

**“SOMETHING THERE IS THAT DOESN’T
LOVE A WALL:”¹ A REFLECTION ON THE
CONSTITUTIONAL VULNERABILITIES OF
THE SOUTHWEST BORDER WALL**

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1. Robert Frost, *Mending Wall*, in MODERN AMERICAN POETRY (Louis Untermeyer, ed., 1919), <https://www.bartleby.com/104/64.html>.

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I. INTRODUCTION

By the beginning of 2021, the Trump Administration had built or replaced 452 miles of a wall between Mexico and the United States.² This milestone is in line with the Administration's declared goal to build 450 miles of new or converted barriers by the end of 2020.³ For much of the early stages of wall construction, the Administration was substantially behind this target because of problems acquiring the land on which to build the wall.⁴ Although the government intended to use its eminent domain powers aggressively, that process was slow and had the potential to result in lengthy court proceedings, which made it difficult for the Administration to meet its construction targets.⁵ Substantial opposition to the wall by environmentalists, affected property owners, and several states have further complicated the intended schedule. Some of these groups object to the source of

2. Christopher Giles, *Trump's Wall: How Much Has Been Built During His Term?*, BBC (Jan. 12, 2021), <https://www.bbc.com/news/world-us-canada-46748492>.

3. Nick Miroff & Adrian Blanco, *Trump Ramps Up Border-Wall Construction Ahead of 2020 Vote*, WASH. POST (Feb. 6, 2020), <https://www.washingtonpost.com/graphics/2020/national/immigration/border-wall-progress/>.

4. *Id.*

5. *Id.*

funds for the wall’s construction,⁶ others to its human rights impacts,⁷ and still others to its environmental impacts.⁸

This article is concerned with the constitutionality of the border wall and the statute authorizing its construction, § 102 of Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”). Particularly, this article questions the constitutionality of § 102(c)’s provisions authorizing the waiver of laws that would otherwise regulate the construction and maintenance of the wall, as well as § 102(c)’s truncated appeal provisions, which eliminate the mid-level appeal of any decision upholding the application of the statute. The article identifies two previously unexamined constitutional challenges to these problematic provisions: (1) that they violate the First Amendment’s Petition Clause; and (2) that they infringe on retained unenumerated rights protected by the Ninth Amendment. The latter might also be deployed against the wall itself for interfering with the constitutionally protected unenumerated right to travel.

Discussing the constitutionality of IIRIRA’s waiver and truncated appeal provisions requires an understanding of the laws regulating traffic across the U.S.-Mexico border. Part I sets the stage by examining the history of the border wall and the problem of border crossings. Part II examines the evolution of IIRIRA, with a particular emphasis on the waiver provisions and truncated appeal provisions of § 102(c). Part III focuses on the impacts of border wall construction on the environment and Native American tribes. Part IV discusses the status of various challenges to the wall’s construction and the fate of some of the legal arguments underlying them. Part V examines the vulnerability of the statute’s judicial review and waiver provisions—as well as the wall itself—to new challenges brought under the Petition Clause of the First Amendment and the Ninth Amendment. The author hopes that the discussion of these new claims persuades the reader that they are of more than academic interest and may offer fresh avenues of persuading a court of the unconstitutionality of these particular statutory provisions.

6. *See, e.g.*, *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019); *Ctr. for Biological Diversity v. Trump*, 2020 WL 1643657 (D.D.C. Apr. 2, 2020); *El Paso Cnty. v. Trump*, 407 F. Supp. 3d 655 (W.D. Tex. 2019).

7. *See, e.g.*, *El Paso Cnty. v. Trump*, 408 F. Supp. 3d 840 (W.D. Tex. 2019).

8. *See, e.g.*, *In re Border Infrastructure Env’t. Litig.*, 915 F.3d 1213 (9th Cir. 2019); *N. Am. Butterfly Ass’n v. Nielsen*, 368 F. Supp. 3d 1 (D.D.C. 2019).

II. BACKGROUND

Today, the border between the United States and Mexico stretches 1,954 miles and runs through California, Arizona, New Mexico, and Texas.⁹ The United States constructed its first fence along its southwestern border between 1909 and 1911 in southern California. That original fence was made of barbed wire to prevent cattle from moving between the U.S. and Mexico.¹⁰ Before 2005—the first significant expansion of the President’s authority to waive laws that might impede construction of a physical barrier—approximately 119 miles of border fencing was in place.¹¹ The George W. Bush Administration significantly increased efforts to construct border fencing, with a particular focus on the region consisting of and surrounding El Paso, Texas.¹² U.S. Customs and Border Protection spent \$2.3 billion on fencing at the U.S.-Mexico border between 2007 and 2015, and, during that time period, expanded barriers between the two countries to cover 654 miles.¹³ Barriers were extended in multiple regions, including near Tucson, Arizona, the Rio Grande Valley, and in the vicinity of San Diego, California.¹⁴ Of the 654 miles of barrier that lined the U.S. border with Mexico in 2015, 300 miles were vehicle barriers, while the rest were designed to keep pedestrians out.¹⁵

9. Denise-Marie Ordway, *Building Border Walls and Barriers: What the Research Says*, JOURNALIST’S RESOURCE (Feb. 15, 2020), <https://journalistsresource.org/studies/government/immigration/border-walls-barriers-migrant-research/>.

10. See Rachel St. John, *The Raging Controversy at the Border Began with This Incident 100 Years Ago*, SMITHSONIAN MAG (July/August 2018), <https://www.smithsonianmag.com/history/raging-controversy-border-began-100-years-ago-180969343/#.X-PEbtNuzTk.link>; see also Ordway, *supra* note 9.

11. See Louise Radnofsky, *Border Barriers, Mile by Mile*, WALL ST. J. (Feb. 14, 2019, 8:55 AM), <https://www.wsj.com/articles/the-border-wall-mile-by-mile-11550152535>; see also Ordway, *supra* note 9.

12. See Radnofsky, *supra* note 11; see also Ordway, *supra* note 9.

13. *Border Barriers: Progress and Challenges with the Use of Technology, Tactical Infrastructure, and Personnel to Secure the Southwest Border: Hearing Before the Subcomm. on Border and Mar. Sec. of the H. Comm. on Homeland Sec.*, 115th Cong. 9 (2018) (statement of Rebecca Gambler, Director of Homeland Security & Justice, United States Government Accountability Office), <https://www.gao.gov/assets/700/690679.pdf>; see also Ordway, *supra* note 9.

14. See Radnofsky, *supra* note 11; see also Ordway, *supra* note 9.

15. *Border Barriers: Progress and Challenges with the Use of Technology, Tactical Infrastructure, and Personnel to Secure the Southwest Border: Hearing Before the Subcomm. on Border and Mar. Sec. of the H. Comm. on Homeland Sec.*, 115th Cong. 9 (2018) (statement of Rebecca Gambler, Director of Homeland Security & Justice, United States Government Accountability Office), <https://www.gao.gov/assets/700/690679.pdf>; see also Ordway, *supra* note 9.

By the end of its tenure in office, the Trump Administration had built over 450 miles of new or replaced barriers.¹⁶ “Most of the new wall will replace older and smaller barriers” and “is far more formidable than anything previously in place along the border. The new structure [will have] steel bollards, anchored in concrete, that reach 18 to 30 feet in height and will have lighting, cameras, sensors[,] and improved roads.”¹⁷ The latter will enable U.S. border patrol agents to respond quickly along what will be “an expanded ‘enforcement zone.’”¹⁸

To pay for the wall, the Administration has been diverting, and plans to continue diverting, money from the annual military budget.¹⁹ This action is the subject of multiple lawsuits,²⁰ but these cases have yet to have any impact on the border wall’s construction.²¹ For instance, in *Sierra Club v. Trump*, the district court concluded that the diversion of military funds for border wall construction was unlawful, but the permanent injunction granted by that court was stayed by the Supreme Court.²² Since then, the Supreme Court has rejected requests to lift this stay, allowing the diversion of funds to continue.²³ As a result, as of the date this article was written, \$18.4 billion was available for wall construction, which is enough to construct nearly 900 miles of new barriers by 2022,²⁴ meeting the government’s goal.

16. See Giles, *supra* note 2.

17. Ordway, *supra* note 9 (quoting Miroff & Blanco, *supra* note 3).

18. *Id.*

19. See J. Edward Moreno, *Appeals Court Revives House Lawsuit Against Trump Border Wall*, THE HILL (Sept. 25, 2020, 12:09 PM), <https://thehill.com/regulation/court-battles/518200-appeals-court-revives-house-lawsuit-against-trump-border-wall>; see also *FY2020 Defense Reprogrammings for Wall Funding: Backgrounder*, CRS (Mar. 24, 2020) (“On February 13, 2020, the Department of Defense (DOD) transferred \$3.8 billion from defense procurement programs to the Army Operation and Maintenance account for use by the U.S. Army Corps of Engineers (USACE) for the construction of 31 additional barrier projects along the southern border of the United States.”).

20. See, e.g., *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019); *Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11 (D.D.C. 2020); *El Paso Cnty. v. Trump*, 407 F. Supp. 3d 655 (W.D. Tex. 2019).

21. See *El Paso Cnty. v. Trump*, No. 19-51144 (5th Cir. 2020) (per curiam) (staying the district court’s injunction because of “the substantial likelihood that [plaintiffs] lack Article III standing.”).

22. See *Sierra Club v. Trump*, No. 19-cv-00892-HSG, 2019 WL 2715422 (N.D. Cal. June 28, 2019).

23. See *Trump v. Sierra Club*, 140 S. Ct. 2620, 2020 WL 4381616 (July 31, 2020).

24. Miroff & Blanco, *supra* note 3. Of the \$18.4 billion available for wall construction, \$5.1 billion was approved by Congress as a routine appropriation to the

The irony is that, while the number of migrants being taken into custody at the border has declined, the number of migrants detained who come from Mexico—the ostensible target of the Trump Administration’s efforts—has increased.²⁵ The Acting Border Control Commissioner attributes the overall decline to the Trump administration’s immigration policies.²⁶ According to the Acting Commissioner, these policies “enabled authorities to quickly deport ‘95 percent’ of the migrants encountered along the U.S.-Mexico border, including tens of thousands of Central American asylum seekers who have been sent to Mexican border towns to await their U.S. court hearings.”²⁷

In fact, nearly one half of the estimated eleven million undocumented immigrants in the country flew in on a visa, passed an inspection at the airport, and then stayed in the country illegally.²⁸ However, this pattern may be changing: while people detained during “overstays” were far more common than border apprehensions between 2015 and 2018, cross-border migration surged in 2019 and was on track to outstrip visa overstays.²⁹

Department of Homeland Security. The Administration has diverted the remaining funds from the Department of Defense National Emergency Funding (\$3.6 billion with a planned \$3.7 billion in additional funding) and routine appropriations for the Department of Defense (\$2.5 billion with a planned \$3.5 billion in additional funding). *Id.*

25. Abigail Hauslohner, *U.S.-Mexico Crossings Continue to Drop, but Number of Mexican Migrants Surges*, WASH. POST (Feb. 11, 2020, 4:02 PM), https://www.washingtonpost.com/immigration/us-mexico-border-crossings-continue-to-drop-but-mexican-migrants-surging/2020/02/11/fc797a4e-4cfb-11ea-b721-9f4cdc90bc1c_story.html (“The number of migrants taken into custody along the U.S.-Mexico border declined for an eighth straight month in January. . . . [but] the number of Mexican adults taken into custody has climbed 32 percent”).

26. Hauslohner, *supra* note 25; *see also* Ordway, *supra* note 9 (“Over the years, the U.S. Department of Homeland Security has cited reductions in border apprehensions as evidence of the barrier’s effectiveness. It offers this example: When it installed fencing near Yuma, Arizona, the number of people caught crossing the border without permission plunged 90%.”) (citing *Walls Work*, DEP’T OF HOMELAND SEC. (Dec. 12, 2018), <https://www.dhs.gov/news/2108/12/12/walls-work>).

27. Hauslohner, *supra* note 25.

28. Miriam Jordan, *The Overlooked Undocumented Immigrants: From India, China, Brazil*, N.Y. TIMES (Dec. 3, 2019), <https://www.nytimes.com/2019/12/01/us/undocumented-visa-overstays.html>; *see also* Ordway, *supra* note 9.

29. *See* Blas Nuñez-Neto, *Visa Overstays Outsize Role in Unauthorized Migration*, HARVARD KENNEDY SCH. BELFER CTR. (Sept. 2019), https://www.belfercenter.org/sites/default/files/files/publication/HSP%20Paper%20SeriesVisa%20Overstays_0.pdf; *see also* Ordway, *supra* note 9.

One difficulty understanding the seriousness of the problem is that U.S. Customs and Border Protection has not developed any “metrics” to assess the effectiveness of the border barriers.³⁰ Yet, according to a 2017 report prepared by the U.S. Government Accountability Office, the agency spent approximately \$2.3 billion from fiscal year 2007 through fiscal year 2015 on fencing costs, and in 2009, estimated that simply maintaining the fence over the next twenty years would cost more than \$1 billion.³¹ A researcher at the University of Illinois at Chicago found that, each quarter, 41,500 Mexican migrants are deterred from entering by the barrier and the cost of each deterred migrant was approximately \$4,820.³² Additionally, the National Bureau of Economic Research found that the physical barriers on the southwestern border had only a “small” impact on curbing migration from Mexico to the U.S.³³ Researchers from Dartmouth College and Stanford University found that the Secure Fence Act (legislation that authorized the construction of over 500 miles of fencing) reduced the number of Mexican nationals living in the U.S. from 2005 and 2015 by an estimated 46,459 people, which amounted to approximately five percent of the actual decline in migration during that period.³⁴ Even extending the barrier along the entire border would have only reduced migration “by an estimated 129,438 people, which, the researchers note, ‘still comprises a small portion (13%) of the observed decline in migration flows between 2005 and 2015.’”³⁵

The construction of the border wall has had another consequence: the death of migrants attempting to cross illegally into

30. U.S. GOV'T ACCOUNTABILITY OFF., *GAO-17-331, Southwest Border Security: Additional Actions Needed to Better Assess Fencing's Contributions to Operations and Provide Guidance for Identifying Capability Gaps* (2017), <https://www.gao.gov/assets/690/682838.pdf>; see also Ordway, *supra* note 9.

