

The Petition between Lobbying and Litigation

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Is there anything like the petition of lore left in our republic? Is there any institution or practices that thrusts a citizen's lament before a sovereign representative body, compels a response, and that structures even lawmaking itself upon the agenda driven by citizen grievances?

In the first few months of any early nineteenth-century Congress – or, for that matter, most any state legislative session — weeks if not months would be taken up with reading of petitions (McKinley 2018; Blackhawk et al 2020). The petitions were read in part or in full and then, often deliberated upon in the Committee of the Whole before and after being referred to a standing or select committee for consideration. The ritual and work of referral, consideration, report and vote occasioned much of the creation of new standing committees in late colonial British North America and the early U.S. Congress (Schneer et al forthcoming). Substantial portions of the statutory output of late-eighteenth century legislatures, often half to two-thirds, started as petitions (Bailey 1979).

Is there anything left of this institution?

Before answering, two caveats. First, a negative answer to this question may not indicate a state of democratic weakness. We have evolved, in the United States and elsewhere. The efficiency of centralized parties with informative labels may be brutal, but it offers a remarkable coordinating device for millions of citizens. Petitioning campaigns have declined in part because party system have replaced them in terms of information aggregation (Carpenter 2016, 2021). Modern advocacy techniques give immense advantages to wealthier interests, but they also compel the production of massive amount of data on the effects and legality of policies. Litigation also favors the well-heeled but it offers a venue at which a hearing can be expected, and in which the marginalized can occasionally put the powerful on the defensive.

Second, even the petitions to which I refer here are not always the more democratized petitions whose narrative I center in *Democracy by Petition*. While I characterize requests for land, indemnity (early American legislatures acted as insurance agents of a sort), relief, as petitions of the settler republic and as less democratic than the collective claims-making that exploded across a continent following the War of 1812.

Whether anything remains of an earlier age of petitioning depends on the two political processes to which Sandy Levinson and Julie Suk point – lobbying and litigation – as well as the politics of protest that historians, sociologists and political scientists have done so much to educate us about. In some sense, the United States retains a culture of complaint that legal scholars Maggie Blackhawk and Ronald Krotoszynski have written about in their insightful works (Krotoszynski 2012; McKinley

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2016, McKinley 2018). Levinson and Suk examine different venues for these complaints – the legislature and the court – and find them both wanting. Even as I do not wish to celebrate the democratizing petition, I agree with Levinson and Suk that our institutions of voice fall far short of what a democratic republic requires.

Lobbying and Petitioning – Responses to Levinson

Sandy Levinson brings his forceful acumen and his ever youthful, unbridled intellectual curiosity to the subject of petitioning. I am reminded, from my time in graduate school at the University of Chicago, of one of the great (at the time, rather gendered) compliments that I heard stated of another scholar: “This is a man who reads.”

Levinson summarizes the book as no other scholar quite could. I find myself reading things that follow from my own words but that I wasn’t fully aware of. Let me focus on two of them here.

Petition campaigns could serve as an outlet for what are sometimes called ‘issue entrepreneurs’ who wish to break up congealed notions of what is (or is not) fit for discussion.

Levinson hits on an important point here. Call them entrepreneurs, activists, “leaders” or what you will, but there are clearly individuals and clusters of people with considerable foresight in these narratives. It is not that these individuals predict perfectly what will happen, but they sense the disrupting power of petitioning campaigns and the way in which the status quo political system systematically suppresses issues that thousands, maybe millions, care about deeply.

Agenda shaping action often requires these “entrepreneurs.” The creative political theorist Deva Woodly (Woodly 2015) has written of a different kind of agenda-setting dynamic, that of shaping “common sense,” changing frames, transforming vocabularies, disrupting the settled bounds of the acceptable. But too often the focus on entrepreneurs (including in my own work on bureaucratic entrepreneurship and autonomy) neglects the organizational and institutional context in which it arises. The agenda-setting force of petitioning would not have been possible without the “complaint and response” norm that has been witnessed in so many human societies but which attached itself to Carolingian office in medieval Europe (Bisson 2012) and that dominated assembly politics in the English civil war and British North American assemblies (Zaret 2000; Greene 2014). The campaigns narrated in *Democracy by Petition* harnessed this agenda-setting power – exploited it, to some degree – but without the millennial history preceding the long nineteenth-century the story would not have been the same.

Levinson’s second point, about lobbying, is worth repeating. He notes that the dialogue between citizen and sovereign (government, legislature, bureau, executive) is now more heavily mediated. Following on some of the research done by classic accounts such as Hansen (1992) on the farm lobby and White (2011) on the transcontinental railroads, he says the following of the present moment:

Professional lobbyists have taken over some of the tasks associated in the past with petitions, with obvious distributional consequences with regard to the kinds of issues and views that are likely to come to a legislator's desk.

Levinson orients our attention to the fact that petitioning has waned but other forms of complaint have not. It is worth remembering, of course, that petitions as a broader set of complaint and demonstration practices remain alive and well (see Krotoszynski 2012; Woodly 2015). Yet these are ever more “out of doors” compared to earlier petition practices. On the “positive” side, there is nothing that quite so grabs one's attention as a lawsuit, and the development of a tort system at the state and federal level in the United States has provided a host of venues for complaint making where the action comes with teeth.

