minority from

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118. In Colorado, proponents of an amendment to the state constitution may have their proposal placed on the ballot at a general election if they can obtain at least five percent of the total number of votes cast for the office of Secretary of State at the previous election. COLO. CONST. art. V, § 1. The Colorado Constitution provides that the people are the sole and exclusive root of sovereign power, and vests the people with the right of initiative, independent of the general assembly, "solely for the good of the whole." COLO. CONST. art. II, § 1.

119. COLO. CONST. art. II, § 306.

120. These include the Equal Protection Clause of the Fourteenth Amendment, the First Amendment (establishment of religion, petition, and free speech clauses), and the Article IV, Section 4, guarantee of a republican form of government. The Colorado District Court recently made the preliminary injunction upheld by the Colorado Supreme Court in Evans v. Romer, 854 P.2d 1270 (Colo. 1993), permanent. Evans v. Romer, No. 92 CV 7223, 1993 WL 518586 (Colo. Dist. Ct. Dec. 14, 1993). To date, arguments have focused on the Equal Protection Clause of the Fourteenth Amendment. The fundamental right allegedly infringed is the right of political participation. Evans v. Romer, 854 P.2d at 1276. The plaintiffs' claims, however, are not restricted to equality claims under the Fourteenth Amendment. They include a claim based on the Petitions Clause of the First Amendment.

normal political relationships and obstructs public debate and decisionmaking about homosexuality.

Advocates both for and against Amendment 2 appeal to ideas historically associated with the Petitions Clause. Indeed, if one compares the public debate about Amendment 2 to the 1836 debate over the abolitionist petitions to Congress, one discerns some interesting parallels. Although the 1836 debate was about whether government is required to accept and give full consideration to petitions presented to it, and the Amendment 2 debate is about whether a majority of voters can disable government from responding to a particular type of petition even should government want to respond, the similarities in the public debate are striking.

For example, just as Senator Calhoun and others argued that abolitionist petitions should not be received because receipt would be inherently divisive,[121] the state of Colorado argues that Amendment 2 legitimately prevents the inherently divisive issue of homosexuality from being formally presented to Colorado government.[122] Just as Senator Calhoun argued that mere receipt of the abolitionist petitions would lend inappropriate credence to the substance of extremist views,[123] Amendment 2 proponents have argued that a statewide ban on non-discrimination policies is a necessary barrier to an extreme homosexual agenda.[124] Just as Senator Calhoun and others tried to impose a limitation on what sort of grievances could be considered "legitimate"[125]—an effort argued to be futile and ill-advised by Senator Tallmadge[126]—Amendment 2 effectively deems that some grievances do not exist.

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121. *See supra* note 39.

122. Appellee's Opening Brief at 42-43, Evans v. Romer, 854 P.2d 1270 (Colo. 1993) (No. 93SA17).

123. The most pointed argument to this effect is found at CONG. GLOBE APP., *supra* note 38, at 224-26 (arguing that receiving petitions gives an implied pledge to give serious regard to the prayer for redress of grievances). *See also id.* at 138, 220-22, and 292-93 (objection of other senators).

124. Brief Amicus Curiae of the Institute in Basic Life Principles at 19-22, Evans v. Romer, 854 P.2d 1270 (Colo. 1993) (No. 93SA17).

125. These efforts ranged from arguments that the petitions used inappropriately offensive language and should therefore be excluded, CONG. GLOBE, *supra* note 38, at 75, 80, 118, 335-37, to arguments that the grievances were not personal to the petitioners *id.* at 76, 87, 118, 292, to arguments that petitioners cannot ask for the exercise of powers not delegated to Congress, *id.* at 75, 76, 80-81, 88; CONG. GLOBE APP., *supra* note 38, at 299-300, 322.

126. For example, Senator Tallmadge argued that

> grievances, so far as the right of petition is concerned, are to be judged of by the petitioner himself. No power can prescribe rules by which he is to judge of them; and to which his petition must conform.

