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Freedom to Petition: The Tort Reform Opponent's Untapped Resource

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Last year, high school officials demoted a Minnesota cheerleader from her position as captain of the cheerleading squad after she was caught with alcohol and tobacco.[1] In the resulting suit against her school, 17-year-old Andrea Warren seeks $50,000 in retribution for the inflicted punishment, which she claims was too harsh and may deprive her of college scholarships.[2] Andrea's civil case is one of fifteen million civil cases processed in the United States every year.[3] America has become the most litigious nation in the world, and our civil justice system the most expensive.[4]

As a result of these rising costs, tort reform efforts have emerged at both the federal and state level.[5] The U.S. Senate is currently debating whether to pass the Class Action Fairness Act,[6] a bill that would reform the "out-of-control state class action lawsuit system."[7] The Act targets frivolous class action lawsuits and abuses

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1. James Walsh, *Cheerleader Sues School over Scope of Her Punishment*, STAR TRIB. (Minneapolis), Aug. 8, 2002, at 1B.

2. *Id.*

3. *Advancing Civil Justice Reform*, CIV. JUST. REF. INITIATIVE (Nat'l Ctr. for State Courts, Willliamsburg, Va.), at 1, http://www.ncsconline.org/WC/Publications/Res_CtComm_CJRIPub.pdf (last visited Mar. 31, 2004) (on file with the First Amendment Law Review).

4. Wayne T. Brough, *Cheering for Tort Reform* (Sept. 3, 2003), *at* http://www.cse.org/processor/printer.php? issue_id=1535 (on file with the First Amendment Law Review).

5. *Id.*

6. Class Action Fairness Act of 2003, 149 CONG. REC. S12996-01 (daily ed. Oct. 22, 2003).

7. Press Release, U.S. Chamber of Commerce, U.S. Chamber Urges Senate Panel to Pass Class Action Reform Bill; Measure Protects Consumers, Investors, Employees, and Businesses from the Worst Abuses of the Class Action System (Aug. 2, 2002), http://www.uschamber.com/press/releases/2002/august/02-129.htm (on file with the First Amendment Law Review).

in the system, which are costly to businesses and consumers.[8] The Act also proposes reform that would diminish those costs by allowing complex national class actions to be removed more easily to federal courts, which have the expertise and resources to better handle such cases.[9]

Most tort reform legislation is enacted at the state level, and several states have already adopted legal reforms.[10] For example, North Carolina is one of thirty-three states that have adopted punitive damage reform legislation.[11] Passed in 1995, the North Carolina legislation limits the award of punitive damages in a tort case to an amount no greater than three times the award of compensatory damages, or $250,000, whichever is greater.[12] It also raises the evidentiary standard so that, in order to recover punitive damages, a plaintiff must show by "clear and convincing" evidence that one of three "aggravating factors" was present.[13] Additionally, the legislation permits a defendant to request a separate proceeding for the determination of punitive damages.[14] These legislative adjustments ostensibly reduce the number of frivolous lawsuits by making it more difficult to collect punitive damages. States have adopted a variety of alternative tort reform legislation, including joint and several liability, the collateral source rule, non-economic damage, and product liability.[15]

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8. "Companies spend millions of dollars each year to defend against class action lawsuits. Even the threat of such suits can lead to significant costs to a business. And those costs often are passed on to consumers." Action Alert, U.S. Chamber of Commerce, Tell Congress to Make Our Legal System Simpler, Fairer and Faster, http://www.uschamber.com/capwiz/load.asp?p=/chamber/issues/alert/?alertid=1838091 (last visited Mar. 31, 2004) (on file with the First Amendment Law Review).

9. CONG. REC. S12996-01 (statement of Sen. Ensign) ("It is obvious there is a need to reform our class action system. We need to take it where we have the best jurists [which is] in the Federal system.").

10. Brough, *supra* note 4.

11. AM. TORT REFORM ASS'N, TORT REFORM RECORD 2–3 (Dec. 31, 2003), http://www.atra.org/files.cgi/7668_Record12-03.pdf (on file with the First Amendment Law Review).

12. N.C. GEN. STAT. § 1D-25 (2003).

13. *Id.* § 1D-15.

14. *Id.* § 1D-30.

15. AM. TORT REFORM ASS'N, *supra* note 11, at 4 ("Joint and several

Although enacting legislation that curbs litigation seems a reasonable response to concerns about the public cost of increased litigation and rising damage awards, legislation that restricts a person's ability to access the court system presents a unique challenge. Our nation has long considered the freedom to petition the court for redress of grievances a fundamental element of prosperous democracy.[16] In *Marbury v. Madison*,[17] Chief Justice Marshall described access to courts as the "very essence of civil liberty."[18] The Supreme Court, however, has only recognized a specific right to court access grounded in the First Amendment's Petition Clause[19] within the last thirty years.[20] While the casual observer may not sympathize with the plight of a disappointed cheerleader, the Supreme Court has indicated that she has a fundamental right to file a grievance in court seeking redress for opportunities lost, both tangible and intangible.

This article discusses the political debate surrounding tort

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liability is a theory of recovery that permits the plaintiff to recover damages from multiple defendants collectively, or from each defendant individually."); *id.* at 13 ("The collateral source rule of the common law says that evidence may not be admitted at trial to show that plaintiffs' losses have been compensated from other sources, such as plaintiffs' insurance, or worker compensation."); *id.* at 29 ("Damages for noneconomic losses are damages for pain and suffering, emotional distress, loss of consortium or companionship, and other intangible injuries."); *id.* at 38 ("Product liability law is meant to compensate persons injured by defective products and to deter manufacturers from marketing such products.").

16. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 557 (1999).

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

18. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.... [The] government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.* at 163.

19. "Congress shall make no law respecting ... the right of the people ... to petition the Government for a redress of grievances." U.S. CONST. amend. I.

20. Andrews, *supra* note 16, at 559 (discussing Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972)).

reform, and posits that the First Amendment's Petition Clause provides an untapped resource for bolstering the argument against tort reform legislation, which would restrict a claimant's access to the court system. Part I summarizes the primary arguments on either side of the tort reform debate. Part II defines the scope of the freedom to petition through its legislative and judicial evolution. Part III applies the Petition Clause to the tort reform debate and shows that legislative reforms restricting court access are unconstitutional.

I. THE TORT REFORM DEBATE

Tort reform has become an important political issue over the last ten years as liability costs soar, affecting not only the litigating parties, but also consumers who vicariously subsidize the rising cost of litigation through escalating insurance premiums.[21] The debate is overwhelmingly partisan, with Republicans supporting tort reform while Democrats oppose it.[22] Both parties are pressed to resolve the problem because it insidiously affects the every day lives of individual citizens. For example, when physicians can no longer afford their medical malpractice insurance theoretically due to skyrocketing damage awards in tort cases, they are forced to change specializations or stop practicing medicine altogether.[23]

Over the last decade,[24] "tort reform" has become a phrase often invoked, although not singularly defined. Corporations, politicians, attorneys, and concerned Americans alike are engaged

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21. Robert R. Gasaway, *The Problem of Tort Reform: Federalism and the Regulation of Lawyers*, 25 HARV. J.L. & PUB. POL'Y 953, 953 (2002).

22. Philip Shuchman, *It Isn't that the Tort Lawyers Are Right, It's Just that the Tort Reformers Are So Wrong*, 49 RUTGERS L. REV. 485, 485 n.1 (1997); John Schmid, *Economy Creates New Political World*, MILWAUKEE J. SENTINEL, Feb. 9, 2004, at A1.

23. Press Release, Am. Tort Reform Ass'n, ATRA to Testify: Medical Liability Reform Key Solution to Skyrocketing Healthcare Costs (Sept. 30, 2003), http://www.atra.org/show.php?id=7637&print=1 (on file with the First Amendment Law Review).

24. Gasaway, *supra* note 21, at 953.

in various contexts and to varying degrees in supporting or protesting legislative action, which may significantly alter the U.S. civil justice system. Corporations view tort reform as a way to control sizable liabilities to which they are exposed, while plaintiff's attorneys resist tort reform.[25] Political leaders employ the phrase to inspire hope that legislative action may soon curb the ever-increasing volume of civil lawsuits and related costs.[26] Attorneys in a myriad of fields apply "the term as a label for a variety of legal reforms they would happen to prefer."[27] The problems and legislative cures vary from state to state.

Opponents of tort reform argue that although costs associated with litigation are undeniably high and steadily increasing, the only beneficiaries of damage caps and other tort reform legislation are corporations and the insurance companies that insure them.[28] To support his assertion that rising damage awards are not the source of skyrocketing insurance premiums, Jamie Court, Executive Director of The Foundation for Taxpayer and Consumer Rights, noted that "the Bush administration's own national practitioner databank found ten years ago the average verdict in a medical malpractice case was $400,000 and last year the average was $450,000."[29]

Critics of tort reform argue that legislative restrictions are based upon a false predicate. They say that, contrary to the claims

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25. *Id.*

26. *Id.*

27. *Id.*

28. News Release, Found. for Taxpayer & Consumer Rights, Tort: Capping Damage Awards and Denying Consumers Their Day in Court (July 13, 1999), http://www.consumerwatchdog.org/justice/pr/pr000066.php3 (on file with the First Amendment Law Review).

29. *Today: Problems with Medical Malpractice Suits* (NBC television broadcast, Aug. 7, 2003), *transcript at* http://www.consumerwatchdog.org/healthcare/nw/nw003531.php3 (last visited Mar. 31, 2004) (on file with the First Amendment Law Review). In his interview with Matt Lauer of the *Today* show, Jamie Court went on to say, "There's a lot of myths floating around here, but the . . . fact is there hasn't been a big uptick in malpractice verdicts. What we've seen is malpractice insurance premiums go up. And what we need to do to fix that is regulate insurance company's [sic] investment practices." *Id.*

of those who support reform, tort legislation does not produce lower insurance costs or rates.[30] A 1999 report tested the hypothesis that tort law succeeds in reducing insurance costs for consumers. If this hypothesis were true, more stringent limits on tort damage awards would be associated with lower insurance rates.[31] The report concluded:

> Despite what 'tort reform' proponents promised lawmakers, tort law limits enacted since the liability insurance crisis of the mid-1980's have not lowered insurance rates in the ensuing years. States with little or no tort law restrictions have experienced the same level of insurance rates as those states that enacted severe restrictions on victims' rights.[32]

Similarly, during his 2000 presidential campaign, Ralph Nader referred to tort reform as "tort deform."[33] Nader argues that " 'tort deform' laws take away the rights of 99 percent of the people who live in this country, while letting a handful of corporations escape accountability for reckless misconduct that causes injury and death."[34] Nader, like others who oppose tort reform, dismisses costs associated with litigation as secondary to the more significant right of injured people to pursue recovery through the civil justice

30. Executive Summary, Ctr. for Just. & Democracy, Premium Deceit: The Failure of "Tort Reform" to Cut Insurance Prices (summarizing the findings of J. Robert Hunter's and Joanne Doroshow's in-depth study of insurance rates), *at* http://www.centerjd.org/lib/premium-deceit.htm (last visited Mar. 31 2004) (on file with the First Amendment Law Review).

