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Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access

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Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access

Abstract

This Article proposes a speech-based right of court access. First, it finds the traditional due process approach to be analytically incoherent and of limited practical value. Second, it contends that history, constitutional structure, and theory all support conceiving of the right of access as the modern analogue to the right to petition government for redress. Third, the Article explores the ways in which the civil rights plaintiff's lawsuit tracks the behavior of the traditional dissident. Fourth, by way of a case study, the essay argues that recent restrictions - notably, a congressional limitation on the amount of fees counsel for prisoners may recover - violates the right of access to the courts.

Keywords

court access, first amendment, constitutional litigation, public law, constitutional law, due process, litigation, civil rights, prisoner's right, prison litigation, attorney fees, right to petition, redress

ARTICLES

CONCEPTUALIZING CONSTITUTIONAL
LITIGATION AS ANTI-GOVERNMENT
EXPRESSION: A SPEECH-CENTERED
THEORY OF COURT ACCESS

ROBERT L. TSAI*

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In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril.¹

INTRODUCTION

It is time to reimagine the fundamental right of access to the courts.

In recent years, congressional backlash against structural reform litigation has led to ever-increasing limitations on an individual's ability to challenge government policy and the authority of federal courts to redress constitutional harms.² It is no coincidence that innovative methods of curtailing court access have developed in areas that have experienced the most public law litigation: the maintenance of prisons and jails, the delivery of welfare services, the handling of immigration matters, and the administration of the death penalty. These restrictions range from procedural to substantive: monetary relief for some categories of constitutional injuries suffered by inmates has been abolished, special rules for effectuating remedies in cases of institutional grievances have been enacted, and harsh new limits have been imposed on the availability of the writ of habeas corpus.³ Which of these enactments represent a legitimate exercise of legislative authority over the scope of judicial power and which impermissibly impair the venerable right of access?

The time is right to rethink the very concept of access, moreover, because the right itself has never fully blossomed. Since the high water mark of the Supreme Court's court access jurisprudence,⁴ a

1. *Gilbert v. Minnesota*, 254 U.S. 325, 338 (1920) (Brandeis, J., dissenting).

2. Federal Court observers have identified two distinctive models of adjudication: the private "dispute resolution" model and the "public law" or structural reform model. The traditional or "dispute resolution" model centers on the resolution of controversies that involve only the interests of those immediately before the court, and is predominantly retrospective in function. The public law model of legal decision-making, by contrast, focuses on vindicating public values, including constitutional principles, and has a unique forward-looking character. When the legal system must decide questions involving constitutional principles, it often employs distinct rules and casts the parties and the court into entirely different, and often controversial, roles. See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976); see also Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 125 (1982) [hereinafter Fiss, *Social and Political Foundations*]; Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 5 (1979) [hereinafter Fiss, *Forms of Justice*].

3. Recent examples include a legislative ban on damages arising from inmate lawsuits unless the underlying conduct caused "physical injury," 42 U.S.C. § 1997e(e) (1994 & Supp. V 1999), and a general one-year statute of limitations on writs of habeas corpus in federal court. 28 U.S.C. § 2244(d)(1) (1994 & Supp. V 1999).

4. See *Bounds v. Smith*, 430 U.S. 817 (1977) (holding that fundamental right of access required prison authorities to assist inmates to prepare and file legal

series of disappointing decisions have followed which collectively undermine the notion of meaningful access.⁵ Recent pronouncements from the Court in this area have rendered the right in many contexts to be little more than an empty shell.⁶ Today, the ideal of access is unfulfilled and desiccated; it borders on irrelevance.⁷

Let us breathe new life into the right of access. This Article proposes a “speech-centered” theory of court access that treats an individual’s efforts to secure her constitutional rights as the equivalent of engaging in anti-government expression. Constitutional litigation constitutes “anti-government” expression in the broadest sense: the speaker questions the legitimacy of a governmental action.⁸ This Article suggests that a civil rights litigant who challenges official policy in court is best understood as a *political dissident*, regardless of that party’s ideology.⁹ In this narrative, the

documents); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (ruling that right of court access requires waiver of fees for indigents who seek divorce).

5. See, e.g., *Ross v. Moffitt*, 417 U.S. 600 (1974) (rejecting argument that due process requires provision of counsel to indigents for discretionary appeals or applications for review in Supreme Court); *United States v. Kras*, 409 U.S. 434 (1973) (restricting fee waiver for indigent litigants to actions involving fundamental rights).

6. See, e.g., *Shaw v. Murphy*, 532 U.S. 223 (2001) (holding that prisons may, consistent with right of access, ban assistance of jail house lawyers); *Lewis v. Casey*, 518 U.S. 343, 351 (1996) (ruling that inmate cannot state claim for violation of right of court access unless his efforts to litigate non-frivolous legal claim was actually hindered).

7. The right of access to judicial processes is in danger of falling out of the constitutional canon. See JESSE CHOPER ET AL., *CONSTITUTIONAL RIGHTS AND LIBERTIES* 1316-21 (9th ed. 2001) (devoting total of 6 pages of 1400+ page treatise to topic of access to courts); DANIEL A. FARBER ET AL., *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY* 366-67 (2d ed. 1998) (discussing cases under topic of “wealth” classification in 2 pages); CHARLES A. SHANOR, *AMERICAN CONSTITUTIONAL LAW AND RECONSTRUCTION* 773 (2001) (mentioning right of access in three sentences). The most sustained treatments of the topic in any constitutional law treatise can be found in ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 833-50 (2001), and KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 838-48 (14th ed. 2001).

8. In this Article, the phrases “constitutional litigation” and “right to seek redress” are used interchangeably in an effort to harmonize disparate bodies of scholarship and to underscore the politically significant, even controversial, aspects of actions for relief from allegedly unconstitutional government practices. I employ these terms here broadly to discuss the structure and ethos of the process by which constitutional norms are clarified and made concrete. I am fully aware that these phrases, individually, have more specific connotations: “Constitutional litigation” can mean simply the mechanics involved in litigating a constitutional claim in the courts; the “right of redress,” in the course of ordinary litigation, deals with compensating injured parties for a garden variety tort or breach of contract.

9. I use the term “civil rights plaintiff” as a shorthand for litigants who file suits primarily to vindicate their constitutional rights, even though 42 U.S.C. § 1983 authorizes suits against state actors for deprivation of rights arising under “the Constitution and laws.” 42 U.S.C. § 1983 (1994). The distinction between statutory civil rights actions and constitution-based lawsuits is not a hard and fast one, as many of the federal civil rights laws were enacted explicitly to enforce and extend constitutional guarantees. Additionally, while many of the concepts discussed in this

government-defendant plays the role of an *authoritarian* power, whose policies must be condemned, exposed, and ultimately reformed.¹⁰ Grounded in political theory, this model holds that access to the courts must be ensured because the expression of anti-establishment sentiment in that forum is critical to the health of our deliberative democracy.

Part I of this Article argues that the First Amendment, consistent with the text and structure of the Constitution, facilitates critique and reformation of the state. An individual's right to criticize state policy and petition public officials for redress historically has been linked with struggles over authority between the branches of government.¹¹ It is fitting that the First Amendment safeguards the gateway to the courts, where similar battles over state policy and enduring principles unfold.

Part II revisits the leading cases establishing the modern right to litigate constitutional claims as a means of engaging in dissident speech. It traces the evolution of the concept of constitutional litigation from the mechanical act of enforcing an individual's rights, to an inchoate form of political speech, and finally to a distinct mode of anti-government expression. Special attention is paid to the Supreme Court's recent decision in *Legal Services Corp. v. Velazquez*,¹² to invalidate a federal law that banned legal services attorneys from challenging existing welfare laws on behalf of their clients.¹³ The Court struck down this provision on free speech grounds, concluding that Congress "may not design a subsidy to effect this serious and fundamental restriction on the advocacy of attorneys and the functioning of the judiciary."¹⁴ Although *Velazquez* is assuredly a public subsidy case, it also breaks important new ground in the law of court access by explicitly coupling the concept of constitutional litigation as

Article appear to apply equally well to rules of criminal procedure, *see* *Murray v. Giarratano*, 492 U.S. 1, 16 (1989) (holding that Constitution demands that "accused and convicted persons be permitted to seek legal remedies without arbitrary governmental interference"), there are many considerations—the importance of finality, for one, and respect for state court judgments, for another—that may very well justify different kinds of rules in the criminal context. I therefore leave, as a topic for future exploration, the extent to which the First Amendment limits the kinds of rules that may be enacted which affect defendants' rights.

10. *See infra* notes 12-15 and accompanying text (explaining that the government can never seek to insulate itself from its subjects, even when a government's citizens question its very existence).

11. *See* BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112 (1921) (documenting a historical map of the judiciary).

12. 531 U.S. 533 (2001).

13. *Id.* at 537.

14. *Id.* at 544. The remaining restrictions, which were challenged unsuccessfully in the Second Circuit, were not addressed by the Supreme Court. *Id.* at 549.

speech with the Court's adjudicative task.¹⁵

Part III explores the characteristics of dissent and the policies that have traditionally justified First Amendment protection of anti-establishment speech. A detailed comparison is made between the classic contrarian and the contemporary civil rights plaintiff. This Part concludes that the nature of the plaintiff-dissident's expressive endeavor and the process of constitutional decision-making reinforce the complainant's role in public life.¹⁶

Part IV addresses the doctrinal implications for a speech-oriented model of access. There are many situations where a deeper appreciation of the right of meaningful access could lead to different results. I examine one scenario in particular: Congress' decision to limit the amount of attorneys' fees available in successful prisoners' rights actions. After reviewing the legislative history and impact of this law on constitutional litigation, I conclude that this fees cap unduly hampers an inmate-plaintiff's ability to bring constitutional challenges to existing law.¹⁷

I. THE RIGHT TO CHALLENGE STATE AUTHORITY

A. *Reimagining the Ideal of Access*

A preliminary inquiry is in order: Why reflect upon the nature of constitutional litigation when considering the right to court access? Further, does conceptualizing constitutional litigation as anti-government speech have any value? There are three initial reasons for embarking on this project.

First and foremost, a fresh perspective is important because existing scholarly materials and case law reflect an inadequate understanding of the right of access. The right is not treated seriously as a basic right, although it is nominally characterized as one. Even when its importance is acknowledged, courts and commentators are not in accord as to the scope of this right.¹⁸ This Article offers an alternative doctrinal basis for the right to meaningful access by linking the importance of court access to a modern understanding of anti-establishment speech.

15. *See id.* at 548-49.

16. *See infra* Part III.D.2.

17. *See infra* Part IV and accompanying notes.

18. *See infra* Part I.C (describing various constructions of right of access). The "right of access to meaningful adjudication" is traditionally understood to emanate from the Due Process and Equal Protection Clauses. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1461-63 (2d ed. 1998) (discussing access in terms of equality of treatment and opportunity to be heard).

