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THE LOST DEMOCRATIC INSTITUTION OF PETITIONING:
PUBLIC EMPLOYEE COLLECTIVE BARGAINING AS A CONSTITUTIONAL RIGHT

Catherine Phillips*

INTRODUCTION

Public sector labor unions learned a difficult lesson this past year: what the legislature giveth, the legislature may taketh away. Wisconsin, Ohio, and Indiana all passed legislation significantly curtailing or eliminating collective bargaining rights for public sector unions.1 State legislatures in nearly half of the remaining states are considering similar legislation, threatening the rights of public sector workers across the nation to engage in a core union activity: bargaining with the employer on behalf of workers.2 This sweeping anti-union legislative campaign suggests it may be time for the labor movement to

*Juris Doctor Candidate, University of North Carolina School of Law, 2013.
2. Simon, supra note 1. Additional anti-union legislation was also being considered nationwide, even measures that had little to do with cost cutting. See, e.g., John Miller, Judge Blocks New Anti-Union Idaho Law, ASSOCIATED PRESS, July 5, 2011, http://www.idahopress.com/news/judge-blocks-new-anti-union-law/article _10753b2e-a791-11e0-880d-001cc4c002e0.html. This legislation, which the judge found was pre-empted by federal law and thus invalid, sought to end a union practice of supplementing members’ wages in order to win government contracts by outbidding competitors. Id. Thus, the rash of anti-union legislation is arguably about more than just cost cutting. See Simon, supra note 1 ("[I]t’s not just budgetary concerns driving Republican officeholders to take on unions, traditionally a strong Democratic ally.").
think seriously about a long-term judicial campaign to gain additional constitutional protection for public sector labor activities.³

Perhaps surprisingly, the constitutional protections for labor activities, particularly public employee labor activities, are quite thin.⁴ Often times, Supreme Court cases addressing labor issues are strikingly incongruent with other case law, failing to constitutionally protect labor union activities while providing enhanced protections for similar activities when done by non-union members.⁵ As discussed below, public sector labor rights are almost entirely statutorily created, historically having very little grounding in constitutional law.⁶

In recent years, some scholars and practitioners have argued that labor organizing deserves greater constitutional protections, including

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⁶ See Herbert, supra note 4, at 345.
greater First Amendment protection.\textsuperscript{7} However, no one heretofore has specifically addressed public employee collective bargaining on its own and where in the Constitution it might find theoretical protection.\textsuperscript{8}

This Note argues that collective bargaining by public employees should receive heightened constitutional protection as part of the right to petition the government for a redress of grievances. Part I will provide a brief history of public employee unions, as well as a discussion surrounding the constitutional status of public employees more generally. This section will conclude with a discussion about why additional constitutional protections for labor activities, particularly public sector collective bargaining, are necessary.

Part II will examine the constitutional right to petition in its historical context, arguing that the right to petition clause provided constitutional protection for a pre-existent, institutionalized, and robust democratic system of petitioning the government, as distinct from other First Amendment rights such as speech and assembly. Part III will examine Supreme Court jurisprudence regarding the right to petition, noting how the court has almost universally ignored the right to petition's distinct historical content and original robustness, incongruously conflating it with other First Amendment rights. This section will conclude by discussing a recent right to petition case involving public employees, Borough of Duryea v. Guarnieri,\textsuperscript{9} which provides the first extensive treatment of the right to petition as a potentially distinct constitutional right with a historical content that is unique from other First Amendment rights.\textsuperscript{10}


\textsuperscript{8} The importance of constitutional protections for labor rights, particularly ones narrowly tailored to protect public sector collective bargaining rights, will be discussed more thoroughly below in Part I.C., infra notes 100–18 and accompanying text.


\textsuperscript{10} Id. at ___, 131 S. Ct. at 2495–2500. While the Court does not apply the implications of its historical analysis to its holding, the discussion is significant, nonetheless, insofar as it represents the first such extensive discussion. See id. at ___, 131 S. Ct. at 2501.
Finally, Part IV will argue that public sector collective bargaining should be protected under the right to petition the government for redress of grievances clause of the Constitution. This argument will rely in part on the robust and institutionalized character of the right to petition historically as well as the analysis of the Petition Clause in both the majority opinion and Justice Antonin Scalia’s partial dissent in Borough of Duryea v. Guarnieri. Public sector collective bargaining represents a logistically feasible, contemporary structure that is faithful to the distinct historical content of the right to petition as an institutionalized democratic practice, while still acknowledging the ways in which society has changed since the time the Constitution was written. As such, public sector collective bargaining should be protected as part of the constitutional right to petition the government for redress of grievances.

11. U.S. CONST. amend. I I acknowledge that this argument may strike some as purely intellectual, having no hope of being adopted by the current Supreme Court. However, in response, I will borrow the argument made against similar criticisms by James Gray Pope, Professor of Law at Rutgers School of Law:

Social movements rarely obtain official endorsement of their rights claims without first going through a period of exercising those rights in the face of official legal hostility. Second, ideas that might seem like romantic fantasies in the context of a short-term litigation campaign can appear as hard-nosed realism in the context of a multi-decade social movement for fundamental legal change. Accordingly, I will not shy away from considering even legal theories that would flunk the straight-faced test in court today.

Right to Organize, supra note 7 at 941–42.


13. Id. at ___, 131 S. Ct. at 2502–07 (Scalia, J., concurring in judgment in part and dissenting in part).

I. PUBLIC EMPLOYEES AND THE LAW

In order to understand the importance of expanding the constitutional protections for public employee collective bargaining, one must first understand the history and current legal context of public employees. Public employee unions have a distinct history and statutory governing framework that is often neglected in scholarship. While private sector employees have one statute that governs their rights to organize, public sector employees' right to engage in various union activities is dictated by a vast array of federal, state, and local legislation, with wide variations. Additionally, public employees occupy a unique place in the constitutional framework insofar as their relationship with the government is arguably unique from that of other citizens. In the 20th century, the Supreme Court extended the constitutional rights of public employees, only to narrow those rights in recent decades. While the narrowing of certain previously-extended constitutional rights is relatively recent, one can already see the negative impacts on the job security of public employees and the ethical functioning of governments. Tracing these developments proves a useful lens to see more clearly the significance of working towards expanded constitutional protections for public employees, particularly the process of collective bargaining.

18. See id. at 20.
20. See id. at 530, 568.
A. A History of the Statutory Protections for Public Sector Labor Unions

Union membership in the United States has been steadily declining in the private sector since the 1950s.\textsuperscript{21} In 2010, only about 6.9\% of private sector workers were union members.\textsuperscript{22} Conversely, unions represented 40\% of public sector workers in 2010.\textsuperscript{23} At the local level, the percentage is even higher, with unions representing almost 46\% of the local public sector.\textsuperscript{24} From the numbers alone, the organization of public sector workers would seem to be the sole success story of the American Labor movement.\textsuperscript{25}

Notwithstanding these current numbers, the public sector labor movement encountered substantially more problems than its private sector counterpart in its early attempts to organize the public sector workforce.\textsuperscript{26} For example, in 1902, during the otherwise labor-friendly presidency of Theodore Roosevelt, federal employees were banned by a series of executive orders from petitioning Congress for salary increases.\textsuperscript{27} While this ban was lifted through the Lloyd-LaFollette Act of 1912, no additional recognition of labor rights was enacted.\textsuperscript{28} Similar attempts to limit the interactions between public employees and legislative bodies were carried out at the state level as well.\textsuperscript{29}

While the efforts of public sector workers to organize continued to be thwarted at every turn, private sector labor unions finally received statutory protections\textsuperscript{30} through the National Labor Relations Act in 1935.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{21} See James Gray Pope, Peter Kellman & Ed Bruno, “We Are Already Dead”: The Thirteenth Amendment and the Fight for Workers’ Rights After EFCA, 67 Nat’l Law. Guild Rev. 110, 110 (2010) (discussing the decline of private sector union membership since the 1950s, when it reached its peak at thirty-five percent).
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Cf. Pope et al., supra note 21, at 110–12 (discussing the inexorable decline of the labor movement, particularly in the private sector).
\item \textsuperscript{25} See Wollett et al., supra note 17, at 1–11.
\item \textsuperscript{26} Herbert, supra note 4, at 348.
\item \textsuperscript{27} See id. at 349.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} See generally Slater, supra note 15, at 71.
\end{enumerate}
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which provided a regulatory framework within which private sector workers could organize, petition, boycott, collectively bargain, and even strike. By 1950, almost a third of the private sector workforce was unionized, demonstrating, at least initially, the power of these protective measures.