31. *Id.*

32. *Id.* The report, which analyzed data on "insurance rate and loss cost movement in every state from 1985 through 1998," was one of the most exhaustive reviews of insurance rate activity to date.

33. Massie Ritsch, *Campaign 2000: Nader Slams Rivals for Consumer Rights Record*, L.A. TIMES, Aug. 11. 2004, at A23.

34. Citizen Works, *Tort Reform*, *at* http://www.citizenworks.org/issues/democracy/demo-issuepapers-tort_ref.php (last visited Mar. 31, 2004) (on file with the First Amendment Law Review). Citizen Works was founded by Nader in 2001. Nader cites a report by the Bureau of Justice Statistics and the National Center for State Courts, which indicates there has been no "explosion" in the amount of punitive damages awards, as evidence that there is no need for legislators to curb the authority of judges and juries. *Id.*

system:

> Tort deforms make it difficult or impossible for American consumers who suffer death, brain injury, amputation, paralysis, quadriplegia, cancer and other devastating injuries at the hands of corporate wrongdoers, to be fully compensated for their harm.... Tort deform is nothing more than bailout from liability and responsibility for corporations, including the largest and richest corporations in the world at the expense of all Americans. The tragic costs, human and economic, are born by the wrongfully injured and their families, not by the wrongdoers themselves.[35]

Tort reformists, on the other hand, suggest that our civil justice system is currently facing challenges unprecedented in its more than two centuries of existence.[36] Supporters of tort reform identify several factors contributing to the increase in liability costs. The contributory negligence rule, for example, once limited the number of injured persons who could claim damages by disqualifying a negligent victim from recovery as against a negligent defendant.[37] The contributory negligence defense has been almost entirely abandoned today.[38] Instead, application of a comparative negligence standard allows recovery where the plaintiff is merely less at fault than the defendant.[39]

Tort reformists argue that another factor contributing to increased litigation is the rapid growth in the number of attorneys.[40]

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35. *Id.*

36. Gasaway, *supra* note 21, at 954.

37. News Batch, *Tort Reform*, *at* http://www.newsbatch.com/tort.htm (last visited Mar. 31, 2004) (on file with the First Amendment Law Review).

38. George L. Priest, *The Culture of Modern Tort Law*, 34 VAL. U. L. REV. 573, 575 (2000). Contributory negligence remains available as a total bar to recovery only in Alabama, Maryland, North Carolina, and Virginia. VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ'S TORTS 588 (10th ed. 2000).

39. SCHWARTZ ET AL., *supra* note 38, at 588.

40. News Batch, *supra* note 37. According to data collected by the U.S.

Legal specialization and technological advances have also improved the efficiency with which attorneys process cases.[41] Pro-reformers are troubled by the advertisement of legal services, which was forbidden prior to 1977.[42] In *Bates v. State Bar*,[43] the Supreme Court authorized attorneys to use paid advertisement to promote their services.[44] Today, phone books and television commercials are replete with advertisements of various legal services. According to tort reformists, legal advertising persuades prospective personal injury litigants to hire an attorney in order to get maximum benefit, despite evidence that claimants are no more satisfied by the outcome when they hire counsel than when they do not.[45]

The American Tort Reform Association (ATRA) applauded a recent report on the American "lawsuit industry" for exposing the industry's big business characteristics.[46] ATRA President Sherman Joyce argued that, "[t]he alarming numbers reported . . . help strengthen the argument to reform America's civil justice system."[47] Joyce also reported that 2003 was ATRA's most successful year since 1995 for reducing costs to the tort system through enactment of civil justice reforms.[48] Twenty-three states

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Census and the American Bar Association between 1980 and 1995, the number of lawyers in this country has increased "at a rate which far exceeds population growth." *Id.*

41. *Id.*

42. *Id.*

43. 433 U.S. 350 (1977).

44. *Id.* at 384.

45. News Batch, *supra* note 38.

46. Press Release, Am. Tort Reform Ass'n, "Trial Lawyers, Inc." Exposes the Big Business of the "Lawsuit Industry" (Sept. 23, 2003) [hereinafter Big Business], http://www.atra.org/show.php?id=7630&print=1 (on file with the First Amendment Law Review); *see also* James R. Copland, *A Message from the Director* for CTR. FOR LEGAL POL'Y, TRIAL LAWYERS, INC., 2, 2–3 (2003) (indicating that tort costs nationwide exceed $200 billion annually, which is more than 2% of the U.S. gross domestic product, a higher percentage than in any other developed country. Even as the economy has stagnated and the stock market plunged, litigation revenues continue to soar), http://www.manhattan-institute.org/triallawyersinc.pdf (on file with the First Amendment Law Review).

47. Big Business, *supra* note 46.

48. *Id.*

enacted new legislation in 2003.[49]

Advocates of tort reform argue that the economic burdens imposed on society by unfettered litigation necessitate restricting court access. In response, tort reform opponents insist that any incidental economic burden does not outweigh the moral or ethical cost of denying an injured party the right to seek redress through the court. These opponents promote a right to court access without explaining its constitutional significance. Despite a clear constitutional mandate for the freedom to petition, tort reform critics have overlooked the role of this right in the current political debate. By defining its scope and applying the freedom to petition to the tort reform debate, opponents of tort reform may find the necessary weight to tip the balance in their favor.