Second, it is valuable to think about constitutional litigation as quintessential dissent. When courts fail to appreciate the dynamic character of constitutional litigation, they may overlook the possibility that laws restricting the assertion of one's rights may be speech-curbing in nature.¹⁹ The simplicity of the norms-enforcing narrative lures courts into thinking that as long as their doors remain open for business, nothing more needs to be done to assure equal and meaningful access.²⁰ This attitude, in turn, infects the legal analysis when questions of court access are involved.

The prevailing First Amendment approach, for better or worse, requires a court to classify speech, regulated by a challenged enactment, according to certain established categories, to estimate the probable scope of the law, and to analyze the law in light of the peculiar set of rules that are protective of speech.²¹ Therefore, the initial effort by a court to classify the speech at issue and "size up" the impact of a given law on speech has profound consequences on how the court evaluates the constitutional questions presented. How a court categorizes expression determines the protection that it is accorded; a court's failure to recognize fully the chilling effect of a rule, at this first step, usually spills over to later stages of the court's analysis.²² Treating the pursue of redress as dissent marks its role as the gateway to the political-legal order by linking familiar, time-honored free speech concepts with a rich understanding of the civil

19. See *supra* note 2 (describing the possible models of constitutional speech and the dangers associated with each model).

20. See, e.g., *Boivin v. Black*, 225 F.3d 36, 45 (1st Cir. 2000) (upholding restrictions on attorneys' fees for prison litigation on the grounds that it "does not preclude any prisoner from actually bringing a claim").

21. This may be an oversimplification. First Amendment jurisprudence is best considered as a pastiche of overlapping principles, categories, and rules of thumb intended to be protective of expression. One such principle is the presumption against content-based rules or those enacted to address the effect of words on a particular audience; another is the requirement of a close fit between means and ends when free expression is at issue. At the same time, there is an enduring instinct to distinguish between categories of speech and give expression varying degrees of protection. Speech is often conceptualized as a seamless continuum with political speech at the most protected end of the spectrum; commercial speech uncomfortably somewhere in the middle; and obscenity, child pornography, fighting words, and speech posing a "clear and present danger" at the opposite end of the spectrum, where they are afforded no protection at all. See, e.g., *United States v. Hilton*, 167 F.3d 61, 70 (1st Cir. 1999) (describing a "constitutional continuum" where different types of speech are distributed). The classification process has been roundly criticized. See, e.g., Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 693 (1983) (criticizing categorical approaches to speech as "too abstract and too reductionist").

22. See *Hilton*, 167 F.3d at 71 (remarking that the Court's reluctance to abandon statutory authority for constitutional principles is grounded in notion that "deciding Constitutional questions in the abstract is a recipe for making bad law") (quoting *New York v. Ferber*, 458 U.S. 747, 781 (1982)).

rights plaintiff's role in constitutional discourse.²³ If internalized, this method may break down the courts' bureaucratic impulse to treat a lawsuit raising constitutionally-based claims as simply another matter to be cleared from the court docket.

The third value to this approach is that it enhances our collective appreciation for the complexities of constitutional decision-making. The rhetoric of the legal opinion, in its persistent refusal openly to acknowledge conflict or disorder, endeavors to resolve disputes cleanly, adjudicate questions finally, and announce authoritative and firm principles. Similarly, the official narrative explains constitutional adjudication as a hermetically sealed, top-down phenomenon: when rights are ultimately vindicated, the constitutional order is "restored" or "affirmed" from above.²⁴ This norms-enforcing narrative, which emphasizes the end result in a successful public law action over the actual process, ignores the reality that constitutional litigation is, by nature, a profoundly disruptive activity and focuses on actual decisions to the exclusion of how and why constitutional claims are actually presented.

The process by which constitutional rights are articulated is messy; battles are lost over fundamental principles for years before they achieve recognition of a constitutional right. Even when litigants "win" by achieving a favorable court ruling, they can "lose" in terms of the real world consequences that flow from pursuing the case, and what seems natural and logical to one generation of jurists and scholars may be utterly inconceivable to the next generation.²⁵ An

23. See *supra* note 15 and accompanying text (documenting the return of the movement supporting the notion of purely free speech in which even anti-government speech is highly valued).

24. For example, Alexander Hamilton's hierarchical description of constitutional adjudication states: "A constitution is, in fact, and must be regarded by the judges, as fundamental law. . . . If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." THE FEDERALIST NO. 80 (Alexander Hamilton). A variant on this theme is Justice Roberts' famous (and simplistic) description of the process by which constitutional questions are decided:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

United States v. Butler, 297 U.S. 1, 62 (1936).

25. For a classic account of the multi-layered process of adjudication, especially where the text of a law or constitutional provision is silent or ambiguous, see CARDOZO, *supra* note 11, at 112 ("[L]ogic, and history, and custom, and utility, and the accepted standards of right conduct, are forces which singly or in combination shape the progress of the law.").

anti-government theory of access not only strives to achieve a coherent substantive theory, it also explicates and embraces the richness of the procedure by which fundamental questions actually are adjudicated. It is principally concerned with the powerful political and cultural forces that shape the constitutional crises; and the practical effects of court decisions on the lives of those who are most affected.

B. The First Amendment: Facilitating Criticism of Authority

To what extent does the Constitution limit the government's authority to enact measures that could reasonably deter the exercise of an individual's constitutional rights? While Article III is one source of structural constraints, the First Amendment is another critical source of countervailing power when lawmakers restrict an individual's ability to articulate—or the court's authority to adjudicate—questions of constitutional law.²⁶ Although the subclauses that make up the First Amendment frequently have been elided by courts and commentators, each embodies separate fundamental values even while overlapping and weaving a general framework protecting citizens' rights to free expression and engagement with government.²⁷ The rights contained in the First Amendment sketch the essential participatory expectations of a citizen of the United States: a citizen reasonably expects that he shall be allowed to make his views known publicly, congregate with others free from undue interference by the state, and have intractable disputes heard and, where appropriate, resolved. As to matters of faith, the state is obligated to strike an uneasy, but crucial, balance in preserving this venerable source of dissent: it may neither go so far as to take sides, nor may the state take steps to inhibit one's practice of

26. By choosing the First Amendment and discussing its relevance for claims arising from the Constitution, I do not deny that a right of access to federal court may very well be implicated when ordinary litigation is at issue. I draw this distinction, however, because the Constitution's structure comes into play most strongly where claims grounded in higher law are raised. Constitutional litigation, which features a direct attack on government action, embodies important values consonant with the underlying purpose of the First Amendment, and the Supreme Court's rulings support the concept of constitutional litigation as a distinct mode of expressive conduct. See *infra* Parts II & III. But see Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 6 DUKE L.J. 1153, 1206 (1973) (denying that there is "firm basis for inferring that litigation is more important when directed against governmental than against private violations").

27. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* 105 (1980) (illustrating this framework as consisting of the premise that strong language, for example, must be taken seriously).

religion, for example.²⁸

As others have noted, the First Amendment serves a crucial purpose related to self-government: it ensures the necessary preconditions to keep the political process open, accessible and accountable.²⁹ The First Amendment, therefore, has a distinct political flavor, and indeed, a deeply ingrained anti-government streak.³⁰ Free speech embodies anti-government values in the sense that the constitutional order tolerates dissent over consensus;³¹ our political-legal structure favors uncertainty and discord in the hope of retaining the dynamic capacity for transformative politics, rather than clinging to stability for its own sake.³² Finally, the Constitution ensures that the voice of the individual may be expressed, even when the words may be uncomfortable for the majority of citizens to hear,³³ and despite the prospect that the ideas may actually undermine the work of those in positions of power.³⁴

C. *Protecting Court Access as a Way of Ensuring Dissent*

What are the contours of a properly conceived First Amendment right to constitutional redress? Recent commentators focusing exclusively on the Petition Clause have recovered its rich history, but few have articulated a coherent theory for protecting the right of access to the courts.³⁵ Professors Gary Lawson and Guy Seidman, who

28. U.S. CONST. amend. I; *see also* *Allegheny County v. ACLU*, 492 U.S. 573, 592 (1989).

29. *See generally* ELY, *supra* note 27, at 105-34 (arguing that First Amendment is "critical to the functioning of an open and effective democratic process"); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT* 6 (1948) [hereinafter *FREE SPEECH*] (propounding a consent-based theory of First Amendment under which open debate is justified because "[r]ulers and ruled are the same individuals"); THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 11 (1966) ("The principle of open discussion is a method of achieving a more adaptable and at the same time more stable community.").

30. *See* EMERSON, *supra* note 29, at 11 (discussing dissident qualities of speech).

31. *See, e.g., Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute."). The Establishment Clause and the Free Exercise Clause also have a legacy rooted in dissent by minimizing government's role in the sphere of religious faith and values. *See generally* JOHN M. MECKLIN, *THE STORY OF AMERICAN DISSENT* 344 (1934) (arguing that "[t]he single greatest contribution of the dissenting tradition to American life is the separation of church and state").

32. *See* EMERSON, *supra* note 29, at 11-12 (arguing that opposition speech, "serves a vital social function in offsetting or ameliorating th[e] normal process of bureaucratic decay").

33. *See, e.g., Boos v. Barry*, 485 U.S. 312, 322 (1988) (stating that in order to allow First Amendment freedoms to function properly, "our own citizens [in public debate] must tolerate insulting, and even outrageous speech").

34. *See* ELY, *supra* note 27, at 116 (claiming that even anti-establishment speech should be appreciated as necessary for preserving "the American way").

35. *See, e.g.,* Carol Rice Andrews, *Motive Restrictions on Court Access: A First*

suggest that the First Amendment simply “restates and emphasizes the federal obligations” under Article III, insist that the Petition Clause “means exactly what it says, and no more.”³⁶ But this response begs the question of what it means to ensure that one’s access to the courts remains largely free and unencumbered, and how one goes about fulfilling that promise.

Other observers articulate a right to lodge grievances, but deprive the right of much force by conceiving that the right of access applies only to rules that hinder one’s initial ability to lodge complaints.³⁷ Professor Carol Rice Andrews, for one, favors a “narrow definition of the right,” conceiving of the right to invoke the legal process as no more than “[t]he right of an individual or group to file a winning claim within the court’s jurisdiction.”³⁸ Professor Andrews argues that “the right of access is one of initial access only,” and that “government may deny the claim or limit the substantive cause of action or remedy, free from any concerns under the First Amendment.”³⁹

Amendment Challenge, 61 OHIO ST. L.J. 665 (2000) [hereinafter Andrews, *Motive Restrictions*] (discussing the impact of the Petition Clause on various court rules and other laws that tend to limit access to the courts); Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557 (1999) [hereinafter Andrews, *A Right of Access*] (concluding that the Petition Clause provides only the limited right to file a winning claim); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899 (1997) (positing that the Petition Clause “operates as a constitutional antidote to the familiar doctrine of sovereign immunity”); Kara Elizabeth Shea, *San Filippo v. Bongiovanni: The Public Concern Criteria and the Scope of the Modern Petition Right*, 48 VAND. L. REV. 1697 (1995) (describing historical development of the Petition Clause); Norman B. Smith, “*Shall Make No Law Abridging . . .*”: *An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153 (1986) (tracing right to petition from Medieval England); Julie M. Spanbauer, *The First Amendment Right to Petition Government for Redress of Grievances: Cut From a Different Cloth*, 21 HASTINGS CONST. L.Q. 15 (1993) (analyzing historical context surrounding the Petition Clause); Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986) (providing history of the Petition Clause in the United States and concluding that modern interpretation is inconsistent with Framers’ intent).

36. Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 741, 757-58 (1999).

37. See, e.g., LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 54-55 (1985) (discussing the “external limits” on the jurisdiction-curtailing power of Congress and finding that many commentators acknowledge in the abstract that the Bill of Rights limits Congress’s power to restrict the jurisdiction of federal courts and then “proceed to talk as though it had little or no bite.”).

38. Andrews, *Motive Restrictions*, *supra* note 35, at 681. Andrews has cogently identified the potential speech-inhibiting aspects of procedural rules such as Rule 11 sanctions. Accordingly, she concludes that a plaintiff’s motive in filing a lawsuit should not limit his right to petition the court. *Id.* at 795.

39. *Id.* at 681-82.

Theories of court access that are moored too tightly to the Petition Clause, like those of Andrews, are unsatisfactory in that they are not based upon a foundation that draws together other elements of the First Amendment. Under this admittedly constricted view of the right of access, only rules that explicitly bar individuals from lodging winning lawsuits or penalize individuals directly for doing so would raise First Amendment problems. Creative laws that nevertheless discourage the assertion of colorable constitutional claims or unduly complicate the adjudicative endeavor would find no obstacle in the First Amendment.⁴⁰ More problematically, an exclusive focus on initial access truncates the right in a temporal fashion and does nothing to assure that access is meaningful: procedural rules that do not govern the actual initiation of lawsuits, but which might nevertheless seriously deter the filing of a complaint, would pose no constitutional difficulty. Nor would legislation that did not explicitly regulate the procedural rules of court but which rendered the right of access purely an empty formalism.

Neither the text nor the structure of the Constitution circumscribes the right of access to redress for constitutional harms in this way. Although it is essential that any right be articulated with sufficient precision as to permit meaningful definition and application, there is no principled reason why the protection of the First Amendment, robust in other areas, should be so spare when it comes to safeguarding the fundamental right to seek constitutional redress.⁴¹ There is no clause-bound basis for relegating the Petition Clause subordinate to the Speech or Assembly Clauses.⁴²

Words in the Constitution range from the highly specific, such as the minimum age and residency requirements for any presidential candidate,⁴³ or the right to a jury trial where “the value in controversy shall exceed twenty dollars,”⁴⁴ to the more general, such as the guarantees of “due process”⁴⁵ and “equal protection of the law.”⁴⁶ The

40. While Andrews acknowledges that “a surprising number of statutes outside of the judicial procedural context impact court access even though that impact is not the specific aim of the statute,” she does not focus on such problem areas, and her theory of access is not well suited to addressing such situations. *Id.* at 671.

41. See Spanbauer, *supra* note 35, at 16-17 (noting that the Supreme Court has recognized that the Petition Clause is “cut from the same cloth” as the other rights afforded by the First Amendment).

42. See *McDonald v. Smith*, 472 U.S. 479, 485 (1985) (“The Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble . . . [t]hese First Amendment rights are inseparable.”) (citations omitted).

43. U.S. CONST. art. II, § 1, cl. 5.

44. *Id.* at amend. VII.

45. *Id.* at amends. V; XIV, § 1.

First Amendment right to petition is not articulated at a level of specificity greater than that of its counterparts.⁴⁷ The Framers' use of the more general term "Government" in the Petition Clause, rather than an express limitation on the right to petition a particular branch of government, suggests a collective desire to codify a broad right to seek redress from the whole of government, including the courts.⁴⁸ In all events, the right to engage in constitutional litigation implicates associational, petition, and free speech values in ways that are not easily cabined by any particular segment of the text.⁴⁹ Theories that fail to account for the unique qualities of this mode of expression do not provide a sufficient foundation for the right to court access.⁵⁰

Consideration of Article III's place in our constitutional design takes us further. Whatever may be said about the duty *vel non* on the part of other branches of government to address modern petitions, Article III, with which the First Amendment must be harmonized, has been construed to not only to empower the judiciary to address claims of deprivations of constitutional rights, but also require courts to remedy violations of individual rights when and where they have occurred.⁵¹ Others have insisted that this is the essence of the judicial

46. *Id.* at amend. XIV, § 1.

47. See Fiss, *Forms of Justice*, *supra* note 2, at 11 (noting that "the equal protection clause . . . is as specific as the free speech clause . . . but neither is very specific. They simply contain public values that must be given concrete meaning and harmonized with the general structure of the Constitution").

48. See, e.g., *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition."). As used in other parts of the Constitution, the word "Government" refers generally to the whole of the ruling structure that the Framers established. The term "Government" appears in four other places in the founding document to denote the particular form of government established by the Constitution, or the broader concept of government generally, or the act of exercising authority. See U.S. CONST. art. I, § 8, cl. 14 (granting Executive power to "make Rules for the Government and Regulation of the land and naval Forces"); *id.* at art. II, § 1, cl. 3 (mentioning "the Seat of the Government of the United States" in discussing electoral process for selecting President); *id.* at art. IV, § 4, ("guarantee[ing] to every State in this Union a Republican Form of Government"); *id.* at amend. XXIII (stating that the "District constitut[es] the seat of Government of the United States"). The Drafters used specific terminology when they described the powers lodged exclusively within "Congress," any particular house of Congress, or the "President." See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (providing one approach to synthesizing various elements of Constitution based on usage of the same words in different parts of Constitution).

49. See generally Smith, *supra* note 35 (discussing generally the need to consider the historical interplay between speech, press, assembly and petitioning for a full understanding of the scope of these rights).

50. See *infra* Part II and accompanying notes (describing judicial recognition of various first amendment underpinnings of constitutional litigation in civil rights public interest case law).

51. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (citing 3 W. BLACKSTONE COMMENTARIES 23 (1783)) ("[I]t is a general and indisputable rule, that

function.⁵² This is not to say that one is entitled to any particular form of relief, but simply that a right without a remedy would leave the right to lodge grievances an empty exercise.

Historical practice deepens our understanding of the text. As the historical record suggests, those who brought their grievances before the government had a reasonable expectation that their plights would be addressed whenever possible, and these individuals frequently employed the language of legal entitlement in their petitions.⁵³ Indeed, there exists a scholarly consensus that government officials felt a “socio-political obligation to hear those grievances, to provide a response, and often to act upon the complaints,”⁵⁴ and it seems perfectly logical to expect that the Framers had this in mind when they preserved the ancient right to seek redress.⁵⁵ The essential gate-keeping dimension of the practice of petitioning should not be overlooked, as “[t]he right of petition was both specific—to voice a particular complaint or to solicit a particular favor—and general: the right’s chief function [is] to protect all other rights.”⁵⁶ It is worth noting that historically, the very act of seeking relief from state policies has been viewed by the state itself as anti-government activity.⁵⁷

where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.”). *See generally* TRIBE, *supra* note 37, at 51 (arguing that congressional enactments “are void to the degree that they leave the Supreme Court incapable of fulfilling its ‘essential role . . . in the constitutional plan’—the role of vindicating the supremacy of federal over state law (and of the Constitution over other sources of federal law) and the uniformity of such federal law as exists.”) (citations omitted).

52. Alexander Hamilton, in the Federalist Papers, made this very point: “[Constitutional] limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.” THE FEDERALIST No. 78 (Alexander Hamilton).

53. *See* Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2174-94 (1998) (discussing importance that citizens placed on their right to petition during early colonial period).

54. *Id.* at 2160. Although a few commentators have denied that the Petition Clause encompasses a right to a response, *see, e.g.*, Andrews, *A Right of Access*, *supra* note 35, at 637-41, others have found that the petitions that were “ignored or rejected outright . . . were few in number.” Alan Tully, *Constituent-Representative Relationships in Early America: The Case of Pre-Revolutionary Pennsylvania*, 11 CAN. HIST. J. 139, 146-47 (1976); *see also* Higginson, *supra* note 35, at 142.

55. *See* Mark, *supra* note 53, at 2207-12 (discussing the debate in the First Congress over the inclusion of the Petition Clause).

56. JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 23 (1986).

57. For discussions of the history of petitioning as it relates to challenges to government policy and the treatment of such grievances by governmental bodies, *see generally* Mark, *supra* note 53, at 2153; Pfander, *supra* note 35, at 899; Smith, *supra* note 35, at 1153; Higginson, *supra* note 35, at 142. In general, “the reactions

However, history aids only partially in giving contemporary meaning to the text. Comprehending how previous generations challenged governmental authority offers insight into both the importance of the right involved and the circumstances giving rise to the right at the moment in time at which the right was originally conceived. Inevitably, however, disputes over how narrowly or broadly to read the historical record limit the usefulness of history as a self-contained approach to constitutional interpretation.⁵⁸ Even if we can overcome such concerns, the circumstances of a bygone era should not prevent the words from having modern relevance.

History must join theory for our project to bear fruit. Professor John Hart Ely's process-based theory provides a way of thinking about a First Amendment right to court access that preserves its place within the context of the Constitution as a whole.⁵⁹ Professor Ely does not focus on the Petition Clause, but envisions the First Amendment broadly to protect the rights embodied in the Amendment, whether or not they are explicitly mentioned, "because they are critical to the functioning of an open and effective democratic process."⁶⁰ Politically oriented expression, particularly where it is aimed at the government or designed to move listeners to take action, must be tolerated as the price for "assuring an open political dialogue and process."⁶¹ The overarching design of the Constitution, Professor Ely insists, is to reinforce, and even strengthen, "the original commitment to control by a majority of the governed."⁶²

This approach enriches a First Amendment theory of court access in three respects. First, the process-based method warns that to understand the First Amendment in a manner that is relevant to the vagaries of modern life, one must not adhere slavishly to a purely text-based test or an excessively restrictive understanding of original intent to interpret its guarantees.⁶³ Under the Ely model, where the

generally strengthened the right" to seek extraordinary relief from oppressive or illegitimate government actions. Mark, *supra* note 53, at 2171.

58. See generally JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996) (discussing use of history in constitutional interpretation).

59. See ELY, *supra* note 27, at 105 (noting that court access, although not expressly protected in the First Amendment, has a solid foundation in First Amendment jurisprudence).

60. *Id.*

61. *Id.* at 112.

62. *Id.* at 7.