Nonetheless, many commentators remained skeptical about the wisdom of allowing public sector workers to unionize or to engage in collective bargaining. In 1937, another otherwise labor-friendly president, Franklin Roosevelt, asserted that "the process of collective bargaining, as usually understood, cannot be translated into the public service." He reasoned:

The very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employers alike are governed and guided, and in many cases restricted, by laws which establish policies, procedure or rules in personnel matters.

32. See Pope et al., supra note 21, at 110.
33. See Wollett et al., supra note 17, at 2-4.
34. Herbert, supra note 4, at 354. This quotation from President Roosevelt was a favorite of conservative commentators during the recent debate in Wisconsin over public sector collective bargaining rights. See, e.g., Mark Hemingway, FDR Supports Wisconsin Governor Scott Walker, The Weekly Standard (Feb. 19, 2011, 11:28 AM), http://www.weeklystandard.com/blogs/fdr-supports-wisconsin-governor-scott-walker_550456.html. However, Herbert points out that the use of a single quotation from Roosevelt largely misrepresents his overall views about labor rights. See Herbert, supra note 4, at 356-57. As a parallel example, Herbert cites a speech by Ronald Reagan, within which Reagan stated, "where free unions and collective bargaining is forbidden, freedom is lost." Id. at 357. Obviously, conservatives would argue similarly that this quotation does not represent Reagan's true views on labor rights. See id.
35. Herbert, supra note 4, at 354.
Thus, government is inherently different from the private sector and its employment relationships should be governed by a different set of rules. Therefore, unions and collective bargaining are inherently incompatible with public sector employment.36

Moreover, courts throughout this period continued to significantly limit the rights of public sector unions.37 Court decisions prior to the 1960s gave public sector unions “no right to strike, to bargain, or to arbitrate disputes, and government workers could be fired simply for joining a union.”38 These cases reflected a judicial antagonism toward unions,39 linking union membership with negative traits such as “disloyalty and inefficiency.”40 The cases also reflected a concern that collective bargaining was “impossible between the government and its employees, by reason of the very nature of government itself.”41 In part, these cases also just reflect court deference to the administrative decisions of other branches of government.42

It was not until the 1960s that public sector unions slowly began to gain the right to unionize and engage in collective bargaining with governmental employers.43 These rights were not extended by constitutional adjudication,44 despite the seeming congruity of labor values with First Amendment values.45 Rather, these rights were


38. Id. at 72.
39. Id.
40. Id. at 73.
41. Id. at 75.
42. Id. at 75–80.
43. Id. at 71.
44. See WOLLETT ET AL., supra note 17, at 8–11 (noting that the public employee collective bargaining laws were primarily state laws, with a few minor exceptions).
45. See Garden, supra note 5, at 2620–21 (discussing why labor values are congruent with First Amendment values).
extended by legislative and executive action at the federal, state, and local level.46

Wisconsin led the movement in terms of state and local support for public sector collective bargaining.47 Beginning in the 1950s, the American Federation of State, County and Municipal Employees (AFSCME) began a push to enact statutory protections for public sector organizing and collective bargaining.48 Additionally, other labor organizations, such as the Wisconsin Federation of Labor (WFL) and the Congress of Industrial Organizations (CIO), both previously private sector labor organizations, publically pledged their support to the growing public sector movement.49 Over several years, Wisconsin enacted statutes that granted state and local public sector workers the right to organize and collectively bargain for the first time in the United States.50 In the following decades, all but five states eventually passed legislation permitting collective bargaining for at least some public sector workers.51 Federal public sector workers received the right to collectively bargain in the Federal Labor Relations Act of 1978.52

As noted at the beginning of this section, the increase in statutorily created rights for public workers corresponded with a dramatic increase over the last half-century in the percentage of unionized public sector workers.53 Depending on the enabling legislation,
teachers, police officers, firefighters, office workers, janitors, or other public sector laborers may, to varying degrees, be represented by a union and have the right to negotiate with the state or local government about salaries, working conditions, benefits, or other issues. Most statutes followed the model of the National Labor Relations Board and established a system of exclusive bargaining units, where one union would represent and bargain for an entire class of workers.

The collective bargaining process usually begins with a series of informal discussions between employee representatives and the government-employer. Statutes often provide some kind of requirement that the parties negotiate in "good faith." If informal discussions do not yield an agreement, the parties may be required to utilize additional methods for reaching a consensus. These additional methods can include more informal mechanisms, such as voluntary fact-finding and mediation, which allows the parties to continue negotiating with a neutral mediator who is empowered to make findings of fact and use other methods to facilitate an amicable resolution to the conflict. Or, the parties may also be required to participate in a formal procedure such as binding arbitration, which binds the parties to whatever decision the arbiter deems appropriate.

Unlike in the private sector, public sector workers usually do not have the right to strike should the tenor of the discussions shift to the government's favor. Moreover, protections against employer retribution for public sector employee speech about wages and working

and accompanying text (discussing how public employees did not even begin to gain statutory rights to organize until the 1960s); see also supra notes 20–21 and accompanying text (discussing the decline in private sector union membership over similar timeframe as the public sector saw a marked increase).

54. See WOLLETT ET AL., supra note 17, at 8–11.

55. See id. at 10. For example, one union would represent all firefighters, while another might represent all police officers. Cf. id. (noting the use of exclusive bargaining units in the public sector).

56. Id. at 72.

57. Id.

58. Id. at 321–22.

59. Id.

60. Id. at 329–33.

61. Id. at 252.
conditions may be less robust than they are in the private sector. Thus, much of the power of public sector unions hinges not on their ability to organize strikes, pickets, or other informational campaigns, as they often do in the private sector, but on their ability to collectively bargain with the government-employer. The fruits of collective bargaining may be seen in the increased salaries and benefits afforded unionized public sector workers as compared with non-unionized workers.

Notwithstanding this success—or perhaps because of it—in the past year, almost every state that has allowed collective bargaining either has passed legislation removing these hard-won rights or is considering passing such legislation. Given the already pared-down rights of public sector unions, as compared with their private sector equivalents, it is not difficult to see that the erosion of collective bargaining rights in the public sector could finally decimate the last bastion of American unions.

B. Public Employees and the Constitution

Public employees occupy a unique space in constitutional law because the government, whose behavior is circumscribed by the

62. See Herbert, supra note 4, at 350. The reasons for this will be discussed more thoroughly in Part I.B.


64. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, available at http://www.bls.gov/cps/tables.htm#union (follow “Median weekly earnings of full-time wage and salary workers by union affiliation, occupation and industry” hyperlink). As is evident on the linked chart, this benefit also applies to unionized, as compared with non-unionized, private sector workers. Id. In a country increasingly concerned about rising income inequality, this power of unions to increase the wages and benefits of middle-class and working-class Americans should be not easily dismissed, regardless of one’s initial opinions about unions.

65. See Simon, supra note 1 (noting that over 700 pieces of legislation have been filed that would limit public sector collective bargaining in almost every state).
Constitution, is also their employer. In general, the Court has been reluctant to treat the Constitution as relevant to the employment decisions of public employers, distinguishing between the government as sovereign and the government as employer. Nevertheless, some scholars have criticized this distinction between the government as employer and the government as sovereign, noting this separation is a court-constructed fiction. The extent to which public employees receive constitutional protection for their labor activities depends on the extent to which the Court is willing to apply the Constitution to the government acting as an employer.

In the 1800s, Justice Olive Wendell Holmes famously noted that a public employee “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” In other words, the government could fire an employee for exercising her constitutional right to speak, not because she did not have a constitutional right to speak, but because she did not have a constitutional right to a government job. The government acting as sovereign could not take any action against a citizen for exercising a constitutional right; however, the government acting as an employer was free to fire someone for exercising a constitutional right.