II. THE SCOPE OF THE FIRST AMENDMENT FREEDOM TO PETITION

The freedom to petition was included in the First Amendment as its "capstone," having been "at the core of constitutional law and politics in the early United States."[50] "Yet, judicial decisions construing this guarantee are . . . rare and there is little doctrinal or scholarly exploration of" how such a right may be defined.[51] James Madison perceived the First Amendment freedom to petition as integral to guarding the American people's right to "communicate their will" to their government.[52] The right of the people to petition the government for redress of grievances is not limited merely to stating their views, but also entitles them to seek relief.[53] Though not guaranteed relief, citizens have the right to ask

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49. *Id.*

50. Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2157 (1998). "Petitioning was the most important form of political speech the colonists had known, not just because of its expressive character, but also because of the ways in which it structured politics and the processes of government, even as separation of powers was becoming a reality." *Id.*

51. Aviam Soifer, *Redress, Progress and the Benchmark Problem*, 40 B.C. L. REV. 525, 525 (1998).

52. Andrews, *supra* note 16, at 624.

53. *Id.*

for it and the right to receive a response, even if only to deny their claim.[54] This freedom gives citizens a chance to resolve grievances peacefully and lawfully and instills in people a sense of justice and order in their government.[55]

Before the freedom to petition (which includes both the right to court access and to government response) can be applied to the tort reform debate, it is first necessary to define the scope of that freedom.

A. Legislative History

Due to the paucity of historical or textual justifications for adopting a narrow or limiting view of the freedom to petition, it is reasonable to accept a broad definition of it. The provenance of the freedom to petition in England and the drafting of the First Amendment both support an interpretation of the right as an absolute one. In contrast to other freedoms drafted prior to the American Revolution – including speech, press, and assembly, all of which were subject to legislative and practical restrictions – the freedom to petition was considered an absolute right as against the government of England.[56]

The American colonists transported much of England's political culture to the colonies and worked to emulate its best features in their burgeoning settlements.[57] Early American colonial charters provided explicit protection of the freedom to petition, as evidenced first in the Massachusetts Body of Liberties of 1641.[58]

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54. *Id.* Andrews notes that the petition clause itself does not include a claimant's right to government response. However, filing an initial claim for relief under the Petition Clause triggers the Due Process Clause which guarantees a response. Under either analysis, the freedom to petition assures a claimant the right to file a claim and receive a response.

55. *Id.*

56. 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, 1181 (1986).

57. Mark, *supra* note 50, at 2174.

58. Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 27–28 (1993).

Colonial governments regarded petitioning as a fundamental right – a tangible method through which individuals could participate in government by voicing their grievances to local governing bodies.[59] Petitioners enjoyed special protections and were rarely punished for the subject matter of their petitions, because the right to criticize the government was understood to be implicit in the fundamental freedom to petition.[60] Not only did the colonies explicitly affirm the freedom to petition via their charters, they expanded it in both law and practice.[61]

Also inherent in the freedom to petition was the correlative right to a response.[62] As in England, the right to a response in the colonies did not include the right to a hearing, nor did it include the right to a favorable response. Instead, it required at a minimum, that the governing body formally deny any petition it chose not to review.[63] Despite rising complaints about the slow administration of justice, colonial courts did not and could not restrict or refuse access even when petitions became numerous; they simply labored more quickly to accommodate the increasing number of claims.[64]

The drafting history of the Petition Clause sheds even more light on the evolving understanding of the freedom to petition, which, in turn, reflects the metamorphosis of American government from its early model of governance by state legislatures to the

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> "Every man whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councel, or Towne meeting, and either by speech or writeing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order, and respective manner."

Id. (quoting the Massachusetts Body of Liberties).

59. *Id.* at 28.

60. *Id.* at 32 (quoting RICHARD L. BUSHMAN, KING AND PEOPLE IN PROVINCIAL MASSACHUSETTS 46–47 (1985)).

61. Mark, *supra* note 50, at 2175.

62. Spanbauer, *supra* note 58, at 33.

63. *Id.* at 33–34.

64. *Id.* at 33.

current federal model of governance by three discrete branches.[65] "The First Congress, and the states that ratified the Petition Clause, deliberately departed from existing models of the right" as one to petition only the legislature.[66] The newly codified right included freedom to petition the entire government: executive, legislature, and judiciary. This change reflected not just the evolution of the American government, but a corresponding evolution of political culture.

The American colonial polity was far more corporate and hierarchical in its social and political structure than the individualistic and liberal polity that came to characterize most of the nineteenth and twentieth centuries.[67] For colonists and citizens of the young republic, petitioning embodied a central form of access to the political process.[68] Filing a petition was a way to inform legislators of public and private concerns among their constituents. As a policy matter, the freedom to petition encouraged peaceful resolution to individual civil strife and fostered participation by citizens who viewed their right to petition as a tool of individual liberty.

As the unmediated, personal politics of America's beginnings gave way to the mass politics we know today, the Petition Clause slid into relative obscurity as a means to directly influence public policy legislation. Once the mainstay of political

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65. Andrews, *supra* note 16, at 611.

66. *Id.* at 621.

67. *See* Mark, *supra* note 50, at 2158.

> Colonial society was characterized to a great extent by its members' conscious and unconscious allegiances to groups, both formally and informally constituted.... [E]very person, to the extent of membership in a group, played out political roles, even *sub silentio*. . . . The decline of that society, and the concurrent rise of a liberal polity, gutted petition of its original constitutional and political meaning and left those persons not directly included in the liberal enfranchised polity with an even more tenuous toehold in formal politics than petition had provided.

Id. at 2158-60.

68. Andrews, *supra* note 16, at 623.

participation, the freedom to petition was overshadowed as a lobbying mechanism by constitutionally-protected speech, press, and assembly. Despite the changing face of political culture in America, the freedom to petition remains a vital ingredient of civil liberty. Though largely overlooked by judges and scholars until recently, the Petition Clause stands today to protect citizens' interest in political participation via the judicial process. The Petition Clause provides broad protection of every person's right to petition the court for redress for grievances, and it is waiting for a proper reception and application by those in the legal profession.

