Courts as Forums For Protest

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For almost half a century, scholars, judges and politicians have debated two competing models of the judiciary’s role in a democratic society. The mainstream model views courts as arbiters of disputes between private individuals asserting particular rights. As former Reagan Administration Solicitor General Charles Fried wrote, “courts should be the impartial tool for doing justice between man and man.”

The reform upsurge of the 60s and 70s witnessed a transformation in the role of the judiciary, particularly the federal judiciary. Courts were now often viewed not merely as forums to settle private disputes, but as instruments of societal change. Harvard Professor Abram Chayes termed the emerging model one of “public law litigation.” This new model emphasized the court’s power to remedy structural, constitutional or statutory violations; as Professor Chayes

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1See, e.g., Lon Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978); Morris Raphael Cohen, Law and the Social Order 251-52 (1933).


put it: “the centerpiece of the emerging public law model is the decree.” The difference in relief between the two models was not itself decisive, what was fundamental to the new conception was the judiciary’s role in implementing social change and not simply ordering private relationships. As one prominent critic perceived it, the new model urged that lawsuits “be recast so they would not just be disputes between individuals over their particular grievances, but political struggles in which judges could reorder whole institutions and change the fundamental nature of society.”

The ongoing debate between these two views of the judicial role has obscured a third model of the role of courts in a democratic society; a model that has been ignored by legal scholars and viewed as illegitimate by some courts. That third, alternative perspective views courts as forums for protest. Under this model, courts not only function as adjudicators of private disputes, or institutions that implement social reforms, but as arenas in which political and social movements utilize to agitate for and educate about their legal and political agenda.

While victory is an important index of success in the first two views of the role of litigation, winning in court is not salient in the forums of protest model. Of course, the litigators and their clients certainly hope, and at times expect to win in court; but their objective is broader than courtroom victory. They primarily seek neither the damages awarded to private litigators under the traditional model, nor the injunction of the public

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4 Chayes, supra note 3, at 1298. But see Abram Chayes, Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 58 (1982) (noting that it is the nature of the controversy, the sources of the governing law, and the consequent impact of the decision—rather than the form of relief—that differentiate public law from private law adjudication).

5 Fried, supra note 2, at 16.
law model, but rather to use the courtroom struggle to build a political movement. The litigation can serve a variety of roles: to articulate a constitutional theory supporting the aspirations of the political movement, to expose the conflict between the aspirations of law and its grim reality, to draw public attention to the issue and to mobilize an oppressed community, or to put public pressure on a recalcitrant government or private institution to take a popular movement’s grievances seriously. What is decisive is that judicial relief not be viewed as dispositive: such relief is important but not the driving force of the litigation.

This model thus breaks down the traditional barrier between law and politics, but in a fundamentally different way than the law reform model. The traditional model attempts to shield the judicial process from the supposedly unsavory influence of politics, while the law reform model views politics as a necessary predicate to the courtroom drama. In this third model, the relationship between law and politics is reversed: a significant point of many of the cases is to inspire political action. The legal struggle is thus a part of a broader political campaign, not the engine of change itself. Courts are not the prime movers of social change, they are one forum in which the struggle for societal change takes place. Even when public interest lawsuits prevail in court, often their most lasting legacy is not the relief ordered by the court, but the lawsuit’s contribution to the ongoing community discourse about an important public issue.

Some courts have questioned whether litigation brought for the purpose of provoking public dialogue and debate is legitimate. For example, the Appeals for the District of Columbia imposed Rule 11 sanctions on the attorneys for fifty-five Libyan citizens and residents who sued for damages resulting from the 1986 United States air
strike on Libya.\(^6\) Although the District Court found that plaintiffs’ counsel, including the former United States Attorney General Ramsey Clark, “surely knew” that “the case offered no hope whatsoever of success,” and that it had been “brought as a public statement of protest” against President Reagan’s actions,\(^7\) it declined to impose Rule 11 sanctions because federal courts “serve in some respects as a forum for making such statements, and should continue to do so.”\(^8\) The court of appeals, however, held that Rule 11 sanctions were warranted because “[w]e do not conceive it a proper function of a federal court to serve as a forum for ‘protests.’”\(^9\)

Commentators have criticized the court of appeals’ decision.\(^10\) Yet even some forceful critics agree that courts do not exist as public forums.\(^11\) But as this Article demonstrates, from the early history of the American Republic onward, political movements have used courts to further public debate on important constitutional issues. Indeed, as one commentator has noted, a “considerable amount of civil rights litigation” is in some sense a “public statement of protest.”\(^12\)


\(^8\)Id.

\(^9\)Saltany, 886 F.2d at 440.


\(^11\)D’Amato, *supra* note 10, at 706.

\(^12\)Tobias, *supra* note 10, at 119.
In recent years, groups at both ends of the legal and political spectrum have used courts as arenas to provoke public education. The lawsuit now pending before the United States Supreme Court challenging the Bush Administration’s detention of prisoners at Guantanamo Bay, Cuba, has as an important goal sparking national and international outcry against these unlawful detentions. African American activists have filed reparations lawsuits against corporations whose histories are entangled with slavery, as well as the United States government, seeking to generate “societal discussion” about the role commercial entities and the government played in the slave trade and slavery. Lawyers for Haitian refugees challenged various aspects of the Coast Guard’s interdiction and return of Haitian refugees, with an important goal being to keep the

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13 Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002); Al Odah et al. v. United States of America, 321 F.3d 1134 (D.C. Cir. 2003), cert. granted, 124 S. Ct. 534 (2003). I am Vice President of the Center for Constitutional Rights, the organization that represents the plaintiffs in the Rasul case, and have been involved in that case.


refugee issue alive politically. During the Vietnam War, countless lawsuits were filed with an aim to focus the public on the unconstitutional nature of the U.S. war in Indochina, and more recent wars have inspired similar lawsuits.

Conservative political groups and individuals have also attempted to use the courts as forums to generate public attention over particular issues. The backers of the *Paula Jones* case undoubtedly brought and continued that litigation to advance conservative political causes and embarrass President Clinton. Anti-abortion activists have supported legislation, concluding that even if they lose the ensuing court challenge over its constitutionality, that battle would be valuable in educating the American people to their point of view on abortion. Gun owners have used the courts to get public attention to their Second Amendment concerns.

Recognizing the legitimacy of litigation brought to spark public debate on an issue, to galvanize a political movement or to spotlight social injustice would have

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several important impacts on courts, lawyers, and social movements. First, it requires narrowing the judicial definition of frivolous or improper litigation subject to Rule 11 sanctions. More importantly, accepting this perspective requires litigants and lawyers to assess the appropriateness of a given legal strategy not solely by the likelihood of success in court, but also by the role it plays in advancing a popular movement.\(^\text{22}\) Most fundamentally it requires looking at law reform litigation and often even private litigation in terms of its interaction and interface with political movements and not as an isolated legal struggle. This perspective not only brings politics the courtroom, but drags the courtroom into the outside political world.

Part I of this article contrasts the traditional and structural reform model of litigation with what I term the Public Forum Model of Law Reform Litigation. Part II demonstrates that this type of litigation has a lengthy pedigree in American history. Part III focuses on the First Amendment values promoted by this form of litigation and the protection it should be accorded. Part IV addresses the implications of this analysis for how judges might address the tensions between judicial articulation of norms and enforcement of those norms that are ever-present in law reform litigation and form an important area of controversy over the public law model. Part V will evaluate the broader implications for lawyers and their clients of using courts in the fashion, evaluating the pitfalls and advantages of such a use of litigation and the possible tensions between law and politics it raises.

\section*{I. Law Reform Litigation and the Courts as Forums for Protest Model}

\(^{22}\)See Arthur Kinoy, Rights on Trial 71 (1983).
The successful law reform litigation of the 1950s and 60s spawned an ongoing debate among scholars over the legitimacy and efficacy of judicially imposed reforms. Legal scholars focused on the legitimacy of this litigation. In seminal articles, Professor Abram Chayes and Owen Fiss argued that structural, public law litigation was displacing the traditional dispute resolution lawsuit as the dominant form of adjudication in the late twentieth century.\textsuperscript{23} The traditional model of adjudication posited a bipolar conflict between individual private parties before a neutral, detached, mostly passive judge to determine whether a legal right had been violated and damages should be awarded. The point of such a lawsuit was to decide a concrete grievance or dispute, not to address some general problem of public policy.

The public structural lawsuit on the other hand contained a multiplicity of parties and interests, often taking the form of a class action. It was not a dispute about private rights, but rather over issues of public policy. The fact inquiry was not simply retrospective but predictive and thus quasi-legislative. Most important, the judge was not a passive, detached arbiter, but rather an active agent who shaped and organized the litigation to ensure a just and workable outcome. The relief imposed was not damages but an injunctive decree that often required ongoing judicial supervision.\textsuperscript{24} The function of this structural, public lawsuit was not to accord damages for a discrete private wrong, but rather to change the behavior of a large bureaucratic organization.

Both Chayes and Fiss viewed the rise of the structural lawsuit as linked to the development of a regulatory, administrative bureaucratic state. The dispute resolution

\textsuperscript{23}Chayes, \textit{supra} note 3; Fiss, \textit{supra} note 3.

\textsuperscript{24}Chayes, \textit{supra} note 3, at 1302; Fiss, \textit{supra} note 3, at 18-28.
model was based on a system of autonomous, individual entrepreneurs operating in the largely unregulated marketplace; the structural reform lawsuit reflects a world in which the state, corporations and large bureaucracies play dominant roles. In this modern world, the role of federal courts was transformed from primarily solving private disputes, to policing the interface between large state institutions, such as schools, prisons, and child welfare systems, and the citizenry.  

The legitimacy of the court’s role in restructuring institutions has come under persistent attack. Some criticize the federal judiciary’s move away from concrete “grievance answering” to more generalized problem solving. Alexander Bickel complained that “All too many federal judges have been induced to view themselves as holding roving commissions as problem solvers, and as charged with a duty to act when majoritarian institutions do not.” Many viewed judges as grabbing the “imperial” power to thwart the will of majoritarian, more democratic organs of government.

The courts and Congress have also battled over the appropriateness of the reform litigation. Justice Powells’ influential concurrence in United States v. Richardson reflected the concerns of the Burger and Rehnquist Court regarding structural reform litigation.

25 Chayes, supra note 3, at 1304; Fiss, supra note 3, at 44.
[Due] to what many have regarded as the unresponsiveness of the Federal Government to recognized needs or serious inequities in our society, recourse to the federal courts has attained an unprecedented popularity in recent decades. Those courts have often acted as a major instrument of social reform. . . . [w]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens. . . . It merits noting how often and how unequivocally the Court has expressed its antipathy to efforts to convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government.

Congress has fought over a host of proposals to limit federal courts jurisdiction to hear and remedy institutional reform cases, and has enacted legislation to limit prison litigation\(^{30}\) and to restrict the ability of Legal Services Lawyers to engage in class action or other structural reform cases.\(^{31}\)

While the traditional dispute resolution model of adjudication and its more recent structural reform competitor are widely divergent, they have some basic similarities. Both are jurocentric. They focus on the judge as the central actor in resolving disputes. Fiss’ “conception of adjudication starts from the top—the office of the judge—and works down. . . . At the core of structural reform is the judge, and his effort to give meaning to


our public values.”\textsuperscript{32} So too, while the dispute resolution model accords the judge a more passive role, it also is fundamentally concerned with defining the role of the judge.\textsuperscript{33} In addition, both models see the judicial grant of relief as critical to the lawsuit, whether it be the award of damages or the implementation of a decree.

Important, recent work of social scientists raises questions about both the traditional legal model and its structural reform competitor. In the 1970s and 80s political and social scientists engaged in a debate, parallel to the legal dispute, over the legitimacy of law reform litigation. The social science discussion did not focus primarily on the proper role of the courts or the competence of the judiciary to restructure political or social institutions. Rather, social scientists debated the question of whether the judiciary’s decisions really had the effect of changing society.

The publication of Gerald Rosenberg’s \textit{Hollow Hope} sparked the debate. Rosenberg argued that the federal courts—even in such celebrated cases as \textit{Brown v. Board of Education} and \textit{Roe v. Wade}—were largely ineffectual—and perhaps even counterproductive—in producing social change. Rosenberg concluded that “U.S. courts can \textit{almost never} be effective producers of significant social reform.”\textsuperscript{34} To Rosenberg “courts act as a ‘fly paper’ for social reformers who succumb to the ‘lure of litigation.’”\textsuperscript{35}

\textsuperscript{32}Fiss, \textit{supra} note 3, at 17, 41.


\textsuperscript{34}GERALD N. ROSENBERG, \textit{THE HOLLOW HOPE} 338 (1991) (emphasis in original).

\textsuperscript{35}Id.
Rosenberg’s conclusions have been challenged by a host of social scientists. Most of these academics agree with Rosenberg that judicial decisions by themselves rarely lead to social change, and that reliance on courts and judges often proves counterproductive for political and social movements. These social scientists focused, however, on the indirect effects of litigation. For scholars such as Michael McCann, Stuart Schiengold and Joel Handler, who studied social movements, the indirect effects and uses of litigation may be its most important aspect for social movements seeking change.\(^{36}\) Social movements’ use of litigation to mobilize political struggles, to gain favorable publicity, to build a political movement, to generate support for political and constitutional claims and to provide leverage to supplement other tactics and force the opposition to settle is the central thrust of these scholars’ work. This body of work argues that “although the litigation by itself may not always produce immediate and sweeping results, it can function as part of an effective political strategy for achieving social reform.”\(^{37}\) Empirical studies in such disparate areas as pay equity reform litigation,\(^{38}\) disability rights cases,\(^{39}\) school financial reform litigation,\(^{40}\) environmental


\(^{38}\) McCann, supra note 36.


and consumer litigation, or civil rights organizing have demonstrated the significant indirect benefits that litigation can achieve for plaintiffs who use courts to mobilize public sentiment or provide leverage for their claims. This social science research must be integrated into the debate among legal scholars over the proper role of the federal judiciary.

A. The Courts as Forums for Protest Model

The work of these social scientists requires that legal scholars conceptualize an alternative, third model of litigation, not to displace but to exist alongside the traditional dispute resolution and law reform models. If the most important effect of even winning law reform cases may not lie in the judicial relief awarded, but in the indirect effects of the litigation on society, than a reconceptualization of the Chayes/Fiss law reform paradigm is necessary.

41 Handler, supra note 36, at 69, 97.

What I term the Courts as Forums for Protest model would have several key characteristics that would distinguish it from both of the other two prominent paradigms.

1. Winning or Losing in Court is Not as Important as Influencing the Public Debate

The lawyers’ and plaintiffs’ interest in the lawsuit is not solely, nor at times even primarily, winning or losing, but in getting their message out to the broader public or a particular group. The lawsuit serves as a means for the plaintiffs and counsel to transform the court into a forum to broadcast their point of view. While the plaintiffs do have a legal claim that they believe is valid and they want the court to decide, they also want to use the litigation as a vehicle for their protest, as a catalyst for aiding or developing a broader social movement.

The efficacy of lawsuits in generating publicity has been well documented. Many social scientists have observed “that litigation is one of the most effective ways to win publicity for a cause.”\(^{43}\) Public interest litigators and organizations have come to view litigation as a vehicle of attracting the media. Reflecting this recognition, it is now a common practice to announce a pending or filed public interest lawsuit by means of a press conference.\(^{44}\) Often litigation attracts the media’s attention in a way that nothing else does.\(^{45}\) Professor Joel Handler concluded that in general “a 20 page complaint and a temporary injunction are worth more than a 300 page report in the media.”\(^{46}\)

\(^{43}\)McCANN, supra note 36, at 58.

\(^{44}\)A LEXIS search of a six-month period between July 1 and December 31, 2003 revealed at least 45 lawsuits that were announced by way of a press conference.

\(^{45}\)McCANN, supra note 36, at 58-62.

\(^{46}\)HANDLER, supra note 36, at 216.
Handler discusses a category of litigation he studied where “the tactic that distinguishes these cases is that the law reformers do not expect to achieve results through court or administrative order: such proceedings take too long or become too costly . . . . Rather, they use legal proceedings to generate harmful publicity that will force the discriminator into a settlement.”

The educational value of litigation is often substantial even where the case does not result in a legal victory. Professor McMann demonstrates that pay equity advocates used lawsuits as a “crucial organizing tool,” and that for many of the activists “whether you win or lose [in court], awareness rises through this type of action.” For McCann, while the pay equity litigation resulted in only modest policy reforms, perhaps the single most important achievement of the movement was the transformations in many working women’s consciousness, understanding and commitments. Similarly, Professor Richard Gambiatta studied the impact of the school finance case that lost in the Supreme Court and concluded that the impact of the litigation nevertheless influenced the legislative agenda. Thus even ultimately defeated litigation “can recast the nature of a debate, facilitate debates that otherwise may not occur, thus setting in motion, at times, the process of policy change.”

47 Id. at 214.

48 McCANN, supra note 36, at 70-71.

49 Id. at 230.

This social science research is buttressed by the experience of the bar. For example, William Colby, the Cruzan family’s attorney in their famous “right-to-die case” that lost in the Supreme Court explained:

The public discourse surrounding the cases quickly took on a life of its own. The true legacy of the two cases is that they caused [the country] to talk about death, dying, living wills, hospital ethics committees, and the withdrawal of futile medical treatment and who should make that decision. This nationwide discussion very quickly outgrew the individual lawsuits of two young girls involved in car accidents.51

Similarly, Yale Professor Harold Koh’s experience in transnational public law litigation led him to view such litigation “as a development whose success should be measured not by favorable judgments, but by practical results: the norms declared, the political pressure generated, the government practices abated, and the lives saved.”52 For Koh, even “adverse Supreme Court decisions are no longer final stops, but only way stations, in the process of ‘complex enforcement . . . ’”53

The recent litigation involving the suspected Taliban and Al Qaida prisoners indefinitely detained by the Bush Administration at the U.S. military installation at Guantanamo Bay without any legal process is but another example. Until recently, the


53Koh, Haiti Paradigm, supra note 15, at 2406.
lower courts had uniformly rejected prisoners’ petitions for habeas corpus relief. Nonetheless, the litigation received a significant amount of press attention and helped keep the issue in the public eye for almost two years. Now the Supreme Court has taken the case and will hear it this year. But whether they win or lose in the Supreme Court, the plaintiffs have already achieved a key goal of focusing public attention on the government’s policy.

2. A Non-Jurocentic Model of Litigation

As already noted, both the traditional dispute resolution model and the Chayes/Fiss structural or reform model of litigation focused on the role of the judge. The recent social science research has concentrated not on the top-down model of judges dispensing decisions to the litigants, but on a more bottom-up, decentralized model that analyzes the interaction between the parties to the litigation and their interface with society. From this perspective, the judge and judicial decision or judicial decree are not the epicenter of litigation, from which all else radiates. Rather “social struggles themselves thus define the center of analysis and nonjudicial actors are viewed as practical legal agents rather than as simply reactors to judicial command.”54

The diminished role of the judge in this decentralized, bottom up-model is inextricably connected to the lessened concern over winning and losing in court. If the role of the court is reconceptualized from authoritative law givers to that of a forum whereby grievances and complaints can be aired and argued, the critical question for the litigation is not what the eventual decree or decision states, but how the litigation affects the various actors in the policy arena—whether those actors are the public in general,

54Michael McCann, Reform Litigation on Trial, 18 LAW & SOC. INQUIRY 715, 731 (1993).
interest groups, legislative bodies, a group the litigants are seeking to organize, or the defendants whom the plaintiffs are seeking to force to the bargaining table. As one commentator has argued, the question for many areas of litigation is “not how do judges make policy, but rather how courts function as an arena of policy disputation.”

Even when plaintiffs win in court, it is a mistake to view the judge as the central actor in the implementation of relief. Rather, one must recognize the interdependence of the courts, media, activists and other branches of government to achieve meaningful reform.

Legal scholars focus primarily on analyzing judicial decisions: critiquing, rationalizing, legitimating, deconstructing them. Yet by focusing so extensively and centrally on judicial decisions and the role of the judge, legal scholars risk missing the larger picture. That broader view is that judicial decisions represent only one incident in what is a rich, variegated and lengthy process of resolving a grievance or public dispute. By focusing narrowly on the decision instead of the entire process, legal scholars fail to understand the broader landscape.