In 1967, the Court softened its position on public employment, finally settling on a more balanced approach that rejected the notion that

66. WOLLETT ET AL., supra note 17, at 20.
67. Id.; see also Borough of Duryea v. Guarnieri, ___ U.S. ___, 131 S.Ct. 2488, 2501 (2011) (noting that constitutional protections for citizens do not give public employees the “right to transform everyday employment disputes into matters for constitutional litigation in the federal courts”).
69. See, e.g., Borough of Duryea, ___ U.S. at ___, 131 S.Ct. at 2501 (holding that the public employee was not protected from retaliatory firing by his government-employer after filing a lawsuit and grievance complaint, both activities otherwise protected by the Constitution, when the subject of these acts was not a matter of public concern).
71. See id.
72. See id.
“public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action.” 73 Thus, public employees were no longer required to surrender their constitutional rights as a precondition to employment. 74 This approach evolved in most areas of constitutional adjudication involving public employment into a balancing test that pitted the government’s interest in an efficient and effective workplace against the employee’s constitutional rights. 75

Specifically in relation to public employee free speech, the Court developed a public concern test, applying the balancing test only if the employee speech was a matter of public concern. 76 If a public employee speaks as a private citizen or an employee on a private matter, then that speech is not protected by the First Amendment and may be subject to government retribution. 77 If a public employee speaks as a citizen about a matter of concern to the public, then the First Amendment protects that speech against government-employer retaliation, unless that protection is outweighed by some legitimate governmental interest. 78

More recently, in Garcetti v. Ceballos, 79 the Court narrowed the public concern test further to apply only when public employees do not speak as part of their official job duties. 80 There, a deputy district attorney was retaliated against for attempting to highlight police misconduct as part of his official case review duties. 81 The Court held

74. See id.
75. See, e.g., O’Connor v. Ortega, 480 U.S. 709, 725 (1987) (holding that Fourth Amendment privacy interests of public employees must be balanced against the legitimate governmental interest of having an “efficient and proper . . . workplace”); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (noting public employee free speech rights must be balanced with government’s legitimate interest to have an efficient workplace).
76. See Pickering, 391 U.S. at 574–75.
77. Id. In other words, if a public employee speaks on a matter of private concern, then they receive no constitutional protection. Id. If a public employee speaks on a matter of public concern, then they receive constitutional protection against retaliation, but only insofar as their freedom of speech is not outweighed by a legitimate governmental interest. See id.
78. Id. at 571–74.
80. See id. at 421.
81. Id. at 413–15.
that when a public employee’s speech is simply part of “performing his or her job duties,” then it receives no constitutional protection from employer discipline, even if that speech is on a matter of public concern. The Court reasoned that “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.” Public employees still have a right to contribute to the civic discourse, but they do not have a right to “perform their jobs however they see fit.”

This public concern test is one of the most significant hurdles to overcome in order for public employees to receive additional constitutional protection for their labor activities. Labor organizing activities are quintessentially “private” concerns according to the Court. While one can argue that the very nature of public employment makes all employment issues a matter of public concern, a majority of the Court has not yet been so persuaded.

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82. Id. at 423.
83. Id. at 421. See generally McGuinness, supra note 19 (providing a detailed discussion of how Garcetti and its progeny have severely hampered the First Amendment rights of public employees, most devastatingly in whistleblowing cases).
84. Garcetti, 547 U.S. at 421-22.
85. Id. at 422. This language is particularly striking insofar as the Court never discusses the nature of the particular way in which the public employee here saw fit to do his job. At issue here was arguably not an issue of differing opinions about how one should do one’s job. Rather, at issue was a public employee who sought to highlight police fraud in securing a warrant and was punished for doing so. That the Court would lump such facts under a general statement, such as, public employees do not have the “right to perform their jobs as they see fit[,]” trivializes what arguably should be a major concern of the judiciary: the integrity of our criminal justice system. Id.
86. See Herbert supra note 4, at 350.
87. Id. at 349–50.
88. See Garcetti, 547 U.S at 413–15, 421 (denying constitutional protection to employee speech that is regarded as part of his or her job duties even when the speech for which the employee was allegedly retaliated against involved the revelation of police misconduct); Connick v. Myers, 461 U.S. 138 (1983) (rejecting the assertion that an employee’s questionnaire about the operation of the District Attorney’s office was a matter of public concern). This hurdle of the public concern test will also be discussed more thoroughly below in Part III in the context of the
However, two facts complicate this otherwise significant hurdle. While *Pickering*, which first articulated the public concern standard, was an opinion with only one Justice in dissent, both cases that followed and narrowed the public concern standard, *Connick v. Myers* and *Garcetti v. Ceballos*, had only 5-4 majorities. Within the dissenting opinions, one finds support for a much more expansive understanding of public concern, which could include labor speech about terms and conditions of public employment.

For example, in *Connick*, Justice William Brennan, Jr. notes in his dissent: “It is hornbook law, however, that speech about ‘the manner in which government is operated or should be operated’ is an essential part of the communications necessary for self-governance, the protection of which was a central purpose of the First Amendment.” Justice Brennan goes on to note that, based on the voluminous newspaper articles on the subject, the internal functioning of the Orleans Parish District Attorney’s office appears to have been a matter of great public concern, despite the majority of the Court holding otherwise. Perhaps, therefore, the Justice reasoned, the Court’s understanding is too narrow to mesh either with what actually interests the public or with what kinds of speech the First Amendment is designed to protect.

In *Garcetti*, the four dissenting Justices filed three separate opinions. Justice John Paul Stevens’ dissent provides the most strident critique of the Court’s recent jurisprudence:

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92. This is important insofar as the Free Speech public concern test has been extended to the Petition Clause. *Borough of Duryea, ___ U.S. ___,* 131 S. Ct. at 2488. While I will argue in Section III that this extension is improper given the distinct history of the Petition Clause, a broader understanding of "public concern" would also succeed in allowing labor petitioning about employment terms and conditions to be constitutionally protected. See Herbert, *supra* note 4, at 350.
94. *Id.*
95. *Id.* at 160 n.2.
96. *Id.* at 163–64.
The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong. Over a quarter of a century has passed since then-Justice Rehnquist, writing for a unanimous Court, rejected 'the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly.'

Thus, while the public concern test is good law, it has received significant dissent from within the Court, as well as from scholars; and, in theory, future Courts may yet expand the First Amendment protections for public employee speech beyond the narrow confines recognized today.

C. Public Sector Collective Bargaining: The Current Need for Additional Protections

Supporters of ending public sector collective bargaining argue that the states' current budget crises require cuts in public employee benefits and salaries that should not be subject to union approval or negotiations. Many disagree philosophically with the very idea of public sector unions, much less collective bargaining. Notwithstanding these commentators, numerous other scholars and practitioners have recognized the importance of the labor movement for the health of the

98. Id. at 427 (Stevens, J., dissenting) (citing Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979)).
99. Id.; see also Lieberwitz, supra note 68, at 597 (analyzing the framework the Court uses to decide labor cases dealing with employee speech); Van Alstyne, supra note 68, at 753–54 (describing the increasing support of the court in cases dealing with public employment); cf. McGuinness, supra note 19, at 530 (describing the decrease in public protection after recent Court decisions); Cynthia L. Estlund, Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category, 59 Geo. Wash. L. Rev. 1, 3–4 (1990) (describing problems with the public concern test).
101. McGinnis & Schanzenbach, supra note 36 ("[T]he potential benefits of unions [are] probably nonexistent in the public sector.").
nation's democracy and for maintaining reasonable benefits, salaries, and working conditions for all workers.  

Moreover, grounded in this appreciation of the vital role of labor unions as well as the fragility and inadequacy of entirely statutorily-based rights, some scholars and practitioners have argued that labor organizing deserves greater constitutional protections, including greater First Amendment protection.  

First, scholars argue that the current state of constitutional protections for labor is bad constitutional law insofar as opinions regarding labor issues are irreconcilable with other Supreme Court opinions relating to similar actions by other types of groups. Protecting labor organizing is congruent with basic First Amendment principles and thus the Court's jurisprudence should reconcile its divergent case law to expand protections for labor activities. Second, as seen recently, statutorily created rights are easily lost. Just as the Civil Rights movement launched a successful legal campaign that changed the way the Supreme Court approached issues of race, equal protection, and due process, the labor movement needs to launch a long-
term legal campaign to change the way the Supreme Court approaches issues of speech, assembly, and petition in the labor context.\textsuperscript{107}

However, no scholar has yet specifically addressed public employee collective bargaining on its own and where in the Constitution it might find theoretical protection. Rather, collective bargaining tends to get lumped in with other labor activities such as picketing, boycotts, strikes, and general labor speech.\textsuperscript{108} While all labor activities are invariably intertwined, collective bargaining in the public sector arguably deserves distinct constitutional treatment.

