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Government Corruption and the Right of Access to Courts

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NOTE

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INTRODUCTION

In early 1992, a Guatemalan guerilla named Efrain Bamaca-Velasquez disappeared during a skirmish with the Guatemalan military.[1] Although the military claimed that Bamaca had died in the battle, his wife, Jennifer Harbury, discovered a year later that her husband was indeed alive and being tortured in a Guatemalan

1. Harbury v. Deutch, 233 F.3d 596, 598 (D.C. Cir. 2000), *rev'd*, Christopher v. Harbury, 536 U.S. 403 (2002).

interrogation camp.[2] Desperate to save her husband's life, Harbury, an American citizen, sought the help of the U.S. government to discover his whereabouts.[3]

At various times, U.S. officials, including the U.S. Ambassador to Guatemala and National Security Advisor Anthony Lake, reported that they were "seriously looking" to obtain information surrounding Harbury's husband's whereabouts, that the Guatemalan military denied ever having custody of Bamaca, and that they would contact Harbury if they received any additional news.[4] Only after a 60 Minutes investigative report revealed that the State Department had intelligence confirming that Bamaca had been captured alive did the government confirm its knowledge of his detainment.[5] Lake stated, however, that he had since "scraped the bottom of the barrel" and had obtained no information as to whether Bamaca was still alive.[6] After more fruitless efforts, Harbury filed a Freedom of Information Request only to receive no response.[7] Finally, in 1995, she began a hunger strike in front of the White House, prompting Congressman Robert Toricelli to announce that Bamaca had been killed years earlier and that the men responsible for the death were paid Central Intelligence Agency ("CIA") informants.[8]

Harbury subsequently filed a complaint against the CIA, the State Department, the National Security Council ("NSC"), seventeen CIA employees, five State Department employees, two NSC employees, and various unnamed employees at each of these agencies.[9] The complaint alleged, inter alia, that through the defendants' affirmative acts of deception, the defendants had foreclosed her efforts to seek judicial relief and possibly save her husband's life.[10] It thereby alleged that these acts effectively denied Harbury access to the courts.[11]

The District Court for the District of Columbia dismissed the case for failure to state a cause of action.[12] The court ruled that even if

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2. *Id.*

3. *Id.* She also obtained permission to open what the Guatemalan government had marked as Bamaca's grave only to find another man's body. *Id.*

4. *Id.* at 598-99.

5. *Id.* at 599.

6. *Id.*

7. *Id.*

8. Christopher v. Harbury, 536 U.S. 403, 406 (2002).

9. Harbury v. Deutch, No. 96-00438 CKK, 1999 WL 33456919, at *1 (D.D.C. Mar. 23, 1999), *rev'd*, Harbury v. Deutch, 233 F.3d at 609, *rev'd*, Christopher v. Harbury, 536 U.S. 403 (2002).

10. Harbury v. Deutch, 233 F.3d at 609.

11. *Id.*

12. Harbury v. Deutch, 1999 WL 33456919, at * 8.

Harbury's situation implicated an access-to-courts violation, Harbury would first need to exhaust her state court remedies to demonstrate that her cause of action had in fact been prejudiced.[13] Even then, the court found that the officials would be entitled to qualified immunity because they had no duty to provide Harbury with information about her husband.[14] The D.C. Circuit reversed this decision, finding that the affirmative acts of the officials, if done for the purpose of suppressing a lawsuit, sufficiently stated a case for denial of access to the courts.[15] The court further held that because Harbury could no longer obtain the relief that she would have pursued absent the deception — i.e., emergency injunctive relief to save her husband's life — requiring her to file state court claims when her husband was already dead would serve no purpose.[16]

The Supreme Court granted certiorari and summarily reversed the D.C. Circuit's decision.[17] In doing so, however, the Court refused explicitly to recognize or reject the validity of Harbury's denial-of-access claim.[18] Instead, it dismissed Harbury's case for failure to state a cause of action.[19] The Court reasoned that irrespective of the constitutional validity of the denial-of-access claim, Harbury's particular claim failed because she could not state a valid *underlying* cause of action, i.e., a cause of action that could have been litigated had the alleged deception not occurred.[20] The Court found untenable Harbury's assertion that emergency injunctive relief, had she timely known of the government's involvement in her husband's detainment, could have saved Bamaca's life.[21] In this way, the Court resolved Harbury's claim without reaching the substantive question of whether a constitutional tort[22] actually lies in such a claim.[23]

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13. *Id.* at *9-10.

14. *Id.* at *10.

15. Harbury v. Deutch, 233 F.3d at 610.

16. *Id.* at 609.

17. Christopher v. Harbury, 536 U.S. 403, 422 (2002).

18. *Id.* at 414 n.9 ("All [previous backward-looking access cases] have been decided in the Courts of Appeals, we assume, without deciding, the correctness of the decisions." (citations omitted)).

19. *Id.* at 422.

20. *Id.*

21. *Id.* at 422 n.19 (discussing the difficulty in trying to prevent Bamaca's death by enjoining acts of U.S. government officials who are only indirectly involved in his torture). Indeed, the possibility that an injunction could have prevented the death of her husband, who was under Guatemalan control, is remote. For the sake of simplicity in analyzing the access-to-courts issue presented in this case, however, this Note analyzes cases in which prior court actions could have been fruitful.

22. Claims seeking damages for violations of the Constitution are brought under 42 U.S.C. § 1983 or as *Bivens* actions, both of which allow for civil actions against state and federal officers respectively. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of

This Note addresses the question left unanswered in *Harbury*: whether these denial of access-to-courts cases, which Justice Souter termed "backward-looking" access claims,[24] are valid exercises of a constitutional right. Backward-looking access claims such as Harbury's differ from traditional denial of access-to-courts claims in that their aim is not to remove impediments to bringing causes of action in the future.[25] Rather, backward-looking access claims allege that a suit that could have been filed in the *past* was not brought or was not litigated effectively, because access to the courts was at that time denied or obstructed by government officials.[26] These cases look "backward to a time when specific litigation ended poorly, or could not have commenced, or could have produced a remedy [now] unobtainable."[27] The novelty of these cases lies in the fact that until very recently, the right of access to courts had always been conceived as providing only forward-looking rather than retrospective relief.[28]

More specifically, within this category of cases, this Note seeks to answer the following question: If the government *intentionally* lied to you sometime in the past and either prevented you from filing a claim or from litigating a claim effectively, can you obtain relief in the present for a denial of access to courts?[29] And if so, what are the contours of such a right? This Note argues that the Supreme Court, as

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Narcotics, 403 U.S. 388 (1971); Monroe v. Pape, 365 U.S. 167 (1961). These constitutional claims are now generically referred to as "constitutional tort" actions. *See generally*, Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980) [hereinafter Whitman, *Constitutional Torts*].

23. *See* Christopher v. Harbury, 536 U.S. at 414 n.9. Some scholars have interpreted the Court's opinion in fact to have recognized the cause of action. *See, e.g.*, Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 729-30 (2003). However, even if the opinion could be interpreted thusly, its cursory treatment of the claim as well as its finding that backward-looking cases must seek relief "unobtainable in other suits" imply at best an exceedingly narrow right. *See* Christopher v. Harbury, 536 U.S. at 416.

24. Christopher v. Harbury, 536 U.S. at 413-14.

25. *Id.*

26. *Id.*

27. *Id.* at 414.

28. *See infra* notes 62-68 and accompanying text.

29. To clarify, this Note does not address the full range of backward-looking access claims, but only those that allege *intentional* conduct. Litigants could conceivably allege a denial of access to courts where *negligent* action on the part of government officials resulted in prejudice to the litigants' claim. *See, e.g.*, Harrell v. Cook, 169 F.3d 428, 430 (7th Cir. 1999) (alleging loss of cause of action when police negligently misplaced evidence). Although the question of whether negligent action also violates the right of access to courts is important , courts' and scholars' dichotomous treatment of negligent and intentional conduct renders this inquiry beyond the scope of this analysis. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 537-40 (3d ed. 1999) [hereinafter CHEMERINSKY, FEDERAL JURISDICTION] (discussing the Supreme Court's aversion to finding constitutional violations for negligent acts). For the sake of simplicity, this Note uses the term "backward looking" to refer only to cases involving intentional conduct.

it has done with forward-looking prisoner's cases,[30] should carve out a body of jurisprudence to allow for denial-of-access-to-courts claims in cases where official fraud or conspiracy has thwarted a potential cause of action. Resolution of the backward-looking access issue is particularly pressing today given current anxiety over the federal government's increasing power to regulate national security and the relative obscurity in which it is able to do so.

Part I describes the current state of Supreme Court jurisprudence on and the jurisprudential gaps in the right of access to courts and illustrates the need for greater guidance from the Court specifically regarding intentional backward-looking access claims. Part II argues in favor of recognizing backward-looking access-to-courts claims by examining constitutional tort theory as well as Supreme Court jurisprudence on forward-looking access cases. It demonstrates that not only do the policies underlying constitutional torts provide particularly compelling reasons for allowing backward-looking access claims, but also these claims implicate few of the concerns typically attendant to constitutional tort litigation. Finally, by analyzing the history of the access right as well as lower court opinions governing backward-looking claims, Part III offers a workable framework for addressing these causes of action, leading courts towards a more uniform method of adjudication.

I. THE ORIGINS AND CURRENT STATUS OF THE RIGHT OF ACCESS TO COURTS

The right of access to courts originated in English common law and, since its introduction into American common law, has evolved into a complex amalgam of legal doctrines and theories that continue to evolve today. This Part demonstrates that the access right has origins in and has developed through many different constitutional clauses, and that courts have treated backward-looking claims differently from other types of access-to-courts claims despite the apparent similarity between the various types.

A. *A Brief History of the Right*

The right to seek judicial redress for grievances is grounded in several different constitutional provisions, including the Due Process Clauses of the Fifth[31] and Fourteenth[32] Amendments, the Privileges

30. Although forward-looking cases have involved civil litigants as well as prisoners, the Supreme Court has almost exclusively limited its forward-looking jurisprudence to the prisoner context. See *infra* note 61 and accompanying text for a more in-depth explanation.

31. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property without due process of law.").

and Immunities Clause of Article IV,[33] and the First Amendment's Petition Clause.[34] In some ways, this breadth of origin has afforded the right of access to courts a measure of legitimacy insofar as its constitutionality is well-established.[35] As this Note argues in Part III, however, it has also contributed to a great deal of confusion surrounding the right's parameters — confusion that has in part stymied its doctrinal growth.[36] This Section demonstrates that each of the above sources provides a legitimate doctrinal framework for the access right while at the same time illustrating the potential for confusion that such broad grounding can cause.

One concept to which the right's origins have often been traced is due process.[37] In English common law, the right of access to courts enjoyed its status as one of five fundamental rights designed to protect life, liberty, and property,[38] the precursors to American due process guarantees.[39] This grounding carried over into American common law and as the right matured, it was afforded certain protections to guarantee its free exercise.[40] In colonial America, for instance, government bodies recognized the right of disenfranchised as well as enfranchised groups to petition for redress of grievances.[41] In addition, all petitioners were highly insulated from retaliation or punishment for their petitions.[42] The Supreme Court eventually endorsed these

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32. U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

33. U.S. CONST. art. IV ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

34. 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 *Christopher v. Harbury*, 536 U.S. at 415 n.12, for a summary of the different constitutional sources.

35. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (describing the right of citizens to resort to the courts as one of the most "fundamental" characteristics of society); Chambers v. Baltimore and Ohio R.R., 207 U.S. 142, 148 (1907) (describing the right of access to courts as "one of the highest and most essential privileges of citizenship").

36. *See infra* note 147 and accompanying text.

37. The right of access is grounded in both the Fifth and Fourteenth Amendment Due Process Clauses and undergo similar analysis under each. *See, e.g.*, Christopher v. Harbury, 536 U.S. at 415 n.12; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 419-20 (1997).

38. 1 WILLIAM BLACKSTONE, COMMENTARIES * 137. The other fundamental rights were (1) Constitution, powers and privileges of Parliament, (2) limitations on the King's prerogatives, (3) a right to petition the King, or either House of Parliament, for redress of grievances, and (4) a right to have arms for self-defense. *Id.* at * 136-41.

39. U.S. CONST. amend. V.

40. Steven A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 144, 153 (1986); 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, 22, 31-33 (1993).

41. Spanbauer, *supra* note 40, at 31-33.

42. *Id.*

protections, pronouncing in 1882 that the right of citizens to seek redress in the courts would be protected from "arbitrary interference."[43] The Court reiterated its endorsement nearly a century later in *Wolff v. McDonnell*,[44] interpreting the due process right of access as one which "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."

In addition to due process, the right of access to courts is also properly rooted in the Privileges and Immunities Clause of Article IV.[45] Although history delineating the reach of this Clause is sparse, its general intent was to protect fundamental individual liberties from interference by the government.[46] In the words of Justice Washington in *Corfield v. Coryell*,[47] the Clause protected those interests "which belong, of right, to the citizens of all free governments." One of these basic interests was the right to institute actions in court.[48] The Supreme Court upheld this view of the access right in the seminal case of *Chambers v. Baltimore and Ohio Railroad*,[49] endorsing the primacy of the access right by characterizing it as "one of the highest and most essential *privileges* of citizenship." Today, the Clause's protection of the right of access to courts stands undisputed.[50]

Lastly, the access right is grounded in the First Amendment's Petition Clause, which states that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."[51] The petition right originated in England with the Magna Carta of 1215,[52] and afforded citizens the opportunity to petition the King, Parliament, and the courts for redress of personal

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43. Pritchard v. Norton, 106 U.S. 124, 132 (1882).

44. 418 U.S. 539, 579 (1974).

45. *See* Chambers v. Baltimore and Ohio R.R., 207 U.S. 142, 148 (1907); Blake v. McClung, 172 U.S. 239, 249 (1898); Ryland v. Shapiro, 708 F.2d 967, 971 (5th Cir. 1983).

46. Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa 1823) (No. 3,230).

47. *Id.*

48. Cole v. Cunningham, 133 U.S. 107, 113-14 (1890).

49. 207 U.S. 142, 148 (1907) (emphasis added). The Court further delineated the right as "conservative of all other rights [in organized society], and [lying] at the foundation of orderly government." *Id. See also* Blake v. McClung, 172 U.S. 239, 249 (1898); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

50. See Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002), for a recent case in which the Supreme Court recognized that the right of access to courts is rooted in part in the Privileges and Immunities Clause of Article IV.

51. U.S. CONST. amend. I.

52. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 597 (1999) [hereinafter Rice Andrews, *A Right of Access*]; 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, 1153 (1986); Spanbauer, *supra* note 40, at 22.

as well as social ills.[53] The petition right carried over from England to colonial America, initially protecting the right of citizens to petition their legislatures for redress of similar concerns,[54] and eventually developing to protect filing of judicial complaints.[55] Thus, the right to petition was an explicit source of protection for seeking adjudication of complaints in the courts.[56] In keeping with this history, the Supreme Court affirmed in *California Motor Transport Co. v. Trucking Unlimited*[57] that the "right of access to the courts is indeed but one aspect of the right of petition."

In short, courts have to date analyzed access-to-courts cases under a variety of different constitutional doctrines and have provided little guidance as to the ways in which the cause of action might differ under each doctrinal source. In neglecting to delineate between these various sources, courts have perhaps inadvertently generated confusion as to the precise parameters of the right as well as its limits. In the following Sections, this Note suggests an alternative framework under which to analyze the right of access to courts with the hope of moving toward more disciplined and predictable adjudication of these claims.[58]

B. *The State of the Access-to-Courts Doctrine*

The principle that an individual has a right "to resort to the laws of his country for a remedy"[59] has evolved into the well-settled notion that every citizen has a general right to seek judicial redress in the courts for his grievances.[60] Today, the question is no longer whether such a right exists, but rather how far this right extends. Specifically, when, if ever, can one seek redress in the courts for interference with

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53. Rice Andrews, *A Right of Access*, *supra* note 52, at 597-98.

54. *Id.*; 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, 929-34 (1997).

55. Higginson notes that around the time of abolition, the legislatures were flooded with petitions from abolitionists, prompting intense reluctance on the part of assemblies to continue addressing individual petitions. Higginson, *supra* note 40, at 158-59. Concomitantly, the rise of judicial institutions resulted in courts taking over where legislative institutions had left off, eventually removing jurisdiction over private petitions from legislative institutions altogether. *Id.* at 157-58.

56. Pfander, *supra* note 54, at 960.

57. 404 U.S. 508, 510 (1972). *See also* Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741 (1983).

58. *See infra* Part III.A.

59. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).

60. *See, e.g.*, Rice Andrews, *A Right of Access*, *supra* note 52, at 563-67; *see also* Chambers v. Baltimore and Ohio R.R., 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force . . . . It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens.").

the very right to seek redress in the courts? Courts have answered this question in different ways depending on the type of claim. This Section highlights the differences, notwithstanding their similar natures, between the judicial treatments of the various access-to-courts claims.

Today, access cases fall into three main categories: forward-looking cases, retaliation cases, and backward-looking cases, with the backward-looking category of claims remaining the most highly-contested of the three. In forward-looking cases, claimants argue that certain impediments, such as filing fees, deny them access to the courts.[61] The Supreme Court has recognized a broad range of protections within this first group, especially with regard to prisoners.[62] In a second group of cases, best referred to as "retaliation" cases, claimants allege an infringement of their right of access to courts because a government actor retaliated against them for filing a claim.[63] For instance, in *Harrison v. Springdale Water and Sewer Commission*,[64] the plaintiffs claimed a denial of access to the courts when state officials filed a frivolous condemnation counterclaim in response to the plaintiffs' nuisance suit against the city.[65] The Eighth Circuit found that the facts as alleged would constitute a violation, recognizing the validity of the retaliation claim.[66]

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61. *See, e.g.*, Johnson v. Avery, 393 U.S. 483 (1969); Burns v. Ohio, 360 U.S. 252, 257 (1959); Griffin v. Illinois, 351 U.S. 12, 20 (1956).

62. See *Bounds v. Smith*, 430 U.S. 817, 821-25 (1977), for an overview of these cases. Since it first recognized a prisoner's right to file for habeas relief without interference from the state in 1941, *Ex parte Hull*, 312 U.S. 546 (1941), the Court has struck down regulations prohibiting prisoners from assisting each other in legal filings, *Johnson v. Avery*, 393 U.S. 483 (1969), has required waiver of legal fees for indigent prisoners, *Burns v. Ohio*, 360 U.S. 252, 257 (1959); *Griffin v. Illinois*, 351 U.S. 12, 20 (1956), and has imposed an obligation on prison officials to provide adequate law libraries and/or legal assistance to prisoners. *Bounds*, 430 U.S. at 821-25.

The Court has also recognized a right of access for civil litigants, albeit a very narrow one. In 1971, the Court broke out of the prisoner context to invalidate a statute requiring payment of court fees in order for indigents to obtain divorces. Boddie v. Connecticut, 401 U.S. 371 (1971). The scope of this access right remains unclear because the Court has not since ruled in favor of a civil litigant. For instance, two years after *Boddie*, in *Ortwein v. Schwab*, the Court curtailed the *Boddie* rule by rejecting the notion that all state filing fees violated the right of access for indigent litigants. 410 U.S. 656, 658-59 (1973). Filing fees would only amount to a denial of access if the underlying litigation involved a fundamental right and resort to the courts was the only way of vindicating that right. *Id.* at 658-60. See *infra* notes 177-189 and accompanying text for a more in-depth discussion of the ramifications of the fundamental rights distinction.

63. *See, e.g.*, Harrison v. Springdale Water and Sewer Comm'n, 780 F.2d 1422 (8th Cir. 1986); Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976).

64. 780 F.2d 1422 (8th Cir. 1986).

65. *Id.* at 1428.

66. *Id.* Similarly, in *Silver* the Tenth Circuit found a denial of access to courts when a public official threatened to withhold certain payments owed to the plaintiff should the plaintiff follow through with a lawsuit he had filed against the city. 529 F.2d at 163. The Supreme Court has not specifically addressed these retaliation cases. It has ruled generally

The third and most unsettled of the access-to-courts claims are the backward-looking cases such as Harbury's, where the claimant argues that past government action impeded or thwarted a claim or potential claim. The theory behind backward-looking cases is that the coverup, by preventing disclosure of evidence critical to a suit, denies or interferes with the plaintiff's right of access to the courts by preventing or undermining litigation of the claim.[67]

Backward-looking claims typically arise as a result of police misconduct. In *Bell v. City of Milwaukee*,[68] for example, defendant police officers shot and killed a man after a routine traffic stop. They then planted a knife on him and claimed they acted in self-defense.[69] Twenty years after the family of the victim entered into a paltry settlement agreement with the city, the officers confessed to the coverup.[70] The Seventh Circuit found this conspiracy to have effectively denied the family meaningful access to the courts.[71]

Denial of access to courts has also been implicated in human experimentation cases, where the U.S. government performed chemical and other tests on humans without their consent.[72] In *Barrett v. United States*, plaintiff family members brought suit after a man died from mescaline injections administered to him in a psychiatric facility as part of a secret experimental program conducted by the U.S. Army.[73] The family argued that had they known of the injections, which were administered without the patient's consent, they would have enjoined the action and thereby prevented the man's death.[74] The coverup denied them access to the courts because it wholly concealed

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against government retaliation for exercising one's constitutional rights. *See, e.g.*, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 282-84 (1977) (finding a violation where teacher's contract was not renewed because of teacher's public criticism of school policies); Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."). At the same time, the Court's recent decision in *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), which protected an employer's right to file a retaliatory lawsuit, renders uncertain the current state of this doctrine. See Carol Rice Andrews, *After* BE & K*: The "Difficult Constitutional Question" of Defining the First Amendment Right to Petition Courts*, 39 HOUS. L. REV. 1299 (2003) for an informative discussion of this case.

67. *See, e.g.*, Ryland v. Shapiro, 708 F.2d 967, 969-70 (5th Cir. 1983).

68. 746 F.2d 1205 (7th Cir. 1984).

69. *Id.* at 1216.

70. *Id.* at 1223.

71. *Id.* at 1261.

72. *See, e.g.*, Barrett v. United States, 798 F.2d 565 (2d Cir. 1986); Heinrich *ex rel.* Heinrich v. Sweet, 62 F. Supp. 2d 282 (D. Mass. 1999); *In re* Cincinnati Radiation Litig., 874 F. Supp. 796 (S.D. Ohio 1995).