63. For a provocative discussion of the consequences of the different ways of using history to give meaning to enduring constitutional principles, see RAKOVE, *supra* note 58, at 7-22 (distinguishing between concepts of "original meaning, intent, and understanding").

problem the state attempts to prevent is unrelated to the content of the message being regulated, a balancing approach involving the scope of the restriction on speech and governmental interests might make sense.⁶⁴ Where the problem that the state seeks to address arises from the message being conveyed, however, the First Amendment should broadly “immunize[] all expression save that which falls within a few clearly and narrowly defined categories.”⁶⁵

Whatever criticisms might be leveled at process theory, its principal thesis that the Bill of Rights serves to broaden democratic participation counsels in favor of a robust right of court access. In Professor Ely’s account, the First Amendment must fulfill its “central function of assuring an open dialogue and process.”⁶⁶

Second, a process-based theory of constitutional law suggests that the First Amendment should be read to protect criticism of government in whatever lawful form that challenge takes.⁶⁷ This principle applies with particular force to the act of attacking official governmental policy in the federal courts on the ground that it is inconsistent with foundational ideals. The focus should not be on the actual claims placed before the court, but on the effect or intended effect upon this deeply anti-government form of expression.⁶⁸ When rules negatively affect one’s ability to articulate constitutional claims, or hamper the federal courts in their task of adjudicating one’s rights, they run the risk of short-circuiting constitutional discourse.⁶⁹ Because the political branches are generally ill-equipped to handle the multiple ways in which their policies affect minority rights, constitutional litigation today, more than ever, is the principal means by which rights are examined, protected, and ultimately refined.⁷⁰

64. See ELY, *supra* note 27, at 111 (asserting that content neutral regulations should be evaluated on a specific threat approach).

65. *Id.* at 110.

66. *Id.* at 112.

67. See Pfander, *supra* note 35, at 989 (arguing that Petition Clause should reach judicial petitions).

68. Some scholars maintain that the key is whether a claim will be successful. See, e.g., Andrews, *Motive Restrictions*, *supra* note 35, at 666 (arguing that the Petition Clause only grants the right to file winning claims).

69. See MEIKLEJOHN, *supra* note 29, at 42 (arguing that First Amendment “was written to clear the way for thinking which serves the general welfare”).

70. For an illuminating discussion of the reasons as to why federal courts are particularly well suited to define and articulate constitutional norms, see EMERSON, *supra* note 29, at 30-41. Emerson argues that the growth and centralization of the federal judiciary has caused it to become an effective counterweight to the modern bureaucratic state. *Id.* at 36-40. In Emerson’s view, the federal courts are more insulated from direct majoritarian pressures than their constitutional counterparts. *Id.* at 40-41. In addition, judges are likely to possess the “knowledge and wisdom derived from historical experience, from broad political and social theory, and from

Third, in related fashion, process theory holds that the Constitution is designed not only to encourage majority rule, but also to “protect those who can’t protect themselves politically.”⁷¹ In so doing, the founding framework facilitates the ability of the politically marginalized to articulate alternative viewpoints and play active roles in public life.⁷² This principle safeguards politically vulnerable citizens, and treats dissent as a form of disfavored communication. When we ensure the openness of the legal system, we create breathing room for the exchange of views on fundamental questions that some might find immoral, blasphemous, or wrongheaded. But all of these views are essential to the process by which our constitutional norms are made relevant in each generation. Where a rule has been enacted impairing one’s ability to pursue constitutional claims, “a more serious threat should be required when there is doubt that the speaker has other effective means of reaching the same audience.”⁷³

II. TOWARD A FIRST AMENDMENT RIGHT TO ARTICULATE CONSTITUTIONAL CLAIMS

A. *The Decisions: The Rise of Constitutional Litigation as a Modern Form of Dissident Speech*

Modern First Amendment case law sketches a framework for protecting the right to pursue constitutional redress as a specialized form of political speech. This Part argues that the Court’s understanding of the act of asserting one’s constitutional rights—*constitutional litigation* for lack of a more suitable term—has evolved from a purely mechanical idea of initiating legal claims to a distinct, fully identifiable model of anti-government expression. As the prevailing conception of dissent has evolved, so, too, the First Amendment has been reconceptualized to protect the expressive components of this unique form of speech.

In a series of cases, decided at the height of this country’s struggle over political and legal equality for African-Americans, the U.S. Supreme Court explicitly acknowledged the public law model of

weighing basic values.” *Id.* at 31.

71. ELY, *supra* note 27, at 152.

72. See ELY, *supra* note 27, at 135-79; see also Michelman, *supra* note 26, at 1175 (suggesting that “[p]articipation values are at the root of the claim that [a right of court access] can be derived from the first amendment”); see generally Note, *A First Amendment Right to Access to the Courts for Indigents*, 82 YALE L.J. 1055 (1973) (arguing that indigents’ right to access the courts derives from the First Amendment).

73. ELY, *supra* note 27, at 111.

litigation as a new form of political speech. In each of these cases, the political branches erected barriers to court access by preventing lawyers and clients from associating freely for the purpose of attacking legal segregation, and each time, the Court knocked down these barriers.⁷⁴

The Court laid the groundwork for a modern First Amendment right of access by making two critical interpretive moves. First, it equated constitutional litigation in the courts with dissident speech, and viewed structural reform as a seamless extension of political strategy.⁷⁵ Second, the Court employed the classic First Amendment test for core political speech to strike down laws that impair one's effort to associate with others for these politico-legal objectives.⁷⁶

In the landmark case of *NAACP v. Button*,⁷⁷ the Supreme Court invoked the First Amendment to invalidate a series of Virginia laws that prohibited individuals and organizations from soliciting legal business and advising prospective clients to hire particular attorneys—in this case, counsel cooperating with the NAACP.⁷⁸ The NAACP and its members challenged these laws, many of which were enacted to deter the NAACP's systematic efforts to dismantle Jim Crow.⁷⁹ The plaintiffs sought a declaration that these laws contravened their right to associate freely and petition the government for redress.⁸⁰

The Court granted the requested relief. Rather than rely exclusively on any particular sub-clause of the First Amendment, the Court adopted a holistic approach, embracing concepts related to free expression, assembly, and petition to safeguard the right to engage in constitutional litigation.⁸¹ In granting heightened protection to the group's public litigation-related activities, the Court explicitly distinguished actions taken to enforce constitutional guarantees from activity related to everyday lawsuits seeking resolution of purely private disputes.⁸² Writing for the Court,⁸³ Justice

74. See, e.g., *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963).

75. See *Button*, 371 U.S. at 431 (highlighting virtues of dissident speech by minority groups and noting that litigation is often the most effective method for achieving their social and political goals).

76. See *id.* at 435-37 (holding that right to expression includes right to persuade others through process of litigation).

77. 371 U.S. 415 (1963).

78. *Id.* at 437.

79. *Id.* at 435-36.

80. *Id.* at 428.

81. *Id.* at 430.

82. See *id.* at 431 (emphasizing the importance of association to litigation pursued to further minority viewpoints).

Brennan acknowledged the profoundly communicative aspect of constitutional litigation:

In 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.⁸⁴

The Court explicitly treated constitutional litigation as “petition[ing] for redress of grievances.”⁸⁵ In so holding, the Court tacitly acknowledged that the deeply rooted social and political structures in America had frustrated the attainment of the constitutional ideal of racial justice,⁸⁶ and that new countervailing sources of authority were required to fulfill the promise of substantive equality held out by the Fourteenth Amendment.⁸⁷ Before political power could redistribute itself, however, the channels of communication and democratic participation had to be forced open. According to this modern perspective of the legal system’s role, “the judicial process is an effective mechanism for registering and responding to grievances . . . in a regulatory state.”⁸⁸ Like the petitions of old, constitutional litigation now represented an innovative device to “force the government’s attention on the claims

83. Justice Douglas would have gone further by holding that Virginia’s anti-solicitation laws, like others enacted in Arkansas, Florida, Georgia, Mississippi, South Carolina, and Tennessee after *Brown v. Board of Education*, “reflect[] a legislative purpose to penalize the NAACP because it promotes desegregation of the races.” *Button*, 371 U.S. at 445 (Douglas, J., concurring). See generally JACK GREENBERG, *CRUSADERS IN THE COURTS* 217-22 (1994) (“virtually every Southern state passed laws and started legislative investigations, criminal prosecutions, suits for injunction, and disbarment proceedings against lawyers to put the NAACP and LDF out of business”). Justice White concurred with the majority’s decision on narrower grounds, finding that the law prohibited organizations from recommending certain attorneys and was therefore overbroad. *Button*, 371 U.S. at 447 (White, J., concurring in part and dissenting in part).

84. *Button*, 371 U.S. at 429.

85. *Id.* at 430. In *California Motor Transport Co. v. Trucking Unlimited*, the Court reaffirmed the essence of *Button*: within the American form of government, “the whole concept of representation depends upon the ability of the people to make their wishes known by their representatives,” and the right to petition “extends to all departments of the Government.” 404 U.S. 508, 510 (1972).

86. See *Button*, 371 U.S. at 429 (recognizing that legal strategy is often closely tied to political strategy because “[g]roups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts”).

87. See *id.* at 430 (acknowledging that right to associate for purpose of constitutional litigation stems from a broad, collective reading of the First and Fourteenth Amendments).

88. Chayes, *supra* note 2, at 1308. In explaining the advent of public interest lawyering, Professor Chayes argued that “the growth of judicial power has been, in large part, a function of the failure of other agencies to respond to groups that have been able to mobilize considerable political resources and energy.” *Id.* at 1313.

of the governed when no other mechanism could.”⁸⁹

A second reason delineated by the *Button* Court for understanding constitutional litigation as political expression was that by organizing themselves around certain specific expressive goals—in this instance, “vindicating the rights of the American Negro community,”—the NAACP’s members made a “distinctive contribution . . . to the ideas and beliefs of our society.”⁹⁰ This amounted to a significant broadening of the understanding of political expression under the First Amendment. By associating with like-minded persons and challenging allegedly unconstitutional governmental practices in the courts, the NAACP actively engaged in debate on issues of public importance in a manner not unlike “a conventional political party.”⁹¹

In an important third analytical maneuver, the Court observed that, especially for minority groups without the means to effect change within the ordinary political process, “association for litigation may be the most effective form of political association.”⁹² In a remarkable appreciation of both the limitations of interest group politics and the difficulty in vindicating individual rights within such constraints, the Court explained that “under the conditions of modern government, litigation may well be the sole practical avenue open to a minority to petition for redress of grievances.”⁹³

In re Primus,⁹⁴ which arose out of the state of South Carolina’s attempt to discipline a public interest lawyer for soliciting and advising prospective clients, provided the Court with another critical opportunity to delineate the First Amendment right to seek transformative change through the legal process. Taking the *Button* analysis one step further, the Court distinguished between lawsuits filed purely “for pecuniary gain” and legal actions “undertaken to express political beliefs and to advance . . . civil-liberties objectives.”⁹⁵ The right to pursue redress for violations of constitutional rights, the Court went on to explain, “comes within the generous zone of the First Amendment protection reserved for associational freedoms” and

89. Mark, *supra* note 53, at 2157.

90. *Button*, 371 U.S. at 431.