First, collective bargaining is the primary tool public sector unions use to gain appropriate benefits, salaries, and working conditions for their members.\textsuperscript{109} Most public sector workers are not allowed to strike, which removes a powerful labor-organizing tool from the available options.\textsuperscript{110} Moreover, public sector union speech is in some ways more strictly circumscribed than private sector union employee speech because the government is the employer.\textsuperscript{111} Thus, if public sector unions are to be more than unions in name only, they need to maintain the power of collective bargaining.\textsuperscript{112}

Second, collective bargaining, as noted above, has become the lynchpin in the movement to erode the power of public sector unions.\textsuperscript{113} Legislatures may not be able to limit the right of public employees to

\textsuperscript{107} See Linzey \& Margil, supra note 3; see also Hyde, supra note 5 at 4–5 (describing how a Department of Labor requirement was held unconstitutional by the Court); Right to Organize, supra note 7, at 947 (discussing how the Constitution is superior to statutory law).

\textsuperscript{108} See, e.g., Right to Organize supra note 7, at 953.

\textsuperscript{109} See Wollett et al., supra note 17, at 8–11.

\textsuperscript{110} Michael T. Leibig \& Wendy L. Kahn, Public Employee Organizing and the Law 23 (1987).

\textsuperscript{111} See generally United Pub. Workers v. Mitchell, 330 U.S. 75, 78 (1947) (upholding the Hatch Act). As will be discussed more fully in Section III, this statement is true regarding issues of working conditions, salaries and benefits insofar as these issues have been held to be matters of private concern. See infra Part III. Public sector employees do still enjoy their constitutional rights when they speak as citizens about matters of public concern. See Pickering v. Bd. of Educ., 391 U.S. 563, 574–75 (1968) (forbidding discharge of public employee for exercising First Amendment rights of free speech).

\textsuperscript{112} See supra note 63.

\textsuperscript{113} See Simon, supra note 1.
join unions completely, but legislatures can seriously undermine the content and significance of this associational right by removing the union’s power to collectively bargain. Given the narrow focus of the anti-collective bargaining legislation, development of a narrowly-tailored constitutional argument in support of collective bargaining is necessary because it opens up a path to challenge the constitutionality of these new laws. Other, less-narrowly tailored constitutional arguments about public sector union rights necessarily leave substantial room for the Court to uphold other union rights, such as association, speech, or assembly in general, while simultaneously allowing the removal of rights, such as collective bargaining, that arguably are what give actual content and effect to the other rights. Thus, in order to preserve the

114. Courts have generally upheld the right of public employees to join a union under the Association Clause. See, e.g., AFSCME v. Woodward, 406 F.2d. 137, 139–40 (8th Cir. 1969). However, what that means in terms of actual substance beyond the power to associate with a union is a matter of debate. See WOLLETT ET AL., supra note 17, at 23–25.

115. See WOLLETT ET AL., supra note 17, at 23–25.

116. Wisconsin unions did file a federal lawsuit alleging that the anti-collective bargaining law was unconstitutional as it violates the Equal Protection Clause, the Due Process Clause, and the First Amendment. Wis. Educ. Ass’n Council v. Walker, No. 3:11CV00428, 2011 WL 2349069, at **81–93 (W.D.Wis. June 15, 2011). However, they put forth no argument that collective bargaining should be a constitutional right as such. Id. Rather, their First Amendment argument rests on the fact that the Wisconsin legislation only impacted some public employee unions, while continuing to allow collective bargaining for other groups, like police officers. Id. The argument rests on equal protection grounds and the somewhat more robust protections of the right of public sector unions to deduct dues for workers’ paychecks. Id. Thus, the constitutional argument is rather thin, if perhaps the only currently viable one. Cf. id. The complaint did not argue the legislation violated the right to free assembly, right to free speech, or the right to petition the government. Id.

117. See Smith v. Ark. State Highway Emps., Local 1315, 441 U.S. 463 (1979). There, the Court upheld as constitutional a public employer’s refusal to allow a union to file grievance complaints on behalf of its members. Id. at 463–64. The Court noted that there was no prohibition against the public employees joining unions or “advocating any particular ideas” and thus no infringement on the employees’ First Amendment Rights. Id. at 465. However, the Court noted that the First Amendment imposes no “affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.” Id. Thus, the Court upheld the right for the union to exist while eviscerating the right to engage in acts from which the union’s actual power flows. See id.
important role that labor unions play in democracy and for workers, the labor movement needs to take seriously the task of developing a constitutional argument to protect public sector collective bargaining rights in a way that imposes an obligation on the government not only to listen to grievances but also to respond in some formalized way.\textsuperscript{118}

II. THE RIGHT TO PETITION IN A HISTORICAL CONTEXT

The right to petition, unlike other First Amendment rights, imposes a positive obligation on governments to listen to grievances and to respond in some formalized way. The text of the First Amendment provides, in pertinent part, that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”\textsuperscript{119} In most contemporary cases addressing the right to petition, the Supreme Court collapses this right into other First Amendment rights, such as the freedom of speech or right to peacefully assemble.\textsuperscript{120} Moreover, the right is discussed in a way that places little to no obligation on the government to listen or respond to these petitions.\textsuperscript{121} However, such an understanding bears little resemblance to the practice and understanding of government petitions in the colonial and post-colonial era when the constitution was written.\textsuperscript{122} Historically, the practice of petitioning “was an affirmative, remedial right which required governmental hearing and response.”\textsuperscript{123} Petitioning was a formalized system that structured how citizens communicated with the government and how the government responded to those communications.\textsuperscript{124} There was not, however, any formalized system that required the government to

\begin{itemize}
\item \textsuperscript{118} Cf. id. (demonstrating how in the absence of such a constitutional argument the effectiveness of public sector unions may be dramatically reduced).
\item \textsuperscript{119} U.S. CONST. amend. I.
\item \textsuperscript{120} See McDonald v. Smith, 472 U.S. 479, 482 (1985).
\item \textsuperscript{121} See Smith, 441 U.S. at 465 (holding that public employees have the right to petition the government but they have no right to a response); Minn. State Bd. for Cmty Colls. v. Knight, 465 U.S. 271, 283 (1984) (holding that the Constitution does not grant citizens the right to be heard by governing authorities).
\item \textsuperscript{122} Higginson, supra note 14, at 142–44; see also Mark, supra note 14, at 2153–61.
\item \textsuperscript{123} Higginson, supra note 14, at 142.
\item \textsuperscript{124} See id. at 144–47.
\end{itemize}
hear and respond to all acts of speech or assembly.125 Thus, unlike the freedom of speech and assembly, the right to petition clause enshrined as a right a *pre-existing and formalized system* of petitioning for public and private grievances.126

Moreover, the right to petition was understood to be a foundational right essential for the working of a representative democracy.127 It was seen as the primary way whereby elected officials could stay informed about what concerned citizens in their jurisdiction in between elections.128 Representative democracy was possible because of elections and petitioning, equally.129

The historical narrative below demonstrates both how the right to petition clause served to protect a robust, essential, and institutionalized democratic practice130 and also how its eventual demise explains the Supreme Court’s failure to appreciate the distinct nature of this right by the time the Court began to consider challenges under the Petition Clause in the 20th century.131

A. Pre-Revolutionary Petitioning

In pre-Revolutionary American colonies, petitioning the government for a redress of grievances was a formalized process whereby individuals would request governmental assistance for anything from divorce to an “investigation of the treatment of prisoners.”122 People submitted private petitions, public petitions for legislation, and “petitions appealing courts’ decisions,” reflecting the quasi-judicial and

127. Higginson, supra note 14, at 144–45.
128. See id.
129. See id.
130. See infra notes 158–93 and accompanying text.
131. See infra notes 158–93 and accompanying text.
132. Mark, supra note 14, at 2182.
legislative role of the colonial assemblies.\textsuperscript{133} Indeed, the colonial assemblies’ primary duty was to receive and respond to the issues raised in citizen petitions.\textsuperscript{134} Both the specific process for submitting citizen petitions and the process for the government hearing and responding to these petitions were dictated by British common law.\textsuperscript{135} As such, petitions determined the legislative agenda of the colonial assemblies to a significant degree.\textsuperscript{136} Moreover, the government was required not just to allow citizens to file petitions, but it was required to hear and respond in some fashion to these citizen grievances.\textsuperscript{137} The government failing to hear or respond to a petition was considered a grievance in and of itself.\textsuperscript{138}

