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The Right of Petition

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The present position of the Court is not one of complete capitulation to administrative finality, which is only as final in any particular case as the court allows it to be in its role as final arbiter, but it is simply recognition of administrative competence.\textsuperscript{37}

If the above states correctly the rationale of the \textit{Hope} and the \textit{Natural Gas Pipeline Co.} holdings, then the cases portend a series of decisions that will, with apparent disregard for consistency, accept, reject, or compromise all the former arguments of the rate-making cases. Whether fair value, prudent investment, present market value, historical costs, or other methods are used to calculate a rate-base, whether depreciation of certain items, good will, going concern value, or abandoned properties are included in the rate-base, or whether the rate-base is used at all—each will be accepted or rejected in a particular case. This may lead to inconsistency or confusion in the eyes of those seeking formalism and generalities, but this process of judicial "inclusion and exclusion" is the only proper way to define the relativity between society's and the individual's interest in a problem which has such a vast number of factorials as does public utility regulation.

It is submitted, then, that the \textit{Hope} and the \textit{Natural Gas Pipeline Co.} cases were a deliberate clearing away of the debris of former decisions so that there could be the desirable fluidity and flexibility in the rate-making process, and that this enlightened approach to a practical problem will continue—at least so long as the liberal element reigns in the Supreme Court of the United States.

L. A. S.

\textbf{The Right of Petition.—}In the parade of decisions on the Constitution and its principles, the right to petition\textsuperscript{1} has been and still is accorded little opportunity to participate in all the legal pomp and ceremony accompanying the procession. Unlike freedom of speech, it is unusual for this constitutional guarantee to be considered separately from its cohorts. Greater contemplation is

\textsuperscript{37}"... in a question of rate-making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing." Darnell v. Edwards, 244 U.S. 564 (1917). "The limits set by the court are deliberately broad, resulting both from notions of special competence and the conception of rate-making as a primarily legislative process." Washington Gas Light Co. v. Baker, 188 F.2d, 11, 15 (D.C. Cir. 1950).

\textsuperscript{1}"Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances." U.S. Const. Amend. I.

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given to the other four freedoms, while this one is considered more as an embellishment.

The fairly recent case of Beauharnais v. Illinois\(^2\) was concerned, *inter alia*, with this right of petition, but only Mr. Justice Black in dissent acknowledged its presence and granted it any consideration. This obliqueness necessitates some comment. Perhaps in a *sub silentio* manner the courts intend to define the right to petition, but with regard to the present stampede for national security and the consequent subrogation of individual rights, a clear enunciation of the contents of this right might prove wise, in order that it may become a useful weapon for the individual to protest unjust impairment of authority, custom, and opinion on his freedom.

The paucity of holdings directly founded on this right led Mr. Justice Story to describe it with meaningless verbiage\(^3\) and Mr. Cooley to state, "Happily the occasions for discussing and defending it have not been numerous in this country, and have been largely confined to an exciting subject now disposed of."\(^4\)

In light of these observations, it might be appropriate to recall Blackstone's comments on the inverse ratio existing between the importance of rights and the legal literature accorded them.\(^5\) One can hardly assume that this right or any other individual right has

\(^2\) 343 U.S. 250. *rehearing denied*, 343 U.S. 988 (1952). *D* was prosecuted for violating an Illinois statute forbidding any person from publishing or circulating matter which portrayed lack of virtue of a class of citizens, exposed any race to contempt or was productive of breaches of the peace or riot. *D* was president of the White Circle League, an organization to "protect" such interests, and was instrumental in passing out handbills, apparently, from the text of the decision, in a quiet and unaggravating manner. The printed matter was in the form of a petition and used the following language: "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will." Consideration of the right to petition was dispensed with on a pleading technicality. Five separate opinions were written, four in dissent, and they embrace several interesting questions beyond the scope of comment by this note. The majority opinion, by Mr. Justice Frankfurter, stated that the statute was not a "catchall" enactment but rather was directed at the unreported form of speech of "group libel" and was "specifically directed at a defined evil." Mr. Justice Black dissented on familiar grounds; . . . "[N]o legislature is . . . vested with power to decide what public issues America can discuss." Mr. Justice Reed dissented because the words of the statute were of "ambiguous meaning and uncertain connotation." Mr. Justice Douglas denied the right of legislatures to curb the fundamental rights within "reasonable grounds." Mr. Justice Jackson reversed himself in that he now believes that the scope of the Fourteenth Amendment is not the same as the First. He also asserted that the "clear and present danger" test should be kept alive.