73. *See Barrett*, 798 F.2d at 567.

74. *Id.*

information such that it was impossible for them to know they had a cause of action to pursue. Similar claims have been brought by victims and their families for human radiation experiments carried out by the Department of Defense and the Atomic Energy Commission.[75] The Supreme Court has not considered a backward-looking access case since *Harbury*, and thus there has never been a definitive ruling on their validity.[76]

In sum, despite the early promulgation of the right of access to courts, judicial decisions delineating the scope of the right beyond the context of the prisoner's cases are sparse and vague. In backward-looking claims, its most recent incarnation, the right has been used to vindicate cases where past actions by government officials are alleged to have interfered with a plaintiff's pursuit of a cause of action.[77] Due to the short history of adjudicating backward-looking claims[78] as well as the somewhat obscure theory behind them, it is the most ill-defined and contentious of the three types.[79]

II. IN SUPPORT OF THE VALIDITY OF BACKWARD-LOOKING ACCESS CLAIMS

If litigants are to advocate expanding constitutional torts doctrine to include backward-looking access-to-courts cases, they must be prepared to defend this expansion in light of the reality that courts today are generally loath to recognize new constitutional tort violations.[80] Because of uncertainty as to how far constitutional tort

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75. Heinrich *ex rel.* Heinrich v. Sweet, 62 F. Supp. 2d 282 (D. Mass. 1999); *In re* Cincinnati Radiation Litig., 874 F. Supp. 796 (S.D. Ohio 1995).

76. The author's thorough search yielded no such cases.

77. *E.g.*, Christopher v. Harbury, 536 U.S. 403 (2002).

78. The first appellate-court case was *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), issued in 1983.

79. *See* Crowder v. Sinyard, 884 F.2d 804, 811 (5th Cir. 1989) (illustrating the confusion surrounding the doctrine: "[w]e cannot say with certainty that there is no possibility that any set of facts which might be proved in support of the allegations would entitle the [plaintiffs in an earlier case] to some relief.").

80. *See* Whitman, *Constitutional Torts*, *supra* note 22, at 6-7. By recognizing, in *Monroe v. Pape*, 365 U.S. 167 (1961), what had until then been a dormant right of plaintiffs to use section 1983 to sue state officials for constitutional violations, the Supreme Court created an unprecedented means by which victims of *past* constitutional violations could seek damage awards. Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 664-67 (1997) [hereinafter Whitman, *Emphasizing*] (explaining how, before *Monroe*, the class of litigants able to challenge government action in court was limited to those "subject to continuing government control" and not to those who had suffered harm in the past); Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617 (1997) [hereinafter Wells, *Constitutional Torts*] ("Before *Monroe* and the revival of § 1983, there was no point in thinking in constitutional terms about an injury that took place in the past and . . . had no bearing on any other legal obligation owed by or to the victim."). The Court recognized a similar right

recovery should extend, and in the face of an ever-increasing number of lawsuits claiming constitutionally protected injuries, courts, particularly the Supreme Court, have all but taken the position that new constitutional tort claims should be presumptively denied.[81] This reality, coupled with the Supreme Court's evasive treatment of Harbury's claim,[82] heightens the possibility that if the Supreme Court should ever reach the merits of another backward-looking access claim, it would refuse to recognize it as a valid cause of action.

This pervasive hostility towards constitutional torts, however, is unwarranted in backward-looking access-to-courts cases. Section II.A argues that the Supreme Court itself has set forth principles for adjudicating access-to-courts claims that, when applied to backward-looking cases, fall in favor of their recognition. Section II.B demonstrates that backward-looking access-to-courts claims, viewed in light of contemporary constitutional tort theory, espouse the very goals that have driven constitutional tort recovery in other arenas. Section III.C shows that these claims do not trigger the concerns, such as fears of overexpansion of constitutional tort litigation and overdeterrence of official action, that have occasioned the current impulse of courts to restrict recovery in other areas.

A. *Jurisprudence of the Supreme Court to Date*

Supreme Court rulings on the right of access to courts in the forward-looking cases provide compelling justifications for extension of these same protections to the backward-looking context. In forward-looking cases, specifically those involving prisoners, the Court has time and again stated that access to the courts must amount to

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to sue federal officers in 1971 in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In the time since, however, courts have struggled with constitutional tort claims, straining to find a proper balance between redress for harms suffered by victims and unbridled liability for hosts of government actions. *See* Whitman, *Emphasizing*, *supra*, at 667-68; Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997 (1990); *see also* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989); Davidson v. Cannon, 474 U.S. 344 (1986); Daniels v. Williams, 474 U.S. 327 (1986); Paul v. Davis, 424 U.S. 693, 699 (1976) (dismissing allegation that defamation by a state official constituted a § 1983 claim because such a claim would "almost necessarily . . . result in every legally cognizable injury which may have been inflicted by a state official . . . establishing a violation of the Fourteenth Amendment").

81. *See, e.g.*, Whitman, *Constitutional Torts*, *supra* note 22, at 6-9; Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 343-44 (1989). *But see* Bush v. Gore, 531 U.S. 98 (2000) (finding a violation under Equal Protection Clause of the fundamental right to vote where a state recount failed to secure minimum requirements for nonarbitrary treatment of voters).

82. Christopher v. Harbury, 536 U.S. 403, 416 (2002) (requiring backward-looking claims to seek a remedy not obtainable through any other cause of action and thereby severely restricting the types of claims that might be brought); *see also supra* note 18.

more than a theoretical ability to enter the courthouse doors.[83] The Court has held that the right must, if it is to have any significance, provide practically meaningful access to the courts.[84] For instance, in *Bounds v. Smith*,[85] a group of prisoners challenged a state's refusal to provide adequate law libraries as a de facto denial of access to courts. In finding for the plaintiffs and imposing upon the state an affirmative responsibility to provide a better library, the Court promulgated the now oft-repeated requirement that access to the courts be "adequate, effective, and meaningful" in order to pass constitutional muster.[86] The right must afford more than the mere ability to file a claim.[87] It must provide an opportunity for the litigant to present his claims "fairly."[88]

These same principles apply with equal force to the backward-looking cases such as Harbury's. First, despite Justice Souter's compartmentalization of backward-looking claims as distinct from forward-looking claims, there is nothing particularly novel about the former that warrant their separate treatment. American tort law is premised upon the notion that a victim may seek compensation for injury that has occurred in the past.[89] The Court in *Monroe*, in holding police officers liable for an unreasonable search and seizure, extended this idea to the constitutional context, creating a means by which victims of past *constitutional* violations could also seek compensation.[90] In the years since *Monroe*, the courts have applied the *Monroe* and *Bivens* rulings to hold government actors liable for a variety of past constitutional infringements.[91] Thus, although the idea of permitting recovery for harm inflicted in the past is new as applied to the doctrine of access to courts, the idea itself is not novel either in common law tort or constitutional tort.

Second, application of these principles to cases such as Harbury's demonstrates that refusal to impose liability in the backward-looking context creates the very inequities that the Supreme Court endeavored to avoid in its forward-looking access-to-courts

83. See *Bounds v. Smith*, 430 U.S. 817, 821-25 (1977) for a summary of cases.

84. *Id.*

85. *Id.* at 818.

86. *Id.* at 822.

87. *Id.*

88. *Id.* at 823 (citing Ross v. Moffitt, 417 U.S. 600, 616 (1974)).

89. *See* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 1 (2d ed. 2002).

90. 365 U.S. at 171-72. *See supra* note 79.

91. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985) (deadly force during arrest); Jeanty v. McKey & Poague, Inc., 496 F.2d 1119 (7th Cir. 1974) (denial of housing opportunities); Basista v. Weir, 340 F.2d 74 (3d Cir. 1965) (unlawful arrests).

jurisprudence. For instance, in *Bell v. City of Milwaukee*,[92] Bell's family, not knowing the true circumstances of Bell's death, agreed to a paltry wrongful death settlement with the city for $1,800. Undeniably, the officers' conspiracy to cover up the crime for twenty years denied the Bell family any semblance of an adequate and meaningful adjudication of its claim.[93] In this way, when government actors abuse their ability to monopolize information by covering up evidence of their negligence, they deny effective court access to those wishing to pursue recovery for injuries stemming from the negligence.[94] Whether a plaintiff is impaired in her ability to bring a claim because a city refuses to waive filing fees or because city officials knowingly provide her with false information, the end result is the same. The claimant, through state-created impediments, has been deprived of her right to receive a fair opportunity to be heard in court.[95]

In fact, backward-looking access claims present a stronger claim for recognition than the already accepted forward-looking cases. In the backward-looking context, government actors are only called upon not to take active steps to thwart a litigant's claim.[96] In comparison, forward-looking cases require action on the part of the official through provision of libraries, counsel, and other assistance.[97] It follows that if officials have a duty under some circumstances to assist litigants proactively in accessing the courts, *a fortiori* they must, at a minimum,

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92. 746 F.2d 1205, 1223 (7th Cir. 1984). Plaintiffs, in the end, never signed the settlement agreement and refused to accept the money. *Id.*

93. When the Bells relitigated their claim in 1983, the jury returned a verdict of over $300,000 for injuries stemming from the killing. *Id.* at 1225.

94. In *Nielson v. Clayton*, for example, state hospital personnel killed a man by performing a chokehold on him but classified his death at various times as "unknown" and/or a "heart attack." Nos. 94-1620, 94-1765, 94-1766, 1995 WL 417569, at *1-2 (7th Cir. July 11, 1995). Although in this case the coverup ultimately failed, had these officials succeeded in effecting their plan, they would no doubt have impeded the family's attempts to recover for wrongful death. *See also* Swekel v. City of River Rouge, 119 F.3d 1259 (6th Cir. 1997); Foster v. City of Lake Jackson, 28 F.3d 425, 427 n. 4 (5th Cir. 1994); Saul B. Shapiro, Note, *Citizen Trust and Government Coverup: Refining the Doctrine of Fraudulent Concealment*, 95 YALE L.J. 1477, 1487-91 (1986) (discussing how the government's monopoly on information and its resulting ability to keep information secret exacerbates the possibility of abuse).

95. To be sure, this analysis does not presume that states may never prevent litigants from filing suit. For instance, sovereign immunity precludes certain claims against state governments and the federal government. CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 29, at 589; Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1203 (2001). This Note does not argue that sovereign immunity should be abolished, but only argues that if a litigant has an apparent right to pursue a particular cause of action, a state official may not take steps to deny that right.

96. Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 229 (1984).

97. *See, e.g.*, Bounds v. Smith, 430 U.S. 817 (1977); Johnson v. Avery, 393 U.S. 483 (1969); Burns v. Ohio, 360 U.S. 252, 257 (1959); Griffin v. Illinois, 351 U.S. 12, 20 (1956).

refrain from doing anything to *impede* a claim.[98] Thus, when government officials take affirmative steps to thwart a potential wrongful death claim by passing it off as a suicide,[99] or destroy evidence necessary to prove a cause of action,[100] there is a particularly compelling argument for providing relief.