B. Judicial History

The Supreme Court first limited the freedom to petition in its 1961 decision, *Eastern Railroad Conference v. Noerr Motor Freight*,[69] an antitrust dispute between trucking companies and railroads.[70] The truckers complained that the railroad had acted solely to " 'injure the truckers and eventually to destroy them as competitors in persuading the governor of Pennsylvania to veto a bill that would have benefited truckers."[71] The Supreme Court "held that the complaint did not state a cause of action under the antitrust laws."[72] Among the policy justifications cited was that the antitrust laws could not apply to petitioning activity[73] because "such a construction . . . would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress the intent to invade these freedoms."[74] The Court, however, qualified the freedom to petition by indicating that "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the

69. 365 U.S. 127 (1961).

70. *Id.* at 144; *see* Smith, *supra* note 56, at 1184.

71. Andrews, *supra* note 16, at 580 (citing *Noerr*, 365 U.S. at 129).

72. *Id.* at 580 ("It reached this result by reading the Sherman Act more narrowly than its literal terms.").

73. "Petitioning" was used in this case to describe legislative lobbying.

74. *Noerr*, 365 U.S. at 138.

business relationships of a competitor and the application of the Sherman Act would be justified."[75]

In 1972, *California Motor Transport v. Trucking Unlimited*[76] expanded the *Noerr* doctrine of immunity from antitrust liability to apply to adjudication.[77] In *California Motor Transport*, truckers in California alleged that a competing group of truckers had filed repetitive claims in both federal and state courts to deliberately sabotage petitioners' attempts to transfer or register operating rights. The Ninth Circuit held that the *Noerr* doctrine was not applicable because the petitioning activity was not traditional lobbying of the legislature, but instead adjudicatory claims before courts and administrative agencies.[78] The Supreme Court ultimately found that the court filings in question were unprotected, *not* because they were adjudicative, but because they were a sham.[79] The Court offered several explanations for defining the challenged litigation as a sham.[80] One explanation indicated that if the petitioners had attempted to deprive their competitors of meaningful access to courts and administrative tribunals by filing "baseless, repetitive" claims, the litigation would be a sham and would not be protected by petitioning immunity.[81]

The idea that the Petition Clause protects a right of court access in civil cases did not catch on immediately, due in some part to confusion about the Court's ambiguous definition of sham

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75. *Id.* at 144.

76. 432 F.2d 755 (9th Cir. 1970), *aff'd*, 404 U.S. 508 (1972).

77. *Cal. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *see* Andrews, *supra* note 16, at 582.

78. *See Cal. Motor Transp.*, 432 F.2d at 758–59.

79. The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to the courts, the third branch of the Government. Certainly, the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition.

Cal. Motor Transp., 404 U.S. at 510.

80. *Id.* at 512–14.

81. Spanbauer, *supra* note 58, at 65; *see Cal. Motor Transp.*, 404 U.S. at 513.

litigation.[82] Courts and scholars alike questioned whether the principle was an "independent constitutional doctrine at all."[83] Judge Posner's opinion in *Grip-Pak v. Illinois Tool Works*[84] provides such an example, when he suggests that *California Motor Transport* was an antitrust principle rather than a matter of Constitutional law.[85] He recognized that the First Amendment protects some litigation, "but limited the protection to political

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82. Andrews, *supra* note 16, at 584.

83. *Id.*

84. 694 F.2d 466 (7th Cir. 1982). In this case, a manufacturer of plastic rings used to bind beverage cans sued a competitor alleging theft of trade secrets and other similar claims. *Id.* at 468. The competitor claimed that the original suit violated antitrust laws. *Id.* The court held that even when a plaintiff's claim has legal and factual merit, it may nonetheless violate antitrust laws if its purpose is to harass a competitor with the process of litigation. *Id.* at 473.

85. *Id.* at 471–72; *see* Andrews, *supra* note 16, at 584–85. Judge Posner, writing for the court, posited:

> The holding [in *Noerr*] was presented as an interpretation of the Sherman Act rather than of the First Amendment, but one strongly influenced by the First Amendment.... Although [the Court in *California Motor Transport*] said that "the right of access to the courts is indeed but one aspect of the right of petition," this statement was used as the fulcrum to lever the petitioners out of range of the First Amendment by characterizing the alleged conspiracy as one to prevent the respondents from exercising their legal rights to obtain and transfer operating rights.... It takes a rather free-wheeling imagination to extrapolate from the *California Motor Transport* opinion a principle that if applied across the board would ... make the tort of abuse of process invalid under the First Amendment; and we decline to do so—noting, also, that the Court used the language of abuse of process to describe the kind of litigation activity that the First Amendment does not protect. But it is a separate question whether, as a matter of antitrust principle, the Sherman Act should be interpreted to forbid using litigation to suppress competition.

Grip-Pak, 694 F.2d at 471–72 (citations omitted).

cases."[86]

In the year following *Grip-Pak*, the Supreme Court, in a labor case, challenged Judge Posner's opinion that *California Motor Transport* is exclusively an antitrust principle and that it only protects political litigation.[87] In *Bill Johnson's Restaurants v. NLRB*,[88] an employer sued his picketing employees for printing allegedly defamatory statements in a leaflet for distribution.[89] The NLRB enjoined the employer's petition as an unfair labor practice, finding that the employer filed it solely to retaliate against his employees' picketing. The Supreme Court conceded that an employer could subvert the judicial process by exacting such a retaliatory scheme, but nevertheless overturned the NLRB's injunction.[90] The Court held that despite the risk of abuse, other considerations, including the states' interest in providing remedies and protecting its citizens from harm, as well as the First Amendment freedom to petition, outweighed the NLRB's interest

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86. Andrews, *supra* note 16, at 585.