Often real cases will present elements of both the forum for protest and institutional reform model, for as with any model, reality is always more complex and intricate than any theoretical or doctrinal formulation. Thus in many cases, litigants who seek to utilize courts to educate the public and mobilize their social and political movements will also be demanding strong judicial intervention to which they should be


entitled to remedy an egregious constitutional violation. Moreover, while certain cases may present the forum for protest model in its pure form, much public interest litigation has as a purpose furthering public education and discourse and in many cases the courtroom battle is but one aspect of a broader political struggle. That many public law litigants have interests in the litigation that extend beyond winning or losing in the courtroom has important implications for lawyers’ strategies and tactics in litigating those cases and for judicial responses to the litigation as part of a multi-faceted political struggle.

B. The Legitimacy of This Model

The model proposed here, however efficacious and widespread in public law litigation raises the question whether these kind of cases and legal strategies are legitimate uses of the courtroom and litigation. Several types of problems appear immediately. The first is whether a litigation strategy that seeks favorable publicity to further a social movement is an ethical and legitimate use of courts. Second, and related, are such purposes an improper purpose under Rule 11.

For the past century lawyers and judges have debated the proper role of the lawyer in obtaining favorable media publicity. For example, in 1964, a committee of the American Bar Association concluded that the proper role of the lawyer “is to present his case in the courtroom . . . not attempting to build a favorable climate of public opinion.”57 Various courts have also opined at times that obtaining publicity is not a legitimate function of litigation. For example, the Fourth Circuit recently denied attorney fees for public relations work by attorneys in concluding a successful civil rights action, stating

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57 AMERICAN BAR ASSOCIATION, STANDARD RELATING TO FAIR TRIAL AND FREE PRESS 92 (1966).
that “the legitimate goals of litigation are almost always attained in the courtroom not in the media.”

The same unease over the use of publicity in connection with litigation has also affected some law reform organizations. Felix Frankfurter, then a member of the ACLU’s Executive Committee, criticized ACLU Executive Director Roger Baldwin’s distribution of a circular criticizing the government’s impending prosecution of a communist labor leader. Frankfurter objected to this attempt to influence public sentiment, arguing that the case must be tried in the courts, not in the press or in a publicity campaign. The ACLU Executive Committee eventually adopted Frankfurter’s position, “both from a standpoint of effective tactics and general principle.”

Federal courts have also at times imposed Rule 11 sanctions on attorneys who have used the courtroom as a forum for public protest. The D.C. Circuit’s imposition of sanctions against former Attorney General Ramsey Clark for what it termed his attempt to use the federal court as a forum for protest in bringing claims on behalf of Libyans killed or injured during the 1986 bombing is but one example. Another is the sanctions imposed by the Fourth Circuit against the prominent civil rights attorney William Kunstler and other attorneys. The Circuit affirmed a district court imposition of Rule 11 sanctions because Kunstler had filed a civil rights lawsuit with a primary purpose of

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58Rum Creek Coal Sales v. Caperton, 31 F.3d 169, 176 (4th Cir. 1994). Even courts that have allowed attorney fees for public relations work have articulated a narrow standard that only permits attorney fees for media work that contributes “directly substantially, to the attainment [of the client’s] litigation goals.” Davis v. City of San Francisco, 976 F.2d 1536, 1545 (9th Cir. 1992).


seeking publicity and embarrassing the defendant. The Court found that sanctions are appropriate even where a complaint is filed to vindicate rights in court, as long as the litigant’s central purpose in bringing the lawsuit is “improper,” such as seeking publicity.

Commentators have criticized Saltany and Kunstler, other courts have disagreed that political education is an improper purpose, and Rule 11 was amended in 1993 to make it more difficult to impose sanctions on litigants and their attorneys. Nonetheless, the present Rule 11 still bars pleadings filed for “any improper purpose.” That text suggests that a court could sanction a complaint filed for the purpose of seeking publicity, even if the primary purpose of the litigation were to vindicate rights. These Rule 11 cases, the text of the rule, and the controversy over the ethical propriety of lawyers

61 In re Kunstler, 914 F.2d 505 (1990).
62 Id. at 520. Subsequently, in Ballentine v. Taco Bell Corp., 135 F.R.D. 117 (E.D.N.C. 1991), a district court imposed sanctions against a plaintiff in a sex discrimination case for filing a claim to harass the defendant, despite concluding that the discrimination claim was arguably colorable and filed with the legitimate motive of seeking to remedy the alleged discrimination. The court, using the Kunstler test found that plaintiff’s legitimate motive was not central. Id. at 125. More recently the Fifth Circuit Court of Appeals has imposed sanctions against an attorney who filed what the Circuit assumed was a nonfrivolous claim solely because his purpose was improper. Whitehead v. K-Mart Corp., 332 F.3d 796 (5th Cir. 2003) (en banc).

63 D’Amato, supra note 10, Tobias, supra note 10.
64 Auen v. Sweeny, 109 F.R.D. 678, 680 (N.D.N.Y. 1986); Sussman v. Bank of Israel, 56 F.3d 450 (2d Cir. 1993); Zalvidar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986).
65 Andrews, supra note 19, at 23. Indeed, the Advisory Committee that wrote the 1983 Amendments to Rule 11 considered, but ultimately rejected inserting the word “primarily” into the Rule to qualify the improper purpose clause. See Letter from Walter R. Mansfield, Chairman, Advisory Committee on Civil Rules, to Judge Edward T. Gignoux, Chairman of the Standing Committee on Rules of Practice and Procedure (Mar. 9, 1987), reprinted in 97 F.R.D. 190, 191 (1983).
obtaining favorable media publicity for their clients, illustrate the deep seated doubts in some sections of the legal community about the propriety and legitimacy of the role for the courts being proposed in this article.
Legitimacy is fundamentally a function of several interrelated inquiries. The first is historical: whether within our historical tradition federal courts have played a role as forums for protest? The second is theoretical and doctrinal: does such a function of courts and litigation fit comfortably within our constitutional structure?

II. The History of Litigation as a Forum for Protest in America
Unlike structural reform litigation, which is a relatively new mid 20th century phenomena, the tradition of using litigation as a forum for protest to obtain favorable publicity for a political cause dates back even before the American revolution. James Otis spoke publicly about the British abuses involving the writs of assistance, and his arguments in the case challenging those writs were widely publicized, including his famous speech, of which John Adams later wrote, “Then and there was the child independence born.”66 When Adams represented John Hancock and others in the tax protests in Boston, he and his colleagues at the bar worked closely with the press to publicize the abuses of the British and make the issue public. Adams’ contentions and later a text of his argument were thoroughly aired in the press, along with commentaries on the important legal issues.67 Indeed, the evidence strongly supports the conclusion that Adams intended his argument in that case to “serve a purpose beyond mere advocacy in court.”68 Both the content and use of the draft argument suggests that it was as much a political as legal document.69 These revolutionary lawyers were using their cases not merely to defend their clients, but to help build a political movement for American independence.

66See J. Quincy, Report of Cases Argued and Adjudged in the Supreme Courts of Judicature of the Province of Massachusetts Bay 51-57, 469-482 (1865); 2 LEGAL PAPERS OF JOHN ADAMS 107 n.2 (L. Wroth & H. Zobel eds., 1965).


682 LEGAL PAPERS OF JOHN ADAMS, supra note 66, at 192 (editorial note) (Adams’ argument was probably never delivered). Id.

69Id. at 193.
The revolutionary tradition pre-independence of using the Courts as a forum for protest was continued by the abolitionist movement in the early 19th century. Historian Hendrik Hartog has noted that the “contest over slavery did more than any other cause to stimulate the development of an alternate rights conscious, interpretation of the federal Constitution.” Much of the fugitive slave litigation was geared not merely to winning in court, but to galvanizing northern public opinion against slavery. The lawyer who best used litigation to further a political agenda and spark public debate over slavery was Salmon Chase. Chase engaged in such political litigation on behalf of fugitive slaves and their underground railroad supporters for more than a decade, eventually using it as a springboard to become a U.S. Senator, Secretary of the Treasury under Lincoln and ultimately Chief Justice of the United States Supreme Court.

Chase’s life was driven by the tension between ambition and moral principles. The Republican Party orator Carl Schurz noted in 1860 that he had never met a man more “possessed by the desire to be President.” Abraham Lincoln reportedly remarked in 1864 that “Chase is about one and a half times bigger than any other man I ever knew,” probably a reference to both Chase’s ability and ego.

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71 By 1837, Chase had established himself as a diligent, effective lawyer, albeit not a great one, representing business clients including the Cincinnati branch Bank of the United States. Albert Bushnell Hart, Salmon Portland Chase, 23 (1899).

72 Frederick J. Blue, Salmon P. Chase: A Life in Politics x (1987).

But Chase also held strongly felt moral principles that he acted upon, principles that probably more than anything else denied him his ultimate ambition of becoming President. A deeply religious man, Chase’s religious faith was the compelling motivation behind Chase’s condemnation of and agitation against slavery.

In the mid 1830s both Chase and the abolitionist movement were at turning points. Until then, abolitionism had been mainly a moral and religious crusade that sought to abolish slavery by means of moral persuasion, not legal or political action. Anti-slavery societies often resolved to use “no weapon but reason and truth” in their campaign against slavery. Antislavery litigation was utilized mainly as a “practical necessity” to defend abolitionists against mobs and riots, not as an ideological opportunity. But reason and truth had not worked. Southerners had not been moved by moral persuasion to end slavery, and by the 1830s, political abolitionists like James Birney were developing constitutional theories that would provide legal and political means for challenging slavery.

On March 10, 1837, a troubled James G. Birney appeared at Salmon Chase’s office in Cincinnati. Birney, a former Alabama slave owner turned an abolitionist told Chase a heart-wrenching tale that exposed the inhumanity and hypocrisy of slavery. His maid, 20-year-old Matilda Lawrence, had accompanied her master and father Larkin Lawrence to Cincinnati. When her father refused, her plea for freedom she ran away. Her father briefly looked for her, then hired the notorious slave catcher John M. Riley to find Matilda and return her to slavery.

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74 JACOBUS TENBROEK, EQUAL UNDER THE LAW 33 (1964).

Riley located Matilda in March 1837 and she was arrested pursuant to the federal Fugitive Slave Act of 1793. Birney asked 29-year-old Chase to handle Matilda’s case. Chase agreed.

Chase’s decision would begin a long crusade earning him the nickname “Attorney General for Runaway Slaves,” and, though it resulted in mostly losing cases and very few freed slaves, it would catapult both Chase and the slavery issue to national prominence. In time, Chase would become the anti-slavery leader most responsible for the successful transition from moral outrage to political action. As the New York Tribune later would write, “To Mr. Chase more than any other one man belongs the credit of making the anti-slavery feeling, what it had never been before, a power in politics. It had been the sentiment of philanthropists, he made it the inspiration of a great political party.” A significant part of that effort was Chase’s use of the courts as a forum for presenting his anti-slavery views.

Chase’s main strategy in his argument before Ohio Common Pleas Judge David E. Estes seems to have been to use Matilda’s case to challenge the constitutionality of the Fugitive Slave Act of 1793. While he did raise a number of technical, legal arguments, he discussed those quickly. Chase focused instead on broader constitutional points of natural rights, federalism, and the Fourth and Fifth Amendments. He did so over the objection of opposing counsel and clear signals from the judge that Chase’s discourse

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77 Niven, supra note 76, at 78.

was not pertinent. His opening and closing arguments were attempts to infuse the Constitution with broad natural rights and an egalitarian moral perspective. He “perceived” the court’s responsibility as not merely to the individual and community, “but to conscience and to God.”

Judge Estes listened patiently to Chase, but quickly ruled against him based on the current state of the law. Slave catcher Riley quickly rushed Matilda across the Ohio River to Covington, Kentucky and eventually to New Orleans where Lawrence had arranged for her sale.

The historian William Wiecik has termed Chase’s Matilda argument “a noble failure.” Chase was saddened by the outcome of the case and felt that his legal position had been “treated with ridicule or disregard.” Yet, despite Matilda’s personal tragedy, Chase’s mentor Birney believed that the case had “done much for the cause in this city.” The litigation had stirred considerable debate over fugitive slaves and slavery in Cincinnati. It was clear that Chase’s argument was designed not merely to win before Judge Estes, but to help spur a political movement against slavery. Birney and Chase in the Matilda case had worked out the legal theory that, while losing in court, was eventually to become the constitutional platform of the Republican Party.

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79Speech of Salmon Portland Chase in the Case of the Colored Woman Matilda, 7-8, Mar. 11, 1837 (1837).


81Foner, supra note 78, at 74.

82Middleton, supra note 76, at 102.
The *Matilda* case did not vanish with the unfortunate woman’s return to slavery. Birney was prosecuted for harboring a fugitive slave, and was found guilty and fined. Birney decided not to pay the fine and Chase filed an appeal. Chase quickly realized that Judge Este had made a technical error when he charged the jury to consider only whether Birney had harbored Matilda and not whether he did so knowing that she was a slave. But both he and Birney agreed not to raise that issue on appeal, even though they knew they would win if they did. Their interest lay in arguing the broad constitutional issue of whether Matilda became free the moment she entered Ohio with her master, not in “winning” the case and avoiding the fine.

The Ohio Supreme Court’s decision disappointed Chase. The Court reversed Birney’s conviction, but only on the technical grounds not argued by Chase that the jury had not considered whether Birney had known Matilda was a slave. Nonetheless, the Ohio Supreme Court took the unusual step of ordering the publication of his arguments in the case. In all likelihood the Court agreed with Chase’s arguments, but was unwilling to adopt them in the Ohio political climate of the late 1830s. So it signaled its leanings by having the argument printed and widely publicized.83

For the next decade, Chase actively represented fugitive slaves in Ohio courts. His cases usually drew large crowds to the courtroom. Most of his efforts lost, although occasionally he was able to win his client’s freedom. Most important to Chase, his arguments were reaching a wider national audience, touching a chord with northerners who wanted to dissociate free states from slavery.

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Chase’s most famous case stemmed from his representation of an abolitionist involved in the underground railroad. His representation of John Van Zandt, particularly his appeal to the Supreme Court, might be termed frivolous or baseless in modern parlance. Yet, this case may have done more than any other of Chase’s cases to publicize the theories and positions that were to motivate Northern public opinion to support a political movement that eventually became the Republican Party.

On April 21, 1842, John Van Zandt, an old, stooped farmer who had left Kentucky because of his hatred of slavery, was conducting nine fugitive slaves north when his wagon was stopped by two slave catchers. The slave driving the wagon fled, but the other eight were captured and rushed across the Ohio River to Covington, Kentucky where their owner, Wharton Jones, reclaimed them and paid the slave catchers $450.

Jones then sued Van Zandt for harboring fugitives in violation of the fugitive slave act. Chase agreed to take Van Zandt’s case and—as usual in his anti-slavery litigation—accepted no fee. He asked former U.S. Senator Thomas Morris to aid him in the defense.

Chase was optimistic about the Van Zandt case. He recognized that whatever the outcome in Court, the case would get wide publicity for his anti-slavery constitutional views. Moreover, he thought he could win in court despite the substantial evidence that Van Zandt was transporting slaves he knew to be fugitives.

Chase did have some good reasons to be optimistic about the Van Zandt case. The case would be tried in federal court before Supreme Court Justice John McLean who was assigned to the Ohio District. McLean, an impressive looking man whose features
and reserved demeanor resembled those of George Washington, had strong anti-slavery views. McLean had ruled in favor of fugitive slaves when he was an Ohio Supreme Court Justice and in 1842 had set forth his anti-slavery views in the U.S. Supreme Court case of *Prigg v. Pennsylvania*. Moreover, McLean was Chase’s friend and soon to be uncle-in-law. It would be hard to find a better federal judge to try the *Van Zandt* case.

Justice McLean rejected Chase’s motion to dismiss the case, and a jury ultimately awarded Jones $1,200 damages. McLean believed that the duty to obey the law overrode natural rights, his anti-slavery views, and individual conscience. He charged the jury:

> In the course of this discussion much has been said of the laws of nature, of conscience, and the rights of conscience. This monitor, under great excitement, may mislead, and always does mislead, when it urges anyone to violate the law.\(^84\)

Chase moved for a new trial, continuing his by then increasingly futile constitutional challenge to the fugitive slave law. McLean again decided against Chase. While he agreed with Chase’s view of slavery and the presumption in Ohio that every person was free, McLean’s view of the Constitution’s necessary compromise with slavery made him object to Chase’s natural law argument and his appeal to conscience. To McLean, the immorality of slavery was irrelevant. Repeating his charge to the jury:

> “The law is our only guide.”\(^85\)

Chase however remained undaunted and appealed to the United States Supreme Court. His unbounded faith, combined with tremendous drive and ambition motivated

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\(^{84}\) *Jones v. Van Zandt*, 13 Fed. Cas. 1040, 1045 (Cir. Ct. Ohio 1843).

\(^{85}\) *Id.* at 1047.
him to articulate arguments that eventually moved thousands of northerners to view the fugitive slave law as unconstitutional. But that faith did not move the Supreme Court. After the Court unanimously ruled against Van Zandt, Chase wrote to the prominent NY abolitionist Lewis Tappan that “I regret the decision in the Van Zandt case, and, I confess, did not expect it.” If he did not, pretty much everyone else did.

But even Chase must have recognized that the chance of winning Van Zandt’s appeal in the Supreme Court was minuscule. The Court’s 1842 *Prigg v. Pennsylvania* decision rendered a constitutional attack on the Fugitive Slave Act futile. The only Supreme Court Justice with anti-slavery views was Justice McLean, and he had already ruled against Chase. Although McLean had urged the Court to hear oral argument in the Van Zandt case, Chief Justice Taney objected to hearing oral argument for he thought the constitutional question was already settled. Taney persuaded the rest of the Court except McLean, and Chase was relegated to submitting only a written brief, an ominous sign. Perhaps Chase subconsciously recognized that he could not win, for his Van Zandt brief comes the closest he ever was to come to adopting a pure higher natural law theory. His brief straddled the fine line between “urging the disregard of positive law and the incorporation of natural law within it.” Chase’s argument was designed to test the limit of law, to put before the country and the court the conflict between humanity and prevailing law.

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86 Shuckers, *supra* note 83, at 65.


88 Cover, *supra* note 75, at 173.
The brief opened by tacitly admitting that current legal precedent might be against him. Chase argued however, that “such authority may stand for law,” but does not always represent the law. Reason and truth “will ultimately prevail.” Other well-established legal doctrines have been overturned in time, and Chase urged the Court to consider his arguments dispassionately and openly. Fifty pages of technical legal argument followed to prove that Van Zandt could not be liable unless the slave owner actually notified him that the persons he was transporting were fugitive slaves. Chase’s argument was logical, well-researched and persuasively argued: but his interpretation of the law would have made it virtually impossible to prosecute underground railroaders: a result neither the South nor the Supreme Court was willing to countenance.

If the first part of Chase’s argument was technically sound but clearly judicially unattainable, the second half descended to utter futility. His argument that the Fugitive Slave Act was unconstitutional defied legal precedent and current political reality. Yet the brief brilliantly sets forth Chase’s anti-slavery constitutional philosophy. Future Massachusetts Senator Charles Sumner considered Chase’s Van Zandt brief to be the best he had ever read and borrowed Chase’s arguments when he condemned the fugitive slave law in the Senate a few years later. “It is a triumph of freedom,” said retired Justice Story of Chase’s argument, and accurately predicted that “his points will seriously influence the public mind and perhaps the politics of the country.”

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89 S.P. CHASE, AN ARGUMENT FOR THE DEFENDANT SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES AT THE DECEMBER TERM 1846 IN THE CASE OF WARTON JONES V. JOHN VAN ZANDT 5 (1847).

90 HART, supra note 71, at 77.
That was Chase’s aim. A biographer argues that Chase’s point “was simply to put before the country a solemn protest against making the free States share in slavery.”91 Chase reprinted the brief as a pamphlet that he widely distributed to every member of Congress, and other leading politicians irrespective of their views on slavery. The case attracted national attention: Chase used the forum to publicize the anti-slavery cause and help his own political ambitions. He had astutely secured the prominent Governor of New York, William Henry Seward, to act as co-counsel in the Supreme Court, in order to help the case achieve national prominence. Seward’s argument to the Court was also published, in the *New York Tribune*.

Chase’s argument, which eventually became the constitutional bedrock of the Republican Party, was that the Constitution intended the U.S. government “to be kept free of all connection” with slavery, and to exclude slavery from the territories.92 Slavery was a local institution, confined to the slave holding states.