\(^3\) 2 Story, *Commentaries on the Constitution* 645 (5th ed. 1891).

\(^4\) 1 Cooley, *Treatise on the Constitutional Limitations* 728 (Carrington's ed. 1927).

\(^5\) 1 Bl. Comm. 125 (Lewises' ed.).
been adequately defined in the present society of mutable economic and social interests.

Petitioning has always been considered, along with other related guarantees, as a basic, fundamental, and natural right, and the constitutional amendment incorporating it recognizes it by its own terms as a pre-existing one. It has been articulated in the Magna Charta, the Petition of Rights, the Bill of Rights, and in the Federal and State Constitutions. Indeed, an impetus for our present government was furnished by ignoring this fundamental. The enumeration of the right in the First Amendment "was probably suggested by the fifth declaration of the English Bill of Rights passed in the first years of William and Mary, after the revolution of 1688, wherein the right of the subject of petitioning the king is set forth."

Because the United States was to be a government of delegated powers, strong argument was advanced against the listing of the First Amendment guarantee in the Constitution. If the government could exercise only the powers that were expressly conferred upon it, there was apparently no need for express restrictions on the powers; but zeal for absolute certainty caused their implantation in the First Amendment as an indication of intent to emasculate any attempts by the sovereign to encroach on these rights and freedoms. Perhaps today, the prudence of this injection is becoming apparent. As common law rights, the guarantees have never been considered absolute, and from the time of their incorporation to the present, this relativity has defied a definition of even moderate precision with popular interpretations being applied many times.

The initial determination that these guarantees applied to the federal government alone was in harmony with the then prevalent emphasis on state supremacy. Interpretations given the rights stayed within this bound until a new frontier for judicial legislation was barred by the Fourteenth Amendment, a legislative command to apply the federal constitutional amendments to the states; but fortunately, the specificity and the extent were not indicated. Whatever the prohibition, it was firmly settled that the limitations applied only to state actions and in no way controlled relations be-

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8 16 C.J.S. 214 (1939); State v. Butterworth, 104 N.J.L. 579, 142 Atl. 57 (1928).
9 "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury." Declaration of Independence.
10 Black, Constitutional Law 557 (2d ed. 1897).
11 2 Von Holst, Constitutional History of the United States 248 (1888).
13 Barton v. Mayor, etc. of Baltimore, 7 Pet. 243 (U.S. 1833).
tween private parties; this area was still the domain of the state. By a tortuous route, judicial decisions reached the point where the First Amendment was made applicable to the states, but still this issue has not matured to the point of finality—as Mr. Justice Jackson’s dissent in the principal case indicated. For a time, this incorporation of the First Amendment into the Fourteenth was attempted through the “privilege and immunities” clause, but the majority view today is to accomplish this assimilation via the due process proviso. Since 1931, each of the First Amendment guarantees has, by way of the due process clause, been made applicable to some extent to the states.

The infamous “gag resolutions” of the House called attention to the Right of Petition early in the country’s history. Unfortunately, this action was not presented to the courts in such a way that they could rule on the propriety of this legislative action. Because of the adoption of the Maryland and Virginia laws for the District of Columbia when it was formed, slavery continued to exist in the District. Although the federal government had no power to control slavery in the various states, it was vested with such power for the District. A multitude of petitions plagued the Congress to abolish slavery in the District and threatened to disrupt the uneasy peace maintained by the northern and southern representatives. Each petition, although directed to slavery in the District, reflected on slavery existing elsewhere. To abort the disruptive influence of such petitions, the House passed resolutions on several occasions either to table all such petitions or not to receive them at all. John Quincy Adams tested the action by refusing to vote because the proposed action would be unconstitutional, and he continued unceasingly to fight such resolutions on that basis.

The “gag resolutions” illustrate a facet of the right of petition. In a republican form of government, all powers stem from the people; a fortiori, the government must be responsive to the desire

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12 United States v. Cruikshank, 92 U.S. 542 (1876).
16 See Von Holst, op. cit. supra note 9, at 235 et seq.; Black, Constitutional Law 557 et seq.
17 Von Holst, op. cit. supra note 9, at 245.
of its peoples and have avenues of communications for their desires. This right is one of the constitutionally created avenues, and if it exists, there must be a corresponding duty residing in the government to receive and entertain petitions in order that the right be efficacious. The House tried to destroy this right, at least on the question of slavery, by eliminating its correlative duty.