My initial reaction to Amendment 2 was that its most significant constitutional deficiency is its attempt to stop peaceful political and social change by interfering with and penalizing speech.[127] Amendment 2 creates disincentives and penalties for

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> You cannot lay him on the bed of Procrustes, and stretch out or lop off his views, in order to conform them to your standard. He must have his own standard . . . else his petition is not for the redress of those grievances which he feels. His grievances may be imaginary, or they may be real . . . . Of this, he must be the sole judge, so far as the right to *ask redress* is concerned; but, so far as *redress* ought to be *granted*, that is to be judged of by those to whom the petition is addressed.

CONG. GLOBE APP., *supra* note 38, at 110. For other arguments opposing various notions of legitimacy, see *id.* at 88, 122, 134, 147, 148 (regarding the nature of public grievances), and *id.* at 110, 123, 133-34, 183 (regarding petitions respecting powers not granted to Congress).

127. Emily Calhoun, *Silence and the Elections of 1992*, ADVOC., Vol. XIV, no. 5, at 13-14 (Colorado Women's Bar Association). The focus of my argument was on that portion of Amendment 2 which prohibits recognition of claims of discrimination based on sexual orientation.

> By endorsing discrimination on the basis of homosexual orientation, Amendment 2 puts persons who speak out in favor of equality—and persons who identify themselves as . . . seeking equality—at risk of becoming targets of discrimination in all aspects of life. Amendment 2 imposes a penalty on those who dare to speak out and acknowledge their homosexual orientation . . . [even if they do so] to seek repeal of Amendment 2 through the initiative process. In fact, Amendment 2 puts people under pressure to falsely represent themselves and their homosexual orientation.

Id.

My argument relied on cases like Merrick v. Board of Higher Educ., 841 P.2d 646 (Or. Ct. App. 1992) (invalidating a statute that prohibited state officials from interfering with personnel actions against any state employee based on that employee's sexual orientation on First Amendment grounds). According to the Oregon Court of Appeals:

> Adverse employment decisions will not occur unless the employee's sexual orientation comes to the employer's attention. A state employee's sexual orientation will seldom become known to the employee's supervisor unless the employee has chosen to "speak, write or print" about it. If, on the other hand, employees never in any way . . . communicate the nature of their sexual orientation to other people, it is highly unlikely that they would encounter discrimination on that basis . . . . Not only does the statute discourage state employees from telling others their sexual orientation, it also discourages them from becoming involved in groups advocating gay and lesbian rights, a constitutionally protected activity, because such involvement might expose them to adverse personnel action.

Id. at 650.

I also relied on West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), in which the Supreme Court of the United States invalidated a statute that demanded a symbolic demonstration of national loyalty from school children. The Court determined that government has no constitutional power to coerce false representations of support from those unwilling to give it. Such attempts

advocates of homosexual rights who dare to acknowledge their sexual orientation or openly talk about homosexuality. I saw Amendment 2 as simply the latest in a history of attempts by dogmatic groups to stop change by restricting speech, in this case speech about homosexuality.[128]

A speech analysis casts doubt on the constitutional validity of one aspect of Amendment 2, but the constitutional deficiencies of the Amendment are not completely accounted for by a conventional free speech analysis. Amendment 2 is about something more than speech. Amendment 2 adversely affects transactional as well as speech interests. Amendment 2 is about a disabling of government's ability to work for the common good of all of its citizens or to assist all of its citizens to form pacts that they might wish to form. It interferes with transactional interests protected through the Petitions Clause by denying one group the opportunity to be taken into account as part of the common good. This is arguably a deprivation of rights of citizenship.

The literal language of Amendment 2 suggests that appeals to government to refrain from discriminating on the basis of homosexual orientation[129] as well as appeals to government to stop private persons from doing so[130] are beyond the power of Colorado government to grant. The state Attorney General argues that Amendment 2 will have a more limited impact. She asserts that the Amendment will only nullify existing state and local laws or policies which prohibit discrimination based on homosexual or bisexual orientation and ensure that state and

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at "officially disciplined uniformity," 319 U.S. at 637, unconstitutionally deny the freedom to be "intellectually and spriitually diverse." *Id.* at 641. *Cf.* Thomas v. Collins, 323 U.S. 516, *reh'g denied*, 323 U.S. 819 (1945) (statute objectionable because it forced speakers to misrepresent their intent to solicit union membership).