Chase drew on several key principles to support his constitutional position: principles that were to undergird civil rights litigation throughout the 19th century. First, he drew on the Declaration of Independence and other extra-constitutional sources such as the Northwest Ordinance to inform his view of the Constitution. To anti-slavery advocates like Chase, the Declaration’s self-evident truths were not “empty flourishes of rhetoric,”93 but proof that slavery was not constitutionally “to be fostered or sustained by

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91 *Id.*

92 *CHASE, supra* note 89, at 82.

93 *Id.* at 76.
national authority.” To Chase either the “Declaration of Independence is a fable,” or the Constitution must recognize all inhabitants of the U.S. as persons with rights.

Chase also relied on a rule of interpretation that the Constitution must be interpreted consistently with natural, God-given rights and slavery was a violation of a natural right.

Reaching its highest rhetorical note, Chase’s brief argued that

No legislature can make right wrong; or wrong, right. No legislature can make light, darkness; or darkness, light. No legislature can make men, things; or things, men. Nor is any legislature at liberty to disregard the fundamental principles of rectitude and justice whether restrained or not by constitutional provisions, these are acts beyond any legitimate or binding legislative authority.

The Court is obligated therefore to avoid interpreting the U.S. Constitution in a manner which will bring its provisions into conflict with that other CONSTITUTION, which, rising, in sublime majesty, over all human enactments finds its “seat in the bosom of God.”

Chase’s real plea in Van Zandt, as in many of his other cases, was not to the Court but to the public and history. For Chase, the final arbiter in cases of a “moral and political nature” is not the court’s judgment, but “public opinion, not of the American people only, but of the Civilized World.”

Anti-slavery lawyers like Chase, and their southern counterparts, understood that an appeal to the Constitution had the same kind of force on public opinion as the equally

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94 Id. at 77.
95 Id. at 82-83.
96 Id. at 93.
97 Id. at 107.
98 Id.
common appeal to the Bible, and therefore tried to read into the Constitution self-evident, natural rights. As the son of one of Chase’s friends later recounted, the appeal to fundamental rights, “however little it might convince a court, was the most effective of all the anti-slavery arguments, because it brought back the discussion to the absolute incongruity of democracy and slavery, and emphasized both the question of moral right and the social expediency of upholding the moral law.”

Nobody was surprised—except possibly Chase—when the Supreme Court unanimously ruled against Van Zandt, holding the Fugitive Slave Act constitutional despite “its supposed inexpediency and [the] invalidity of all laws recognizing slavery or any right of property in man.” But despite losing, Chase wrote that he was “thankful” to have brought the case. His arguments were widely publicized and he was “satisfied” with the public discussion the case generated. Abolitionists praised his arguments, and the respect he won in Van Zandt and other fugitive slave cases helped propel Chase to election to the U.S. Senate in 1849 and Governor of Ohio in 1855 and 1857. Lincoln appointed him Secretary of Treasury in 1861, and when Chase could not

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99 Hart, supra note 71, at 72. Chase was one of the most effective anti-slavery constitutional advocates. He grounded his constitutional theory both in moral principle and practical politics. One of his biographers notes that, “hundreds of men on both sides liked to make the Constitution a partner in their speeches; hardly any other rendered such services as Chase in defending victims of slavery who got across the line into the free States. It was his courage as counsel in those cases, his use of all possible legal technicalities and expedients in behalf of his client, and his fearless and widely circulated speeches, which have made him best known as an anti-slavery man.” Id. at 73.


101 Disappointed with the result, Chase recognized that the deck had been stacked against him. In a letter to future Senator Charles Sumner of Massachusetts, he stated, “I do not suppose that the judges of the Supreme Court regarded the arguments as worth much attention. I have reason to believe that the case was decided before they received it. Middleton, supra note 76, at 121.
contain his presidential ambition, and quietly tried to run against Lincoln in 1864, Lincoln recognized his dedication and legal skills honed in his fugitive slave litigation, nominated him to be the Chief Justice of the Supreme Court in 1864.

While Chase went on to a national career, the poor, old abolitionist farmer John Van Zandt, who had found “special gratification in aiding fugitives from the oppression of slavery,” died in 1845, while his case was pending in the Supreme Court. But Van Zandt’s struggle lived on in the hearts and minds of others. Chase considered the underground railroader John Van Troupe in Harriet Beecher Stowe’s *Uncle Tom’s Cabin* to be modeled on Van Zandt, and hoped that “even though my poor old client be sacrificed, the great cause of humanity will be a gainer by it.”

The main long-term legacy of Chase and other fugitive slave litigators was their contribution to a culture that encourages political movements to use courts as vehicles of political protest. That litigation aided the rising tide of Northern public opinion against slavery and eventually contributed to a Republican Party nominee who won the presidency helped by his attacks on the Supreme Court. As the prominent Wisconsin newspaper editor Rufus King wrote in 1855, the judicial controversy over the constitutionality of the Fugitive Slave Act “must provoke, everywhere, discussion and agitation, and Liberty and Right must profit by these.”

Nor was Chase the only anti-slavery advocate who used the courtroom for political ends prior to the Civil War. Another group of abolitionists waged a more

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102 *Id.* at 127.

103 *BLUE, supra* note 72, at 38.

104 *FONER, supra* note 78, at 136.
utopian battle to constitutionally extinguish slavery everywhere in the United States. These abolitionists also read the Constitution to conform to the Declaration of Independence and the natural right to freedom but drew the much more radical conclusion that the Constitution required the abolition of slavery both in the North and in the South. They did so in the belief that Northern reverence for the Constitution required the abolitionist movement to develop an anti-slavery constitutional interpretation in order to gain adherents and spur anti-slavery sentiment. Like Chase and the more moderate anti-slavery movement, the utopian constitutionalists used test-case litigation as one means of publicizing their constitutional doctrines.

In 1844, the utopian constitutionalists created an opportunity to litigate their broad constitutional theories in court. That year, New Jersey ratified a new constitution that included a Declaration of Rights providing that “All men are by nature free and independent, and have certain natural and unalienable rights.”\(^{105}\) Although the framers of the New Jersey constitution had ignored the continued, although dying existence of slavery in that state, the New Jersey Anti-Slavery Society nevertheless resolved to initiate a test case to “settle the question of the existence of slavery under the new Constitution.”\(^{106}\) They genuinely hoped to win in court, but the abolitionists’ primary goal was to focus the attention of an indifferent public on their cause.\(^{107}\)

The New Jersey abolitionists realized that their constitutional challenge to the remnants of slavery in New Jersey would be difficult, and their leader, John Grimes, was

\(^{105}\) N.J. CONST. art. I, § 1.


\(^{107}\) Id. at 337–38.
openly dubious. 108 Alvan Stewart who argued the case for the abolitionists, eschewed legal formalism in favor of a broad political-moral argument. While he purported to be arguing a dry legal question, 109 his argument reads like a political speech or religious sermon. In his request for relief, he asked that the “court set the nation the shining example of doing right on this question, by acting up to the full measure of their judicial and moral power.” 110

The New Jersey Supreme Court, by a 3-1 vote, rejected Stewart’s plea. The justices chose to follow the formalistic reasoning of the defense counsel, Joseph Bradley, who was later appointed to the United States Supreme Court. 111 According to one member of New Jersey’s highest court, Stewart’s arguments were “rather addressed to the feelings than to the legal intelligence of the court.” 112 Only the antislavery Justice Joseph Hornblower dissented, and he did so without writing an opinion. 113

108 Id. at 343.

109 Id.

110 Id. at 470.

111 Justice Bradley’s most famous civil rights decision was his opinion in The Civil Rights Cases, 109 U.S. 3 (1883), in which he articulated a formalistic reading of the Fourteenth Amendment to deny Congress the power to prohibit segregation in public inns, accommodations, and transportation.


113 The abolitionists appealed to the New Jersey Court of Errors and Appeals, which affirmed the decision of the Supreme Court by a 7-1 vote without issuing written opinions. State v. Post, 21 N.J.L. 699 (N.J. 1848).
While losing in Court, the New Jersey Slave Cases did accomplish the abolitionists’ aim of initiating a political debate on slavery, which ended in the New Jersey legislature’s formal abolition of slavery in that state several years later.\footnote{In Massachusetts, Charles Sumner litigated and lost the Boston school desegregation case, \textit{Roberts v. City of Boston}, 59 Mass. (1 Cush.) 198 (1849). In both New Jersey and Massachusetts, abolitionists eventually obtained politically through legislative action what they failed to win in the courts. H\textsc{arold H. H}yman \textsc{\&} W\textsc{illiam M. W}ieck, \textsc{E}qual \textsc{J}ustice \textsc{U}nder \textsc{L}aw: \textsc{C}onstitutional \textsc{D}evelopment 1883-1875, at 90, 96, 97 (1982) (racial segregation was prohibited in Boston by statute in 1855); Ernst, \textit{supra} note 106, at 364 n.109 (Abolitionists won a partial victory in 1846 when the New Jersey legislature formally abolished slavery but declared the slaves to be apprentices for life.).}

Similarly, in Boston black and white abolitionists waged a concerted campaign in the 1840s to end segregation, which included litigation as one component of the broader political effort. The litigation lost in court, but helped place the issue of segregation on the legislative agenda. In 1841, a number of black abolitionists, including Frederick Douglass, attempted to ride the “white” cars of various segregated Massachusetts railroads.\footnote{L\textsc{eon F. L}itwack, \textsc{N}orth of \textsc{S}lavery, \textsc{The \textsc{N}egro in the \textsc{F}ree \textsc{S}tates}, 1790-1860, at 107-08 (1961); J. M\textsc{organ} Kousser, \textit{The Supremacy of Equal Rights’: The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendments}, 82 N\textsc{w. U. L. R}ev. 941, 954 (1988).} When physically removed, they often sued; yet the lower courts ruled in favor of the railroads. The abolitionists turned to the legislature, and the resulting pressure forced the railroads to voluntarily end segregated cars.\footnote{Kousser, \textit{supra} note 115, at 955.} The Boston abolitionist community then challenged school segregation. In the 1849 case \textit{Roberts v. Boston}, the Massachusetts Supreme Court, in an unanimous opinion written by the prominent antislavery judge Lemuel Shaw, upheld segregated schools in
Massachusetts.\footnote{117} Yet, despite their loss in the courts, the abolitionist community continued its political struggle, and, five years later, the Massachusetts legislature barred segregation. Similarly, New York City blacks in the 1850s formed the Legal Rights Association and, represented by future President Chester A. Arthur and other lawyers, staged a series of sit-ins against segregated streetcars, losing in court but succeeding in pressuring a number of railroads to end segregation.\footnote{118} In each of these cases the litigation was brought, not merely to prevail in court, but as one method to spur debate in both the public at large and in the legislature.

After the Civil War, African Americans continued this abolitionist tradition, waging an impressive campaign in the courts against racial discrimination in schools. Between 1865 and 1903, more than seventy challenges to discriminatory schools were litigated throughout the United States.\footnote{119} Blacks overwhelmingly lost the cases that were decided on Fourteenth Amendment grounds, although they were often successful on narrower state law claims.\footnote{120} Moreover, even lawsuits that lost in court often led to legislative victories. For example, New York blacks lost all six cases that they brought


\footnotetext[119]{119}{See J. Morgan Kousser, Dead End: The Development of Nineteenth Century Litigation on Racial Discrimination in Schools 5 (1986).}

\footnotetext[120]{120}{Only one judge out of the 33 cases involving the Fourteenth Amendment “squarely ruled that school segregation \textit{per se} contravened the Fourteenth Amendment.” Id. at 9.}
challenging school segregation in the 19th century, but the judicial battle was a springboard to victory in the local political arena; the state legislature enacted legislation securing integration. As Professor J. Morgan Kousser has written about the New York experience: “the failures of success and the ultimate success that stemmed from those failures . . . all would be missed by observers concerned only with the abstract principles embodied in printed court opinions.”

The early women’s movement also used the courts for the purposes of political agitation. At an 1869 women’s suffrage convention, a husband and wife team of Missouri suffragists, Francis and Virginia Minor, argued that, instead of agitating for a new constitutional provision granting women, feminists should assert that they already had the constitutional right to vote under the Fourteenth Amendment’s privileges and immunities clause. They urged women to attempt to vote and, if prevented, to sue the officials who had denied them that right. The Minors viewed litigation as a means not only of vindicating rights, but also of educating the public. Francis Minor urged that a test case be brought because, “in no other way could our cause be more widely, and at the same time definitely, brought before the public. Every newspaper in the land would tell the story, every fireside would hear the news. The question would be thoroughly discussed by thousands who now give it no thought.”

Several test cases were brought by what became known as the New Departure Movement. The case that stirred the most political debate and controversy was initiated

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121 Id. at 14.

when Susan B. Anthony convinced the Republican poll inspectors to allow her to vote in the 1872 election.

Anthony and her comrades created an immediate sensation around the country, earning both cheers and attacks. The *New York Times* boldly declared that “the act of Susan B. Anthony should have a place in history”; the *Toledo Blade* praised her for “keeping the public mind agitated upon the women’s rights question,” while the hometown *Rochester Union and Advertiser* condemned her for “female lawlessness.”

But Susan Anthony saw voting as a mere precursor to the main event. Encouraged by the response to her dramatic action, she hoped to launch a test case on behalf of the registered women who had been turned away from the polls. For Anthony, as for the abolitionists Chase and Stewart, litigation was both a means to win concrete rights and an opportunity to convert the courtroom into an arena for protest. A courtroom battle, she believed, would provide a dramatic forum for publicizing the cause. To her friend, the feminist leader Elizabeth Cady Stanton, she wrote about the exhilaration of casting a vote in a national election, and her expectation of the ensuing litigation: “[W]e are in for a fine agitation in Rochester on this question.”

Anthony could not have foreseen the course of events that was to result in one of the great state trials of the 19th century. On Thanksgiving Day, a federal marshal asked the women voters of Rochester to turn themselves in to be prosecuted under an 1870 federal statute, grandly titled “An Act to Enforce the Right of Citizens of the United

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123 ALMA LUTZ, 2 SUSAN B. ANTHONY: REBEL, CRUSADER, HUMANITARIAN 200 (1959); see also IDA HARPER, 1 THE LIFE AND WORK OF SUSAN B. ANTHONY 424-25 (1898).

124 STANTON, supra note 122, at 934.
States to Vote.” Designed to prevent former Confederates from voting illegally and to prevent Klan intimidation of black voters, the statute had ensnared as its first victims a respectable group of northern housewives who had voted for the Republican ticket.

The women did not surrender. As Anthony reported, “The ladies refusing to respond to this polite invitation, Marshal Keeney made the circuit to collect the rebellious forces.” Finely tuned to political theater, Anthony even demanded that the courteous and embarrassed marshal take her to jail in handcuffs. Eventually, all the women voters and the three election inspectors who had let them vote were indicted. The stage was thus set for a courtroom battle that would be even more dramatic than the test case Anthony had originally hoped to bring.

After her indictment in December 1872, Anthony launched a broad speaking campaign to educate the people of Rochester on the right of all citizens to have equal access to the ballot. Over the course of the next several months, Anthony spoke in twenty-nine different post-office districts in the county, hoping, she said, “to make a

125 id. at 628.

126 Of course, resort to test-case litigation had its critics, even among supporters of women’s suffrage. The famous abolitionist orator Wendell Phillips agreed with the New Departurists’ claim that the Fourteenth Amendment’s protection of citizens’ privileges and immunities required women suffrage but believed that the legal argument was “too good a handle for agitation to be risked by a speedy contest in the courts.” As Phillips prophetically argued, “an adverse decision would destroy its value as a new means of attack.” Woman Suffrage Before the Courts, The Revolution, June 11, 1871. The Nation opined that the change the New Departurists hoped for was too momentous to occur through judicial resolution; women’s suffrage, the paper editorialized, “could not be achieved by anything short of deliberate popular consent.” The Nation, June 26, 1987, at 426. The American Women’s Suffrage Association viewed the litigation effort as foolhardy, and even Stanton, while she admired much about the approach, was never enthusiastic about a court test.
verdict of guilty impossible."\textsuperscript{127} Her campaign obviously was having an impact, for the
district attorney moved to change the trial’s venue to another county, and the court
granted his motion.

The change of venue did not stop Anthony’s agitation. In the twenty-two days
before the opening of the trial, Anthony made twenty-one speeches in the new county to
which the action had been transferred. Another suffrage leader, Matilda Joslyn Gage,
spoke in an additional sixteen townships. Together they covered the entire county, taking
the offensive and declaring that “the United States [is] on trial, not Susan B. Anthony.”\textsuperscript{128}
Anthony publicized her argument that she had committed no crime but simply exercised
her citizen’s right to vote, as guaranteed by the Constitution.

Anthony clearly was successful in generating nationwide publicity. Her use of
the pending court proceeding as a forum on women’s suffrage set off a lively debate in
the press. The \textit{Syracuse Standard} wrote that “Miss S. B. Anthony . . . is conducting her
case in a way that beats even lawyers,” while the \textit{New York Commercial Advertiser}
admirred the “regular St. Anthony’s dance she leads the District Attorney . . . in spite of
winter cold or summer heat, [Anthony] will carry her case from county to county
precisely as fast as the venue is changed. One must rise very early in the morning to get
the start of this active apostle of the sisterhood.”\textsuperscript{129} Other papers excoriated Anthony’s
attempt to influence public opinion. A \textit{Rochester Union & Advertiser} piece was
headlined, “Susan B. Anthony as a Corruptionist,” and angrily declared that “United

\textsuperscript{127} STANTON, \textit{supra} note 122, at 630.

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} \textit{Id.} at 936.
States Courts are not stages for the enactment of comedy or farce.”

A reader wrote in that Anthony was committing “a law offense known as embracery,” defined as “such practices as lead to affect the administration of justice, improperly working upon the minds of jurors.”

Anthony’s trial opened on June 18, 1873, before the newly appointed Supreme Court Justice Ward Hunt. The packed courtroom included such notables as former President Millard Fillmore, Senator Charles Sedgwick, and former Congressman E. G. Lapham.

Justice Hunt immediately made it clear that he was determined to limit Anthony’s use of the case for political protest. He refused to permit Anthony to be a witness in her own behalf, ruling that she was incompetent, although he did allow the Assistant U.S. District Attorney to submit hearsay evidence of Anthony’s testimony at pretrial hearings.

Anthony’s lead attorney was retired New York State Appellate Judge and former New York lieutenant governor, Henry Selden. After Selden’s three-hour argument and the district attorney’s rebuttal, Judge Hunt read his prepared opinion. Written before the trial had commenced, it stated that Anthony had no right to vote under the Constitution and that any mistaken belief she may have had about such a right did not excuse her criminal action. As a matter of law, he directed the jury to find Anthony guilty and then discharged the jury.

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130 Id.
131 Id. at 937.
132 Id. at 647.
The court then fined Anthony $100 and the costs of the prosecution, to which Anthony replied that she would not pay a penny and would exhort women that “resistance to tyranny is obedience to God.” But Anthony was not sent to prison for refusing to pay her fine. In an unusual move for such a case, Hunt said that he would not order Anthony imprisoned until the fine was paid. As Anthony’s lawyer John Van Voorhis later commented, it was an adroit move, intended to deny Anthony the ability to use a writ of habeas corpus to take her case directly to the Supreme Court of the United States, where she would have had an excellent argument that her right to trial by jury had been denied. Anthony never paid the fine, the government never proceeded to enforce the fine or to jail her, the other women voters’ cases were not prosecuted, and Anthony lost her chance for Supreme Court review.

Anthony’s case did generate substantial public controversy. Virtually every newspaper in the country reported and commented on the trial, and several reprinted Anthony’s arguments about women’s right to vote.

