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Lawsuits as Information: Prisons, Courts, and a Troika Model of Petition Harms

ABSTRACT. This Note is about the practice of conditioning recovery for violations of prisoners' intangible constitutional rights, like First Amendment petition rights, upon a showing of physical injury. It argues that the prior physical injury requirement of the Prison Litigation Reform Act is unconstitutional as applied to petition violations because it arbitrarily impairs prisoners' right to access the courts and, in doing so, enables retaliation against prisoner litigants to go unchecked. This Note outlines a theoretical portrait of petition violations as threefold structural harms, comprising distinct harms to plaintiffs, to the public, and to the courts as institutions. It uses that portrait to intervene in a doctrinal debate over the nature of the right to petition and to illuminate flaws in contemporary First Amendment doctrine both within and outside the prison context.

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INTRODUCTION

The degree of civilization in a society is revealed by entering its prisons.

— Fyodor Dostoyevsky¹

Does [your law] say that, before presenting a petition, you shall look into it, and see whether it comes from the virtuous, and the great and the mighty? No, sir, it says no such thing; the right of petition belongs to all.

— John Quincy Adams, on petitions from slaves, 1837²

The prison guards at Iowa were not fans of Jeffery Royal.³ Between his arrest and eventual imprisonment, Royal sustained a spinal cord injury in a farm accident. When he arrived in prison, he found himself unable to turn his wheelchair in his cell, unable to obtain medical assistance, and unable to extract himself from his prison jumpsuit without throwing himself to the floor. His repeated requests for pants were denied, and prison officials confiscated his wheelchair, forcing Royal to crawl on the floor. Rather than return the chair, the Security Director issued a directive “stating that any inmate seen crawling on the floor would be subject to discipline.”⁴ Royal submitted seventeen grievances and ultimately filed a motion in court seeking return of the wheelchair.⁵ When the Director “tired of Royal’s behavior,” he put Royal in solitary confinement for sixty days.⁶

1. FYODOR DOSTOYEVSKY, *THE HOUSE OF THE DEAD: A NOVEL IN TWO PARTS* 76 (Constance Garnett trans., 1957).
2. WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS* 262 (2d prtg. 1996) (alteration in original).
3. *Royal v. Kautzky*, 375 F.3d 720, 722 (8th Cir. 2004). Royal’s case has become shorthand for a dispute among the federal circuits over “whether the physical injury requirement applies to constitutional claims in which physical injuries rarely occur, such as violations of the First and Fourteenth Amendments.” *Id.* at 727 (Heaney, J., dissenting); see, e.g., Jeff B. Allison, Comment, *First Amendment Claims Under the Prison Litigation Reform Act: A Mental or Emotional Injury?*, 74 U. CIN. L. REV. 1067, 1067 (2006) (opening with *Royal*); Allison Cohn, Comment, *Can \$1 Buy Constitutionality?: The Effect of Nominal and Punitive Damages on the Prison Litigation Reform Act’s Physical Injury Requirement*, 8 U. PA. J. CONST. L. 299, 315 n.92, 324-25 (2006) (using *Royal* to illustrate courts’ denials of retaliation claims and punitive damages).
4. *Royal*, 375 F.3d at 727 (Heaney, J., dissenting).
5. Royal filed a motion for a preliminary injunction. *Id.* at 726.
6. *Id.* at 722 (majority opinion).

Royal filed a civil action for retaliation, alleging a violation of his constitutional right to access the courts, secured for prisoners by the Petition Clause of the First Amendment.⁷ The district court found that the prison director had “unconstitutionally retaliated against Royal by placing him in segregation because [he] filed numerous grievances,”⁸ but held that Royal was ineligible for compensatory or punitive damages, citing language from the Prison Litigation Reform Act (PLRA), which specifies that prisoners may not recover for “mental or emotional injury” without a “prior showing of physical injury,”⁹ and holding that the bar applied to First Amendment claims.¹⁰

This Note is about the practice, employed by about half of the federal circuits, of conditioning recovery for retaliation claims brought by prisoners on a prior showing of physical injury. It argues that the portion of the PLRA that gives rise to this practice is unconstitutional as applied to claims, like retaliation, arising under the Petition Clause, because it arbitrarily impairs prisoners’ right to access the courts and, in doing so, enables retaliation against prisoner litigants to go unchecked.

American prisons are beset by a culture of retaliation.¹¹ In the prison

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7. U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”). Royal’s complaint included allegations that: 1) he could not turn his wheelchair in his cell; 2) he was unable to get to the toilet or shower; 3) he had blood in his catheter but no action was taken by medical staff because he did not have an elevated temperature; 4) he was transferred in a van that was not handicapped accessible, requiring him to fall to the floor before pulling himself onto the van’s seat; 5) he had to fall on the ground and pull himself up onto a shower chair in order to shower; 6) he had to lay on the floor after using the toilet to pull on his prison-issue jumpsuit, and his request to wear pants instead of a jumpsuit was denied; and 7) his requests for an enema were delayed – once for ten days and once for six days.
Royal, 375 F.3d at 726 (Heaney, J., dissenting).
 8. *Id.* at 722 (majority opinion).
 9. *Id.* (citing 42 U.S.C. § 1997e(e) (2000)).
 10. Royal returned to his cell with \$1 in nominal damages and \$1.50 in attorney’s fees. Some courts have read the Prison Litigation Reform Act (PLRA) to bar nominal damages as well. The issue of nominal damages is discussed at length in this Note. *See infra* notes 120-127 and accompanying text.
 11. Patterns of retaliation against employees filing discrimination suits, the need for whistleblower laws, colloquial expressions like “snitches get stitches” or “don’t be a nark,” and the Talmudic law of *mesira*, which prohibits Jews from informing on each other to non-Jewish authorities, all illustrate the sociology of distaste for those who betray group secrets. For a treatment of retaliation in the prison context, see James E. Robertson, “One of the Dirty Secrets of American Corrections”: Retaliation, Surplus Power, and Whistleblowing Inmates, 42 U. MICH. J.L. REFORM 611 (2009). For a treatment of retaliation outside of the prison context, see Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and*

context, this translates to a pattern in which officials punish prisoners who file grievances protesting the conditions of their confinement or exposing the behaviors of their jailors.¹² Retaliation against prisoners can take many forms: officials might send prisoners to solitary confinement, deny essential services, construct false weapons charges, or subject prisoners to beatings, verbal abuse, or rape, all as punishment for attempting to communicate with the world outside the prison.¹³ Indeed, retaliation in prisons is a pattern so “deeply engrained in the correctional officer subculture” that “[c]orrectional officers who retaliate against prisoners cannot be regarded as rogue actors.”¹⁴ By some estimates, a majority of prisoners have experienced retaliation by guards for filing, or attempting to file, an administrative grievance or a complaint in court, and a majority of prison staff report that their colleagues have retaliated

Management Retaliation: The Battle To Control Information About Organization Corruption, 26 WORK & OCCUPATIONS 107 (1999).

12. JOHN BOSTON, LEGAL AID SOCIETY, THE PRISON LITIGATION REFORM ACT (2006), http://www.law.yale.edu/documents/pdf/Boston_PLRA_Treatise.pdf (noting “a recurrent pattern in American prisons of threats and retaliation against prisoners who file grievances and complaints”). For a general survey of the prevalence of prison violence, including staff-on-inmate violence, see Nancy Wolff et al., *Physical Violence Inside Prisons: Rates of Victimization*, 34 CRIM. JUST. & BEHAV. 588, 588-90 (2007). See also *Prison Abuse Remedies Act of 2007: Hearing on H.R. 4109 Before the Subcomm. on Crime, Terrorism & Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 72 (2008) [hereinafter *Hearing on H.R. 4109*] (statement of Ernest D. Preate, Jr.) (“If you think that retaliation is not a part of everyday prison life, then you don’t know the reality of prisons.”); Robertson, *supra* note 11, at 613-14; *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUM. RTS. WATCH 20, 28, 42 (2009), <http://www.hrw.org/sites/default/files/reports/uso609web.pdf> (documenting inmate fears of retaliation, including through congressional testimony in support of the Prison Rape Elimination Act).
13. Retaliation in prisons is widespread. *E.g.*, *Royal*, 375 F.3d at 726-27 (described above); *Dannenberg v. Valadez*, 338 F.3d 1070, 1072 (9th Cir. 2003) (concerning retaliation against a prisoner for assisting another prisoner with litigation); *Trobaugh v. Hall*, 176 F.3d 1087, 1088-89 (8th Cir. 1999) (concerning a prisoner placed in isolation for filing grievances); *Suggs v. Caballero*, No. 06-CV-13931, 2009 WL 368208, at *2 (E.D. Mich. Feb. 11, 2009) (involving retaliation against an inmate who tried to file a class action against a prison employee in which the employee terrorized and intimidated the inmate in an area obscured from the view of the security cameras, informing him that he could “find a razor blade in your room whenever I want, and have your ass placed in segregation”); Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America’s Most “Open” Secret*, 18 YALE L. & POL’Y REV. 195, 204, 210, 217 (1999) (documenting patterns and mechanisms of retaliatory punishment, and citing a report documenting “widespread sexual abuse of female prison inmates” and a pattern of retaliation by prison officials to punish or deter inmates from reporting abuse); John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429 (2001) (surveying the PLRA).
14. Robertson, *supra* note 11, at 612 (noting that correctional officers hassle inmates, subject them to disciplinary action, and bar their access to legal documents).

against prisoners for such actions.¹⁵

The PLRA, passed in a triptych of jurisdiction-stripping statutes in the mid-1990s, imposes a procedural formality that facilitates institutional retaliation against prisoners who attempt to exercise the “fundamental political right”¹⁶ of access to the courts by making it difficult for prisoners to recover against guards who abuse them. The Act specifies, in relevant part, that “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”¹⁷

Roughly half of the federal circuits read the prior physical injury requirement to bar claims for First Amendment injuries, like retaliation for an attempt to access the courts, an injury, for prisoners, to the First Amendment right to “petition the government for redress of grievances.”¹⁸ The other half object to placing First Amendment claims within the physical/mental taxonomy, holding that the prior physical injury requirement does not apply to claims for violations of “intangible” rights.¹⁹ They argue, as did the dissent in *Royal*, that applying the requirement to First Amendment violations would block legitimate claims²⁰ and that doing so misunderstands the nature of violations of “intangible” constitutional rights,²¹ which “occur at the time of the deprivation, not at a later time when the physical or emotional harm

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15. *Id.* at 613-14 (citing a “groundbreaking survey of Ohio inmates” finding that “70.1% of inmates who brought grievances indicated that they had suffered retaliation thereafter” and that “87% of all respondents and nearly 92% of the inmates using the grievance process agreed with the statement, ‘I believe staff will retaliate or get back at me if I use the grievance process’”); *see also* JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, VERA INST. OF JUST., CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS 92-94 (2006), http://www.vera.org/download?file=2845/Confronting_Confinement.pdf [hereinafter CONFRONTING CONFINEMENT] (documenting the ineffectiveness of prison grievance systems and noting that “[p]reliminary findings from a survey of prisoners by the Correctional Association of New York suggest that more than half of prisoners who file grievances report experiencing retaliation for making a complaint against staff,” and that “[c]orrections officers also fear retaliation by fellow officers if they report wrongdoing”).
 16. *Thaddeus-X v. Blatter*, 175 F.3d 378, 391 (6th Cir. 1999) (quoting *Hudson v. McMillian*, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring in the judgment)).
 17. 42 U.S.C. § 1997e(e) (2006).
 18. U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”); *see infra* note 96 (collecting cases).
 19. *See infra* note 99 (collecting cases).
 20. *Royal v. Katuzky*, 375 F.3d 720, 729 (8th Cir. 2004) (Heaney, J., dissenting).
 21. *Id.* at 730.

manifests.”²²

In doctrinal terms, the split amongst the federal circuits turns on whether to award compensatory damages for constitutional torts recognized, in the days before the PLRA, as capable of monetization.²³ In theoretical terms, the split reflects disputes about hierarchies of injury and the nature of First Amendment harms, both in general and in the context of the PLRA. And in broader terms, the split reflects confusion about the interlocking harms that stem from denial of access to the courts. This confusion, as will be argued later, has translated into harms that transcend injuries to individual litigants.

The pages to follow argue that interpreting the prior physical injury requirement to bar recovery for retaliation against prisoner litigants violates the Petition Clause. Before proceeding further, two notes on scope. First, this Note is not about *whether* prisoners have a constitutional right to access the courts to protest the conditions of their confinement. That has been established.²⁴ The argument here is that by denying recovery for retaliatory violations of that right, courts are validating the extrajudicial adjudication of claims in a way that hampers prisoners’ constitutional rights, eliminates the flow of critical

22. *Id.* at 726-31. Judge Heaney argued that First Amendment rights were “not concerned with preventing physical abuse by government agents, but rather with the invasion of the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control.” *Id.* at 730 (quoting *Shaheed-Muhammad v. Dipaolo*, 138 F. Supp. 2d 99, 108 (D. Mass. 2001)).

23. See discussion *infra* notes 120-127 and accompanying text.

24. There is a wide body of case law establishing both a prisoner’s right to access the courts and the impermissibility of retaliation in reaction to a prisoner’s exercise of constitutionally protected rights. See *Jacobs v. Beard*, 172 F. App’x 452, 454 (3d Cir. 2006) (noting that the plaintiff “was asserting a broader right; that of access to the courts, which *is* constitutionally protected” (citing *Lewis v. Casey*, 518 U.S. 343, 355 (1996))). In *Lewis*, the Court held that prisoners retain, at minimum, the right to “a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.” 518 U.S. at 351 (quoting *Bounds v. Smith*, 430 U.S. 817, 825 (1977)); see also *infra* note 55 (listing access-to-courts cases). But see *infra* note 236 (describing limitations on a prisoner’s right to litigate).

Retaliation has long been specifically proscribed. See, e.g., *Holmes v. Williamson*, No. 11-CV-3230, 2011 WL 3241419, at *2 (C.D. Ill. July 27, 2011) (noting that “[t]he federal courts have long recognized a prisoner’s right to seek administrative or judicial remedy of conditions of confinement, . . . as well as the right to be free from retaliation for exercising this right” and collecting cases (alteration in original) (citations omitted) (quoting *Babcock v. White*, 102 F.3d 267, 276 (7th Cir. 1996))); *Jones v. Coughlin*, 696 F. Supp. 916, 920 (S.D.N.Y. 1988) (“[A]ction taken by prison officials which would otherwise be constitutional becomes unconstitutional if such action was taken as reprisal for the prisoner’s exercise of constitutionally protected rights.”); *Morrison v. LeFevre*, 592 F. Supp. 1052, 1071 (S.D.N.Y. 1984) (“[P]risoners in this nation should not fear the imposition of solitary confinement because they have engaged in litigation and prison reform activities.”).

information to the public, and abdicates the judiciary's responsibility to check governmental excess.²⁵ Second, under the prior physical injury requirement, prisoners may encounter petition violations at three distinct chronological points: when a prisoner files an underlying claim and is denied recovery because the claim is for a nonphysical injury; when the prisoner is retaliated against for filing that claim; and when the court denies recovery for the retaliation. Only the latter two cases are addressed here. The devaluing of what this Note will call classically emotional claims, like psychological trauma or distress—as distinguished from what it will call intangible or abstract claims, like speech, religion, or due process²⁶—is problematic, and, as has been argued elsewhere,²⁷ may itself produce petition violations. But injuries of this first type are beyond the scope of this discussion. Without a retaliatory component, the first violation may block a damages award, but it does not itself bar access to the courts.²⁸ By contrast, the second violation punishes the suit itself, and the third validates and legitimizes that punishment, implicating the judiciary in the arbitrary denial of a constitutional right. Because the discussion to follow is concerned with the informational character of prisoner suits, it focuses on the latter two forms of injury.

This Note intersects with two strands in the academic literature, the first dealing with the prior physical injury requirement and the second dealing with the right to petition. Scholarly attention to the prior physical injury requirement has been limited, despite the provision's reach. The few academic treatments to consider the requirement have been confined to doctrinal exegesis, outlining the mechanisms by which the PLRA stifles prisoner access

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25. Thus the question here is not whether prisoners have a right to access the courts, but once they have such a right, whether and to what extent the courts may protect it against encroachment, whether by the Executive, in the form of retaliation or retaliation-facilitating policies, or by Congress, in the form of legislation forcing or enabling the constriction of prisoners' access to the courts.
 26. None of these terms is perfect, as emotions are abstract and intangible. The terms enmeshed within the PLRA are likewise imperfect, as mental or emotional reactions might have physical roots. Using "emotional" and "constitutional" as shorthand would not suffice, since some constitutional claims encompass emotional harm (those brought under the Eighth Amendment, for instance). Imprecise as they are, "emotional" and either "intangible" or "abstract" will have to do.
 27. See, e.g., James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105, 117-19, 146-49 (2000) (discussing classically "mental or emotional" injuries).
 28. Petition violations are thus distinct from (some) other procedural barriers. See *infra* Sections I.B, II.C (distinguishing the prior physical injury requirement from procedural bars like filing fees, statutes of limitations, and heightened pleading requirements).

to the courts;²⁹ arguing that judicial interpretation of the provision likely misinterprets congressional intent;³⁰ describing the circuit split over the applicability of § 1997e(e) to First Amendment and other intangible constitutional claims;³¹ and arguing that barring recovery for litigants based on their status as prisoners violates the Equal Protection Clause.³² Few have attempted to explain why subjecting petition claims to the physical/mental dyad is problematic, beyond making the circular claim that restrictions on access to the courts infringe upon the right to access the courts. And all have focused on the individual-rights aspects of barring recovery for First Amendment violations, missing entirely the broader structural implications of predicating access to the courts on the ability to satisfy a physical predicate unrelated to the right itself.

Nor has the literature on petitioning produced a defense of petition sufficient to shield it from the prior physical injury requirement or even from the doctrinal shifts presaged by the Court's recent petition holding, described below.³³ The First Amendment literature, as a general matter, has neglected petitioning, and major casebooks skip the Petition Clause entirely.³⁴ A small number of academic treatments have provided detailed histories of the distinctive origins of petition and speech, of petitioning in colonial America

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29. Erica M. Eisinger, Daniel E. Manville & Kelly Rimmer, *Prisoners' Rights*, 52 WAYNE L. REV. 857, 915-16 (2006); Robertson, *supra* note 11, at 635.
 30. Jennifer Winslow, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655, 1677-78 (2002).
 31. Corbett H. Williams, *Evisceration of the First Amendment: The Prison Litigation Reform Act and Interpretation of 42 U.S.C. § 1997e(e) in Prisoner First Amendment Claims*, 39 LOY. L.A. L. REV. 859, 864-81 (2006); Allison, *supra* note 3, at 1072-80, 1086-87. Both articles outline the split between the restrictive, *see infra* note 96, and permissive, *see infra* note 99, circuits and side with the latter, but neither analysis goes further. *But see* Molly R. Schimmels, Comment, *First Amendment Suits and the Prison Litigation Reform Act's "Physical Injury Requirement": The Availability of Damage Awards for Inmate Claimants*, 51 U. KAN. L. REV. 935, 968-70 (2002) (taking the opposite view).
 32. Cohn, *supra* note 3, at 315-22 (arguing that § 1997e(e) violates the Equal Protection Clause, despite the potential for nominal or punitive damages, because it effectively deprives inmates of privileges because of their status as prisoners, "creating an irreparable hole in civil rights law"). Robertson, *supra* note 27, at 106-07, makes a similar argument in speaking not of First Amendment harms, but of "mental or emotional" injuries, as does Jason E. Pepe, *Challenging Congress's Latest Attempt To Confine Prisoners' Constitutional Rights: Equal Protection and the Prison Litigation Reform Act*, 23 HAMLIN L. REV. 58, 63-80 (1999).
 33. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2500 (2011).
 34. *See, e.g.*, GEOFFREY R. STONE, LOUIS M. SEIDMAN & CASS R. SUNSTEIN, *THE FIRST AMENDMENT* (3d ed. 2008) (covering the Religion and Speech Clauses, but not the Petition Clause).

and the early Republic, and of the collapse of petition into speech during debates over slavery, illustrating that petitioning once enjoyed protections superior to those afforded speech, press, or assembly.³⁵ Through these works emerge scattered snapshots of the various roles of petitioning in furthering individual rights,³⁶ “keeping the government informed,”³⁷ and “reaffirming the judicial role.”³⁸ At a normative level, contemporary treatments of petitioning have argued that, in light of historical evidence, the courts are correct to hold that the right to petition “must include a substantive right of access to courts”³⁹ and that the failure to differentiate between speech and petition has “placed an inappropriate limitation on the right to petition.”⁴⁰ But none has linked these various roles into a unified portrait of petitioning and its role in the constitutional order. Petitioning remains, despite several discrete historiographical advances, almost entirely untheorized.