B. *Backward-Looking Claims and the Constitutional Torts Paradigm*

Looking beyond the scope of the access-to-courts doctrine, constitutional tort theory generally also favors recognition of backward-looking access-to-courts claims. The principal reason courts have carved out a separate sphere of liability to remedy constitutional wrongs is that these violations, as opposed to common law violations, inflict a special type of injury upon their victims, an injury not present in common law torts.[101] One can point to the Los Angeles Police Department's Rampart corruption scandal,[102] the accusations of racially-motivated brutality leveled against the New York Police Department,[103] and even the scandals of the Watergate era[104] to demonstrate the devastating ramifications that government conspiracies and abuses of power can cause. The social harm and

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98. Indeed, the conflicting holdings of the district court and the D.C. Circuit stem in part from differences in their perceptions of the defendants' actions. The district court denied Harbury's claim because it read her claim to allege a duty on the part of government officials to investigate her claim. Harbury v. Deutch, No. 96-00438 CKK, 1999 WL 33456919, at *10 (D.D.C. Mar. 23, 1999), *rev'd*, Harbury v. Deutch, 233 F.3d 596 (D.C. Cir. 2000), *rev'd*, Christopher v. Harbury, 536 U.S. 403 (2002). The D.C. Circuit, however, reframed her complaint as alleging a duty not actively to provide false information in hopes of thwarting her ability to seek redress in the courts. Harbury v. Deutch, 233 F.3d 596, 609 (D.C. Cir. 2000), *rev'd*, Christopher v. Harbury, 536 U.S. 403 (2002). In doing so, it found a prima facie showing of a violation. *Id.* Had the district court read correctly Harbury's allegation, it may have ruled differently. *See* Harbury v. Deutch, 1999 WL 33456919, at *10 (implying that, had Harbury alleged an *affirmative* suppression or destruction of evidence, her claim may have stated a valid cause of action).

99. Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983).

100. *See, e.g.*, Foster v. City of Lake Jackson, 28 F.3d 425, 427 n.4 (5th Cir. 1994).

101. Whitman, *Emphasizing*, *supra* note 80, at 669.

102. *See* Matt Lait and Scott Glover, *The Rampart Scandal; LAPD Probe Fades Into Oblivion; The Investigation That Gripped the City Is All But Over, Though Far from Done*, L.A. TIMES, Aug. 11, 2003, at A1, *available at* 2003 WL 2426596 (discussing the two-year probe of the Rampart-area police department following reports of widespread criminal activity by Rampart police officers).

103. *See* Human Rights Watch, *Shielded from Justice: Police Brutality and Accountability in the United States* (1999), *at* http://www.hrw.org/reports98/police/index.htm (discussing numerous incidents of unjustified shootings, beatings, and other abuses by New York City police that took place during the mid- to late-1990s).

104. *See generally* KEITH W. OLSON, WATERGATE: THE PRESIDENTIAL SCANDAL THAT SHOOK AMERICA (2003) (detailing the use of Republican funds to finance widespread and illegal intelligence gathering by the Nixon administration that lead to Nixon's resignation in 1974).

mistrust such abuses engender can be debilitating, and one can intuitively sense that the damage these scandals leave in their wake is qualitatively different than when only private actors are involved.[105]

The distinct nature of this harm stems from the unusual nature of citizen-government interaction.[106] As articulated by professors Michael Wells and Thomas Eaton, citizens place a certain degree of trust in their government bodies and actors to implement rules and regulations, to provide services, create order, mete out justice, and in general to safeguard societal interests.[107] This trust is compelled in part by the government's monopoly on police power and rule-creation, which creates an unavoidable dependency of the public upon it.[108] The resulting power imbalance creates a citizenry particularly vulnerable to government coercion.[109] In all, these factors align to give government officials a unique ability not only to harm but to harm a greater number of people with greater ramifications.[110]

Not only is the potential to harm in the context of government actors greater than in the realm of private law, but also the harm is itself unique in that these abuses inflict a "moral" injury that is not similarly implicated outside of the context of government action.[111] This injury is propagated by the unusual role the state plays in affording legitimacy to a person's membership in society.[112] Professors Dauenhauer and Wells point out that to the extent citizens rely upon the state to create a properly functioning and ordered society, the state must also rely on the citizens to engage themselves as

105. *See* Wells & Eaton, *supra* note 96, at 229-30; Whitman, *Emphasizing*, *supra* note 80, at 669.

106. Wells & Eaton, *supra* note 96, at 229.

107. *Id.*; Shapiro, *supra* note 94, at 1488.

108. Shapiro, *supra* note 94,. at 1487-91 (arguing that people tend to place a great deal of trust in government actors because of the inherent need to rely on government for basic goods, services, and information, among other things).

109. *Id.* at 1488.

110. For instance, because of the federal government's monopoly on information, it was able to conceal from the public the fact that it was conducting nuclear testing in Nevada between 1951 and 1963. *See* Allen v. United States, 816 F.2d 1417 (10th Cir. 1987). The nuclear tests ultimately resulted in over a thousand residents developing leukemia and other cancers. *See* STAFF OF HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE 96TH CONG. 2D SESS., "THE FORGOTTEN GUINEA PIGS:" A REPORT ON THE HEALTH EFFECTS OF LOW-LEVEL RADIATION SUSTAINED AS A RESULT OF THE NUCLEAR WEAPONS TESTING PROGRAM CONDUCTED BY THE UNITED STATES GOVERNMENT 22 (Comm. Print 1980).

111. As Professors Bernard Dauenhauer and Michael Wells explain, injury caused by infringements on constitutional rights cannot necessarily be quantified in monetary terms. Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 911-16 (2001). The real concern that constitutional torts address is the "moral" injury suffered by victims of these violations and also the social harm engendered by the abuse. *Id. See also* Whitman, *Emphasizing*, *supra* note 80, at 669.

112. Dauenhauer & Wells, *supra* note 111, at 911-16.

contributing members of society — in essence, to conform to the rules the state has created.[113] Because of the inherent vulnerability of each participant to the whims of the government, every violation committed against him by the state in effect delegitimates his membership in society, risks alienating his ongoing participation, and upsets the symbiotic balance of rights and obligations between the two.[114] Awarding victims redress through constitutional tort actions serves to offset the damage the government wrongdoer may have caused.[115] It accords the victim a renewed sense of legitimacy and encourages him to remain a productive member of the community.[116] Imposing liability for constitutional violations also promotes social peace by urging people to continue to "embrace their citizenship."[117]

In addition, liability for these abuses does more than provide redress for the individual claimant. A constitutional violation affects more than any individual victim: "A constitutional tort committed against one citizen can, and not infrequently does, give other citizens reason to fear that they too may become the direct victims of some deprivation of due recognition."[118] Accordingly, government accountability for the violation serves to ameliorate the fear and disillusionment aroused in those sympathetic to the victim as well.[119]

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113. *Id.* at 913-15.

114. *Id.* at 916. The community as a whole must take steps to ensure that the "empowering function" of the state prevails over its "dominating, disempowering function" if it is to prevent a collapse of social order. *Id.* at 915. Along these same lines, Wells and Eaton also argue that courts should limit constitutional torts to cases that implicate a threat to concern and respect for the individual by the government, since this is the interest that the Constitution intended to protect. Wells & Eaton, *supra* note 96, at 232.

The theoretical focus on government's unique power to demoralize can also account for the allowance of nominal damages in constitutional tort actions. *See* Carey v. Piphus, 435 U.S. 247 (1978) (awarding nominal damages where plaintiffs demonstrated a violation of their constitutional rights even if they suffered no other harm). As Professor Whitman points out, the allowance of nominal damages, which is not allowed for common law torts, is rooted in the idea that constitutional torts are in part meant to address the dignitary harm caused by government abuse of power. Whitman, *Emphasizing*, *supra* note 80, at 669.

115. Dauenhauer & Wells, *supra* note 111, at 917. In the same way that government regulations of property can involve demoralization costs, constitutional violations can also result in demoralization. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). See also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 790 n.126, 807-08, 809 n.188, discussing the ways in which Fifth Amendment takings claims are analogous to Fourth Amendment unlawful seizure claims, and Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123 (1996), applying the demoralization concept to Fourth Amendment actions, for other areas to which the concept of demoralization has been applied.

116. Dauenhauer & Wells, *supra* note 111, at 917.

117. *Id.* at 920.

118. *Id.* at 918.

119. *Id.*

Claims that involve intentional attempts on the part of a government actor to defraud a victim or conceal information implicate precisely those harms that constitutional torts are intended to address, perhaps more than any other type of constitutional claim.[120] As scholars and courts uniformly recognize, harms inflicted upon victims through deliberate, intentional action tend to produce more deleterious results than injuries that result from simple negligence or ignorance.[121] While both types of acts might lead to similar quantifiable losses, injuries inflicted intentionally or maliciously carry the added demoralization that does not usually result from negligent actions.[122] And even those scholars who advocate greater limitations on constitutional tort recovery do not advocate limiting recovery in cases of intentional and flagrant abuse.[123]

In the case of backward-looking access claims, in fact, the injuries suffered by victims are twofold: the injury inflicted by the underlying cause of harm and the injury caused by the ensuing coverup. For example, in *Barrett v. United States* there were actually two separate sources of injury inflicted upon Mr. Blauer and his family.[124] The first came from the nonconsensual use of Mr. Blauer by the government for human experimentation and his resulting death.[125] The second came from the active and extensive coverup of the experimentation program by the U.S. Army Chemical Corps.[126] Both acts implicate

120. *See, e.g.*, Barrett v. United States, 798 F.2d 565 (2d Cir. 1986); Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984); Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983); *see also supra* note 29.

121. John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 278 (2000) [hereinafter Jeffries, *Disaggregating*]; John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90-91 (1999) [hereinafter Jeffries, *Right-Remedy*]; Wells & Eaton, *supra* note 96, at 246-50; Whitman, *Emphasizing*, *supra* note 80, at 690-91.

122. Wells & Eaton, *supra* note 96, at 248.

123. Jeffries, *Right-Remedy*, *supra* note 121, at 90-91. Professor Jeffries goes so far as to suggest that constitutional tort doctrine be altered to include only constitutional violations involving malicious motivation. Jeffries, *Disaggregating*, *supra* note 121, at 278; *see also* Wells & Eaton, *supra* note 96, at 241-52; Whitman, *Emphasizing*, *supra* note 80, at 690-91. Indeed, Professors Wells and Eaton also argue that constitutional torts should be available where the defendants acted intentionally, recklessly, or in disproportion to the benefits conferred by legitimate goals of the state. *See* Wells & Eaton, *supra* note 96, at 236-37.

Courts as well have never been concerned about imposing liability in cases involving blatant abuse, perceiving no danger in imposing liability on this type of conduct because it so clearly violates the most "basic" constitutional norms. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 850-53 (2001).

124. 798 F.2d 565 (2d Cir. 1986)

125. *Id.* at 567.

126. In their efforts to keep the mescaline injection program secret, the federal government, including the Department of Justice and the Chemical Corps, attempted to keep secret the contract between the Army and the psychiatric hospital. *Id.* at 568-69. The officials also decided to attribute the injection program to the Army Medical Corps instead of the Chemical Corps should they be required to divulge sponsorship of the program. *Id.*

those compensable injuries, e.g., physical injury, emotional and mental suffering, generally addressed by common law torts.[127] The coverup triggers the additional *moral* disenfranchisement that scholars agree constitutional torts are intended to protect against.[128] Because of the unique type of harm inflicted in these backward-looking access claims, such claims tend to better reflect the policies of constitutional liability than other, more controversial, constitutional claims.[129] This analysis holds true for all backward-looking access cases involving intentional acts, such as *Ryland*, *Bell*, and *Harbury*, because all involve an original cause of action as well as injury caused by the intentional concealment of information pertaining to that original claim.