133 Katherine Anthony, Susan B. Anthony: Her Personal History and Her Era 299 (1954).


135 The women voters were largely portrayed with sympathy: one newspaper described the “lawbreakers” as “elderly matronly-looking women with thoughtful faces, just the sort one would like to see in charge of one’s sickroom, considerate, patient, and kindly.” The Albany Law Journal agreed with the guilty verdict and suggested that Anthony “adopt the methods of reform that men use, or better, still, migrate,” but criticized Hunts’ decision to remove the case from the jury. The New York Sun attacked Hunt for violating one of the most important provisions of the Constitution, while the Utica Observer approved Hunts’ interpretation of the Fourteenth Amendment but nonetheless condemned his seizure of jury power. Lehman, supra note 134.
More than a thousand dollars and scores of letters of support poured in to Anthony after Hunt’s verdict. She used most of the money to publish a pamphlet containing a full report on the trial. Three thousand copies were sent out to libraries and newspapers all over the country, and five thousand copies of Selden’s argument were also distributed. The next year, one newspaper called Anthony “America’s best known woman.” She had used litigation successfully to protest women’s inequality, speaking to thousands of people about the case, engaging prominent figures in her agitation up to and including the President of the United States, and initiating debate in legal journals, as well as in the popular press of the day.

The New Departurists brought a number of other test cases, all of which lost in court. The decisive loss came when the Supreme Court unanimously ruled, in a case brought by the Minors that the Constitution did not guarantee women the right to vote. Despite their losses, the New Departurists as one historian has noted, were not primarily “outcome-oriented” litigants, but activists who believed that the real success of their strategy “must be measured in terms of the amount and kind of publicity it was able to generate.”

Susan B. Anthony’s case is now remembered as a noble, legitimate and useful attempt to enlist the courts and country in behalf of women’s right to vote. Supreme

136 ANTHONY, supra note 133, at 301.


139 KAREN O’CONNOR, WOMEN’S ORGANIZATIONAL USE OF THE COURTS 43 (1980).
Court Justice Sandra Day O’Connor, reflecting on the significance of Anthony’s case stated:

> In another respect, Susan B. Anthony was the clear victor. Her treatment at the hands of the judicial system won for her the sympathy even of those who had been opposed to her original act.”

Anthony was denied a jury trial precisely because she had successfully used her case as a forum for public agitation and protest.

Nor was Anthony the only early leader of the women’s movement to use the courts in this fashion. Margaret Sanger, the birth control activist, who in 1914 founded a magazine *Women Rebel*, “dedicated to the interest of working women,” provoked an indictment with the notion of using the resulting trial to garner publicity for her cause.

Similarly civil liberties organizations in the first part of the twentieth century, well before the well publicized law reform movements of the 1950s and 60s, used litigation as a means for publicizing their cause. The Free Speech League clearly saw the early 1900s free speech fights and the resulting court cases as a means of publicizing its radical first amendment views. Even the more conservative ACLU, despite Frankfurter’s early objections, used litigation in tandem with other means of publicizing its views. In the 1930s watershed case of *Hague v. CIO*, establishing the right to use public forums to publicize one’s views, one chronicler of the ACLU notes that

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140 O’Connor, *supra* note 137, at 662.

141 Rabban, *supra* note 59.

142 *Id.*
The ACLU did not simply run to the courthouse; it sent speakers like Norman Thomas to Jersey City to protest the Hague regime’s discrimination against labor organizers. It consciously sought out publicity in the media, including more conservative establishment newspapers. It persuaded influentials like Walter Lippman and Dorothy Thompson to speak out. And it solicited the assistance of organizations like the CIO. While litigation was critical, it was nevertheless only a single element in a well-orchestrated campaign of resistance.143

To summarize, these examples illustrate that throughout American history, political movements and organizations have resorted to the courts, and the federal courts in particular, not simply to win favorable court decisions, but as a mechanism to publicize these movements’ views. Even when this litigation lost in court, as in Chase’s or Anthony’s cases, the cases often generated substantial publicity and sympathy for the litigants. Lawyers such as Chase were viewed by respected legal observers such as Justice Story and Charles Sumner as being engaged in legitimate litigation and using appropriate strategies, and his legal work on behalf of fugitive slaves was one qualification that supported his appointment as Chief Justice of the United States Supreme Court.

III. First Amendment Protection for Using Courts as Forums for Protest

The use by protest movements of the courts as forums to express and publicize their views finds protection under the First Amendment. On many occasions, the Supreme Court has proclaimed that litigation is a “form of political expression” protected by the First Amendment.\footnote{NAACP v. Button, 371 U.S. 415, 429 (1963).} In 1972, the Court held that “the right of access to the courts is indeed but one aspect of the right of petition.”\footnote{California Transport v. Trucking Unlimited, 404 U.S. 508, 510 (1972).} The Court has reiterated that “[f]iling a complaint in court is a form of petitioning activity,” protected by the First Amendment.\footnote{McDonald v. Smith, 472 U.S. 479, 484 (1983); see also Bill Johnson’s Restaurants, Inc. v. NLRB, 461 U.S. 731, 745 (1983); SureTan v. NLRB, 467 U.S. 883, 897 (1984); Professional Real Estate Investors v. Columbia Pictures Industries Inc., 508 U.S. 49 (1993).}
The Supreme Court has also specifically noted the difference between private litigation to resolve disputes and public interest lawsuits which are at the core of the First Amendment’s protective ambit and are thus entitled to greater protection. In *NAACP v. Button*, for example, the Court noted that “[i]n the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression . . . resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious or avaricious use of the legal process for purely private gain.”

The *Button* Court felt that “regulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest.”

Justice Powell, writing for the Court in *In re Primus* also relied on the distinction between public interest litigation and litigation undertaken primarily for pecuniary gain to determine the constitutionally permissible scope of a state’s proscription of solicitation. The Court noted that Primus’ actions were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain. The question presented in this case is whether in light of the values protected by the First and Fourteenth Amendments, these

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148 *Id.* at 440.

differences materially affect the scope of state regulation of the conduct of lawyers. 150

Justice Powell held that those differences were material.151 He noted that for the ACLU, like the NAACP, litigation is a form of political expression and political association. Most importantly, Justice Powell argued that “The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public.”152 In Primus, as in Button the Court recognized that litigation can be a form of “cooperative, organizational activity,” which is part of the “freedom to engage in association for the advancement of beliefs and ideas” protected by the First Amendment.153

The Court has also relied on the First Amendment to severely limit the applicability of federal statutes to sanction litigation that was undertaken in “bad faith.”

In Professional Real Estate Investors v. Columbia Pictures Inc., the Court invoked the

150Id. at 422.

151The court on other occasions has noted that the difference between public interest litigation and litigation for pecuniary gain is significant in determining the constitutionality of bar rules. Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995). The American Bar Association has also recognized that the rules for professional conduct cannot ignore the differences between public interest and purely private litigation. In deciding that a National Lawyers Committee opposed to New Deal legislation could, consistent with the rules of professional ethics, offer counsel without fee or charge to anyone financially unable to retain counsel to challenge such legislation, the ABA’s Committee on Professional Ethics and Grievances held that “the question presented, with its implication, involves problems of political, social and economic character that have long since assumed the proportions of national issues, one side or the other which multitude of patriotic citizens have aligned themselves. These issues transcend the range of professional ethics.” Opinion 148, Opinion of the Committee on Professional Ethics and Grievances, American Bar Association 308, 312 (1957).

152Id. at 431 (emphasis added).

153436 U.S. at 438 n.32.
First Amendment right of petition to interpret the Sherman Act as immunizing a litigant from antitrust liability even where the litigant was motivated solely by an anti-competitive intent and not by an expectation of a successful outcome to the litigation. Such litigation was entitled to immunity unless it was also “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.”

Moreover, even if subjectively “bad faith,” anti-competitive litigation presented a “novel” claim without any supporting authority, it was nonetheless entitled to antitrust immunity, “as long as a similarly situated reasonable litigant could have perceived some likelihood of success.”

Similarly, in Bill Johnson Restaurants, Inc. v. NLRB the Court held that First Amendment and federalism concerns prevented “a well-founded lawsuit” from being “enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff’s desire to retaliate against the defendant for exercising rights protected by the [NLRA].” “The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right.” The Court recognized in Johnson, as in Primus, that it is legitimate to petition the judiciary not merely for compensation and the psychological benefits of vindication but also for the “public airing of disputed facts.”

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155 Id. at 65.
157 Id. at 741.
158 Id. at 743.
The Court relied on its antitrust jurisprudence to determine that the Board could only enjoin suits brought with a retaliatory motive that were also baseless.\textsuperscript{159}

In its most recent holding, \textit{B&K Construction Company v. NLRB}, the Court further articulated the protection the First Amendment accords litigation.\textsuperscript{160} There the question was whether the NLRB may impose liability on an employer for a retaliatory lawsuit that turned out to be unsuccessful. The Court first suggested that baseless or frivolous lawsuits might not be completely unprotected by the First Amendment. Analogizing baseless litigation to false statements, the majority noted that “the First Amendment requires that we protect some falsehood in order to protect \textit{speech that matters}.\textsuperscript{161} Baseless litigation may be protected to ensure that the freedom of speech and press receive “breathing space, essential to their fruitful exercise”—a protection analogous to that articulated in \textit{New York Times v. Sullivan} that a public official seeking damages for defamation prove that false statements were made with knowledge or reckless disregard of their falsity.\textsuperscript{162} Justice O’Connor’s majority opinion stated that these “breathing space” principles were consistent with the Court’s prior cases limiting regulation of litigation to “suits that were both objectively and subjectively motivated by an unlawful purpose.”\textsuperscript{163} Ultimately, the Court did not decide the scope of First

\textsuperscript{159} Id. at 744 (citing California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972)).

\textsuperscript{160} 536 U.S. 516 (2002).

\textsuperscript{161} Id. at 531 emphasis in original quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

\textsuperscript{162} Id. (quoting NAACP v. Button, 371 U.S. 415, 433).

\textsuperscript{163} Id.
Amendment protection to be accorded frivolous litigation, since the case involved the class of “reasonably based but unsuccessful litigation” which had a retaliatory, anti-union motive.164

Justice O’Connor stated that the First Amendment protects all genuine petitions and not merely those that are successful. The “genuineness of a grievance does not depend on whether it succeeds.”165 Equally important, the Court articulated the First Amendment interests advanced by an unsuccessful but reasonably based suit. Unsuccessful suits allow the “public airing of disputed facts . . . and raise matters of public concern. They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around.”166

Those values—public airing of disputes, raising issues of public concern, promoting a community’s own narrative of the law, which may not be accepted by the state immediately but which is eventually adopted later on—are values traditionally associated with litigation. The Court in B&K thus recognizes that litigation has legitimate and important purposes apart from winning in Court.

Despite its broad invocation of First Amendment values and principles, the Court’s actual holding was quite narrow. The Court avoided deciding the difficult constitutional issue of the extent to which the First Amendment protects reasonable, but unsuccessful litigation brought with a retaliatory purpose, by adopting a limiting construction of the relevant NLRA provision. Nor did the court decide whether the

164 Id.
165 Id. at 532.
NLRB could sanction an unsuccessful but reasonably based lawsuit which was filed solely to impose the costs of the litigation process. Finally, the Court specifically included the caveat that “nothing in our holding today should be read to question the validity of common litigation sanctions imposed by courts themselves—such as those authorized under Rule 11 of the Federal Rules of Civil Procedure . . .”\(^{167}\)

Taken individually, each of these cases invoking the First Amendment to determine the permissible scope of state or congressional regulation of litigation may stand for relatively narrow propositions. But as a whole, these cases have profound implications for the role of litigation that seeks not only or even primarily to obtain a favorable reply from the government official petitioned—whether it be an Executive official or judge—but to provoke public debate and discourse on the subject of the petition. Notwithstanding Justice O’Connor’s caveat concerning Rule 11 and other litigation sanctions imposed by courts, the \(B\&K\) opinion does appear to call into constitutional question the use of sanctions against lawyers such as Ramsey Clark or Bill Kunstler for bringing litigation to educate the public about important issues.

\section*{B. Sanctions and the First Amendment}

The use of courts as forums to spark political protest and debate throughout American history, and the Supreme Court’s more recent explicit recognition of the first amendment values and protections of litigation support the legitimacy of litigation brought to achieve these purposes. Courts must analyze Rule 11 and other similar state court sanctions in light of the First Amendment protection accorded litigation. Yet many

\footnote{\textit{B\&K Constr.}, 536 U.S. at 537.}
court decisions, including a recent Fifth Circuit Court of Appeals decision, pay no heed to First Amendment principles when imposing sanctions on attorneys.\textsuperscript{168}

The authority of judges to sanction attorneys who present frivolous claims, or bring non-frivolous claims for what a court terms an improper motive, or seek publicity for their clients or causes is the power to determine that certain legal arguments or strategies are illegitimate and to use the state’s power to stifle and curtail their articulation and development. During the past two decades, public interest attorneys such as prominent Civil Rights advocates Ramsey Clark and Bill Kunstler have been sanctioned for what courts termed frivolous claims or improper motives. In other cases, defendants have sought sanctions in an effort to chill litigation, as occurred in the litigation challenging the United States policies towards Haitians fleeing persecution in that country. In that case, the government responded to the plaintiffs’ lawsuit by moving to impose Rule 11 sanctions against the plaintiffs’ lawyers for bringing a frivolous lawsuit.\textsuperscript{169} That motion was obviously an attempt to chill the lawyers and gave them “considerable concern,” although it became moot when the district court granted the plaintiffs the relief they sought.\textsuperscript{170} Many lawyers were so chilled: a 1980s American Judicature Society study found that almost one-third of lawyers representing civil rights plaintiffs reported that they had declined to present a claim they believed to be

\textsuperscript{168}Whitehead v. K-Mart Corp., 332 F.3d 796 (5th Cir. 2003) (en banc).

\textsuperscript{169}Anthony Lewis, Abroad at Home; Mockery of Justice, N.Y. TIMES, May 2, 1992, at A29; Victoria Clawson, Elizabeth Detweller & Laura Ho, Litigating as Law Students: An Inside Look at Haitian Centers Council 103 Y ALE L.J. 2337, 2343 (1994).

meritorious.” While the 1993 Amendments to Rule 11 have significantly ameliorated the problem, the text of Rule 11 and its interpretation by some courts still may create a chilling effect on public interest litigation.

Rule 11(b)(1) provides that a litigant or lawyer can be sanctioned where a case or motion is brought “for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” Rule 11(b)(2) requires the attorney to certify that the claim or defense or other legal contention are not baseless in that it is “warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.” The requirement that a lawsuit or motion not be presented for an improper purpose raises two First Amendment questions. The first is what is an improper purpose; more specifically is a lawsuit that has as either a purpose or primary purpose obtaining publicity for a plaintiff’s cause improper. Second, can a lawsuit that is nonfrivolous nonetheless be sanctioned because it was brought in whole or in part for political purposes. The questions are important because, as the social science research explored at the beginning of this article demonstrates, many public interest cases, whether successful or

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171 Lawrence C. Marshall et al., The Use and Impact of Rule 11, 86 Nw. U. L. Rev. 943, 971 (1991). An American Judicature Society Study found that lawyers who spent most of their time representing plaintiffs in civil rights suits were “far more likely to be affected by Rule 11 than other lawyers” and that 31% of lawyers representing civil rights plaintiffs reported that they had declined to present a claim they believed to be meritorious). Margaret Z.L. Samer & Carl Tobias, Recent Work of the Civil Rules Committee, 52 Mont. L. Rev. 307, 313 (1991). But see Carl Tobias, The 1993 Revision of Federal Rule 11, 70 Ind. L.J.171 (1994).


unsuccessful, are brought with an aim of seeking favorable publicity for a plaintiff’s cause. Yet Rule 11 can be read to render such litigation illegitimate and sanctionable.

1. Publicity as an Improper Purpose

The courts have divided on whether a litigant who files an action or a motion seeking publicity has an improper purpose under Rule 11(b)(1). The Second and the Ninth Circuits have held that seeking publicity is not an improper purpose—at least for claims that are nonfrivolous. The Second Circuit recently overturned a District Court’s imposition of sanctions against litigants who had brought an action with the purpose of obtaining publicity to put pressure on defendants:

The district court held that the filing of the complaint with a view to exerting pressure on defendants through the generation of adverse and economically disadvantageous publicity reflected an improper purpose.

To the extent that a complaint is not held to lack foundation in law or fact, we disagree. It is not the role of Rule 11 to safeguard a defendant from public criticism that may result from the assertion of nonfrivolous claims. Further, unless such measures are needed to protect the integrity of the judicial system or a criminal defendant’s right to a fair trial, a court’s steps to deter attorneys from, or to punish them for, speaking to the press have serious First Amendment implications.174

Similarly, the Ninth Circuit rejected sanctions against plaintiffs whose motives were arguably to delay and defeat a recall attempt against a city councilman rather than merely obtaining the specific voting rights sought in the complaint. The court held that such a

174Sussman v. Israel, 56 F.3d 450, 459 (2d Cir. 1995).
political purpose would not be improper under the Rule. “[T]he political inspiration for
the federal lawsuit does not necessarily mean that the action is ‘improper’ within the
meaning of Rule 11. Much of the redistricting litigation under the Equal Protection
Clause has been inspired by those with a transparent political interest.”

Other courts, however, disagree. The Fifth Circuit has recently held that an
attorney can be sanctioned because he had an improper purpose of embarrassing his
adversary by obtaining adverse publicity. That the attorney “orchestrated” a media
event was strong evidence of his improper purpose which was sanctionable even if the
action the attorney took was not frivolous. Some District Courts have also concluded that
plaintiffs seeking publicity by filing a reasonable complaint constitutes an improper
purpose. The Fourth Circuit suggested in Kunstler that holding a press conference and
seeking publicity was an improper purpose if that were the plaintiff’s central or primary
purpose in filing the complaint.

These cases illustrate the confusion surrounding the definition of an improper
purpose. Litigation brought that has the purpose of sparking public debate or promoting
greater public awareness of an issue, or obtaining publicity to put pressure on a
defendant, should not be viewed as improper. Nor can the filing of complaints or

175 Zalvidar v. City of Los Angeles, 780 F.2d 828, 831 (9th Cir. 1986).
178 In re Kunstler, 914 F.2d 505 (4th Cir. 1990). Kunstler and some other cases
suggesting that seeking publicity constitutes an improper purpose (but not the Fourth
Circuit’s decision in Whitehead) occurred in the context of cases the court also found to
be frivolous. Therefore those cases are not necessarily inconsistent with the Second and
Ninth Circuit’s finding that seeking publicity or some other political goal does not
constitute an improper purpose in the context of nonfrivolous litigation.
motions through press conferences be viewed as either in “poor taste” or evidence of improper purpose; public interest lawyers who file pro bono litigation frequently announce their suits in press conferences for the purpose of drawing broad public attention to their grievances.\textsuperscript{179} This type of litigation falls within the core First Amendment protection articulated by the court in \textit{Button}, \textit{Primus} and \textit{B&K}, and cannot be sanctioned simply because the petition is directed at the public and not simply the court.

\textsuperscript{179}See Brief for Petitioner in Gentile v. Nevada at 6. \textit{See also} note 44 \textit{supra}.
2. Sanctioning Nonfrivolous Lawsuits That Have an Improper Purpose

The text and the history of Rule 11 also suggests that a finding of any improper motive alone is sufficient for the court to award sanctions. The Circuit Courts are split on this issue. A number of Circuits have departed from the text of Rule 11(b)(1) and will not sanction a plaintiff for filing a nonfrivolous complaint, even if the plaintiff’s purpose is improper.180 The Seventh Circuit, on the other hand, has repeatedly ruled that sanctions are appropriate where a party has filed a nonfrivolous complaint for an improper purpose,181 and the Fifth Circuit recently has concurred in that approach.182 Other circuits, in dictum, have suggested that improper purpose alone can support Rule 11 sanctions even where a complaint is nonfrivolous.183 A number of District Courts have sanctioned plaintiffs based solely on a finding of improper purpose independent of an analysis of whether the complaint was nonfrivolous.184

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181 Szabo Food Service Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987); Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928 (7th Cir. 1989) (en banc); Kapko Mfg. Inc. v. C&O Enters., Inc., 886 F.2d 1485, 1491 (7th Cir. 1989).


183 For example, Justice Breyer, when he sat on the First Circuit joined an opinion stating that Rule 11 has been read “to reach groundless but ‘sincere’ pleadings, as well as those which, while not devoid of all merit, were filed for some malign purpose.” Lanelloli v. Foy, 909 F.2d 15, 18-19 (1st Cir. 1990). The Third and Eleventh Circuits have also suggested that sanctions are appropriate for a complaint filed with improper
It seems inconsistent that the First Amendment right of access to Article III courts requires that the federal antitrust statute be read to allow regulation only of suits that are both objectively baseless and subjectively motivated by an unlawful purpose, yet Rule 11 can sanction lawsuits that are either objectively baseless or undertaken with an improper purpose. Justice O’Connor suggests that sanctions imposed on litigants by the courts themselves, are different than sanctions created by federal law. Yet it is unclear why the First Amendment should afford less protection against judicially imposed sanctions, since both anti-trust and Rule 11 sanctions may only be imposed by a court after it concludes that a lawsuit is “improper.” Certainly the legislature’s interest in preventing anti-competitive or anti-union lawsuits is as important, if not stronger, than the judiciary’s interest in preventing frivolous or otherwise improper litigation. While the anti-trust treble-damages remedy may pose a serious chilling effect, so too obviously does the potential of Rule 11 sanctions.