31. U.S. GOV'T ACCOUNTABILITY OFF., *GAO-17-331, Southwest Border Security: Additional Actions Needed to Better Assess Fencing's Contributions to Operations and Provide Guidance for Identifying Capability Gaps* (2017), <https://www.gao.gov/assets/690/682838.pdf>.

32. Ordway, *supra* note 9 (citing Benjamin Feigenberg, *Fenced Out: Why Rising Migration Costs Matter*, SEMANTIC SCHOLAR (Oct. 26, 2013), <https://pdfs.semanticscholar.org/d8b9/5f0ac5098cbc43aa219065dc73c295e068af.pdf>).

33. Treb Allen et al., *Border Walls*, NAT'L BUREAU ECON. RSCH. at 32 (Nov. 2019), https://web.stanford.edu/~memorten/ewExternalFiles/Allen_Dobbin_Morten_Border_Walls.pdf.

34. *Id.*; see also Ordway, *supra* note 9.

35. Ordway, *supra* note 9 (citing Allen et al., *supra* note 33, at 32).

the United States.³⁶ “Multiple studies over the years have found a direct link between increased border security and migrant deaths,” and indicate that increased border control causes migrants to seek entry from remote areas, increasing mortality.³⁷ Additionally, “segmented border militarization” has caused a “funnel effect,” which redistributes the flow of migrants away from what had been traditional “urban crossing points” to more remote and dangerous areas.³⁸ Typical of these areas is the Sonoran desert in southern Arizona and Texas, which is characterized by rugged terrain, pronounced elevation changes, and relatively little rainfall, where temperatures can be as high as 120 degrees Fahrenheit in the summer and drop below freezing in the winter.³⁹

III. EVOLUTION OF THE WAIVER AND ABRIDGED JUDICIAL REVIEW PROVISIONS IN THE LAW AUTHORIZING THE WALL’S CONSTRUCTION

The situation with respect to construction of the border wall has evolved since 1996, when Congress granted the first authorization for the wall’s construction and conceived of the idea of waiving applicable laws that might impede construction.⁴⁰ The 1996 version of § 102 of IIRIRA authorized the Attorney General to waive provisions of the Endangered Species Act and the National Environmental Policy Act based on his determination that these waivers were “necessary to ensure expeditious construction of barriers and roads.”⁴¹ However, in 1996, § 102(b) of IIRIRA only required construction of border fencing along a 14-mile region near San Diego, California.⁴² The Homeland Security Act of 2002 transferred this authority from the Attorney General to the Sec-

36. *Id.* (“The U.S. Border Patrol reported 300 deaths at the southwestern border in fiscal year 2019, up slightly from 283 in fiscal year 2018 but considerably lower than the decade high of 471 deaths in fiscal year 2012.”); *see also id.* (“Hundreds of migrants die each year along the U.S.-Mexico border, particularly in southern Arizona and Texas.”).

37. *Id.* (citing Daniel E. Martínez et al., *Structural Violence and Migrant Deaths in Southern Arizona*, 2 J. ON MIGRATION & HUM. SEC. 257 (2018), <https://journals.sagepub.com/doi/abs/10.1177/233150241400200401>).

38. *Id.*

39. *Id.*

40. *See generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-2008, § 102, 110 Stat. 3009, 3009-554 (codified as amended at 8 U.S.C. § 1103).

41. *Id.*

42. *Id.*

retary of the Department of Homeland Security.⁴³ In 2005, Congress dramatically expanded the Secretary’s waiver power under § 102(c) of IIRIRA, granting the Secretary the authority to waive “*all* legal requirements” that he determines necessary under his sole discretion.⁴⁴

The 2005 amendment had another important consequence: it largely insulated the Secretary’s waiver authority from judicial review by restricting the scope of any challenge to any Secretarial waiver decision, by ousting state court jurisdiction, and by giving federal courts exclusive jurisdiction to hear all causes or claims arising from those waiver decisions.⁴⁵ The amendment further protected Secretarial waivers by limiting challenges to only constitutional violations;⁴⁶ by requiring that those challenges be filled no later than sixty days after issuance of the Secretary’s waiver;⁴⁷ and by eliminating ordinary appellate review in the federal courts of appeal.⁴⁸ This restrictive judicial review provision forces litigants to seek review of an adverse district court ruling only by petitioning for a writ of certiorari to the Supreme Court.⁴⁹ Despite the significant changes to the judicial review and waiver provisions of IIRIRA, the 2005 amendment did not change § 102(b)’s focus on the San Diego portion of the fence.⁵⁰ In 2006, President Bush signed the Secure Fence Act⁵¹ into law, which significantly amended § 102(b) of IIRIRA. The Secure Fence Act expanded the geographic range of the fence to 850 miles and put construction under tight deadlines, calling for completion milestones in May and December 2008.⁵² In 2008, Congress amended

43. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135 at 13 (2002).

44. See REAL ID Act of 2005, Pub. L. No. 109-13, § 102(c)(1), 119 Stat. 231, 302, 306 (2005) (emphasis added).

45. See REAL ID Act of 2005, Pub. L. No. 109-13, § 102(c)(2)(A), 119 Stat. 231, 302, 306 (2005).

46. See *id.*

47. See REAL ID Act of 2005, Pub. L. No. 109-13, § 102(c)(2)(B), 119 Stat. 231, 302, 306 (2005).

48. See REAL ID Act of 2005, Pub. L. No. 109-13, § 102(c)(2)(C), 119 Stat. 231, 302, 306 (2005).

49. See *id.*

50. See REAL ID Act of 2005, Pub. L. No. 109-13, § 102(b), 119 Stat. 231, 302, 306 (2005).

51. See *generally* Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, 2369, § 102(b)(1)(A)(i)–(v).

52. See Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, 2369, § 102(b)(1)(B)(i)–(ii).

§ 102(b) again to require fencing “along not less than 700 miles of the southwest border where fencing would be most practical and effective.”⁵³ Before the Trump Administration took office, the government used the waiver authority under § 102(c) of IIRIRA five times, all of them during the tenure of George W. Bush.⁵⁴ All of the Bush Administration waivers applied to projects specifically authorized by § 102(b) of IIRIRA.⁵⁵

On January 25, 2017, nine years after Congress last touched IIRIRA, President Trump issued Executive Order 12767, authorizing the Secretary of Homeland Security to take steps to “obtain complete operational control” of the Southern border, including planning, designing, and constructing a physical wall “immediately.”⁵⁶ The Order defined the term “wall” as a “contiguous, physical wall or a similarly secure, contiguous, and impassable physical barrier.”⁵⁷ In response to that order, on August 2, 2017, the Secretary of DHS issued a determination (“the San Diego Waiver”) authorizing construction of three border wall projects near San Diego, California, including replacement of fencing and construction of prototype walls.⁵⁸ In his determination, the Secretary waived application of more than thirty laws, including the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA), the entire Administrative Procedure Act (APA), and the American Religious Freedom Act (ARFA), together with all *state* and *local laws* related to the subjects covered by the laws listed.⁵⁹ A little over a month later, the Secretary issued a second determination (“the Calexico Waiver”) on September 12, 2017, again waiving many federal and state laws that otherwise would have applied with respect to construction of replacement fencing along a three mile segment of the border near Calexico, California.⁶⁰ Critics and adverse litigants, however, have contin-

53. Consolidated Appropriations Act, 2008 Pub. L. No. 110-161, § 564, 121 Stat. 1844, 2090, § 102(b)(1)(A)–(B).

54. Press Release, Dep’t of Homeland Sec., DHS Issues Waiver to Expedite Border Construction Project in New Mexico (Jan. 23, 2018), <https://www.dhs.gov/news/2018/01/23/dhs-issues-waiver-expedite-border-construction-project-new-mexico>

55. See Petition for Writ of Certiorari, Animal Legal Def. Fund v. U.S. Dep’t of Homeland Sec., 2018 WL 4105818, at *6–7 (2018), https://www.biologicaldiversity.org/campaigns/border_wall/pdfs/ALDF-Petition.pdf.

56. Exec. Order No. 13767 §4, 82 Fed. Reg. 8793 (Jan. 25, 2017).

57. *Id.* at 8793, 8794.

58. See 82 Fed. Reg. 35984-01 (Aug. 2, 2017).

59. See generally *id.*

60. See 82 Fed. Reg. 42829-02 (Sept. 12, 2017).

ued to point out that the waivers will continue to apply to upkeep and maintenance costs in perpetuity, even after construction of the barriers is complete.⁶¹

IV. THE IMPACT OF THE WALL’S CONSTRUCTION ON THE ENVIRONMENT AND AFFECTED TRIBES

The wall will have an adverse environmental impact on native animal and plant species, and will have concordant impacts on the ecotourism industry in the Southwest. It will also severely interfere with tribal communities and cultural resources on both sides of the border.

A. PROJECTED ENVIRONMENTAL IMPACTS FROM WALL CONSTRUCTION AND MAINTENANCE

The environmental impact of the projects authorized by the San Diego and Calexico Waivers is extensive. The proposed wall segments are within or close to the habitats of rare animal and plant species, including the burrowing owl, Quino checkerspot butterfly, Tecate cypress, snowy plover, two species of fairy shrimp, and the Otay Mesa mint.⁶² The Tijuana River National Estuarine Research Reserve will also be affected.⁶³ The Reserve “is designated a ‘Wetland of International Importance’ under the 1971 International Convention on Wetlands.”⁶⁴ “The Tijuana River estuary is one of only two intact estuaries in California, and it provides productive marsh habitat for a range of invertebrates, fish, birds, and plants.”⁶⁵ A portion of the affected area also falls within California’s coastal zone, which authorizes the state to promulgate regulations to ensure that coastal resources and uses are protected.⁶⁶ The San Diego Waiver eliminates all of these protections.⁶⁷

Once built, the wall will prevent the regular passage of many mammals, including jaguars, which only recently have reestab-

61. See Petition for Writ of Certiorari at *7, *11, *Animal Legal Def. Fund v. Dep’t of Homeland Sec.*, 139 S. Ct. 594 (2018) (No. 18-247), 2018 WL 4105818.

62. See *id.* at *9.

63. See *id.*

64. See Petition for Writ of Certiorari at *9, *Animal Legal Def. Fund v. Dep’t of Homeland Sec.*, 139 S. Ct. 594 (2018) (No. 18-247), 2018 WL 4105818.

65. See *id.*

66. See *id.*

67. See *id.*

lished habitat on the United States side of the border.⁶⁸ A 2017 Center for Biological Diversity study reported that ninety-three endangered or threatened species could be harmed if the proposed additional sections of the wall are built or improved.⁶⁹ The National Butterfly Center also filed suit in protest to construction of the wall through their 100-acre property which, if completed, would render as much as 70% of it inaccessible.⁷⁰

The economic impact from reduced tourism in the area due to the decline in species will likely be severe.⁷¹ Local towns will lose revenues from the decline in tourism, as well as tourist-related services, including lodging, food, and guides.⁷² This loss in revenues will be permanent with no alternative source of comparable revenue on the horizon.

B. IMPACT ON TRIBES

Besides negatively affecting a wide variety of species and environmental resources, the wall may harm members of several Indian tribes who occupy land on both sides of the border. For example, the barriers have adversely affected civil and property rights of the Tohono O'odham Nation, the Pascua Yaqui Tribe in Arizona, the Kickapoo Traditional Tribe of Texas, and other federally recognized tribes.⁷³ The barriers have kept tribal members from accessing the southern parts of their land.⁷⁴ The barriers also

68. NOAH GREENWALD ET AL., CTR. FOR BIOLOGICAL DIVERSITY, A WALL IN THE WILD: THE DISASTROUS IMPACTS OF TRUMP'S BORDER WALL ON WILDLIFE 13-15 (May 2017), https://www.biologicaldiversity.org/programs/international/borderlands_and_boundary_waters/pdfs/A_Wall_in_the_Wild.pdf.

69. *Id.*

70. Matthew S. Schwartz, *Butterflies vs. Border Wall: National Butterfly Center Seeks Restraining Order*, NPR (Feb. 13, 2019), <https://www.npr.org/2019/02/13/694173820/butterflies-v-border-wall-national-butterfly-center-seeks-restraining-order>.

71. See April Reese, *'People Think It's Not Safe': Nature Tourism Takes Hit Over Trump Wall Policy*, THE GUARDIAN (Mar. 22, 2019), <https://www.theguardian.com/us-news/2019/mar/22/texas-nature-tourism-industry-trump-border-wall> (discussing the economic benefits of regional tourism and the adverse impacts the border wall's construction is having on tourism numbers).

72. *See id.*

73. See Joseph Kowalski, *Imaginary Lines, Real Consequences: The Effect of the Militarization of the United States-Mexico Border on Indigenous Peoples*, 5 AM. INDIAN. L.J. 643, 651-52, 656 (2017); *see also* Ordway, *supra* note 9.