Even at a time in which only propertied white males could vote, people from all genders, races, and social strata could and did petition the government for redress of their grievances.\textsuperscript{139} In one particular instance, a group of freed African-Americans successfully petitioned the government to have “their wives and daughters be exempted from paying poll taxes.”\textsuperscript{140} Further evidence exists of petitions by women, Native Americans, and other free and enslaved African-Americans.\textsuperscript{141} These groups of individuals, though not permitted to vote, were allowed to petition the government for grievances, both public and private, and receive a hearing and a response from governmental officials.\textsuperscript{142} Thus,

\begin{itemize}
  \item 133. Higginson, supra note 14, at 145. Examples of petitions include: debt relief, reimbursement for care provided to the indigent, financial assistance to other governing authorities, divorce, “tax policy, land distribution, [and] monopoly grants.” \textit{id.} at 150.
  \item 134. \textit{id.} at 145.
  \item 135. \textit{See generally} Smith, supra note 125.
  \item 136. Higginson, supra note 14, at 144-45.
  \item 137. \textit{See Smith, supra} note 125, at 47-57 (discussing the various colonial petitions and responses of both colonial governments and the British Parliament to these petitions).
  \item 138. \textit{See id.} at 57.
  \item 139. Mark, supra note 14, at 2162, 2177–88.
  \item 140. \textit{id.} at 2185. “A group of African-Americans, even free, acting in concert on a political matter was as incendiary an action as could be conceived in the slave South. All the more stunning, then, that the petition was not simply heard, but granted.” \textit{id.}
  \item 141. \textit{id.} at 2184–86.
  \item 142. \textit{id.;} Higginson, supra note 14, at 145.
\end{itemize}
the institutionalized practice of petitioning was not limited to only certain topics or people.\(^{143}\) Indeed, the Revolutionary War can be seen, in part, as a reaction to the British government's failure to respond to colonial petitions.\(^{144}\) The text of the Declaration of Independence reads as such, stating "[i]n every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury."\(^{145}\) This wording suggests that one key issue enraging the colonists was that the British government was not hearing or responding to the colonists' petitions adequately.\(^{146}\) Moreover, the remaining text of the Declaration reads like a long list of grievances, of the type one might find within a formal petition; a fact, suggesting here again, the prominence of formal petitioning and the extent to which a hearing and response was the accepted norm.\(^{147}\)

**B. The Constitutional Right to Petition**

When the Constitution was being written, the expectation that petitions would receive a hearing and a response was so normative that much of the debate surrounded not whether petitioning was a right, but whether that right itself included the right to have the government respond in whatever way the petitioner wanted.\(^{148}\) Thus, a leading political figure could question whether it is "'improper for freemen to petition for their rights? If it be; then I say that the impropriety consisted only in their not demanding them.'"\(^{149}\) As the colonists transitioned to being independent people, they questioned the deferential tone and format of pre-revolutionary petitions.\(^{150}\) Should the method of petitioning

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144. Smith, *supra* note 125, at 57–64.
147. *Id.; see also* Higginson, *supra* note 14, at 155; Smith, *supra* note 125, at 57–64; Spanbauer, *supra* note 126, at 89.
149. *Id.* In other words, free people should not have to submissively petition a government for redress of grievances. Rather, such a person should have the freedom and authority to tell the government what to do on his or her behalf. *See id.*
150. *Id.*
not be converted into a universal right to instruct the legislative bodies? 151 Instructing legislative bodies implied that citizens would tell their legislators specifically how to redress a particular grievance and that the legislature would be bound to act in the manner the citizen instructed. 152

Whether free citizens should "instruct" or "petition" was also debated in terms of what would be the most effective system for the new country. 153 The debate centered on understandings of representative democracy and the relationship between citizens and their representatives. 154 Throughout these debates, however, the implicit assumption was that something like the pre-existent system of petition—in which citizens' grievances were heard and acted upon—was essential. 155 Absent from the debate was any suggestion that this right should not be central to the new nation. 156 This scarcity of constitutional debate demonstrates not only the foundational significance of the right to petition but also the normative nature of the formal system that made such communications with government possible and productive. 157

C. The Disappearance of Petitioning

In the early days of the new nation, petitions were heard and acted upon in much the same way as had been done prior to the American Revolution. 158 Petitions were referred to committees, debated, and some response, positive or negative, was formulated. 159 The content

151. Id. at 2206–10.
152. See id.
153. Id. at 2207–10.
154. See id.
155. See id.; see also Higginson, supra note 14, at 155. "That the Framers meant to imply a corresponding governmental duty of a fair hearing seems clear given the history of petitioning in the colonies and the colonists' outrage at England's refusal to listen to their grievances." Id.
156. Mark, supra note 14, at 2206 (noting "everyone assumed it was part and parcel of the rights to be preserved").
157. See id.
158. Higginson, supra note 14, at 156.
159. Id.
of petitions set the legislative agenda for each day.\textsuperscript{160} However, several challenges to the system of petition began to arise.\textsuperscript{161}

First, as the nation grew and transitioned from local assemblies to a national body, logistical challenges arose when trying to respond appropriately to all petitions.\textsuperscript{162} Additionally, the nature of petitions began to shift from private, individual petitions to petitions from members of organized groups advocating for a particular policy change.\textsuperscript{163} Thus, petitions became less an instrument of an individual communicating grievances to his or her government and more the instrument of a particular group's demands or even propaganda.\textsuperscript{164}

In particular, abolitionists organized a nationwide petition drive beginning in the 1830s.\textsuperscript{165} In support of their petition drive, they invoked the constitutional right to petition and to have such petitions receive a hearing and a response.\textsuperscript{166} After various tactics designed to avoid hearing and responding to the abolitionists' petitions, Congress passed a law stating that "no petitions or resolutions 'praying the abolition of slavery . . . shall be received by this House, or entertained in any way whatever.'"\textsuperscript{167} This gag rule, as it came to be known, was the first time the new Congress formally distanced itself from the colonial common law assumptions that petitioning on whatever topic automatically required a hearing and a response.\textsuperscript{168}

\textsuperscript{160} Id. at 157. Indeed, Congress began its day by reading all the citizen petitions received. \textit{Id.}

\textsuperscript{161} Mark, supra note 14, at 2212–13.

\textsuperscript{162} \textit{Id.} at 2212–14; Higginson, supra note 14, at 157.

\textsuperscript{163} See Higginson, supra note 14, at 157.

\textsuperscript{164} \textit{Id.} Compare, for example, the difference between the types of personal petitions, such as divorce proceedings, heard during colonial times, \textit{id.} at 146, with a petition drive organized by a group ofabolitionist in an attempt to have slavery abolished in the United States, \textit{id.} at 158–65.

\textsuperscript{165} \textit{Id.} at 158.

\textsuperscript{166} \textit{Id.}

\textsuperscript{167} \textit{Id.}

\textsuperscript{168} Cf. \textit{Id.} at 158–60 (noting how petitions were initially "received and considered, typically by referral to committees" in the early days of Congress and how Congress initially responded to Abolitionist petitions with informal mechanisms to avoid hearing and responding to these petitions).
This controversy introduced the now recognizable modern position that the right to petition, generally, does not impose any obligations upon the government to hear or respond to petitions. During the gag rule debate about abolitionist petitions and the years that followed, Southern Congressmen argued that there should be a sharp line separating citizens and legislators. Legislators should set the legislative agenda, not citizens. Citizens were still free to petition their governments, but their rights ended upon submission of the petition. Thereafter, the legislature could act in whatever manner it deemed appropriate in hearing or not hearing, responding or not responding, to citizen petitions. Thus, whatever the previous system of petitioning had required in terms of governmental hearing and response, an argument developed during this time that limited petitioning to freedom of expression and created no positive obligations on the government to

169. But see Borough of Duryea, Pa. v. Guarnieri, ___ U.S. ___, 131 S. Ct. 2488, 2495 (2011) ("A petition conveys the special concerns of its author to the government and, in its usual form, request action by the government to address those concerns.").

170. Higginson, supra note 14, at 166 (noting Supreme Court cases confining the right to petition to being about free expression).