128. Compare the numerous attempts of white Southerners to protect their way of racially segregated life by suppressing the First Amendment rights of the NAACP, *e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (statute demanded the names of NAACP members); *id.* (argument that NAACP lacked standing to assert constitutional rights of its members); NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964) (statute prohibited NAACP from doing business as a corporation). *See also* Higginson, *supra* note 9, at 163 (abolitionists argued that an official bar to receipt of petitions was an attempt to stop change by taking a position before facts were known).

129. Arguably, government policies may not prevent, for instance, a decision of a welfare office not to distribute benefits to a gay man or a decision of a government official to fire a lesbian public employee.

130. Arguably, government policies may not prevent, for instance, a decision of an apartment owner not to rent to homosexuals, of an employer not to hire homosexuals, or of an insurance company not to insure gay men.

local authorities cannot adopt new laws or policies of that sort.[131] According to the Attorney General's analysis, the guiding intent and ultimate goal behind Amendment 2 "was not to deprive homosexuals or bisexuals of any constitutionally guaranteed rights, but to remove any state-based grounds for putting such individuals in a more favorable position vis-a-vis other citizens."[132]

Despite disagreements on some points, it seems clear that Amendment 2 invalidates existing local legislation prohibiting discrimination against homosexuals and would, therefore, presumably bar any similar legislation in the future.[133] For this reason, the Colorado Supreme Court upheld a preliminary injunction to prevent Amendment 2 from going into effect pending a trial on the merits of constitutional claims.

The Colorado Supreme Court based its decision on a belief that Amendment 2 likely infringes a fundamental right to equal political participation. Citing reapportionment cases, cases protecting minority party rights, cases invalidating restrictions on the franchise, and cases involving attempts to limit the ability of certain groups to have desired legislation implemented through the normal political processes,[134] the Court determined that "the Equal Protection Clause of the United States constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on that right . . . must be subject to strict judicial scrutiny."[135]

The court's reasoning is not convincing to me as a matter of conventional equal protection doctrine.[136] Only the First

131. Appellant's Opening Brief at 16, Evans v. Romer, 854 P.2d 1270 (Colo. 1993) (No. 93SA17).

132. *Id.*

133. See the discussion of non-discrimination ordinances adopted by the cities of Aspen, Boulder, and Denver; the non-discrimination policy adopted by the Denver Public Schools; the non-discrimination personnel policy adopted by the Governor of Colorado; the non-discrimination policies adopted by Metropolitan State College of Denver and Colorado State University; and the statute restricting insurance companies from basing insurability on sexual orientation, in LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, RESEARCH PUB. NO. 369, AN ANALYSIS OF 1992 BALLOT PROPOSALS 15 (1992).

134. Evans v. Romer, 854 P.2d at 1277-79.

135. *Id.* at 1282. *See generally id.* at 1276-82.

136. The Supreme Court decisions most closely on point cannot easily be explained as calling for strict scrutiny any time any group is told to pursue their interests through some special process of democratic decisionmaking. See a number of descriptions of the analytical problem: Eule, *supra* note 11, at 1561-64, 1576-77; Calhoun, *supra* note 1, at 565; and Hsiao, *supra* note 26, at 1287. In *Evans v. Romer*, Justice Erickson, who could not find a principled basis for

Amendment provides the fundamental right that warrants strict scrutiny in voting rights cases brought by groups other than racial minorities.[137] It also provides the right, through the Petitions Clause, that may warrant invalidation of Amendment 2.