74. Kowalski, *supra* note 73, at 643, 653; *see also* Ordway, *supra* note 9.

impede the sharing of customs and have led to the desecration of burial sites.⁷⁵

The impact could be particularly devastating for native people whose cultural traditions depend on crossing the border. For instance, some tribe members who live on the United States side of the border depend on their tribal elders, who live on the Mexican side of the border, to teach their youth about their culture.⁷⁶ Additionally, some U.S. tribal members need to cross the border into the Mexican desert to gather plants and other materials important for cultural rituals.⁷⁷ These members can be prevented from traveling to those areas or from returning with those items when “overzealous border guards mistake them for forbidden plants.”⁷⁸ Furthermore, “tens of thousands of U.S. tribal members live in the Mexican states of Coahuila, Chihuahua, Baja California and Sonora . . . [and] routinely cross the U.S.-Mexico border for cultural, ceremonial or social purposes.”⁷⁹ They are considered to be “visitors” to the U.S. and are required “to pass through security checkpoints, where they can be interrogated, rejected or delayed.”⁸⁰

The Tohono O’odham Nation, in particular, may be significantly affected. Sections of the border wall will run through sixty-two miles of the Tohono O’odham Nation’s 2.8 million acre reservation between Arizona and Mexico.⁸¹ Tightening of border security and immigration policies have infringed on the Nation’s “mobile way of life” and its sovereignty.⁸² If these barriers are constructed on Tohono O’odham lands, the Nation will be irreparably harmed as a result of the injury done to sacred lands and environmental resources, as well as from the curtailment of the

75. Kowalski, *supra* note 73, at 654-55.

76. *Id.* at 656.

77. *Id.* at 654.

78. *Id.*

79. Ordway, *supra* note 9 (citing Christina Leza, *For Native Americans, US-Mexico Border is an ‘Imaginary Line’*, THE CONVERSATION (Mar. 19, 2019), <https://theconversation.com/for-native-americans-us-mexico-border-is-an-imaginary-line-111043>).

80. *Id.*

81. Ordway, *supra* note 9 (citing Keegan C. Tasker, *Waived: The Detrimental Implications of U.S. Immigration and Border Security Measures on Southern Border Tribes*, 8 AM. INDIAN L.J. 303 (2019)).

82. Keegan C. Tasker, *Waived: The Detrimental Implications of U.S. Immigration and Border Security Measures on Southern Border Tribes*, 8 AM. INDIAN L.J. 303, 318 (2019).

Nation's mobility and sovereignty. Additionally, the effects of construction may strip tribal lands of sacred natural resources that are important to the Nation for spiritual and cultural practices.⁸³

The border wall appears to be making only a slight dent in the flow of illegal migrants into the United States, at a high cost in human life and dollars. Its expansion will substantially harm native plants and animals, causing a loss of tourism dollars in border towns and an irreplaceable loss in biodiversity. It will diminish native cultures, which thrive on both sides of the border. These impacts have spurred a multitude of lawsuits against the fence seeking to halt its construction, and even to dismantle what has been built, as discussed in the next section.

V. THE STATUS OF VARIOUS LAWSUITS AGAINST THE WALL'S CONSTRUCTION

At the time of writing this article, there were eight lawsuits pending against the wall's construction.⁸⁴ They contain a mix of constitutional, Freedom of Information Act (FOIA), and environmental claims. Included in this mix of cases are those brought by tribes on both sides of the border, seeking relief under international agreements. Unfortunately for groups hoping to halt or reverse border wall construction, none of these cases has advanced very far.⁸⁵ Two similar cases brought by environmental plaintiffs

83. *Id.*

84. Most of the pending litigation challenges the appropriation of funds for the border wall, sometimes in conjunction with environmental claims. *See* Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11, 23 (D.D.C. 2020); Washington v. Trump, 441 F. Supp. 3d 1101, 1106-07 (W.D. Wash. 2020); Sierra Club v. Trump, 379 F. Supp. 3d 883, 908 (N.D. Cal. 2019); El Paso Cnty. v. Trump, 408 F. Supp. 3d 840, 844 (W.D. Tex. 2019); U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8, 11 (D.D.C. 2019); California v. Trump, 407 F. Supp. 3d 869, 879 (N.D. Cal. 2019); Ctr. for Biological Diversity v. Esper, No. 1:20-cv-02130 (D.D.C. filed May 12, 2020). Another case takes a different approach, instead challenging whether the government fulfilled its obligations under FOIA. *See* Ctr. for Investigative Reporting v. U.S. Customs and Border Prot., 436 F. Supp. 3d 90, 96 (D.D.C. 2019) (seeking records under FOIA related to border wall construction).

85. For example, most of the challenges to the waiver provisions have thus far failed. *See* Ctr. for Biological Diversity v. McAleenan, 404 F. Supp. 3d 218, 235 (D.D.C. 2019) (challenging the constitutionality of IIRIRA's waiver provisions); *in re* Border Infrastructure Env't Litig., 284 F. Supp. 3d 1092, 1103 (S.D. Cal. 2018) (challenging the constitutionality of IIRIRA's waiver provisions); N. Am. Butterfly Ass'n v. Nielsen, 368 F. Supp. 3d 1, 4 (D.D.C. 2019) (granting the government's motion to dismiss for failure to state a claim); Ctr. for Biological Diversity v. U.S.

demonstrate just how difficult challenging the border wall in court has been.

First, a group of environmental organizations (including the Center for Biological Diversity, Defenders of Wildlife, and the Animal Legal Defense Fund), as well as the State of California, sued the DHS, alleging three constitutional and one statutory violations.⁸⁶ The Southern District of California granted the government’s motion for summary judgment, rejecting plaintiffs’ non-delegation, Presentment Clause, and ‘Take Care’ Clause arguments.⁸⁷

With respect to the plaintiffs’ unconstitutional delegation claim, the District Court held that IIRIRA § 102 provided the Secretary with an “intelligible principle” enabling him to exercise his delegated waiver authority.⁸⁸ While the court acknowledged that § 102(c) contained fewer details than other statutes that had been challenged on similar grounds, the section articulated a sufficient limit on the Secretary’s authority, as his authority was limited to laws whose elimination was necessary to ensure expeditious construction of barriers and roads.⁸⁹ The court also concluded that the waivers were sufficiently narrow in scope as the authority was granted only for the purpose of building border barriers authorized under § 102(c) and consistent with congressional intent, thereby vitiating any Presentment Clause claim.⁹⁰ The court also noted that the waived statutes “largely retained legal force and effect” because the waivers only “disturbed” them “for a specific

Army Corps of Eng’rs, 405 F. Supp. 3d 127, 135 (D.D.C. 2019) (upholding the government’s response to FOIA requests from the Center for Biological Diversity). Even cases where the plaintiffs were victorious in lower courts have had little effect on the wall’s construction, due to stays being issued by higher courts. *See, e.g., Sierra Club*, 379 F. Supp. 3d at 908, *stay issued* 140 S. Ct. 1 (2019); *El Paso Cnty.*, 408 F. Supp. 3d at 844, *stay issued* No. 19- 51144 (5th Cir. Jan. 8, 2020).

86. *See in re Border Infrastructure Env’t Litig.*, 284 F. Supp. 3d 1092, 1102 (S.D. Cal. 2018). Environmental plaintiffs argued that they have a property and liberty interest in ensuring that environmental laws and interest are protected, *see id.* at 1142–43, an argument not that dissimilar from one being made in the *Juliana* appeal in the 9th Circuit. *See Juliana v. United States*, 947 F.3d 1159, 1165 (9th Cir. 2020), *petition for reh’g filed*, No. 18-36082 (9th Cir. Mar. 2, 2020).

87. *In re Border Infrastructure Env’t Litig.*, 284 F. Supp. 3d 1092, 1103 (S.D. Cal. 2018).

88. *Id.* at 1134-35.

89. *Id.*

90. *Id.* at 1141.

purpose and for a specific time.”⁹¹ While the court agreed that the Take Care Clause applies to Executive officers, in this instance, the Secretary’s waivers were “plausibly called for by an act of Congress,” and, therefore, did not violate the Take Care Clause.⁹² Plaintiffs also made an ultra vires claim—that the waivers were beyond the scope of IIRIRA § 102(b)—which the court agreed to rule on even though it arguably did not raise a constitutional question.⁹³ The court then went on to reject the claim, because nothing in IIRIRA § 102 places a “clear mandatory” limit on the Secretary’s waiver authority, robbing the waivers as a basis for any ultra vires claim.⁹⁴

Under IIRIRA, only the Supreme Court can review the district court’s ruling on plaintiffs’ constitutional claims.⁹⁵ Accordingly, petitioners filed a certiorari petition seeking reversal of the District Court’s opinion on August 23, 2018.⁹⁶ On December 3, 2018, the Supreme Court denied the petition for certiorari, effectively affirming the District Court’s decision.⁹⁷ During the time the waiver provision case was pending in the Supreme Court, work began on a 30-foot high, 14-mile long fence construction and replacement project in Calexico, California.⁹⁸

In 2019, the Center for Biological Diversity, Southwest Environmental Center, Defenders of Wildlife, and Animal Legal Defense Fund brought a similar case in the District of Columbia, challenging DHS’s waiver of laws that would impede construction of 145 miles of barrier wall.⁹⁹ In this case, the plaintiffs alleged that DHS did not have the statutory authority to use its waiver power because DHS failed to meet the procedural requirements of

91. *In re Border Infrastructure Env’t Litig.*, 284 F. Supp. 3d 1092, 1103 (S.D. Cal. 2018).

92. *Id.* at 1139.

93. *Id.* at 1115.

94. *Id.* at 1126–28.

95. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I §102 (2005).

96. See Petition for Writ of Certiorari, *Animal Legal Def. Fund v. U.S. Dep’t of Homeland Sec.*, No. 18-247, 2018 WL 4105818 at *34 (2018).

97. *Animal League Def. Fund v. U.S. Dep’t of Homeland Sec.*, 139 S. Ct. 594 (2018).

98. Kate Morrissey, *Border Fence Replacement Hailed by Trump is Completed in Calexico*, L.A. TIMES (Oct. 11, 2018), <https://www.latimes.com/local/lanow/la-me-trump-border-barrier-20181011-story.html>.

99. *Ctr. for Biological Diversity v. McAleenan*, 404 F. Supp. 3d 218, 224-25 (D.D.C. 2019).

§ 102(b).¹⁰⁰ The Court rejected this argument on the grounds that § 102(c) limited its authority to only adjudicating constitutional challenges to the border wall.¹⁰¹ The plaintiffs’ constitutional claims—that the waiver provision violated the Take Care Clause, the Presentment Clause, and the nondelegation doctrine—were also rejected by the Court.¹⁰²

As required by § 102(c) of IIRIRA, the plaintiffs filed a petition for certiorari on January 31, 2020, against the Acting Secretary of DHS.¹⁰³ La Union del Pueblo Entero, the North American Butterfly Association, and the National Butterfly Center, Archaeology Southwest, and several local governments filed amicus curiae briefs in support of the petitioner.¹⁰⁴

In their certiorari petition, petitioners noted that § 102(c) of IIRIRA grants the Secretary of Homeland Security sweeping powers, in his “sole discretion,” to waive any and all legal requirements, including state and tribal requirements, that would otherwise apply to the construction, replacement, and upkeep of barriers, including prototype barriers, along the U.S.-Mexico border that would impede their “expeditious construction.”¹⁰⁵ Petitioners argued that this authority, coupled with language limiting judicial review to constitutional challenges and appellate review to seeking certiorari in the Supreme Court (§ 102(c)(2)(A)), violated the separation of powers doctrine.¹⁰⁶ Petitioners also contended that the waiver authority under § 102(c) violated the nondelegation doctrine, as well as the Presentment Clause, to the extent that the section works as a partial repeal of enacted laws.¹⁰⁷ Petitioners contended that the fact that the section’s jurisdiction-stripping provision shields presidents from judicial review of their own actions makes the separation of powers violation more severe.¹⁰⁸ The petition also complained that the language of § 102(a)

100. *Id.* at 235.

101. *Id.*

102. *Id.* at 243-50.

103. Petitioners applied for an extension of the time within which to file their petition on October 21, 2019, which the Chief Justice granted on October 29, 2019, extending the original filing date of December 3, 2019 to February 1, 2020.

104. *See* No. 19-975, U.S. SUP. CT., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-975.html> (last visited Dec. 24, 2020).

105. *See* Petition for Writ of Certiorari at 9, *Ctr. for Biological Diversity v. Wolf*, 141 S. Ct. 158 (2020) (No. 19-975), 2020 WL 584341.

106. *Id.*

107. *Id.* at 37-39.

108. *Id.* at 39.

grants the Secretary of DHS wide discretion to determine what the “actions” are that may be necessary to trigger the installation of barriers to deter illegal crossings, as well as where the areas of “high illegal entry” are to construct those barriers.¹⁰⁹ Without reaching the merits of any of these allegations, the Court denied cert. on June 29, 2020.¹¹⁰

For those seeking to stop the wall’s construction, clearly, another approach is needed. Rather than describe the status of the remaining lower court cases involving the wall’s construction or evaluating the arguments made in these various cases, this article examines the extent to which the Petition Clause of the First Amendment and the unenumerated rights language of the Ninth Amendment provide any possible relief to claimants. It is to these analyses that the article now turns.