C. *Absence of Concerns Limiting Recovery*

At the same time, backward-looking access-to-courts cases do not raise those concerns and criticisms that have in the past defeated so many constitutional claims. One of the principal reasons courts have refused to recognize new constitutional torts is the fear of overexpansion, i.e., the fear of opening the floodgates for increasingly novel and vague claims of constitutional wrongdoing.[130] Lurking beneath this worry is the broader concern that as courts give greater allowance for more constitutional tort recovery, such torts will become virtually indistinguishable from common law torts and will lose any special "constitutional" status they were meant to have.[131] Then-Justice Rehnquist articulated this fear in *Paul v. Davis*:

> If the same [allegedly defamatory] allegations had been made about [the plaintiff] by a private individual, he would have nothing more than a claim for defamation under state law. But, he contends, since [defendants] are . . . [officials] of city and of county government, his

127. ABRAHAM, *supra* note 89, at 207-08.

128. John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 93-95 (1989); Whitman, *Emphasizing*, *supra* note 80, at 669.

129. *See* Davidson v. Cannon, 474 U.S. 344 (1986) (declining to find liability where negligence resulted in the attack of a prisoner by another inmate); Paul v. Davis, 424 U.S. 693 (1976) (dismissing a section 1983 claim alleging defamation at hands of police officer).

130. *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (refusing to impose an affirmative duty on social workers to prevent child abuse); Davidson v. Cannon, 474 U.S. 344 (1986); Daniels v. Williams, 474 U.S. 327 (1986) (declining to find liability where negligence resulted in prison slip and fall). This fear of overlitigation is understandable, and given that the number of civil rights filings in the two decades after *Monroe* increased from under 300 to over 30,000, Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 662 (1987), few scholars question the need for at least some limiting devices to prevent such proliferation. *See generally* Wells, *Constitutional Torts*, *supra* note 80; Whitman, *Constitutional Torts*, *supra* note 22; Rosen, *supra* note 81.

131. *See Paul*, 424 U.S. at 698-99; Whitman, *Emphasizing*, *supra* note 80, at 670.

> action is thereby transmuted into one for deprivation by the State of rights secured under the Fourteenth Amendment . . . .
>
> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment.[132]

This concern, however, does not adequately justify denial of backward-looking access claims, because these claims do not fall within the category of cases to which the fear is directed. Rehnquist's concern in *Paul v. Davis* was that constitutional torts were being construed by litigants as nothing more than common law torts involving government officials, when they were originally intended to provide more distinctive protections.[133] He seemed to suggest that courts should entertain only those constitutional tort actions that involve abuses committed by government *qua* government.[134] Thus, constitutional recovery should be reserved for those abuses that government actors are able to commit precisely *because* they are government actors.[135]

Backward-looking access-to-courts claims involve exactly such scenarios. Government bodies and their agents are armed with the power to provide protections for the public by enacting and enforcing laws and investigating infractions.[136] This very power, carrying with it a special ability to monopolize information and impede information dissemination, also carries with it a special susceptibility for abuse, which affords government officials the opportunity to effect their conspiracies.[137] Because of this nexus, there is little worry that recognition of backward-looking access-to-courts cases might relegate constitutional torts to nothing more than a "font of tort law" in the way that allowing recovery for defamation by a police officer or a slip and fall on government property might.[138]

Nor do these access-to-justice claims implicate the other oft-repeated criticism of constitutional tort law: detrimental

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132. *Paul*, 424 U.S. at 698-99.

133. *Id.*

134. *Id.* at 710-711 (construing its earlier cases to imply that constitutional torts will only be found where a state arbitrarily removes or infringes upon a right it had previously granted *in its capacity as a state*).

135. *Id.*

136. *See supra* note 106 and accompanying text.

137. *See supra* note 107 and accompanying text.

138. See *Paul*, 424 U.S. at 701 and *supra* notes 130-131 and accompanying text for a further explanation of *Paul*'s concerns.

overdeterrence.[139] Constitutional torts, like common law torts, strive to deter activities that may lead to injury.[140] More than common law torts, however, they carry the heightened concern that imposing liability on government actors might inhibit not only detrimental conduct but also beneficial conduct.[141] The fear is that if liability flows too easily from infringements of the Constitution, government actors, who do not personally realize the benefits of their activities, will become overly risk-averse, shying away from acting in those gray areas that might subject them to suit.[142]

These concerns, however, apply exclusively to liability imposed for negligent conduct rather than intentional conduct.[143] As one scholar aptly noted, there is no disagreement among courts or scholars as to whether cases of intentional wrongdoing and/or malice should trigger liability:

> [although r]easonable people may differ over where to draw the line . . . the basic idea here is this: we seek to identify police conduct that may be socially useful and, even if that conduct is (non-egregiously) unconstitutional, we accord it immunity from suit. At the same time, we identify conduct that we are not worried about overdeterring — conduct that is lacking in social utility, or shocking and egregious — and we label it "over-the-line" and expose it to liability.[144]

Backward-looking access claims do not give rise to these concerns because they deal only with deliberate, knowing efforts to cover up harmful activity. The backward-looking claims addressed in this analysis do not seek to impose liability for merely accidental or negligent behavior, but only where the specific goal of the government actor was to thwart litigation that the plaintiff otherwise had a right to pursue. There is little if any social utility in this type of conduct.[145]

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139. PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 71-73 (1983).

140. *Id.*

141. *Id.* Jeffries, *Right-Remedy*, *supra* note 121, at 90; Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 877-78 (2000).

142. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1792 (1991). Stemming from this worry is the additional possibility that such a liability scheme will deter competent people from serving in government. *Id.* at 1750 (citing Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)). Liability imposed for too many acts will deter socially desirable "vigorous decisionmaking" by government officials and result in a less than optimal assemblage of public servants. *Id.* *See also* SCHUCK, *supra* note 139, at 21-22.

143. *See* Fallon & Meltzer, *supra* note 142, at 1792.

144. Gilles, *supra* note 123, at 853.

145. *See id.* at 851 ("[W]here courts are confronted with actions that they apprehend as egregious and largely devoid of social utility, *e.g.*, . . . corruption . . . courts perceive no danger of overdeterring vigorous, legitimate police activity, because the challenged action is, by definition, one which any reasonable officer will clearly understand to violate the most basic constitutional norms.").

There is no fear that imposing liability in these cases will produce the loss-creating behavioral deterrence that drives so much of the courts' wariness.[146]

In sum, backward-looking access claims are prototypical of claims that the courts envisioned when they first began to use the Constitution as a vehicle for recovery and espouse the very principles that drive imposition of liability on government actors. There are few distinguishing factors to justify excluding recovery for backward-looking claims and allowing recovery for forward-looking ones, or recognizing some constitutional torts but not backward-looking access claims.

III. A METHODOLOGY AND FRAMEWORK FOR ADJUDICATING BACKWARD-LOOKING ACCESS CLAIMS

While it remains to be seen whether the Supreme Court will recognize backward-looking access claims as viable causes of action, almost all of the appellate courts that have addressed the issue agree that such a cause of action exists.[147] In keeping with the Supreme Court's ambivalence regarding the issue, however, these courts' decisions conflict sharply on virtually every critical element governing

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146. Indeed, the Supreme Court endorsed this view in *Carey v. Piphus*, 435 U.S. 247, 257 n.11 (1978) (sanctioning punitive damage awards where government agents acted "with a malicious intention to deprive [plaintiffs] of their rights or to do them other injury"). *See also* Fallon & Meltzer, *supra* note 142, at 1793-94 (arguing that when the conduct in question is clearly prohibited, "to withhold remedies because of cost or disruption would threaten the maintenance of an appropriate structure of incentives to learn and comply with constitutional rules. By contrast, when officials reasonably might have thought their conduct constitutionally valid, there is less need to impose a 'penalty' to deter future misconduct."); Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 102 (1997).

147. The Fifth Circuit was the first to rule decisively on the issue in *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), finding a denial of access to courts where a local prosecutor used his authority to coverup a murder to look like a suicide. *Id.* at 973. The Seventh Circuit followed suit a year later in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984). To date, in addition to the Fifth and the Seventh Circuits, the Second, Ninth, Tenth, and Eleventh, and D.C. Circuits have affirmatively recognized the validity of backward-looking access claims. Chappell v. Rich, 340 F.3d 1279 (11th Cir. 2003); Delew v. Wagner, 143 F.3d 1219 (9th Cir. 1998); Barrett v. United States, 798 F.2d 565 (2d Cir. 1986); McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984). To note, because the D.C. Circuit's *Harbury* decision was reversed by the Supreme Court, *Christopher v. Harbury*, 536 U.S. 403 (2002), this circuit's position on the issue remains unclear.

The Third Circuit, in *Brown v. Grabowski*, 922 F.2d 1097, 1113 (3d Cir. 1991), and the Sixth Circuit, in *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997), recognized in dicta the holdings of *Bell* and *Ryland*, but have not yet upheld a violation of the right. The First Circuit also recognized *Bell* in *Williams v. City of Boston*, 784 F.2d 430, 435 (1st Cir. 1986), but declined to rule explicitly on the issue and has never affirmed the right. To note, although the First Circuit upheld a denial-of-access claim in *Germany v. Vance*, 868 F.2d 9, 15-18 (1st Cir. 1989), the plaintiff in *Germany* was a juvenile in state custody, rendering the case more like a prisoner's access case rather than a true backward-looking access case.

it. Consequently, while most appellate courts have recognized the right, they have failed to articulate a coherent framework for analysis of such a right. Moreover, as these courts have continued to narrow their jurisprudence over time, the future of litigation under this cause of action has become increasingly uncertain.[148] This Part offers a methodology for analyzing backward-looking access claims, and by delineating the sources of conflict among the lower courts, proffers a workable framework for future adjudication of them.

A. *A Method for Understanding the Right of Access to Courts*

One of the main problems propagating the ongoing confusion in the appellate courts is the very breadth of the access right, the diversity in the right's constitutional origins having led courts down wildly different paths and having caused many courts to retreat doctrinally in the face of growing uncertainty.[149] To remedy this problem, courts must find a way to define the right more narrowly and delineate a more precise blueprint for addressing these claims. To this end, courts should cease adjudicating backward-looking access claims under vague notions of "fundamental rights" or the generic rubric of due process.[150] Instead, courts should frame the right in the constitutional provision where it is most specifically addressed: the First Amendment's Petition Clause.[151] As the Supreme Court has articulated in the past, where there is a specific constitutional right infringed, using due process to adjudicate claims can be redundant.[152]

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148. Even those courts that have accepted the cause of action as constitutionally valid have engaged in significant judicial backpedaling over the years, increasingly narrowing its scope and rendering uncertain its future viability. For instance, although when the Fifth Circuit first recognized the cause of action in *Ryland* it adopted a very broad view of right, in cases since the court has severely narrowed this decision. It has done so by imposing narrow intent requirements on the cause of action, *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), requiring a showing of "substantial prejudice" to the original claim as opposed to mere interference, and disallowing claims brought for post-filing abuses, *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 & n.8 (5th Cir. 1994).