This is the first academic treatment to offer a theoretical view of petition harms and the first to join the scattered narratives of the various roles of petitioning to form a theory of petitioning as a threefold structural protection. It is the first in the literature specific to the physical injury requirement to transcend doctrinal exegesis or to illustrate why taxonomizing petition violations within the physical/mental injury dyad is inappropriate as a matter

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35. See generally Norman B. Smith, “*Shall Make No Law Abridging . . .*”: *An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153 (1986) (tracing the origins of petitioning, with a focus on English history); Julie M. Spanbauer, *The First Amendment Right To Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 16-17 (1993) (disputing the Supreme Court’s contention that the Speech and Petition Clauses were “cut from the same cloth” and tracing the distinct history of the right to petition); Stephen A. Higginson, Note, *A Short History of the Right To Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986) (tracing the history of petitioning with a focus on the role of petitioning in early American life).
 36. See, e.g., Higginson, *supra* note 35, at 153 (describing the role of petitioning in securing individual rights).
 37. See, e.g., Smith, *supra* note 35, at 1154.
 38. See, e.g., James E. Pfander, *Restoring the Right To Petition*, 94 NW. U. L. REV. 219, 219 (1999) (arguing that “the framers understood the right to petition the courts for redress as reaffirming the judicial role in determining claims against the government and as rejecting sovereign immunity”); James E. Pfander, *Sovereign Immunity and the Right To Petition: Toward a First Amendment Right To Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899 (1997).
 39. Spanbauer, *supra* note 35, at 43; see also *id.* at 49 (arguing that “invocation of the judicial process is a protected form of petitioning,” and that the petition right “should afford substantive protection to all who claim that state actors have retaliated against them for pursuing litigation”) (capitalization altered from original).
 40. Smith, *supra* note 35, at 1154.

of theory, independent of historical claims about the role of petitioning or normative claims about prisoners' rights to access the courts. In addition to making a claim about the unconstitutionality of the prior physical injury requirement, this Note intervenes in two debates about First Amendment theory, both made urgent by the Court's holding in *Borough of Duryea v. Guarnieri*,⁴¹ discussed below.

This Note argues that the prior physical injury requirement is unconstitutional as applied to violations of prisoners' First Amendment rights to access the courts. Rather than understanding petition violations as injuries to individual rights alone, it argues that petition violations, including retaliation, create three layers of harm: to individuals, to the public, and to the courts as institutions. But the prior physical injury requirement, at least under the restrictive interpretation, ignores the latter two types of harm by forcing petition violations into the mold of private torts, miscasting court-access barriers as individual rather than structural wrongs.

To contextualize this argument and the ferocity of the barriers imposed by the PLRA, Part I provides background on prisoner access to courts and on the genesis, intent, and consequences of the Act. Parts II, III, and IV argue that petitioning implicates a troika of constitutional interests transcending those of individual litigants. Part II argues that interpreting the PLRA to bar substantive recovery creates harms to individual plaintiffs, threatening both the right to access the courts and the realization of underlying individual rights. Part III argues that the prior physical injury requirement harms the public by impairing what this Note will call the "information function" of lawsuits: the critical role played by lawsuits in pushing information about prison life to the outside world, a role enshrined in both the original right to "petition the Government for a redress of grievances"⁴² and in contemporary norms about open courts and public participation in the judicial process. Part IV argues that the requirement undermines the courts as institutions both by destabilizing the structural division between the branches of government and by interfering with "the duty and authority of the Judiciary to call the jailer to account."⁴³

Constitutional norms of due process, open access, expression, and the separation of powers intersect in the First Amendment right to petition the government, a structural recognition not only of the individual right to seek remedy, but of the importance of facilitating the flow of information to the public, particularly in the context of closed institutions, and of enabling courts

41. 131 S. Ct. 2488, 2491-92 (2011); see *infra* Part V.

42. U.S. CONST. amend. I.

43. *Boumediene v. Bush*, 553 U.S. 723, 745 (2008).

to exercise effective oversight. Petitioning, in other words, must be understood not as an individual “emotional” right, but as the underpinning of an informational system in which, particularly in the absence of press and the franchise, prisoners’ own communications with courts are the critical element. Understanding the Petition Clause as a point of overlap suggests that the First Amendment has an answer to the question of what harm comes from limiting access to the courts: a structural answer, privileging the importance of information to democratic governance.

Part V argues that understanding the right to petition in this way suggests that contemporary petition holdings are misguided, and uses the theory of petitioning that emerges through the prison setting to intervene in a broader doctrinal debate over the nature of the right. A combination of historical accident, doctrinal confusion, and judicial inertia has led the Court to conflate speech and petition, culminating in last Term’s holding in *Borough of Duryea v. Guarnieri* that although speech and petition are distinct protections, certain doctrinal tests could be transposed from speech to petition.⁴⁴ This holding reflects the understanding that speech and petition are not only textually but theoretically proximate. But the lawsuits-as-information model suggests that although petition and speech share concerns for expressive freedom and public deliberation, petitioning implicates a set of constitutional concerns distinct from those encompassed in protections for speech. Petitioning protects, among others, the individual’s right to invoke the state’s adjudicatory capabilities and the state’s interest in delivering them. As such, the petition guarantee protects the act of reaching to the government for redress, rather than the content of the grievance itself.

Understanding petitioning in this way illustrates the theoretical incoherence of looking to speech frameworks to resolve petition claims, and suggests that *Guarnieri* was wrongly decided, or in the alternative, that further transposition of the *Guarnieri* principle would threaten the core protections of the right to petition. Outlining the theoretical underpinnings of the petition right is a project of some urgency. After *Guarnieri*, the Court is on the verge of further doctrinal mistake, and the circuit split over the prior physical injury requirement may push the Court to elaborate on prisoners’ right to petition. Part V thus closes by offering a framework for petitioning distinct from speech.

44. *Guarnieri*, 131 S. Ct. at 2500.

I. BACKGROUND

The PLRA, enacted in 1996, reflected attempts by a conservative Congress to reverse the perceived interventionist strides of the post-Civil Rights era courts.⁴⁵ Prisoners had too much time on their hands, legislators argued, and courts had gotten into the habit of sympathizing with litigants, using the banner of civil rights to entertain even “frivolous” complaints. But in passing the Act, legislators made a critical error, mistaking the symptoms of a dramatic increase in the prison population for “frivolity.” As a result, legislators enacted overbroad legislation that has impeded meritorious claims, including valid prisoner filings exposing civil rights abuses.⁴⁶ This Part places the PLRA in historical context, first explaining, in Section I.A, the rapid growth in prisoner filings in the federal courts in the latter half of the twentieth century, and in Section I.B, charting the conservative backlash to increasing intervention by the federal courts.

A. *Bringing the Prison to Court*

The federal courts, under the then-dominant “hands-off” doctrine,⁴⁷ heard

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45. The jurisdiction-stripping efforts of the mid-1990s—the PLRA and its cousins the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform, and Immigrant Responsibility Act—“may be the most significant limitations on federal jurisdiction since those enacted in connection with World War II price controls and draft legislation.” Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2446 (1998). The PLRA was ultimately passed with bipartisan support.
46. See Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 141 (2008) (“[The prior physical injury requirement] has obstructed judicial remediation of religious discrimination, coerced sex, and other constitutional violations typically unaccompanied by physical injury, undermining the regulatory regime that is supposed to prevent such abuses.”).
47. The “hands-off” doctrine was a doctrine of nonintervention in state prison affairs by the federal courts. Courts generally marshaled arguments about separation of powers and voiced concerns about interfering with the judgment of prison officials. See *Ex parte Pickens*, 101 F. Supp. 285, 290 (D. Alaska 1951) (finding that prisons were overcrowded and prisoners were subjected to conditions that were “inexcusable and shocking to the sensibilities of all civilized persons,” but refusing to intervene); *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871) (holding that prisoners were “slaves of the State,” having “not only forfeited [their] liberty, but all [their] personal rights except those in which the law in its humanity accords [them]”); Alison Brill, *Rights Without Remedy: The Myth of State Court Accessibility After the Prison Litigation Reform Act*, 30 CARDOZO L. REV. 645, 652 n.38 (2008) (“In effect, we are asked to enter the domain of penology This Court has no such power.”)

virtually no prisoner rights cases until the 1960s,⁴⁸ when federalism concerns⁴⁹ ceded to widespread concerns about prisoner treatment, particularly in the South.⁵⁰ Federal courts began long-term oversight of state prisons,⁵¹ abandoning the hands-off policy in *Cooper v. Pate*.⁵² National advocacy groups undertook systematic litigation of prison conditions cases,⁵³ particularly after the Court applied the protections of the Civil Rights Act to state prisoners.⁵⁴ Over the course of several decades, the Supreme Court expanded the range of constitutional protections available to prisoners, from the right to be free from excessive force and the right to adequate medical care to the rights to adequate prison conditions, religious freedom, and due process.⁵⁵ Courts at all levels

(alteration in original) (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958) (Frankfurter, J.)) (internal quotation marks omitted)). See generally Robert T. Sigler & Chadwick L. Shook, *The Federal Judiciary and Corrections: Breaking the “Hands-Off” Doctrine*, 7 CRIM. JUST. POL’Y REV. 245, 245-46 (1995) (describing the death of the “hands-off doctrine”).

48. See Brian J. Ostrom, Roger A. Hanson & Fred L. Cheesman, II, *Congress, Courts, and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525, 1530 n.18 (2003); Joshua J. Fougere, Note, *Paying for Prisoner Suits: How the Source of Damages Impacts State Correctional Agencies’ Behavior*, 43 COLUM. J.L. & SOC. PROBS. 283, 288-90 (2010).
49. See Fougere, *supra* note 48, at 289 n.36 (“Other justifications [for the hands-off doctrine] included separation of powers, lack of judicial expertise, and fear of chilling prison officers.”); see also Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 306 (2007) (reviewing justifications).
50. Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2006-08 (1999); see also Brill, *supra* note 47, at 652-53 (reviewing history).
51. See, e.g., *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).
52. 378 U.S. 546 (1964). These developments coincided with the expansion of litigants’ ability to use 42 U.S.C. § 1983 in the federal courts. See *Monroe v. Pape*, 365 U.S. 167 (1961).
53. See Shay & Kalb, *supra* note 49, at 298 (discussing the efforts of the ACLU and others).
54. *Cooper*, 378 U.S. at 546.
55. See *Hudson v. McMillian*, 503 U.S. 1, 4 (1992) (right to be free from excessive force); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (right to adequate medical care); *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (right to minimal due process protections in proceedings to strip prisoners’ good-time credits); *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (right to religious freedom); see also *Bounds v. Smith*, 430 U.S. 817, 817-18, 824 (1977) (requiring that prisoners be granted access to law libraries and other means of accessing legal knowledge and holding that states have “affirmative obligations to assure all prisoners meaningful access to the courts,” as well as noting the per curiam holding in *Younger* that such services are constitutionally mandated); *Younger v. Gilmore*, 404 U.S. 15, 15 (1971) (per curiam) (prohibiting prisons from limiting access to law books and legal assistance); *Johnson v. Avery*, 393 U.S. 483, 486-87 (1969) (holding that corrections officers cannot impede access

heard reports of widespread mistreatment and degrading conditions, and overhauled the “trustee” guard systems in Mississippi, Texas, and Arkansas.⁵⁶ By 1976, a judge in Alabama had found most prisons in the state “unfit for human habitation,”⁵⁷ and two years later, a federal judge, “shocked” by “dark, dirty, and totally isolated” psychiatric cells in some Pennsylvania prisons, found conditions “constitut[ing] treatment so inhumane and degrading as to amount to cruel and unusual punishment.”⁵⁸ By 1984, twenty-four percent of state prisons were under court order.⁵⁹ Litigation by prisoners and advocates led to critical reforms of prison conditions.⁶⁰ For a time, noting those gains, courts were able to defend against accusations of judicial activism. Nevertheless, by the eighties and early nineties, critics gained the upper hand, prompting a return to a quasi-“hands off” policy by both the judiciary and the legislature.⁶¹ Prisoner litigation had ballooned: in 1990, prisoners filed more

to courts for a writ of habeas corpus); *Ex parte Hull*, 312 U.S. 546, 549 (1941) (expanding habeas rights).

56. “Trustee” or “trustee” guard systems were systems in which prisoners were armed and authorized to guard other inmates. These systems led to widespread abuse. They were once compulsory under Mississippi law, *see* MISS. CODE ANN. § 47-5-143 (1972), and were in wide use in the South, *see* *Ruiz v. Estelle*, 503 F. Supp. 1265, 1383-84 (S.D. Tex. 1980); *Holt*, 309 F. Supp. at 373-76. *See also* *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (eliminating the trustee system at Mississippi State Penitentiary, also called “Parchman Farm”).
57. *See* *Brill*, *supra* note 47, at 646 (citing *Pugh v. Locke*, 406 F. Supp. 318, 323-24 (M.D. Ala. 1976), *rev’d in part sub nom.* *Alabama v. Pugh*, 438 U.S. 781 (1978)); *see also* *Locke*, 406 F. Supp. at 324 (describing testimony of a public health officer who recommended that the prisons be “closed and condemned as an imminent danger to the health of the individuals exposed to them”).
58. *Imprisoned Citizens Union v. Shapp*, 451 F. Supp. 893, 898 (E.D. Pa. 1978) (“[W]e were genuinely shocked by the dark, dirty, and totally isolated conditions we observed.”).
59. *Schlanger*, *supra* note 50, at 2004.
60. *See* *Brill*, *supra* note 47, at 646; *Schlanger*, *supra* note 50, at 2018-19, 2028-29 (describing efforts at Attica and elsewhere to improve prison conditions); *see also* John J. DiIulio, Jr., *Conclusion: What Judges Can Do To Improve Prisons and Jails*, in *COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS* 287, 291 (John J. DiIulio, Jr. ed., 1990) (noting that “in most cases it is . . . futile to assert that such improvements would have been made, or made as quickly, in the absence of judicial intervention”).
61. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 355-56 (1996) (holding that the district court’s failure to identify anything more than isolated instances of actual injury rendered its finding of a systemic *Bounds* violation invalid). In *Casey*, Justice Scalia wrote that *Bounds* “does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims.” *Id.* at 355; *see also* *Rhodes v. Chapman*, 452 U.S. 337, 344-52 (1981) (calling crowded prison conditions “part of the penalty that criminal offenders pay for their offenses”); *Bell v. Wolfish*, 441 U.S. 520, 562 (1979) (Rehnquist, J.) (“[U]nder the Constitution, the first question to be

than 24,000 civil rights cases in federal district court, up from 2,267 twenty years earlier. By the mid-nineties, “state prisoners challenging the conditions of their confinement accounted for the single largest category of civil lawsuits filed in U.S. district courts.”⁶² In 1996, prisoners brought 41,302 lawsuits, or more than one in six federal lawsuits filed that year.⁶³

B. Passing the PLRA

Against this backdrop, a coalition of conservative senators introduced the PLRA, billed in home districts as a means to reduce the “crushing burden” of “frivolous prisoner lawsuits.”⁶⁴ Advocates of the proposed legislation, including the National Association of Attorneys General, compiled “Top Ten Inmate Lawsuits” lists including soon-to-be-infamous lawsuits over chunky peanut butter and bad haircuts.⁶⁵ Legislators justified the proposal by pointing to prisoners’ low success rate in court,⁶⁶ arguing that the data showed that only a miniscule percentage of prisoner lawsuits had “enough merit to reach trial.”⁶⁷ Prisoner advocates, including Judge Newman of the Second Circuit, objected to these characterizations, arguing that the “poster child” cases were atypical at best, and on investigation, far more meritorious than the bill’s proponents

answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan.”); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 12-19 (1997) (describing a Republican campaign to counter “judicial activism”).

62. Ostrom et al., *supra* note 48, at 1525.

63. *Id.* Prisoners enjoyed the lowest plaintiff win-rate of all federal court filings, less than fifteen percent. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1557, 1597-98 (2003). These statistics do not include habeas claims. *Id.* at 1558 n.4.

64. 141 CONG. REC. 27,042 (1995) (statement of Sen. Orrin Hatch); *see also id.* at 38,276 (1995) (statement of Sen. Jon Kyl) (complaining about prisoner suits); *id.* at 26,554 (1995) (statement of Sen. Spencer Abraham) (same).

65. *Id.* at S14,413-19 (daily ed. Sept. 27, 1995) (statements of Sen. Bob Dole, Sen. Orrin Hatch & Sen. Jon Kyl) (giving examples of “frivolous” suits); *see also id.* at 27,045 (1995) (statement of Sen. Jon Kyl) (entering two lists of “frivolous” inmate lawsuits into the record); *Vacco Targets Frivolous Lawsuits Filed by Inmates*, BUFFALO NEWS, June 13, 1995, at A4 (describing attacks on prisoner suits by attorneys general). *See generally* Schlanger, *supra* note 63, at 1568 (describing lobbying efforts and collecting senators’ statements about ostensibly “frivolous” suits).

66. Ostrom et al., *supra* note 48, at 1526.

67. *See, e.g.*, 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Orrin Hatch) (“[O]nly a scant 3.1 percent [of inmate lawsuits] have enough validity to reach trial.”).

suggested.⁶⁸

Drafters and supporters of the PLRA repeatedly affirmed that they did not wish to obstruct the filing of legitimate constitutional claims evincing no physical injury.⁶⁹ Congressional debates on the statute focused on limiting “‘non-meritorious’ and ‘frivolous’ inmate litigation”⁷⁰ by designing structural barriers to constrain prisoners who “file free lawsuits in response to almost any perceived slight or inconvenience.”⁷¹ Notably, senators underscored that “the legislation would not prevent legitimate claims and would actually ‘help protect convicted criminals’ constitutional rights,” explicitly distinguishing between wasteful claims and claims concerning “actual violations.”⁷²

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68. Judge Jon Newman of the Second Circuit objected to the characterization of three ostensibly “frivolous” lawsuits by a group of attorneys general in a letter to the *New York Times*. See Dennis C. Vacco et al., Letter to the Editor, *Free the Courts from Frivolous Prisoner Suits*, N.Y. TIMES, Mar. 3, 1995, <http://www.nytimes.com/1995/03/03/opinion/1-free-the-courts-from-frivolous-prisoner-suits-486495.html>. Judge Newman showed that, on further investigation, each of the cases was far less frivolous than the attorneys general were suggesting and labeled their descriptions as “at best highly misleading and, sometimes, simply false.” Jon O. Newman, *Foreword: Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520 (1996). A coalition of prisoner rights advocates filed a competing list. ACLU Nat’l Prison Project, *The Top Ten Non-Frivolous Lawsuits Filed by Prisoners*, ACLU OR. (Feb. 11, 1996), http://archive.acluor.org/archive/Leg_2005/pdf/Leg_2005_HB2140_top10.pdf. For descriptions of this history, see Shay & Kalb, *supra* note 49; and Schlanger, *supra* note 50. For explanation of Schlanger’s (non-)“deluge” statistics, see Schlanger, *supra* note 50, at 1585-87 nn.86-87. See also note 50 and accompanying text.
69. See *Royal v. Kautzky*, 375 F.3d 720, 730 (8th Cir. 2004) (Heaney, J., dissenting) (noting that the drafters specified that they did not wish to obstruct meritorious claims); *Siggers-El v. Barlow*, 433 F. Supp. 2d 811, 816 (E.D. Mich. 2006) (claiming that Congress intended to limit only frivolous suits); *Percival v. Rowley*, No. 1:02-CV-363, 2005 WL 2572034 (W.D. Mich. Oct. 12, 2005) (same).
70. *Royal*, 375 F.3d at 730 (Heaney, J., dissenting).
71. *Id.* (quoting 141 CONG. REC. S14,418 (1995) (statement of Sen. Jon Kyl)).
72. *Id.* (quoting 141 CONG. REC. S14,418 (1995) (statement of Sen. Orrin Hatch)) (distinguishing between wasteful claims and claims concerning “actual violations of prisoners’ rights”). See generally Schlanger, *supra* note 63, at 1565-69 (reviewing the debate in Congress). There is an argument that members of Congress were not attuned to the potential consequences of certain provisions, including the prior physical injury requirement. Senator Kennedy, for instance, famously complained that the legislation had received only one hearing, and that despite repeated professions by sponsors and supporters on Capitol Hill that the legislation would do nothing to inhibit meritorious claims, the bill installed no procedural safeguards to ensure that meritorious claims would be protected. See also *supra* notes 64-69 (reviewing the legislative history). But others have suggested that Congress cared little about limiting meritorious claims, and that the bill represented a political attack on judges, like Norma Shapiro and William Wayne Justice, who were perceived as “activists.” See, e.g., Theodore K. Cheng, *Invading an Article III Court’s Inherent Equitable Powers: Separation of Powers and*

The bill passed. As enacted, the PLRA created a series of procedural barriers to prisoner lawsuits. In addition to instituting the prior physical injury requirement,⁷³ the statute imposes filing fees on indigent prisoners, where fees for similarly impoverished free persons would be waived; it imposes barriers to filing *in forma pauperis*; it requires that prisoners exhaust administrative remedies before pursuing action in court;⁷⁴ and it severely limits attorneys' fees—often to a mere \$1.50—even for successful suits.⁷⁵ The statute enables courts to dismiss suits for frivolity, maliciousness, or failure to state a claim upon which relief can be granted.⁷⁶

The PLRA was “successful” on at least two counts: symbolically, in showing constituents that their representatives in Congress had “done something about a problem,”⁷⁷ and substantively, in reducing prisoner litigation. Indeed, in the four years after passage, the total number of prisoner lawsuits fell by more than 40%, from more than 41,000 to about 24,400, despite a simultaneous 23% increase in the incarcerated population.⁷⁸ By 2006, prison litigation had been reduced by 60%.⁷⁹

But those “successes” came at considerable cost.

the Immediate Termination Provisions of the Prison Litigation Reform Act, 56 WASH. & LEE L. REV. 969, 980 (1999) (“[F]loor debates specifically condemned efforts by Judge Norma L. Shapiro of the Eastern District of Pennsylvania to impose a population cap on Philadelphia’s prisons because of overcrowding”); *The Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act: Implications for Federal District Judges*, 115 HARV. L. REV. 1846, 1855 (2002) (noting that one committee witness cited Judge Justice’s “control of the Texas prison system” to argue that “judges in these cases have gone way beyond remedying specific, documentable violations” (quoting *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 886, S. 930, and H.R. 667 Before the S. Comm. on the Judiciary*, 104th Cong. 43 (1995) (statement of John J. DiIulio, Jr., Professor of Politics and Public Affairs, Princeton University))); *see also* Tushnet & Yackle, *supra* note 61, at 23 (arguing that the bill was a symbolic statute designed so that members could tell their constituents they had “done something about a problem”).