VI. POSSIBLE ADDITIONAL CLAIMS AGAINST THE STATUTORY AUTHORIZATION FOR CONSTRUCTING THE WALL

There are three potential arguments for why legislation authorizing the wall’s construction is unconstitutional. First, that the statute’s truncated judicial review procedures, which close off intermediate appellate court review of failed legal challenges and make a grant of certiorari by the Supreme Court the only potential avenue for review, violate the Petition Clause of the First Amendment. Second, that the statute’s waiver procedures, which eliminate protections under existing laws for endangered and rare species, contravene the Ninth Amendment’s reservation of unenumerated rights to cultural enjoyment. A third potential challenge is to the wall itself, namely, that it violates the unenumerated right of citizens to travel, including members of tribes who live on both sides of the wall, in violation of the Ninth Amendment.

A. THE PETITION CLAUSE OF THE FIRST AMENDMENT

“One need not call oneself an originalist to acknowledge that historical fit has a place in constitutional interpretation.”¹¹¹

109. *Id.* at 2-3.

110. *See* *Ctr. For Biological Diversity v. Wolf*, 141 S. Ct. 158 (2020).

111. Mitchell Gordon, *Getting to the Bottom of the Ninth: Continuity, Discontinuity, and the Rights Retained by the People*, 50 IND. L. REV. 421, 463 (2017).

The Petition Clause of the First Amendment guarantees judicial review of citizen grievances against the government.¹¹² By cutting off appellate review of challenges to waivers of environmental laws, section 102(c) of IIRIRA violates the First Amendment’s Petition Clause. “Despite its modern obscurity, the petition right is in fact the most ancient of the First Amendment’s guarantees.”¹¹³ Petitioning government officials to complain about grievances was “a well-established right and practice, both in England and the American colonies, well before the American Revolution.”¹¹⁴ “[T]he right to petition evolved in both England and America into a broad right which was distinct from and superior to the rights of speech, press, and assembly.”¹¹⁵ In fact, the associated rights of speech, press, and assembly emerged later than the right to petition.¹¹⁶ Petitioning can include written requests from individuals or groups which are then submitted to any of the three branches of government.¹¹⁷ In contrast to the rights of speech and the press, the contents of petitions are not

112. See Julie M. Spanbauer, *The First Amendment Right to Petition Government for Redress of Grievances*, 21 HASTINGS CONST. L.Q. 15, 45 (1993) (“In *NAACP v. Button*, [t]he Court emphasized that NAACP-sponsored litigation was a ‘form of political expression’ and was very possibly the only avenue by which minority groups could petition government for redress of grievances.”).

113. Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1109 (2016); see also *id.* at 1111 (“[W]hat we find through a close examination of the First Amendment as a whole is that each of the five rights protected by the nonreligious parts of the Amendment—freedom of speech, freedom of the press, assembly, association, and petition—are important, independent rights with distinct histories. What they have in common, however, is that each of the rights has as its primary goal the advancement of democratic self-governance. Each, moreover, provides a distinct path for citizens to participate in and influence their government.”).

114. *Id.* at 1109-10; see also Spanbauer, *supra* note 112, at 28 (“By the time of the American Revolution, Delaware, New Hampshire, North Carolina, Pennsylvania, and Vermont also provided explicit protection for the right of colonists to petition local governing bodies for redress of both individual and collective grievances. Thus, the early colonial governments recognized petitioning as a tangible right.”) (internal citations omitted).

115. Spanbauer, *supra* note 112, at 68.

116. 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, 1168 (1986). Indeed, Smith attributes the right to assemble to the right to petition, as the former was not yet seen to be a constitutional right when petitioning had long been accepted. *Id.* at 1169 (“What develops as an accepted or even tolerated practice often is transmuted into a right. Such appears to have been the case with public assembly, and petitioning likely was the activity that brought about the practice of publicly assembling.”).

117. Spanbauer, *supra* note 112, at 68.

restricted.¹¹⁸ Though the precise extent of the petition right has yet to be clarified by the Supreme Court, the right to petition the government likely includes the right to petition a court for relief from a grievance.

1. BACKGROUND

Petitions are an important way to inform the government of grievances held by citizens. Before the advent of the administrative state, they were an important source of information for the government about how citizens felt about certain issues outside of the election cycle.¹¹⁹ The Petition Clause of the First Amendment “guarantees that people may bring their causes to the government without fear of reprisal.”¹²⁰ Norman Smith believes that the development of petitioning in constitutional jurisprudence is closely related to the concept of popular sovereignty.¹²¹ For example, in early America, even women, free blacks, and enslaved persons could petition, despite the fact that their other rights were extremely limited.¹²²

In England and colonial America, petitions were not considered “publications” that could trigger the application of libel laws.¹²³ Because of their perceived importance, petitioners who presented petitions to a court received immunity from libel charges regardless of whether the dispute triggering the petition concerned public, private, or commercial matters,¹²⁴ unless the litigation was “base-

118. *Id.* For example, seditious libel laws limit the right to free speech, and the government can restrict the number of people who can assemble and require participants to “act in a peaceful, orderly manner.” *Id.*

119. See *Constitutional Law—First Amendment—Tenth Circuit Holds That Petition Clause Protection Cannot Extend to Nonpetitioners*, 114 HARV. L. REV. 654, 658 (2000).

120. *Constitutional Law—First Amendment—Tenth Circuit Holds That Petition Clause Protection Cannot Extend to Nonpetitioners*, 114 HARV. L. REV. 654, 657 (2000).

121. Smith, *supra* note 116, at 1153; see also *id.* at 1196 (“Petitioning historically and textually is a separable right from speech and press, and the interests served by petitioning go to the very heart of the principle of popular sovereignty. For these reasons, petitioning must be regarded as an extremely valuable right.”).

122. 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, 1172 (1986).

123. Spanbauer, *supra* note 112, at 38.

124. *Id.* at 63 (1993); but see *id.* at 52 (“Petitioners were historically protected from both seditious libel prosecutions and private libel actions. The Supreme Court has ignored this history and has applied the same qualified immunity given speech and

less.”¹²⁵ Although many individuals were punished for written or verbal speech under the Sedition Act of 1789, not a single petitioner was punished.¹²⁶ Julie M. Spanbauer argues that the protection of petitioners from libel laws shows a lack of intent to bring freedom of speech and the press to the same level of protection as the right to petition, as neither the free speech nor press clauses protected individuals from charges of libel.¹²⁷

The special status of petitions throughout American history means that limits that are commonly placed on free speech and freedom of the press must be looked at critically before being applied to core petitioning activities like drafting, circulating or presenting a petition.¹²⁸ The highest level of protection should be applied to these activities, although the less demanding standard of protection applied to freedoms of speech, the press, and assembly, should be applied to publicizing the content of a petition or holding a public meeting where a petition is discussed.¹²⁹ Where a petition affects only the public interest, petitioning should only be restricted in situations where there is a “clear and present danger

the press to the information contained in petitions. As a result, petitioners receive less protection than is historically justified.”).

125. *Id.* at 52 (1993). But “petitioners were not clothed with immunity if they published the content of their petition in a newspaper or in some other written communication.” *Id.* at 55.

126. *Id.* at 39.

127. Spanbauer, *supra* note 112; *see also* 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, 673 (1999) (citing *Thomas v. Collins*, 323 U.S. 516 (1945) (saying that, although freedom of speech and the press are cognate rights and have overlapping functions, they are not the same and the history of protecting government access through petitioning is longer than the history of protecting speech)); Aaron H. Caplan, *The First Amendment’s Forgotten Clauses*, 63 J. LEGAL EDUC. 532, 552 (2014) (quoting *Thomas*, 323 U.S. 516 (“It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, and therefore are united in the First Article’s assurance.”)).

128. Smith, *supra* note 116, at 1196; *see also id.* at 1158–59 (describing a 1648 Parliament ordinance limiting to twenty the number of people who could present a petition to Parliament and also requiring that the presentation of the petition must “be in a peaceful and orderly manner,” which was the first statute in England that recognized petitioning as a “fundamental right.”); *id.* at 1159 (“[T]he essential features of the ordinance of 1648 were reenacted in 1661, as the Act 13 Car. II, Stat. I, c. 5, which is still on the statute books of Great Britain.”).

129. 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, 1196 (1986).

to public order or national security.”¹³⁰ But these are minimal and reasonable restrictions on this important constitutional right.

2. HISTORICAL CONTEXT

A First Amendment petition is a distinct type of communication between a citizen and her political representative that is neither “discourse [n]or deliberation,” but rather a precursor of hoped-for action.¹³¹ Scholars consider petitioning “part of the ‘fabric’ of English constitutional law” and to be of sufficient importance that it was among the fundamental rights the English citizenry demanded of William and Mary in the 1689 Bill of Rights.¹³² The 1689 English Bill of Rights also made prosecution of petitioners illegal, indicating the importance of the activity.¹³³ Before that, petitioning for redress of the sovereign’s action had a toehold in the 1215 Magna Carta to the extent that any assemblage of four barons could ask the King to correct promptly any improper actions committed by his agents.¹³⁴ By the mid-fourteenth century, petitions were filed in Parliament as opposed to with the King.¹³⁵ In many of England’s colonies in America, the right to petition Parliament or the King for redress of grievances was guaranteed by their respective colonial charters.¹³⁶ Many colonial charters also included procedures for petitioning or protec-

130. *Id.* at 1197; *see also* Spanbauer, *supra* note 112, at 16 n.3 (“[A] restricted view of petitioning under the First Amendment does not accord with the importance given the right in a series of late 19th and early 20th century Supreme Court cases. *See The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872) (right to petition a privilege and immunity of national citizenship); *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907) (right of access to courts, as component of right to petition government, also a privilege and immunity of national citizenship); *see also Crandell [sic] v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867) (stating that a citizen’s right to petition is correlative to the plenary powers granted the federal government).”).

131. Bhagwat, *supra* note 113, at 1117.

132. 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, 599–600 (1999).

133. *See id.* at 600.

134. Aaron H. Caplan, *The First Amendment’s Forgotten Clauses*, 63 J. LEGAL EDUC. 532, 545 (2014).

135. *Id.* (“King Edward III opened each Parliament with an announcement of the King’s willingness to hear petitions from the people. As Parliament itself grew in power over the centuries, the petitions began to be directed directly to it.”). *See also id.* (“Even today, a bag hangs on the back of the Speaker’s chair in the House of Commons where members may deposit petitions from constituents.”).

136. Andrews, *supra* note 132, at 603.

tions for the act of petitioning,¹³⁷ and when the first Congress was assembled in 1789, within ten days, petitions began arriving, without the benefit of the Petition Clause of the First Amendment.¹³⁸ The 1765 Stamp Act stated that “it is the right of the British subjects in these colonies, to petition the King or either House of Parliament,” and the fact that the royal government ignored these petitions led colonists to “complain in the Declaration of Independence that the King had answered their previous petitions ‘only by repeated Injury.’”¹³⁹

“The drafters of the Bill of Rights replaced the right to petition the legislature, which was the supreme power in the states, with the right to petition the whole ‘government’—which possessed all of the powers of the federal government.”¹⁴⁰ James Madison, who wrote the initial version of the Bill of Rights, included a first draft of the Petition Clause.¹⁴¹ He wrote that “[t]he people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.”¹⁴²

Madison viewed the right to petition “as part of the system by which the First Amendment would guard the people’s right to

137. *Id.* at 604 (“The 1641 Massachusetts Bay Colony Body of Liberties guaranteed a very broad right of petition that expressly encompassed the right to file complaints in local courts: ‘Every man, whether Inhabitant or Sorreiner, free or not free, shall have libertie to come to any publique Court, Councel or Towne meeting, and either by speech or writeing, to move any lawfull, seasonable and materiall question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order and, respective manner.’”).

138. Caplan, *supra* note 134, at 546.

139. Andrews, *supra* note 132, at 603–04; *see also* Smith, *supra* note 110, at 1173 (“The Declaration of Independence, which accused the king of trampling upon many liberties of the colonists, did not claim that petitioning itself had been punished, only that the petitions had not met with favorable response: ‘In every state of these Oppressions we have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.’”).

140. Andrews, *supra* note 132, at 611–12.

141. *Id.* at 612–13.

142. *Id.* *See also* Smith, *supra* note 116, at 1182 (“Only one amendment of the text of the first amendment significantly affected the petition clause: the word ‘petition’ was substituted for the words ‘apply to.’ Although no statement of intent accompanied this change of language, the substituted term’s well established common law and historical meaning as an absolute right is properly incorporated into the first amendment.”).

'communicate their will' to their government."¹⁴³ This distinguished the right to petition from the right of free speech in two ways. First, the right to petition preserves the right to speak *to the government*, not just to speak in general, and, second, to seek redress of grievances beyond merely stating views about something.¹⁴⁴ The latter difference gives aggrieved individuals an opportunity to seek a legal and peaceful alternative to "self-help and force," and gave a sense of "justice and order in their government."¹⁴⁵ But the right to petition imposed no obligation of the government to respond to a petition – then or now.¹⁴⁶

According to Carol Rice Andrews, any duty to respond lies in the courts and stems from the Due Process Clause, not the Petition Clause.¹⁴⁷ But even if there is no duty to respond, the Petition Clause informs the government of citizen grievances and gives citizens access to government to express their grievances. It also creates a chance that a petitioner might get relief in a governmental system that otherwise would not give them that opportunity outside of the courts.¹⁴⁸

3. DIFFERING VIEWS ON THE IMPORTANCE OF THE PETITION CLAUSE

Julie M. Spanbauer disagrees with the Supreme Court's jurisprudence on the Petition Clause, which largely ignores its existence and deemphasizes its importance. Spanbauer argues that "the right to petition was cut from a different cloth than were the cognate rights of speech, press, and assembly."¹⁴⁹ She maintains that the right to petition, historically, "was a distinct right, supe-

143. Andrews, *supra* note 132, at 624.

144. *Id.*

145. *Id.*

146. *Id.* at 635–36; *see also id.* at 638–39 ("James Madison broadly stated that "the people have a right to express and communicate their sentiments and wishes" through various means including 'by petition to the whole body,' but he did not say that Congress must specifically respond to each of these views."); *id.* at 667 ("There is some historical basis for concluding that the right to petition extends only as far as the power of the federal courts, as granted both by Article III and by Congress.").