91. *Id.*

92. *See id.* (“We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly.”).

93. *Id.* at 430.

94. 436 U.S. 412 (1978).

95. *Id.* at 422. Like the NAACP, the ACLU was deemed to engage in constitutional litigation, “a form of political expression” and “political association.” *Id.* at 428.

involves the “communicati[on] [of] useful information to the public.”⁹⁶

Particularly important, the *Primus* Court expressly treated constitutional litigation as contrarian speech, singling out “unpopular” subject matters on which the ACLU often found itself at odds with public opinion and governmental policy. Included were “political dissent, juvenile rights, prisoners’ rights, military law, amnesty, and privacy.”⁹⁷ In a candid acknowledgment of the serious difficulties faced by indigent litigants, the Court stated that “the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants,”⁹⁸ and affirmed the principle that the First Amendment extends beyond the mere exchange of ideas, and includes the right to seek their lawful implementation.⁹⁹

These decisions, working in tandem, established a nascent First Amendment right of court access by acknowledging the communicative nature of structural reform litigation. At the same time, however, these decisions provided an incomplete foundation for a speech-centered theory of access. Although the Court grasped the crucial role that lawyers play within our adversarial process of constitutional adjudication, *Button* and *Primus* involved only the right to solicit clients for public law litigation—in other words, pre-litigation activity.¹⁰⁰ Similarly, the Court’s due process cases focused on the extent to which excessive fees barred access to the courts in the first place.¹⁰¹ Neither line of cases considered the significance of meaningful access once constitutional litigation has commenced.¹⁰² The Rehnquist Court’s recent ruling in *Velazquez* goes a long way toward filling that void.¹⁰³

96. *Id.* at 424.

97. *Id.* at 428.

98. *Id.* at 431.

99. *See id.* at 432 (“Free trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts.”) (quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1945)).

100. In *Primus*, for example, the appellant was a cooperating attorney for the ACLU who advised women of their legal rights regarding sterilization and was thereafter disciplined for violating ethical rules. *See id.* at 412.

101. *See generally* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 17.10 (3d ed. 1999) (offering a comprehensive discussion of the due process right to access in light of excessive fees).

102. *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that a state violated due process and equal protection by denying an indigent woman the ability to appeal from a trial court determination permanently terminating her parental rights solely because she could not afford to pay for a transcript of the trial proceedings).

103. *See* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

B. The Velazquez Decision and Beyond

In *Velazquez*, the Court took a powerful step toward recognizing a First Amendment right to litigate questions of constitutional law effectively, announcing that rules which effectively impair the advocacy of constitutional claims or which were intended to “distort” the process of constitutional adjudication run afoul of the First Amendment.¹⁰⁴ At issue in *Velazquez* was the constitutionality of certain advocacy restrictions imposed on LSC lawyers by Congress in 1996. Specifically, § 504(a)(16) of the Act prohibited the expenditure of federal funds in “litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system.”¹⁰⁵ The Second Circuit had struck down § 504(a)(16) as unconstitutional viewpoint discrimination to the extent that it forbade LSC attorneys from challenging “existing law” on behalf of their clients, concluding that Congress impermissibly “s[ought] to discourage challenges to the status quo.”¹⁰⁶

The Supreme Court affirmed the Second Circuit’s decision.¹⁰⁷ Justice Kennedy, writing for a 5-4 majority, began by characterizing the efforts by LSC attorneys to engage in structural reform litigation as “private” speech, even though it was funded through public monies.¹⁰⁸ From this starting point, he reasoned that congressional attempts to circumscribe constitutional litigation amounted to regulation of private speech.¹⁰⁹ The majority was troubled by the

104. *Id.* at 537.

105. *Id.* at 538 (quoting Omnibus Consolidated Rescissions and Appropriations Act of 1996, § 504(a)(16), 110 Stat. 1321); *see also* 45 C.F.R. § 1639.3(a) (1999) (“Prohibited activities include participation in: (a) Litigation challenging laws or regulations enacted as part of an effort to reform a Federal or State welfare system.”); *id.* § 1639.4 (“Recipients may represent an individual eligible client who is seeking specific relief from a welfare agency, if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.”).

106. *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 770 (2d Cir. 1999).

107. *Velazquez*, 531 U.S. at 549.

108. *See id.* at 542 (explaining that LSC was designed to facilitate private speech and not to promote a governmental objective).

109. *See id.* (pointing out that LSC attorney speaks on behalf of client, not government). On this basis, the Court distinguished *Rust v. Sullivan*, 500 U.S. 173 (1991), which had upheld a provision that barred doctors who received Title X funds from advising patients about abortion. Rather tenuously, the *Velazquez* Court continued to regard the abortion advice gag order as a legitimate limitation on “governmental speech.” *Velazquez*, 531 U.S. at 540-42. In drawing a razor fine distinction between the kinds of speech at issue, the Court refused to acknowledge that limits on speech in *both* cases had a powerful capacity to distort the professional advice and services upon which the clients’ health or welfare depended. *Rust* has been so regularly condemned that appellees’ counsel suggested that the Court overrule the decision. *See* Brief for Respondent at 19 n.17, 2000 WL 991809, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (No. 99-603).

statute's provisions "foreclos[ing] advice or legal assistance to question the validity of statutes under the Constitution of the United States,"¹¹⁰ which the Court read to forbid LSC attorneys from challenging or questioning laws as inconsistent with the constitutional rights of their clients.¹¹¹ Not only did the restriction violate the principle of speech neutrality, it undermined the adjudicative function of the federal courts.¹¹² Analogizing to the Court's previous First Amendment decisions in the area of broadcasting and student newspapers, the majority held that a lawyer's advocacy to contest the constitutionality of government laws and policies was "inherent in the nature of the medium" of speech, and that the challenged restrictions impermissibly "alter[ed] the traditional role of attorneys" and "distort[ed] [the] usual functioning" of the legal system.¹¹³ The Court characterized the provision, without further elaboration, as "inconsistent with accepted separation-of-powers principles."¹¹⁴

1. *Tethering the right of court access to the judicial function*

As a preliminary matter, one should view the events leading to the passage of the provision, as well as the decision ultimately striking it down, against the broader backdrop of institutional struggle. The opinion of the Court did not explicitly distinguish between lawmakers' motivations in enacting § 504(a)(16) and the effect of the restrictions at issue; rather it discussed both interchangeably.¹¹⁵ Nevertheless, the restrictions were formulated and approved in an

110. *Velazquez*, 531 U.S. at 544.

111. *Id.*

112. *Id.* at 546.

113. *Id.* at 544.

114. *Id.* at 546. Justice Kennedy explained that "[b]y seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression *upon which courts must depend for the proper exercise of the judicial power.*" *Id.* at 545 (emphasis added).

115. Much of the decision emphasizes the improper effects of curtailing the publicly funded attorney's speech (i.e., his advocacy), altering the traditional role of counsel, and affecting the court's work. *Id.* at 544-48. At other points in the ruling, the Court focuses on Congress' intended purposes. *See id.* at 545 ("By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power."). Its conclusion that "Section 504(A)(16) sifts out cases presenting constitutional challenges in order to insulate the Government's laws from judicial scrutiny" seems, at first glance, a mixture of the two concepts. *Id.* at 546. Because the provision actually does not deprive courts of the power to decide questions of constitutional law, this rationale seems more sensibly read as saying the lawmaking branches have unconstitutionally tried to insulate the law from judicial review. This suggests that in certain circumstances the First Amendment may serve as a more substantial barrier against encroachments on the right of access than does Article III.

environment where legislators repeatedly questioned the propriety of public service attorneys in questioning existing welfare rules through class action lawsuits, and attacked litigants who sought enforcement of their constitutional rights.¹¹⁶ Observers understood that the congressional restrictions on LSC activity had everything to do with plaintiffs' successes in obtaining structural reform of the welfare system and the willingness of federal courts to entertain welfare recipients' claims.¹¹⁷

A majority of the Justices certainly viewed the ideal of an independent Judiciary to be under attack.¹¹⁸ In a dramatic display, the judiciary reasserted its prerogative to define the parameters within which the judicial function is to be performed. The fact that the Court invoked the separation of powers doctrine and characterized the provision as an attempt to "insulate" some congressional enactments from judicial review, all under the rubric of the First Amendment, conveyed the Court's belief that the law encroached upon its core judicial authority, however indirect the means and however ineffective it was in actually circumscribing the Court's zone of influence.¹¹⁹

That five members of the Court deemed this case to affect their institutional power is evidenced by their decision to reach back to *Marbury v. Madison*¹²⁰ to reestablish their authority to decide questions of law.¹²¹ In doing so, the Court signaled that Congress had, by enacting these limits on lawyers, invaded "the sphere of its authority to resolve a case or controversy."¹²² These are strong sentiments, particularly where the lawmaking branches had not explicitly stripped the courts of jurisdiction to entertain questions of constitutional law, but instead had simply prevented some federally funded lawyers from raising such claims.¹²³ By invoking the

116. See Jessica A. Roth, Note, *It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 HARV. C.R.-C.L. L. REV. 107, 107 (1998) (noting that LSC recipients were prohibited from engaging in reform litigation, challenging executive or agency orders, or encouraging political participation).

117. See *id.* at 108 (noting that congressional restrictions on LSC activities were primarily targeting "political" lawsuits, including those lawsuits that were instituted for purpose of reforming welfare system).

118. See *Velazquez*, 531 U.S. at 546 ("The restriction imposed by the statute here threatens severe impairment of the judicial function.").

119. See *id.* (noting that proposed restrictions would not allow attorneys to seek resolution from courts regarding questions of statutory validity).

120. 5 U.S. (1 Cranch) 137 (1803).

121. See *id.* at 177 ("It is emphatically the province and the duty of the judicial department to say what the law is."), cited in *Velazquez*, 531 U.S. at 545.

122. See *Velazquez*, 531 U.S. at 545.

123. When the lawmaking branches have more obviously attempted to strip

“separation of powers” doctrine in this context, the Court broke important new ground in the law of court access.¹²⁴

In turning aside what it viewed as a direct challenge to its authority, the judiciary expanded its sphere to encompass the power not only to interpret the Constitution in an authoritative manner, but also to govern lawyers’ and parties’ capacities to *articulate constitutional claims intelligently* and to monitor the quality of court access. To secure this victory over the other branches of government, the Court embraced an almost entirely lawyer-dependent model of constitutional adjudication, where the quality of the decisions reached, and perhaps the legitimacy of the results obtained, depends largely on the information and ideas provided by the parties and their counsel.¹²⁵

2. *Treating constitutional litigation as dissident speech*

As with prior struggles over institutional prerogative, the latest inter-branch conflict further delineated the scope of public access to the courts—this time, by expanding the individual right of access. Embedded within the *Velazquez* decision are several concepts that reinvigorate a substantive, speech-centered theory of access.