Although this action was improper, it further illustrates the point that as the right of petition is a relative one, so too is the duty that resides in government. It is traditional that before a petition can be considered, it must first be received. Conditions can be attached to its reception, although prohibitive conditions would be improper. Two ancient conditions are that the petition must not use unbecoming or abusive language and that it must be directed to a body with power to act upon it; otherwise, it will not be considered. If received, there are no compelling rules as to how it should be entertained, for having been received, it has apparently served the function for which it was created. Objection may be made to the petition or to the receiving of the petition without assigning grounds.\(^8\) It seems to be sufficient if some consideration is allowed, even the little that is metered by a vote not to consider.

The *Cruickshank* case\(^9\) is perhaps the earliest United States Supreme Court decision that is of aid to a general discussion of the First Amendment guarantees. The "Civil Rights" statutes were enacted with intent to supplement the recently passed Fourteenth Amendment—the amendment that reversed the position of federal and state citizenship, making the former supreme. An action was brought under the statute against a group of individuals charging that they conspired to deprive a citizen of the United States of his rights guaranteed by the amendment. The Court pointed out that because the federal government was one of delegated powers and the states by the amendment had only granted the right to the federal government to prohibit federal or state deprivation of the guarantees, the statute would not afford a mechanism for an individual to obtain redress from another for an invasion of his fundamental rights. The control of relations between individuals still resided in the states as it did at common law before the enactment of the Constitution.

\(^8\) *Robert's Rules of Order Revised* 23.

\(^9\) See note 12 *supra.*
The Civil Rights cases\textsuperscript{20} further considered this legislation and declared it to be unconstitutional. With a reiteration of the matter of the \textit{Cruickshank} case, the Court added that since the Fourteenth Amendment was only to prohibit state action, the federal government could take no affirmative action until the state had taken action adverse to these rights. Thus, because the legislation was premature and directed to the control of a subject within the domain of the state, it was void.

Mr. Justice Miller indicated in \textit{Ex parte Yarbrough}\textsuperscript{21} that within the domain of rights and duties existing between the individual and federal government, Congress could enact positive legislation to prevent interference with those rights by other individuals. In this case, a conviction for a conspiracy to prevent one from exercising his right to vote on federal matters was sustained.

Therefore, the rights and duties created by the First and Fourteenth Amendments seemingly have no application to the relation of one individual with another, act only prohibitively on the relation between a state and an individual, and are an affirmative force on the relationship between the federal government and the individual.

The Right of Petition may best be defined by a negative approach; for every right there is a limitation on that right. The wordings expressing the limitation vary with the right but generally have the same scope, and the scope of the limitation is determined by prevalent legal philosophy. Today, the socialization theory of justice waxes supreme, and the tendency is to use the butcher's thumb on the scale of justice in weighing the interest of society. In this field stare decisis has little power in determining the course of decisions. Judicial inclusion and exclusion is favored, although it results in ragged edges on the definitions of the limitations.

Although not a binding interpretation of the Federal Constitution, the decisions of the state courts referred to in this note are useful indices of the common law view of the right, and they adumbrate its present status.

The most common form of interference with the right of petition are private suits based on alleged libelous matter contained in a petition. This is, of course, for state adjudication if the petition is not addressed to a federal body. Statements to the effect

\textsuperscript{20} 109 U.S. 3 (1889).
\textsuperscript{21} 110 U.S. 651 (1884).
that the right of petition is absolutely privileged have been made,22 but the better view is that it is not.23 The Supreme Court of the United States in White v. Nichols24 held that a petition was a privileged communication and as such, it was presumed not to be maliciously made. Proof of express malice, however, would make it libelous and the court would accept proof of falsehood in the absence of probable cause in the place of express malice. Accordingly, it can be qualitatively stated that a petition presented in good faith is absolutely privileged, and this would seem to be based on reason. As one case25 stated:

"If the citizen with a just cause of complaint may not question the conduct of officials, and the administration of public affairs, in a respectful way by petition of the proper authority, without being subject to an action of damages for libel unless he is prepared with witnesses to prove the truth of statements which are made the foundation of his complaint, a wholesome restraint upon official corruption, extravagance, and maladministration would be removed, and the public would suffer."