Other courts have followed suit, imposing overly stringent requirements of proof, *Nielsen v. Clayton*, 62 F.3d 1419 (7th Cir. 1995) (finding that a hospital examiner's report that patient died of a heart attack following a chokehold despite evidence of neck trauma and blood on the deceased's nostrils was not sufficient evidence of coverup), complicated ripeness doctrines, *Morales v. City of Los Angeles*, 214 F.3d 1151, 1152-54 (9th Cir. 2000), and use of equitable exemptions such as equitable tolling and spoliation of evidence lawsuits to preempt denial-of-access claims, *Swekel v. City of River Rouge*, 119 F.3d 1259, 1265 (6th Cir. 1997).

149. *See* sources cited *supra* note 148.

150. *See, e.g.*, *Bell*, 746 F.2d at 1261; *Ryland*, 708 F.2d at 971.

151. U.S. CONST., amend I.

152. In *Graham v. Connor*, 490 U.S. 386 (1989), a plaintiff sued various police officers for using excessive force during his arrest in violation of his Fourteenth Amendment due process rights. *Id.* at 388-90. The Supreme Court refused to consider the claim under the

In explaining this idea, the Court has stated that courts may not look to more generalized rights to adjudicate claims that already receive protection under a specific textual source.[153] Applying this *lex specialis* principle to the context of backward-looking access claims, courts should look not to vague constitutional sources such as the Due Process or Privileges and Immunities Clauses to frame the access-to-courts doctrine, but should instead examine the history and purposes of the Petition Clause to define the basic parameters of the right, even if the right may be secondarily informed by due process principles.[154]

B. *Toward a Uniform Framework for Adjudicating Claims*

This Section, by applying the principles governing the right to petition as well as those constitutional tort policies referenced in Part II, suggests a more precise framework for analyzing backward-looking access claims, setting forth the basic contours of the right so as to guide courts' future decisionmaking. While this Section does not purport to define every parameter of the claim, it offers specific solutions to some of the more divisive problems surrounding the cause of action.

1. *How Far Should the Right Extend?*

One area of divergence concerns what stage or stages of access the right protects. The appellate courts disagree as to whether the right only applies to pre-filing abuses or whether it also extends to post-filing abuses. For instance, in *Smith v. Marasco*,[155] the Third Circuit refused to recognize a violation when police officers who were sued for wrongful death destroyed incriminating audiocassette tapes in response to a discovery request.[156] The court interpreted the right of access to courts as applying only to pre-filing abuses, and consequently

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Fourteenth Amendment, ruling instead that the claim should have been brought as a Fourth Amendment "unreasonable seizure" claim. *Id.* at 394-95.

The Court has since applied this principle to a variety of other cases involving the Fourth Amendment. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 842 (1998); Albright v. Oliver, 510 U.S. 266, 273-74 (1994). Similar analysis has also driven the Court's Fifth Amendment takings jurisprudence. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 197-99 (1985); Agins v. Tiburon, 447 U.S. 255, 260-61 (1980).

153. *Graham*, 490 U.S. at 395.

154. *See, e.g.*, Carol Rice Andrews, Jones v. Clinton*: A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 BYU L. REV. 1 (2001). *See generally* Rice Andrews, *A Right of Access*, *supra* note 52 (arguing that the right of access to courts should be adjudicated under the First Amendment). See also Pfander, *supra* note 54, at 899, for the view that the First Amendment's Petition Clause was intended to allow citizens to sue the government for unlawful conduct.

155. 318 F.3d 497 (3d Cir. 2003).

156. *Id.* at 512.

found that the cause of action did not apply because the cover-up occurred after litigation had already commenced.[157] The courts that restrict the backward-looking access right to abuses that take place pre-filing reason that if the deceit occurs post-filing, the litigant has already brought suit, which means her ability to access the courts has not been infringed upon.[158] They further opine that when a litigant is already in court, the judicial system can provide appropriate redress for any abuses that take place, thus obviating the need for a denial of justice claim.[159]

Other courts, however, have never imposed this temporal restriction. To the contrary, the Seventh Circuit in *Bell* refused to make any distinction between the instances of coverup that occurred before a claim was brought and those that occurred after, finding that even those abuses that took place during the course of litigation contributed in denying the Bells adequate access to the courts.[160] The court stated that even though the original claim had been litigated to completion, the denial-of-access claim was nonetheless valid because the conspiracy had "rendered hollow" the right to seek redress.[161]

In keeping with the Seventh Circuit's instincts on this issue, examination of the petition right's historical practice indeed demonstrates that the right to petition does not encompass merely the right to submit a claim. As noted by Professor Stephen Higginson, the petition right in early America included not only the right to file a claim, but also the right to receive a fair hearing as well as a response.[162] No petition could be summarily dismissed without abiding

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157. *Id.* at 511-12. The Fifth Circuit in *Foster v. City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1994), also adopted this interpretation, denying a similar claim in which plaintiffs alleged that police destruction of evidence during discovery violated their right of access to courts. *Id.* at 430.

158. *See Marasco*, 318 F.3d at 511-12; Swekel v. City of River Rouge, 119 F.3d 1259, 1263 (6th Cir. 1997).

159. *Id.*

160. 746 F.2d 1205, 1263 n.72 (7th Cir. 1984).

161. *Bell*, 746 F.2d at 1261. The Second Circuit in *Barrett v. United States* also allowed a denial-of-access claim to proceed even though the underlying claim had been fully litigated and had resulted in a settlement. Barrett v. United States, 798 F.2d 565, 577-78 (2d Cir. 1986).

162. Higginson, *supra* note 40, at 155. In its early manifestations, the right to petition was interpreted literally and encompassed little more than the actual right to submit a claim. Spanbauer, *supra* note 40, at 26. When the petition right carried over from England to colonial America, however, the inequities of a practice where governing bodies could summarily discard a petitioner's claim became apparent as governing institutions became more accountable to the citizenry than those in England. Higginson, *supra* note 40, at 155 (stating that colonists' "outrage" over England's refusal to listen to their grievances led the Framers to include a governmental duty to a fair hearing). As such, in contrast to its English predecessor, the original right to petition in America developed to include a right to a fair hearing and a response, thus affording some procedural guarantees to petitioning activity. *Id.* at 147-49; Spanbauer, *supra* note 40, at 33-34.

by at least these procedures, and the right to full judicial consideration came to be one of the "inviolate" principles governing the right to petition in America.[163]

In addition, even in its early manifestations, petitioners could rely on more than simply these basic procedural protections. In England as well as in America, petitioning activity was also insulated by law from interference and retaliation by government officials. The English Bill of Rights of 1689, for instance, strictly prohibited governmental intrusions and also guaranteed the right's "free[dom] from governmental retaliation."[164] These same protections carried over to colonial America, and as the right developed here, interference with petitioning activity by government officials soon came to result in citizen challenges.[165] Eventually, the Framers of the Constitution included the petition right in the Bill of Rights as one of several enumerated "fundamental" rights of citizens upon which the government could not infringe absent a compelling interest.[166]

In viewing these principles together with the historical scope of the petitioning right, it becomes clear that those protections that guarantee the right's freedom from government interference must properly be seen as extending to the entire course of litigation. If petitioning activity was protected against arbitrary government interference, and if petitioning activity historically included the right to a fair hearing as well as to a response, it follows that the entire process, rather than simply the filing of the claim, must be insulated from government intervention. To this end, analysis of backward-looking denial-of-access claims must include those conspiracies that take place after a claim has already been filed as well as those that occurred before the claim was brought.

This interpretation is also consistent with current jurisprudence governing the right of access to courts. The Supreme Court has made clear in the past that a mere "formal" right of access will not suffice to satisfy the right.[167] It has unequivocally expressed the view that

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163. Higginson, *supra* note 40, at 149.

164. Spanbauer, *supra* note 40, at 26. Spanbauer does clarify that although freedom from retaliation was upheld in theory, until the early eighteenth century petitions were often stymied and in some extreme cases, those offensive to the King resulted in the petitioner's imprisonment. *Id.* Nonetheless, it is critical to note that, in theory, punishment was not condoned and was eventually prohibited altogether. *Id.*

165. Smith, *supra* note 52, at 1172-73. *See also* RAYMOND C. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH CENTURY VIRGINIA 36-41 (1979).

166. See Rice Andrews, *A Right of Access*, *supra* note 52, at 590-621 and Pfander, *supra* note 54, at 900 for a thorough discussion of how the drafting history of the Petition Clause supports the notion that the right was not meant to apply only to petitioning the legislatures but also to petitioning the courts.

167. *See* Boddie v. Connecticut, 401 U.S. 371, 380-81 (1971) (concluding that a filing-fee requirement to obtain a divorce effectively foreclosed court access for indigents).

"[a]ccess to courts does not only protect one's right to physically enter the courthouse halls, but also insures that the access to courts will be 'adequate, effective and meaningful.'"[168] Other courts have also observed that although the right "in its most formal manifestation protects a person's right to physically access the court system . . . [w]ithout more . . . such an important right would ring hollow in the halls of justice."[169] Accordingly, protections for the access right must be shaped to provide an opportunity for the litigant to present his claims "fairly" and not simply to submit his papers to the courthouse clerk.[170] As the Sixth Circuit has aptly noted, to impose a merely formalistic interpretation of the right would entirely defeat its purpose.[171]

Enforcing the Petition Clause protections in this way makes normative sense as well. To cite one example, in *Foster v. City of Lake Jackson*, the plaintiffs alleged that a malfunctioning traffic light led to their son's death in an auto accident.[172] They were, however, unable to press their claim effectively when police destroyed records logging complaints about the light and further purported to know nothing about the light's malfunction.[173] The court dismissed the denial-of-access claim on the ground that it was improperly brought for post-filing abuses, which fell outside the scope of the right.[174] In this situation, however, given that the evidence necessary to support the plaintiffs' case was intentionally kept hidden from them, one cannot sensibly argue that the plaintiffs' right to present their claims fairly was not impeded just because the abuse happened after they filed

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168. Swekel v. City of River Rouge, 119 F.3d 1259, 1262 (6th Cir. 1997).

169. *Id.*

170. Ross v. Moffitt, 417 U.S. 600, 616 (1974); *see also Bounds*, 430 U.S. at 823.

171. *Swekel*, 119 F.3d at 1262 ("[T]o what avail would it be to arm a person with such a constitutional right, when the courtroom door can be hermetically sealed by a functionary who destroys the evidence crucial to his case."). The Supreme Court may, for instance, adopt the "breathing space" doctrine for Petition Clause cases borrowing from its jurisprudence governing free speech. Although in its strictest sense, false defamatory speech is not protected by the First Amendment, *see* ABRAHAM, *supra* note 89, at 253, the Supreme Court recognized in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), that strict adherence to the doctrine would vitiate free speech protections because erroneous statements are "inevitable" in the course of free debate. *Id.* at 271-72. In response, the Court adopted the "breathing space" doctrine, which essentially creates a buffer zone around the First Amendment privilege and immunizes it from liability. *Id.* (citing NAACP v. Button, 371 U.S. 415, 433 (1963)). In the same way, the Court might apply this doctrine to grant protections for more than just the act of petitioning but for the subsequent litigation activities that make petitioning meaningful. The Court has in fact recognized the relevance of the "breathing space" doctrine to Petition Clause cases in *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 530-31 (2002), but it has yet to promulgate this particular rule.