147. Andrews, *supra* note 132, at 645. *See also id.* at 646–47 ("The Petition Clause, with all of its attendant 'strict scrutiny' protections under the First Amendment, protects the initial filing of the complaint, and the Due Process Clause, and its somewhat lower 'reasonableness' standard of protection, steps in from that point forward.").

148. *Id.* at 636.

149. Spanbauer, *supra* note 112, at 17.

rior to the other expressive rights.”¹⁵⁰ Over time, the right to petition one’s government evolved “in both England and America into a superior expressive right that was subject to few restrictions,” compared to the “corollary rights of speech, press, and assembly,” which all suffered heavier legal burdens.¹⁵¹ Indeed, some argue that petitioning nurtured the previously-unrecognized rights of freedom of the press and assembly.¹⁵² Norman B. Smith stated that the failure to recognize petitioning activity when it occurs and the failure to protect that activity, forfeits “peoples’ expressive rights.”¹⁵³

Ashutosh Bhagwat refers to the First Amendment as the “Democratic First Amendment,” saying that it should be interpreted as adopting Thomas Jefferson’s democratic republican philosophy. In this philosophy, citizens should be involved in a multiplicity of activities in which they engage and even challenge their elected officials by communicating their values and beliefs “jointly” through assemblies and associations.¹⁵⁴ Thus, petitioning

150. *Id.*

151. *Id.*

152. Smith, *supra* note 116, at 1166–67; *see also* Spanbauer, *supra* note 112, at 41–42, n.192 (citations omitted) (“Given the final punctuation of the First Amendment, it is important to understand the link the Framers made not only between assembly and petition but also between assembly and speech. In both the House and the Senate, the early versions of the First Amendment the Speech, Press, Assembly, and Petition Clauses were separated by a comma; the conjunctive ‘and’ was used to separate the last two clauses. Very late in the formulation process and without any record of discussion, however, semicolons were substituted for the commas and the disjunctive ‘or’ was substituted for the conjunctive ‘and’ between the Speech and Press Clauses. The rights of assembly and petition remained separated by a comma and the conjunctive ‘and.’”); *but see* Spanbauer, *supra* note 96, at 41 (“The debates over the Petition Clause make clear that assembly was often a necessary component to the creation of collective petitions. The debates also indicate that the Framers wanted to ensure the assembly right in order to make meaningful the right of collective petition.”).

153. Smith, *supra* note 116, at 1196. *See also id.* at 1188 (“Most of the limitations that have been imposed on speech and the press, whatever their justifications in the contexts of these expressive rights, are inappropriate restrictions upon petitioning.”).

154. Bhagwat, *supra* note 113, at 1099–2000. He complains that the Court’s modern First Amendment Jurisprudence is “a series of opinions interpreting the Religion and Free Speech Clauses, which ignores the rest of the Amendment’s protections for the Press, Assembly, and Petition.” *Id.* at 1097–98; *see also id.* at 1112 (“These rights [assembly and petition] are “cognate” because they are similar in nature and share common roots [with speech and press] . . . , and they are ‘democratic freedoms’ because their common nature is that they all advance democratic self-governance.”); *id.* at 1118 (“I have emphasized the fact that the rights of association, assembly, and petition are as important as speech and the press to an effective democracy, and that all of these rights share common roots and purposes. They are

offers a means for citizens to bring their problems to the attention of government and provides a source of information for the government about what people are thinking about how the government is conducting public business.¹⁵⁵ Petitions can shine a spotlight on government incompetence and misconduct and present a way to measure the degree to which citizens approve of a current government and whether it should be kept in office.¹⁵⁶ Failure to appreciate and protect the right to petition has, at various times, led to popular discontent, and attempts to restrict the “time, place, and manner” for filing petitions have largely failed.¹⁵⁷

Scholars like Spanbauer are critical of the Court for collapsing “the historically superior right to petition into the other historically inferior rights of the First Amendment,”¹⁵⁸ and for mistakenly concluding that the Petition Clause of the First Amendment does not offer a “substantive right of access to the courts unless free speech rights are also implicated.”¹⁵⁹ On the point of whether the government has an obligation to respond to petitions, courts and scholars are divided.¹⁶⁰ Spanbauer claims that the Supreme Court’s jurisprudence, which does not require the government to listen to individuals or respond to grievances,

distinct rights but, as the Supreme Court has said, ‘cognate.’ To say that they are distinct, however, is not to say they are unrelated. To the contrary, these rights usually operate in combination with one another, and are much more effective in combination as well.”)

155. Smith, *supra* note 116, at 1179.

156. *Id.*

157. Smith, *supra* note 116, at 1179; *see also* Spanbauer, *supra* note 112, at 37 (“The revolutionary movement utilized the doctrine of seditious libel as its tool for suppressing critical political speech. In comparison, the right to petition was far less restricted and was the only authorized means by which individuals could speak out against governmental action.”).

158. Spanbauer, *supra* note 112, at 68; *see also id.* at 42–43 (“The Supreme Court has unfortunately failed to recognize either legitimate petitioning activity or the superior status historically afforded petitioning. As a result, the Court has refused to distinguish petitioning from speech and has refused to afford petitioning the appropriate level of constitutional protection.”).

159. Spanbauer, *supra* note 112, at 68.

160. *Id.* at 68–69; *see also id.* at 38 (“The right to petition consisted of a right to complain and a concomitant right to receive a response.”); *id.* at 49 (“Congress did agree, however, that the government was required to respond to petitions. Thus, history clearly supports a First Amendment right of governmental consideration and response. Contrary to historical understanding, the Supreme Court has clearly stated that the First Amendment does not require the government to listen to individuals or to respond to individual grievances.”). In fact, Spanbauer argues the Court got it “backwards”—the development of the Petition Clause “preceded and fostered the evolution of speech, assembly, and the press.” *Id.* at 68–69.

is “[c]ontrary to historical understanding.”¹⁶¹ Instead, according to Spanbauer, it is “[c]onsistent with the original understanding” of the Petition Clause that a petitioner would be entitled to a response, though not necessarily a positive one.¹⁶² Spanbauer does acknowledge that petitioners could not always be entitled to a public hearing to address their grievances; such a requirement, as noted by Justice Oliver Wendell Holmes in *Bi-Metallic v. Colorado Board of Equalization*, would cause government “to grind to a halt.”¹⁶³

On the other side of the debate, Aaron Caplan disagrees with the prominence Spanbauer gives to the Petition Clause, noting that the Court has not found that it protects any more than is already protected by the Speech Clause.¹⁶⁴ Caplan believes the Court got it right in *McDonald v. Smith*,¹⁶⁵ when it stated the right to petition is “‘cut from the same cloth as the other guarantees of the First Amendment’ and as a result ‘there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expression.’”¹⁶⁶ He also cites the 2011 decision in *Borough of*

161. Spanbauer, *supra* note 112, at 38; *see id.* at 50 (citing *Smith v. Ark. Highway Emps.*, 441 U.S. 463 (1979), where the Court found no violation of the Petition Clause when the Commission did not act on or even consider those grievances because the Commission had no First Amendment obligation to listen or respond to them); *accord* *Minn. Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984); *see also* *Smith*, *supra* note 116, at 1175 (“Congress debated and rejected a motion to require representatives to submit to instructions of the electorate. Congress generally agreed, however, that popular opinion should be received and considered, and that the right to petition for redress of grievances must be respected. This action amounted to a formal acceptance of the tacit understanding that petitioners can command the government’s reception of, but not its acquiescence in, their petitions.”).

162. Spanbauer, *supra* note 112, at 51.

163. *Id.* at 50–51 (citing *Bi-metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915)).

164. Caplan, *supra* note 134, at 547.

165. *McDonald v. Smith*, 472 U.S. 479 (1985).

166. Caplan, *supra* note 134, at 547; *but see supra* note 119, at 658 (“In *California Motor Transport Co. v. Trucking Unlimited*, Justice Stewart, concurring, found Noerr’s Petition Clause protection necessary “to preserve the informed operation of governmental processes and to protect the right of petition guaranteed by the First Amendment. Noerr and California Motor recognized that petitions may transmit to the government the very information that guides its actions, and that the Clause’s promise of an informed government can oblige the state to refrain from obstructing the flow of petitions.”); Andrews, *supra* note 132, at 588 (“[I]n *McDonald v. Smith*, 472 U.S. 479 (1985), the Court broadly stated, also in dictum, that the Petition

Duryea v. Guarnieri,¹⁶⁷ which found that the Petition Clause added nothing that the Speech Clause did not already provide, although he notes that the Court suggested in dicta that “the right to petition might have independent force in as-yet-unrecognized circumstances.”¹⁶⁸

4. PETITIONERS’ RIGHT TO SEEK RELIEF FROM A COURT FOR THEIR GRIEVANCES

Many legal scholars have concluded that the Petition Clause protects the right of a group of citizens or individual citizens to take a grievance to court.¹⁶⁹ Considered by Andrews a “right conservative of all other rights,” and one that “lies at the foundation of orderly government,” access to a court is “one of the highest and most essential privileges of citizenship” that each state must grant to citizens of other states in conformity with its own citizens.¹⁷⁰ However, while legal scholars may be of this mind, there is little analysis by the Supreme Court on whether the Petition Clause actually applies to the judicial branch, and so there is little “historical, textual or policy” support for this application.¹⁷¹

The most that can be said, according to Carol Rice Andrews, is that: “the history, text, and policies of the Clause are not inconsistent with an application of the right to petition to the courts.”¹⁷² She goes on to say that “a plausible argument can be made that the Petition Clause does protect, at least to some de-

Clause protects civil court filings: “[F]iling a complaint in court is a form of petitioning activity.”).

167. *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011).

168. Caplan, *supra* note 134 at 547–48.

169. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (“That right, [the right of access to the courts] is part of the right of petition protected by the First Amendment.”); *see Andrews, supra* note 126, at 563 (“In 1972, the Court proclaimed in *California Motor Transport v. Trucking Unlimited*, that “[t]he right of access to the courts is indeed but one aspect of the right of petition.”); *id.* at 560 (“In the wake of these due process decisions, the Petition Clause is becoming, slowly, the best avenue for asserting a right of court access.”). Andrews is referring to Supreme Court decisions holding that an ordinary person has no due process right to go to court except in extraordinary circumstances. *See id.*; *but see Spanbauer, supra* note 112, at 46 (“A number of [lower] courts have concluded that the First Amendment right to petition the judiciary is not a substantive constitutional right separate from other First Amendment rights.”).

170. Andrews, *supra* note 132, at 566–67.

171. *Id.* at 592.

172. *Id.* at 595.

gree, a person’s right to file a civil lawsuit.”¹⁷³ She bases this conclusion on the fact that the right to petition historically protected requests for some form of individual redress, even if by the legislature.¹⁷⁴ Second, she contends that the actual text of the clause extends the right to petition the ‘government’ and is not limited to a particular branch.¹⁷⁵ Finally, she argues that “the policies served by petitioning—citizen participation in government and opportunity for peaceful resolution of grievances—apply to the courts as well as to the other branches of government.”¹⁷⁶ But the degree to which the Petition Clause guarantees court access for petitioners is still an open issue.

Perhaps reflecting its uncertain opinion of the reach of the Petition Clause, the Court has, on occasion, turned to the Due Process Clause of the Fifth Amendment as a possible source for the right to plead a grievance in court.¹⁷⁷ However, this line of cases is of little use here, as they primarily concern cases where the Court held that the plaintiffs had no due process right to court access,¹⁷⁸ or involved assertion of a defendant’s rights once in court, not the right to get into court *ab initio*.¹⁷⁹ The high level of judicial scrutiny under the Due Process Clause also distinguishes cases brought under it from the cases relying on the Petition Clause on the issue of judicial access.¹⁸⁰

173. Andrews, *supra* note 132, at 595.

174. *Id.* at 595–96.

175. *Id.* at 596.

176. Andrews, *supra* note 132, at 596; *see id.* at 623 (“First though the right to petition started in England as a check on the King’s power, petitioning grew to serve broader functions. It became a means by which all English subjects, not just the Barons, could inform their government, whether Parliament or King, of their complaints and needs, whether large or small. It also became a tool of individual justice. By acting as a back-up to the courts when relief was wanting there, petitions gave individuals the opportunity, if nothing more, to have a peaceful solution to their disputes.”).

177. *See* Andrews, *supra* note 132, at 562.

178. *Id.* at 567.

179. *Id.* at 568. There is a very narrow doctrine, most famously demonstrated in *Boddie v. Connecticut*, that allows plaintiffs to exercise their due process right to get into court if the plaintiff’s fundamental rights are implicated and the dispute is one that the parties cannot otherwise reconcile. *See* *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971). However, this doctrine is exceedingly narrow and will likely not be of use in this case. *See* *United States v. Kras*, 409 U.S. 434, 444–45 (1973); *Ortwein v. Schwab*, 410 U.S. 656, 659 (1973) (per curiam).