3. Frivolous Claims

The Rule 11 requirement that a litigant certify that his or her claims are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal purpose alone. CTC Imports & Exports v. Nigerian Petroleum Corp., 951 F.2d 573, 578 (3d Cir. 1991); Didie v. Howes, 988 F.2d 1097, 1104 (11th Cir. 1993) (Rule 11 requires sanctions for filing of a frivolous pleading or a pleading in bad faith for an improper purpose). See generally Andrews, supra note 19, at nn.122-25.

184 Ballentine v. Taco Bell Corp., 135 F.R.D. 117, 122 (E.D.N.C. 1991) even though the plaintiff had made a reasonable inquiry and had a legitimate purpose of seeking relief, solely because his improper purpose of harassing defendant outweighed the proper one. In Bryant v. Brooklyn Barbeque Corp., 130 F.R.D. 665 (W.D. Mo. 1990) the court found that plaintiff had not made a proper factual inquiry, but even had a reasonable basis existed for the filing of the complaint, because it was filed solely for publicity and harassment, sanctions were appropriate.

of existing law or the establishment of new law is equally problematic. Ironically, the
replacement of the old subjective, bad faith test with an objective reasonableness test has
made the amended Rule 11 much more unpredictable.\textsuperscript{186} Empirical research conducted
by the Federal Judicial Center found that presented with a number of hypothetical cases,
judges most often divided almost equally as to whether a case was legally frivolous.\textsuperscript{187}
Experience in actual litigation is consistent with the Center’s research. District court and
appellate judges have been unable to agree on whether a case is frivolous. Circuit courts
have held that claims that district courts judges sanctioned as frivolous were not merely
reasonable but winning,\textsuperscript{188} and that claims District Courts upheld were legally
frivolous.\textsuperscript{189} The Supreme Court Justices and circuit court panels have found a claim to
be so frivolous that no reasonable litigant could believe it meritorious even though strong

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\textsuperscript{186}Linda Ross Meyer, \textit{When Reasonable Minds Differ}, 71 N.Y.U. L. REV. 1467,
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\textsuperscript{187}SAUL M. KASSIN, AN EMPirical STUDY of RULE 11 SANCTIONS (1985).
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\textsuperscript{188}Warren v. City of Carlsbad, 58 F.3d 439, 444 (9th Cir. 1995); In re Edmonds,
924 F.2d 176, 181-82 (10th Cir. 1991); Goldman v. Belden, 754 F.2d 1059 (2d Cir.
1985); Operating Eng’rs Pension Trust v. A-C Co., 859 F.2d 1336, 1343-44 (9th Cir.
1988); Trident Ctr. v. Conn. Gen. Life Ins. Co., 847 F.2d 564, 570 (9th Cir. 1988);
Cooper v. City of Greenwood, 904 F.2d 302 (5th Cir. 1990); Stevens v. Lawyers Mut.
Liab. Ins. Co., 784 F.2d 1056, 1060 (4th Cir. 1986); Locomotor USA Inc. v. Korus Co.,
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\textsuperscript{189}Dilley v. United States, No. 93-4225, 1995 U.S. App. LEXIS 4480 at *5 (10th
Cir. Mar. 6, 1995); Oil and Gas Futures Inc. v. Andrus, 610 F.2d 287, 288 (5th Cir.
1980); Sanford Levinson, \textit{Frivolous Cases: Do Lawyers Really Know Anything at All}, 24
OSGOODE HALL L.J. 353, 370-71 (1986) (commenting on circuit court’s opinion that
plaintiff’s argument was “quite incredible,” but that District Court had apparently
accepted it and the circuit had to reverse him); Meyer, \textit{supra} note 186, at 1484 (court
agreed with sanctioned argument, though controversy moot).
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opinions by their presumably reasonable brethren find that the litigant had stated a valid claim. 190

Most commentators concur that despite the Rule 11’s attempt to create an “objective” standard of frivolous litigation, courts have been unable to develop a principled line for determining whether a complaint is so baseless as to be frivolous. 191 Indeed, some scholars have argued that the definition of frivolous is fundamentally indeterminate, 192 or as Professor Sandford Levinson has put it:

It is, I suspect, no coincidence that writers on frivolousness have tended to adopt versions of Justice Stewart’s famous (or is the correct word

190 For example in Hughes v. Rowe, 449 U.S. 5 (1980) the Court reversed a dismissal of a prisoner’s petition and the lower court’s award of attorney’s fees against the prisoner. Justice Rehnquist dissented arguing that the prisoner’s claim was totally meritless and therefore the “award of attorney’s fees was entirely proper.” As Mark Tushnet has written, “[I]t seems that, in Justice Rehnquist’s view, a claim can be ‘meritless’ even though six members of the Supreme Court found that it stated a claim on which relief could be granted.” Cited in Levinson, supra note 189, at 377. See also Hyde v. Van Wormer, 106 S. Ct. 403, 404 (1985) (damages awarded for frivolous petition for certiorari where three Justices believed petition was not frivolous); Tatum v. Regents of University of Nebraska, 462 U.S. 1117 (1983) (same); Gullo v. McGill, 462 U.S. 1101 (1983) (three Justices would have awarded damages for frivolous appeal); Garr v. U.S. Healthcare Inc., 22 F.3d 1274, 1281-83 (3d Cir. 1994); Alia v. Michigan Supreme Court, 906 F.2d 1100, 1102-03, 1108 (6th Cir. 1990) and cases cited in Meyer, supra note 186.


192 Meyer, supra note 186.
"notorious"?) test of pornography, that is "[P]erhaps I could never succeed in intelligently [defining it] . . . [b]ut I know it when I see it."\textsuperscript{193}

Indeterminate or vague legal standards chill speech, and that has been the effect on public interest lawyers asserting novel or cutting edge claims. The vagueness or indeterminancy of the test for frivolous is evident in cases where a court imposes sanctions upon a finding that "the case offered no hope whatsoever of success."\textsuperscript{194} But the "no chance of success" standard inherently mixes law and politics indeterminately, forcing attorneys to decide whether an argument is legally reasonable based on whether anybody believes in the contemporary political environment any court would adopt it. This suggests that the frequent litigation brought by Black litigants in the early 1900s attacking Plessy\textsuperscript{195} would have been sanctionable since surely any "reasonable" observer would agree that there was no chance of success whatsoever.

Northwestern Law School Professor Anthony D’Amato has argued that the Libyan plaintiffs in \textit{Saltany} had a legitimate legal argument that the United States and Great Britain bombing of Libya constituted a war crime that should not be accorded

\footnote{\\textsuperscript{193} Levinson, \textit{supra} note 189, at 370. \textit{See also} R. Hermann, \textit{Frivolous Criminal Appeals}, 47 N.Y.U. L. Rev. 701, 705 (1972) ("frivolousness, like madness and obscenity, is more readily recognized than cogently defined"). Report of the Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts, \textit{reprinted in} 18 \textit{Fordham Urb. L.J.} 3, 12 (1990) ("The circularity of the [objective tests] definition, however, inevitably leads to and invites subjective decisionmaking.").

\textsuperscript{194} \textit{Saltany}, 886 F.2d 483 (D.C. Cir. 1989) (per curiam); Buckley, Ginsburg, and Sentelle, \textit{cert. denied}, 495 U.S. 932 (1990). \textit{See also} B&K \textit{Construction}, 536 U.S. 516 and \textit{Professional Real Estate Investors}, 508 U.S. at 65 (articulating that test). One commentator asserts that the test of "absolutely no chance of success" is the "prevailing approach" of many courts to frivolousness. Schwarzer, \textit{supra} note 191, at \_\_\.

\textsuperscript{195} Gladys Tignor Peterson, \textit{The Present Status of the Negro Separate School as Defined by Court Decisions}, 41 J. NEGRO EDUCATION 351-74 (July 1935).}
immunity under the Nuremberg precedent established by the United States after World War II.\textsuperscript{196} The reason that a reasonable observer could determine that the Saltany litigation was hopeless was not because of the unreasonableness or frivolousness of the plaintiffs’ legal argument. Rather, it was the political and legal reality that United States courts have refused to apply the Nuremberg precedent and more generally international law norms against United States officials in U.S. courts. Nor should Salmon Chase have been sanctioned for appealing the \textit{Van Zandt} case to the Supreme Court, nor the Women Suffrage Movement for continuing the \textit{Minor} litigation in the Supreme Court, despite the certainty in both cases that they would lose. Both cases were presenting arguable legal theories that resonated with a substantial sector of the American public, if not with the contemporary court to which they argued.

The 1993 Amendments to Rule 11 sought to blunt the criticism that the threat of sanctions had discouraged novel litigation.\textsuperscript{197} The Advisory Committee made clear the broad latitude to be given novel legal claims, stating that courts should “consider whether the litigant has support for its theories even in minority opinions in, law reviews, or through consultation with other lawyers.”\textsuperscript{198} Similarly, some courts have discarded the approach that looks at the objective frivolousness of plaintiffs’ claims in favor of an

\textsuperscript{196}D’Amato, \textit{supra} note 10.

\textsuperscript{197}The Advisory Committee found support for the criticism of the rule that “it occasionally has created problems for a party which seeks to assert novel legal contentious.” Tobias, \textit{supra} note 171, at 180 (citing Advisory Committee Report).

\textsuperscript{198}Fed. R. Civ. P. 11 Advisory Committee’s note \textit{reprinted in} 146 F.R.D. 583, 586-87.
approach that analyzes whether the attorney’s research and preparation of the litigation or motion was objectively reasonably.199

Read properly, the Rule immunizes litigators who bring reasonably researched and thought-out claims arguing claims on an issue of public importance. That is because a colorable argument can be constructed for virtually any proposition: Chase’s argument that the Fugitive Slave Law was unconstitutional,200 Professor Joseph Singer’s argument that socialism is implied in the Constitution,201 Professor Gary Lawson’s argument that “the modern administrative state openly flouts almost every important structural precept of the American constitutional order,”202 or my own argument that the political branches of government are constitutionally bound by the fundamental precepts of international law.203 If these propositions are not frivolous, and the Advisory Committee’s notes suggest that they should not be so considered, what claims are frivolous? As one commentator has noted “it is extremely difficult in practice, if not impossible in principle, to devise an ‘extension, modification or reversal’ exception that does not devour the ‘unwarranted by existing law’ rule.”204


200 See pp. ___-___ supra.


204 Attinson, supra note 191, at 288.
Remarkably, many court decisions have not even recognized the applicability of the First Amendment in the Rule 11 context. For example the Court of Appeals’ decision in Saltany never mentioned the First Amendment when it held that sanctions were required because federal courts do not properly “serve as a forum for protests.”

The indeterminacy of a determination whether a claim is objectively frivolous requires a recognition that the First Amendment protects lawyers who make losing arguments about real harms and important values in order to promote public dialogue. The First Amendment requires some protection or “breathing space” for frivolous lawsuits, particularly those that reflect core First Amendment values of presenting important issues of public concern, just as the Amendment precludes public officials from recovering damages for defamation unless they can prove actual malice. For a court to sanction a legal argument as “objectively frivolous” is to determine that it is beyond the pale, beyond discussion in the courtroom. That the law, like truth, is not static, requires that the remedy for a legal petition deemed “frivolous” is to respond to it, not sanction it.

As a New York Bar Association Committee eloquently stated:

Access to the court system is a basic tenet of the American legal and historical tradition. A sanctions provision which exerts a chilling influence on creative counsel does violence to this tradition. The sanction of dismissal or the denial of relief by the court is a sufficient safeguard.

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205 Saltany, 886 F.2d at 440.

206 B&K, 536 U.S. 516, 531.

207 Meyer, supra note 186, at 1492.
Indeed, in our common law tradition, it is bad public policy to provide judges with a tool that would permit them not only to dismiss an action, but also to sanction the losers when in their view the claims or theories were frivolous.\textsuperscript{208}

C. The Appropriate Role of Lawyers in the Court of Public Opinion: Sanctions for Attorney’s Speech

A model that views litigation as a forum for educating the public also raises questions as to the appropriate role of lawyers as advocates outside the courtroom. That a lawyer should not argue his or her case outside the courtroom has long been articulated as a basic obligation of the legal profession.\textsuperscript{209} That view ignores the long tradition in American law recounted above of prominent lawyers arguing important law reform cases not merely in the courts of law, but in the court of public opinion.

The explosion in the media’s attention to the law, particularly in such high profile, high publicity trials as the murder trial of Sam Sheppard in the 1960s and the O.J. Simpson trial in the 1990s, has sparked a vigorous debate over the circumstances in which a lawyer may argue his or her case outside the courtroom.

\textsuperscript{208}Report, FORDHAM URBAN L.J., \textit{supra} note 193, at 8-9. The committee recommended a standard that would impose sanctions only for abusive conduct, not frivolous claims position that ought to be the rule: that conduct sanctionable ought to be abusive rather than frivolous, which it defined abusive conduct as conduct “undertaken or omitted primarily to delay or prolong unreasonably the resolution of the litigation or to harass or maliciously injure another.” \textit{Id.} at 12. That recommendation has not been adopted by the New York courts.

\textsuperscript{209}See Note, \textit{Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion}, 95 COLUM. L. REV. 1811 (1995) [hereinafter \textit{Legal Spin Control}]. See, for example, Canons of Professional Ethics, Canon 20 (1908), in American Bar Association, Selected Statutes, Rules and Standards on the Legal Profession 237 (1990) (“Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned.”).
which a lawyer may engage in extrajudicial advocacy. Some courts, commentators and leaders of the bar have urged that a lawyer’s proper function is to “present his (or her) case in the courtroom, not . . . to build a favorable climate of public opinion,” and would permit rules narrowly limiting the circumstances in which a lawyer may present her client’s case to the public.\textsuperscript{210} Other judges and commentators have concluded that an attorney’s advocacy for his client outside the courtroom is both legitimate and strongly protected by the First Amendment. They would strictly limit the restrictions the bar and judiciary may place on such speech as those necessary to protect against a clear and present danger to the administration of justice.\textsuperscript{211}

Rule 3.6 of the ABA Model Rules of Professional Conduct, adopted in 1983 and then amended in 1994, attempts to weave a compromise between the competing views, yet is significantly more protective of lawyers’ speech than the rules contained in the older Model Code of Professional Responsibility.\textsuperscript{212} While the Model Code sees little public value in attorneys’ extrajudicial speech, the commentary to the Model Rule recognizes that “there are vital social interests served by the free dissemination of

\textsuperscript{210}See American Bar Association, Standards Relating to Fair Trial and Free Press, 92 (1966); State v. Van Duyne, 204 A.2d 841, 852 (N.J. 1964); Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 176 (4th Cir. 1994).


\textsuperscript{212}For example, the Model Code of Professional Responsibility DR 7-107 (1988), stated that it is the duty of a lawyer not to release information or opinion “if there is a \textit{reasonable likelihood} that such dissemination would interfere with a fair trial,” while the newer Model Rules provide that the lawyer shall not make an extrajudicial statement if it “will have a substantial likelihood of materially prejudicing an adjudicative proceeding.”
information about events having legal consequences and about the legal proceedings themselves.”213

Both lawyers’ use of the media and restrictions on lawyers’ speech have become increasingly common in the last few decades.214 The battle has become particularly intense over restrictions on criminal defense attorneys’ speech in the context of an ongoing or pending criminal trial. In Gentile v. State Bar, the Supreme Court narrowly divided 5-4 on the First Amendment standard to be applied to attorney speech. Writing for the majority, Justice Rehnquist upheld a Nevada Rule that was based on Model Rule 3.6 which prohibited a lawyer from making “an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.”215 The Court held that the First Amendment did not require the state to meet a “clear and present danger” standard before disciplining an attorney for public pronouncements about a pending criminal trial, but permitted such discipline upon a lesser showing of “substantial likelihood of material prejudice.”216 The court balanced the general First Amendment interests in information about criminal trials against “the basic premise of our legal system . . . that lawsuits should be tried in court, not in the media.”217 Writing for four Justices, Justice Kennedy would have applied the

214 Chemerinsky, supra note 51; Legal Spin Control, supra note 209.
216 Id. at 1071-76.
217 Id. at 1080 n.6, 1070-71.
First Amendment clear and present danger test to state prohibitions on attorney speech, and not the more deferential balancing test of the majority. Kennedy rejected the state’s argument that attorney contact with the press during the pendency of a trial somehow “is inimical to the attorney’s proper role,” and pointed out that the State’s disciplinary rules did not posit any inconsistency between an attorney’s role and discussions with the press. Moreover, Kennedy recognized the legitimacy, value and even necessity in some circumstances of attorneys’ commentary to the press. For attorneys hold “unique qualifications as a source of information about pending cases,” and that in some circumstances, an attorney’s “press comment is necessary to protect the rights of the client and prevent abuse of the courts.”

Despite the majority view that lawyer’s speech about pending cases can be regulated under a less demanding First Amendment standard, the court nonetheless reversed the State’s discipline of the lawyer for his comments to the press. A majority of the Court, including Justice O’Connor, who had joined Justice Rehnquist’s opinion on the First Amendment standard to be used, found the Disciplinary Rule, as interpreted by the Nevada Supreme Court, void for vagueness. Attorney Gentile had carefully researched the rule and had attempted to comply with its safe harbor immunity for a lawyer to “state without elaboration the general nature of the . . . defense.” In its vagueness determination, the court held that the First Amendment required the state to regulate lawyer’s speech clearly enough to avoid the suppression of speech critical of those who

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218 Id. at 1056 (Kennedy, J.).

219 Id. at 1056-57, 1058-59.

enforce the law, a requirement particularly relevant to the regulation of “the criminal defense bar, which has the professional mission to challenge actions of the state.” In a sense, the Court’s vagueness holding in *Gentile* is similar to court opinions in the Rule 11 arena that would not sanction well researched complaints because they meet the stand of objective reasonableness, even if a court might find that the claims they presented had no chance of success.221

The Supreme Court’s *Gentile* decision thus reflects the deep division within the Bar about the legitimacy of and protection to be accorded attorney speech. While *Gentile* and most other attorney speech cases occur in the context of a criminal case, Model Rule 3.6 at issue in *Gentile* is applicable to civil cases also,222 and there have been attempts to sanction or gag attorneys or litigants in conjunction with public interest civil litigation such as environmental litigation.223

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221 *Id.* at 1051. Compare with Mars Steel Corp. v. Continental Bank, 880 F.2d at 932-33.

222 Rule 3.6 speaks of prejudice to any adjudicative proceeding, including civil trials. However, the commentary makes clear that the nature of the proceeding is relevant to a determination of prejudice, with a prejudicial effect of a statement much less likely in civil and non-jury trials. The older Model Code specifically precluded a lawyer from making an extrajudicial statement that would be disseminated relating “to his opinion as to the merits of the claims or defenses of a party, or any other matter reasonably likely to interfere with a fair trial . . . .” DR 7-107(G).

223 See Colorado Supreme Court Grievance Committee v. District Court, City and County of Denver, 850 P.2d 150 (Colo. 1993) wherein an attorney for an environmental group was investigated by the Colorado Office of Disciplinary Counsel in connection with the attorney’s speaking at a Press Conference about a law suit the group had filed and his giving interviews to the press. *See also* Jennifer L. Johnson, *Empowerment Lawyering: The Role of Trial Publicity in Environmental Justice*, 23 B.C. ENVTL L. REV. 567, 590-93 (1996) (describing Colorado case) (the attorney was not sanctioned and the Colorado rule changed to make it more difficult to sanction attorneys). *See also* Ruggieri v. Johns-Manville Products Corp., 503 F. Supp. 1036 (D.R.I. 1980) (sanctions sought for attorneys’ extrajudicial comments concerning asbestos litigation); Iowa
Sanctions have generally been rejected in the civil litigation context. Attorneys who bring and speak publicly about civil litigation with the purpose of furthering public education and public debate are protected by the First Amendment and not subject to sanction under the Rules of Professional Conduct. The civil litigation problem presents an analytically different balancing than the tension described by the Model Rules and cases such as *Gentile*. The Model Rules and other state rules are premised on a balance of the Sixth Amendment interests in the fair administration of justice versus the First Amendment interests of the lawyers and public in speech directed at or likely to influence juries. But frequently, particularly in the litigation model described in this article, attorney publicity is not directed at the court at all. Rather it is aimed at influencing non-judicial actors, general public opinion, executive officials, defendants or industry officials. This type of speech simply does not raise the same type of concerns that speech by lawyers aimed at helping their clients win a jury verdict does.