The question, Levinson rightly asks, is whether these other tools shape the things that “come to a legislator's” desk and what she is likely to do once they arrive. And here it is worth paying renewed attention to Maggie Blackhawk's pioneering work on petitioning, scholarship that is every bit as generative theoretically as it is empirically (McKinley 2016, McKinley 2018). Blackhawk shows that modern administrative procedures intentionally embed some of the constitutionally envisioned complaint action earlier countenanced in the Petition Clause of the First Amendment. That is a world, of course, in which the rulemaker sets the agenda (Libgober 2020a), far more so than in the case of legislative petitioning or even modern citizens' petitions in the administrative era.

The other reason is that, once parties develop organizationally and informationally, there is a powerful alternative apparatus upon which to mobilize and discipline both voters and legislators (Carpenter 2016), and the force of modern partisanship, even aside from polarization, weighs far more heavily on the legislative desk than the petition (or any modern analog such as the movement) does.

Another way of putting the question is whether the tort or the lobby truly qualify as a weapon of the weak in the sense that Scott (1979) used the term. In some respects, certainly, but once the “weak” enter the terrain of the courtroom they tread upon a field of play where the “strong” have developed new technologies and forces of power. Noncompliance, delay, subterfuge and the like are weapons that in many respects give the weak a rare tilted playing field (Scott 1979, Chapters 1-3).

Democracy by Litigation? Responses to Suk

Julie Suk wonders whether we have seen “democracy by litigation” in the century and a half since 1870, and I suspect she is right. The expansion of the federal and state court systems and, relatedly, the expansion of a national bar, has given people from all walks of society the ability to seek a hearing and potentially make costly claims upon those who have injured them. And among the many advantages that the lawsuit carries vis-à-vis the petition is that monetary damages can be awarded the petitioner, damages that often come from the pockets of the injuring party. So too, in principle, partisan legislatures may be more likely to ignore a petition from a disfavored constituency (see Chapter 14 of *Democracy by Petition*), while in principle, partisan courts are less likely to behave in this way (though our present times may put that aspiration to the test).

Suk is also right to highlight the degree to which contemporary movements have harnessed the legal process just as earlier movements used petitioning. The interplay between legal claims and petitioning practices has been featured in earlier studies of Black political activity (Sinha 2016; Jones 2018; Gronningsater 2017, 2018; Masur 2021; see also the innovative Gosse 2021). Black Americans used the petition, the legal claim and the freedom suit as highly complementary strategies (Schweninger 2018), though in some cases freedom suits were used more commonly when other venues and tools were closed off. In the contemporary era, the collective degree of claims-making witnessed in historical petitioning has been used by many social movements, and well outside the United States (Arrington 2019). Like petitioning campaigns that diffuse and leave an organizational legacy (Carpenter and Schneer 2016, Carpenter 2016), collective legal action can sometimes do so as well.

Suk raises an important question, though, about what happens when petitioning declines.

If petitioning is a path that is sought because the vote is not available, what paths remain when petition democracy closes down?

To this query, the customary answer is that protest and legal redress remain, and surely they account for many of the hopes of the disadvantaged. Yet one feature that legal tools do not carry as surely with them is the triggering of debate or collective deliberation. Perhaps a controversial lawsuit will, but perhaps it will not. Social movements can reframe common discourse and can use lawsuits in performing this work (Woodly 2016), a legacy that legal activism critics neglect (Rosenberg 1991).

The other feature of the lawsuit is that it is an adversarial process, for better or for worse, and the disadvantaged do not always have unfettered access to lawyers (Libgober 2020b). We know, beyond this, that wealthier and entrenched interests have excellent lawyers, in fact, probably the best in the game. Social science is just catching up to the documentation of how massive these advantages really are.

In some ways, this predicament of deep inequality was expressed in nineteenth-century petitioning. Even petitioning required a scribe, an ability to make an argument, and petitioners used clergy, lawyers and statemen to assist in their advocacy. The question, then and now, is really one of the power of allies and alliances. Black Americans could complement their emerging organizational power with alliances to White abolitionists (*Democracy by Petition*, Chapters 5 and 10); the Seneca could draw upon their alliances with the Quakers (Chapter 13); French Canadian farmers could strengthen their cause with assistance from Montréal merchants (Chapter 7; Carpenter and Brossard 2019; Carpenter 2020); Hispanos in New Mexico could ally with *genízaros* and the two could find Catholic clergy to cement and mediate these ties (Chapter 5).

All of this is to underscore the organizational and agenda-setting power of the democratizing petition. The worry is that litigation does not lend itself to deliberative by representative sovereigns, and that it does not lend itself to the participatory politics that petitioning harnessed to leave organizational footprints. If litigation *can* perform these functions for the oppressed, then we should harness it to do so. If not, then protest and other forms of advocacy must be developed to fill the gap. *Democracy by Petition* is written of another time. I fear that in our own, better institutions of dialogue between citizen and sovereign must be developed.

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