87. *Id.* at 585–86.

88. 461 U.S. 731 (1983).

89. *Id.* at 734.

90. *See id.* at 750 (Brennan, J., concurring). The Court recognized the risk associated with permitting a powerful employer to file what may be an entirely retaliatory lawsuit against hourly-wage employees, like the waitresses picketing Bill Johnson's Restaurants:

> [B]y suing an employee who files charges with the Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it. Furthermore . . . the chilling effect of a state lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief. Where, as here, such a suit is filed against hourly-wage waitresses or other individuals who lack the backing of a union, the need to allow the Board to intervene and provide a remedy is at its greatest.

Id. at 740–41 (citations omitted).

in enjoining the employer's state suit.[91]

The statutory interpretation in *Bill Johnson's Restaurants* was dictated in part by the Petition Clause.[92] The Court deliberately used First Amendment language to define labor laws and to describe what "baseless" suits might fall outside the protection of its holding.[93] This recognition of the right of court access under the Petition Clause is significant for at least two reasons. First, the Court applied the Petition Clause doctrine outside the realm of antitrust law.[94] "Second, the Court did so in a private suit by one plaintiff."[95] Unlike *Noerr* and *California Motor Transport*, *Bill Johnson's Restaurants* involved neither a collective effort to litigate, nor a political issue; rather, it raised a simple defamation claim as filed by a single petitioner.[96] Thus, *Bill Johnson's Restaurants* swung open the door to a universal freedom to petition for individual claimants.[97]

The Court has continually bolstered its affirmation that the Petition Clause independently protects citizens' access to the judicial system. In *Sure-Tan v. NLRB*,[98] the Court stated that "[t]he First Amendment right protected in *Bill Johnson's Restaurants* is plainly a 'right of access to the courts . . . for redress of alleged wrongs.' "[99] In *McDonald v. Smith*,[100] the Court indicated further

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91. Andrews, *supra* note 16, at 586 (citing *Bill Johnson's Rests.*, 461 U.S. at 741).

92. *Id.*

93. *Bill Johnson's Rests.*, 461 U.S. at 743 (citations omitted) ("Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition.").

94. Andrews, *supra* note 16, at 587.

95. *Id.*

96. *Id.*

97. *Id.*

98. 467 U.S. 883 (1984).

99. *Id.* at 897. In *Sure-Tan*, the NLRB found an employer engaged in unfair labor practice when he reported employees to the Immigration and Naturalization Service (INS) after they attempted to unionize against his wishes. *See id.* at 886–88. The Court held the employer's report to INS was not protected petitioning activity because he "did not invoke the INS administrative process in order to seek the redress of any wrongs committed against him." *Id.* at 897.

that the Petition Clause protects civil court filings, because "filing a complaint in court is a form of petitioning activity."[101] Most importantly, the Court in its 1993 decision, *Professional Real Estate Investors v. Columbia Pictures Industries*,[102] clarified the "definition of sham litigation and granted broader *Noerr-Pennington* protection than had been [applied by] lower courts."[103] In *Professional Real Estate Investors*, the latest significant assessment of the right of court access under the Petition Clause, a more straight-forward standard was established when the Court said: "We . . . hold that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent."[104]

III. PETITION CLAUSE MEETS TORT REFORM DEBATE

"*Professional Real Estate Investors* triggered a virtual explosion" in the number of courts and scholars who recognize a fundamental right, under the Petition Clause, to access the court and seek redress for grievances.[105] Most courts and legal observers agree that *Professional Real Estate Investors* established the constitutional standard for applying immunity to court petitions.[106]

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100. 472 U.S. 479 (1985).

101. *Id.* at 484 (citing Bill Johnson's Rests. v. NLRB, 461 U.S. 731, 743 (1983); Cal. Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 513 (1972)); *see* Andrews, *supra* note 16, at 588.

102. 508 U.S. 49 (1993).

103. *Id.* at 57; *see* Andrews, *supra* note 16, at 588.

104. *Prof'l Real Estate Investors*, 508 U.S. at 57. In *Professional Real Estate Investors*, Columbia Pictures sued Professional Real Estate (PRE), resort hotel operators for alleged copyright infringement after PRE attempted to develop a market for selling videodisc players to other hotels for use by hotel guests who rent videodiscs to watch in their rooms. *Id.* at 51–52. Columbia held copyrights to the motion pictures recorded on PRE's videodiscs. *Id.* at 52. PRE counterclaimed, alleging Columbia's copyright action was a sham disguising underlying motivation to monopolize trade in violation of the Sherman Act. *Id.* The Court held that Columbia's subjective intent was irrelevant so long as the claim itself was reasonable. *Id.* at 57.

105. Carol Rice Andrews, *After* BE & K: *The 'Difficult Constitutional Question' of Defining the First Amendment Right to Petition Courts*, 39 HOUS. L. REV. 1299, 1319 (2003).

106. *Id.* at 1318–19.