There are a number of ways in which Amendment 2 might violate the Petitions Clause. Without undertaking an extended constitutional analysis, let me describe a few Petitions Clause difficulties suggested by the previous discussion.[138]

First, Amendment 2 is intended to be—and is taken as—a statement about the citizenship rights of one group of persons.[139] The Amendment 2 debate is a replay of the 1836 debate about receipt of abolitionist petitions in one critical respect. Just as the opponents of the abolitionist petitions knew that mere receipt of the petitions would be seen as an acknowledgment that African-Americans enjoyed a status fundamentally at odds with slavery, so the proponents of Amendment 2 know that if they can deny homosexuals access to normal government channels they have severely compromised the standing of homosexuals as citizens. Under Amendment 2, homosexuals owe a duty to accede to the exercise of government powers conferred for the benefit of the common good but are deprived of reciprocal rights of access to government.[140]

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subjecting the Amendment to strict scrutiny, also perceived the analytical difficulty. 854 P.2d at 1286, 1293-1302 (Erickson, J., dissenting).

137. In fact, the court's discussion of these cases emphasizes their First Amendment elements.

138. My purpose in this Article is not to construct a constitutional brief against Amendment 2's validity, although I do believe that Amendment 2 violates the First Amendment. My purpose here is simply to use Amendment 2 to illustrate how a Petitions Clause analysis raises questions about government structures that are not necessarily objectionable under either free speech or equal protection principles. In the following section which sets forth a proposal for a Petitions Clause analysis, *see infra* part IV, constitutional issues are further discussed.

139. The discrimination that Amendment 2 validates affects citizens in many ways. Denver police officers have refused to provide assistance or backup to a fellow officer on a high risk call. Appellee's Answer Brief at 7, Evans v. Romer, 854 P.2d 1270 (Colo. 1993) (No. 93SA17). The enforcement of Amendment 2 would allow insurance underwriters to refuse coverage on the basis of sexual orientation. *Id.* at 15. Amendment 2 effectuates the complete disenfranchisement of homosexuals by "denying them the ability to participate in the political process at all levels and before all branches of local and state government." *Id.* at 16. This occurs because Amendment 2 requires "gay men, lesbians, and bisexuals, but no other group in Colorado, to amend the state constitution before they could meaningfully petition for any administrative or legislative relief from discrimination." *Id.* at 19.

140. *See supra* text accompanying notes 124-25. That homosexuals are deprived of access to demonstrate their need for protection against

Amendment 2 also precludes the ability of "the people" to form pacts among themselves.[141] Consider, for example, communities that want to be able to adopt policies believed to promote the general welfare of all citizens, including homosexuals. As the local communities of Aspen, Boulder, and Denver have been told, they are disabled from adopting such policies.[142] At the state level, only the direct democracy, initiative route arguably remains open to those seeking policies that promote the general welfare of all citizens, including homosexuals. The initiative process, inherently private, is not oriented to decisionmaking for the common good that transcends special interests.[143] Moreover, Amendment 2 makes it substantially less likely that an initiative reflecting the common good will ever be put before the voters. The disincentives for speech about homosexuality make it unlikely that good and reliable information about homosexuals, the reality of their lives or their interests, will gain entry to

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discrimination, a grievance that is by definition relates to their personal status rather than, simply, to some general policy question of interest to a cross-section of the citizenry, highlights the nature of Amendment 2's prohibition.

141. Amendment 2 also makes it difficult for homosexuals to form pacts with each other and thereby erects barriers to full citizenship. *See supra* notes 48-51 and accompanying text (discussing the isolating means used by slaveholders to maintain subjugation of slaves); *supra* notes 125, 127-28, 131-33 and accompanying text (discussing how Amendment 2 penalizes and creates disincentives for speech and association).

142. *See supra* note 131. Some of the entities affected by Amendment 2 have resorted to circuitous means to try to avoid excluding homosexuals from those entitled to be taken into account as part of the general welfare. For example, the University of Colorado has adopted a policy which requires all decisions to be based on merit. Even if Amendment 2 arguably leaves such indirect openings for people to form pacts, Amendment 2 precludes homosexuals from naming their own grievances. *See supra* note 120 (discussing the efforts of Southerners to restrict how abolitionists might state their grievances); *supra* notes 22-25 (the nature of the equitable principles with which petitioning and the trusteeship concept of government are associated is to permit people to work within the interstices of formally-approved legal norms). Under those circumstances, any pacts made will be unsatisfactory. *Cf.* Thomas v. Collins, 323 U.S. 516, *reh'g denied*, 323 U.S. 819 (1945) (the Petitions Clause protects the right of people to openly and without indirection or misrepresentation state what they are after); Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) (restraints on judicial petitions must give plenty of leeway for grievants to articulate their problems as they see them).