One key to the ruling is the Court’s unspoken assumption that the articulation of constitutional claims amounts to dissident speech. While the majority did not explicitly invoke the anti-government speech line of cases, its analysis leaves no doubt that constitutional litigation should be equated with anti-government speech for purposes of First Amendment analysis. There is no sense in understanding § 504(a)(16) as viewpoint discrimination unless litigation within “existing law” is seen as one opinion on the broader subject of government authority (i.e., the official policy at issue is valid or constitutional or consistent with fundamental principles),

federal courts of jurisdiction over certain subject matters, the Court’s reaction has been more muted. The Court has taken refuge in the “clear statement” rule to avoid interpreting an arguably ambiguous statute so as to withdraw jurisdiction, and hence, refrain from addressing any constitutional questions. *See, e.g.,* *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 326 (2001) (holding that federal courts have jurisdiction over an alien’s petition for federal writ of habeas corpus and that an alien convicted via plea bargain who would have been eligible for waiver under 212(c) was entitled to a discretionary waiver under that section). There are two explanations for this phenomenon. First, the Court, where possible, will opt for the most effective way of avoiding constitutional conflict while still vindicating its authority. Second, the Court will be most tempted to sound a ringing defense of its prerogative when the stakes are not as high, that is, when doing so will not seriously call into doubt its own legitimacy.

124. *See Velazquez*, 531 U.S. at 562 (Scalia, J., dissenting) (arguing that majority’s decision was “inexplicable on the basis of our prior laws”).

125. *See id.* at 545 (affirming the principle that “[a]n informed, independent judiciary presumes an informed, independent bar”).

while constitutional litigation represents a different perspective on the same topic (i.e., the policy is inconsistent with other laws, basic rights, or founding values).¹²⁶ After all, viewpoint discrimination occurs when the state either favors or disfavors a privately expressed perspective. As Justice Scalia points out in dissent, the provision does not distinguish *between* the kinds of constitutional arguments that can be made by LSC lawyers, but precludes *all* forms of constitutional litigation funded by government coffers.¹²⁷

3. *Safeguarding the channels for the transmission of constitutional values*

Another important development in access jurisprudence is the *Velazquez* ruling's extension of free speech protection to laws or rules that inhibit the free flow of information to the courts.¹²⁸ Unlike conventional public fora where ideas compete for attention and where false or frivolous notions may triumph over well-founded points of view, courts are driven by the goals of truth-seeking and constitutional adjudication.¹²⁹ The First Amendment ensures court access by protecting the integrity of the mechanism by which constitutional discourse takes place. Under this reasoning, restrictions at odds with the judicial process may fail judicial scrutiny, even when the undertaking is publicly funded.

If the restrictions at issue in *Velazquez* had the potential to "distort[] the legal system,"¹³⁰ then public law activity must be qualitatively different from other forms of speech, and restrictions burdening the assertion of such rights must be more skeptically viewed under the First Amendment than other kinds of speech-curbing laws. This entire line of reasoning is consistent with a process-based approach to court access.

The recognition of a plaintiff-dissident's right to articulate a constitutional claim, and have the judiciary understand its essence, is a noteworthy broadening of *Button* and *Primus*, which, despite their analytical force, presented only the narrow question of whether the

126. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (stating that viewpoint discrimination occurs when "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

127. See *Velazquez*, 531 U.S. at 551 (Scalia, J., dissenting) (insisting that provision "funds neither challenges to nor defenses of existing welfare law" and therefore did not constitute viewpoint discrimination).

128. See *id.* at 546 (explaining that Congress does not have authority to exclude issues or information from courts that are "within the province of the courts to consider").

129. *Id.* at 544.

130. *Id.*

state could bar or punish individuals for soliciting public interest clients.¹³¹ After *Velazquez*, it might be said that First Amendment protection inheres in the entire structure within which constitutional litigation occurs. The Court extended the First Amendment's reach to one's effort to obtain accurate legal advice, communicate effectively with competent counsel, and present the "vital theories and ideas" associated with constitutional claims.¹³² These structural rationales for striking down the provision are wholly separate from the finding of viewpoint discrimination.

The Court's acceptance of the "distortion" rationale under the circumstances—the restrictions at issue barred only federally-funded LSC attorneys from raising constitutional claims, leaving the clients free to assert such claims on their own or to hire lawyers competent to raise them—only underscores the potential reach of the decision. A rule or regulation unduly restricting the lawyer's public litigation activities may very well have the effect of "distorting" the court's ability to receive information about constitutional claims, or impairing the judiciary's function of adjudicating constitutional conflicts.¹³³ The point at which an enactment or rule unduly "distorts" the adjudicative process will likely depend on the novelty of the restriction, the reasons underlying the enactment, and the rule's impact on a dissident's ability to articulate her claim.¹³⁴

4. *Court access and the quality of representation*

While the *Velazquez* Court did not explicitly cite *Button* or *Primus*, the spirit of those decisions informed its reasoning in another aspect as well: it affirmed the principle, first established in those cases, that lawyers articulating constitutional claims are "necessary to the proper functioning of th[e] system."¹³⁵ The Court has never ventured very far down the road of requiring the appointment of attorneys for civil actions.¹³⁶ In fact, the Court stopped short of any suggestion of a

131. See *NAACP v. Button*, 371 U.S. 415, 419 (1963); *In re Primus*, 436 U.S. 412, 422 (1978).

132. See *Velazquez*, 531 U.S. at 544 (concluding that statute "forecloses advice or legal assistance").

133. *Id.* at 545 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803)).

134. If the rule of *Velazquez* is to mean anything, it means that any "unconventional" law that "suppress[es] speech inherent in the nature of the medium" of constitutional litigation is presumptively invalid. See *id.* at 543 (explaining that First Amendment forbids "Government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium") (citing *FCC v. League of Women Voters*, 468 U.S. 364, 396-97 (1984)).

135. See *id.* at 544 (referring to the restrictions on advocacy as "serious and fundamental").

136. See, e.g., *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 33 (1981) (finding no

general right to counsel in *Velazquez*.¹³⁷ Nevertheless, the Court's emphasis on the attorney's role in engaging in this type of protected dissent is significant.¹³⁸ First Amendment interests may be implicated where a law has the effect of preventing or discouraging lawyers from raising constitutional claims or taking such cases in the first place, particularly where the public has pursued a policy of providing or encouraging legal assistance. While there is no guarantee that a future combination of the Court will be as open to these policy arguments in a case involving questions of constitutional access, the effect of a speech-curbing law on the quality of representation might well make the difference in a close case.

III. THE QUALITIES OF ANTI-GOVERNMENT SPEECH

Examining the myriad of ways in which the pursuit of constitutional causes of action mirrors the expression of anti-government sentiment enriches our understanding of the importance of court access. This Part analyzes the nature of contrarious speech and the reasons that the Court has offered for its protection of dissent. These values should inform our conception of the right to court access. This Part continues with an exploration of the various ways in which the assertion of one's rights, the rules that govern the resolution of constitutional disputes, and the process of adjudication confirm the plaintiff's role as a dissident in civic life. In many striking respects, the expressive features of constitutional litigation track the essential elements of traditional dissent.

As any First Amendment scholar or constitutional lawyer is aware, the modern First Amendment is understood to ensure that "debate on public issues should be uninhibited, robust, and wide-open."¹³⁹ The marketplace of ideas was not always receptive to criticism of the state, and the right to excoriate one's leaders or their official policies has not been consistently protected by the courts, particularly in

constitutional requirement for appointment of counsel in parental rights termination hearing); *Lewis v. Casey*, 518 U.S. 343, 354 (1996) (finding no constitutional requirement for provision of counsel to inmates in civil actions where access to court is not at issue).

137. See *Velazquez*, 531 U.S. at 546-47 (discussing importance of the lack of an alternate source of counsel to those represented by LSC attorneys).

138. See *id.* (arguing that restrictions on speech and legal advice cast doubt as to whether LSC counsel can fully advise client and properly present all appropriate legal issues).

139. See *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (noting this principle was one to which the nation holds a "profound commitment" and acknowledging that such a commitment will permit harsh criticism of government).

times of war.¹⁴⁰ Nevertheless, over time, courts have gradually become more protective of speech that is critical of the state.¹⁴¹ Whereas seditious speech¹⁴² was once punishable consistent with the prevailing understanding of the First Amendment,¹⁴³ the right to dissent has become a central element of our shared freedoms.¹⁴⁴

140. See, e.g., *Masses Publ'g Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917) (assuming that “the power to repress [criticism of government] may rest in Congress in the throes of a struggle for the very existence of the state,” but concluding as a matter of law that anti-war cartoons did not constitute false statements of fact).

141. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (fashioning a test which protected, as a form of anti-government expression, advocating the use of violence to overthrow the state “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

142. By “seditious speech,” I refer to advocacy of the destruction or overthrow of a particular form of government, unaccompanied by any overt act from which one could reasonably infer a plan to do imminent violence or harm.

143. In practice, one’s constitutional rights are often curtailed during times of war. See *Dennis v. United States*, 341 U.S. 494 (1951) (affirming convictions based on advocacy of overthrowing the U.S. government); *Gilbert v. Minnesota*, 254 U.S. 325 (1920) (upholding conviction where defendant spoke out against U.S. policy of conscription during World War I); *Debs v. United States*, 249 U.S. 211, 216 (1919) (upholding conviction of Socialist party and labor leader who gave speech on Socialism urging “continuous, active, and public opposition to the war” against Germany); *Schenck v. United States*, 249 U.S. 47 (1919) (affirming conviction for circulating flyers, which urged men to resist the draft).

144. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.”); *Boos v. Barry*, 485 U.S. 312, 321-22 (1988) (striking down law that prohibited displays shielding foreign diplomatic personnel “from signs critical of their governments”); see also ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 24 (1968) (describing as “remarkable” that “the individual citizen may protest governmental actions; that he may bitterly dissent from government policies; that he may oppose the government itself”). The Court has invoked the right to criticize the state as the basis for overturning convictions of individuals who burned, or unconventionally displayed, the American flag as an anti-war expression. See *United States v. Eichman*, 496 U.S. 310 (1990) (invalidating federal law criminalizing desecration of United States flag); *Johnson*, 491 U.S. 397 (reversing conviction for flag burning); *Spence v. Washington*, 418 U.S. 405 (1974) (reversing conviction of individual who hung American flag upside down, with peace symbol affixed, to protest invasion of Cambodia and shooting of students at Kent State). The Court has exempted those who refused to recite the Pledge of Allegiance or salute the flag. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (declaring that government cannot require “gestures of acceptance or respect . . . a bowed or bared head, a bended knee”); *Lipp v. Morris*, 579 F.2d 834, 835 (3d Cir. 1978) (holding that standing during Pledge is a “symbolic gesture” that individuals may avoid); *Goetz v. Ansell*, 477 F.2d 636 (2d Cir. 1973) (same). The Court has also protected public school students from discipline when they expressed anti-war views in a non-disruptive fashion. See *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (protecting students’ right to wear black armbands “to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce”). In 1966, the Court ordered the seating of a duly elected member of Congress, who was denied his place because he criticized American foreign policy in Vietnam. See *Bond v. Floyd*, 385 U.S. 116, 132, 136 (1966) (holding that “the First Amendment protects expressions in opposition to national foreign policy and to the Selective Service system” and “[l]egislators have an obligation to take positions on controversial issues”).