Subsequently, courts have applied the "objectively reasonable" standard to cases in various contexts.[107]

In *Professional Real Estate Investors*, Columbia Pictures sued Professional Real Estate Investors (PRE), resort hotel operators, for alleged copyright infringement after PRE rented movies (to which Columbia held copyrights) to hotel guests.[108] PRE counterclaimed, alleging, among other things, that Columbia's copyright action was a sham, disguising an underlying motivation to monopolize trade in violation of the Sherman Act.[109] The United States Supreme Court affirmed the Ninth Circuit's ruling that in order to be considered sham, a claim must be objectively baseless, such that no reasonable person could realistically expect to secure favorable relief.[110] The Court further clarified that the claimant's subjective intent was irrelevant so long as the claim itself was reasonable.[111]

The Supreme Court in *Professional Real Estate Investors* set out a two-part test for identifying sham litigation.[112] First, the lawsuit must be "objectively baseless," which is to say that no claimant could reasonably expect success on the merits.[113] If an objective claimant could reasonably presume that the suit stands to win in court, "the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail."[114] A court may examine the claimant's subjective motivation for filing the suit only if the challenged litigation is objectively without merit.[115] Under the

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107. *See, e.g.*, Cove Rd. Dev. v. W. Cranston Indus. Park Assocs., 674 A.2d 1234, 1235, 1238-39 (R.I. 1996) (applying the *Professional Real Estate Investors* objective test to determine whether the defendant's losing zoning suit was protected against liability under state torts of malicious prosecution and abuse of process).

108. *Prof'l Real Estate Investors*, 508 U.S. at 52.

109. *Id.*

110. *Id.* at 62.

111. *Id.* at 65 (finding the claim "objectively reasonable" because any "reasonable copyright owner in Columbia's position could have believed that it had some chance of winning an infringement suit against PRE").

112. Andrews, *supra* note 105, at 1312.

113. *Prof'l Real Estate Investors*, 508 U.S. at 60.

114. *Id.*

115. *Id.*

second part of the test, the court must focus on "whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor" by using the court process itself—rather than the outcome of that process—as "an anticompetitive weapon."[116]

The Court's formula in *Professional Real Estate Investors* looks to the objective content of the petition.[117] The first prong of the test prescribes the relevant expectation as that of a reasonable person, not that of the actual litigant.[118] Under the second prong of the test, which is reached only if the claim is objectively without merit, the Court includes among possible plaintiff motives not only intent to harm a competitor through the case's outcome, but also intent to abuse the litigation process itself.[119] Nonetheless, so long as the petition is objectively reasonable, the fact that the plaintiff may have filed it solely for the purpose of injuring a competitor by imposing litigation costs is irrelevant.[120]

Opponents of tort reform legislation could rely on the objectively reasonable test and a broad definition of the Petition Clause to argue that tort reform legislation that restricts access to the courts is unconstitutional. For example, North Carolina's tort reform statute limits a petitioner's ability to seek punitive damages by restricting awards in a tort case to an amount no greater than three times the award of compensatory damages, or $250,000, whichever is greater.[121] Where a petitioner is challenged to do so by the opposing party, she must first show that the petition in a tort suit is objectively reasonable.[122] If the reasonable litigant could expect success on the merits of the claim, then the claim is

116. *Id.* at 60–61 (citations omitted).
117. Andrews, *supra* note 105, at 1313.
118. *Id.*
119. *Id.*
120. *Id.*
121. N.C. GEN. STAT. § 1D-25 (2003).
122. Prof'l Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49, 60 (1993) (citing the First Amendment "right to petition" and the Court's holding in *Noerr* to find that "[i]f an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome," the suit is guarded against filing restrictions).

objectively reasonable and must be afforded broad protection of the Petition Clause.[123] If the claim is not objectively reasonable, then the claimant must show that the petition was filed in good faith.[124] Unless the court finds that the petition was not filed in good faith, the claimant must be afforded broad protection of the Petition Clause.[125] Where a claimant's petition passes this two-part test, North Carolina's statute, restricting a petitioner's ability to seek punitive damages, infringes on the tort victim's First Amendment freedom to seek redress for grievances in court.[126] Not only is the restriction arbitrary, it is unnecessary because the court is not constrained under the Petition Clause, or otherwise, to award damages as sought by the petitioner, but merely to acknowledge the petition.[127] Thus, in any case where the petitioner's claim is objectively reasonable, this statute, as applied to that petitioner, violates the Petition Clause.

"[M]uch of the legal system is controlled at the state level,"[128] and therefore many arguments in opposition to tort reform will arise in state courts. In an Illinois case, *Best v. Taylor Machine Works*,[129] the plaintiff, Vernon Best, "suffered second and third degree burns over 40% of his body, including his face, torso, arms, and hands" when the forklift he was operating at work collapsed

123. *See id.* (citing the First Amendment's Petition Clause and *Noerr* to support its holding that objectively reasonable claims must be afforded broad filing protection).

124. *See id.* (explaining that where a claim is not objectively reasonable, the claimant may still show good faith and by doing so successfully trigger Petition Clause protection).

125. *See id.* (clarifying that where an objectively *un*reasonable petition was filed in good faith, it satisfies the two-part test and shall be afforded full protection under the Petition Clause).

126. *See* U.S. CONST. amend. I. ("Congress shall make no law... prohibiting... the right of the people... to petition the Government for a redress of grievances."); *see Prof'l Real Estate Investors*, 508 U.S. at 56, 60–61 (citing *Noerr* and the First Amendment to hold that unwarranted restriction on a claimant's right to file a claim "invade[s]" one's constitutional freedom to petition).