73. 42 U.S.C. § 1997e(e) (2006).

74. *Id.* § 1997e(a).

75. *Id.* § 1997e(d); *see infra* note 129 (discussing the mechanism by which this provision can limit fees to \$1.50).

76. *Id.* § 1997e(c).

77. *See* Tushnet & Yackle, *supra* note 61, at 23.

78. Ostrom et al., *supra* note 48, at 1532 fig.1, 1525-26; Schlanger, *supra* note 63, at 1559-60.

79. Schlanger & Shay, *supra* note 46, at 141-42.

C. A Mismatched Solution for a Misunderstood Problem

The PLRA tragically mischaracterized the nature of prison litigation. True, prisoner filings had increased from the 1970s to the 1990s. But the increase in litigation tracked neatly the explosion in the prison population during the same period. Because increases in the filing rate for federal civil rights were “primarily associated, in nearly every state, with the growing incarcerated population,” it would be, as Margo Schlanger has noted, equally inappropriate to speak of a “deluge” of inmate filings as to speak of a “deluge” of inmate requests for food.⁸⁰ The population trend had manifold causes: changes in sentencing requirements, sentencing enhancements for recidivists, the nationwide decline in mental health services, and the War on Drugs.⁸¹ And population growth, in turn, created problems of its own, which themselves spawned litigation: overcrowding led to poor hygiene, substandard housing, and lack of exercise, abuse, and neglect.⁸²

Moreover, prisoner suits before the PLRA were far less problematic than legislators claimed. Indeed, “[n]umerous researchers who have conducted systematic reviews of case records have concluded that a large portion of inmates ‘present serious claims that are supported factually,’ and that even ‘most “frivolous” cases are neither fanciful, ridiculous, nor vexing.’”⁸³ Although success rates were low compared to other categories of federal cases, they were

80. Schlanger, *supra* note 63, at 1586-87; see also Glenn C. Loury & Bruce Western, *The Challenge of Mass Incarceration in America*, DAEDALUS, Summer 2010, at 5-7 (“With roughly 5 percent of the world’s population, the United States currently confines about 25 percent of the world’s prison inmates.”). See generally Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 939-64 (1984) (reviewing twenty years of data on prisoner litigation rates and charting government attempts to distinguish habeas from “conditions” claims, and reviewing the normative consequences of considering the volume of prisoner filings).

81. Brill, *supra* note 47, at 647 & nn.13-16 (reviewing causes of growth in the prison population).

82. See *Brown v. Plata*, 131 S. Ct. 1910 (2011) (litigation regarding overcrowding in California prisons); *Rhodes v. Chapman*, 452 U.S. 337 (1981) (litigation challenging “double celling” in crowded Ohio prisons); *Hoptowitz v. Ray*, 682 F.2d 1237 (9th Cir. 1982) (litigation challenging overcrowding, lack of medical care, and violence, and disregard for inmate safety, ability to exercise, and living conditions).

83. Schlanger, *supra* note 63, at 1692 (quoting Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 440 (1993)); see also Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 538 (1982) (“[M]ost prisoner section 1983 complaints were not plainly trivial assertions implicating little or no federal interest.”); Schlanger, *supra* note 63, at 1573 (“[T]he best evidence available demonstrates that the . . . major accusation—that typical inmate complaints were . . . undeserving of serious concern, much less legal accountability—was incorrect.”).

“far from miniscule,” with 15% of prisoner suits ending in “some kind of negotiated disposition or in litigated victory for the plaintiff.”⁸⁴ In all, a “close look uncovers . . . a very different prisoner litigation problem than that animating the PLRA’s supporters’ account.”⁸⁵

As noted earlier, legislators had pointed to prisoners’ limited success in court as evidence of the absurdity of prisoner claims.⁸⁶ But structural factors, not the underlying weakness of prisoner claims, explain why prisoners achieved so little success in court.⁸⁷ Prisoners faced, then as now, the range of barriers meeting poor populations generally: the lack of lawyers available to represent low income populations in civil matters; underresourced and undertrained counsel for indigent criminal defendants; barriers to access for people with physical and psychiatric disabilities; barriers imposed by court decisions and statutes; and at times, mandatory reliance on alternative dispute resolution.⁸⁸

More importantly, prisoner litigants face limitations specific to their status as prisoners. Among others, no lawyer receiving any funding from the Legal Services Corporation is permitted to represent prisoners.⁸⁹ Prisoner litigants who reach court encounter a generalized deference, both de jure and de facto, to prison officials. Prisoner civil rights claims are governed by the deferential standard established in *Turner v. Safley*, with which courts have maintained

84. Schlanger, *supra* note 63, at 1692.

85. *Id.* at 1693.

86. *See supra* note 67 and accompanying text.

87. Inmate litigants face obstacles ranging from “a jaded or . . . very hurried judiciary,” Schlanger, *supra* note 63, at 1692, to “an extremely high decision standard or persuasive burden (so high that over twenty percent of cases that meet it are actually egregious enough to prompt the award of punitive damages),” *id.* at 1692-93 (footnote omitted); “plaintiffs’ poor information,” *id.* at 1693; “defendants’ strong perception that settling tends to have the externality of promoting additional filings,” *id.*; “and the antagonistic milieu of corrections, which discourages ‘capitulating to inmates,’” *id.* at 1692; to a lack of representation (95.6% of inmate civil rights cases are pro se, compared with 10.1% across the rest of the federal civil docket), *see id.* at 1609 tbl.II.D. Damages for prisoner litigants tended, pre-PLRA,

to be extremely low, due in large part to the ordinary rules of tort damages, which better compensate the kinds of economic losses not typically incurred by inmates, and perhaps also to the more idiosyncratic problem faced by pro se plaintiffs trying simultaneously to act as effective litigators and demonstrate devastating injury.

Id. at 1693.

88. David S. Udell & Rebekah Diller, *Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts*, 95 GEO. L.J. 1127, 1130-52 (2007) (reviewing factors). *See generally* Boston, *supra* note 13, at 433 (discussing the burden of filing fees on an indigent prison population).

89. Schlanger, *supra* note 63, at 1654.

that “[s]ubjecting the day-to-day judgments of prison officials to an inflexible, strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.”⁹⁰ *Turner* creates an especially high bar for challenges to prison regulation, upholding challenges only if the relationship of a policy to a governmental objective is “so remote as to render the policy arbitrary or irrational.”⁹¹ Matched with this, prisoner suits are often met with a generalized suspicion on the part of courts, some of which perceive retaliation claims by prisoners as particularly “prone to abuse,”⁹² warranting “skepticism and particular care,” since prisoners could cry abuse in the face of any decision they disliked.⁹³

II. HARM TO PLAINTIFFS: IMPEDING ACCESS TO THE COURTS

In the face of existing generic barriers to court access, the PLRA created new ones. Among these, the physical injury requirement has been interpreted to create a barrier not only for classic emotional claims, but for constitutional violations, as illustrated in Section II.A. Section II.B shows that the requirement sets in motion a cascade of access-blocking procedures, which operate to exclude prisoner claims for violations of intangible constitutional rights, from retaliation to harms to freedom of religion.⁹⁴

90. 482 U.S. 78, 89 (1987). *See generally supra* note 61 (discussing limitations on prisoners’ rights to litigate).

91. *See, e.g., Freeman v. Tex. Dep’t of Criminal Justice*, 369 F.3d 854, 861 (5th Cir. 2004) (citing *Turner*, 482 U.S. at 89-90).

92. *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996) (quoting *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983)).

93. *Dawes v. Walker*, 239 F.3d 489, 491 (2d Cir. 2001).

94. *See Thompson v. Carter*, 284 F.3d 411, 416-17 (2d Cir. 2002) (holding that the physical injury requirement bars compensatory damages for a violation of due process rights); *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001) (holding that the physical injury requirement bars compensatory damages for a violation of religious rights); *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) (same); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (holding that the physical injury requirement bars compensatory damages for a violation of constitutional privacy rights); *Carter v. Hubert*, No. 07-614, 2011 WL 616723, at *2 (M.D. La. Jan. 20, 2011) (denying compensatory damages for a First Amendment violation absent a showing of prior physical injury); *Holloway v. Bizzaro*, 571 F. Supp. 2d 1270, 1272 (S.D. Fla. 2008) (denying compensatory damages for separate religious freedom violations because the plaintiff failed to demonstrate physical injury).

A. *The Circuit Split*

The federal circuits have been caught in a protracted definitional battle over how to taxonomize First Amendment injuries, like retaliation against prisoners for petitioning the courts,⁹⁵ for the purposes of the prior physical injury requirement. As interpreted by about half of the federal circuits,⁹⁶ petition violations, including but not limited to retaliation, are understood as “not physical” and thus “mental or emotional,” leaving the prisoner who is punished for communicating with the courts—and who is likely unable to show any physical effects of his chilled communication⁹⁷—entirely without remedy.⁹⁸ The pages to follow will refer to this as the “restrictive” interpretation. The remaining circuits object to the characterization of First Amendment injuries as “mental or emotional,”⁹⁹ arguing that claims for First

95. See *supra* notes 18-23 and accompanying text.

96. The federal circuit courts are roughly evenly divided over the applicability of the prior physical injury requirement, 42 U.S.C. § 1997e(e) (2006), to First Amendment claims. The Third, Eighth, Tenth, and D.C. Circuits have interpreted § 1997e(e) to preclude compensatory damages in prisoner suits alleging constitutional violations without a prior showing of physical injury. Under this theory, prisoners bringing First Amendment claims typically are left with only nominal (often \$1) damages. Among this group, the Third, Eighth, and Tenth Circuits read the PLRA to permit, at least theoretically, punitive damages for a First Amendment violation, but the D.C. Circuit reads the provision to bar punitive damages, holding that “Congress’s evident intent [to curtail frivolous prisoner suits] would be thwarted if prisoners could surmount § 1997e(e) simply by adding a claim for punitive damages.” *Davis*, 158 F.3d at 1348 (D.C. Cir. 1998) (analyzing a Fourth Amendment claim). For other circuits adopting the same argument about punitive damages, see *Royal v. Kautzky*, 375 F.3d 720, 723-25 (8th Cir. 2004); *Searles*, 251 F.3d at 876; *Allah*, 226 F.3d at 250-51; and *Zehner v. Trigg*, 133 F.3d 459, 462 (7th Cir. 1997).

97. See discussion *infra* notes 134-135.

98. Because of the PLRA’s tandem-fee limitation, plaintiffs occasionally receive \$1 in nominal damages and \$1.50 in attorneys’ fees. See *supra* note 75 and accompanying text; *infra* notes 120-127 and accompanying text.

99. The Fifth, Sixth, Seventh, and Ninth Circuits, as well as district courts in the First and Second Circuits, have taken this view, holding that the physical injury requirement of § 1997e(e) does not apply when the underlying constitutional right either inherently lacks a physical component or possesses intrinsic value independent of any secondary (physical, mental, or emotional) harms.

Courts have applied this reading to constitutional claims involving, among other rights, freedom from illegal confinement, religious freedom, equal protection, procedural due process, and, as here, freedom from retaliation for exercising First Amendment speech and petition rights. Robertson, *supra* note 11, at 635-39 (collecting cases). Textually, this reasoning turns on the language of § 1997e(e), which requires a showing of physical injury in suits “for mental or emotional injury.” 42 U.S.C. § 1997e(e) (emphasis added). These courts have not applied § 1997e(e)’s physical injury requirement where they understand the

Amendment violations “are not brought to redress [mental, emotional, or physical] injuries . . . [but] to redress the actual violation of the right.”¹⁰⁰ First Amendment injuries, by this permissive interpretation, “are abridged the moment a state silences free speech, or prevents a citizen from following the precepts of his religion,” and “occur at the time of the deprivation, not at a later time when the physical or emotional harm manifests.”¹⁰¹

The restrictive reading understands the PLRA as categorizing the range of potential harms in the manner of a standard tort: injuries are either physical, or they are “mental or emotional.” Intuition suggests this dichotomy must be wrong, but as the experience of several circuits has shown, the two-category heuristic is powerful and has encouraged the shoehorning of intangible injuries into inappropriate frames. To predicate recovery for retaliation on a showing of physical injury is to make two mistakes, discussed in the sections to follow: first, to imagine nonphysical¹⁰² violations as less significant than physical violations (the message implicit in the subordination of the “mental” to the “physical”); and second, to imagine retaliation as an injury to the individual alone (the message implicit in placing retaliation in the same framework as mental and physical pain). The first is a tragedy, and outmoded; the second may be more threatening for remaining *en mode*.

suit not to be *for* a “mental or emotional injury,” but *for* the intangible harm inhering in the constitutional violation itself. *See, e.g.,* Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) (understanding the prisoner’s suit not to be *for* mental or emotional harm, but for “violation of [the petitioner’s] First Amendment rights”).

Other circuits’ holdings have adopted similar reasoning. *See, e.g.,* Hutchins v. McDaniels, 512 F.3d 193, 198 (5th Cir. 2007); Calhoun v. DeTella, 319 F.3d 936, 940 (7th Cir. 2003) (“[T]he deprivation of the constitutional right is itself a cognizable injury, regardless of any resulting mental or emotional injury.”); Williams v. Ollis, No. 99-2168, 2000 WL 1434459, at *2 (6th Cir. 2000) (noting that the “plaintiff’s First Amendment retaliation claim [wa]s not precluded” by § 1997e(e)); Robinson v. Page, 170 F.3d 747, 748 (7th Cir. 1999) (“It would be a serious mistake to interpret section 1997e(e) to require a showing of physical injury in all prisoner civil rights suits.”). District courts in the First and Second Circuits have issued similar holdings. *See, e.g.,* Shaheed-Muhammad v. Dipaolo, 393 F. Supp. 2d 80, 107-08 (D. Mass. 2005) (Gertner, J.) (holding that § 1997e(e) is “inapplicable to suits alleging constitutional injuries” because such violations are “independent injur[ies] that [are] immediately cognizable and outside the purview of § 1997e(e)”; *id.* (“[T]he harm that is constitutionally actionable is the violation of intangible rights—regardless of actual physical or emotional injury” (quoting Shaheed-Muhammad v. Dipaolo, 138 F. Supp. 2d 99, 107 (D. Mass. 2001)) (internal quotation marks omitted)); Birth v. Pepe, No. 98-CV-1291, 1999 WL 684162, at *2 (E.D.N.Y. July 21, 1999); Amaker v. Haponik, No. 98-CIV-2663, 1999 WL 76798, at *7 (S.D.N.Y. Feb. 17, 1999).

100. *Royal*, 375 F.3d at 730 (Heaney, J., dissenting).

101. *Id.* (quoting *Shaheed-Muhammad*, 138 F. Supp. 2d at 101).

102. *See supra* note 99 and accompanying text.

B. Doctrinal Incoherence

At a doctrinal level, applying the physical injury requirement to First Amendment violations, like retaliation, conflates “deprivation[s] of an intangible right”¹⁰³ with tangible losses. While petition violations “may be accompanied by psychological or even physical injury,”¹⁰⁴ such injuries are not by themselves psychological or physical, but rather “inhere[] in the retaliatory conduct itself.”¹⁰⁵ Retaliation for the exercise of a constitutional right, independent of any external symptoms, “is itself a violation of the Constitution.”¹⁰⁶ To categorize First Amendment injuries as “mental or emotional” is to misunderstand the “purpose behind the First Amendment,” which is “not concerned with preventing physical abuse by government agents, but rather with the invasion of the ‘sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control.’”¹⁰⁷

Even were the courts to classify retaliation as a “mental or emotional injury,” this classification would be inconsistent with tort law principles, which have historically differentiated between “mental or emotional” and intangible injuries,¹⁰⁸ and which make available remedies for forms of emotional distress

103. *Royal*, 375 F.3d at 730 (Heaney, J., dissenting).

104. *Id.* (stating that the harm attaches “at the time of the deprivation, not at a later time when the physical or emotional harm manifests”).

105. *Dixon v. Brown*, 38 F.3d 379, 379 (8th Cir. 1994).

106. *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999); *see also id.* (“As long as the injury is ‘distinct and palpable’ rather than abstract, conjectural, or hypothetical, it is sufficient to confer standing.” (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984))).

107. *Shaheed-Muhammad v. Dipaolo*, 138 F. Supp. 2d 99, 108 (D. Mass. 2001) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

108. Tort law differentiates between “mental or emotional” distress and intangible harms like injuries to reputation or injuries to liberty. *See* JOHN BOSTON, THE PRISON LITIGATION REFORM ACT: PREPARED FOR SECOND CIRCUIT COURT OF APPEALS STAFF ATTORNEYS’ ORIENTATION 105-08 (2004), <http://www.wnylc.net/pb/docs/plra2c1ro4.pdf>. Defamation law, for instance, explicitly differentiates mental and emotional injury from injuries like damage to reputation or alienation of associates. False imprisonment cases differentiate mental or emotional injury from the harm inherent in the loss of liberty. *Id.* at 105-06 & nn.473-74; *see also id.* at 106 (“The damages recoverable for loss of liberty for the period spent in a wrongful confinement are separable from damages recoverable for such injuries as physical harm, embarrassment, or emotional suffering; even absent such other injuries, *an award of several thousand dollars may be appropriate simply for several hours’ loss of liberty.*” (emphasis added) (citing *Kerman v. New York*, 374 F.3d 93, 125-26 (2d Cir. 2004))). The comparison to tort law is apt, as § 1983 creates a “species of tort liability” for those suffering constitutional violations at the hands of persons acting under color of state law, and assigns damages “according to principles derived from the common law of torts.” *Memphis Cmty.*

lacking physical components.¹⁰⁹ Moreover, the rationale in tort for physical predicates does not apply to intangible injuries. The physical injury requirement of the PLRA echoes the rule at common law that plaintiffs in negligence actions can only recover for emotional distress stemming from a “physical impact,”¹¹⁰ a rule reflecting the concern that emotional harm is difficult to verify and difficult to value. Physical injury, in such a framework, is said to “vouch for the asserted emotional injury.”¹¹¹ Whatever one thinks of such a rule as applied to emotional harms, it has no relevance to intangible harms; physical injuries neither “vouch” for the genuineness of an intangible injury nor relate to the injury in any material way.