More fundamentally, the increasing recognition of the role of litigation in furthering public debate and shaping public opinion requires that lawyers be accorded the strongest First Amendment protection in commenting on civil litigation. Several courts have reached that conclusion. In the 1975 case of *Chicago Council of Lawyers v. Bauer*, the Seventh Circuit held the Model Code’s Disciplinary Rule governing lawyers’ extrajudicial statements in civil trials unconstitutional. The court noted

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*Legal Spin Control*, supra note 209, at 1834–41.

numerous differences between civil and criminal cases with respect to the likelihood of lawyers’ extrajudicial speech prejudicing the trial. The court also found the “nature of certain civil litigation” important:

As plaintiffs indicate, in our present society in any important social issues become entangled to some degree in civil litigation. Indeed, certain civil litigation may be instigated for the very purpose of gaining information for the public. Often actions are brought on behalf of the public interest on a private attorney general theory. Civil litigation in general often exposes the need for government action or correction. Such revelations should not be kept from the public. Yet it is normally only the attorney who will have this knowledge or realize its significance . . . . Therefore, we should be extremely skeptical about any rule that silences that voice.226

The Fourth Circuit and other courts have been unanimous in reaching the same conclusion.227

Advocacy in the court of public opinion has become a norm of the legal profession.228 Many high-powered criminal defense and civil litigators engage in what

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226 522 F.2d 242 at 257-58 (emphasis added).

22 Hirschkop v. Snead, 594 F.2d 356, 373 (4th Cir. 1979) (“Civil actions may also involve questions of public concern such as the safety of a particular stretch of highway, the need of the government to exercise its power of eminent domain, or the means of racially integrating schools and colleges. The lawyers involved in such cases can often enlighten public debate.”); Wachsman v. Disciplinary Counsel of the Supreme Court of Ohio, 1991 U.S. Dist. Lexis 20899 (Sept. 30, 1991); Ruggieri v. Johns-Manville Products Corp., 503 F. Supp. 1036, 1039 (D.R.I. 1980). See also Bailey v. Lesjack, 852 F.2d 93 (3d Cir. 1988) (vacating order that applied local rule restricting defendants in a civil case from commenting).

228 Legal Spin Control, supra note 209, at 1830.
one attorney calls “political litigation,” in which they rely on a public relations strategy to protect their clients’ interests. As one commentator notes, “for a public figure, the real concern from the legal action may not be the legal result but the press coverage.” The reaction to *Gentile* was to further amend the professional rules to ensure that lawyers’ speech would not be chilled. Chief Justice Rehnquist’s opinion discounting the need for extrajudicial advocacy has been strongly criticized by commentators for failing to recognize the realities of modern practice.

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230 *Legal Spin Control*, supra note 209, at 1830.


These developments suggest that a model that views an important function of litigation to educate the public on matters of important social concern has gained legitimacy in recent decades. Judicial acceptance of this function should lead to a recognition that lawyers’ extrajudicial speech in both civil and criminal matters is legitimate and must be governed by the strict First Amendment clear and present danger test and not by some lesser standard. A lawyer’s speech on pending litigation performs an important social and political function protected by the First Amendment, and only when it can be demonstrated that there is some serious and imminent threat to the fair administration of justice should that speech be constrained.

IV. The Courts as Protests for Forum and the Law Dilemma Between Articulation of Norms and Their Enforcement

One important difference between the courts as forums for protest model and the public law litigation model set forth by Chayes is the diminished role that judicial relief plays in the former. The judicial role required by the courts as public forums model is often significantly more minimalist than that presented by the institutional or structural law reform model. While the centerpiece of the international law reform model was the decree which attempts to restructure or change institutions, judges can and do utilize a myriad of much less assertive mechanisms to aid and not obstruct litigants who seek to utilize courts as public forums.

The judiciary’s intervention in restructuring or supervising institutions such as schools, prisons or mental hospitals has been one focus of much of the scholarly and legislative criticism of and debate over law reform litigation. Indeed, Professor Fiss

claimed that the core dilemma of structural reform litigation was the tension between “declaration” of a norm and its “actualization” in a decree. Plaintiffs’ use of courts as forums to further public debate and dialogue presents relatively unexplored and underutilized alternatives for judges grappling with that dilemma.

There is an inherent dialectic tension between the court’s roles of creating legal meaning and exercising its power. I define the creation of legal meaning to be the court’s articulation of norms, within the context of particular narratives or stories that give those norms context and texture. Conversely, the court exercises its power by ordering or failing to order those brought before it to do something.

These dual functions of the judiciary are both distinct yet inextricably connected. Normally the Court creates constitutional meaning and articulates constitutional principle in the context of exercising its power to either grant or deny relief, whether it be in the form of an equitable decree or award of damages. There are judicial decisions where the connection between the court’s dual functions are radically separated: a court may issue an order with no rationales articulating its reasoning, or a court may abstractly articulate norms with no interest of ever enforcing them. Between these two poles lies a multitude of gradations.

Plaintiffs who use courts primarily to further a public dialogue or political movement draw the legal system directly into the political arena, and by doing so strain

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234 Constitutional theorists have often describe the tension I describe between meaning and power as one between rights and remedies. Dory L.J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 861-74 (1999); Fiss, *supra* note 3, at 52-53.
the connection between the articulation of meaning and the exercise of power. These forums of protest cases lend themselves to the possibility of a court articulating a constitutional principle yet refusing to act on that principle in the particular case before it. The Court would do so to further the plaintiffs’ goal of increasing the public’s understanding of the constitutional principles involved, to lend its weight and prestige to the public dialogue on the constitutional values at issue, and to put pressure on Executive officials or other defendants to comply with its constitutional vision. Yet at the same time the court would yield to a complex assortment of political, social, ethical, practical and legal reasons to refuse to order the defendant to comply with the constitutional principle the court invokes.

I admit that articulating and exploring this potential schizophrenic or dialectical judicial role in cases wherein the court’s jurisdiction has been invoked at least in part as a forum for protest leaves me deeply troubled and conflicted. It raises a host of practical and theoretical questions that go to the heart of our most basic constitutional doctrines about the role and function of Article III Courts and of judges more generally. Does this judicial mechanism allow judges to avoid their own struggle between the myriad of social, psychological, ideological and jurisprudential factors that are involved in making difficult decisions such as whether to allow the government to execute a prisoner, initiate a war, or prohibit gay marriage? If used more often, will it provide judges with a justification to avoid confronting the government’s unconstitutional actions? Does it constitute an advisory opinion, something forbidden by two centuries of judicial case-or-controversy doctrine? Will it lead to judicial denunciation of government action in principle while permitting such action in practice, which as Professor Larry Tribe has
noted is inconsistent “with an Anglo-American legal system that has long insisted that
tlaw be composed of enforceable norms” and “seems to teach mostly hypocrisy.”

Illustrative of the conflict I feel in proposing this court as a “teacher to the
citizenry” approach, is that one of its most articulate and eloquent expositions came from
Alexander Bickel, who argued that the Court must recognize the “passive virtues” of
refusing to decide certain cases. For Bickel,

Even when it is ultimately constrained to yield to necessity, however—to
yield, this is to say, to the judgment of the political institutions—the court
can exert immense influence. It may be unable to wield its ultimate power
as an organ of government charged with translating principle into positive
law: but it need not abandon its concomitant role of “teacher to the
citizenry.” The power to which Marshall successfully laid claim is not the
full measure of the Court’s authority in our day. And the Court’s
arguments need not be compulsory in order to be compelling. Many of the
devices of not doing engage the concept, as I have shown, in colloquies

Professor Glendon had argued in support of the French statute and other similar European
approaches which (a) recognize as a basic principle that a fetus is “a human life which
must be protected”; (b) require the woman to undergo counseling before obtaining an
abortion; and (c) nonetheless permit abortion within a certain period after pregnancy (in
France 10 weeks) and in many cases require social security to pay for the abortion. This
standard generally allows women who want an abortion within the first 10 weeks of
pregnancy to obtain one, and does not attempt to coerce poor women to go to term, as
United States law does. See MARY ANN GLENDON, ABORTION AND DIVORCE LAW IN
WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES (1989). See also
German abortion decisions reprinted in VICKI C. JACKSON & MARK TUSHNET,
COMPARATIVE CONSTITUTIONAL LAW 115-39 (1999). Tribe responded to Glendon’s
support for a European approach with the argument that the “codification of a truly empty
promise . . . whose vision is belied by the people’s day-to-day experience . . . can take an
unacceptably high toll on confidence in the rule of law and the integrity of the legal
system as a whole.” Tribe id.; JACKSON & TUSHNET, supra at 141.
with the political institutions . . . . But the Court . . . can see to it that the political judgment of necessity is undertaken with awareness of the principle on which it impinges.\textsuperscript{236}

The Court’s use of the political question doctrine and similar prudential and jurisdictional devices to avoid reaching difficult constitutional questions is a device that should be minimized, and not affirmed. Cases presenting deeply felt protests against important government or corporate policies often present courts with difficult dilemmas and choices between the demands for justice and the judges’ perceived limitations on their role, function or ability to confront that injustice. These cases require the Court to carefully negotiate the ever-changing fault line between what the law is and ought to be, and not retreat behind formalistic or other jurisprudential rationales to avoid seriously grappling with the moral and legal issues the cases present.

Yet often the cultural, legal and political milieu of a judge makes such an approach difficult if not impossible for a judge freighted with the baggage of her era to actualize. As Robert Cover demonstrated in his book \textit{Justice Accused}, prominent anti-slavery judges felt constrained by their era’s jurisprudential tools, or what he termed their “juristic competence,”—which severely limited their range of responses to the moral-formal dilemmas presented by slavery.\textsuperscript{237} Judges such as John McLean, when confronted by ideological advocates such as Salmon Chase who challenged the dissonance between their antislavery ideology and their judicial support for a system that returned runaway slaves to their owners sought refuge in a set of mainly formalist rationales. While

\textsuperscript{236} \textsc{Alexander M. Bickel, The Least Dangerous Branch, The Supreme Court at the Bar of Politics} 187-88 (1962).

\textsuperscript{237} \textsc{Cover, supra note 75, at 258-59.}
Cover’s study is a careful analysis of the specific historical, cultural and legal assumptions and environment facing these judges, it obviously has broader implications. For throughout American history, judges have continually confronted the moral and legal dilemmas that Cover addresses, and have often responded with similar rationales of deference to formal law, or to perceived necessity to defer to political or military choices made by the Executive or Congress, or fear of too radically challenging an established constitutional framework and the social order it protects. Cover’s study itself stemmed from an analogy he had made between judicial complicity in slavery and judicial acquiescence in the crimes of the Vietnam War. The 20th century has witnessed many similar judicial articulations of powerlessness when confronted by claims of injustice; the internment of Japanese-Americans during World War II, the sending of American soldiers to kill and be killed in Vietnam, or a myriad of other challenges to injustice that were disposed of formally with the court eschewing responsibility such as DeShaney v. Winnebago County, McClesky v. Kemp, San Antonio Independent School District v. Rodriguez, or Harris v. McRae. Nor has judicial deference to and

\[238\] Korematsu v. United States, 323 U.S. 214 (1944).


\[243\] 448 U.S. 297 (1980).
acquiescence in the unjust assertion of power by the political branches has not been
confined to judges who articulate positivist, formalist jurisprudence, but has plagued
judges such as Justice Felix Frankfurter steeped in a modern realistic model law. The
perceived needs to defer to power overwhelmed even those Justices such as Brennan and
Marshall who normally fought against narrow, mechanistic legal perspectives, when
confronted with a great intractable national issue such as Vietnam.

In *Justice Accused* and other works, Cover suggested some approaches that judges
could apply to the dilemmas faced by the anti-slavery judges.\textsuperscript{244} So too, Professor
Richard Abel’s study of South African judges’ responses to litigation challenging aspects
of the apartheid system in that country illustrates that even in time of great repression in
which a nation’s legal structure supported an unjust social structure, judges do have
choices and can creatively and flexibly work within the fissures and contradictions of the
legal system to undermine, not prop up the unjust regime.\textsuperscript{245} But might one such creative
and flexible solution to the dilemmas judges face lie in a court’s use of whatever fissure
exists between its power to order compliance with rules, and its authority to set forth the
principles upon which the government and private organizations ought to act? When is it
appropriate for a court to speak truth to power, yet not directly confront power with its

\textsuperscript{244}For example, in *Justice Accused*, Cover argued that “in a dynamic model, law
is always becoming. And the judge has a legitimate role in determining what it is that the
law will become. The flux in law means also that the law’s content is frequently unclear.
[T]his frequent lack of clarity makes possible “ameriolist” solutions. The judge may
introduce his own sense of what “ought to be” interstically, where no “hard” law yet
exists. And, he may do so without committing the law to broad doctrinal advances . . . .”

\textsuperscript{245}RICHARD ABEL, POLITICS BY OTHER MEANS (1995).
own power? Can a court sidesteps a direct confrontation with authority, but nonetheless get its message heard by the public and the government.

A case that best illustrates the potential usefulness and pitfalls of this approach is Dellums v. Bush. That case involved a challenge by 54 Democratic members of Congress and one senator to enjoin President George H.W. Bush from going to war against Iraq to expel it from Kuwait without the congressional authorization required by Article I, Section 8, Clause 11 of the Constitution. I was the lead counsel for plaintiffs. The case was filed by Congressman Dellums and the other representatives because they believed such a war would violate the Constitution, and thought that a court might agree. But win or lose, they were sure the lawsuit would shake people up and provide an opportunity to educate the public. Congressman Dellums later recounted his conversations with members of Congress who were unsure whether they wished to join the lawsuit as plaintiffs: “I told them even if we don’t win in court, maybe we’ll win in the courtrooms and living rooms of America, where this case will eventually be tried.”

The case was assigned to Judge Harold Greene of the District Court of the District of Columbia. The son of a German-Jewish jeweler, Greene had escaped from the Nazis with his family in 1939 and came to the United States. After the war and his service in Army Intelligence, Greene attended law school and joined the Justice Department. A strong advocate of civil rights, his most lasting contribution as justice was his role in drafting the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Appointed to

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the federal bench in 1978 by President Carter, Greene was considered an excellent judge—smart, fair and in control of the courtroom.

A month after his appointment to the federal bench, Greene was assigned his first, and probably most important case, *United States v. AT&T*. For the next six years, Greene presided over litigation that led in the end to the breakup of the AT&T monopoly over the telephone industry. He masterfully handled the complex case, which some antitrust experts thought was too difficult for any single court, rising to the challenge and dominating the courtroom. Greene was independent, and undaunted by a big political case.

The pressures and tensions Judge Greene faced in the *Dellums* case were enormous. Yet his dilemma was very different from that faced by Judge McClean when confronting Chase in the *Van Zandt* case. Judges like McClean were torn by their obligations to uphold what they saw as a static, formal law and their moral duty as anti-slavery advocates. In *Van Zandt* and other cases, McLean chose the former.

At oral argument, Judge Greene was clearly troubled by his inclination that the formal law—the Constitution’s text and the framers’ intent—strongly supported the plaintiffs’ position that the Executive did not have the unilateral power to initiate a major armed conflict which under any plausible definition, was a war. As a judge and strong advocate of fidelity to the Constitution, Greene clearly did not want to evade his obligations to enforce what he viewed as a clear constitutional provision. “What I am interested in finding out,” Greene calmly asked the Justice Department attorney arguing the case, “is whether a clause in the Constitution, not some blank space in the Constitution or some interpretation but an actual clause in the Constitution, can be
enforced, or is it simply up to the President either to ignore it or abide by it?" Greene seemed unsatisfied by the answer he got.

Despite Judge Greene’s apparent view that the executive position was inconsistent with the Constitution’s command, the practical, political and constitutional realities must have pressed on him. The case was argued against a backdrop of a deeply divided Congress and nation where neither the congressional Democratic leadership nor the President was willing to call a special session to vote on authorization for war. The U.N. Security Council had voted 12-2, with China abstaining, to authorize the United States and its allies to use “all necessary means,” a euphemism for force, to expel Iraq from Kuwait. Less than a week before the argument, President Bush dropped a diplomatic bombshell. At a news conference, Bush announced that he had invited Iraq’s foreign minister to Washington, and offered to send Secretary of State Baker to Baghdad “to reach a peaceful solution” to the Persian Gulf crisis. While Congressman Dellums and other observers saw the diplomatic maneuverings as mostly show, nonetheless, a judge would be reluctant to issue an injunction while diplomatic efforts were under way. What if a court’s injunction stiffened Hussein’s resolve and led to the breakdown of negotiations? Any judge deciding the case would shoulder a heavy burden.

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250 The MacNeil/Lehrer News Hour, Nov. 30, 1990, Transcript #3914 (LEXIS).
Moreover, Judge Greene must have felt some conflict as to the underlying substantive policy to be followed toward Iraq. For Greene, while liberal in domestic affairs, was, according to a former clerk who knew him well, an admirer of former Senator Henry “Scoop” Jackson’s hawkish views on foreign policy.

Most important was the reality that judges have been virtually unanimous in refusing to interfere with the U.S. military operations. At oral argument, Judge Greene demonstrated an awareness of that reality when he asked whether any court at any point in American history had ever enjoined United States military action. The answer is no, with one exception; that of Judge Judd who enjoined the U.S. bombing of Cambodia in 1973. His injunction was stayed within hours by the Second Circuit Court of Appeals, which eventually reversed his decision a few months later.

A similar decision by Judge Greene in the *Dellums* case would undoubtedly have suffered the same fate. Moreover Judge Greene could have worried about its effect on the ongoing drama then unfolding in the Middle East.

Greene came up with a creative solution. His decision, announced a month before the deadline set by the U.N. for Iraq to withdraw from Kuwait, rejected the government’s constitutional arguments and most of its jurisdictional and prudential arguments.

Greene decisively rejected the Justice Department’s political question defense, stating:

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251 Transcript, *supra* note 248, at 5.


253 484 F.2d 1307 (2d Cir. 1973).
If the Executive had the sole power to determine that any particular
offensive military operation, no matter how vast, does not constitute “war-
making” but only an “offensive military attack,” the congressional power
to declare war will be at the mercy of a semantic decision by the
Executive. Such an interpretation would evade the plain language of the
Constitution, and it cannot stand.\(^{254}\)

Greene held that a U.S. assault on Iraq would be war, within the meaning of Article I,
Section 8, Clause 11, and announced that “the court is not prepared to read out of the
Constitution the clause granting to the Congress, and to it alone, the authority to declare
war.”\(^ {255}\) He went on to hold that the plaintiffs had standing, that the court had the
equitable power to grant relief and concluded that, in principle, a court could issue an
injunction at the request of members of Congress to prevent the conduct of a war that was
about to be launched without congressional authorization.

Nonetheless, Greene concluded that the plaintiffs were not entitled to injunctive
relief because the controversy was not ripe. Greene held that the President was not so
clearly committed to military action against Iraq to make the case ripe for injunctive
relief. More important, Greene said that the judicial branch should not decide issues
affecting the allocation of power between the President and Congress if only a minority
of Congress seeks relief. Only where a majority of Congress has disapproved a
president’s claim to use force does a ripe controversy exist, for only then, Greene held,


\(^{255}\) Dellums, 752 F. Supp. at 1146.
are the President and Congress locked in such deadlocked conflict that a court should intervene.

Greene did not dismiss the case; he only denied plaintiffs’ motion for a preliminary injunction. He seemed to invite congressional action disapproving Bush’s move to war and stated that, should Congress take such action, plaintiffs could come back to court.

Both sides claimed victory: on Nightline, Dellums praised Judge Greene’s rejection of the Justice Department’s sweeping war powers claims. The government correctly pointed out that technically Greene’s decision imposed no limit on the President’s prerogatives. “The bottom line,” said the Justice Department attorney Stuart Gerson, “is we won.”