172. 28 F.3d 425, 427 (5th Cir. 1994).

173. *Foster*, 28 F.3d at 427.

174. *Id.* at 430 & n.7.

their lawsuit.[175] Nor is it normatively reasonable to argue that conspiracies covering up the facts of a crime are somehow more worthy of protection or somehow more harmful if they occur before a claim is filed rather than after.[176] The dispositive inquiry should be simply whether the deliberate actions in fact interfered with the disposition of the claim.[177]

2. *What Types of Claims Are Protected?*

A second area of uncertainty plaguing the appellate courts involves the types of underlying claims the backward-looking right of access to courts protects. Some courts have construed the right broadly and have applied it to protect any and all suits. The Second Circuit, for example, has stated that the right protects all property rights, including any "vested right[s] of action."[178] Under this broad construction, the constitutional inquiry is straightforward: "[u]nconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim."[179]

Other courts, however, have suggested that the right only protects vindication of "fundamental rights."[180] In *Ryland*, for instance, the Fifth Circuit grounded the access right in the Due Process Clause, and in so doing seemed to insinuate that the Clause protects only the opportunity to seek redress for violations of "fundamental constitutional rights."[181] And although no court to date has imposed this limitation expressly, this dictum in *Ryland* coupled with similar

175. In *Foster,* the plaintiffs alleged that the destruction of log records, police refusal to respond to interrogatories, and false deposition testimony so impeded their ability to gather evidence that they were forced to settle for a much smaller sum of money than originally sought. *Id.* at 427 n.4.

176. Presumably the *Foster* court based its decision on the availability of Rule 11 sanctions (and its state analogues) to remedy post-filing abuses. *See, e.g.*, LaBarbera v. Angel, 95 F. Supp. 2d 656, 665 (E.D. Tex. 2000). Imagining, however, a situation where the discovery abuses went undetected until long after the litigation ended highlights the sophistry in arguing that pre-filing abuses violate the right while post-filing abuses do not.

177. *See, e.g.*, Ryland v. Shapiro, 708 F.2d 967, 975 (5th Cir. 1983).

178. Barrett v. United States, 798 F.2d 565, 575 (2d Cir. 1986).

179. *Id.* Likewise, the Seventh Circuit in *Harrell v. Cook* agreed to hear an appeal where the plaintiffs alleged that police mishandling of evidence thwarted their ability to recover money stolen from them by a third party. 169 F.3d 428, 430 (7th Cir. 1999). The court ultimately dismissed the claim, but in an important clarification of the access right, stated that had the plaintiffs alleged that the police intentionally misplaced or destroyed the evidence, the claim would have survived. *Id.* at 432-33.

180. *Ryland*, 708 F.2d at 972.

181. *Id.*

such intimations made by the Supreme Court[182] forebode that it may be a ground for future restriction of the backward-looking access right.

Analysis of Petition Clause history as well as analysis of current Supreme Court jurisprudence governing the right, however, demonstrates that the right of access to courts protects more than simply fundamental rights. In its inception, the right to petition itself was deemed one of only a handful of "fundamental rights,[183] and in colonial America this right was not restricted to protect only a narrow class of essential rights but was used to vindicate a broad range of private interests, fundamental or not.[184] Whether petitioning to resolve debt actions, estate distributions, divorce proceedings, or land disputes, all were protected exercises of the right.[185]

Moreover, the First Amendment under which petitioning activity receives its protection has never been construed to protect only fundamental liberty interests. Specifically with regard to the Petition Clause, the Supreme Court has never construed the right to apply only to fundamental liberties. In *Bill Johnson's Restaurants, Inc. v. NLRB*, for instance, the Court held that suits filed by an employer against a union for unfair labor practices were protected from NLRB sanctions even if the suits were filed for retaliatory purposes.[186] In finding for the employer, the Court held the right of access to courts "too important" to be prohibited as an unfair labor practice, even though the petitioning activity sought only assertion of economic interests.[187] In the years since *Bill Johnson's*, the Court has consistently upheld similarly broad protections for petitioning activity,[188] prohibiting interference with petitioning seeking vindication of a variety of economic interests as well as fundamental rights.[189]

In short, restricting backward-looking access claims to only those cases where the original cause of action concerned a fundamental right would fly in the face of well-established principles governing the First Amendment and petitioning. Although the remedy provided might

182. In *Ortwein v. Schwab*, the Supreme Court ruled that refusal to waive filing fees to appeal a welfare-hearing determination was not a basis for a denial-of-access claim because the interest affected, increased welfare payments, was not sufficiently "constitutionally significant." 410 U.S. 656, 659 (1973).

183. *See supra* note 38 and accompanying text.

184. Higginson, *supra* note 40, at 158-59. *See also* Pfander, *supra* note 54, at 940.

185. Higginson, *supra* note 40, at 146.

186. 461 U.S. 731, 741 (1983).

187. *Bill Johnson's Restaurants*, 461 U.S. at 741.

188. The Court reiterated this view more recently in *BE & K Construction Co. v. NLRB*, which also involved an employer's allegedly retaliatory legal filings. 536 U.S. 516, 531-34 (2002).

189. *See, e.g., id.*; Bhd. of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964) (recognizing union's right under petition Clause to assist its members in litigation).

vary based on the relative importance of the original claim,[190] these considerations should not bear on the actual validity of the claim itself.

3. *Must the Underlying Claim Have Been Litigated?*

A third, and perhaps the most contested, source of disagreement among the appellate courts is whether the claimant must have attempted to litigate the underlying cause of action before pursuing a denial-of-access claim.[191] The Sixth Circuit imposed this requirement in *Swekel v. City of River Rouge*,[192] finding that only by having litigated or attempted to litigate the original claim would a plaintiff be able to demonstrate that access to the courts was actually denied.[193] The court held that such a determination would be impossible to make if the underlying claim was never brought before the courts to begin with.[194] It further cautioned that "[a] plaintiff cannot merely guess that a state court remedy will be ineffective because of defendant's actions."[195]

Other circuits, on the other hand, have declined to impose this litigation requirement. For instance, the Seventh Circuit in *Bell* held inequitable any requirement forcing plaintiffs to demonstrate what relief they "would have obtained" had the conspiracy never occurred, finding that coverups inherently preclude knowing what "would have happened" absent the conspiracy.[196] Instead, the court required only a showing that the concealment was a "substantial cause of their failure to obtain judicial relief."[197] In doing so, the court implied that the

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190. For instance, conspiracies covering up wrongful deaths might warrant a stronger remedy than conspiracies covering up loss of personal property.

191. *See* Delew v. Wagner, 143 F.3d 1219, 1222-23 (9th Cir. 1998); Swekel v. City of River Rouge, 119 F.3d 1259, 1264 (6th Cir. 1997) (imposing this requirement). *Compare with* Harbury v. Deutch, 233 F.3d 596, 609 (D.C. Cir. 2000), *rev'd*, Christopher v. Harbury, 536 U.S. 403 (2002) (finding this requirement unnecessary).

192. 119 F.3d at 1264.

193. *Id.*

194. *Id.* at 1263-65.

195. *Id.* at 1264. The *Swekel* court did allow for the possibility that, in some cases, any attempt to bring suit would be "completely futile," implying that the prerequisite could be waived under such circumstances. *Id.* But see *infra* notes 205-222 and accompanying text for an explanation of why this exception does not resolve the problems with this requirement.

The Ninth Circuit joined the Sixth Circuit in imposing this requirement, *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998); *Morales v. City of Los Angeles*, 214 F.3d 1151 (9th Cir. 2000), holding as well that only after litigation of the underlying issue has concluded can a litigant realistically demonstrate injury sufficient to allege a constitutional violation. *Morales*, 214 F.3d at 1154; *Delew*, 143 F.3d at 1222-23.

196. Bell v. City of Milwaukee, 746 F.2d 1205, 1263 (7th Cir. 1984).

197. *Id.* at 1263 n.72.

constitutional violation would remain viable irrespective of whether the underlying claim could be restored and litigated.[198]

Indeed, as the *Bell* court suggests, there are several critical problems with the litigation requirement that weigh in favor of its abandonment.[199] First, to the extent that it requires plaintiffs to have filed or attempted to file their claims when their causes of action first became ripe, the requirement does not take into consideration those cases such as *Harbury*, *Ryland*, or *Barrett* where the conspiracy entirely prevented the plaintiffs from bringing their claims because it covered up the claim's existence.[200] In *Harbury*, for instance, Jennifer Harbury alleged that because federal officials so extensively covered up their involvement with her husband's captors, she had no idea that suing to enjoin their activities might save her husband's life.[201] In other words, the coverup was so sophisticated that she did not know she had a claim to pursue until it was too late and the claim was no longer viable.[202] In *Harbury* and similar cases, the litigation requirement effectively penalizes the plaintiffs for the success of the conspiracy.

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198. *Id.* The Fifth Circuit in *Ryland* also declined to impose the litigation requirement, adjudicating the plaintiffs' case without even inquiring into whether a state claim might still be brought. Ryland v. Shapiro, 708 F.2d 967, 973 (5th Cir. 1983). In doing so, the court rejected the notion that an ability to institute or reinstitute the original suit would obviate the denial-of-access claim, finding that a constitutional deprivation could occur from delay alone, even in the absence of prejudice to the underlying cause of action. *Id.* at 975-76.

199. The Supreme Court has made clear in past cases that section 1983 does not require exhaustion of state or even administrative remedies before filing a claim. *See* CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 29, at 466-69. This section argues that even if courts were to ignore these pronouncements, exhaustion in backward-looking access cases would still be unjustified.

200. In *Ryland*, the family of the deceased did not pursue a wrongful death claim because the coverup of the murder led them to believe that she had committed suicide. 708 F.2d at 969-70. Similarly, in *Barrett* the plaintiffs had no idea that the U.S. Army Chemical Corps was really behind the mescaline injections administered at the New York State Psychiatric Institute and therefore could not pursue a claim against it. Barrett v. United States, 798 F.2d 565, 568-69 (2d Cir. 1986).

201. Brief for Respondent at 7-8, Christopher v. Harbury, 536 U.S. 403 (2002) (No. 01-394). Recognizing this flaw, the D.C. Circuit refused to uphold the district court's requirement that Harbury attempt to file suit before pursuing an access-to-courts claim. Harbury v. Deutch, 233 F.3d 596, 609 (2000), *rev'd*, Christopher v. Harbury, 536 U.S. 403 (2002) (stating that such a requirement would be unreasonable in situations where a plaintiff had "no reason to believe that she could state a claim in United States courts").