Under the prior physical injury requirement, retaliation preceded by a punch might be actionable, but retaliation absent the punch might not be, implicating procedural fairness or arbitrariness concerns on at least three levels. First, the provision conditions the enjoyment of one constitutional right on a predicate unrelated to demonstrating the legitimacy of the violation, raising due process concerns.¹¹² In imposing conditions without meaningful relationship to the underlying right, the provision creates a hierarchy of rights without constitutional sanction or justification other than docket clearing. In the process, the provision minimizes the importance of intangible injuries,

Sch. Dist. v. Stachura, 477 U.S. 299, 305-06 (1986) (citing *Carey v. Phipus*, 435 U.S. 247, 253 (1978)).

109. For instance, tort law makes available remedies for intentional infliction of emotional distress. See, e.g., William Glaberson, *After Stillbirth, Courts Try To Put a Price on a Mother's Anguish*, N.Y. TIMES, Aug. 23, 2011, <http://www.nytimes.com/2011/08/24/nyregion/in-stillbirth-malpractice-cases-courts-try-to-put-price-on-mothers-anguish.html> (noting that courts are increasingly recognizing the importance of recovery for psychological and emotional injury). To subordinate psychological injury to physical injury contravenes a line of Eighth Amendment jurisprudence, similar enough in its underpinnings to draw parallels to the present context, holding that a physical injury is not necessary for a showing of a constitutional violation. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding that denationalization of U.S. citizens as criminal punishment violated the Eighth Amendment). The *Trop* court reasoned that “[t]here may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual’s status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.” *Id.*
110. See, e.g., *Lee v. State Farm Mut. Ins. Co.*, 533 S.E.2d 82, 84 (Ga. 2000) (“In a claim concerning negligent conduct, a recovery for emotional distress is allowed only where there is some impact on the plaintiff, and that impact must be a physical injury.” (quoting *Ryckley v. Callaway*, 412 S.E.2d 826, 826 (Ga. 1992)).
111. *Dawes v. Walker*, 239 F.3d 489, 495 (2d Cir. 2001) (Walker, J., concurring); see also *id.* at 494-97 (discussing the theory of the PLRA’s physical injury requirement).
112. The injury of concern is the retaliation, not the punch; the retaliation is as much a manifestation of totalitarian control—and is arguably more so—than the punch.

enshrouds retaliatory behavior in a kind of immunity, and potentially blocks legitimate claims. Second, the requirement means that not all identical intangible violations against prisoners are regarded equally, thus raising arbitrariness concerns at another level, and differentiating among individual prisoners in possible violation of the equal protection guarantee. Third, the requirement, as interpreted by the limiting circuits, conditions prisoners' constitutional rights in a manner distinct from free persons' constitutional rights. As noted below, some have argued that to deny to prisoners certain claims available to others, whether in the context of retaliation or in the context of other threats—the threat of violence, for instance, as opposed to actual violence—could violate prisoners' constitutional right to equal protection.¹¹³ Although constitutional rights are regularly constrained in the prison context,¹¹⁴ the limitations here extend beyond *Turner* deference¹¹⁵ and carry the potential to limit actual freedoms beyond justifiable penological ends.

C. Blocking Individual Rights: The Individual and Cascade Mechanisms

The physical injury requirement constructs rigid barriers to prisoner safety by creating the possibility that officials might punish or injure prisoners without fear of reprisal. This Section describes four of the mechanisms by which the requirement creates such a result. Certain of these mechanisms flow from the requirement itself, and others arise from the interaction between the physical injury requirement and other provisions.

First, as noted earlier, courts espousing a restrictive reading of the PLRA read § 1997e(e) to limit the availability of compensatory damages absent a “prior showing of physical injury,”¹¹⁶ leaving prisoners subject to unconstitutional retaliation—even weeks or months in solitary confinement, a

^{113.} See sources cited *supra* note 32.

^{114.} Prisoners lose their Second Amendment right to bear arms, for instance, and their First Amendment right to freedom of assembly is highly restricted. *But see* *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (“[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime.”); *Lowrance v. Coughlin*, 862 F. Supp. 1090, 1121 (S.D.N.Y. 1994) (stating that prison officials have discretionary authority, but “[f]ederal courts must be especially vigilant to [e]nsure that all citizens—even the most unpopular—are guaranteed’ the protections secured by the Constitution” (quoting *Santiago v. Miles*, 774 F. Supp. 775, 778 (W.D.N.Y. 1991))).

^{115.} *Turner v. Safley*, 482 U.S. 78, 89 (1987) (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).

^{116.} 42 U.S.C. § 1997e(e) (2006); see cases cited *supra* notes 96, 99.

punishment some have termed “torture”¹¹⁷ – with nothing for their suffering. Without damages, even a judgment in the prisoner’s favor has little deterrent value and renders prison officials effectively immune for their behavior.

Second, although under most readings nominal and punitive damages and injunctive relief theoretically remain available to plaintiffs, none is sufficient to deter abuse or to cure the problems with the restrictive reading. Punitive damages in prisoner retaliation suits are virtually never awarded, commonly leaving prisoners with only \$1 in nominal damages.¹¹⁸ Injunctive relief can be a similarly pyrrhic remedy, as many prisoners are transferred before the close of their suits, and many implicated staff leave the prisons or are reassigned.¹¹⁹ And nominal damages pose problems of their own, in this context. The availability of nominal damages¹²⁰ allows proponents of the restrictive reading to argue that prisoner litigants are being “compensated” for their injuries. Since intangible constitutional violations can be difficult to monetize, constitutional litigants outside prisons are often granted symbolic awards of \$1. Put simply, the argument goes, if Jeffery Royal left court with \$1, and retaliation is an “intangible” right, was Royal not appropriately compensated? If so, why is the restrictive interpretation problematic? In *Memphis Community School District v. Stachura*, the Supreme Court held that courts may not grant damages awards based on the “abstract ‘importance’ of a constitutional right,”¹²¹ but only based on the value of the individual’s suffering.¹²² But the

117. The literature on the effects of solitary confinement is extensive. Several writers have equated solitary confinement with torture. See, e.g., Michael B. Mushlin, *Unlocking the Courthouse Door: Removing the Barrier of the PLRA’s Physical Injury Requirement To Permit Meaningful Judicial Oversight of Abuses in Supermax Prisons and Isolation Units*, 24 FED. SENT’G REP. 268, 274 nn.38-39 (2012); Atul Gawande, *Annals of Human Rights: Hellhole*, NEW YORKER, Mar. 30, 2009, http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande. See generally Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 331 (2006); Mushlin, *supra*, at 273 n.29 (reviewing studies on the psychological effects of solitary confinement).

118. Punitive damages exist to punish reckless or malicious conduct, but are rarely awarded to prisoners. Cohn, *supra* note 3, at 300. But see Schlanger, *supra* note 63, at 1591-92 (noting that, although inmates fare worse than other federal civil litigants by all metrics, in the rare cases in which they win at trial, one in five wins punitive damages).

119. See Cohn, *supra* note 3, at 323 n.135.

120. But see *infra* note 213 (noting that some circuits read the provision to bar all damages, including nominal damages, and some adopt an incongruous but ostensibly “saving” construction of the provision permitting nominal but not compensatory damages).

121. 477 U.S. 299, 310 (1986); see also *id.* at 303 (rejecting a jury instruction telling jurors to consider, in calculating the damages award, the “importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the plaintiff was engaged in”).

Stachura court made clear that “compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as ‘impairment of reputation . . . , personal humiliation, and mental anguish and suffering.’”¹²³ Thus *Stachura* stands not for the proposition that classically nonmonetary “harms” cannot be monetized, but rather for the proposition that damages must be calculated “to compensate persons for injuries that are caused by the deprivation of constitutional rights,” rather than to reflect the general value of a right to society.¹²⁴ In other words, after *Carey v. Phipus* and *Stachura*, litigants—even prisoners—retained the right to prove the cost of a given injury to themselves and to demonstrate that they were owed more than nominal damages. Litigants did so prove, even in First Amendment cases¹²⁵ and even in prison retaliation cases.¹²⁶ It is this right—the right to (attempt to) monetize the violation of an intangible constitutional harm—that prisoners lose under

122. *Stachura*, 477 U.S. at 307 (“[T]he basic purpose’ of § 1983 damages is ‘to compensate persons for injuries that are caused by the deprivation of constitutional rights.’” (quoting *Carey v. Phipus*, 435 U.S. 247, 254 (1978) (emphasis added))); see, e.g., *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 650 n.5 (2d Cir. 1998) (noting that “any recovery must be based on actual loss” and that in the absence of such loss, the plaintiff could recover only nominal damages).

123. *Stachura*, 477 U.S. at 307.

124. *Id.* (quoting *Carey*, 435 U.S. at 254).

125. See, e.g., *Sallier v. Brooks*, 343 F.3d 868, 880 (6th Cir. 2003) (upholding a jury award, in a case involving the unlawful opening of legal mail, of \$750 in compensatory damages for each instance of the conduct); *Goff v. Burton*, 91 F.3d 1188, 1192 (8th Cir. 1996) (upholding an award of \$10 per day, or \$2,250 in total, for a prisoner who lost privileges as a result of a retaliatory transfer to a higher-security prison); *City of Watseka v. Ill. Pub. Action Council*, 796 F.2d 1547 (7th Cir. 1986) (upholding an award of \$8,300 in damages, of which \$5,000 was for the loss of the plaintiff’s First Amendment rights), *aff’d*, 479 U.S. 1048 (1987) (mem.); *Vanscoy v. Hicks*, 691 F. Supp. 1336 (M.D. Ala. 1988) (awarding \$50 for pretextual exclusion from a religious service, even though the plaintiff did not demonstrate separate mental anguish).

126. *Lowrance v. Coughlin*, 862 F. Supp. 1090, 1120–21 (S.D.N.Y. 1994) (awarding \$132,000 in compensatory damages and \$25,000 in punitive damages to a prisoner for repeated retaliatory prison transfers, segregation, and cell searches).

Before the passage of the PLRA, § 1983 plaintiffs were not required to show physical injury before recovering damages for mental, emotional, or intangible injury. For an example of a pre-PLRA compensatory award for a First Amendment violation, see *Trobaugh v. Hall*, 176 F.3d 1087, 1089 (8th Cir. 1999), which overturned the district court’s award of \$1 for a prisoner’s retaliatory placement in administrative segregation for exercising his constitutional right to access the courts and remanded for an “appropriate” damage award, somewhere “in the vicinity of \$100 per day.” To secure compensatory damages before the PLRA, a plaintiff had to demonstrate only actual—as distinct from “physical”—injury and a causal connection between the injury and the defendant’s action. See *Stachura*, 477 U.S. at 307; *Carey*, 435 U.S. at 262–64.

the restrictive reading of § 1997e(e).¹²⁷

The requirement thus is problematic despite the possible availability of nominal damages. Nonprisoner litigants can recover for “actual damages” resulting from First Amendment injuries, not merely “nominal damages.” Litigants must prove those damages, but they are entitled to prove them. Barring prisoners from compensatory damages means that prisoners, under the restrictive interpretation, are not permitted to prove the “actual harm” that others are permitted to prove. This, in turn, means that under the restrictive reading, some prisoners—those whose claims would have a monetized value greater than \$1, were they permitted to so demonstrate—are left uncompensated for harms that society and the courts have deemed worthy of compensation. Some have argued that such restrictions pose equal protection problems, in denying remedies to prisoners that are available to other litigants.¹²⁸ Equal protection aside, the restriction may limit the responsiveness of prison officials to court findings of constitutional violations.

Third, the prior physical injury requirement interacts with other portions of the PLRA to strengthen access barriers. For instance, some circuits have interpreted the PLRA’s fee limitations to mean that, where a plaintiff is awarded only \$1 in nominal damages, his or her attorney may receive only \$1.50. This practice reverses the pre-PLRA practice of awarding fees to an attorney who prevailed in the district court by obtaining either injunctive or monetary relief, and interprets both the language of the PLRA and congressional intent to amplify the effect of the limitation on compensatory damages.¹²⁹ Critically, the limitation on attorneys’ fees means that many attorneys will only take clients with physical injuries, buttressing the barrier to access posed in theory by the physical injury requirement with a barrier in fact.¹³⁰

Finally, prisoners hospitalized as a result of their injuries, for instance, often cannot challenge those injuries because they miss unyielding deadlines

127. For a discussion of the permissible and impermissible restriction of remedies by Congress, see *infra* Part IV.

128. See sources cited *supra* note 32.

129. See *Royal v. Kautzky*, 375 F.3d 720, 721-22, 725 (8th Cir. 2004) (awarding \$1.50 in fees). Courts espousing a restrictive reading of the PLRA read one section of the Act, § 1997e(d), to eliminate, or to limit to \$1.50, the attorney’s fees, available under 42 U.S.C. § 1988(b) (2006), which provides for an award of fees to prevailing parties in 42 U.S.C. § 1983 suits. The restrictive reading chills meritorious claims and conflates two provisions, § 1997e(d)(1) and § 1997e(d)(3), that Congress arguably never intended to conflate. The former allows reasonable fees, the latter limits fees to 150% of the hourly rate for court-appointed counsel. Scholars have criticized this result on fairness grounds. See, e.g., Schlanger, *supra* note 63, at 1655; Cohn, *supra* note 3, at 325-28.

130. See *infra* note 229.

for filing administrative grievances or court papers while in treatment.¹³¹ The PLRA's exhaustion requirement permits prisons to install "hyper-technical" internal procedures, the requirements of which can frustrate even the most sophisticated prisoner or lawyer.¹³² Filing requirements are especially problematic in light of the high rate of traumatic injury in prison, including rape, which is understood outside the prison context to require especially forgiving periods in which to file suit.¹³³ Courts can be stingy with determinations of physical abuse,¹³⁴ and there is no consensus among the courts as to what constitutes physical injury.¹³⁵ Together, such procedures can

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131. The exhaustion requirement of the PLRA, 42 U.S.C. § 1997e(a) (2006), permits prison officials to design rigid and complex internal grievance procedures, and bars inmates from filing suit until those avenues have been exhausted. See *Hearing on H.R. 4109*, *supra* note 12, at 21 (statement of Stephen Bright, President, Southern Center for Human Rights) (describing a case in which an inmate was beaten with a sock full of combination locks and in which "it was argued that he could not file suit because of his failure to comply with the [five-day] deadline [for filing a grievance]," even though he was unable to file because he was "in and out of consciousness during that time"); *id.* at 20-22 (reviewing problems with the exhaustion requirement); Schlanger, *supra* note 63, at 1650-54 (same); *id.* at 1653 n.332 (listing instances in which prisoners' cases were dismissed because they were hospitalized during the entire grievance filing period).
132. *Hearing on H.R. 4109*, *supra* note 12, at 20-21 (statement of Stephen Bright, President, Southern Center for Human Rights).
133. See, e.g., Andy Metzger, *Sex-Abuse Statute Bill Heads to House*, SENTINEL & ENTERPRISE (Fitchburg, Mass.), July 26, 2012 (tracking the legislative effort to recognize that statutes of limitations can be barriers to those not psychologically ready to file claims).
134. See, e.g., *Jarriett v. Wilson*, 162 F. App'x 394, 404 (6th Cir. 2005) (Moore, J., dissenting) (finding no physical injury where a prisoner was forced to stand in a 2.5-square-foot cage "for approximately thirteen hours (naked for the first eight to ten . . .), in acute pain, with . . . visible swelling in . . . his leg"); *Brown v. Simmons*, No. V-03-122, 2007 WL 654920 at *3, *6 (S.D. Tex. Feb. 23, 2007) (finding no physical injury where a prisoner suffered second-degree burns to the face, which healed); *Hancock v. Payne*, No. 103-CV-671, 2006 WL 21751 at *3 (S.D. Miss. Jan. 4, 2006) (holding that allegations of repeated sexual assault by guards were not claims of physical injury). As other commentators have noted, barring recovery for sexual assault, among other injuries, through a restrictive reading of the prior physical injury requirement is in "sharp tension" with congressional attempts to eliminate sexual violence and coercion in prison. Schlanger & Shay, *supra* note 46, at 144-45; see also Katherine C. Parker, *Female Inmates Living in Fear: Sexual Abuse by Correctional Officers in the District of Columbia*, 10 AM. U. J. GENDER SOC. POL'Y & L. 443, 461-63 (2002) (describing the PLRA's effects on inmate claims for harms stemming from rape by guards).
135. See, e.g., *Pool v. Sebastian County*, 418 F.3d 934, 943 (8th Cir. 2005) (noting the defendants' claim that no physical injury resulted from improper medical care leading to stillbirth but dismissing the case on jurisdictional grounds); *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) ("[T]he alleged sexual assaults qualify as physical injuries as a matter of common sense."); *Clifton v. Eubank*, 418 F. Supp. 2d 1243, 1245 (D. Colo. 2006) (finding that improper medical care leading to stillbirth constituted physical injury); *Hancock*, 2006 WL

block prisoners' ability to recover for even severe violations.

Failing to appreciate the nature of a First Amendment violation has barred recovery for those plaintiffs who have reached the courts and has blocked access, via both the prior physical injury requirement directly and via the cascade described above, for the thousands whose cases have "disappeared" as a result of the PLRA. As applied to block access to the courts, the physical injury requirement runs afoul of the First Amendment right to petition the government.¹³⁶

The PLRA is thus a mismatched "solution" to a misunderstood problem. The procedural barriers constructed by the PLRA in general, and the prior physical injury requirement in particular, have inhibited nonfrivolous lawsuits.¹³⁷ At best, proponents of the legislation have failed to show that procedural mechanisms like filing deadlines and filing fees have not obstructed legitimate claims.¹³⁸ At worst, through the PLRA, the government is "severely inhibiting prisoners' abilities to protect themselves from the crimes it commits against them."¹³⁹ Despite repeated professions by legislators that they did not wish to increase burdens for legitimate grievances by enacting the statute,¹⁴⁰ the PLRA "seems to be making even constitutionally meritorious cases harder both to bring and to win."¹⁴¹ Independently of data showing that the PLRA has blocked meritorious litigation, but with particular urgency in light of it, courts should hold that § 1997e(e) is "unconstitutional to the extent that it precludes First Amendment claims."¹⁴²

21751, at *3 (concluding that the "bare allegation of sexual assault" does not satisfy the physical injury requirement).

136. See *Percival v. Rowley*, No. 1:02-CV-363, 2005 WL 2572034, at *2 (W.D. Mich. Oct. 12, 2005) (noting that applying the physical injury requirement "to effectively foreclose a prisoner's First Amendment action would put [§ 1997e(e)] on shaky constitutional ground").
137. See Boston, *supra* note 13, at 432-33; Anna Rapa, Comment, *One Brick Too Many: The Prison Litigation Reform Act as a Barrier to Legitimate Juvenile Lawsuits*, 32 T.M. COOLEY L. REV. 263, 298 (2005).
138. Ostrom et al., *supra* note 48, at 1559 (noting that nearly twice as many prisoner § 1983 suits are dismissed for failure to comply with complex procedural requirements (38%) than for any other substantive reason).
139. Jeffrey Ian Ross, *Resisting the Carceral State: Prisoner Resistance from the Bottom Up*, 36 SOC. JUST., no. 3, 2009-2010, at 28, 39.
140. See *supra* note 69 and accompanying text.
141. Schlanger, *supra* note 63, at 1557.
142. *Siggers-El v. Barlow*, 433 F. Supp. 2d 811, 816 (E.D. Mich. 2006); see also *Mason v. Schriro*, 45 F. Supp. 2d 709, 719-20 (W.D. Mo. 1999) (holding that § 1997e(e) does not apply to a Fourteenth Amendment claim since the statutory provision would deprive the prisoner of

III. HARM TO THE PUBLIC: IMPAIRING THE INFORMATION FUNCTION OF LAWSUITS

Insofar as the PLRA's prior physical injury requirement blocks access to courts and facilitates retaliation, it impairs individual constitutional rights, as the previous Part argued. But this Part and the Part to follow argue that the PLRA threatens not only individual interests, but the interests of the public and of the courts as institutions. In limiting prisoners' ability to access the courts, the physical injury requirement interferes with the critical role played by lawsuits in facilitating the flow of information about prison life to the outside world.¹⁴³ This Part calls the mechanism by which lawsuits transmit information about issues evading the view of the government or the public the "information function" of lawsuits and looks to the history of the Petition Clause of the First Amendment to argue that the Clause arose to protect both individual access to the government and the structural and communicative role of lawsuits, such that violations of the petition right offend not only the petitioner, but the society within which he or she lives.