180. Andrews, *supra* note 132, at 677; *see id.* at 691 (“Though I contend that the right of court access under the Petition Clause is a narrow right, I believe that it is a meaningful right. It fills the void left by the Court’s due process decisions.”).

Thus, Carol Rice Andrews concludes: “The Petition Clause alone guarantees the average person the right to come to court and ask for redress of his claim.”¹⁸¹ These conclusions support the argument that Congress cannot limit the jurisdiction of federal courts beyond the bounds granted to them by Article III. As Andrews argues, this would “abridge the right [of citizens] to petition” courts for redress of grievances.¹⁸² Indeed, there would be relatively little to stop Congress from rendering the right to petition lower federal courts “almost meaningless” by “impos[ing] unreasonable preconditions on filing suits.”¹⁸³

Under this view of the Petition Clause, § 102(c)’s judicial review provisions, which eliminate mid-level appellate review of unfavorable decisions,¹⁸⁴ may be unconstitutional because they unlawfully abridge the rights of citizens to seek appeal of unfavorable decisions in the federal courts. Section 102(c) forces parties aggrieved by a district court ruling on the issue of waiver to seek review directly in the Supreme Court.¹⁸⁵ But this does little to protect the right to petition the “government”—including the judicial branch—for a redress of grievances, partly because of the Supreme Court’s reluctance to exercise its discretionary review authority, which makes it unlikely that an unfavorable decision will ever be subject to appeal. Because of the likelihood that the Supreme Court will decline jurisdiction, § 102(c)’s waiver provisions have the effect of foreclosing all appellate review, meaning that any ruling of a District Court will likely be final.

Additionally, IIRIRA § 102(c) limits judicial review of the waiver process to claims that implicate constitutional, rather

181. Spanbauer, *supra* note 112, at 43 (“The Supreme Court has recognized that the right of access to the courts is a component of the right to petition government for a redress of grievances and is constitutionally protected.”); *see id.* at 45 (“The only context in which the Supreme Court has been willing to find First Amendment Petition Clause protection is civil actions in which collective activity is undertaken to secure legal advice and initiate legal proceedings.”).

182. Andrews, *supra* note 132, at 666–67.

183. *Id.* at 667.

184. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I §102, 119 Stat. 231, 302, 306, § 102(c).

185. *See* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I §102, 119 Stat. 231, 302, 306, §102(c)(2)(C) (“An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ certiorari to the Supreme Court of the United States”).

than statutory, rights.¹⁸⁶ This functions in much the same way as the elimination of mid-level appeals: it substantially reduces an aggrieved party’s access to courts, even when the agency is acting outside of its statutory authority.¹⁸⁷

As a result, people aggrieved by the grant of a waiver may find themselves in a position where they are unable to seek a redress of those grievances. This situation is precisely what the Petition Clause of the Constitution guarantees will not occur.¹⁸⁸ Consequently, its occurrence undercuts one of the oldest constitutional guarantees in our nation’s history and erects a different kind of wall: one between the government’s decision-making process and the citizens who are supposed to be the beneficiaries of that process.

While institutional restrictions on court access usually reflect “considered policy judgments,” courts must balance competing interests and consider the “nature and purpose behind the restriction and its impact on the right of access.”¹⁸⁹ Certain restrictions on petitions, such as the number of signatures and presenters of a petition, and requiring the “peaceful and orderly presentation of petitions appear reasonable,” as their application will prevent the possibility that large coercive groups would overwhelm legislative assemblies.¹⁹⁰ However, effectively curtailing meaningful judicial review of decisions about the wall’s construction and financing hardly seems reasonable.

186. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I §102, 119 Stat. 231, 302, 306, § 102(c).

187. It should be noted that, in rare cases, if an agency substantially exceeds the bounds of its authority and acts in contravention of a “clear and mandatory” statutory mandate, a court may exercise jurisdiction despite a statutory bar. See *Leedom v. Kyne*, 358 U.S. 184, 188–89 (1958); *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092, 1112–18 (S.D. Cal. 2018) (applying the doctrine of *Leedom v. Kyne* to analyze DHS’ actions despite the bar in § 102(c)).

188. See Spanbauer, *supra* note 112, at 43–49 (arguing that the Petition Clause of the Constitution should be red to include a right of access to the courts).

189. Andrews, *supra* note 132, at 673.

190. Spanbauer, *supra* note 112, at 38; see also Smith, *supra* note 116, at 1191 (“[T]he petition clause of the first amendment protects only the core petitioning activities—preparing and signing a written petition and transmitting it to the government—either individually or in concert with others but without the involvement of public meetings. Any protection of activities beyond this scope is derived from other constitutional rights. The important lesson from this analysis is that no need can be established to impose time, place, and manner restrictions on petitioning because no legitimate government interest such as maintaining public order could be affected by the exercise of the core petitioning activities themselves.”).

Although the Petition Clause may occupy the backwaters of the First Amendment and is often ignored by litigants and courts, nonetheless its guarantees are real. Included among those guarantees is arguably the right to access a court to complain about some action by the government. While the right to petition is not limitless, any restrictions cannot interfere with the basic right to petition. And although the government need not redress the grievance, at minimum, it must listen to the complaint—meaning, at least arguably, courthouse doors must be open to receive it. To the extent that § 102(c) of IIRIRA¹⁹¹ cuts off appellate court access for individuals who have experienced a grievance at the hands of their government, the waiver section of the border wall statute violates the Petition Clause of the First Amendment, making that section unenforceable.¹⁹²

B. NINTH AMENDMENT

“In sophisticated legal circles,’ wrote John Hart Ely, ‘mentioning the Ninth Amendment is a surefire way to get a laugh.’”¹⁹³

Another constitutional theory supporting those who seek the abolition of §102(c) of the IIRIRA is that it interferes with the rights retained by the people under the Ninth Amendment by lessening the protection given to those rights, including the ability of people to choose where they wish to live, to consort with neighbors and friends, and to engage in certain practices and rituals.

The Ninth Amendment “prohibit[s] the denial or disparagement of ‘rights retained by the people’ in favor of rights enumerated in the Constitution.”¹⁹⁴ Some constitutional scholars view the Ninth Amendment as superfluous, but this is more likely a reflection of the fact that it has been buried under various theo-

191. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I §102, 119 Stat. 231, 302, 306, § 102(c).

192. See Andrews, *supra* note 132, at 676–77 (“The Court has long applied ‘strict scrutiny’ to judge regulation of First Amendment freedoms, including the right to petition. This standard has many articulations, but it generally requires courts to look to whether the government has a compelling state interest in regulating the exercise of the right and whether the regulation is narrowly drawn to achieve that goal with minimal impact on the right. Unlike other standards of review, this standard is not deferential to the government.”).

193. Gordon, *supra* note 111, at 425.

194. Christina Carmody Tilley, *Rescuing Dignity Torts from the Constitution*, 78 BROOK. L. REV. 65, 76 (2012).

ries of what the phrase “unenumerated rights” means. Some scholars suggest that these constitutionally protected unenumerated rights are “natural rights” that are an aspect of “Western law ‘history and tradition’”; alternatively, other scholars argue that these unenumerated rights can be state rights that either were familiar at the time of the American founding, or ones that “developed consistent with constitutional jurisprudence after the founding.”¹⁹⁵ As Mitchell Gordon puts it, the Ninth Amendment “has been an unfortunate casualty of the enumeration wars.”¹⁹⁶

1. BACKGROUND ON THE NINTH AMENDMENT

The Ninth Amendment engendered little debate when it was introduced in Congress and passed both Houses with little change to its original language.¹⁹⁷ The intent behind its introduction was to quell fears that any proposed bill of enumerated rights would not be sufficiently expansive to cover all essential rights, leaving the possibility that any right that was not mentioned was not protected; worse yet, that those unenumerated rights were intended to be given to the general government, not to the people, leaving them “insecure.”¹⁹⁸

The Ninth Amendment is very short—only twenty-one words. The Amendment declares that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁹⁹ In effect, the Amendment “adds an ‘et cetera’ to the end of th[e] list” of the first

195. *Id.* at 66.

196. Gordon, *supra* note 111, at 440.

197. Adam Lamparello, *Fundamental Unenumerated Rights Under the Ninth Amendment and the Privileges or Immunities Clause*, 49 AKRON L. REV. 179, 199 (2016).

198. *Id.*; see also *id.* (“As Justice Goldberg explained, the purpose of the Ninth Amendment was ‘to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, e converso, that a negation in particular cases implies an affirmation in all others.’”); Lochlan F. Shelfer, *How the Constitution Shall Not Be Construed*, 2017 BYU L. REV. 331, 344 (2017) (“‘A bill of rights,’ he [James Wilson] declared, ‘is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given.’ Therefore, he concluded, ‘an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.’”). Madison called this “one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system.” *Id.* at 345.

199. Kalt, Brian C., *The Ninth Amendment in Congress*, 40 PEPP. L. REV. 75, 75 (2012).

eight amendments in the Bill of Rights.²⁰⁰ Unfortunately, there is a problem with understanding the Amendment on its face: no one knows for sure what the unenumerated rights are and the amendment's brevity does not give interpreters much guidance.²⁰¹ Although the Eighth Amendment is shorter, totaling sixteen words, at the time of the framing of the Bill of Rights, the words used in the Eighth Amendment were nearly a century old, having first appeared in the 1689 English Bill of Rights.²⁰² In contrast, the phrases appearing in the Ninth Amendment were completely new.²⁰³ Additionally, there were no counterparts to the Ninth Amendment in the Articles of Confederation or in any of the laws of the new states.²⁰⁴ Time has not helped to clarify the issue; the Supreme Court has never issued a majority opinion explaining the Ninth Amendment's meaning.²⁰⁵ Perhaps as a result of this lack of guidance, few courts have relied on the Ninth Amendment as a basis for any decision they have rendered.²⁰⁶ It is more often used as a "punch line" than as a serious citation.²⁰⁷ However, despite its detractors, the Ninth Amendment significantly enhances the Constitution's protective scope.²⁰⁸

The Ninth Amendment prevents narrow interpretations of constitutional text that would abridge rights.²⁰⁹ It acts to delegitimize an argument that any right just beyond the unembellished words of constitutional text are unprotected.²¹⁰ Lochlan F. Shelfer commented that the Ninth Amendment instructs those who in-

200. *Id.* at 76; see also DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE* 1, 4 (2007) (describing the Ninth Amendment as adding "a crucial 'etc.' to the Bill [of Rights]").

201. Gordon, *supra* note 111, at 423.

202. Gordon, *supra* note 111, at 423 n.22.

203. *Id.* at 423 n.22.

204. *Id.* at 427.

205. *Id.* at 423–24.

206. Gordon, *supra* note 111, at 423–24.

207. Tilley, *supra* note 194, at 77.

208. Gordon, *supra* note 111, at 427.

209. Lochlan F. Shelfer, *How the Constitution Shall Not Be Construed*, 2017 BYU L. REV. 331, 333 (2017) ("Over the centuries, interpreters have construed the wording of particular constitutional rights to deny the existence of analogous but unarticulated rights by negative implication. Such interpretations have used the words of constitutional protections to deny closely related or even implicit protections. The Constitution, however, contains a clause prohibiting narrow constructions of the Constitution's text that abridge rights: the Ninth Amendment.")

210. Shelfer, *supra* note 209, at 384.

interpret constitutional principles not to view their meaning as narrow or absolute, but to wonder whether the Constitution might protect similar rights “just beyond the bare text.”²¹¹ In other words, when the Constitution protects a particular textual right, this does not mean that a right that is “similarly situated, analogous or functionally similar” is not protected.²¹² Thus, to the extent that a right to cross-border travel might be considered comparable to other “privileges” that citizens enjoy under the Privileges or Immunities Clause of the Fourteenth Amendment, such as the right to interstate travel,²¹³ that right could potentially be protected by the Ninth Amendment, even though it is unenumerated.

One way of looking at the Ninth Amendment is that it is “about what the Constitution does not say.”²¹⁴ It tells us that we should not diminish something just because it is not explicit.²¹⁵ Thus, the point of the Amendment is to clarify that all individual natural rights remained in force, notwithstanding that only some had been specifically set out in the constitutional text.²¹⁶ In sum, the Amendment’s principal function is to ensure that rights that are not specifically mentioned in the Constitution, but which were protected before the Constitution was adopted, would continue to enjoy protection.²¹⁷

As Mitchell Gordon points out, this is about as “metalegal” as one can get: words that “point off the page” for their meaning, alerting the reader that that there is “more constitution ‘out there.’”²¹⁸ As such, its guarantees are often treated with a

211. *Id.* at 376; *see also id.* at 383 (“There is, indeed, very little extant evidence for the ratification of the Bill of Rights in general and the Ninth Amendment in particular. But the evidence that exists suggests that attempts to limit the scope of the Ninth Amendment by narrowly construing the word ‘retained’ may conflict with its own ratification history and poorly fit its anti-exclusionary meaning.”).

212. *Id.* at 383; *see* Gordon, *supra* note 111, at 432 (“The Ninth Amendment is unlike other constitutional provisions, not because it is vague, open-ended, etc. (for that is hardly unique), but because it is metaconstitutional: [i]t is an instruction about how to read the text we are already reading.”).

213. *See* Slaughter-House Cases, 83 U.S. 36, 79 (1872) (describing the right to interstate travel as being protected under the Privileges or Immunities Clause of the Fourteenth Amendment).

214. Gordon, *supra* note 111, at 469.

215. *Id.*

216. *Id.* at 457.

217. *Id.* at 469.