The academic community reacted positively to Greene’s decision. Harold Koh, the author of a brief filed on plaintiffs’ behalf by a group of prominent law professors, termed the decision an unappealable declaratory judgment against the government. John Hart Ely, a signer of that brief, wrote an essay entitled “Two Cheers For Judge Greene.”


The media could not declare a clear winner to the *Dellums* case, juxtaposing headlines like “Judge Finds Bush Can’t Go to War Alone” with subtitles, in smaller type, reading “But Says It’s Premature to Order President to Get Congressional OK.”260 The *Los Angeles Times* reversed the captions, starting with “U.S. Judge Refuses to Block Bush From Starting a War” and then adding “But He Also Says Only Congress Can Authorize an Attack on Iraq.”261 The *N.Y. Times* noted that, while Greene had rejected the legislators’ request for an injunction, “his ruling was also a significant rejection of the Bush Administration’s position that it need do nothing more than consult with Congress before going to war.”262

For Ron Dellums, however, the lawsuit was a clear success. He focused on the political climate the case had helped create. “I’m convinced that the main reason Bush eventually came to Congress was because of our lawsuit,” Dellums emphatically told me. “The lawsuit brought our struggle front and center, brought the Constitution front and center, and brought the Persian Gulf buildup front and center.” Judge Greene’s holding that “the Court is not prepared to read Congress’ war powers out of the Constitution” gave us momentum to force Bush to come to Congress. “Everyone felt buoyed by the decision.” The congressman’s aide Lee Halterman felt that a “sea change” took place in Congress after Greene’s opinion was announced. While Dellums had not stopped the war, Bush was forced to come to Congress, and Congress debated and voted on whether

260 Stoffer, *supra* note 257.

261 Savage & Ross, *supra* note 256, at 1.

to go to war. “For me that was a victory,” Dellums claims.263 Our purpose in bringing the lawsuit had been, in large part, to spur political action. From that perspective, Judge Greene had written a masterful decision, probably the best he could have rendered.

Greene had told the president that he couldn’t go to war alone. But his decision also took Congress to task for avoiding its responsibility and for contributing to the constitutional crisis through its refusal to vote on Bush’s war. In effect, Greene was telling Congress to show some backbone of its own if it wanted him to enjoin the president. The whole decision put political and legal heat on both Congress and the president to act, and the fact that Greene had not dismissed our case meant that, if Congress did show some courage and voted to stop Bush, we could be back in court. Dellums decided not to appeal Greene’s decision.

Yet I remain troubled and conflicted by Greene’s approach. Certainly Judge Greene’s approach was preferable to that of the other District Court Judge who heard a soldier’s objection to the pending Persian Gulf War at the same time and who broadly dismissed his claim as presenting a non-justiciable political question.264 Moreover, had Judge Greene enjoined the President from going to war without congressional authorization, his decision would have certainly been appealed and undoubtedly reversed. But might that have been preferable. Such an injunction certainly would have raised the constitutional issue to the foreground of the public debate, and in a manner where the meaning of the Executive’s constitutional violation was clearer. It would have placed the court’s money where its mouth was: the court’s commitment to its constitutional ruling

263 All the foregoing quotes are from Dellums Interview, supra note 247.

would have been clear. Perhaps the best answer is that the acceptability of Greene’s approach is dependent on the factual circumstances confronting the court. Given the circumstances Greene faced, in hindsight I cannot say he reached a bad result.

Greene’s approach in Dellums has a long pedigree in American history. Certainly the most famous and celebrated use of this general technique was Chief Justice Marshall’s opinion in Marbury v. Madison where he first held that the Jefferson Administration had unconstitutionally deprived Marbury of his judicial commission and that the court could remedy that violation by issuing a mandamus against high Executive officials. Only then did the court determine that it was without the jurisdiction to do so because the statute providing such jurisdiction was unconstitutional. Jefferson firmly believed that the court’s discussion of Marbury’s right to a commission and the propriety of a court-issued mandamus against cabinet officials was “obiter dissertation,” 265 and it was this part of the opinion that aroused the greatest attack by Republicans. 266 Indeed, it was Marshall’s dicta condemning the President’s actions, and not his assertion of the principle of judicial review of legislative acts that received most of the press attention at the time. 267 Marshall certainly intended to send the message that the President was acting unlawfully, at the very time he was avoiding a direct confrontation with the political branches. His opinion has aptly been termed, “a masterwork of indirection, a brilliant example of Marshall’s capacity to sidestep danger while seeming to court it, to advance

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266 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 244 (1924).

267 Representative was the New York Evening Post’s Editorial headed “Constitution violated by President.” Id. at 247; see generally id. at 247-55.
in one direction while his opponents are looking in another.”268 Like Greene’s opinion, Marshall’s tactical brilliance in Marbury lay at least in part in his taking advantage of the always potential tension between the court’s role in creating meaning and its function of exercising power.269

Examples of similar judicial strategies of creating meaning while declining to exercise judicial power appear in other cases. While the initial Vietnam War cases simply dismissed soldier or citizen complaints as posing broad political questions or on other jurisdictional grounds, as the war dragged on, a few courts, such as the D.C. Circuit, spoke out clearly against the constitutionality of the war, while still dismissing the lawsuit. In Mitchell v. Laird, the respected jurists Judge Wyzanski and Chief Judge Bazelon held the Vietnam War unconstitutional, despite congressional funding for the war, writing “this court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a congressman is not necessarily approving of the continuation of a war no matter how specifically that appropriation or draft act refers to that war.”270 The court nonetheless refused to enjoin the continuing war, holding that the question of whether President Nixon was proceeding in good faith to promptly end that unconstitutional war was a non-justiciable political question. The


269 Marshall’s opinion is different from Greene’s in that by denying jurisdiction he cleverly asserted the enormous power to hold congressional statutes unconstitutional. But what if Marshall had simply resorted to a less powerful device to deny jurisdiction, such as a technical reading of the Judiciary Act so as not to provide the Court with original mandamus jurisdiction over Marbury’s claim. Marshall’s decision, which was dicta, that the President had acted unconstitutionally and a court could order Madison to appoint Marbury would have still been an important decision in American constitutional law.

court’s statement of what “every schoolboy knows,” was shortly thereafter written into the War Powers Resolution, when Congress enacted that law over President Nixon’s veto later in 1973.271

Courts have at times introduced changes in legal doctrines by articulating legal limitations without granting the relief sought by the particular party before the court.272 Similarly, the Supreme Court has in a variety of different contexts recognized the validity and necessity of ignoring the general rule that a court should avoid deciding difficult constitutional questions when the decision can rest on alternative grounds and instead encouraged lower courts to decide a constitutional issue that may even be irrelevant to the disposition of a case in order to instruct the citizenry and public officials as to the Constitution’s meaning.273 Another situation that contains traces of the same approach is what my colleague Arthur Hellman terms oppositive dictum, where a court denies relief,

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272 See, e.g., Stovall v. Denno, 388 U.S. 293 (1967) (establishing rule that unfairness of lineup can lead to due process violation, but refusing to apply the rule in that case. Some of the courts that created exceptions to the common law employment at will doctrine did so by recognizing the existence of a public policy exception but construing it narrowly to deny relief to the party before the court. See Larsen v. Motor Supply Co., 177 Ariz. 507, 573 P.2d 907 (Ct. App. 1977); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974); Roberts v. Atlantic Richfield Co., 88 Wash. 887, 568 P.2d 764 (1977).

273 See United States v. Leon, 468 U.S. 897 (1984) (Fourth Amendment claim can be adjudicated even though good faith exception may be dispositive of the suppression issue); Coleman v. Alabama, 399 U.S. 1, 10-11 (1970) (whether Constitution requires assistance of counsel at preliminary hearing can be litigated even though no relief may be available); Saucier v. Katz, 533 U.S. 194, 201-02 (2001) (court should determine whether a constitutional right has been violated even if it then determines that defendant has qualified immunity).
but states that in a different set of circumstances it might or would reach a different result.\textsuperscript{274}

There are a myriad of mechanisms that a court can use to indicate support for a legal norm to the broader legal and political community, yet refuse to enforce such a rule. One historical example is the Ohio Supreme Court’s refusal to rule on Salmon Chase’s broad constitutional claim that a slave became free the moment her master brought her to Ohio, yet its signaling its agreement with his argument by having it printed and widely publicized.\textsuperscript{275} The court’s decisions in \textit{Brown v. Bd. of Education} contain aspects of the same dichotomy between norm articulation and norm enforcement, in its strong and unanimous rejection of segregation as a constitutional norm yet refusal to order any relief for the Black plaintiffs except its later dictate that the southern states should adopt desegregation plans with “all deliberate speed,” which turned out to be an illusory effort to avoid using the full force of the court’s coercive power to compel compliance.

Supreme Court decisions since \textit{Brown} have sometimes “attached as much significance, or more, to the symbolism of laws as to their more tangible or material consequences.”\textsuperscript{276}

The fundamental problem with this general rubric is its separation between legal meaning and the commitment to live by and enforce that meaning. As Robert Cover pointed out, law cannot exist apart from both a legal narrative and a commitment to that


\textsuperscript{275}James G. Birney v. The State of Ohio, 8 \textit{Ohio Reports} 230, 231 (1837); HART, \textit{supra} note 71, at 74 and SHUCKERS, \textit{supra} note 83, at 43-44.

law. To Lon Fuller, unenforced norms strain the concept of “rule of law,” because “congruence between official action and declared rule” is an essential part of “the internal morality” of law. Similarly Professor Tribe argues that the articulation of norms for symbolic purposes that are not enforced breeds a hypocrisy and cynicism that undermines the rule of law in the Anglo-American tradition. Professor Fiss rejected an approach that would resolve the core dilemma in structural reform litigation by confining the judge to the declaration of rights and not their enforcement because it “would require a detachment or an indifference to this world.” Less philosophically and more doctrinally, the law pronouncement approach is in tension with Article III courts rejection of advisory opinions and their avoidance of deciding difficult constitutional issues unless absolutely necessary.

The answer to the doctrinal problem is fairly straightforward. The advisory opinion doctrine prevents a court from adjudicating hypothetical or moot issues or controversies between adverse parties not before the court. It does not prevent the

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277 Robert Cover, Nomos and Narrative, 97 Harv. L. Rev. 4 (1983).
279 Tribe, supra note 235.
280 Fiss, supra note 3, at 57-58.
281 See Zadyydas v. Davis, 533 U.S. 678, 689 (2001) (It is a “cardinal principle” of statutory interpretation . . . that when an Act of Congress raises a ‘serious doubt’ as to its constitutionality, “this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”); Public Citizen v. United States Dep’t of Justice, 491 U.S. 440, 466 (1989); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (Brandeis, concurring).
282 See Princeton University v. Schmid, 455 U.S. 100 (1982); Muskrat v. United States, 219 U.S. 346 (1911); see also 3 Correspondence and Public Papers of John
court from articulating the law governing an issue, nor from deciding an issue in plaintiff’s favor yet denying relief on other grounds. The rule does not mandate any particular order of deciding issues, it merely requires that the issues be presented by adverse parties alleging an actual dispute.  

Nor does the principle, developed in the context of statutory interpretation, of not deciding difficult constitutional questions unless it is necessary to do so, preclude the articulation of principle approach suggested here. The Supreme Court has recognized in a number of areas the propriety of addressing an important constitutional question before turning to another, potentially dispositive issue. The value of avoiding difficult constitutional questions is not absolute and must be balanced against the competing value of providing guidance to the other branches of government. For example, in its decision to create a good faith exception to the exclusionary rule, the court held that “[t]here is no need for courts to adopt the inflexible practice of always deciding whether the officers’ conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated.” Noting that “courts have considerable discretion in conforming their decision-making processes to the exigencies of particular cases,” the Court stated that “[i]f the resolution of a particular Fourth Amendment question is


284 Id. at 3422-23 (1984) (fourth amendment claim can be adjudicated even though good faith exception may be dispositive of the suppression issue); Saucier v. Katz, 533 U.S. 194, 201 (2001) (qualified immunity requires first a determination of whether a constitutional right was violated, before turning to the issue of whether the right is clearly established in order to protect the process of the law’s elaboration).

necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good faith issue.\textsuperscript{286}

The more troubling problem is therefore the objection that by articulating a rule without enforcing it in the particular case, the court states “no more than the proclamation of an admittedly unworkable moral idea.”\textsuperscript{287} Professor Scharpf’s criticism of Bickel captures the essence of the quandary inhering in the Court’s lack of commitment to the principle it articulates:

What would be the persuasiveness of an interpretation of the Constitution which the interpreter himself could not wish to see put into practice? From what revelation should the Court derive authority to proclaim moral postulates—or have its judgments any legitimacy beyond that of an intellectual honesty disciplined by its responsibility for the disposition of the concrete case?

It would sacrifice that realism of constitutional interpretation which is the necessary condition of its effectiveness. Interpretation which would no longer be answerable to the real conditions and exigencies of community life would transform constitutional law into a collection of programmatic postulates to be worshiped on the Fourth of July; and the easier it would be for the Court to retreat from conflicts in the real world into the ideal realm of pure principle, the less ready and able would it be to protect the community against transgression of its fundamental code.\textsuperscript{288}

\textsuperscript{286} \textit{Id.}


\textsuperscript{288} \textit{Id.}
It may well be that the enunciation of a principle without a commitment to enforce it would have the effect that Scharpf describes and cannot be considered law but mere rhetoric. But a judge’s commitment to a principle he or she articulates cannot be measured in pure all or nothing terms—as Scharpf suggests. Rather judicial commitment comes in all shades and hues, just as the community’s commitment to its narratives of law can take many forms.

As Robert Cover points out in *Norms and Narrative*, there is a difference between the commitment demonstrated by a community that “writes law review articles”—forcing the officialdom to maintain its interpretation “merely by suffering the protest of the articles,” and a community that disobeys the criminal law, forcing judges to affirm the official interpretation of law only by committing violence against the protestor.289 To Cover, however, both communities demonstrate a commitment to create and maintain law. We certainly cheer more loudly for the civil resister; law review authors win no Noble prizes. One clearly has a stronger commitment than the other, but neither is merely dishonestly evoking an unworkable moral ideal. The soldier who retreats in the face of a massive and uncontainable enemy assault in order to take up a more defensible position from which to fight may have no less a commitment to his nation’s cause than the soldier who stands fast and dies. So too, judicial commitment to constitutional liberty and justice takes many forms, and cannot be measured simply by the heroic judge who affirms justice at the peril of his office, his legitimacy, or his life. Certainly history’s verdict is conclusive that Chief Justice Marshall’s dicta in *Marbury* that high Executive officials are not above the law has certainly been accorded as much legitimacy as if

Marshall had ordered *Marbury* appointed—certainly if the result of that decision would have been that Jefferson refused and the Supreme Court’s authority decisively weakened. Judge Greene, while refusing to enforce the clear constitutional command that Congress authorize war (in my opinion wrongly), nonetheless kept jurisdiction over *Dellums* claim and suggested that given the right circumstances in the future, he would (or more aptly might) enforce the law. Had a majority of Congress voted down the authorization for war when the President finally placed the issue before them in early January 1991, and had President Bush nonetheless proceeded to initiate war as he later indicated he would have done, Greene might have enforced Article I had a soldier or representative of Congress so requested. What Judge Greene would have done in that not purely hypothetical scenario is conjecture—quite possibly he would have found yet another way to avoid issuing an injunction. But certainly his opinion left open that possibility, and was not purely abstract moralizing. It is not hard to see why, when another congressional war powers challenge to Executive war making was made some years later, the plaintiffs again sought to draw Judge Greene, despite his refusal to grant relief in the *Dellums* case.

The question of whether those who act as Judge Greene did are affirming or avoiding their constitutional responsibilities, must, in the final analysis, be determined on a case-by-case basis given the context and circumstances of each case and an analysis of

290 President Bush continued to maintain that congressional approval was unnecessary and was committed to war even if Congress voted against him. (As he later explained, “I wasn’t going to let some old goats in Congress tell me whether I could kick Saddam Hussein out of Kuwait.”) Remarks of President George Bush before the Texas State Republican Convention in Dallas, Texas. Federal News Service, June 20, 1992, at 3.

291 On January 11, the Senate narrowly approved authorization by a 52-47 margin, the House by a much wider margin.
the Court’s specific decision. My point here is not to fashion a sweeping proposition either affirming or denying the validity of such judicial action. Rather it is that particularly in cases where the litigation functions in whole or part as a forum for public debate, judges should consider it as an option. That is especially true if the judge is disposed to permit an injustice to continue because of her reading of formal law or of the practical necessities of the situation. In some cases, a judge’s resort to this option may have the effect that Scharpf describes and make judges less ready and able to protect the community against transgressions of its fundamental code. In others, it might help spur the political movement in ways that may be more important than obtaining judicial relief. How judges craft their opinion can help or harm the political or social movement of which the plaintiff is but a representative. Congressman Dellums certainly felt that Judge Greene helped his.

Robert Cover ended his book Justice Accused with an insight about judges that, “If a man makes a good priest, we may be quite sure he will not be a great prophet.”292 That insight sounds right, but it may also be true that a good priest may be able to aid, instead of obstruct those that are prophets. Judges are seldom great prophets, but the best can prove very valuable and helpful to a prophetic or redemptive constitutional movement that has as its primary arena not the courtroom, but the streets.

V. The Role of Lawyers in the Public Forum Model

That litigation can often have as a primary or significant purpose or effect political mobilization and education outside the courtroom yields important insights for lawyers as well as judges. This model of litigation radically redefines the role of a

292 COVER, supra note 75, at 259.
lawyer. The lawyer in presenting his or her case does not act as the neutral detached advocate posited by the traditional model, nor even the less detached, elite, sympathetic and empathetic legal expert of the law reform model. Rather, the lawyer ought to be not simply for the movement, but in and of the political or social movement he or she represents; “a lawyer can join the client as a comrade and serve as a legal advisor.”

Activist attorneys often use the term “movement lawyer” to express what they do and how they view their role. For example, prominent socialist, labor activist attorney Staughton Lynd derived his legal role from the notion of “accompaniment” used by liberation theologians in Latin America. This meant a duty to accompany workers in their struggle for justice, to help them articulate their interests and express their anger, and to present their vision of a more just and ultimately socialistic society. Many lawyers who bring litigation for broader political purposes straddle the line between lawyer and political activist, as did Salmon Chase, Staughton Lynd, or well-known civil rights lawyer Arthur Kinoy.

This conception of a lawyer’s role leads to somewhat different legal decisionmaking and strategies from that posited by either the traditional dispute resolution or institutional litigation models. First, the decision as to whether to bring a case, make an argument, or raise a claim cannot be based solely, or at times even primarily on an analysis of the legal merits. As Professor Arthur Kinoy, a leading civil


rights litigator of the 1950s, 60s and 70s explained in his autobiographical book, *Rights on Trial*

the test of success for a people’s lawyer is not always the technical winning or losing of the formal proceeding. Again and again, the real test was the impact of the legal activities on the morale and understanding of the people involved in the struggle. To the degree that the legal work helped to develop a sense of strength, an ability to fight back, it was successful. This could even be achieved without reaching the objective of formal victory. . . .

Thus, for Kinoy, the decision whether to bring a lawsuit could not be based solely on “the likelihood of success within the court structure.” Rather, the question was what role the lawsuit would play in the people’s struggle. “If it helped the fight, then it was done, even if the chances of immediate legal success were virtually non-existent.”

This approach requires such movement lawyers to take risks in bringing cases that present difficult, uphill battles and could create bad precedents. For many traditional law reform litigators, such as former NAACP Legal Defense Fund general counsel Jack Greenberg, test cases generally “should not be brought if they are likely to be lost.” To be sure, the likely legal success of a case should be carefully considered before it is

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296 *Id.* at 71.