Descriptions of the right usually contain the statement that the petition must be addressed to a body empowered to act, creating the inference that if not so addressed, the petition is not a privileged communication.26 The decisions involving this question, however, use the point to test the good faith of the petitions, and if a mistake has been made in good faith, the privilege is still allowed to remain, although the body will not act upon it. To hold otherwise would place an undesirable burden on the petitioner in divining the appropriate body to petition. "The right of petition guaranteed to the citizens by the bill of rights should not be allowed to become a trap for the petitioner to be sprung by any such hair trigger of technical law."27 Of course, if the petition is used in a clearly improper manner, such as influencing the decision of a court, the presumption of good faith may be destroyed.28

Another mode of encroachment on the right in the domain of private relations is to cause or attempt to cause the individual

24 3 How. 266 (U.S. 1845).
27 McKee v. Hughes, 133 Tenn. 455, 181 S.W. 930 (1916).
to waive his right in advance as a condition for a contract or other relationship. As true of most fundamental rights, this cannot be done. "The constitutional right to petition those invested with powers of government, being conferred to work out the public weal rather than to serve private ends, can neither be denied by others nor surrendered by the citizen himself." Legislation may be designed to infringe on the right of petition and this action comes within the scrutiny of the prohibitory due process clause. If a statute places justifiable restriction or limitations on the right, it is, of course, upheld. If it goes too far, however, such as requiring the surrender of the right, it is unconstitutional.

There appears to be no limitation in this country on the number of persons that may initiate or sign a petition; an individual may petition, or he may circulate the petition for others to sign, or a group may petition. A limitation was placed on the number of signers in England in 1640 to prevent riots; if more than twenty signed a petition, they were required to secure the approval of three justices. Perhaps this is a foundation for a common law limitation on the number than can create a petition, but certainly an individual can petition; in this country, it is considered an inherent individual constitutional right.

In Citizens' Bank of Louisiana v. Board of Assessors for the Parish of Orleans, the statement was made that the right applied to "every being, natural and artificial." This is to be questioned in light of Mr. Justice Stone's decision in Hague v. C.I.O., that the fundamental rights apply only to natural persons, although corporations are "persons" within the meaning of the due process and equal protection clauses. Being artificial creations, corporations are thought to be unable to enjoy rights that enure to natural

32 Dennehy v. O'Connell, 66 Conn. 175, 33 Atl. 920 (1895).
34 Weiman v. Mabie, 45 Mich. 484, 8 N.W. 71 (1881); McKee v. Hughes, 133 Tenn. 455, 181 S.W. 930 (1916); Kent v. Bongartz, 15 R.I. 72, 22 Atl. 1023 (1885).
35 19 Car. II St. 1, c. 5.
36 167 U.S. 37 (1893).
37 507 U.S. 496 (1993). There was, however, no conclusiveness in the holding of the Hague case, and an interesting question exists today: With regard to corporations, does the Federal Bill of Rights or segments of it operate with greater force on the states through the due process clause than it does on the Federal Government?
38 Covington & L. Turnpike Road Co. v. Samford, 164 U.S. 578 (1892).
persons and are individual in nature. Certain natural persons have also been denied the right in part. One case based the denial of fundamental rights to an alien on the basis that the rights are an attribute of citizenship. Because it is uniformly understood that any person is entitled to the freedoms and privileges of the First Amendment, this holding is dubious.

The subject matter or content of a petition is apparently limitless. Thomas v. Collins stated that the grievances for which the right to petition was created were not solely religious or political ones and were not confined to any field of human interests. American Federation of Labor v. Reilly held that the petition does not have to originate from an assemblage. Cases contain the phrasing that the petition must spring from a "public or social duty" in order to be elevated to the privileged status. The cases doing so, however, are usually called to decide the question of malice, and the phrase appears to be used as the antithesis to the expression that the petition should not gratify an unfounded personal enmity.

The privileged nature of a petition has protected its originator from suits based on the subject matter of the petition that would be otherwise libelous, as often in cases where a group complained of the personal character of an individual. It has protected the individual from such suits when complaint is made of the incompetency or misconduct of public officials. The protection still exists even though the complaint is addressed to a body without authority to act. But if malice or lack of good faith is proved, the protection ceases, and an action can be maintained.

In more unusual applications of the right, it has been held that the right of petition will support a submission by a state to its voters of the proposition that a portion of the Federal Constitution should be repealed. Its privilege was attached to a telegram by a labor leader informing a government official of possible union action against an unfavorable court decision.