A. *The Role of Prison Litigation: Information Poverty and Public Awareness*

As seen above, prisoner litigation tracked the vast increase in the prison population. But it is also not surprising that, prior to the enactment of the PLRA, prisoners filed proportionately more federal lawsuits per capita than civilians.¹⁴⁴ Prison is a managed environment, in which prisoners' lives may be entirely controlled by their captors. As the Supreme Court said in *Preiser v. Rodriguez*,

[f]or state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.¹⁴⁵

meaningful remedies for egregious constitutional violations). In the alternative, Congress should repeal the provision.

¹⁴³. The argument here is not necessarily that the broader public would necessarily read or invest in communications from prisons. But sectors of the public, like specialists and prison advocates, and through them, perhaps officials or legislators, may rely on such information to a greater extent.

¹⁴⁴. Schlanger, *supra* note 63, at 1692. However, Schlanger notes that combined state and federal data show that prisoners brought suit at rates comparable to those of non-inmates. *See id.*

¹⁴⁵. 411 U.S. 475, 492 (1973).

In other words, taken alone, a high litigation rate is not necessarily a sign of frivolity or abuse. As Deborah Rhode has shown, sexual harassment lawsuits were seen as frivolous responses to the “petty slights of the hypersensitive,” until it was found that Fortune 500 companies forfeited on average \$6 million dollars in lost productivity, absenteeism, and employee turnover due to harassment.¹⁴⁶ Moreover, several rigorous surveys have concluded that the majority of prisoner suits are not frivolous;¹⁴⁷ prisons are pervaded by violence, inflicted by fellow prisoners and by staff.¹⁴⁸ In this context, litigation is often a channel through which to illuminate stories that would otherwise remain hidden, just as stories of sexual harassment once were. True, prisoners lose most lawsuits they bring, but numbers alone reveal little about the merits of a given claim.¹⁴⁹

Prisoners have few other mechanisms to communicate about, or improve, the conditions of their confinement.¹⁵⁰ Media access to prisons is scattered at best,¹⁵¹ particularly in the midst of the decline of investigative and public journalism,¹⁵² and prisons are largely populated by persons without the right to vote.¹⁵³ Particularly in the absence of other canonical sources of information, lawsuits, regardless of their result, are critical mechanisms for communicating with the outside world about conditions inside prison, acting to facilitate a commerce in information, both about the subject of the lawsuit and about

146. DEBORAH RHODE, *ACCESS TO JUSTICE* 28 (2005).

147. See Schlanger, *supra* note 63, at 1692 & n.458.

148. See, e.g., 42 U.S.C. § 15601(2), (13) (2006) (“[E]xperts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison.”); *Madrid v. Gomez*, 889 F. Supp. 1146, 1161, 1280 (N.D. Cal. 1995) (finding a “conspicuous pattern of excessive force” in prisons in violation of the Eighth Amendment).

149. Schlanger, *supra* note 63, at 1692-94.

150. See *id.* at 1574 (citing *Preiser*, 411 U.S. at 492).

151. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 15-16 (1978) (holding that “the media have no special right of access” to a county jail “different from or greater than that accorded the public generally,” as “[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control”). See generally WILBERT RIDEAU, *IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE* (2010) (describing the role of an internal prison newspaper in exposing prison abuses).

152. See, e.g., Mary Walton, *Investigative Shortfall*, *AM. JOURNALISM REV.* (Sept. 2010), <http://www.ajr.org/article.asp?id=4904>.

153. *Felon Voting Rights*, PROJECT VOTE, <http://www.projectvote.org/felon-voting.html> (last visited Oct. 5, 2012).

subjects peripheral to the litigation.¹⁵⁴

Consider the case of a contemporary California prisoner.¹⁵⁵ Although his brief focused principally on the major subject of the litigation—restrictions on exercise in violation of the Eighth Amendment—the brief also revealed critical and concealed details about prison policy. The prisoner wrote that he, an African-American, was punished for an incident committed by Latino prisoners, even though standard prison policy was to lock up all (and only) prisoners of one race or gang affiliation in response to an act committed by members of that group.¹⁵⁶ Thus, in the process of protesting his own treatment, the prisoner, and other prisoners making statements to the same effect, revealed—without contesting, or even necessarily being aware that the policy might be contested—information about a possibly overbroad prison policy that was not the subject of the complaint. By communicating with the court, the suit served to broadcast information that otherwise would have remained hidden.¹⁵⁷

Of course, neither reinvigorating the media nor extending the franchise would abrogate prisoners’ need—and “fundamental . . . right”¹⁵⁸—to access the

154. See RIDEAU, *supra* note 151, at 285-300; Schlanger, *supra* note 63, at 1681-82 (“[I]nmate litigation can trigger bad publicity about correctional institutions and officials. Even news organizations that don’t do investigative reporting can use filed complaints to expose corruption, sex, drugs, and death in jails or prisons So even for an agency that doesn’t care about payouts . . . media coverage of abuses or administrative failures can trigger embarrassing political inquiry and even firings, resignations, or election losses. . . . [T]his positive . . . effect of publicity is likely to be particularly important for jails.”).

155. See Brief for Petitioner-Appellant, *Norwood v. Bourland*, No. 09-56969 (9th Cir. Jan. 31, 2009); Amended Complaint and Demand for Jury Trial at 5, *Norwood v. Cate*, No. 1:09-CV-00330 (E.D. Cal. Aug. 14, 2009).

156. Brief for Petitioner-Appellant, *supra* note 155, at 38, 41.

157. In so doing, the California lawsuit echoed an early pattern of petitioning: although some early petitions complained directly of prison conditions, some centered on other complaints, delivering word of prison conditions indirectly or even unwittingly. See *infra* note 187 (listing petitions complaining directly of prison conditions). For examples of petitions broadcasting news of prison conditions in less direct ways, see, for example, *Legislative Petitions Database: Petition of Littleton Tazewell, Williamsburg, to Va. Legislature, Dec. 6, 1799*, LIBR. OF VA., <http://www.lva.virginia.gov/public/guides/petitions/petitionsSearch.asp> (search “Tazewell, Littleton”; only link) (asking to be compensated “for the loss of his slave’s legs, which had to be amputated due to frost while imprisoned in the jail on a charge of felony”); see also *Petition of Charleston Sheriff Nathaniel Cleary, Oct. 1825*, DIGITAL LIBR. ON AMERICAN SLAVERY, <http://library.uncg.edu/slavery/details.aspx?pid=1439> (telling legislators that the 37.5 cent-per-day allowance for each prisoner was insufficient “to provide food, much less blankets or clothing”).

158. *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (“[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing

courts. Particularly in the context of closed institutions, access to the courts has no substitute. It is fundamental not only to the realization of individual rights, but to the functioning of democratic government, a fact embodied, as illustrated in the next Section, both in the original right to “petition the Government for a redress of grievances”¹⁵⁹ and in contemporary norms about open courts and public participation in the judicial process.

B. The (First) Rise and Fall of Petitioning: Information and Limited Infrastructure

Petitioning arose to protect the free flow of information from individuals to the government, for their mutual benefit. Many colonial and early republican communities lacked news or political structures to facilitate the passage of information to assemblies.¹⁶⁰ Politicians were part-time and not trained as lawmakers, and they had little time for independent investigations of social problems.¹⁶¹ Petitions provided information where formal channels did not exist.¹⁶²

Petitioners recognized their role in providing information. A common introduction to a colonial petition read as follows:

L[e]st . . . our beeing remoat & . . . o[u]t of sight might too much burie us in oblivion, or want of information might render you the les sensible of our condition, wee make bold to remind you, & . . . to add a litell breath to the saylls and fethers to the winges of your solicitous indeavours in our behalfe¹⁶³

Colonies relied on petitions to make them aware of people in need of public funds, including those caring for orphans, the sick, and the insane.¹⁶⁴

of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.”).

159. U.S. CONST. amend. I.

160. Higginson, *supra* note 35, at 153.

161. *Id.*

162. *See id.* Higginson collected several examples of early petitions from the Colonial Records of Connecticut from which I draw for the discussion *infra*. *See infra* notes 163-166, 168-169, 181-183, 185-186.

163. 2 COLONIAL RECORDS OF CONNECTICUT: THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 530 (1850) (date of assembly: 1668) [hereinafter CONNECTICUT RECORDS, cited with the date of assembly].

164. 2 CONNECTICUT RECORDS 255 (1675) (describing intervention by the assembly to guarantee meadow lands to the petitioner); 2 CONNECTICUT RECORDS 326 (1677) (describing a petition

Individuals and towns petitioned the government directly, in the absence of a welfare bureaucracy or a systematized data collection mechanism, to inform decisions about where roads should go,¹⁶⁵ boundary disputes,¹⁶⁶ and assistance to towns;¹⁶⁷ to check public corruption or malfeasance;¹⁶⁸ and to plead for the protection of debtors.¹⁶⁹ Well into the mid-nineteenth century, petitioners wrote to the government requesting release of prisoners,¹⁷⁰ pardons,¹⁷¹ improved treatment of “colored citizens,”¹⁷² labor rights,¹⁷³ compensation for loss of ships seized in wartime,¹⁷⁴ relief from unjust confinement in prison,¹⁷⁵

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- for child custody and support); 12 CONNECTICUT RECORDS 309-10 (1764) (describing a petition for child support funds); 13 CONNECTICUT RECORDS 612 (1772) (describing an ill minister’s petition for family support).
165. 2 CONNECTICUT RECORDS 255 (1675) (petition leading to a bill for highway construction); 14 CONNECTICUT RECORDS 118 (1773) (selectmen petition for replanning of impassable roads); 15 CONNECTICUT RECORDS 161 (1775) (petition leading to taxation for highway repair).
166. 2 CONNECTICUT RECORDS 65-66 (1667) (establishing a committee to settle boundary disputes in response to a petition); 3 CONNECTICUT RECORDS 203 (1686) (appointing officers to study a boundary dispute between towns in response to a petition).
167. RALPH VOLNEY HARLOW, *THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825*, at 19 (1917) (listing the various Massachusetts legislative committees hearing petitions, and noting that the residents “petitioned for anything they wanted, and their wants were both varied and curious”).
168. 14 CONNECTICUT RECORDS 132-33 (1773) (petition lodging complaints against an indolent constable and tax collector, which led to a new appointment).
169. Higginson, *supra* note 35, at 146 (discussing debtor petitions); see Ruth Bogin, *Petitioning and the New Moral Economy of Post-Revolutionary America*, 45 WM. & MARY Q. 391, 407-12 (1988) (reviewing the efforts of post-revolutionary debtors to petition for debt relief); Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right To Petition*, 66 FORDHAM L. REV. 2153, 2181 (1998) (noting that “debt prisoners . . . filed many such petitions”).
170. An Act for the Relief of Solomon Boston, ch. 2, 6 Stat. 42 (1801); An Act To Discharge Robert Sturgeon from His Imprisonment, ch. 20, 6 Stat. 40 (1800); H.R. JOURNAL, 12th Cong., 2d Sess. 577 (1812) (petition of prisoner Royal Converse praying for his release).
171. *Petition Signed by Citizens in Shelby County, Alabama*, 1822, ADAH DIGITAL COLLECTIONS, http://digital.archives.alabama.gov/cdm4/item_viewer.php?CISOROOT=/voices&CISOPTR=3824&CISOBOX=1&REC=5 (requesting the release of five men charged with abetting a sixth “in committing, a mayhem, by biting, off a small part of one James A Moors left Ear”) (last visited Aug. 16, 2012).
172. S. JOURNAL, 40th Cong., 1st Sess. 91 (1867) (presenting resolutions adopted at “mass meetings of colored citizens . . . setting forth their miserable condition and praying relief; which were referred to the Committee on the Judiciary”).
173. *Id.* (presenting a petition of “mechanics and laboring men” requesting eight-hour work day).
174. *Richard Smith’s Diary*, Jan. 26, 1776, LIBR. OF CONGRESS: AM. MEMORY, <http://memory.loc.gov/ammem/hlawquery.html> (last visited Dec. 11, 2012) (search

special relief from taxes and tariffs,¹⁷⁶ payments to the war wounded,¹⁷⁷ payment for extraordinary expenses incurred as a result of disasters,¹⁷⁸ exemptions from military service,¹⁷⁹ and compensation for government torts.¹⁸⁰ Petitioners included both those few with the vote and the many without it, including women,¹⁸¹ Native Americans,¹⁸² slaves,¹⁸³ and children,¹⁸⁴ in a manner that some have argued “mitigated some of the hardship of limited colonial suffrage.”¹⁸⁵

Petitions had the capacity to translate into individual relief or structural change, even for prisoners. For one, felons used the petition right to communicate with the government,¹⁸⁶ including about prison conditions.¹⁸⁷ In

“Richard Smith Charming Peggy”; first result) (describing a petition requesting compensation for the ship *Charming Peggy*, which was seized by the British in 1775).

175. S. JOURNAL, 18th Cong., 2d Sess. 56 (1824) (petition of Oliver Blake for compensation for military service and unjust imprisonment).
176. See, e.g., An Act for the Relief of the Sufferers by Fire, in the Town of Portsmouth, ch.6, 6 Stat. 49 (1803).
177. See, e.g., H.R. JOURNAL, 30th Cong., 1st Sess. 171 (1847) (petition of Alexander McDonald).
178. S. JOURNAL, 34th Cong., 3d Sess. 132 (1857) (petition for relief of shipwrecked mariners).
179. S. JOURNAL, 38th Cong., 2d Sess. 114 (1865) (petition of ministers requesting exemption from military service).
180. H.R. JOURNAL, 15th Cong., 1st Sess. 4 (1817) (petition for compensation for a house used as barracks during “the late war”).
181. See LINDA J. LUMSDEN, RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT OF ASSEMBLY 54-58 (1997) (noting Elizabeth Cady Stanton and Susan B. Anthony’s drive to launch a “mammoth petition’ . . . too big for Congress to ignore” (quoting 3 ELIZABETH CADY STANTON, SUSAN B. ANTHONY & MATILDA JOSLYN GAGE, HISTORY OF WOMAN SUFFRAGE: 1876-1885, at 58 (1886))); Jacob Katz Cogan & Lori D. Ginzberg, *1846 Petition for Woman’s Suffrage, New York State Constitutional Convention*, 22 SIGNS 427, 437-38 (1997); see also 1 CONNECTICUT RECORDS 319 (1658) (women petitioners complaining of a minister’s indiscretion and seeking replacement); 2 CONNECTICUT RECORDS 84 (1668) (female petitioner’s claim referred to town officials).
182. 3 CONNECTICUT RECORDS 219 (1686) (Podunck Indian land petition); 4 CONNECTICUT RECORDS 280 (1698) (Pequott Indian petition); 14 CONNECTICUT RECORDS 130 (1773) (Massatucksett tribe land petition).
183. 2 PUBLIC RECORDS OF THE STATE OF CONNECTICUT, 1778-1780, at 427-28 (1779) (approval of an emancipation petition from a “negro man slave” owned by a resident who joined the British).
184. Children would have petitioned through adults, as guardians ad litem or otherwise. Mark, *supra* note 169, at 2182.
185. Higginson, *supra* note 35, at 153.
186. 6 CONNECTICUT RECORDS 54 (1718) (act compelling petitioners to appear before the General Assembly).

one case in Georgia, the state legislature, responding to petitions alleging inhumane treatment of prisoners, “‘immediately resolved itself into a Committee of the Whole House upon said Petition,’ and went in a body to the jail to look into the matter.”¹⁸⁸ Likewise, debt prisoners’ petitions tracked rising economic hardship and ultimately spurred the creation of a system of debt relief and other legislative interventions, including investigations of prisoner treatment.¹⁸⁹ Indeed, in eighteenth-century Virginia, more than half of the bills enacted by the state legislature began as petitions.¹⁹⁰

C. *The Information Function of Lawsuits*

Petitions were critical sources of information in the early days of the Republic. The right disappeared from the mainstream not as an inevitable consequence of time nor for the doctrinal reasons contemporary jurisprudence assumes,¹⁹¹ but at the behest of pro-slavery Southerners, bent on keeping abolitionist petitions out of Congress, in what became known as the gag-rule crisis.¹⁹² As abolitionist groups learned to stall House business by flooding

187. There is a long history of petitions protesting prison conditions at the state and federal levels. See, e.g., JOHN FRASER, A PETITION REGARDING THE CONDITIONS IN THE C.S.M. PRISON AT COLUMBIA, S.C., ADDRESSED TO THE CONFEDERATE AUTHORITIES 27-29 (George L. Anderson ed., Univ. of Kan. Pub. 1962) (1864) (petition on behalf of Union officers confined in Confederate prison complaining of “rations short in quantity & very inferior in quality,” a “great want of adequate shelter,” “officers weak & sickly from long confinement & insufficiently supplied with clothing, blankets & shoes hav[ing] suffered severely from cold & rain,” and the “provoking detention of letters monies & boxes from home”); *The Petition of Isaac Ogden, George Watts, and Arent Kingsland*, reprinted in NEW JERSEY IN THE AMERICAN REVOLUTION 1763-1783: A DOCUMENTARY HISTORY 246 (Larry R. Gerlach ed., 1975) (petition of suspected Tory loyalists to the New Jersey Council of Safety, writing of overcrowding, lack of water or food, and unsanitary conditions).

188. Higginson, *supra* note 35, at 147 n.27 (quoting HARLOW, *supra* note 167, at 97).

189. See sources cited *supra* note 169.

190. RAYMOND BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 64, 122 (1979); see also Higginson, *supra* note 35, at 144 (noting that petitioning “originated more bills in pre-constitutional America than any other source of legislation”).

191. See *infra* Part V.

192. Changes in mass politics set the scene for the decline of petitioning, and the gag-rule crisis forced the tide at the federal level. See Mark, *supra* note 169, at 2216.

By the early nineteenth century, the petition system had begun to fray. Congress had long adhered to a practice of “attempt[ing] to pass favorably or unfavorably on every petition,” beginning each legislative session by reading petitions submitted from the states. Higginson, *supra* note 35, at 143; see also *id.* at 157 (noting that Jacksonian sentiment demanded total availability of representatives, who were said to owe “unrelaxing

Congress with antislavery petitions, a coalition of angered Southern legislators demanded that the petitions be sent to committees to die and ultimately secured the passage of a standing gag order.¹⁹³ The petition right would not be reawakened for nearly one hundred years.¹⁹⁴

responsibility to the vigilance of public opinion” (quoting Democratic Review, *An Introductory Statement of Democratic Principle*, in SOCIAL THEORIES OF JACKSONIAN DEMOCRACY 21, 23 (Joseph L. Blau ed., 1954)). House rules were ill-suited to volume, a lesson soon incorporated by enterprising advocates, who used petitions “for mass agitation on numerous topics, ranging from the legality of the Bank of the United States to the annexation of Texas.” David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 LAW & HIST. REV. 113, 119 (1991). By the 1830s, groups like the American Anti-Slavery Society had learned how to slow legislative business by flooding Congress with hundreds of thousands of petitions. See, e.g., *id.* at 121, 132.

Legislators used procedure as a shield from substance, responding to petitions with motions to refuse. But these members, led by a coalition of angered Southerners, soon demanded a different solution: that petitions be tabled, or sent to committees to die. See, e.g., *id.* at 123. By 1840, the House adopted a standing “gag” rule to fully refuse antislavery petitions: “That no petition, memorial, resolution, or other paper praying the abolition of slavery . . . shall be received by this House, or entertained in any way whatever.” Robert P. Ludlum, *The Antislavery “Gag-Rule”: History and Argument*, 26 J. NEGRO HIST. 203, 215 (1941). After four years and considerable parliamentary brinkmanship, including the near-censure of John Quincy Adams, the anti-gag rule coalition was able to rescind the gag rule in exchange for a compromise that allowed petitions to be received but silenced by referral to a committee where they would “sleep the sleep of death.” See Frederick, *supra*, at 139 (quoting 12 REG. DEB. 2000-01 (1835) (statement of Rep. John Quincy Adams)). For general historical treatments of the gag-rule crisis, see MILLER, *supra* note 2, 258, 269, which details John Quincy Adams’s efforts to foster debate about slavery in Congress; Frederick, *supra*, at 114, which argues that procedural barriers instituted in reaction to antislavery petition campaigns “led to the decline of petitioning as a means for individual citizens to communicate grievances on issues of public policy to Congress”; and Mark, *supra* note 169, at 2212-26, which argues that petitioning subsided as a result of changes in mass politics.