A. *Preventing State-Imposed Uniformity of Sentiment*

There are several enduring features of the Court's jurisprudence regarding anti-government speech that bear directly on our task of reconceptualizing the right of court access. The principal observation is that in this line of cases, many of which were influenced by American war efforts against Nazism and Fascism, the Court frequently equated the suppression of dissent with authoritarianism. When the state inhibits expression directed at it, the state acts as a tyrant. Receptivity to political criticism, by contrast, is understood as the hallmark of a free people and a democratic system.

As the Supreme Court pronounced in *West Virginia State Board of Education v. Barnette*,¹⁴⁵ while striking down compulsory flag salute for schoolchildren as a means of inculcating patriotism, the First Amendment forbids "coerce[d] uniformity of sentiment."¹⁴⁶ Writing in 1943 at the height of World War II, Justice Jackson distinguished the American form of government from the totalitarian regimes of the nation's enemies by affirming the Constitution's tolerance of anti-government viewpoints: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."¹⁴⁷ Such laws, the Court reasoned, "invade the sphere of intellect and spirit" protected by the First Amendment.¹⁴⁸

Therefore, keeping the channels of communication as free as possible prevents the state from imposing uniformity in thought, culture, or values, whereas permitting the coercive power of the state to insinuate itself in these most intimate areas of community and self-improvement amounts to toleration of tyranny.¹⁴⁹ As the educator

145. 319 U.S. 624 (1943).

146. *Id.* at 640.

147. *Id.* at 641. For an analysis of the impact of totalitarianism on the Court's rulings, see Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423 (1996).

148. *Barnette*, 319 U.S. at 642; see also Staughton Lynd, *Freedom Now: The Intellectual Origins of American Radicalism*, reprinted in *DISSENT: EXPLORATIONS IN THE HISTORY OF AMERICAN RADICALISM* 16-17 (Alfred F. Young ed., 1968) (discussing 17th Century dissenters' belief in "natural right to freedom of conscience").

149. *Barnette*, 319 U.S. at 637 (contrasting "individual freedom of mind" with "officially disciplined uniformity"). This principle is severely tested in times of war. One socio-cultural explanation is that the impulse toward internal coercion increases as an external threat emerges, though as Justice Murphy pointed out in his dissenting opinion in *Korematsu v. United States*, 323 U.S. 214 (1945), the state that resorts to oppressive methods against its own citizens has trouble credibly denouncing authoritarianism:

th[e] inference [that individual disloyalty is proof of collective disloyalty], which is at the very heart of the evacuation orders, has been used in support

Alexander Meiklejohn explains, suppression of ideas as a way of avoiding lesser evils results in system-wide disaster, while preservation of free speech “facilitates the search for and the dissemination of truth that can keep our country safe.”¹⁵⁰ Where matters of public interest are at stake, more information is better than less.

This powerful free speech principle, used to justify government respect for competing points of view, works equally well in protecting access to the federal courts.¹⁵¹ When the state erects obstacles to the pursuit of legal redress, government improperly compels the non-conformist to accept the status quo; in making this demand, the state violates the critic’s sense of personal and intellectual autonomy.¹⁵²

B. *Enhancing Political Accountability*

A second reason the judiciary must be solicitous of contrarian viewpoints is that criticism of the state preserves the legitimacy and accountability of the existing political-legal order. Exposure to ideas from “diverse and antagonistic sources”¹⁵³ keeps the state honest, and remains the one sure method of ascertaining whether our constitutional form of government is, in fact, healthy and deliberative.¹⁵⁴ On the other hand, by eliminating dissent, the government improperly restricts the channels through which constitutional dialogue takes place.¹⁵⁵

of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case . . . is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

Korematsu, 323 U.S. at 240.

150. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATIONSHIP TO SELF* 68 (1948).

151. *See id.* at 91 (applying First Amendment protections to all institutions of government).

152. *See Barnette*, 319 U.S. at 633 (criticizing law compelling flag salute as a measure that “requires affirmation of a belief and an attitude of mind”).

153. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 n.12 (1978); *see also Barnette*, 319 U.S. at 641 (“Authority here is to be controlled by public opinion, not public opinion by authority.”).

154. *See First Nat’l Bank*, 435 U.S. at 777 (noting that speech related to the affairs of government “is the type of speech indispensable to decision making in a democracy”).

155. Even during times of armed conflict, what has distinguished our republic from its more repressive adversaries is the citizen’s right to mount legal challenges to the government’s wartime policies. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1945) (challenging, unsuccessfully, wartime internment of Japanese-Americans); *Ex parte Endo*, 323 U.S. 283 (1944) (ordering release of loyal Japanese-American from detention camp); *Ex parte Milligan*, 71 U.S. 2 (1866) (holding unconstitutional Lincoln’s suspension of habeas corpus during the American Civil War); *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y. 1973) (enjoining U.S. bombing of

Consider the majority's decision in *Stromberg v. California*,¹⁵⁶ which reversed the conviction of a young Communist for the peacetime display of a red flag "as a sign, symbol, or emblem of opposition to organized government."¹⁵⁷ The statute at issue troubled the Court because it prohibited "the peaceful and orderly opposition to government" by one group "which did not agree with the one in power."¹⁵⁸ In striking down the statutory provision, the Court reasoned that

The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which . . . permit[s] the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.¹⁵⁹

Because the American form of government derives its authority from the citizenry (rather than birthright or religious sanction), individuals must be permitted to critique the state's conduct so that the process remains responsive to their needs and official decisions reflect their values and priorities.¹⁶⁰ As the majority opinion in *Stromberg* shows, even disloyal speech that is not directed at any specific branch of government can, in theory, influence public opinion, and the individual is entitled to the opportunity to express his view for this reason.¹⁶¹

Justice Brandeis observed a similar connection between speech critical of the government and the fundamental principle of participatory democracy in dissenting from the Supreme Court's

Cambodia), *rev'd*, 484 F.2d 1307 (2d Cir. 1973) (finding the issue presented to be a political and not judicial question). Although the overwhelming majority of such efforts have failed, the very fact that the legal order usually treats these challenges as worthy of fair resolution enhances our collective respect for controversial speech.

156. 283 U.S. 359 (1931).

157. *Id.* at 361. The defendant was a nineteen-year-old woman and a citizen of the United States. *Id.* at 362. The factual basis for her prosecution was that, in her role as camp counselor, she led the children in a daily exercise where they raised and saluted the red flag of the Communist Party, which they treated as "the workers' red flag." *Id.*

158. *Id.* at 369 (invalidating a law that curbed "opposition to government by legal means and within constitutional limitations").

159. *Id.*; *see also* *Masses Publ'g Co. v. Patten*, 244 F. 535, 539 (S.D.N.Y. 1917) (discussing "the right to criticize" [sic] as essential to the "ultimate source of authority").

160. *See supra* notes 153-59 and accompanying text.

161. *See Stromberg*, 283 U.S. at 369-70 (arguing that public opinion can stimulate government to make changes, and that opportunity for free political discourse is a fundamental element of our constitutional system).

decision to uphold a state law that prohibited persons from “discourag[ing] the enlistment of men in the military”:¹⁶²

The right of a citizen of the United States to take part, for his own or the country’s benefit, in the making of federal laws and in the conduct of the government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it.¹⁶³

Expression calling into question government authority, therefore, “is the essence of self-government.”¹⁶⁴ According to Meiklejohn, whose theory of the First Amendment rests on the principle that in America “[r]ulers and ruled are the same individuals,” the Constitution protects opinions that are “unfair as well as fair, dangerous as well as safe, un-American as well as American” on the ground that all are necessary for informed decision making about the public good.¹⁶⁵

The notion that the state must remain transparent to self-criticism has resonance for a First Amendment theory of court access, because preserving the right to bring legal actions attacking government policy fulfills the representative feature of our system. Statutes that are intended to frustrate, or have the effect of deterring, a citizen from seeking redress for violations of higher law diminish the critic’s role in public life and unjustifiably restrict a crucial category of information upon which the courts and political branches rely.¹⁶⁶ To the extent that the state adopts such measures, it hinders citizens’ ability to communicate their opinions publicly as to the content of fundamental values and the priorities that should be assigned to these values by officials in power.

Litigants present concrete circumstances, highlight competing norms, and advance new ways of understanding public values. The

162. *Gilbert v. Minnesota*, 254 U.S. 325, 326 (1920).

163. *Id.* at 337-38 (Brandeis, J., dissenting).

164. *See First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 n.12 (1978); *see also* ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 96 (1960) [hereinafter *POLITICAL FREEDOM*] (describing First Amendment as protecting “not merely ‘the freedom to speak,’ but the ‘political freedom’ which the Constitution establishes as the basis for any arrangement by which men govern themselves, rather than submit to despotic control by others”).

165. *See* *POLITICAL FREEDOM*, *supra* note 164, at 26-27; *see also* *California Motor Transp. Co. v. Trucking, Ltd.*, 404 U.S. 508, 510, 515 (1972) (finding that our representative system rests on the ability of the citizenry to express their views to their leaders); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961) (same).

166. *See supra* notes 159-63 and accompanying text (discussing importance of citizens’ opportunity to express their political opinions to the proper functioning of democratic government).

courts, in turn, give continuing meaning to constitutional principles by resolving these disputes. To be sure, the federal courts are not available to resolve every sort of grievance and are not constituted to opine on values in the abstract. Only lawsuits presenting well-supported allegations that protected rights have been abridged enjoy a reasonable chance of success. However, by protecting equal and meaningful access to the legal system, the judiciary ensures that “conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant.”¹⁶⁷

C. *Protecting Vulnerable Speech*

A third tenet to be drawn from the Court’s rulings on anti-government expression is that criticism of governmental affairs must be safeguarded because dissent represents the type of expression over which government has the most control and is most tempted to suppress.¹⁶⁸ Bureaucratic explanations are at the forefront, for extended debates about constitutional rights are inconvenient for even the most well intentioned political leaders. The individuals whose rights may be affected might not vote regularly and thus might not evoke a feeling of personal stake or public duty from their representatives that would cause serious consideration of their interests.¹⁶⁹

167. POLITICAL FREEDOM, *supra* note 164, at 27. Theories of the First Amendment rooted in concepts of political legitimacy are often criticized on the ground that they fail either to descriptively account for the modern trend toward recognizing a right of individual self-actualization for its own sake, or fail normatively to justify First Amendment protection of artistic expression. *See, e.g.*, Schlag, *supra* note 21, at 708 (contending that the Meiklejohnian view “does not extend protection to literary, scientific, and forms of speech that contribute to self-realization”); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) (arguing that free speech allows individuals to self-actualize through expression). I believe it possible to ground protection of artistic expression within a political framework by understanding artistic expression as historically, and functionally, related to anti-government speech. While it certainly is not the case that all artists try to affect policy, it can hardly be doubted that art traditionally has had a strong political component: it allows artists to express dissatisfaction with contemporary cultural mores and political values, and helps viewers of art to cultivate the capacity to imagine alternative ways of social and political organization. More to the point, theories that emphasize the importance of self-realization as a First Amendment value, to the exclusion of political accountability, do not provide a meaningful guide to explain the importance of court access.