297 *Id.*

brought, and the risk of precedent should be weighed, but under the public protest model of reform litigation that cannot be the sole or, at times even the primary consideration. For example, in Danville, South Carolina, Kinoy and William Kunstler, another prominent civil rights attorney, pioneered the use of the long-dormant federal removal statute to prevent state prosecutions of civil rights activists. Jack Greenberg, then the legal director of the NAACP Inc. Fund, completely rejected the idea of using this old Reconstruction-era statute to stop the state court trials of the demonstrators, calling it a crazy idea amounting to “playing with the courts.” 299 But, despite the reservations of many of the lawyers, and the lack of legal precedent, Kinoy and Kunstler decided to try, for there were no other good alternatives and the civil rights movement was pressing for some legal action. Miraculously, Kinoy and the other Danville lawyers temporarily won an injunction in the Fourth Circuit Court of Appeals. 300

Similarly, when the first Holocaust restitution lawsuit was filed in October 1996 against the Swiss banks, most legal observers viewed the suit as a “sure loser.” 301 Yet the suit obviously had a political motive to create public embarrassment and put political pressure on the Swiss banks by exposing their role in the Holocaust. The suit, a “legal loser,” succeeded in that aim. Less than two years later, the Swiss banks were willing to pay $1.25 billion to end the litigation. 302

299 Id. at 193.
300 Id. at 193-208.
302 Id. Bazyler also observes that in December 1999, Germany and its industry agreed to pay DM 10 billion ($4.8 billion) to settle Holocaust slave labor claims, just
Most cases brought in the face of unfavorable precedent undoubtedly lose in court. They therefore may create bad precedent, although in most instances they simply pile more bad precedent on an already poor situation. Some cases do contain a silver lining when the judges draft their opinions in a manner to create room for the law to grow and develop despite the defeat in court. But generally, while the risk of creating bad precedent ought clearly to be weighed before litigation is commenced, lawyers ought not to allow a fear of losing to paralyze their work, stifle creativity or make them overly cautious. The courts as forums for protest therefore balances the risk of creating bad precedent against the other, more political aims of the lawsuit differently than either of the other models, with a recognition that the aim of litigation at times extends beyond winning or losing in court.

Another critical lesson posed by the courts as forums of protests is that public interest lawyers must draft their complaints and argue their cases before the courts based not simply or at times primarily on the technical, sound legal arguments, but on the broad moral/political themes that will resonate with their clients, the political movement they represent, the general public, and often judges. Salmon Chase and the other anti-slavery lawyers understood this when they framed their legal arguments as broad moral and constitutional broadsides against slavery. These arguments might not and in fact did not convince a court, but were very effective anti-slavery arguments because they

303 Often the dialectical process by which the common law and constitutional law changes starts with failed efforts to change the law, followed by a series of cases that distinguish the first cases or create exceptions that eventually lead to a change in the rule. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-19 (1949).
emphasized both the immorality of slavery and the absolute incongruity of democracy and slavery.\textsuperscript{304}

The *Shelley v. Kraemer* case presents another example of a lawyer making a broad moral/political argument which might make an impression on a judge, but will more likely resonate in the public debate. George Vaughn, a municipal court lawyer in St. Louis who had brought the *Shelley* case to the Supreme Court despite Thurgood Marshall’s objections that the time was not right for Supreme Court review of the issue argued the restrictive covenant cases along with Marshall.\textsuperscript{305} Philip Elman, an attorney in the Solicitor General’s office who helped draft the government’s brief in *Shelley* and attended the oral arguments recounts Vaughn’s argument:

[H]e made an argument that as a professional piece of advocacy was not particularly distinguished. You might even say it was poor. He mainly argued the thirteenth amendment, which wasn’t before the Court. He tried to distinguish cases when it was clear that the cases were indistinguishable and the only way to deal with them was to ignore or overrule them. It was a dull argument until he came to the very end. He concluded his argument by saying . . . “Now I’ve finished my legal argument, but I want to say this before I sit down. In this Court, this house of law, the Negro today stands outside, and he knocks on the door, over and over again, he knocks on the door and cries out, ‘Let me in, let me in, for I too have helped build this house.’”

\begin{footnotes}
\item[304] Hart, supra note 71, at 72-73.
\item[305] See William Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 Yale L.J. 1623, 1627-33 (1997). As Rubenstein notes, several cases were consolidated for review in the Supreme Court.
\end{footnotes}
All of a sudden there was drama in the courtroom, a sense of what the case was really all about rather than the technical legal arguments. . . . [It was] the most moving plea in the Court I’ve ever heard.\footnote{Philip Elman & Norman Silber, *The Solicitor General’s Office, Justice Frankfurter and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 819 (1987).}

Vaughn was so inspiring that he was invited to repeat his speech at the 1948 Democratic National Convention.\footnote{Rubenstein, *supra* note 305, at 1630.}

The examples of George Vaughn making broad emotional/political arguments and poorly arguing or ignoring the technical legal distinctions that are the daily grist of an appellate lawyers’ life are extreme. In many cases, it is precisely the broad moral/political/legal arguments that place more technical, legal points in their proper context, and if made properly can influence both the judges hearing the case and the broad public to whom the lawyer seeks to appeal. Many more polished and experienced oral advocates than Vaughn have recognized that to strike a chord with both the judges one needs to convince and the public one often has to cut through the technical legal underbrush with a broad plea to justice and morality. For example, Harold Koh who argued the Haitian Refugee case before the Supreme Court started his argument with a broad plea about the injustice of the United States’ policy, hoping that his opening might convince the Court to view his technical arguments more favorably, but recognizing that even if it did not, it would appeal to his broader audience.\footnote{See Kauffman & Gosselin, *supra* note 14.}
Public interest lawyers also have to look at the interaction between the litigation and broader interests of their clients and the movements they represent, not only in arguing their cases, but in drafting complaints. Many lawyers feel constrained in drafting pleadings by their perception of the Federal Rules of Civil Procedure requirement of notice pleadings, the constraints of professional standards and the rules learned theory of their legal education. They therefore draft complaints that lose the details, passion and identity of their clients, the “thickness” of her story and oppression. For example, in litigation filed recently challenging a particularly outrageous case of the Federal government’s anti-terrorism policy run amok, an experienced and excellent attorney cited the Federal Rules notice pleading requirement to request that the lawyers who had drafted the complaint cut out alot of the detail. That detail had provided a rich and vivid account of the oppression the client had encountered. While the complaint could undoubtedly have been improved through editing, it needed to tell the client’s full narrative, so that both the judge assigned to the case would comprehend its full outrage, but additionally so that the media, and the public will understand his dramatic and compelling story.

The forum for protest model of courts therefore compels a lawyer to think not only of the technical arguments that will win in court, but what arguments will serve the movement he or she is working with. The model is therefore much more receptive to transformative arguments that look beyond the winning or losing the particular legal


311 Elman & Silber, supra note 306, at 771-72.
battle and serve to transform political consciousness and reshape the way legal conflicts are represented in the law. 312

While urging lawyers to pay attention to the broader political aims of their clients and political movements when they draft complaints and argue before courts may temper some of the limitations of law reform litigation articulated by the Critical Legal Studies Movement and other progressive scholars, it raises new contradictions. Those new tensions are generated by what often is a conflict between broad political, moral or legal arguments and the often narrow terrain that courts and law forces lawyers to work in. That conflict envelops many law reform cases, particularly those in which the lawyers’ and litigants’ goals are broader than just winning in court.

For example, in 1984 the prominent human rights lawyer Michael Ratner brought a case on behalf of Congressman Michael Barnes and a number of other Democratic Congressmen challenging President Reagan’s pocket veto of legislation that would have required a certification that human rights were improving in El Salvador. 313 His real interest, and the interest of many of the human rights groups and members of Congress supporting the lawsuit was to eventually stop the flow of U.S. aid to the Salvadoran government, whose human rights record was atrocious. Nevertheless, the case, in which the entire House of Representatives and Senate eventually joined as plaintiffs only raised a narrow legal argument of whether the President had the constitutional power to pocket-


veto legislation. While that question was an important separation of powers issue, as the case dragged on through the lengthy appellate process, for Rather and many other human rights activists, the case lost much of its political meaning. After the Court of Appeals decided in plaintiffs’ favor and the Supreme Court agreed to hear the case, Ratner decided not to argue it before the Court, deferring to his co-counsel. While most litigators would jump at the chance to argue before the Supreme Court, to Ratner, “the idea that I would put aside weeks and months to brief and argue this highly technical case while I was at the height of my political organizing was absurd.”

The Supreme Court eventually decided the case had become moot because the statutory period within which the certification would have been effective had elapsed.

Ratner’s conflict was an extreme case of the reform lawyer’s dilemma. The litigation forum often channels legal argument into forms that are likely to persuade a judge, but are not necessarily what the lawyers, litigants or political movements believe represent justice. For example, Professor Charles Lawrence has discussed this dilemma in the context of whether and how to support the diversity defense of affirmative action when in the short run it is the course most like to succeed in the contemporary judicial climate yet it leaves unchallenged and indeed affirms a university’s role in perpetuating and entrenching a privileged elite. For the lawyer using the courts as a forum to both protest and hopefully ultimately transform the social, political and economic injustices of our society the dilemma is particularly acute, for he or she, unlike the theorist must work daily in that arena. For that lawyer, one question is how to introduce what Lawrence

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314 Quoted in LOBEL, supra note 294, at 207.

terms “transformative arguments” into litigation, and use that litigation to thus inform the political dialogue.\textsuperscript{316} Generally, the institutional law reform model does not address this dilemma, because this problem focuses more on the relationship between lawyers and the political movements they work with and less on the role of the judge in a particular case.

For some constitutional theorists, the solution is to abandon the effort to articulate progressive, transformative or aspiration norms in the courts.\textsuperscript{317} Some civil rights litigators, however reject that approach and continue to view litigation not merely as a means to transform institutions, but as one forum among many to raise questions that may eventual transform contemporary, mainstream political dialogue.

This question was starkly presented in litigation challenging U.S. Steel’s plan closings in Youngstown, Ohio in the late 1970s. An attorney in that case, Staughton Lynd, had articulated a promissory estoppel theory that he believed was supported by contract law. U.S. Steel had made a promise to keep the Youngstown mills open if they could be made profitable. The workers had agreed to a variety of concessions, worked hard, and relied on that promise to their detriment, yet U.S. Steel had breached its promise. That theory in Lynd’s view, both articulated the worker’s feelings of injustice and posed a radical challenge to traditional management rights.

But the district court judge raised a much more radical theory that perhaps the Youngstown community had acquired some vested property rights in U.S. Steel “from the lengthy, long-established relationship between United States Steel, . . . the community

\textsuperscript{316}Lawrence, supra note 314, at 958-60.

Ultimately the judge had concluded that there was no legal precedent for such a property right, dismissed the “property right” claim and found that U.S. Steel had not breached any promise to keep the mills running.

The workers appealed and Lynd wrote a brief arguing for the worker’s contract claim. But Lynd could not write a brief arguing for a community property right for which there was no precedent. Lynd’s socialist politics led him to the belief that, while he could use the law to win concrete victories and raise issues, he also felt that the limitations of capitalist laws had to be recognized, understood, and explained. While Lynd was perfectly willing to bring a “prophetic” case for which there was some legal precedent, even if for political reasons the case would likely lose, he was unwilling to argue a case with no supporting precedent. The role of a radical labor lawyer, Lynd thought, is to articulate the workers’ feelings of injustice in a manner that the law could recognize. If the law did not recognize the workers’ complaint as actionable, then the lawyer’s role was to tell the workers that and to develop another strategy for fighting the injustice.

But, though Lynd was unwilling to argue the community property right issue to the Court of Appeals, there was a respected national legal group and a prominent national lawyer willing to fill the void. The Center for Constitutional Rights submitted an amicus brief, signed by Arthur Kinoy, a professor at Rutgers Law School, that argued for a community property right to prevent a company in U.S. Steel’s position from unilaterally deciding to close mills vital to that community.

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Kinoy’s approach to the dilemma presented by “transformative arguments” differed from Lynd’s. Local unions were actively engaged in struggle, raising fundamental questions of whether the Constitution protected not merely civil and political rights but also economic rights. Irrespective of whether legal precedent supported a community property right, Kinoy believed that people’s lawyers had to find and use whatever they could to argue that the Constitution supported such rights—a position that would help motivate workers across America to struggle against plant closing. He hoped that the mass labor movement around plant closings would have the same impact as the civil rights movement had on the courts in the 1960s.

While Lynd’s approach recognizes the limits of law and using litigation both to advance particular struggle and to help explain, educate and expose the nature of capitalist law, for Kinoy, the law and the Constitution are fundamentally indeterminate vessels, with their meaning determined not by legal precedent but by the political struggle of masses of people. Articulating radical rights such as economic and social rights both in the context of litigation as well as political forums can, for Kinoy, motivate thousands of people to struggle for those rights which in turn will impact upon the courts. For Kinoy, the paradigm for this courts as forums for protest model was the mass, democratic civil rights struggle during the 1960s, during which period he articulated radical, transformative notions of the Thirteenth and Fourteenth Amendments which at times were accepted by the courts.319

The different approaches to law and constitutional rights taken by Kinoy and Lynd reflect longstanding tensions in the radical movement’s view of the Constitution

and of litigation that commenced with the split within the abolitionist movement over whether the Constitution, properly interpreted, outlawed slavery. Lynd sympathized with the abolitionists who had accurately viewed the Constitution as having accepted slavery and thus had called on anti-slavery judges to resign, as opposed to those abolitionists, such as Alvan Stewart, who had proposed radical reinterpretations of the Constitution based on theories of natural law and natural rights. Kinoy’s view hued closer to that of Alvan Stewart and Senator Charles Summer who argued in court and elsewhere that the Constitution should always be interpreted in favor of liberty, equality, and human rights.

My intellectual predilection lies more with Lynd’s approach, which captures critical theory’s emphasis on exposing the contradictions and limitations of law. However, Kinoy was able to use his approach in the 1960s to help use litigation to mobilize thousands of civil rights activists and law students to engage in potentially transformative litigation. What this suggests is that solutions to the dilemma must come in a case by case contextual context, and that in some eras and cases Kinoy’s approach may have the invaluable effect he sought. It didn’t in the plant closing case. Perhaps the Courts as Forums for Protest model main contribution is simply to articulate it and the dilemma of attempting to make transformative arguments in the context of litigation, force litigators to attempt to grapple with it and not ignore the problem.

Finally, lawyers who undertake this type of litigation must be both willing to support their clients’ political actions and mount public educational campaigns that dovetail and interface with the litigation. Yet often clients’ political actions cause

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problems with a law reformer’s carefully calibrated legal/political strategy. For example, in the Haiti refugee litigation, the Haitians’ hunger strike pushed the popular mobilization beyond the “legal team’s grand plan.” While the strike led to a very successful organizing effort and educational effort around the case, but caused division amongst the legal team as to whether the strike and resulting publicity was helpful or harmful.

I conclude with a discussion of the litigation brought on behalf of the prisoners being held by the United States at Guantanamo Bay, Cuba. This important litigation fits comfortably within the Courts as forums for protests model, and illustrates many of the insights and contradictions of the model.

In early 2002, the Center for Constitutional Rights challenged the Bush Administration’s detention of suspected Taliban and Al Qaeda prisoners at Guantanamo Bay without affording them the protections or rights due under the Geneva Convention. At the time, many individuals and organizations were timid about openly challenging the Administration’s anti-terrorism policies. Moreover, a case on behalf of the Guantanamo detainees presented a particularly difficult context within to challenge the Administration. These prisoners had been captured in and around Afghanistan as part of a popular war effort. The memory of September 11 was fresh on people’s minds. The government claimed that what they were doing at Guantanamo was necessary to defend American national security and prevent future terrorist attacks, a claim that resonates particularly strongly with courts. Most important, Johnson v. Eisentrager decided by the Supreme Court in 1950 held that non-resident enemy aliens convicted of war crimes after

321 Michael Ratner, How We Closed the Guantanamo HIV Camp, supra note 15, at 208-12.

a military trial detained by the United States government outside the United States
territory in time of war had no right or privilege to avail themselves of the jurisdiction of
a United States court to challenge their detentions.

While the legal and political climate was bleak, the CCR attorneys believed that
Johnson was distinguishable and that it was possible to win in court. The CCR decided
to take the risk.\footnote{Marcia Coyle, Taking the Risks: Rights Center Tackles Guantanamo
Detentions, NAT’L L.J., Feb. 26, 2004, at 1.} The government’s position was in clear violation of the Geneva
Conventions and was in effect saying that no law applied to these detainees. But the
CCR’s objective went beyond winning or losing in court. Its objective was to
demonstrate that there was resistance to U.S. policy, to help publicize the injustice to and
plight of the detainees, to keep the issue of the detainees in the public mind and to help
use of the case as part of a broader political movement against the Administration’s anti-
terrorism policies. The decision to litigate was not based on whether the CCR attorneys
thought the litigation had a good chance of winning in court.

The CCR first filed a complaint with the Inter-American Commission of Human
Rights of the Organization of American States, which ruled that the Guantanamo
prisoners may not be held “entirely at the unfettered discretion of the United States
government,” and that the government must accord those prisoners a hearing to
determine their legal status under the Geneva Convention.\footnote{Decision on Request for Precautionary
predictably refused to comply with the Commission’s ruling. Indeed, given the certainty
that the Administration would not comply with any unfavorable Commission ruling, the
purpose of the complaint was to obtain an authoritative ruling and to use that ruling to mobilize international and domestic public opinion against the Administration’s Guantanamo policies.

The CCR also brought a federal lawsuit on behalf of several of the detained prisoners. The Federal District Court and then the U.S. Court of Appeals for the District of Columbia Circuit ruled unanimously in the government’s favor. Nonetheless, the CCR persisted, and the Supreme Court decided in November to hear its appeal.

The Guantanamo case has already had an impact. For almost two years now, it has helped keep the outrageous Guantanamo situation in the public eye and galvanized international protest. News reports have sparked outrage at keeping the detainees in what British judges termed a “legal black hole.” Amicus briefs submitted to the Supreme Court from former federal judges, former senior American diplomats, former American POWs, former judge advocates general of the Navy and a top Marine Corps lawyers, the bar association representing the 54 nations of the former British Commonwealth, and the International Bar Association reflected and fanned the widespread protest against the

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The question the case presents before the Supreme Court is very narrow and involves only whether federal courts have jurisdiction to consider the detention of foreign nationals captured abroad and held at Guantanamo Bay.\footnote{Rasul v. Bush, 124 S. Ct. 534 (2003).} Thus, at this stage of the litigation what is being requested of the Court is exceeding minimal: namely a holding that federal courts have the jurisdiction to hear plaintiffs’ habeas petitions. On remand, the District Court will determine what rights, if any, plaintiffs have, and what process, if any, they are entitled to. At least theoretically, it is quite possible for the Supreme Court to hold that the lower courts have jurisdiction to review the plaintiffs’ case, but after remand for the courts to deny their habeas petition.

The Supreme Court’s assertion of jurisdiction to hear the case would be a tremendous victory for the plaintiffs. First, it would articulate and give meaning to a fundamental constitutional principle; that Executive detentions of prisoners outside the United States cannot operate entirely outside the law nor without some legal process. Moreover, as with Judge Greene’s very different decision in \textit{Dellums}, the Court’s mere assertion of jurisdiction in the Guantanamo case would affect governmental conduct. Indeed, the Supreme Court’s decision to hear the Guantanamo case has already had a dramatic impact on the government’s behavior, leading to the release of many prisoners
and Secretary of Defense Rumsfeld’s decision that some process will be established to determine whether a prisoner should continue to be detained. 331

Finally, the Guantanamo case also illustrates the limitations of litigation to transform the public dialogue. For some of the lawyers at the Center for Constitutional Rights, the most fundamental issue involved in the case is the Executive’s use of the military, wartime paradigm to detain and prosecute people who should be prosecuted under civilian law. They would want to challenge whether the “war against terrorism” really fits within the definition of a war, or should Al Qaida be treated as a criminal conspiracy and its members prosecuted under ordinary civilian war. 332 But a challenge in the Guantanamo case to whether the war against Al Qaida is really a war for constitutional or international purposes would have almost no chance of success in the courts, therefore these attorneys are relegated to making that more fundamental point in their public speaking about the case, and not in the court.

The Guantanamo litigation is but a recent example of the long tradition in this country of using courts as one arena of protest. That tradition needs to be cherished, protected and nourished. We should not underestimate the power of the courts and of litigation to awaken the public’s conscience. The political movements, individual litigants, judges and lawyers who use courts as a forum for protest play an essential role in enriching and vitalizing democracy.


332 The Executive’s position on the Guantanamo and other detainees suspected of Al Qaida ties is circular. It invokes the laws of war as the framework to analyze their detentions and then argues that the protections of those laws contained in the Geneva Convention are liable because these prisoners are “unlawful combatants.”