127. Spanbauer, *supra* note 58, at 49.

128. Brough, *supra* note 4.

129. 689 N.E.2d 1057 (Ill. 1997).

and ignited.[130] In his petition against the forklift's manufacturer, Taylor Machine Works, Best alleged that he had sustained lost earnings, anticipated diminished future earnings, had incurred past medical expenses, and expected to incur future medical expenses as a result of his injuries.[131] Best also indicated that his injuries were "severe, disfiguring and permanent," and that he anticipated future need for "vocational rehabilitation and convalescent care."[132] He also described a "painful and lengthy experience as a patient in a hospital burn unit," where he underwent numerous surgeries and expected to continue suffering "grievous pain and anguish from his injuries."[133]

As part of Best's petition, he sought "declaratory and injunctive relief against Public Act 89-7 on the grounds that the Act [violated] the Illinois state constitution."[134] In particular, Best argued that the provision of the Act which imposed limitations on recovery of non-economic damages[135] was unconstitutional because it violated his constitutional "right to a certain remedy."[136] Under Article 1, § 12 of the Illinois Constitution, every person shall "find a certain remedy . . . for all injuries . . . which he receives to his person . . . [and shall] obtain justice by law, freely, completely, and promptly."[137] Additionally, though Best did not reference the Illinois Constitution's petition clause in his claim, it provides for every person's right to "apply for redress of grievances."[138]

The Court ultimately held that the compensatory damages cap of §2-1115.1 violated the Illinois constitutional prohibition against special legislation[139] and the separation of powers clause.[140]

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130. *Id.* at 1064.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. ILL. COMP. STAT. ANN. 5/2-1115.1 (2003).
136. *See Best*, 689 N.E.2d at 1063.
137. ILL. CONST. art. I, § 12.
138. ILL. CONST. art. I, § 5.
139. ILL. CONST. art. IV, § 13 ("The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.").

The Court declined to address the plaintiff's additional argument that the Act violated his right to apply for a certain remedy.[141] Best won, but had the state constitution not protected his freedom to petition, he might have argued his case under the Petition Clause. The Illinois law at issue limited a tort victim's recovery of non-economic damages to $500,000, regardless of the particular facts of his case.[142] After satisfying the two-part objectively reasonable test, Best could have argued that the Illinois statute restricting his ability to seek more than $500,000 violated his First Amendment freedom to petition the court.[143]

Notably, the defendant in *Best v. Taylor Machine Works* made the tort reformists' policy argument that the government interest "in reducing the systemic costs of tort liability is sufficient to overcome" a petitioner's interest in seeking redress.[144] The defendant characterized the law as a legitimate reform measure within the scope of the state legislature's power to shape public policy, regulate the state's economic health, and change the common law.[145] The Court responded that even where a reduction of undefined systemic costs may be identified as a state interest, it is not clear how limiting "noneconomic damages in personal tort actions may be rationally related to the achievement of that interest."[146] The Court reasoned that although damages for non-economic injuries are difficult to assess, it does not follow that such difficulty is "alleviated by imposing an arbitrary limitation or cap on all cases without regard to the facts or circumstances" in an individual case.[147] Such limitation actually undermines the "goal of providing consistency and rationality to the civil justice system."[148]

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140. ILL. CONST. art. II, § 1 ("The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.").

141. *See Best*, 689 N.E. 2d at 1081.

142. ILL. COMP. STAT. ANN. 5/2-1115.1 (2003).

143. *See* U.S. CONST. amend. I.

144. *Best*, 689 N.E. 2d at 1077.

145. *Id.* at 1063.

146. *Id.* at 1080.

147. *Id.* at 1076.

148. *Id.*

The Court in *Best* cited the preamble to the Public Act itself which states that "it is the public policy of this State that persons injured through [tortious conduct] be afforded a legal mechanism to seek compensation for their injuries."[149] The Court goes on to say that "[t]here is universal agreement that the compensatory goal of tort law requires that an injured plaintiff be made whole."[150]

The opportunity to resolve grievances fairly and peacefully and to seek restoration of wholeness reflects the pursuit of justice that has characterized our legal system from its inception and that continues to inform its evolution.[151] The First Amendment Petition Clause has played a central role in furthering that pursuit of justice. From its original penning and function as a tool of political participation to its current application as a means of individual access to courts, the Petition Clause has ever provided broad protection of a person's freedom to petition the government for redress of grievances. More recently, the Supreme Court has established the objectively reasonable test to indicate when the Petition Clause is applicable in the judicial context.[152] Where a petition to the court is objectively reasonable under the two-part test set out in *Professional Real Estate Investors*, the petitioner is afforded the full protection of the Petition Clause. Because legislation restricting a tort victim's ability to seek redress in court will inevitably affect claims that are objectively reasonable, it follows that any such tort reform legislation that infringes on a petitioner's freedom to file a claim may be ruled unconstitutional under the Petition Clause.

CONCLUSION

Our courts have long applied a strict scrutiny standard "to judge regulation of First Amendment freedoms, including the freedom to petition."[153] In the area of tort reform legislation, this

149. *Id.* at 1076.

150. *Id.*

151. *See* Andrews, *supra* note 16, at 624.

152. Prof'l Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49, 60–61 (1993).

153. Andrews, *supra* note 16, at 676.

standard requires courts to examine whether the government has a compelling state interest in restricting the freedom to petition the court, and whether the regulation is narrowly drawn to achieve that goal with minimal infringement on the right.[154] "Unlike other standards of review, [strict scrutiny] is not deferential to the government."[155] Justice Rutledge, writing for the Court in 1945, said about First Amendment freedoms:

> [T]he preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment . . . gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.[156]

The First Amendment freedom to petition is a broad right limited narrowly by the objectively reasonable standard as defined by the Supreme Court. As such, it will not bow easily to any legislative reform that impedes a tort victim's ability to access the court to seek redress for grievances. It is, simultaneously, the most neglected and the best resource for many tort reform opponents in their campaign against tort reform legislation.

154. *See id.* at 677.
155. *Id.*
156. Thomas v. Collins, 323 U.S. 516, 530 (1945) (citations omitted).