218. *Id.*

“strange mix of marvel [and] disdain.”²¹⁹ Yet, as Gordon also notes, the disdain for the Ninth Amendment “seems out of proportion”²²⁰ because “[t]he Ninth Amendment is not the only unenumerated rights clause that was ever written, after all; it is not even the only one in our Constitution.”²²¹ Perhaps this is a reason to take the guarantees of the Ninth Amendment more seriously.

Brian Kalt reasonably argues that the Amendment’s language of retained rights should not be limited to rights that existed in 1791; instead the amendment should be susceptible to a modern reading, just as the other eight amendments are.²²² This view reflects Madison’s desire “to communicate to Anti-Federalists that all rights under state laws then ‘on the books’ would be protected from harm, *as would any additional rights that the states might later enact.*”²²³ Accordingly, the “specific function of the Ninth Amendment was to prevent any suggestion that these preexisting rights had been supplanted.”²²⁴

If the purpose of the Ninth Amendment is to instruct Congress to think more broadly about rights than those enumerated in the Constitution, then there should be no limit to what rights Congress can consider, including new ones, as long as it can “muster a sufficient consensus” for whatever the new right is.²²⁵ The additional right must also be “entrenched”²²⁶ to earn more protection than an ordinary statute might offer,²²⁷ protecting it from repeal or change. It is possible to make this argument with respect to a statutory right; though, according to Kalt, in order to be entrenched as an unenumerated right, the statute must substantially change the status quo and “stick[] in the public culture in a deep way, becoming foundational or axiomatic to our thinking.”²²⁸ This means that a modern Congress can introduce positive and collective rights, like “the right to a healthy environ-

219. Gordon, *supra* note 111, at 469.

220. *Id.*

221. *Id.*

222. Kalt, *supra* note 199, at 82.

223. Gordon, *supra* note 111, at 449–50 (emphasis added).

224. *Id.* at 449–50.

225. Kalt, *supra* note 199, at 89.

226. *Id.* at 93.

227. *Id.* at 89.

228. Kalt, *supra* note 199, at 93–94.

ment[] or intergenerational equity,”²²⁹ which can receive protection under the Ninth Amendment.

However, one does not need to wait for Congress to create new rights because “[t]he language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.”²³⁰ The Amendment’s text makes that clear when it says that the Constitution’s list of enumerated rights “shall not be construed to deny or disparage others retained by the people.”²³¹

2. VARIOUS MEANINGS OF THE CONCEPT OF UNENUMERATED RIGHTS

Due to its ambiguity, scholars have varying opinions on the meaning of the Ninth Amendment, including: “a source of natural justice rights[,] a rule of construction for securing unenumerated rights (but not a source of rights)[,] a grant of standing to argue public rights[,] a source of public rights[,] and solely a protector of individual, personal rights.”²³² Courts and legal scholars have largely ignored the Ninth Amendment, in part because of the trouble they have understanding it.²³³ Another problem is that although the “selective incorporation doctrine and the Supremacy Clause give the U.S. Supreme Court authority to create express, implied, and unenumerated rights,” the Court’s inclusion of unenumerated rights within the category of implied rights means they remain largely unrecognized as a separate type of right.²³⁴

Some scholars, like Adam Lamparello, argue that the Court can “create unenumerated rights by relying on the text of the Ninth Amendment” in order to “ensur[e] that state and federal

229. *Id.* at 90–91.

230. Lamparello, *supra* note 197, at 199 (citing *Griswold v. Connecticut*, 381 U.S. 479, 488–89 (1965) (Goldberg, J., concurring)).

231. U.S. CONST. amend. IX (“The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.”).

232. Ronald E. Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 *IND. L.J.* 203, 219–220 (1974).

233. Duane Ostler, *Rights under the Ninth Amendment: Not Hard to Identify after All*, 7 *FED. CTS. L. REV.* 35, 38 (Jan.–Sept. 2013).

234. Lamparello, *supra* note 197, at 191.

laws do not infringe on individual liberty.”²³⁵ Lamparello argues, for example, that the Ninth Amendment grants the Court the power to protect individual rights to make consensual sexual choices or to use contraceptives.²³⁶ Applying Lamparello’s view, one might argue that the Court could use the Ninth Amendment to protect unenumerated, but fundamental rights that the border wall might impair, such as the right to travel or the right to engage in one’s traditional, cultural practices. This interpretation could create significant implications for the waiver provisions of the border wall—as well as for the wall itself.

Another scholar, Brian C. Kalt, takes a slightly different view: that the Ninth Amendment allows Congress to address the existence of new positive and negative rights.²³⁷ Specifically, in Kalt’s view, there must be a congressional consensus supporting the new right, regardless of whether the new right is a positive one or a negative one.²³⁸ Under this view, the border wall may well interfere with unenumerated rights; while it might be hard to believe that it would not be difficult to gain congressional support for a right to travel and practice one’s traditional rituals, given Congress’ current dysfunction, this assumption may not be valid.

An unenumerated right can be phrased as an entitlement to engage in a certain activity, like travel, or a right to be free from any impediment to that activity, such as a right to be free from a ban preventing travel. Although the list of positive rights that might be protected by the Ninth Amendment is potentially “infinite,” according to scholars like Lamparello and Kalt, this flexibility is consistent with the Ninth Amendment’s “open-ended nature.”²³⁹ However, according to natural rights theorists like Randy Barnett, the Amendment does not protect those positive rights, such as civil trial by jury, that do not predate the Constitution.²⁴⁰ Daniel Farber agrees with that view, positing that the Amendment protects rights that are not created by positive law; instead, it protects natural rights that predate positive law.²⁴¹

235. *Id.* at 205.

236. *Id.* at 204.

237. Kalt, *supra* note 199, at 77.

238. Kalt, *supra* note 199, at 89.

239. See Kalt, *supra* note 185, at 91; Lamparello, *supra* note 197, at 182, 201.

240. Shelfer, *supra* note 209, at 338; see Kalt, *supra* note 199, at 91.

241. Shelfer, *supra* note 209, at 339.

Rights protected by the Ninth Amendment are inalienable.²⁴² Such rights are different from implied rights which are “ancillary to and necessary for the full realization of the protections afforded by the Bill of Rights’ express provisions.”²⁴³ As Adam Lamperello explains: “[U]nenumerated fundamental rights, such as the right to privacy and the right to make consensual sexual choices, exist independently of the Constitution’s text but have the same force as enumerated rights.”²⁴⁴ Lamparello argues that the Due Process Clause of the Fifth and Fourteenth Amendments plays no role as a source of unenumerated rights.²⁴⁵ His argument is not that rights that are acknowledged under the substantive Due Process Clause are not worthy of being considered fundamental, but rather that the Ninth Amendment and the Privileges and Immunities Clause are “more legitimate sources of these rights because the Founders intended them to protect *substantive* unenumerated liberties.”²⁴⁶ This, however, leads to a more difficult question: *which* enumerated rights are protected by the Ninth Amendment?

3. DIFFERENT APPROACHES FOR DETERMINING WHICH UNENUMERATED RIGHTS ARE PROTECTED

Descriptions of the Ninth Amendment’s scope and guarantees are often grand. For example, Thomas B. McAfee wrote:

242. *Id.*

243. Lamparello, *supra* note 197, at 180.

244. Lamparello, *supra* note 197, at 180. Lamparello argues that the Ninth Amendment and the Privileges or Immunities Clause are “the proper means by which to recognize such rights.” *Id.*

245. Lamparello, *supra* note 197, at 182–83 (noting that implied rights are different from unenumerated rights, the source of which is the Ninth Amendment or the Privileges or Immunities Clause and not the Due Process Clause, enabling the courts to respond to “abuses that occur in the democratic and political process.”); *but see* Gordon, *supra* note 111, at 439 (“[C]ourts protect all enumerated rights but also protect some additional specific unenumerated rights (through substantive due process). This is the approach the Supreme Court took in *Griswold* and which the Court has continued to take in the five decades since, enforcing some unenumerated rights by identifying them as within the ‘liberty’ protected by the Due Process Clause.”).

246. Lamparello, *supra* note 197, at 198 (emphasis added). Lamparello believes that linking the Ninth Amendment’s language retaining other rights not mentioned in the Constitution to the prohibition in the Privileges or Immunities Clause preventing the abridgement of any privileges or immunities possessed by any citizens is a way to develop a “credible unenumerated rights jurisprudence” and provide a basis for the “Court to abandon its much-maligned substantive due process jurisprudence.” *Id.* at 203. It also would provide a basis for recognizing “other enumerated rights that are implicit in free societies.” *Id.* at 183.

the [N]inth [A]mendment refers to constitutional rights as we generally think of them today—legally enforceable, affirmatively defined limitations on governmental power on behalf of individual claimants . . . the rights its adherents conceive of are to be defined independently of, and may serve to limit the scope of, powers granted to the national government by the Constitution.²⁴⁷

This descriptive language, however, is not very helpful for the difficult task of figuring out which rights are protected by the Ninth Amendment. As a result of the difficulty this endeavor poses, there are almost as many different approaches to figuring out what unenumerated rights are as there are identified unenumerated rights.

Natural rights proponents “interpret the Ninth Amendment’s reference to ‘other [rights] retained by the people’ as protecting the universe of unenumerated natural rights.”²⁴⁸ As a proponent of this interpretative school, Randy Barnett believes the concept of unenumerated rights in the Ninth Amendment includes all individual natural rights in existence prior to the Constitution.²⁴⁹ According to Barnett, since it is impossible to identify all the rights one has under the Ninth Amendment in advance, the best solution is to “adopt a ‘presumption of liberty’ approach”

247. Lamparello, *supra* note 197, at 201–02; *see id.* at 200 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring)) (arguing that the Ninth Amendment “lends strong support to the view that the ‘liberty’ protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.”).

248. Shelfer, *supra* note 209, at 338; *see Gordon, supra* note 111, at 459 (“Retained rights are those natural rights that have not been given up under the terms of the social compact—i.e., have not been relinquished in the formation of political society.”).

249. Shelfer, *supra* note 209, at 338; *see also id.* at 339 (“He [Barnett] argues that the text of the Ninth Amendment ‘strongly suggests that unenumerated rights deserve no less protection from courts than those that were enumerated.”). According to Duane Ostler, individual rights were derived from the laws of nature, predated the social compact, and were derived from the laws of God, imbuing them with a moral sensibility. Ostler, *supra* note 233, at 32, 41; *see also id.* at 82 (“It was the intent of the Founders that any unenumerated rights found to be constitutional would be derived from the Ninth Amendment. These were rights that were based on the fundamental laws of nature, and were not considered as changing over time.”); *id.* at 35 (“The Founders very firmly intended that the Ninth Amendment would include fundamental, morally-based rights from their generation that should continue to be followed by succeeding generations.”).

that places the burden of justifying “the necessity and propriety of any infringement on individual freedom” on the government.²⁵⁰

Brian Kalt advocates a somewhat different approach, arguing that the Ninth Amendment can be used to preserve “so-called collective rights (like the right to a healthy environment, or inter-generational equity), or animal rights, or really any sort [of right]” as long as there is enough congressional support.²⁵¹

Those who view questions like these through a federalism lens think that the Ninth Amendment works together with the Tenth Amendment as a constraint on the federal government in relation to state governments.²⁵² Duane Ostler views the Ninth Amendment as “crucial” for protecting natural rights from encroachment by the legislative branch.²⁵³ Akhil Amar argues that one of the Amendment’s primary purposes is to “protect collective rights and popular sovereignty” and the “core meaning’ of the phrase ‘the people’ in the ‘Ninth Amendment is collective,” giving “We the People” the “collective right . . . to alter or abolish government.”²⁵⁴

Theories for identifying what retained rights are covered by the Ninth Amendment include: “natural-law’ rights as originally publicly understood by the Framers; rights deemed ‘natural’ by virtue of their deep roots in Western and American legal tradition; state-law rights at the time of ratification; and state law rights post-ratification.”²⁵⁵ “The ‘natural-law rights’ theory of the Ninth Amendment suggests that any right understood at the time of ratification to belong to individuals, as distinct from rights derived from membership in a centrally governed society, was among those ‘rights retained’ by the people.”²⁵⁶ Thus, rights retained under the Ninth Amendment might include the right to

250. Gordon, *supra* note 111, at 439.

251. Kalt, *supra* note 199, at 91; *see also id.* (“One important category is state-based rights, which are also not completely enumerated in the Constitution.”).

252. Shelfer, *supra* note 209, at 340.

253. Ostler, *supra* note 233, at 45.

254. Shelfer, *supra* note 209, at 340.

255. Tilley, *supra* note 194, at 78–79; *see also id.* at 81 (“[U]nder the ‘state rights’ theory, ‘the ninth amendment preserves rights existing under state laws already ‘on the books’ in 1791 plus those rights which the states would thereafter see fit to enact.”).