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40 State v. Sincuk, 96 Conn. 605, 115 Atl. 33 (1921).
41 323 U.S. 516 (1945).
46 McKee v. Hughes, 133 Tenn. 455, 181 S.W. 980 (1916).
48 Bridges v. California, 314 U.S. 252, 277 (1941).
political party to have its name on an official ballot in a certain form has been held subject to reasonable police regulation and not guaranteed by the right.\footnote{Hoskins v. Howard, 214 Miss. 481, 59 So.2d 263 (1952).}

Now what of the holding in the \textit{Beauharnais} case, predicated upon the novel basis that the defendant committed group libel by his petition? Even accepting such a principle of group libel, the former position of the Court was that a petition may contain libelous, defamatory, and unfounded matter, and that the creator of the petition will not be subject to legal action unless the petition was maliciously made. The writing in question was in the form of a petition, but neither the statute nor the holding require that malice or ill-will be proved in order to subject the petitioner to criminal sanctions under the statute. This is certainly not in accord with the common law definition of the right nor with the terms of the right itself.

The right is for the redress of grievances. Without comment- ing on the tendency of certain persons to harbor racial or religious prejudices, one must certainly recognize that such feelings are common to people in this country. If a sufficient percentage of society has a deep interest on a given issue, however unjust, that interest might better be allowed some expression. Law is for the benefit of society and must be in harmony with the economic, social, and political tunes of the time, and this communication of feeling would promote legislation in accord with the times, whereas no sound action can be taken on a hypocritical silence.

The only avenue that exists for curtailing the right of petition is the approach that all the rights and freedoms are not absolute and can be limited with a view to protecting the public interest. Customarily, such curbing must find justification in a reasonable apprehension of danger to organized government; the limitation upon individual liberty must have an appropriate relation to the safety of the state.\footnote{Herndon v. Lowry, 301 U.S. 242 (1937).} Here, the Court based its justification for the statute on the history of race-rioting and said it was specifically direced to a defined evil. The people of Illinois were troubled by racial riots; people of all states have been troubled by labor riots or strikes, but the Court has, by virtue of the freedom of speech proviso, seen fit to accord picketing (usually a segment of such troubles) immunity, so long as it is peaceful. Petitioning may be incident to racial riots, but there is no reason why peaceful petitioning should not be granted the same sanctity as the immunization.
allowed picketing. From the above case, it appears that the circumstances surrounding the solicitation of signers for the petition were peaceful, and thus on this basis, little justification existed for curtailing the right.

The Court by classifying the language of the Petition as being "within a certain well defined and narrowly limited class of speech" removed the protection of the freedom of speech proviso. This, then, may indicate that the wordings removing constitutional protection are the same for both speech and petition. But because a petition has much less force than the spoken word, would it not be desirable to allow more color in the writing?

The Court justified its removing of the freedom of speech protection by observing that "such utterances are no essential part of any exposition of ideas" and have slight social value. But what if the defendant sincerely believed his statements, disagreeable as they may be to reason? The purpose of the right is to protect and foster expression; to penalize a petitioner for putting forth matter later adjudged as improper is to nullify this purpose. A fallaciously or improvidently worded petition should not, perhaps, receive consideration, and this nonaction would be sufficient discipline. The further punishment of the individual for writing his convictions would drain the essence from the right. To prove that he did not believe his statements would be proof of malice satisfying the traditional requirement. To adjudge the language bad is to do away with the necessity of finding this intent. Such adjudication removes all distinction between freedom of speech and the right to petition. Although the subject matter of this petition was the disagreeable one of prejudices, later petitions may raise issues just as disagreeable to the majority view. Permitting after judging to remove the right will vitiate one of the safeguards of the Constitution that sanctifies minority expression.

Two approaches to a common law expansion of this right might be made on the basis that: (1) The right to petition differs from the freedom of speech in that one does not have to arm himself with facts in advance to the assertion of possibly libelous matter so long as he acts in good faith. The detailing by the courts of this aspect of the right would lead to a more vigorous use of it. With the present revulsion against the methods of senatorial investigations, care must be taken that such privileges are not swept away by the desire to "catch" those who abuse their privileges. (2) Robert's Rules of Order 51 prescribes the manner of dealing with

51 27 (d).

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petitions made to bodies in formal assemblage. No such exactness exists for other governmental units, i.e., administrative and executive agencies, which leaves a vast area for judicial legislation. With propriety, certain mandates could be evolved compelling reception and consideration in some definite manner of the petitions of the people. Further, certain appeals not now considered as petitions could be so classified, thereby giving to such papers more forcefulness.

Under the stress of the last decade, the judiciary and the people of this country have permitted a gradual "encroachment on individual freedom" under the excuse of the necessity of preserving the government existence. Even if the people are prone at present to trade slices of their constitutional guarantees for the present comfort but false security of noninvasion of the mind with ideas conflicting with present staid ones, the judiciary, traditionally charged with the duty of being alert and thinking, should expand and modernize this Right of Petition—not allow it to become a fruitless constitutional dictum.

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