171. Id. at 157–62 (discussing Senator John Calhoun from South Carolina and his assertion that requiring the government to consider and respond to citizen petitions was a "grave menace"); id. at 159 n. 117 (citing Congressman Rayner, of North Carolina, on Abolition Petitions in the House of Representatives on June 15, 1841 ("the inherent and necessary right of every legislative body to protect itself... in the exercise of its legal functions.").

172. Id. at 157–62.

173. Id. One of the arguments against the abolitionist petitions was that they were unlawful because slavery had pre-existed the Constitution and been adopted therein, no person could now lawfully "seize upon the property of any citizen." Id. at 160. Moreover, people argued that the petitions were unlawful because they did not directly impact the petitioner as such. Id.

174. Id. at 160.

175. Id. Many southern Congressmen felt vehemently that they could not even be forced into discussing this issue. In the words of Congressman Raynor of North Carolina, "[t]he discussion, on our part,... is of a defensive character—we want no discussion—we call for no action—but we simply ask to be let alone." Id. (quoting The Question of the Reception of Abolition Petitions: Hearing before the H.R., 27th Cong. (1841) (statement of Rep. Rayner)).
hear or respond. One can see this argument reflected in later Supreme Court jurisprudence, as discussed in the next subsection.

Nonetheless, at the time of the gag rule, some members of Congress did resist the interpretation that the right to petition did not create any positive obligation on the government to hear and respond to citizens' petitions. John Quincy Adams was the primary proponent for the position that the system of petitioning required at least a governmental hearing and some response. He maintained that the right to petition the government was the foundational civic practice to protect citizens in the period between elections. Each petition continued to deserve a fair hearing and response. Adams argued vehemently for a return to the historical understanding and system of petitioning as faithful to the Constitution and the spirit of democracy.

Other supporters of petitioning went even further in their critique of Southern attempts to alter the previously shared understanding that governments were required to hear and respond to citizen petitions. For example, John Dickson from New York stated:

176. See id. at 157–62.
177. See id. at 166 (noting until the Court acknowledges the disconnect between the history of petitioning and the Court's jurisprudence, the Court will continue to “appear to rest [its Petition Clause opinions] not on the Framers' intent, but on deference to the resolve of antebellum Congresses to defeat a right which threatened the institution of slavery”).
178. See, e.g., id.
179. Id. at 162–64; see also Speech of John Quincy Adams Upon the Right of People to Petition (Arno Press 1969); id. at 58, (discussing with great indignation examples of Congress failing to even read citizen petitions); id. at 55 (noting how Congress had failed to read or consider petitions dealing with slavery and that “this was the process whereby the right of petition had been broken down”).
180. Higginson, supra note 14, at 162–64.
181. Id.
182. See id.
183. David C. Frederick, John Quincy Adams, Slavery, and the Disappearance of the Right to Petition, in The First Amendment: Freedom of Assembly and Petition: Its Constitutional History and the Contemporary Debate 76 (Margaret M. Russell ed., 2010). Adams had agreed that the governmental response could simply be to refer the matter to a legislative committee, where it could be tabled from further consideration at that time. Id. at 75. Some scholars believe it is possible that this concession inadvertently also eroded the substantive right to petition. Id. at 80.
A right "to petition the Government for a redress of grievances" is secured to the people. But, sir, of what use to the people is the right of petition, if their petitions are to be unheard, unread, and to sleep "the sleep of death," and their minds to be enlightened by no report, no facts, no arguments?\textsuperscript{184}

Foundationally, Adams and his allies asserted "that the right to petition implies duties to hear, consider, debate, and decide."\textsuperscript{185} In recognizing these implicit governmental duties, they recognized the distinctiveness of petitioning as a democratic institution, not just a right to self-expression.\textsuperscript{186}

Nonetheless, as evidenced by much of the constitutional jurisprudence since that time, the anti-abolitionists ultimately won the argument, significantly narrowing the practical import of a formally robust democratic right.\textsuperscript{187} In 1836, Congress passed the "gag rule" forbidding the considerations of citizen petitions "relating in any way, or to any extent whatever, to the subject of slavery, or the abolition of slavery,"\textsuperscript{188} against objections that this rule was unconstitutional.\textsuperscript{189} In the decades that followed the imposition of the gag rule, petitioning would slowly lose steam as a civic practice and as a formal democratic institution that determined Congressional agendas.\textsuperscript{190} Thus, by the 20th century, the Court could more or less conflate the right to petition with the freedom of speech or the right to assemble without obvious error.\textsuperscript{191} The once robust civic institution that had been enshrined as a constitutional right, by which citizens could communicate grievances to

\textsuperscript{184} Id. at 76 (quoting John Dickson).
\textsuperscript{185} Higginson, supra note 14, at 163.
\textsuperscript{186} See, e.g., id. at 163–64 (discussing the argument that petitioning requires some response from the government); see also id. at 165 (noting how the right to petition later was reduced to being about free expression).
\textsuperscript{187} Id. at 165–66; see also infra Part III.
\textsuperscript{188} Frederick, supra note 183, at 78.
\textsuperscript{189} Id. at 79.
\textsuperscript{190} Id.
\textsuperscript{191} See Higginson, supra note 14, at 166 (noting that courts have detached the meaning of the petition clause from its historical context that required a hearing and response).
the government and be ensured of a hearing and response,192 became a mere afterthought in constitutional jurisprudence.193

III. RIGHT TO PETITION JURISPRUDENCE

Compared with other parts of the First Amendment, such as speech, press, and religion, the Supreme Court’s discussion of the right to petition is relatively sparse.194 Moreover, most cases that do discuss the right to petition conflate it with other First Amendment rights.195 The Court has, at times, even given the Petition Clause meaning only as a modifier of other rights, carving out special rights for speech and assembly that relate to petitioning the government.196 Moreover, the Court has largely discussed the right to petition as being about freedom of expression.197 The Court’s approach necessarily neglects the more formalized nature of historical petitions, which required the government not just to refrain from obstructing citizen petitions, but to actively listen and respond to all petitions.198 Thus, there has been a disconnect between the robust, formalized historical system of petitioning and the Court’s
flaccid understanding of the Petition Clause for much of the country's history. 199

However, a recent case involving the right to petition in a public employment context does hint at the Petition Clause’s distinctive character through the Court’s relatively lengthy discussion of the distinct historical legacy and substantive content of the right to petition in both the majority opinion 200 and the partial dissent. 201 The Court recognized for the first time the unique history of petitioning, 202 including its institutionalized form, 203 its requirement of a hearing and response, 204 and its distinctiveness from the Speech and Assembly Clauses. 205 However, the Court blunted the impact of this discussion by refusing to follow its own logic, ultimately putting forth a holding that once again conflated the right to petition with the freedom of speech, 206 despite its analysis to the contrary. 207 Nonetheless, the door is cracked, albeit slightly, to the potential for a deeper and broader understanding of how the right to petition might be distinct from the other rights enshrined in the First Amendment. 208 Most importantly, the door is cracked enough to allow the labor movement to think about what a robust right to petition would look like in the 21st century in terms of protecting public employee collective bargaining.

199. Compare supra notes 132–47 and accompanying text (discussing the origins of the right to petition), with supra notes 194–98 (discussing the court’s treatment of the petition clause), and infra notes 200–08 (discussing the court’s recent treatment of the clause).


201. Id. at ___, 131 S. Ct. at 2502 (Scalia, J., concurring in judgment in part and dissenting in part).

202. See id. at ___, 131 S. Ct. at 2498–2500.

203. See id. at ___, 131 S. Ct. at 2499.

204. See id. at ___, 131 S. Ct. at 2495.

205. See id. at ___, 131 S. Ct. at 2500.

206. See id. at ___, 131 S. Ct. at 2501.

207. See id. at ___, 131 S. Ct. at 2498–2500.

208. Id. at ___, 131 S. Ct. at 2495 (“There may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis; and if that is so, the rules and principles that define the two rights [Speech and Petition] might differ in emphasis and formulation.”).
A. Cut from the Same Cloth

Most often, the Court has stated that the right to petition is "cut from the same cloth" as the other First Amendment rights. Indeed, many of the Court's right-to-petition discussions occur when no actual petition is at issue, demonstrating the Court's conflation of this right with other First Amendment rights. For example, in *Thomas v. Collins*, the Court overturned the conviction of a labor union organizer for violating a restraining order that forbade him from soliciting union members in Texas. Here, the facts of the case implicated the First Amendment rights to free speech and peaceful assembly. The petitioner's actions were directly aimed at soliciting union membership, not petitioning the government for a redress of grievances.