202. Harbury v. Deutch, 233 F.3d at 609. At this point it is also worthwhile to put to rest one source of confusion that tends to muddle the litigation requirement. The Supreme Court, in denying Harbury's claim, pointed out that even though a wrongful death claim would not bring back her husband's life, neither would the access-to-justice claim. Christopher v. Harbury, 536 U.S. at 421-22. It thus enunciated its position that, where a denial-of-justice claim would not afford a remedy that other suits could not give, the claim would necessarily fail. *Id.* Other courts have held similarly, finding untenable a denial of justice claim where state remedies are still available for the underlying cause of action. *See, e.g.*, Delew v. Wagner, 143 F.3d 1219, 1222-23 (9th Cir. 1998); Swekel v. City of River Rouge, 119 F.3d 1259, 1263-64 (6th Cir. 1997). The fallacy in this argument lies in the failure to grasp the distinct nature of the two causes of action. If the fraud has indeed succeeded in prejudicing the claim, the plaintiff has a viable denial-of-justice claim *along with* potential

Relatedly, the requirement also produces inequitable results for those plaintiffs who, despite having had suspicion of the government's wrongdoing, decided not to file their claims because they lacked sufficient evidence to prove them.[203] If crucial information is kept completely hidden or is lost or destroyed, a plaintiff or potential plaintiff may simply assume it does not exist and abandon her claim.[204] Imposing the requirement in this case produces similar inequitable results.

Second, to the extent that plaintiffs are expected to litigate their claims after the conspiracy has been uncovered, the courts misconstrue how constitutional torts function and how backward-looking denial-of-access claims should be analyzed. In imposing the requirement in this scenario, the courts assume that if the original cause of action can now be pursued without encumbrance, access to the courts has not been denied.[205] In doing so, however, the courts seem to throw by the wayside some very basic liability rules,[206] in that they fail to recognize that once a coverup has interfered with the claimant's underlying cause of action, a breach has occurred. The

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state claims for the underlying cause of action. *See generally* Bell v. City of Milwaukee, 746 F.2d 1205, 1224-25 (7th Cir. 1984) (allowing recovery for wrongful death following discovery of the abuses and also for denial of access to courts).

The discontinuity in the Supreme Court's reasoning here is clear, for if the Bells were prevented from pursuing their denial-of-access claim simply because they could still pursue a wrongful death suit in state court, there would be no vindication of the injuries inflicted by the conspiracy at all — i.e., the Bell's would recover as if the conspiracy had never happened and the offending police officers would also go unpunished. Although the ends of corrective justice might be satisfied, but see notes 211-213 and accompanying text for an explanation of why they might not be, the equally powerful policy goal of deterrence is not. Given that constitutional torts are in large part propagated by a desire to deter government officials from unconstitutional behavior, SCHUCK, *supra* note 139, at 16, this above scenario finds no justification in law or policy.

203. *See, e.g.*, Foster v. City of Lake Jackson, 28 F.3d 425 (5th Cir. 1994).

204. The Supreme Court has expressed a similar concern in another arena as well. In *United States v. Bagley*, 473 U.S. 667, 682-83 (1985), Justice Blackmun stated that a prosecutor's failure to respond to a specific request for information during discovery could prejudice the defense not simply by depriving it of potentially important information, but by "representing to the defense that the evidence does not exist . . . [such that] the defense might abandon lines of independent investigation, defenses, or trial strategies."

205. *Swekel*, 119 F.3d at 1263-64.

206. While it is beyond the scope of this Note to detail the myriad requirements plaintiffs must overcome in bringing section 1983 or *Bivens* actions, it suffices to say that the basic notions of duty, breach, causation, and damages of common law torts also apply to constitutional tort actions. *See, e.g.*, DeShaney v. Winnebago, 489 U.S. 189, 202 (1989) (denying a section 1983 claim because government official did not have duty to prevent child abuse); Daniels v. Williams, 474 U.S. 327, 330 (1986) (finding negligence insufficient to support a claim of a constitutional breach); Carey v. Piphus, 435 U.S. 247, 264 (1978) (holding that a plaintiff in section 1983 litigation must prove "actual injury" in order to claim compensatory damages).

question at this point should become solely one of damages to be proved as a matter of fact.[207]

To illustrate by analogy, few would argue that a landlord's post-hoc agreement to lease an apartment to someone whose application was denied in violation of Title VIII would have the effect of eviscerating the federal cause of action.[208] Nor would an order to reinstate an employee who was discriminatorily fired have the effect of preempting recovery for damages.[209] In both of these scenarios, the initial denial of rights in itself results in compensable injury to the victim in the form of dignitary, emotional, and mental harm,[210] and later granting the apartment or reinstating employment does not serve to ameliorate these injuries.[211]

Similarly, in backward-looking access-to-courts claims, once the violation has occurred, the only remaining inquiry should be what injuries resulted from the breach. To this end, plaintiffs in constitutional tort actions may seek damages for all "actual injuries" stemming from the violation, such injuries including emotional and mental suffering as well as humiliation.[212] Thus, injuries in denial-of-access claims involve not only prejudice to the original cause of action but any emotional and other harms that the plaintiff suffered as a result of the breach itself, including demoralization costs caused by the deceit as well as humiliation or reputational injury engendered by the fraud.[213] Many of these injuries, particularly humiliation and loss of reputation, take place at the time of the actual violation and not simply when it is clear the original claim has been irretrievably harmed.[214]

Thus, it is inappropriate to look only at the prejudice to the underlying claim to determine if the plaintiff has stated a valid cause

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207. *See, e.g.*, Ryland v. Shapiro, 708 F.2d 967, 976 (5th Cir. 1983) (discussing calculation of damages once breach has been established).

208. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION, § 25:3, at 25-12 & 25-13, § 25:16, at 25-77 & 25-78 (2003).

209. MACK A. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION 291 (4th ed. 1999). *See, e.g.*, Carrero v. New York City Hous. Auth., 890 F.2d 569 (2d. Cir. 1989) (allowing recovery for pain and suffering even after the employee was reinstated).

210. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986).

211. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 101 (1984).

212. CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 29, at 560.

213. For example, in the case of *Bell*, the suggestion that Daniel Bell may have attacked police officers with a knife could very well have damaged his and his family's reputation. The same is true in *Ryland*, where the allegation that Lavonna Ryland committed suicide could have tarnished her and her family's reputation and caused grave emotional suffering for her family.

214. *See supra* note 213.

of action.[215] Whether facts emerge one year or twenty years after an injury originally occurred so as to clear the way for the underlying claim is an inquiry independent of whether the cause of action was undermined at the time the coverup initially took place. Later litigation of the original cause of action does not serve to eviscerate the constitutional one.[216] As Professor Martin Redish rightly observed, because section 1983 is directed toward the conduct of persons acting under color of state law, the subsequent conduct of the state offering remedies to the victim is entirely irrelevant.[217] To the extent that litigation of the underlying claim is needed, it is only necessary to help determine the extent of total damages.[218] But where there is a believable allegation of emotional and mental injury, recovery is warranted even if the underlying cause of action can be restored and later litigated.[219]

Moreover, because a litigant may receive nominal damages as well as punitive damages even in those cases where he cannot demonstrate compensable injuries,[220] when courts look only to the underlying cause

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215. *See, e.g.*, Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) (stating a clear case of constitutional injury even though the coverup was eventually uncovered and the wrongful death suit was successfully litigated).

216. *See* Smith v. City of Fontana, 818 F.2d 1411, 1415 (9th Cir. 1987), *overruled on other grounds by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999) ("[C]onstitutional violation is complete at the moment the action or deprivation occurs, rather than at the time the state fails to provide requisite procedural safeguards surrounding the action."); *see also* Redish, *supra* note 211, at 101.

217. Redish, *supra* note 211, at 102

218. Litigating the underlying claim can be helpful to the court to determine how severely the claim was prejudiced and thereby better assess the damages to be awarded. The litigation requirement's purpose here, however, would be solely to assess injury in the access claim and not to determine the claim's validity. Where the claim can in fact be litigated without any encumbrance, the proper course of action is not to dismiss the denial-of-access claim, but to limit recovery to emotional and mental suffering and punitive and/or nominal damages. *See supra* notes 211-213 and accompanying text; *infra* notes 219-221 and accompanying text.

219. It may be that a litigant can recover for these other injuries through the underlying cause of action. For instance, the plaintiff may be able to sue for intentional infliction of emotional distress and recover not only for the emotional distress caused by the initial injury itself but also the ensuing coverup. *See, e.g.*, Christopher v. Harbury, 536 U.S. 403, 421 (2002) (stating that nothing prevented Harbury from bringing a suit for IIED in the present). The problem with this solution is that even if the plaintiff makes out a clear claim for emotional harm, the plaintiff would need to overcome state laws governing immunity for official action, laws which vary widely from state to state. PETER G. BROWN, PERSONAL LIABILITY OF PUBLIC OFFICIALS, SOVEREIGN IMMUNITY, AND COMPENSATION FOR LOSS 7 (Acad. for Contemporary Problems, Law and Ethics Series No. 1, 1977) ("Complete absence of legislation . . . for assessing and assigning liability . . . . makes it difficult for either citizens or officials to know where they stand with respect to redress of grievances and liabilities."). Relying on such an unpredictable system for vindicating the egregious abuses implicated in these backward-looking access cases ignores the unique circumstances of these claims and the importance of constitutional torts.

220. Smith v. Wade, 461 U.S. 30, 56 (1983) (allowing punitive damages where the official's conduct was "motivated by evil motive or intent"); Carey v. Piphus, 435 U.S. 247,

of action to determine the validity of a denial-of-access claim, they ignore the general societal interest in punishing and deterring egregious behavior[221] and in vindicating dignitary injuries that the Supreme Court has held section 1983 litigation is meant to further.[222] They also unfairly foreclose relief for these other interests to which the litigant is otherwise entitled. For these reasons, because the prejudice to the underlying cause of action is not the dispositive inquiry in determining whether a plaintiff can recovery for a denial of access to the courts, courts should, in keeping with prevailing constitutional tort doctrine, abandon the litigation requirement when adjudicating backward-looking access-to-courts claims.

CONCLUSION

Although the Supreme Court sidestepped the backward-looking access-to-courts issue in *Harbury*, the increasing divergence of and confusion within the lower courts suggests that the Court will again be presented with this issue before long. As this Note has demonstrated, the potential for official abuse is highest precisely when government power is at its peak and its actions, if left unchecked, could result in an inability of citizens to vindicate those rights they have an entitlement to pursue.

This Note has demonstrated that, should the Court grant certiorari to another backward-looking access-to-courts claim, it should recognize the right as a constitutionally valid cause of action. Not only does such recognition comport with the access-to-courts jurisprudence the Court has set forth to date, but it is also compelled by those theories and principles that drive constitutional tort recovery. More importantly, this Note has also suggested that should the Court award such recognition in a future backward-looking access-to-courts claim, it should offer clear guidance to the lower courts on how to adjudicate the cause of action. To this end, it should shy away from the current restrictive impulse of the lower courts and instead adjudicate claims according to the Petition Clause-based framework set forth herein. In doing so, the Court would facilitate greater uniformity in the development of the right and would also frame the right in keeping with history, constitutional tort policies, as well as empirical practicality.

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266 (1978) (allowing nominal damages in absence of proof of actual injury). Awarding punitive damages furthers the general societal interest in punishing and deterring egregious behavior, see for example *Smith v. Wade*, 461 U.S. 30, 56 (1983), while allowing nominal damages affords some redress for the moral injury the violation itself may have caused. Dauenhauer & Wells, *supra* note 110, at 926

221. *Wade*, 461 U.S. at 56.

222. *See supra* notes 211-220 and accompanying text.