193. See *supra* note 192 (reviewing the gag-rule crisis).

194. Many state constitutions contain a right to “petition the legislature,” as distinct from the federal constitutional right to petition the “Government” writ large. See MD. CONST. art. XI Declaration of Rights (“That every man hath a right to petition the Legislature, for the redress of grievances, in a peaceable and orderly manner.”); see, e.g., Edmund G. Brown, *The Right To Petition: Political or Legal Freedom?*, 8 UCLA L. REV. 729, 731-32 (1961) (discussing California’s statutory provision). At the state level, direct petitioning evolved into lobbying, and in certain contexts, to initiative and referendum rights. Scholars of the Progressive Era expressly linked initiative and referendum campaigns to the right to petition. See, e.g., W.A. Coutts, *Is a Provision for the Initiative and Referendum Inconsistent with the Constitution of the United States?*, 6 MICH. L. REV. 304, 316 (1908) (“[T]hose who contend for the constitutionality of the Initiative and Referendum . . . insist that its exercise is as consistent with the Constitution of the United States as is the exercise of the right of petition They believe that the petition should cease to be a weak and impotent toy, the amusement of the legislator, the lobbyist, and the corporation lawyer; that it should develop

Alternative structures eventually replaced the communicative roles of petitioning in most corners: the expansion of the franchise and the rise of bureaucratic information-collection mechanisms made direct communication with the government arguably less critical, in some contexts, than it had once been. But certain corners of contemporary society, most notably prisons, retain the characteristics of information poverty that marked early American life and that gave rise to constitutional protection for petitioning the government. As used here, “information poverty” refers to the condition in which an institution or dynamic¹⁹⁵ is relatively or wholly inaccessible from the outside, and knowledge of that institution or dynamic does not flow, or flow readily, from the inside. Information poverty thus is distinct from, and more serious than, lack of transparency: whereas transparency refers to the ability to see into an institution, information poverty pairs the inability to see in with the inability to speak out from within.¹⁹⁶ Information-poor institutions like prisons lack the alternative information-collection and information-dissemination mechanisms available to free society, making it essential to protect—perhaps specially—prisoners’ direct communication with the government. It is perhaps not surprising, then, that when the right to petition resurfaced in the mid-twentieth century, one of the first contexts in which it did so was in prisons, when the Court situated prisoners’ rights to access the courts—until then, vaguely rooted—in the right to petition in *Cruz v. Beto*, discussed *infra* Part V.¹⁹⁷

As the judicial and legislative roles diverged in the nineteenth century, early ideals about the role of petitions in communicating with government translated into ideas about the roles of lawsuits, trials, and newly independent courts in providing information to a public beyond the litigants themselves,¹⁹⁸ a pattern

into the Initiative and become a club representing the power of the people in their sovereign capacity.”). As will be noted later, both state and federal petition rights remain viable.

195. I say “institution or dynamic” to suggest that relationships or social paradigms may be information poor—a well-disguised but abusive marriage, for instance, may so restrain the ability to “speak out” as to be information poor; a leper colony, a ghetto, or an exploited child may be so isolated from the public at large as to lack transparency, and so deprived as to lack the means to communicate to the outside.
196. Thus, as I use the term “information poverty,” the White House may lack transparency, but it is not information poor, as those within may communicate with the outside, but the National Security Agency is information poor, as it is both difficult to see in and difficult to report out. Information poverty is concerned with flows of information from the inside to the outside; information flows may also be stifled internally, but that is irrelevant here.
197. 405 U.S. 319, 321 (1972); see discussion *infra* Section V.A.
198. Early legislatures, including the national Congress, played quasi-judicial roles in some areas, a vestige of English practice. See, e.g., Higginson, *supra* note 35, at 145 (noting that the early Connecticut legislature, “like other colonial legislatures, performed both legislative and

illustrated by the California case discussed above.¹⁹⁹ Thus the modern Court has justified open-courts rules and the right to litigate as serving not only procedural fairness ends—the elimination of “secret bias or partiality,”²⁰⁰ the preservation of the fact and “appearance of justice”²⁰¹—but governance ends, from the “prophylactic purpose” of “providing an outlet for community concern, hostility, and emotion,”²⁰² to the construction of “the court system as a designated alternative to force.”²⁰³

As petitioning long played a role as a structural counterweight to information problems in government, so litigation, one form of the modern petition,²⁰⁴ can serve as “a vehicle for effective political expression and association, as well as a means of communicating useful information to the public.”²⁰⁵ It can “facilitate the informed public participation that is a cornerstone of democratic society.”²⁰⁶ And it can provide an avenue for “the distinctive contribution of a minority group to the ideas and beliefs of our society.”²⁰⁷ As such, contemporary courts enshrine norms of public information in protecting open trials, civil and criminal,²⁰⁸ and in affirming the structural importance of lawsuits. The protections share not only justifications

judicial functions”); *see also id.* at 146 (“Partly because early colonies lacked strong judicial institutions, the legislatures heard and resolved these conflicts.”).

199. *See supra* note 155 and accompanying text.

200. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

201. *Id.* at 572 (1980) (quoting *Offut v. United States*, 348 U.S. 11, 14 (1954)).

202. *Id.* at 571.

203. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002).

204. As noted elsewhere, the petition right also protects certain forms of communication to the legislature, including lobbying. *See infra* note 251.

205. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2500 (2011) (quoting *In re Primus*, 436 U.S. 412, 431 (1978)).

206. *Id.*

207. *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 431 (1963)); *see infra* note 249.

208. *See, e.g., Presley v. Georgia*, 130 S. Ct. 721, 722 (2010) (per curiam) (reversing a conviction because a “lone courtroom observer” was excluded from a voir dire); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980) (holding that the First and Fourteenth Amendments guarantee the public and the press a right to attend criminal trials absent an overriding articulated interest); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court of L.A. Cnty.*, 20 Cal. 4th 1178, 1181-82 (1999) (establishing the public’s right to access noncriminal proceedings); *see also* Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 80, 87, 92 (2011) (discussing the norm of publicity and noting that state and federal constitutions “entrench th[e] norm of publicity in courts by turning rituals of public attendance into rights”). The open courts norm is echoed in concerns about closed arbitral proceedings and the dearth of written, reasoned opinions in some courts and arbitral fora. *Id.* at 111 & n.180.

but outputs: as open courts rules “enhance the integrity and quality of what takes place”²⁰⁹ in the courtroom, so petition rights, particularly in conditions of information poverty, serve to “enhance the integrity and quality of what takes place” in total institutions like prisons.

As Justice Blackmun noted, particularly because a person “convicted of a serious crime and imprisoned usually is divested of the franchise, the right to file a court action stands . . . as his most ‘fundamental political right, because preservative of all rights.’”²¹⁰ Thus, if litigation carries great weight where information is rich, the right to litigate takes on heightened meaning where information is poor. Seen in this light, efforts to restrict prisoners’ ability to bring claims about constitutional violations—like the prior physical injury requirement, through the direct and cascade mechanisms detailed in Part I—are especially problematic, both because they interfere with prisoners’ individual rights and because they interfere with the second tier of protections enshrined in the Petition Clause: those that protect public access to information about closed institutions and problems evading the view of the government.

IV. HARM TO THE COURTS: INTERFERING WITH THE SEPARATION OF POWERS

The legislative campaigns of the mid-1990s bore traces of antebellum fights over slavery; again in the 1990s, a group bent on keeping the voices of “undesirables” from overwhelming a government institution used law and procedure to make it harder, if not impossible, for that group to bring suit.²¹¹ But the gag-rule crisis and the PLRA did more than restrict outcomes for litigants themselves. Both affected the ability to be heard in the first place. In addition to chilling prisoner grievances and restricting public knowledge of prison conditions, the physical injury requirement thus inflicts a third level of harm to the courts as institutions.

In the prison context, retaliation is a problem not only for the punishment it inflicts, but also for the punishments it may conceal. By blocking access to the courts, the physical injury requirement permits both retaliation and

209. *Richmond Newspapers*, 448 U.S. at 578.

210. *Hudson v. McMillian*, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring in the judgment) (quoting *Yick Wo. v. Hopkins*, 118 U.S. 356, 370 (1886)).

211. The gag rule blocked the arrival of information to the legislature, and the physical injury requirement blocks the arrival of information to the courts. The analogy is nonetheless more apt than it would be in the contemporary sphere, as early legislatures played a judicial role. See *supra* note 198.

underlying violations to go unremedied. In so doing, the requirement, as applied to violations of intangible rights, interferes with the courts' ability to make real the rights that prisoners maintain. Alongside harms to plaintiffs and the public, the prior physical injury requirement thus interferes with the constitutional separation of powers, posing discrete harms to the judicial branch by insulating certain practices from judicial inquiry.

An objection to this argument might be that, since Congress has plenary power to dictate the scope of an Article III court's subject matter jurisdiction,²¹² or in the alternative, since Congress may impose restrictions on pleading or damages, the prior physical injury requirement is a permissible exercise of congressional power. But whether the prior physical injury requirement is read as a jurisdictional bar or a limitation on damages,²¹³ Congress may not nullify constitutional rights by eliminating remedies for their violation, and a "serious constitutional question" . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."²¹⁴ To foreclose *all* relief, or to read the provision as a categorical jurisdictional bar, would thus pose the obvious due process and separation-of-powers problems that arise when "the laws furnish no remedy for the violation of a vested legal right."²¹⁵

212. U.S. CONST. art. I, § 8 (authorizing Congress to constitute inferior tribunals and to make "all laws . . . necessary and proper" to carry out that end); *id.* art. III (vesting the judicial power in the Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish" and delimiting federal judicial power).

213. The prior physical injury requirement is amenable to multiple constructions. Under one reading, § 1997e(e) precludes all remedies, not only damages. Although the subsection is labeled "[l]imitation on recovery," the text specifies that "[n]o Federal civil action" for mental or emotional injury "may be brought" without a prior showing of physical injury, language some courts have interpreted as either a categorical jurisdictional bar or a plenary limitation on remedies. 42 U.S.C. § 1997e(e) (2006). Under an alternative reading, § 1997e(e) limits only damages, leaving injunctive and declaratory relief available. (An incongruous intermediate position, adopted by some circuits, reads § 1997e(e) to limit compensatory damages, but not nominal damages.) *See supra* notes 96-99 and accompanying text. Each construction poses separation-of-powers problems, discussed here and above. *See supra* Section II.A (discussing the circuit split on this issue).

214. *Webster v. Doe*, 486 U.S. 592, 603 (1988); *see also Zehner v. Trigg*, 952 F. Supp. 1318, 1331 (S.D. Ind. 1997) ("There is a point beyond which Congress may not restrict the availability of judicial remedies for the violations of constitutional rights without in essence taking away the rights themselves by rendering them utterly hollow promises."), *aff'd*, 133 F.3d 459 (7th Cir. 1997).

215. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). These problems would arise both in eliminating the existence of a forum in which to press a given constitutional claim and because it is unconstitutional to eliminate a constitutional right without amending the Constitution. Although the "plain text of the Constitution neither supports nor proscribes the power of Congress to place limitations solely on the exercise of a federal court's equity

Alternatively, what if the statute is read not to foreclose *all* damages, but only some? The absence of a damages remedy does not in itself violate the Constitution, as evidenced by the constitutionality of the doctrines of absolute and qualified immunity, which leave plaintiffs without damages.²¹⁶ But § 1997e(e) does more than limit damages. It creates arbitrary hierarchies among constitutional rights and, in the process, interferes with the separation of powers by permitting the political branches to be the arbiters of the constitutionality of their own conduct and by restricting the delivery of colorable constitutional arguments to the courts.

Retaliation constructively denies access to the courts, and in so doing, constructively prohibits analysis of the litigant's underlying claim.²¹⁷ Because the restrictive reading of the physical injury requirement facilitates such retaliation, it requires the sort of "vigilant[ce]" necessitated when, as the Court has said, Congress—or for that matter, the Executive—"imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge."²¹⁸

Two cases help to illustrate. In *Legal Services Corp. v. Velazquez*, the Court held unconstitutional a congressional funding condition that prohibited legal services attorneys from challenging state or federal welfare statutes.²¹⁹ The Court held that the condition violated the First Amendment, and in the process, "threaten[ed] severe impairment of the judicial function" by "sift[ing] out cases presenting constitutional challenges in order to insulate the Government's laws from judicial inquiry."²²⁰ In "seeking to prohibit the

jurisdiction," "Congress may codify the traditional equitable remedies offered by a federal court in its exercise of equity jurisdiction, but it may neither expand nor limit those powers in cases arising under the Constitution." Theodore K. Cheng, *Invading an Article III Court's Inherent Equitable Powers: Separation of Powers and the Immediate Termination Provisions of the Prison Litigation Reform Act*, 56 WASH. & LEE L. REV. 969, 1017 (1999) (making a separation-of-powers argument about a different section of the PLRA).

Of course, the prior physical injury requirement does not exist in a vacuum; read in tandem with the PLRA's drastic limitations on attorney's fees and restrictions on injunctive relief, it may operate to eliminate a forum for the vindication of constitutional rights, creating yet another layer of due process problems.

216. For a discussion of nominal damages and distinctions between prisoners and non-prisoners, see *supra* notes 118-128 and accompanying text.
217. The same can be said of other practices facilitated by the PLRA, notably the imposition of complex internal grievance procedures. See *supra* note 131.
218. *Velazquez*, 531 U.S. at 548.
219. *Id.* at 537. The statute prohibited challenges to the statutory or constitutional validity of the laws.
220. *Id.* at 546.

analysis of certain legal issues and to truncate presentation to the courts,” the majority wrote, the condition “prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power.”²²¹ The Court rejected the funding condition as an invalid “attempt . . . to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider.”²²²

In much the same way, the physical injury predicate operates to “prohibit the analysis of certain legal issues” and “to insulate the Government’s [practices] from judicial inquiry.”²²³ Although *Velazquez* dealt with courtroom speech, the analogy here is apt, as the principal holding of *Velazquez* was not that the content of the speech was protected, but that unrestricted argument played a functional role in ensuring that the judiciary could exercise appropriate oversight of matters within its “province”²²⁴:

An informed, independent judiciary presumes an informed, independent bar. Under [the statute at issue] however, cases would be presented by LSC attorneys who could not advise the courts of serious questions of statutory validity. The disability is inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case.²²⁵

Velazquez identifies a distinct harm in depriving the courts of the information on which they rely to make decisions. Thus did the Court rely on the words of *Marbury v. Madison*, that “[t]hose . . . who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.”²²⁶ Like the statute in *Velazquez*, the physical injury requirement pushes courts to “close their eyes on the constitution”²²⁷ and the underlying violation and see only the requirement itself, thereby creating a barrier to raising intangible constitutional claims in the absence of an arbitrary predicate.²²⁸ In turn, the requirement restricts the

221. *Id.* at 545.

222. *Id.* at 546.

223. *Id.* at 545-46.

224. *Id.* at 545 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

225. *Id.*

226. *Id.* at 545 (quoting *Marbury*, 5 U.S. at 178).

227. *Id.*

228. In some cases, it is the requirement itself that creates these barriers; in other cases, it is the restrictive reading of the requirement that creates barriers.

argumentative avenues open to lawyers and to pro se litigants.²²⁹ The statute's vague language and lack of clarity about prisoners' ultimate ability to recover further chills the bringing of meritorious claims.²³⁰

Likewise, read in the context of *Boumediene v. Bush*, the restrictive reading poses problems for the separation of powers, in that it impairs the ability of the courts to exercise the power of judicial review.²³¹ In order to protect individual liberty, the *Boumediene* majority said, it was essential to preserve the power of the courts to assess the constitutionality of the government's policies: "Security subsists . . . in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."²³²

Boumediene speaks to the duty of the judiciary to preserve its role as a forum for those desiring to challenge the fact of their confinement. But the language of *Boumediene* can be read to transcend habeas challenges, affirming a general "duty and authority of the Judiciary to call the jailer to account"²³³ and a continuing role for the courts in checking the exercise of power by the political branches.²³⁴ *Boumediene* strengthens "the notion that the denial of access raises constitutional concerns whenever it interferes with judicial resolution of viable

229. See, e.g., *Hearing on H.R. 4109, supra* note 12, at 8 (statement of Stephen Bright, President, Southern Center for Human Rights) ("Prior to enactment of the PLRA, we brought suit on behalf of women who were constantly splattered with bodily waste as a result of being housed with severely mentally ill women. Our clients could not sleep at night because the mentally ill women shrieked and carried on loud conversations, often with themselves. We would not bring that suit today. Our clients were degraded, they were deprived of sleep, but they suffered no physical injury."); see also *id.* (noting that the requirement "changes the framework of the debate because it provides incentives for officials to argue that truly reprehensible and degrading conduct was acceptable because it did not produce a 'physical injury'").

230. See, e.g., cases cited *supra* note 135 (noting disagreements about what constitutes physical injury).

231. 553 U.S. 723, 797 (2008).

232. *Id.*

233. *Id.* at 745.

234. See *id.* at 742-43 (discussing separation-of-powers cases). *Boumediene* cites Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952): "[T]he Constitution diffuses power the better to secure liberty." See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) ("But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.").

claims,”²³⁵ as such denials compromise the ability of the courts to fulfill their constitutional role. Fulfilling such duties requires that courts hear of potential excesses, in conditions-of-confinement cases as in fact of confinement cases.²³⁶ Thus the *Boumediene* Court underscored that prisoners’ access to the courts “is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.”²³⁷

Both *Velazquez* and *Boumediene* thus stand for the broad principles that access-to-courts violations harm not only litigants but the courts themselves, and that courts must resist efforts to restrict their ability to check governmental excess by ensuring that colorable constitutional arguments reach the judiciary. Understood in this way, the physical injury requirement poses separation-of-powers problems. By creating arbitrary and unpredictable barriers to recovery, the requirement interferes with the core functioning of the judiciary by prescribing a formalist principle with the potential to eliminate “intangible” constitutional claims, like religion, process, or speech claims.²³⁸ Each of the branches is implicated in this process. When the political branches retaliate or facilitate retaliation, as through the physical injury requirement, they assert the prerogative to insulate certain actions from review.²³⁹ And when

235. Stephen I. Vladeck, *Boumediene’s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2146 (2009). The argument is not that all barriers, incidental or severe, to access are inherently unconstitutional, but that barriers *may* pose constitutional concerns.

236. Even in otherwise limiting holdings, the Court has emphasized that prisoners’ rights to challenge the fact of confinement and the conditions of confinement stand on equal constitutional footing. See, e.g., *Lewis v. Casey*, 518 U.S. 343, 355 (1995) (citing *Bounds v. Smith*, 430 U.S. 817 (1977)) (restricting the ability to litigate, but noting at a minimum that “[t]he tools [*Bounds*] requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement”); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) (“The right of access to the courts, upon which *Avery* was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ.”).

237. *Boumediene*, 553 U.S. at 797.

238. See, e.g., cases cited *supra* note 135 (noting disagreements about what constitutes physical injury).

239. A further argument might be made that, if the restrictive courts consider themselves bound by the statute to act unconstitutionally (e.g., by eliminating a forum for the vindication of a constitutional right), the statute might pose problems under *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871). In that case, the Court held that Congress had “inadvertently passed the limit which separates the legislative from the judicial power” when it passed a bill directing the Court to resolve a pending case in a particular way. *Id.*; see Amanda L. Tyler,

the judiciary uses a formalist reading of the physical injury requirement to deny retaliation claims, it is “deferring to the Executive on the question of which suits it will hear,” and thereby “entrusting to the Executive [the judiciary’s] own duty to recognize violations of individual rights.”²⁴⁰ In this way, the physical injury requirement—and in particular the restrictive reading—interferes with the “duty and authority of the Judiciary to call the jailer to account,”²⁴¹ and thus impermissibly infringes upon the structural separation of powers by enabling the political branches to be the final arbiters of the constitutionality of their own conduct.

The Story of Klein: The Scope of Congress’s Authority To Shape the Jurisdiction of the Federal Courts, in *FEDERAL COURTS STORIES* 87, 109 (Vicki C. Jackson & Judith Resnik eds., 2010) (citing Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 *GEO. L.J.* 2537, 2549 (1998)). Tyler and others have argued that *Klein* stands for the proposition that the legislature acts unconstitutionally when it asks or forces the courts to act unconstitutionally. *Klein* demands that courts reject such attempts, to avoid becoming pawns in the denial of constitutional rights. See also Lawrence G. Sager, *Klein’s First Principles: A Proposed Solution*, 86 *GEO. L.J.* 2525, 2528-29 (1998) (arguing that in *Klein*, Congress “attempted to conscript the judiciary in a constitutional charade” by asking the Justices to “implicate themselves in what they saw as an injustice, and furthermore, to do so in the public light of judicial reason-giving for articulate reasons that went to the heart of the injustice”). Sager argues that *Klein* demands that the judiciary “not permit its . . . authority to be subverted to serve ends antagonistic to its actual judgment . . . [and] “will resist efforts to make it seem to support and regularize that with which it in fact disagrees.” *Id.* at 2529. Thus, if the statute requires the courts to execute an unconstitutional agenda, it could be argued that in altering decisional prerogatives of the judiciary, and in implicating the courts in the business of arbitrarily eliminating prisoners’ ability to vindicate the constitutional rights they retain, the prior physical injury requirement creates the problem that led the Court to strike down the statute in *Klein*. Congress, in other words, acted unconstitutionally in directing the courts to impose arbitrary barriers to recovery for constitutional violations. *But see* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (holding that Congress could not retroactively require federal courts to reopen final judgments and noting that “[w]hatever the precise scope of *Klein*, . . . its prohibition does not take hold when Congress ‘amend[s] applicable law’” (quoting *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 441 (1992))).