The Court, nonetheless, discussed all the First Amendment rights as implicated because while, "not identical, [all the rights] are inseparable." The Court noted that the right to petition applied to economic, as well as political and religious grievances, despite there being no government petition at issue. Thereafter, the Court discussed the freedom of speech and freedom of assembly, which were relevant to the facts of the case. Thus, the Court, while mentioning the Petition Clause, failed in any of its discussion to mention the Clause's distinctive historical content or apply the Clause's substantive meaning to the facts of the case.

Even in cases in which the right to petition was germane to the facts, the Court nonetheless has tended to conflate the freedom of speech, the right to assemble, and the right to petition, as if they were equivalent.

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211. *Id.*
212. *Id.* at 518.
213. See *id.* at 520–23.
214. *Id.*
215. *Id.* at 530.
216. *Id.*
217. *Id.*
218. See *id.*
Association,\textsuperscript{220} the Court held that a labor union’s right to hire an attorney to handle the workers’ compensation claims of members was protected by the freedom of speech, right to assemble, and right to petition.\textsuperscript{221} Here, the lawsuit presumably constituted a petition and thus the right to petition was relevant to the facts of the case.\textsuperscript{222} Nonetheless, the Court provided no analysis of the right to petition as distinct from the other applicable rights of assembly and speech.\textsuperscript{223} This conflation of the right to petition with other First Amendment rights blurs the arguably distinct nature of the historical content and understanding of the right to petition, making it about expression—about yelling your grievances to the wind—rather than a formalized democratic process that required a governmental hearing and response.\textsuperscript{224}

Insofar as the Court has discussed the right to petition in any distinct way, the discussion has been short and largely a-historical and a-textual.\textsuperscript{225} Nonetheless, in general, the Court has held that the right to petition extends to petitions targeting all branches of government.\textsuperscript{226} The right to petition has been extended to corporate entities,\textsuperscript{227} and it also applies to the states through the Fourteenth Amendment.\textsuperscript{228} Though lawsuits have been held to be petitions, the Court has held that the right

\textsuperscript{220} 389 U.S. 217 (1967).
\textsuperscript{221} Id. at 221–22.
\textsuperscript{222} See id. at 218; see also Cal. Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 513 (1972) (noting that “the right of access” to courts is part of the Petition Clause).
\textsuperscript{223} United Mine Workers of America, 389 U.S. at 218–24. The point here is not to argue that First Amendment rights are not related. Rather, the point is to highlight how the Court has almost never even acknowledged that such a distinct discussion might be appropriate. Given the distinct history of petitioning, this omission is striking.
\textsuperscript{224} See, e.g., Smith v. Ark. State Highway Emps., Local 1315, 441 U.S. 463, 465 (1979); see also supra notes 132–47 and accompanying text.
\textsuperscript{225} See United Mine Workers of America, 389 U.S. at 217 (1967) (discussing the right to petition in brief along with the freedom of speech and assembly); Thomas v. Collins, 323 U.S. 516, 530 (1945) (discussing the right to petition simply as “cognate” with other First Amendment rights).
\textsuperscript{226} See Cal. Motor Transp., 404 U.S. at 510.
\textsuperscript{228} United Mine Workers of America, 389 U.S. at 221 n.4.
to petition creates no obligation on the government to hear or respond to petitions. 229

However, none of these cases engaged in a lengthy discussion about the right to petition as a right substantially distinct from other First Amendment rights, ensuring that its history as a robust and foundational democratic practice is all but forgotten in our current age. 230 The Court repeatedly considered the right to petition as "cut from the same cloth" or virtually indistinguishable from other First Amendment clauses, most notably the assembly clause and the speech clause. 231 In doing so, the Court has failed to appreciate how the right to petition is historically distinct from the other constitutional rights and how this distinctiveness might inform their jurisprudence. 232 Without an appreciation of the historical context of petitioning, the Court has invariably narrowed the meaning of the Petition Clause, most notably removing the requirement that petitioning implies the government must have a formalized system for hearing and responding to these petitions. 233 Instead, the Clause has become primarily about another right to self-expression, which creates restraints on governmental actions but no positive obligations. 234

B. Borough of Duryea v. Guarnieri: A Notable, Albeit Small, Step in the Right Direction

The paucity of judicial discussion highlighted above was finally remedied in a recent case dealing with a public employee grievance lawsuit, Borough of Duryea v. Guarnieri. 235 However, more extensive discussion about the distinctive purpose and history of the right to petition led to the incongruous solidification of the Court’s prior reductionist treatment of the right to petition as indistinguishable from

230. See Spanbauer, supra note 126, at 90.
232. See Spanbauer, supra note 126 at 90.
233. See id.; see also Smith, 441 U.S. at 464–65.
234. See Spanbauer supra note 126, at 90; see also Smith, 441 U.S. at 464–65.
other First Amendment rights. In *Guarnieri*, a police chief alleged his employer had taken retributive action against him subsequent to his filing a union grievance challenging prior action by the borough. The police chief argued that his union grievance constituted a petition and thus was protected from retaliation by the Petition Clause of the First Amendment. The District Court “instructed the jury that the lawsuit and the union grievances were ‘protected activity . . . under the constitution.’” The jury awarded Guarnieri compensative and punitive damages.

On appeal, the Third Circuit upheld the ruling, but not the punitive damages, holding that “a public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition Clause from retaliation for that activity, even if the petition concerns a matter of solely private concern.” Thus, the Third Circuit did not extend the public concern test applied in other First Amendment contexts to the right to petition context. However, courts in other circuits had extended the public concern test to the right to petition context, finding that the Speech Clause and Petition Clause overlap significantly enough to warrant such an extension. The Court thus heard *Guarnieri* to resolve a split in the circuits as to whether the public concern test applied to cases arising under the Petition Clause.

In its discussion, the Court, on the one hand, provided the most extensive discussion to date of the distinct history and purpose of the Petition Clause. The Court acknowledged that “[a] petition conveys the special concerns of its author to the government and, in its usual

238. Id. at ___, 131 S. Ct. at 2492.
239. Id. at ___, 131 S. Ct. at 2492.
240. Id. at ___, 131 S. Ct. at 2492–93.
241. Id. at ___, 131 S. Ct. at 2492–93.
242. See supra notes 76–88 and accompanying text.
243. See Borough of Duryea, ___ U.S. at ___, 131 S. Ct. at 2493.
244. Id. at ___, 131 S. Ct. at 2493.
245. See id. at ___, 131 S. Ct. at 2493.
246. See supra Part III.A for a history of the Court’s jurisprudence relating to the Petition Clause.
form, requests action by the government to address those concerns.”247 The Court went on to even more clearly, though reservedly, recognize that at least some petitions imply a required response.248

The Court also discussed the distinct history of petitioning, noting that petitions historically involved matters of both private and public concern.249 The Court traces, in brief, the history of petitioning from the Magna Carta to the Declaration of Independence, as well as the history of petitioning in the early days of the United States.250 The Court even recognized that, rather than the Petition Clause being a modifier of other rights, it was in fact historically the source of other rights like freedom of speech.251 Unlike the Supreme Court’s previous paucity of discussion, the Court for the first time recognized the distinctive substance and historical importance of the Petition Clause.