143. MANSBRIDGE, *supra* note 26, at 301. According to Mansbridge, in direct democracy, citizens file into a voting booth and cast a secret ballot for which they do not have to be publicly accountable. As she says, "small wonder that the preferences so conceived and so expressed should tend toward the private and the selfish." *Id.* In Colorado, polls taken before the election at which Amendment 2 was adopted showed a majority of citizens in opposition to the Amendment. Perhaps Mansbridge's observations explain why the election results were at odds with what the polls indicated.

public debate and pave the way for change in public policy respecting homosexuals and their relationships to the general community.[144]

Finally, Amendment 2 sends a message about government accountability that is at odds with the requirements of the charter for government. As the Supreme Court has recently said in another context, government may not be structured so as to send a message to elected officials that they need only represent one constituent group.[145] Amendment 2 does precisely that. Amendment 2 tells government officials that they do not have the power or authority to respond to the demands of one constituent group. They are told that, although they may represent the interests of felons as felons or rich people as rich people, they may not represent homosexuals as homosexuals. If homosexuals ask to have their group interests included in discussions of government policy, officials may simply respond that Amendment 2 limits their ability to take those interests into account. Thus, government officials are relieved of political pressures that would otherwise exist to respond to demands for policy appropriate to demonstrated need.[146]

A speech analysis does not adequately respond to these features of Amendment 2. Only an analysis that looks at the non-adversarial transactional interests protected by the Petitions Clause—and at the impact of measures like Amendment 2 on the charter for government secured by that provision—suffices.

IV. A Proposal for Petitions Clause Analysis

My proposal is intended to provide a constitutional home for claims alleging that government structures prevent some citizens from being part of transactions that forge pacts for the common good. It takes seriously Alexander Meiklejohn's argument that, to work for the common good, a government must be able to proceed in ways that do not mutilate a community thinking process. It also takes seriously the idea that a government ceded power so that it may act for the common good must guarantee all

144. *See supra* notes 124-25, 127-28.

145. Shaw v. Reno, 113 S.Ct. 2816, 2827 (1993) (discussing the validity of messages that elected representatives need be concerned only about citizens of one race).

146. Because of Amendment 2, information becomes useless to persons who might otherwise be able to demonstrate a need for policies against discrimination. Similarly, information becomes unnecessary to those who oppose such policies. Opponents of non-discrimination policies need only invoke Amendment 2 to effectively foreclose legislative debate.

citizens a meaningful opportunity to be included in the formulation of pacts and policies for the common good.

My proposal focuses on characteristics of government structures which, if absent or compromised significantly, signal that the Petitions Clause charter for government may have been violated. Under the proposal, an ultimate judgment of unconstitutionality would depend on a qualitative appraisal of all factors and would turn on assessments of "proximity and degree"[147] rather than application of a bright-line rule or formula.

The proposal builds on ideas embodied in the Supreme Court's Petitions Clause opinions and on arguments historically associated with the Petitions Clause, but focuses on non-adversarial transactional interests. It is intended to identify instances in which government has been deprived of the ability to respond to adversarial speech in ways that serve the non-adversarial transactional interests protected by the Petitions Clause charter for government.[148]

The proposal is concerned with a corruption of decision-making processes.[149] Corruption in the Petitions Clause sense consists of something more than mere disruption and disturbance of processes, something more than a refusal of government to respond to a particular group's advocacy, and something more even than attempts to penalize people who ask government to respond. The proposal has a procedural orientation, but it should not be thought of as embodying merely a special type of

147. Bridges v. California, 314 U.S. at 296.

148. The proposal's focus should not be interpreted to preclude Petitions Clause protection for speech interests. As the Court's Petitions Clause opinions attest, equal speech access is an important precondition to government's ability to form pacts for the common good. The adversarial reality of the political process—the origin of pacts for the common good in the vigorous statement of adversarial interests—cannot be ignored as part of political transactions. A Petitions Clause analysis that focused on transactional interests only as they pertain to the common good would pose dangers equal to those that arise from an analysis that focuses on speech alone. *See, e.g.*, Mansbridge, *supra* note 26, at 261 (demanding action for the common good, or consensus, can be silencing in itself and can inappropriately mask conflict).