240. *Access to Courts*, 122 *HARV. L. REV.* 1151, 1200 (2009) (discussing political questions outside the prison context, but speaking broadly to questions of access to courts and the separation of powers, and arguing that “*Marbury v. Madison* distinguished political questions as such, which the courts could not hear, from those involving individual rights, which they emphatically *should*”).

241. *Boumediene*, 553 U.S. at 745; see *Vladeck*, *supra* note 235, at 2109-10.

V. CONSTITUTIONAL IMPLICATIONS: TOWARD A THEORY OF PETITIONING DISTINCT FROM SPEECH

In arguing that petition violations are not rightly understood as “mental or emotional,” the preceding pages have sketched a portrait of petition violations not merely as injuries to individuals, but as structural injuries, comprised of distinct informational harms to the public and structural harms to the courts. At the most basic level, this portrait points to the need for doctrinal intervention to remedy the persistent denial of prisoner First Amendment claims absent a showing of an arbitrary physical predicate.

In broader terms, this portrait suggests not only the imperative to shield prisoner petitions from the prior physical injury requirement, but to reconsider the direction of recent petition jurisprudence. For reasons to be explained, the courts have adopted, most recently in *Borough of Duryea v. Guarnieri*,²⁴² the practice of looking to speech doctrine for tools with which to address petition claims.

This Part argues that that practice is misguided. When courts look to speech doctrine to resolve petition claims, they capture the expressive elements of petitioning but neglect the protection at the core of the right. Petitioning protects the right to invoke the state’s adjudicatory capabilities and the state’s interest in providing them. As such, the petition guarantee protects the act of reaching to the government for redress, rather than the content of the grievance itself. Rather than being understood as a variant of the right to free speech, the right to petition is best understood as akin to a due process protection for the right to access the courts, perhaps with special concern for corners of society marked by conditions of information poverty.²⁴³

The lawsuits-as-information model suggests that the Supreme Court’s most recent holding on petitioning, *Guarnieri*, was misguided, or in the alternative, that further extension of the *Guarnieri* principle would be error. This Part argues that such extension would threaten the rights of petitioners, perhaps none so critically as prisoners.

In order to contextualize this argument, Section V.A explains the process by which petition cases returned to the courts a century after their marginalization in the wake of the gag-rule crisis. It shows that the temporary quieting of petitioning led to confusion in the courts, and ultimately to the

242. 131 S. Ct. 2488 (2011).

243. Seen in this light, a sound theory of the Petition Clause may do as much to illuminate the contemporary requirements of due process in conditions of information poverty as the converse.

conflation of speech and petition. And it shows that, even after courts disaggregated petition and speech cases, they maintained the practice of borrowing tests from one context to reason about the other. Section V.B uses the holding in *Guarnieri* to illustrate five problems that stem from this practice, and argues that continuing or expanding such a practice would compromise the rights of petitioners in general, and prisoners in particular. The suggestion is not pedantic, as pointed reservations in *Guarnieri* might be read as requests for doctrinal clarification about the distinctions between petitioning and speech.²⁴⁴ Providing such clarification is a project of some urgency in light of the circuit split surrounding the prior physical injury requirement, which may soon prompt the Court to elaborate on the nature of the petition guarantee as applied to prisoners. Section V.C argues that, faced with such an opportunity, the courts should understand petition and speech as theoretically distinct. It highlights the need not for an “exception” to the default rule of transposing speech frameworks to petitioning, but for a new default rule. It closes by sketching, for the prison context if not beyond, a theory of petitioning distinct from speech.

Taken together, this Part argues that contemporary First Amendment doctrine misunderstands petitioning as an individual freedom subject to the managerial prerogative of prison officials, leading courts to place petitions to courts into “balancing” frameworks designed for internal prison communications. In so doing, courts have compromised the interlocking public and private protections enshrined in the Petition Clause. This Part argues that the practice of conflating petition and speech is theoretically and historically unsound, and if not halted, threatens to subsume the core protections of the petition guarantee into a sea of judicial deference and balancing tests.

A. Petitioning and the Modern Court: The Residue of Speech

The petition guarantee, sidelined for decades by the antebellum gag-rule crisis and the expansion of the franchise,²⁴⁵ resurfaced in the mid-twentieth century, seeded in labor politics and prisoners’ rights campaigns, and gradually extended beyond those contexts. Courts had long recognized that access to the courts was of “central importance” to prisoners.²⁴⁶ But for many years,

^{244.} *Guarnieri*, 131 S. Ct. at 2495 (“[T]he rules and principles that define the two rights [the right to petition and the right to speech] might differ in emphasis and formulation.”).

^{245.} See *supra* Section III.C.

^{246.} *Thaddeus-X v. Blatter*, 175 F.3d 378, 388 (6th Cir. 1999). For a discussion of prisoner access to courts, see sources cited *supra* notes 24, 55, and 236.

prisoners' right to access the courts was vaguely situated. In none of the early cases granting access, nor in sister habeas cases, did the Supreme Court ground prisoners' rights of access in an enumerated constitutional right, instead justifying access to courts on the basis of broad due process, speech, and policy considerations.²⁴⁷

As courts began to limit the protections afforded by the Speech Clause to speech on "matters of public concern," prisoner litigants developed novel constitutional arguments.²⁴⁸ Courts responded by disaggregating employee retaliation cases—then situated in the right to free speech—from prisoner retaliation cases, grounding the latter in a newly revitalized First Amendment right to "petition the government for redress of grievances." The revitalization of the petition right in the prison context accompanied a revitalization in other spheres, from civil rights²⁴⁹ to labor²⁵⁰ to antitrust.²⁵¹ In 1972, the Supreme Court situated the right of access to the courts in the Petition Clause in both the antitrust context, in *California Motor Transport v. Trucking Unlimited*, and

247. See sources cited *supra* note 55.

248. *Thaddeus-X*, 175 F.3d at 390 (noting that petitioners began to "plead more artfully," invoking their rights to assembly and petition in the hopes of avoiding the "matter of public concern" limitation on their speech rights).

249. See, e.g., *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1, 5-6 (1964) (holding that the state cannot handicap the right to petition by keeping workers from advising one another in their selection of counsel); *NAACP v. Button*, 371 U.S. 415, 429-30 (1963) (holding that litigation efforts were a form of petitioning and noting that "[g]roups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts . . . [a]nd under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances" (emphasis added) (footnotes omitted)).

250. *BE & K Constr. v. NLRB*, 536 U.S. 516, 531-33 (2002) (holding that reasonable but unsuccessful employer lawsuits against unions do not violate the National Labor Relations Act, absent a finding that the suit was objectively baseless); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (holding that the National Labor Relations Board could not constitutionally enjoin an employer from suing employees who were protesting business practices that infringed upon the employer's right to petition state courts unless the suit lacked a reasonable basis in fact or law).

251. See, e.g., *Cal. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (holding that the "right to petition extends to all departments of the Government" and includes "[t]he right of access to the courts"); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) (holding that petitioning—in this case, lobbying—is protected activity: "[The] right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms"); see also *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 57, 62-63 (1993) (broadening the petition protection by rejecting the idea that litigation was without value "merely because a subjective expectation of success does not motivate the litigant," and clarifying the "sham"-litigation test from *Noerr*).

in the prison context, in *Cruz v. Beto*.²⁵² Ten years later, courts had solidified the understanding that prisoners retained the constitutional right to petition the government and that the petition right included a “reasonable right of access to the courts.”²⁵³ In time, the disaggregation of speech and petition translated back to the employment context, such that many access-to-courts cases came to be understood as arising under the Petition Clause, rather than the Speech Clause.²⁵⁴

Nonetheless, a long tradition of conflating speech and petition left a kind of jurisprudential residue in the prison context and beyond.²⁵⁵ The “tools for adjudicating . . . retaliation claims under the Free Speech clause ha[d] been so extensively developed” that courts “tended to import fully that reasoning when litigants ha[d] characterized their claims as arising under another First Amendment clause.”²⁵⁶ Thus courts have subjected prisoner petitions to “balancing” rules developed for internal institutional speech, as described in Section V.B. Even when courts recognized that applying speech frameworks to prisoner petitions led to undesirable results, they nevertheless abandoned those frameworks under the pall of speech doctrine.²⁵⁷

This conflation culminated in the Court’s holding in *Borough of Duryea v.*

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252. 405 U.S. 319, 321 (1972) (holding that “persons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes ‘access of prisoners to the courts for the purpose of presenting their complaints’” (citing *Johnson v. Avery*, 393 U.S. 483, 485 (1969)); *Ex parte Hull*, 312 U.S. 546, 549 (1941)); *Cal. Motor Transp.*, 404 U.S. at 510.
253. *Compare, e.g.*, text accompanying *supra* note 236, *with Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (“Like others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts.”).
254. In short order, a series of circuit holdings challenged the application of the “public concern” requirement to employee petition cases. *See, e.g.*, *Ivan v. Cnty. of Middlesex*, 595 F. Supp. 2d 425, 468 (D.N.J. 2009) (“Where the expressive conduct includes filing of a lawsuit or grievance, the Petition Clause is implicated and such lawsuit need not relate to a matter of public concern.” (citing *San Filippo, Jr. v. Bongiovanni*, 30 F.3d 424, 443 (3d Cir. 1994))).
255. *See, e.g.*, *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985) (“Petitioner alleges that the . . . policy violated both his right to free speech and his right to petition. Because he does not argue that it burdened each right differently, we view these claims as essentially the same. Although . . . [they] are separate guarantees, they are related and generally subject to the same constitutional analysis.”); *United Mine Workers of Am. v. Ill. State Bar Ass’n*, 389 U.S. 217, 222 (1967) (noting that the petition and assembly rights are “intimately connected both in origin and purpose, with the other First Amendment rights of free speech and free press”). *But see id.* at 226 (Harlan, J., dissenting) (maintaining that petitioning is a form of “freedom of expression,” but suggesting that “litigation is more than speech; it is conduct”).
256. *Thaddeus-X v. Blatter*, 175 F.3d 378, 390 (6th Cir. 1999).
257. *See infra* note 277 and accompanying text.

Guarnieri that although petition and speech were distinct, tests from one context could be transposed to the other,²⁵⁸ at least as to employee petitions.²⁵⁹ In *Guarnieri*, the Supreme Court held that a police chief's administrative grievance and lawsuit against his employer, which alleged that the employer was retaliating against him for filing and winning a union grievance proceeding, did not amount to constitutionally protected activity under the Petition Clause because his petitions (the grievance and the lawsuit) did not relate to "matters of public concern."²⁶⁰ The Court applied *Connick v. Myers*²⁶¹ and *Pickering v. Board of Education*,²⁶² under which a public employee suing an employer for a violation of the Speech Clause must show both that he or she spoke as a citizen on a matter of public concern rather than as an employee on a matter of personal interest,²⁶³ and that his or her right to speak outweighs the government's interest in promoting efficiency in the public service.²⁶⁴ In *Guarnieri*, the Court borrowed the public concern test from speech doctrine and applied it to the distinct constitutional right to petition.

In justifying the application of speech principles to petitioning, the *Guarnieri* majority turned to arguments about efficiency, redundancy, and judicial restraint. Petitions, the majority wrote, might "bring the 'mission of the employer and the professionalism of its officers into serious disrepute,'"²⁶⁵ and might "cause a serious breakdown in public confidence in the government."²⁶⁶ They might be "frivolous"²⁶⁷ and might "subject . . . government operations to invasive judicial superintendence."²⁶⁸ They would be

258. 131 S. Ct. 2488, 2494 (2011) (asking whether a police chief's lawsuit could be subject to the public concern test arising from the speech doctrine). The contemporary generation of petition cases had embodied unclarity about the relationship between petition and speech, such that the *Guarnieri* Court had an opportunity to push petition jurisprudence either toward speech or away from it. The opinion seems to have been aware of at least some contemporary scholarship suggesting that the rights be disaggregated, but the holding reified, albeit cautiously and only in the employment context, the practice of aggregation.

259. See *id.* ("[T]his case provides no necessity to consider the correct application of the Petition Clause beyond that context.").

260. *Id.* at 2490.

261. 461 U.S. 138 (1983).

262. 391 U.S. 563 (1968).

263. *Connick*, 461 U.S. at 147.

264. See *Guarnieri*, 131 S. Ct. at 2490 (citing *Pickering*, 391 U.S. at 568).

265. *Id.* at 2495-96 (quoting *City of San Diego v. Roe*, 543 U.S. 77, 81 (2004)).

266. *Id.* at 2496.

267. *Id.*

268. *Id.*

duplicative of “generous” and “detailed” statutory and administrative anti-retaliation provisions protecting employees’ right to “file grievances and to litigate.”²⁶⁹ And finally, the majority wrote, the “[a]rticulation of a separate test for the Petition Clause would . . . compound[] the costs of compliance with the Constitution.”²⁷⁰

*B. Losing Access to Courts in “Speech”: Guarnieri and a Petition
Jurisprudence on the Verge of Misstep*

In *Guarnieri*, the Court recognized that “[t]here may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis,”²⁷¹ such that the “rules and principles that define the two rights might differ in emphasis and formulation.”²⁷² Outside the context of public employment, the Court wrote, “constitutional protection for petitions does not necessarily turn on whether those petitions relate to a matter of public concern.”²⁷³ The Court explicitly rejected the contention that the “right to petition can extend no further than the right to speak”²⁷⁴ and wrote that “[c]ourts should not presume . . . Speech Clause precedents necessarily and in every case resolve Petition Clause claims,”²⁷⁵ before an extended meditation on the history of the Petition Clause as a guarantor of expressive freedom, democratic deliberation, and justice for the disenfranchised.²⁷⁶

These caveats make it unclear to what extent the Court envisioned *Guarnieri*, and the doctrinal transposition of speech frameworks generally, as the rule rather than the exception. The narrow principle of *Guarnieri*—borrowing the public concern test—might be of lesser relevance in the prison context, as some federal courts had eliminated that test for prisoner petitions before the holding.²⁷⁷ But applying the public concern requirement validated the broader

^{269.} *Id.* at 2497. In a curious divergence from principles of constitutional supremacy, the Court wrote that the Petition Clause is “not an instrument for public employees to circumvent these legislative enactments when pursuing claims based on ordinary workplace grievances.” *Id.*

^{270.} *Id.* at 2498 (emphasis added).

^{271.} *Id.* at 2495.

^{272.} *Id.*

^{273.} *Id.* at 2498.

^{274.} *Id.* at 2495.

^{275.} *Id.*

^{276.} *Id.* at 2498-2500.

^{277.} Some circuit courts once applied public concern requirements to prisoner petitions. See *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009); *Sasnett v. Litscher*, 197 F.3d 290, 292

principle of looking to speech cases to resolve petition claims. After *Guarnieri*, when should courts “presume . . . an essential equivalence in the two Clauses,” and when should they not?²⁷⁸ When, if ever, might the right to petition extend “further than the right to speak”?²⁷⁹ When does protection for petitioning turn on the content of the petition – public or personal – and when does it not?

These questions take on particular significance amid the ongoing struggle surrounding the prior physical injury requirement, which may prompt the Court to consider the level of constitutional protection due prisoner petitions. For reasons to be argued in Section V.C below, the broad *Guarnieri* principle – of the transposition of speech precedents to resolve petition claims – should be understood as the exception, rather than as the default. Despite the textual

(7th Cir. 1999); *Brookins v. Kolb*, 990 F.2d 308, 313 (7th Cir. 1993). It appeared that the requirement had been eliminated in 2010 when, in *Watkins v. Kasper*, 599 F.3d 791, 796 (7th Cir. 2010), the Seventh Circuit held that the “public concern test developed in the public employment context has no application to prisoners’ First Amendment claims, even in the case of speech by a prisoner-employee.”

But the requirement seems to be resurfacing in some corners. *See, e.g.*, *Spearman v. Stoddard*, No. 1:09-CV-632, 2011 WL 4005381, at 7 n.9 (W.D. Mich. Mar. 30, 2011) (“The Sixth Circuit has not yet found it necessary to resolve the question of whether a prisoner’s speech must address a matter of public concern for it to constitute protected speech. . . . The Supreme Court’s recent decision in *Snyder v. Phelps*, 131 S. Ct. 1207, 1215-16 (2011), emphasizes the importance of the public concern component, and makes it more likely that an issue of public concern is a foundational requirement for protected prisoner speech. *It would be extraordinary if convicted felons possessed greater free speech protections than public employees.*” (emphasis added)), *report and recommendation adopted*, No. 1:09-CV-632, 2011 WL 4005376 (W.D. Mich. Sept. 8, 2011); *Towns v. Cowan*, No. 10-CV-264, 2011 WL 293711, at *4 (S.D. Ill. Jan. 27, 2011) (“A prisoner’s grievances about prison conditions are protected where they are statements concerning matters of public concern in an attempt to change prison policy.”).

The requirement may be in danger of appearing with greater force after *Guarnieri*. Some circuits, while vigorously rejecting the transposition of the “public concern” test to prisoners’ First Amendment retaliation claims, have left open the question of whether the framework might be appropriate in contexts where the government functions as an employer to prison inmates. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 390-93 (6th Cir. 1999) (“It can as easily be applied in the prison context, accommodating the difference between the government as employer and as jailor, as well as the difference between the free speech rights of a public employee and an inmate’s right to access the courts. Certainly the government’s interests as an employer are not identical to its interests as a jailor.”).

But transposing a public concern requirement to prisoner-employees would be deeply troublesome, as even “personal” prison issues may take on a public character. *See McElroy v. Lopac*, 403 F.3d 855, 859 (7th Cir. 2005) (Fairchild, J., dissenting) (“McElroy’s question would surely concern that ‘public’ [the prison population] and the general public would be concerned with the policy of compensating prisoners for whom there is no work.”).

278. *Guarnieri*, 131 S. Ct. at 2495.

279. *Id.*

proximity of the Clauses, neither the public concern requirement nor other doctrinal tools from speech inherently belong in Petition Clause analysis. Where courts develop tests for petitioning analogous to those found in speech jurisprudence, those tests should be employed not because they appear in speech doctrine, but because they independently validate the “objectives and aspirations that underlie the right.”²⁸⁰ Petitioning should be understood not as analogous to speech, but as a protection for the right to access the courts analogous to the protections of the Due Process Clauses.²⁸¹

The doctrinal transposition principle espoused in *Guarnieri* is problematic in at least five ways, the last two of which are of special relevance to prisons. For one, as argued by the dissent,

[t]he complexity of treating the Petition Clause and Speech Clause separately is attributable to the inconsiderate disregard for judicial convenience displayed by those who ratified a First Amendment that included *both* provisions as *separate* constitutional rights. A plaintiff does not engage in pernicious ‘circumvention’ of our Speech Clause precedents when he brings a claim premised on a separate enumerated right to which those precedents are inapplicable.²⁸²

At the most basic level, conflating the two provisions deprives each of independent meaning.

Second, as to the narrow principle of *Guarnieri*, the idea that petitions merit heightened protection “when they seek to advance political, social, or other ideas of interest to the community as a whole” is without foundation in

²⁸⁰. *Id.*

²⁸¹. Protections for the right to access the courts include those of the Due Process Clauses of the Fifth and Fourteenth Amendments. *See, e.g.,* *Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (“The Due Process Clause also requires the States to afford certain civil litigants a ‘meaningful opportunity to be heard’ by removing obstacles to their full participation in judicial proceedings.” (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971))); *Boddie*, 401 U.S. at 382 (holding that filing fees that prevented welfare recipients from filing for divorce violated the due process right to access the courts). These protections are also derived from Article IV’s Privileges and Immunities Clause. *See* *Blake v. McClung*, 172 U.S. 239, 247-48 (1898) (holding that among the “fundamental principles” protected by the Clause is the right “to institute and maintain actions of any kind in the courts of the state”); *see also* Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right To Protect One’s Rights* (pt. 2), 1973 DUKE L.J. 527 (discussing contours of the right to access the courts); Resnik, *supra* note 208, at 86-87 (discussing *Boddie* and other access-limiting provisions).