256. *Id.* at 79.

travel, to look for work, and self-defense.²⁵⁷ The important understanding to have about the founding generation's understanding of the concept was its polarity with governmental powers. In other words, "rights began where powers ended, and powers began where rights ended."²⁵⁸

Another theoretical approach to the Ninth Amendment views it not as a stand-alone source of constitutional rights, but as a "rule of construction that governs when unenumerated- but-retained rights clash with enumerated rights."²⁵⁹ The approach contends that unenumerated retained rights cannot be given "categorical second class status when they conflict with enumerated rights."²⁶⁰ Thus, unenumerated rights are entrenched in the Constitution even if they are not specific rights set out in the Constitution.²⁶¹ A final theory is that the Amendment covers rights that fit within a penumbra, or shadow, that emanates from guarantees contained in the Bill of Rights.²⁶² Many of these in-

257. *Id.* at 78–79. Mitchell Gordon lists examples of where the Court "has recognized or enforced liberties not specifically enumerated in the Bill of Rights," including, "the right to relocate or travel interstate, see *Dunn v. Blumstein*, 405 U.S. 330, 338–42 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 629–30 (1969); the right to vote, see *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 625–29 (1969); *Harper v. Va. Bd. Of Elections*, 383 U.S. 663, 665–70 (1966); *Reynolds v. Sims*, 377 U.S. 533, 55–58 (1964); and the right to equal protection of federal laws, see *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954). Other unenumerated rights the Court has recognized include the right to bodily integrity, see *Washington v. Harper*, 494 U.S. 210, 221–22 (1990); *Rochin v. California*, 342 U.S. 165, 172–73 (1952); the right to marry or not marry, see *Turner v. Safley*, 482 U.S. 78, 95–96 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 383–87 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); the right to make one's own decisions about having children, including the decision to use contraceptives or terminate a pregnancy, see *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977); *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965); *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942); the right to live with one's own family, see *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 (1977) (plurality opinion); and the right to direct the education and upbringing of one's children, see *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); see also *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)."). Gordon, *supra* note 111, at 433–34 n.87.

258. Tilley, *supra* note 194, at 79–80.

259. *Id.* at 78. Mitchell Gordon complains that this approach tends "to deemphasize the specific ends the amendment aims to protect or advance." Gordon, *supra* note 111, at 451.

260. Tilley, *supra* note 194, at 78.

261. Kalt, *supra* note 199, at 96.

262. "The reference to a 'penumbra' in respect to the Amendments comes from a statement of Justice Douglas in *Griswold*, in which he said that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life." Ostler, *supra* note 233, at 53 n.59 (citing *Griswold v.*

interpretive theories suggest that “rights retained” under the Ninth Amendment “have status as independent constitutional rights, thus playing the same judicially enforceable ‘oversight role’ with regard to state or federal law as do the enumerated constitutional rights.”²⁶³ Accordingly, the question of which rights are “retained” is a very significant and “politically charged” inquiry because “these rights could serve as the basis for striking down legislation” that abridges those rights.²⁶⁴ This is where the Ninth Amendment potentially intersects with § 102(c)’s waiver provisions: if the waiver provisions (or the wall itself) abridge these retained rights, a court could strike down that portion of the statute.

4. THE NINTH AMENDMENT CAN PROTECT *NEW* UNENUMERATED RIGHTS

There are two basic arguments for using the Ninth Amendment as a source of a new substantive rights:²⁶⁵ first, that the Ninth Amendment is its own source of these rights; and second, that the Ninth Amendment acts as a rule of construction that allows an interpreter to search the Constitution for unenumerated rights.²⁶⁶ The general understanding is that the Ninth Amendment is not an “independent source of rights,” but the Amendment’s “language and history imply the existence of unenumerated fundamental rights which are contained in the traditions and collective conscience of our people.”²⁶⁷ For example, Thomas C. Grey, relying on the concurring opinion of Justice Goldberg in *Griswold v. Connecticut*, maintains that “[t]he [N]inth

Connecticut, 381 U.S. 479, 484 (1965)); see Gordon, *supra* note 111, at 431 (“The task of writing for the Court’s majority [in *Griswold v. Connecticut*] fell to Justice Douglas, who used the Ninth Amendment in the customary (i.e., auxiliary) way, mentioning it only in passing as one of the guarantees of the Bill of Rights that ‘ha[s] penumbras, formed by emanations from [such] guarantees.’”); see also *id.* (“Fifty years later, it is still this general liberty category that the Court uses as a textual basis for rights not explicitly described by the text.”).

263. Tilley, *supra* note 194, at 77.

264. *Id.*

265. For a similar discussion of using the Ninth Amendment to protect new unenumerated rights, see Hope M. Babcock, *The Federal Government Has an Implied Moral Constitutional Duty to Protect Individuals from Harm Due to Climate Change: Throwing Spaghetti Against the Wall to See What Sticks*, 45 *ECOLOGICAL L.Q.* 735, 783–85 (2018).

266. Klipsch, *supra* note 232, at 220; see also *id.* at 221 (“By its terms the amendment applies to the entire Constitution, rather than just the first eight amendments.”).

267. *Id.* at 222.

[A]mendment on its face has no substantive content. It is rather a license to constitutional decisionmakers to look beyond the substantive commands of the constitutional text to protect fundamental rights not expressed therein.”²⁶⁸ In Grey’s view, the Ninth Amendment reflects the Framers’ belief that “unwritten higher law principles had constitutional status”—a belief that is reflected in both the letter and spirit of the Constitution, including in the “majestic generalities” of the Fourteenth Amendment.²⁶⁹

However, in order for the rights and duties discussed in this article—namely, a right to cross-border travel, a right to engage in traditional practices, and a right to enjoy wildlife—to be protected under the Ninth Amendment, these rights and duties must stand on firm historical footing. In other words, these rights can only be protected under the Ninth Amendment if they could be considered “higher law principle[s]” akin to those protected by traditional natural rights.²⁷⁰

There is an added complication: because the Ninth Amendment “suffers from . . . uncertainties and controversy[,]”²⁷¹ it alone seems a “slender reed”²⁷² to support such a new right. The fact that the contours of the Ninth Amendment are dependent on how the term “retained rights” is defined and the term is not self-defined in the Amendment means one can “get wildly different pictures of the Ninth Amendment,” which would require “some additional defining at the outset, simply to make the Ninth Amendment usable.”²⁷³

268. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 709 (1975).

269. *Id.* at 717.

270. See Gordon, *supra* note 111, at 468 (“The Court will continue to enforce some unenumerated rights, provided those rights fall within the appropriate subset (e.g., fundamental rights). To make that determination, the Court will presumably look at any number of factors. If one of those factors is historical evidence, then the integrity of those determinations will depend in part on whether they are supported by plausible historical fact.”).

271. Babcock, *supra* note 265, at 784.

272. *Missouri v. Holland*, 252 U.S. 416, 434 (1920). *But see* Shelfer, *supra* note 209, at 384 (“Indeed, even in the sparse ratification history of the Bill of Rights, one can perceive the Ninth Amendment’s role in instructing readers how (not) to interpret individual textual provisions of the Constitution. This constitutional history also strongly suggests that the Ninth Amendment applies not just to natural rights but also to procedural and positive rights.”).

273. Gordon, *supra* note 111, at 449.

Turning to the rights potentially affected by the border wall, one can argue that enjoyment of wildlife and the ability to engage in cultural practices that involve wildlife are embedded in the collective consciousness of our citizens. There are many statutes recognizing the importance of this right, including the Endangered Species Act, the National Environmental Policy Act, and the Marine Mammal Protection Act, as well as a variety of other federal laws setting aside public lands and wildlife for communal enjoyment. There are also an inordinate number of state and local laws, as well as common law, protecting the rights of people to enjoy and use the environment and wildlife. This could show evidence of a “congressional consensus” that environmental rights are fundamental and, therefore, worthy of Ninth Amendment protection.²⁷⁴ Furthermore, the enjoyment of wildlife and the ability to engage in cultural practices have been protected by laws and traditions that predate the written Constitution, thereby potentially qualifying for Ninth Amendment protection under even the more restrictive tests.²⁷⁵

To the extent that the waiver provisions of IIRIRA lessen the protections available for wildlife or cultural resources, they violate the unenumerated rights of citizens to enjoy and use those resources. However, this may be a difficult claim; it is unclear whether environmental rights would actually fall within the ambit of unenumerated rights protected by the Ninth Amendment. Ultimately, “[t]he blunt fact is that there is simply no ‘clear legal and historical precedent for basic constitutional environmental rights[.]’”²⁷⁶ so showing that these rights are protected by the Ninth Amendment will be an uphill battle.

Additionally, one can argue that the Ninth Amendment prohibits construction of a border wall to the extent that such a wall would inhibit travel between Mexico and the United States by cross-border inhabitants, like Indian tribes. Cross-border tribes who travel between Mexico and the United States to see family, engage in traditional ceremonies, and collect medicinal plants and animals, will no longer be able to engage in these activities,

274. See Kalt, *supra* note 199, at 89.

275. For example, the public trust doctrine and laws regulating public access to natural resources predate the Constitution. See Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 *FORDHAM ENVTL. L.J.* 107, 132–33 (1997).

276. Babcock, *supra* note 265, at 785.

which interferes with their existing rights.²⁷⁷ Such traditional rights may be protected under the Ninth Amendment.²⁷⁸ The activities of concern include cross-border movement by tribes, the ability of tribes to practice traditional rituals on both sides of the border, and the unimpeded movement of wildlife across the border, the enjoyment of which is potentially important to people who observe or hunt wildlife or who rely on them for traditional practices.

There is little question that people have an inherent right to travel and to move freely within the territorial United States.²⁷⁹ “Article IV of the Articles of Confederation stated that all persons ‘shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State.’”²⁸⁰ This right to leave and enter a state dates back to the Magna Carta, which stated that “[i]t shall be lawful in future for any one . . . to leave our kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy—reserving always the allegiance due to us.”²⁸¹ Ostler claims that “the right to travel had been a recognized, natural right for centuries by the time of the drafting of the Constitution.”²⁸²

The right to travel across the U.S.-Mexico border is similar to this ancient natural right and, therefore, may fall under the

277. Ordway, *supra* note 9 (citing Leza, *supra* note 77).

278. See Thomas B. McAfee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L.R. 61, 67 (1996) (discussing a reading of the Ninth Amendment to protect unenumerated natural rights and traditions); see also *Griswold v. Connecticut*, 381 U.S. 479, 491 (1965) (Goldberg, J., concurring) (discussing how the Ninth Amendment can protect rights that are “basic” and “fundamental” and “deeprooted in our society”).

279. See *Crandall v. Nevada*, 73 U.S. 35, 44 (1867) (“[The citizen] has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports through which all the operations of foreign trade are conducted . . . and this right is in its nature independent of the will of any State over whose soil he must pass in exercise of it.”).

280. Ostler, *supra* note 233, at 84; see also *id.* at 83–84 (“[T]he 1776 Declaration of Rights in the Pennsylvania Constitution identified the right to travel as a natural right, stating in Article fifteen ‘That all men have a natural inherent right to emigrate from one state to another that will receive them.’ The 1777 Vermont Declaration of Rights had nearly identical wording.”).

281. *Id.* at 84.

282. *Id.*

Ninth Amendment’s protective penumbra. The right to travel between countries can be and is regulated and, in some cases, prevented, but any restriction on that right must be reasonable, and the burden is on the government to prove its reasonableness.²⁸³ The facts do not demonstrate that the construction of a wall to prevent citizens of another country traveling to the United States, let alone back and forth across the border is reasonable, making the construction of the wall an unconstitutional violation of the Ninth Amendment.

The Ninth Amendment bars interference with fundamental rights like the right to engage in traditional ceremonies and the right to travel. The statute’s waiver of laws protecting animals and plants that are of importance to those ceremonies lessens the rights of citizens to engage in those ceremonies, while construction of a wall prevents their occurrence in the first place. To the extent that the border wall does those things, it violates the unenumerated rights of affected citizens and must fall.

VI. CONCLUSION

Government, in my humble opinion, should be formed to secure and to enlarge the exercise of the natural rights of its members; every government, which has not this in view as its principal object, is not legitimate.²⁸⁴

Despite the questionable and morally troubling impetus to construct a physical barrier between the United States and Mexico, the barrier is being built. The inability of the wall’s opponents to deploy environmental and historic preservation laws that might prevent or slow down the construction have steered and eased its path. Congress has waived the application of these laws to the wall’s construction and made appealing the application of these waiver provisions almost impossible. As a result, to date, challenges brought by opponents to these provisions have not prevailed.

Applying the Petition Clause of the First Amendment to the truncated appeal provisions of the border wall statute that allow waiver of protective environmental and cultural laws could provide a novel challenge that sidesteps the statutory snares built

283. See *Aptheker v. Sec’y of State*, 378 U.S. 500, 505 (1964); see also *id.* at 526–27 (1964) (Clark, J., dissenting) (discussing how the government may reasonably restrict the right to travel).

284. Ostler, *supra* note 233, at 77 (quoting James Wilson).

into the IIRIRA. Additionally, applying the Ninth Amendment to the law's interference with the unenumerated right to engage in traditional activities and travel could challenge the problematic portions of the IIRIRA and provide a fresh avenue for expanding fundamental rights in other contexts. With respect to the Petition Clause, the statute's elimination of an interim level of appeal for any initially unsuccessful judicial appeal, allowing appeal only to the Supreme Court, severely restricts the ability of citizens to petition the judicial branch with their grievances, and thus potentially violates the First Amendment. With respect to the Ninth Amendment, if we view its provisions as containing sufficient elasticity, it is likely to protect unenumerated rights that pre-existed the Constitution and which are intrinsic to members of a civil society, including the right to travel and to engage in traditional practices (such as visiting ancestral graves or collecting plants and animals for traditional rituals). To the extent that these activities will be less protected and thus less feasible because of the statute's waiver provisions or interfered with because of the wall's physical barrier, the statute interferes with protected enumerated rights. If that view is correct, then the border wall statute also violates the Ninth Amendment.

If these arguments have any merit, then the statute authorizing the border wall violates the constitutional protections of the First and Ninth Amendments. Accordingly, the wall's constructions must be stopped, and those portions of the wall that are already built, must come down.