Compare arguments that First Amendment/free speech doctrine generally should move away from the marketplace metaphor in, for example, Owen M. Fiss, *State Activism and State Censorship*, 100 Yale L. J. 2087 (1991), and Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405 (1986). My argument for an augmenting, rather than a substitutive move, finds support in and pertains only to the Petitions Clause.

149. *See supra* notes 217-28 and accompanying text.

due process analysis. A Petitions Clause claim is about abridgments of citizenship, not mere procedural inadequacy.[150]

Processes that are corrupt in the Petitions Clause sense have two essential characteristics: (1) they disable government from assisting citizens to form pacts for the common good and, as a result, (2) they fracture the reciprocal relationship between government and citizen. Processes that are corrupt implicitly reject the possibility that people with different interests can and will form pacts. Corrupt processes are premised on an assumption that the people always speak adversarially and only to promote special (majoritarian or non-majoritarian) interests. In other words, corrupt processes are fundamentally at odds with the normative premises of the Petitions Clause charter for government.[151]

Many of the Supreme Court's constitutional voting rights decisions—which I believe are best explained in First Amendment terms—support this approach to the concept of corruption. For example, although vote dilution decisions have come to be seen as standing only for the proposition that minority groups are entitled to an opportunity to elect representatives of their choice, they actually stand for a slightly broader proposition. Consider *White v. Regester*.[152] In *White*, the Court held that multi-member districts are not per se unconstitutional[153] and that no constitutional claim exists simply because minorities cannot elect representatives.[154] Rather, an inability to participate in the political process—shown by evidence that minorities have long suffered discriminatory treatment in education and other government services[155] and that representatives are insufficiently responsive to minority interests[156]—is the crux of the constitutional claim. Although a variety of factors showed an inability to

150. *Cf.* Meyer v. Grant, 486 U.S. 414 (1988); American Constitutional Law Found. v. Meyer, No. 93-1467 (D. Colo. filed July 14, 1993).

151. The proposal is not based on an argument that government has a duty to respond to petitioners, a duty advocated in Hodgkiss, *supra* note 9, at 574-75, and Higginson, *supra* note 9, at 155; and disputed in Smith, *supra* note 9, at 1190-91. I do not argue that government has such a duty and can be forced to base its policy on pacts responding to the interests of all citizens. I only argue that government cannot be forced to relinquish the power and structures that enable its citizens to form pacts for the common good.

152. 412 U.S. 755 (1973).

153. *Id.* at 765.

154. *Id.*

155. *Id.* at 768.

156. *Id.* at 769.

participate in *White*, an absence of government reciprocity was an important part of the equation.[157]

Rogers v. Lodge[158] also makes the point. In *Rogers*, African-American plaintiffs challenged at-large county elections. Almost fifty-four percent of county residents belonged to the plaintiffs' minority group.[159] The Supreme Court upheld a district court determination that African-Americans were deprived of an opportunity to participate in the political process in part because "[v]oting along racial lines allows those elected to ignore black interests without fear of political consequences . . . ."[160] African-Americans were discriminated against in education,[161] and "in the selection of grand jurors, the hiring of county employees, and in the appointments to boards and committees which oversee the county government."[162] There was extensive evidence that "elected officials . . . have been unresponsive and insensitive to the needs of the black community . . . ."[163] At-large elections, not unconstitutional per se, were "subverted to invidious purposes."[164]

The importance of reciprocity and responsiveness is emphasized in *Davis v. Bandemer*,[165] a non-racial gerrymandering decision. In *Davis*, a majority of Justices discussed a voting rights claim within the framework of an equal protection concept of "fair and effective representation."[166] One of the primary concerns of the two blocs of Justices that comprised a voting majority was the way in which representatives acted toward the constituents claiming a violation of voting rights.