Nonetheless, the Court still failed to carry out all the implications of its discussion, relying for its ultimate holding on old categories that do not cohere with its historical analysis. For example, the Court still discussed the right to petition as being about freedom of expression, noting “[t]he right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives.”252 However, petitioning understood to be primarily about expression, without a requirement for the government to listen or respond, bears little resemblance to the history of petitioning discussed elsewhere in the opinion.253

Most incongruously, the Court extended the free speech doctrine about matters of public concern to the Petition Clause, holding that

247. Borough of Duryea, ___ U.S. at ___, 131 S. Ct. at 2495.
248. Id. at ___, 131 S. Ct. at 2496 (noting that “[u]nlike speech of other sorts, a lawsuit demands a response”).
249. Id. at ___, 131 S. Ct. at 2498.
250. Id. at ___, 131 S. Ct. at 2498–2500. “Petitions allowed participation in democratic governance even by groups excluded from the franchise.” Id. at ___, 131 S.Ct. at 2499–2500. Notably, the Court cites both the Higginson, supra note 14, and Mark, supra note 14, articles discussed in detail above.
251. Id. at ___, 131 S. Ct. at 2500 (“The right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign.”).
252. Borough of Duryea, ___ U.S. at ___, 131 S. Ct. at 2495.
253. See supra notes 132–47 and accompanying text.
public employees are not protected from retaliatory actions by their employers when their petitions relate to matters of purely private concern.254 Despite a lengthy discussion about the private nature of petitioning and the inconsistency generally with the development of free speech jurisprudence, the Court found the two rights to be similar enough to warrant the extension of the public concern doctrine.255

Despite the case's holding, the Court's overall discussion is important for two reasons. First, the Court, in discussing the historical significance of petitioning, opens the door to further holdings that could carve out a distinct place for the right to petition, beyond the narrowing logic of it being about freedom of expression alone.256 In acknowledging the formal process whereby petitions were not just issued, but also responded to, the Court undercut its own logic that petitioning is just about shouting one's grievances to the wind.257

Second, the Court acknowledged, however guardedly, for the first time that the Petition Clause in and of itself may imply a required governmental response, at least in limited circumstances.258 While the Court's discussion may not open the door to a new, more substantive appreciation of the Petition Clause as far as some might like, it does open the door nonetheless.259 After over a century of jurisprudence that failed to significantly appreciate the distinct content of the Petition Clause, this small opening may be potentially significant in future Petition Clause

255. Id. Justices Thomas and Scalia argue as much in their separate concurring and dissenting opinions, noting the distinct history of the Petition Clause as well as the private nature of the majority of historical petitions. See id. at ___, 131 S. Ct. at 2501–02 (Thomas, J., concurring); id. at ___, 131 S. Ct. at 2503–06 (Scalia, J., concurring in judgment in part and dissenting in part). See also supra Part I.B. (discussing the public concern doctrine).
256. See Mazzone, supra note 196, at 29.
257. Compare Borough of Duryea, ___ U.S. at ___, 131 S. Ct. at 2498–50 (majority opinion), with id. at ___, 131 S. Ct. at 2501 (Thomas, J., concurring in the judgment).
258. See id. at ___, 131 S. Ct. at 2495 (majority opinion) ("A petition conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns.").
259. Cf. id. at ___, 131 S. Ct. at 2495 ("There may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis; and if that is so, the rules and principles that define the two rights might differ in emphasis and formulation.").
cases. Thus, Borough of Duryea v. Guarnieri is a notable first step in opening up a future argument that the Petition Clause could help protect public sector collective bargaining.

IV. PUBLIC SECTOR COLLECTIVE BARGAINING SHOULD BE CONSIDERED A “PETITION”

As argued above, first, petitioning historically was a formalized system whereby citizens would communicate grievances, both public and private, to the government. Moreover, petitioning assumed a governmental obligation to listen and respond accordingly. Historically, the formalized democratic institution of petitioning eroded, in part, because elected officials desired to avoid discussing the controversial issue of slavery. Additionally, challenges also arose as the population of the United States grew, making it logistically difficult for Congress to hear and respond to every citizen petition. Given the current population size of the United States, it seems unlikely that one

260. Cf. id. at __, 131 S. Ct. at 2503–07 (Scalia, J., concurring in the judgment in part and dissenting in part) (discussing the unique history of petitioning in depth for the first time in a Supreme Court opinion).

261. Id. at __, 131 S. Ct. at 2498–2500 (majority opinion); see also id. at __, 131 S. Ct. at 2503–07 (Scalia, J., concurring in the judgment and dissenting in part). It is important to note also the discussion supra at notes 86–99 and the accompanying text, discussing the fragile status of the narrow public concern test. The narrow public concern test, as currently understood by the Court, asserts that such matters as salary, benefits and other employment matters—the very topic of public employee collective bargaining—are not a matter of public concern. See supra notes 76–99 and accompanying text. For the Petition Clause to protect public employee collective bargaining, either the holding in Guarnieri expanding the public concern test to the Petition Clause would have to be overturned; or the Court’s understanding of the public concern test would have to return to its earlier jurisprudence before the recent narrowing. See supra notes 86–99 and accompanying text. The later seems most likely, given the strong dissents of at least four justices that the employment condition and terms of public employees are certainly matters of public concern. See supra notes 93–99 and accompanying text.

262. See supra notes 132–38 and accompanying text.

263. See supra notes 132–38 and accompanying text.

264. See supra notes 165–93 and accompanying text.

265. See supra notes 158–64 and accompanying text.
could simply transpose the 19th century system of petitioning onto the 21st Congress with any logistical success.266

Second, despite the Court's repeated failure to recognize its distinctiveness, the right to petition is categorically different from other First Amendment rights.267 While the Speech and Assembly Clauses contain within them a right for citizens to take some action (speak, assemble) and the government to avoid actions (i.e., not arrest or otherwise hinder these rights), the right to petition should include both a right for citizens to take some action and an obligation for the government to take some affirmative action—to hear and respond to the petition.268 Blurring the three rights as one obfuscates this distinction and consequentially narrows the once robust right to petition in terms of the Court's understanding.269

Nonetheless, the Court has recognized that the right to petition extends to all branches of government.270 Further, the Court has recognized, while failing to extend the implications to its holdings, the unique historical content and meaning of petitioning.271 Perhaps in the coming decades, the Borough of Duryea v. Guarnieri discussion will lay the foundation for an expanded appreciation of the Petition Clause by the Court and its historically foundational role in stabilizing this nation's democracy.272

266. See, e.g., Higginson, supra note 14, at 157 (noting that "systemic strains" began to appear even in the nineteenth century that made it logistically difficult to hear and respond to every citizen petition). Thus, it is unlikely, for logistical reasons, that Congress will institute a system whereby its business for the day is set by citizen petitions, which Congress would then proceed to hear and respond to in a formalized way—though such would no doubt be an improvement on the current state of affairs, even if it did quickly create a backlog of petitions.

268. See supra Part II (discussing the unique historical content of the Petition Clause).

269. See id.


271. See supra notes 249-53 and accompanying text.

In the meantime, the labor movement should not wait for the Court to act in order to harness the implications inherent in the Guarnieri discussion as providing a constitutional hook for the protection of public employee collective bargaining. Historically, the labor movement has successfully harnessed the power of the people to interpret the Constitution, in the face of initial institutional opposition, in order to bring about social change. Here, the historical content of Petition Clause could provide a powerful foundation for expanding the constitutional protections for public workers. The system of collective bargaining by public employees is an example of an already existent institutional framework that coheres with the substantive, historical content of the Petition Clause.

Just like the historical system of petitioning, collective bargaining is a formalized system whereby citizens communicate their grievances and desires to a governmental entity that is required to listen and respond in some fashion. Of course, as with petitioning, the government need not respond as the public employees wish. But, the collective bargaining system requires government representatives to respond to public employee grievances, just as the historic system of petitioning did. During collective bargaining, the government usually must negotiate in good faith, participate in mediation or even binding arbitration, if an informal agreement cannot be reached. The grievances discussed over collective bargaining are arguably of both

273. See generally Labor's Constitution, supra note 7, at 942–46 (discussing the historical "constitutional insurgency" of the labor movement that "advanced their own interpretations of the Constitution, usually in opposition to those of the Supreme Court" in order to effect social change); see also supra Part I.C.

274. See Labor's Constitution, supra note 7, at 942–46.

275. See supra Parts I & II.

276. See supra notes 56–65 and accompanying text (discussing collective bargaining).

277. See supra notes 148–57 and accompanying text (discussing the difference between the historical system of petitioning, which did not require the exact response desired, and the proposed, but not adopted system of instruction, which would have required the government respond in the exact manner the citizen desired).

278. See supra notes 56–65 and accompanying text (discussing the process of collective bargaining).

279. See id.
private and public concern, just as historical petitions were,\textsuperscript{280} impacting both the employment terms of public employees as well as overall public budgets.\textsuperscript{281} While much of the institutional framework that would be needed to take seriously the robust nature of the right to petition does not currently exist, a system of collective bargaining does.\textsuperscript{282} Were labor unions to use these analogies between historic petitioning and contemporary collective bargaining, in time, unions may not only build a stronger labor movement but also finally provide public workers more of the official constitutional protections they deserve.

\textsuperscript{280} See supra note 135 and accompanying text.

\textsuperscript{281} See supra notes 56–65 and accompanying text (discussing the process of collective bargaining).

\textsuperscript{282} See id.