²⁸². *Guarnieri*, 131 S. Ct. at 2504 (Scalia, J., concurring in the judgment in part, dissenting in part).

history or theory.²⁸³ As the dissent argued, the public concern limitation arguably “makes sense in the context of the Speech Clause,” because “speech on matters of public concern,” particularly political speech, lay at the “core of First Amendment protection” for speech.²⁸⁴ But such a requirement was not at the “core” of other constitutional guarantees, which protected private and public conduct equally. The “mere fact that we have a longstanding tradition of granting heightened protection to *speech* of public concern does not suggest that a ‘public concern’ requirement should be written into other constitutional provisions,” Justice Scalia wrote. “We would not say that religious proselytizing is entitled to more protection . . . than private religious worship,” nor that due process rights become “heightened in the context of litigation of national importance.”²⁸⁵ Moreover, as argued elsewhere, the filing of a lawsuit is by definition “never purely private” because it “invokes a process which may announce or apply the law in ways that govern the future conduct of others,” and because the public has an interest in the availability and effectiveness of adjudicatory processes.²⁸⁶

Third, judicial concerns about calling into question the “professionalism” of public officials or causing “breakdowns in public confidence in the government” are misguided.²⁸⁷ Nearly every legitimate lawsuit could be eliminated as potentially “embarrassing” to those it challenges. But even were this logic to have a limiting principle, it abrogates the judicial role; courts ought not to be in the business of buttressing public confidence in a government or its officials if doing so means suppressing, or potentially suppressing, a legitimate grievance. As illustrated above, lawsuits that question the behavior of public officials can play important informational roles, such that undue restrictions on the right to petition infringe more than an individual’s right to expressive freedom.

Fourth, the prison context lacks the redundancy of the public employment

283. *Id.* at 2490 (majority opinion); *see id.* at 2505 (Scalia, J., concurring in the judgment in part, dissenting in part) (arguing that since “petitions to redress *private* grievances were such a high proportion of petitions at the founding,” the Court’s refusal to protect them “has to be wrong”). Scalia’s dissent cites Higginson, *supra* note 35, at 145, and quotes 8 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791, at xviii (Kenneth R. Bowling et al. eds., 1998), for the proposition that “[t]he overwhelming majority of First Congress petitions presented private claims,” *Guarnieri*, 131 S. Ct. at 2504 (Scalia, J., concurring in the judgment in part, dissenting in part).

284. *Guarnieri*, 131 S. Ct. at 2505 (Scalia, J., concurring in the judgment in part, dissenting in part) (quoting *Engquest v. Or. Dep’t of Agric.*, 553 U.S. 591, 600 (2008)).

285. *Id.*

286. Brief of Amici Curiae ACLU and ACLU of Pa. at 8, *Guarnieri*, 131 S. Ct. 2488 (No. 09-1476).

287. *Guarnieri*, 131 S. Ct. at 2496.

sector, insofar as prisoners do not enjoy “generous” or “detailed” – or even, as the foregoing portrait has suggested, effective – antiretaliation provisions.²⁸⁸ Prisoners have – and sometimes only have – petitions.

Fifth, what would be private grievances in the outside world take on a public character when filed by prisoners, both because apparently private disputes become, in prison, “dispute[s] with the State,”²⁸⁹ and because the public has both a stake in and a right to information about prison conditions. As such, any petition rule attempting to privilege “public” grievances over “private” ones – if nowhere else, then certainly in the prison context – risks both illogic and injustice.

A ready response to the argument presented in this Part is that a court could adopt the general principle of *Guarnieri* – that of drawing from speech doctrine to resolve petition claims – without borrowing problematic limitations like the public concern requirement.²⁹⁰ The question that follows is whether the broader practice of transposition is desirable or theoretically sound. Why not understand petitions through a speech lens, as some have proposed? The paragraphs below outline two possible mechanisms by which petition claims could be adjudicated using tools from speech. But the next Section argues that even with modifications, speech frameworks would not fully protect the interests at stake in petitioning, for the reason that the petition guarantee is best understood as akin to a due process protection for the right to access the courts, rather than as akin to speech (or speech alone).

In the prison context, speech, like other rights, is balanced against institutional needs. First Amendment speech theory has justified this as a product of the specialized needs of the settings Robert Post has called “managerial domains”: institutional realms, like prisons and the military, in which the state acts as administrator.²⁹¹ In its current formulation, speech doctrine, in the context of managerial domains, balances institutional requirements against individual rights, weighing potential damage to the “protected role[] of being . . . a participant in the judicial process” against the “potential damage to institutional authority resulting from judicial review” of official actions.²⁹²

288. *Id.* at 2497.

289. *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973).

290. *See supra* note 277.

291. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1776-81 (1987).

292. *Id.* at 1813. *See generally* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353 (2000) (discussing the incoherence in First Amendment doctrine).

The challenge, in the shadow of *Lewis* and *Turner*, has been to shield prisoner communication with the courts from a generalized standard of deference to prison officials.²⁹³ First Amendment scholars have proffered a range of conceptual frameworks for doing so. Robert Tsai, for instance, has proposed that the pursuit of redress be treated as dissent, arguing that categorizing lawsuits as “anti-government expression” would insulate them from some of the vagaries of speech law, under which different forms of speech are given different protections. Marking lawsuits as “dissident speech,” Tsai argues, would link “familiar, time-honored free speech concepts with a rich understanding of the civil rights plaintiff’s role in constitutional discourse.”²⁹⁴ Tsai, in other words, proposes that lawsuits be protected as a special kind of speech, entitled to heightened protection.

An alternative, while still accepting a speech framework, would be to protect prisoner petitions by changing the way they are taxonomized within speech doctrine. Existing “‘speech-centered’ theor[ies] of court access”²⁹⁵ understand prisoner communication with the courts as internal to the institution, thus permitting regulation of speech “as necessary to achieve instrumental objectives.”²⁹⁶ The alternative view would understand that the act of filing suit can transform a managerial domain into a public realm, and in turn, can alter the standards with which prisoner conduct must be addressed.²⁹⁷ In contrast to managerial domains, in which the state may “constitutionally regulate speech as necessary to achieve instrumental objectives,” when the state acts in a “governance capacity”—as when it exercises authority over what Arendt called the “public realm”—it may constitutionally regulate speech only in accordance with “ordinary and

293. *Lewis v. Casey*, 518 U.S. 343, 355 (1996) (limiting *Bounds v. Smith*, 430 U.S. 817 (1977), and holding that this line of cases does not confer on prisoners a generalized right to litigate, but only “[t]he tools . . . inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement”); *Turner v. Safley*, 482 U.S. 78, 89 (1987) (establishing a standard of deference).

294. Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835, 839, 841-42 (2002).

295. *Id.* at 838.

296. Post, *supra* note 291, at 1717.

297. In other words, the argument would be that the conduct in question—the filing of the lawsuit—does not happen “at” the prison and thus is not properly understood as speech internal to the institution. Where the conduct at issue is the pursuit of a judicial claim, the conduct does not occur at the prison or the workplace itself, but is “confined to a procedure that the government offers to resolve disputes.” Brief of Amici Curiae ACLU and ACLU of Pa., *supra* note 286, at 19.

generally applicable principles of first amendment adjudication.”²⁹⁸ Petitions to the courts address not the government as manager, but the government as sovereign; in turn, the freedom of petition implicates both the ability of the sovereign to process petitions and the ability of citizens to provide information to the sovereign. Prisoner lawsuits could be understood to fit not within the “managerial” context but within the “governance” context, requiring not *Turner*-esque deference to officials but more permissive standards.²⁹⁹ Prisoner lawsuits belong in the governance category, not the management category, because they support public negotiation of “competing values and expectations,”³⁰⁰ insofar as the public and the courts rely on prisoner suits for knowledge about the conditions of closed institutions.

But the struggle to differentiate and defend prisoner communication with the courts in a context of rights removal and judicial deference³⁰¹ points to a broader problem inherent in the project of applying balancing rules for speech to questions of access to courts. Understanding prisoner petitions as speech leaves them vulnerable to reclassifying and balancing as a general matter, and accepts the general premise that the executive or the legislature may act as a kind of moderator, sorting worthy claims from unworthy outside the courthouse door. And it is here that the practice of looking to speech to understand petitioning, if not in general then at least as currently structured, reveals itself to be fatally flawed.

298. Post, *supra* note 291, at 1717.

299. This might mean translating the idea, from speech, that communications implicate both the rights of the sender and the receiver. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 399-400, 403-04, 408-09, 415 (1974) (invalidating a regulation prohibiting prisoners from writing letters that “magnify grievances” or sending or receiving letters with “lewd, obscene, or defamatory . . . or . . . otherwise inappropriate” content, and holding that such restrictions violated the First Amendment rights of those with whom prisoners correspond).

300. Post, *supra* note 291, at 1717 (citing HANNAH ARENDT, *THE HUMAN CONDITION* 22-78 (1959)).

301. Prison speech jurisprudence is highly deferential to prison officials. See, e.g., *Overton v. Bazzetta*, 539 U.S. 126, 132-33 (2003) (upholding a regulation limiting the number of visitors a prisoner may receive); *Thornburgh v. Abbott*, 490 U.S. 401, 419 (1989) (upholding a regulation restricting the types of publications that may be delivered to prison); *Jones v. N.C. Prisoners’ Labor Union*, 433 U.S. 119, 126 (1977) (upholding prison officials’ restrictions on the ability of prisoners to form, or solicit membership for, an employees’ union, and holding that prison administrators were owed “deference” because the “realities of running a penal institution are complex and difficult”); *id.* at 142 (Marshall, J., dissenting) (noting problems with deference to prison officials, as “prison officials inevitably will err on the side of too little freedom”). But see *Procunier*, 416 U.S. at 399.

C. *Toward a Theory of Petitioning Distinct from Speech*

Petition and speech share concerns for expressive freedom and public deliberation. But petitioning “implicates constitutional concerns different from those addressed by the free-speech right.”³⁰² The critical attribute of the petition guarantee as applied to lawsuits—the “right to invoke the government’s adjudicatory processes”—is distinct from, and protects different concerns than, the right to free speech.³⁰³ Thus the petition guarantee protects the act of reaching to the government for redress, rather than the content of the grievance. Petitioning “protects access to state-prescribed processes and, unlike the free speech right, is unrelated to the expressive content of the petition.”³⁰⁴ A corollary is that the protections of the Petition Clause are limited to petitions for redress directed to the government such that communications directed to the government but not seeking redress might still be classed as “speech,” rather than “petition.” Thus a letter to the government expressing an opinion in the style of an editorial, rather than seeking remediation, would not fall under the category of petitioning, whereas lawsuits and certain lobbying efforts would.³⁰⁵

The Petition Clause protects the state’s interest in providing “designated alternatives to force,”³⁰⁶ a forum for the “public airing of disputed facts,”³⁰⁷ and a mechanism for the “preservati[on] of . . . rights.”³⁰⁸ And it protects the interests of the state and the public about problems hidden from view, an interest nowhere more critical than in parts of society, like closed institutions, marked by conditions of information poverty. These interests transcend protections for expression alone and operate “without regard to the content of the petition.”³⁰⁹ For these reasons, the right of access to the courts found within the Petition Clause, like that protected by the Due Process Clauses,

302. Brief of Amici Curiae ACLU and ACLU of Pa., *supra* note 286, at 15.

303. *Id.* at 7.

304. *Id.* at 8; *see also id.* at 4 (arguing that petitioning should be understood in light of “the effectiveness and integrity of the state’s prescribed processes for the neutral adjudication of disputes, the public interest in and general applicability of the legal outcomes of those state processes, and the absence of any true operational interest in retaliating against employees who use the processes that state law instructs them to use”).

305. For a discussion of lobbying, *see supra* note 251.

306. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002).

307. *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (quoting Thomas Al Balmer, *Sham Litigation and the Antitrust Laws*, 29 *BUFF. L. REV.* 39, 60 (1980)).

308. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980).

309. Brief of Amici Curiae ACLU and ACLU of Pa., *supra* note 286, at 16.

must “forbid[] governmental conduct that unduly obstructs persons who seek to present complaints to the state’s adjudicatory authorities.”³¹⁰

Thus, the Petition Clause exists to insulate certain requests for consideration by the government from reprisal. In so doing, the access prong of the petition guarantee reaches to protect expression that would not be protected were it understood as expression alone. In other contexts, the Court has recognized the distinction between the content of the expression and the act of delivering the expression to the government. Certain statements made in the course of court proceedings, for instance, cannot form the basis of a defamation suit, whereas the same statements, made out of court, would be actionable in tort.³¹¹ Moreover, the Court has recognized a distinction between the protected activity inherent in petitioning and that inherent in speech, noting that “[g]oing to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer.”³¹² The starting principle of *Guarnieri*—that an employee’s lawsuit is akin to a letter to the editor—is thus mistaken. There is a critical difference between airing grievances before the public and approaching the government to seek redress, and in that difference lies the divide between the Petition and Speech Clauses.

It is because the petition guarantee protects more than the expression itself—that is, more than the “speech” within it—that the tools of speech doctrine cannot fairly represent it. As applied to lawsuits, the Petition Clause is best understood as a mirror of the due process protection for the right to access the courts, or in the alternative, as a hybrid of the Speech and Due Process Clauses, concerned not only with the expression contained within the petition but with the conduct inherent in filing it. Looking to speech alone misses the core protection of the right to petition. Prisoner petitions to courts should be understood not as speech, implicating the needs of plaintiff and prison, but as

310. *Id.* at 9.

311. This is true even when the speaker out of court enjoys absolute immunity in court. *See Kalina v. Fletcher*, 522 U.S. 118, 131 (1997) (holding that prosecutors do not enjoy absolute immunity for statements made in affidavits supporting arrest warrants, though they would enjoy absolute immunity for the same statements made in court); *Imbler v. Pachtman*, 424 U.S. 409, 426 n.23 (1976) (holding that prosecutors are immune from civil suits for damages for actions taken and statements made in court in the course of pursuing a criminal prosecution); *see also Rehberg v. Paulk*, 132 S. Ct. 1497, 1498 (2012) (holding that witnesses are entitled to absolute immunity from suit under § 1983 for tort claims based on grand jury testimony, though they remain subject to prosecution for perjury); *Kalina*, 522 U.S. at 133 (Scalia, J., concurring) (noting that the common law protected witnesses and attorneys from slander and libel actions for statements made in the course of a judicial proceeding, even if the statement was alleged to be maliciously false).

312. *Bill Johnson’s Rests.*, 461 U.S. at 741.

petition, a distinct protection, especially in the institutional context, implicating the needs of three distinct groups: plaintiffs, the public, and the courts. When a prisoner files a lawsuit, courts should balance not the needs of captor and captive alone—the managerial speech model, legitimated in *Guarnieri*—but the individual’s interests in his or her civil rights, the public’s interest in information, and the court’s interest in securing the tools necessary to fulfill the obligations of oversight.³¹³ Thus a sound petition model would challenge judicial deference rules that prioritize managerial needs to the exclusion of the other interests implicated by prisoners’ attempts to access the courts. In due process terms, balancing the needs of prisoner and prison misunderstands the governmental interest as located within the executive alone. But the “government” is not unitary. The judicial interest in prisoner access-to-courts cases is at least as strong as the executive’s (or the legislature’s), and must be counted, as must the interests of the public.

This is not to say that managerial interests should not be counted, or that the executive has no valid interest in prison discipline. Nor is it to say that incidental burdens on access to the courts are necessarily invalid. Classic due process frameworks can accommodate both.³¹⁴ Courts may need, at points, to manage dockets in various ways, and all behavior—even communicating with the courts through the mail—might implicate prison discipline at some level.³¹⁵

313. In any balancing test, the “government’s interests in retaliating” against petitioners who “invoke the state’s own adjudicatory processes to redress grievances are minimal at best and counterbalanced by the state’s interest in the effectiveness of its processes and the public’s perception of their integrity.” Brief of Amici Curiae ACLU and ACLU of Pa., *supra* note 286, at 23.

314. The classic due process balancing test weighs the interests of the “Government” against other needs. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (“[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970))).

315. But consider that, in contrast to prison cases, in domestic abuse cases, courts do not “balance” the needs of the alleged abuser and the alleged victim in allocating access to the courts. Access is not the right to be believed, but it is the right to be heard. See, e.g., Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 886 (1981) (“[T]he effects of process on participants, not just the rationality of substantive results, must be considered in judging the legitimacy of public decisionmaking.”).

As to “docket-flooding,” earlier parts of this Note noted that those concerns are largely unfounded. Where courts must engage in triage, a reasonable model would, at the very least, ensure (1) that triage rules are not arbitrary (as is the physical injury requirement);

The point is not that such concerns should not be weighed, but that, in balancing the needs of prison and prisoner, courts are neglecting other parties with stakes in prisoners' petitions. Moreover, disciplinary concerns are weighed heavily in access-to-courts cases, in the current calculus, and may deserve far less weight than they currently receive, and considerable skepticism, particularly where such concerns are employed as justifications for arbitrary or retaliatory actions, as distinguished from behavior that is transparent and not unduly burdensome.

The petition guarantee, as applied to lawsuits, is about ensuring the individual's fundamental right to access the courts. It is about guaranteeing the right of the public to access information about closed institutions. And it is about ensuring that the courts have the tools to "call the jailer to account."³¹⁶ Any viable theory of petitioning must account for each of these three roles, and for their intersections: first, the dignitary interests of individuals in the right to be heard,³¹⁷ critical for all participants "even if, in the end, they do not obtain the relief they seek";³¹⁸ second, the informational interests of the public, for whom litigation "facilitate[s] . . . informed public participation";³¹⁹ and third, the structural interests of the courts, insofar as the "ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force."³²⁰ Petition, in other words, must be understood to protect three values, each attaching to a distinct type of harm: access, information, and review.

Nowhere are these roles more important than in the context of closed institutions, where informational infrastructure is poor. In the absence of means to "pull" information from institutions, outsiders must rely on insiders to "push" information out. Seen in this light, procedural barriers to prisoner

and (2) that triage efforts do not impede meritorious claims. By "meritorious," I mean something distinct from "winning." I reject Carol Rice Andrews's argument in *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 691 (1999), that the Petition Clause should be construed to protect only "winning" claims, because as Justice O'Connor noted in *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002), "the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force."

³¹⁶. *Boumediene v. Bush*, 553 U.S. 723, 745 (2009) (noting that prior holdings on judicial oversight "affirm[] the duty and authority of the Judiciary to call the jailer to account").

³¹⁷. See Mashaw, *supra* note 315, at 886-87 (on dignitarian interests); Michelman, *supra* note 281, at 1172-77 (noting the range of values—dignitary, participation, deterrence, and effectuation—that are implicated in the right to litigate).

³¹⁸. *Boumediene*, 553 U.S. at 797.

³¹⁹. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2500 (2011).

³²⁰. *BE & K Constr.*, 536 U.S. at 532.

communication with the courts are offensive not only to the prisoner, but to the world beyond him: to the public, which relies on his efforts, and to the courts, which rely on his efforts in order to exercise their own obligations of oversight.

This, in turn, points to an answer to the questions left unanswered in *Guarnieri*. For the purposes of the First Amendment, prisoners who attempt to communicate with the courts are not speaking. They are petitioning.

The distinction is fundamental.

CONCLUSION

Applying the prior physical injury requirement to bar recovery for violations of the right to access the courts runs afoul of the Petition Clause and misunderstands petition violations as injuries to the individual alone. Rather, petition violations create three interlocking harms: to the plaintiff, by interfering with the ability to realize constitutional rights; to the public, by impairing the flow of information about closed institutions; and to the courts, by impeding the separation of powers, and in turn, the “duty and authority of the Judiciary to call the jailer to account.”³²¹ Understanding petition as a threefold structural protection illustrates the error inherent in predicating recovery for access-to-courts violations on physical injury.

But the troika model does more. It illustrates the problems with the practice, unjustified by theory or history, of conflating speech and petition. And it illustrates the incoherence—and indeed, the constitutional infirmity—of subjecting petition claims to rules designed to help prison guards regulate prison conduct. The model presented in this Note points to the need for a thorough disaggregation of petition and speech, and a petition jurisprudence that enshrines protections for access, information, and review. Contemplating the balance of equities at the core of the petition guarantee could move the law toward a model that prioritizes the rights of individuals to be heard, and the rights of the public and the government to hear.

321. *Boumediene*, 553 U.S. at 745.