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157. In fact, in Bexar County, Texas, where Mexican-Americans constituted almost a majority of county residents, it was arguably the most important part of the equation for a court. Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972) (three-judge court), *aff'd in part and rev'd in part sub nom.* White v. Regester, 412 U.S. 755 (1973).

158. 458 U.S. 613, *reh'g denied*, 459 U.S. 899 (1982).

159. *Id.* at 614.

160. *Id.* at 623.

161. *Id.* at 624.

162. *Id.* at 625.

163. *Id.* In footnote 9, the Court said that evidence of "unresponsiveness" might be used to imply discriminatory purpose, *id.* (quoting Lodge v. Buxton, 639 F.2d 1358, 1375 (5th Cir. 1981)), but in the vote dilution cases—which repeatedly disavow finding constitutional harm in at-large elections or multi-member districts per se, or in the mere inability of minority groups to elect representatives—the evidence seems also to go to the lack of an opportunity to participate in political processes.

164. *Id.* at 622 (quoting App. to Juris. Statement 71a).

165. 478 U.S. 109 (1986).

166. *Id.* at 170 (Powell, J., concurring in part and dissenting in part).

Speaking for three Justices, Justice White said that the constitution protects against a diminished ability of constituent groups "to secure the attention of the winning candidate,"[167] but he was not willing to presume that "those who are elected will disregard a disproportionately [under]represented group."[168] In order to show a violation of voting rights under the equal protection clause, the complaining constituent group would have to produce some evidence that the electoral system "is arranged in a manner that will consistently degrade . . . influence on the political process as a whole."[169]

Justices Powell and Stevens had the same central concern voiced by Justice White, but they were a little less willing to presume that elected officials would take into account all constituent groups. They argued that the determination of "fair and effective representation" should turn on several factors. They would have asked whether the challenged political structure interfered with the ability of citizens to associate effectively for purposes of democratic government.[170] They asserted that artificially gerrymandered communities would interfere with the ability of citizens to associate.[171] They would also have asked whether the process that produced the challenged decisionmaking structure was private. In *Davis*, Republicans had caucused outside the legislature to draw up the challenged apportionment scheme and then had presented it, without public hearing, to the legislature for enactment by the Republican majority. This was of concern to them. Finally, they would have asked whether the challenged decisionmaking structure would be seen by the electorate as serving a "public purpose,"[172] as taking into account the "public interest in a fair electoral process,"[173] or, in contrast, as simple manipulation of the electorate or a game to see who is kept in power. They believed this inquiry was important to ensure that voters would not be disillusioned by the structures of government and fail to participate in democratic processes.[174]

The concerns for reciprocity and responsiveness evidenced in *White*, *Rogers*, and *Davis* are echoed elsewhere. For example, in

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167. *Id.* at 133.

168. *Id.* at 132 (people who vote for a losing candidate are "usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district").

169. *Id.*

170. *Id.* at 173.

171. *Id.* at 173 n.13.

172. *Id.* at 177.

173. *Id.*

174. *Id.* at 177-78.

special district voting rights decisions like *Ball v. James*,[175] the Court has seemed willing to permit some district residents to be excluded from the franchise because of the correspondingly limited powers of special districts.[176] In *Gomillion v. Lightfoot*,[177] the Court stated that the pernicious aspect of the challenged racial gerrymander was that it "deprive[d] the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, inter alia, the right to vote in municipal elections."[178] In *Shaw v. Reno*,[179] the Court linked the plaintiffs' harm to the fact that a majority-minority district constructed solely on the basis of race would send the unconstitutional message to the district representatives that they need only represent one, racially-defined part of the district constituency rather than the entire community.[180]

A constitutional concern for reciprocity-responsiveness and the ability of citizens to form pacts for the common good may be addressed by expanding Petitions Clause analysis beyond its focus on free speech. Petitions Clause protections should guard against government processes that are corrupt because they disable government from assisting citizens to form pacts for the common good and, as a result, fracture the reciprocal relationship between government and citizen. Although Petitions Clause protections against corrupt government processes may be needed only rarely, we should not forget that, when needed, they are available.

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175. 451 U.S. 355 (1981).

176. *See* Calhoun, *supra* note 1, at 571-74.

177. 364 U.S. 339 (1960).

178. *Id.* at 341. *Gomillion* is typically interpreted only as a Fifteenth Amendment—deprivation of vote—decision, but the language of the Court clearly indicates that the plaintiffs' concerns were much broader than simply the right to vote. *But see* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978) (persons living outside municipal boundaries, but subject to extraterritorial municipal police jurisdiction, claimed a right to vote in municipal elections). In *Holt*, the majority rejected the claim, over the objections of dissenters who argued that:

> [a]t the heart of our basic conception of a "political community" . . . is the notion of a reciprocal relationship between the process of government and those who subject themselves to that process by choosing to live within the area of its authoritative application . . . . [The extraterritorial jurisdiction of the City of Tuscaloosa] fracture[s] this relationship by severing the connection between the process of government and those who are governed in the places of their residency. . . .

Id. at 82 (Brennan, J., dissenting) (quoting Dunn v. Blumstein, 405 U.S. 330, 344 (1972)).

179. 113 S.Ct. 2816 (1993).

180. *Id.* at 2827.

CONCLUSION

Although some would have us believe otherwise, people do want to form pacts among themselves for the common good. That desire, exploited and given an opportunity to be realized by Martin Luther King, Jr., gave the civil rights movement of the 1960s its power.[181] People can and will form pacts for the common good if they are not precluded from doing so.

No one needs principles that can never be realized and so operate as dysfunctional myth[182] or principles that only obscure reality,[183] but we must not forget that we live our political lives in spheres of both aspiration and reality.[184] As aspirants, we should not tolerate structures fundamentally at odds with the aspirational principle that very different people are able, through government, to form pacts for the common good.[185] We should not tolerate structures that prevent us from any possibility of realizing our aspirations. Precisely because the aspiration is so frequently obscured by adversarial politics, we need a constitution that stands for the aspirational principle.[186]

The Petitions Clause charter for government, more than any other provision of the Bill of Rights, makes evident the interest which we all have in the protection of citizenship rights of other people. The Petitions Clause is a charter for government for all the people. Rights of political participation are not of concern merely to minority groups. They are important to all of us who, as citizens, wish not to be precluded from entering into transactions and pacts with other citizens for the benefit of our common

181. *See* Feldman, *supra* note 7, at 1867-68.

182. *See* MANSBRIDGE, *supra* note 26, at 295.

183. *See* Emily Calhoun, Shaw v. Reno*: On the Borderline*, 65 U. COLO. L. REV. 137 (1993).

184. As one of the reportedly significant influences on Martin Luther King, Jr., noted, political strategies should be measured by two criteria: (1) whether they "[d]o justice to the moral resources and possibilities in human nature and provide for the exploitation of every latent moral capacity in man," and (2) whether they "take account of the limitations of human nature, particularly those which manifest themselves in man's collective behavior." REINHARD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY at xxiv-xxv (1932).

185. *Cf.* Michelman, *supra* note 2, at 1527-28 (we should hold out the possibility of government for the common good).

186. Constitutional aspirations are not a trivial aspect of the charter for government, for they can have tangible consequences for how representatives act. *See* MANSBRIDGE, *supra* note 26, at 139, 163, 182, 261 (an ideology about representative capacity re all the people serves the end itself); Feldman, *supra* note 7, at 1867-68 (we need to preserve the aspiration in order to promote behavior). Because there is little one can do to force representatives to act for the common good, no matter what government structure is adopted, the aspiration is all the more important.

good. They are important to all of us who, as citizens, wish to protect the speech of each as a means of securing a voice of all.