168. *See First Nat’l Bank*, 435 U.S. at 777 n.11 (“Freedom of expression has particular significance with respect to government because ‘[i]t is here that the state has special incentive to repress opposition and often wields a more effective power of suppression.’”) (quoting EMERSON, *supra* note 29, at 9).

169. *See* POLITICAL FREEDOM, *supra* note 164, at 95 (discussing “ignorance and apathy” among segments of society as a reason for the nation being only partially “self-governed”).

Furthermore, the idea of a faceless, neutral government is pure fiction, as ordinary people who make decisions for the public good possess the same human prejudices, irrational fears, and intensely-held religious or moral convictions as the citizens in whose name they purport to govern. Most of the time, such influences upon official decision-making are natural and unobjectionable on constitutional grounds. Occasionally, however, animus toward one group of citizens or their perspectives forms the impulse behind a particular course of conduct, and in those instances, the Constitution rejects these bases for state action.¹⁷⁰ Some observers have suggested a tendency on the part of the state to crush dissent, on the view that power, with a life of its own, naturally seeks to expand its influence and blinds those in positions of authority to the possibility of alternative truths.¹⁷¹

According to this perspective, access to courts must be protected on the ground that constitutional rights likely will be sacrificed by elected officials who take unjustifiable shortcuts to achieve their ends. The First Amendment ensures the right of people who normally are invisible within our polity, who have no lobbyists, or donors, or consistent advocates (and even those who do), to criticize government in the courts. It compels officials who currently set policy, and the courts which are obliged to give meaning to more enduring principles, to hear from citizens other than those occupying the boisterous middle, whose short-term interests often shape the contours of the law and the direction of government affairs. When one seeks structural reform of existing law—whether in the legislatures or the courts—leaders are forced to listen to individuals at the margins of society who might be most impacted by their day-to-day decisions.

170. See *Romer v. Evans*, 517 U.S. 620 (1996) (holding that a law denying individuals the ability to seek legal protection from government action because of sexual orientation violated equal protection).

171. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (“Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.”) (Holmes, J., dissenting); EMERSON, *supra* note 29, at 17 (“Most men have a strong inclination to suppress opposition even where differences in viewpoint are comparatively slight.”); JOHN STUART MILL, *ON LIBERTY* 63-65 (1929) (acknowledging “[t]he disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others”). But see Jeremy J. Ofsever, *Taking Liberties With John Stuart Mill*, 1999 ANN. SURV. AM. L. 395, 422-46 (1999) (arguing that the Court has distorted Mill’s views to the extent it has suggested Mill tolerated false speech).

D. *The Anti-Government Nature of Constitutional Litigation*

1. *The civil rights plaintiff as political dissident*

Although the analogy is not perfect, it may be helpful to understand constitutional litigation as a peculiar variety of political expression—namely, anti-government speech.¹⁷² The nature of the endeavor, the rules that govern the adjudicative process, and the roles played by those involved in the battle over fundamental principles bolster the plaintiff's role as a political dissident. In this Section, I identify the aspects of constitutional reform litigation that reflect this theme.

Unlike ordinary litigation or “dispute resolution,”¹⁷³ the act of suing a branch of government or public official in court is an explicit, often multi-faceted, challenge to the authority of the defendant-government in the name of the public interest.¹⁷⁴ The initiation of structural reform litigation, unlike ordinary suits between private parties, is inherently radical in nature. As Professor Owen Fiss explains, the entire enterprise “reflects doubt as to whether the status quo is in fact just.”¹⁷⁵ As religious dissidents might describe it, the civil rights action is a “revolt against the establish[ment].”¹⁷⁶

In the truest sense of the word, a civil rights plaintiff who undertakes this program of reform becomes a quintessential dissident: “a person who disagrees with an opinion, resolution, or proposal”¹⁷⁷ or who “openly opposes the policies of a totalitarian regime.”¹⁷⁸ The heresy, which the individual commits when he

172. See JAMES MACGREGOR BURNS, *THE VINEYARD OF LIBERTY* 24-25, 55, 90 (1983) (discussing the history of free speech and the First Amendment in American society); see generally *POLITICAL FREEDOM*, *supra* note 164, at 96 (discussing the role of free speech in a democratic society).

173. See Fiss, *Social and Political Foundations*, *supra* note 2, at 124 (contrasting two models of adjudication, “dispute resolution” and “structural reform,” the latter of which emerged as a “new form of constitutional litigation”).

174. See *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989) (affirming the notion that civil rights plaintiffs sue to vindicate interests “for society at large”); Chayes, *supra* note 2, at 1284 (suggesting that the dominant feature of modern federal litigation is its underlying objective to vindicate a constitutional or statutory policy, rather than resolve a dispute between private parties about private rights, and characterizing such litigation as “public law litigation”).

175. Fiss, *Social and Political Foundations*, *supra* note 2, at 124.

176. MECKLIN, *supra* note 31, at 13. In the American religious tradition, dissent typically takes the form of a sect challenging the dominant faith. *Id.* In sociological terms, the sect is defined by the rejection of all forms of dogma and religious authority, and an emphasis on tolerance, the pursuit of a “sectarian ideal [that] is usually radical and hence utopian in character,” and the turning inward, rather than outward, to achieve their ideal. *Id.* at 18, 20-21, 31.

177. See *THE NEW SHORTER OXFORD ENGLISH DICTIONARY* 702 (1993) (defining “Dissenter”).

178. See *id.* (defining “Dissident”). The notion that a dissident opposes an

publicly challenges the authority of the constituted entity, “is a set of unpopular ideas or opinions on matters of grave concern to the community.”¹⁷⁹ The tradition of American dissent, whether rooted in religious faith or secular principles,¹⁸⁰ is a powerful one, and it is from this mold that the modern litigant has emerged.¹⁸¹

The actual filing of the complaint is a powerful publication of dissent; by initiating the action, the plaintiff-dissident declares her refusal to conform.¹⁸² This act of protest, protected by the First Amendment, commonly is understood as an overt display of disagreement, usually in the form of marches, speeches, and rallies. But the term also has a more formal connotation: to “give (esp[ecially] formal) expression to objection, dissent, or disapproval” or to “make a request in legal form,”¹⁸³ and it is this more formalized protest in which the plaintiff engages. Whether a lawsuit demands monetary damages or equitable relief, every civil rights plaintiff seeks a formal, enforceable declaration that certain government enactments, policies, or practices exceed the government’s lawful authority.¹⁸⁴

Another characteristic shared by these two models of dissent is the lack of available alternatives to achieve desired goals. As the sociology of revolt and even the First Amendment case law protecting constitutional litigation reflect, those who turn to the courts often are the vulnerable and dispossessed.¹⁸⁵ For the inmate, welfare recipient, or religious minority residing in a mostly homogeneous community, the levers of power are nearly always beyond his reach.¹⁸⁶

establishment or institutional way of thinking, such as “a prevailing or established form of religion,” is an essential element of the word. *Id.*

179. SIDNEY HOOK, *HERESY, YES—CONSPIRACY, NO!* 21 (1953).

180. See generally MECKLIN, *supra* note 31, at 82-263 (describing religious dissenters in early American colonial history).

181. Cf. FORTAS, *supra* note 144, at 41-42 (discussing alternative means of expressing disagreement with state policies, including exercising right of free expression through speech, organization, and demonstration, and suing the state or its officials directly).

182. See *id.* at 42 (describing legal action against government as a form of dissent).

183. See THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2389 (1993) (defining “Protest”).

184. See, e.g., *Garner v. Louisiana*, 368 U.S. 157 (1961) (overturning convictions for disturbing the peace where defendants, who were black, peacefully sat at a lunch counter reserved for whites); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that government-imposed segregation in public schools violated guarantees of equal protection); *Marsh v. Alabama*, 326 U.S. 501 (1946) (declaring unconstitutional trespass convictions of Jehovah’s Witnesses for proselytizing).

185. See, e.g., GREENBERG, *supra* note 83, at 108 (describing early twentieth century constitutional challenges to laws in southern states, which prohibited blacks from participating in primary elections, and which effectively denied blacks representation in the South).

186. See Fiss, *Social and Political Foundations*, *supra* note 2, at 122 (describing

Constitutional litigation represents a particularly effective means of communicating displeasure with government policy.¹⁸⁷

2. *Invoking core values*

There certainly are real differences between the archetypal dissident and the civil rights plaintiff. The former tends to be a charismatic leader or other influential individual, who has suffered prolonged persecution and articulates a program of action or well-defined set of beliefs.¹⁸⁸ The latter is less likely to have a following, might prefer to shield his identity from public scrutiny, and may or may not adhere to a particular ideology. Nevertheless, the points of overlap between the new and the old are striking.

Civil rights plaintiffs, like traditional political dissidents, call upon public values and social interests at a level of generality that extends well beyond the immediate policy debates that have given rise to the challenged enactment or policy.¹⁸⁹ Just as the traditional dissenter appeals to higher moral or religious authority to justify his act of protest,¹⁹⁰ so the modern contrarian seeks legitimacy in fundamental principles of law and broader conceptions of the public good.¹⁹¹

The important distinction between the traditional dissenter and the civil rights litigant is that the former strategically submits to the political-legal authority to make his point, accepting punishment to emphasize the injustice of his situation,¹⁹² while the latter

evolution of structural reform litigation as a means for certain social groups, such as inmates, racial minorities, and disabled persons, to challenge unconstitutional government action); FORTAS, *supra* note 144, at 33-34 (recognizing that many citizens who comprise social or political minorities are "divorced from the conventional instruments of power").

187. See Fiss, *Social and Political Foundations*, *supra* note 2, at 122 (suggesting that traditional forms of dispute resolution provide no remedy for certain social groups).

188. See, e.g., MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* 25-43, 90-107 (1958) (describing repressive conditions in Jim Crow South, King's development of a philosophy of non-violent resistance, and massive, non-violent protests he led); *id.* at 102-03, 217 (describing Gandhi's role as a non-violent leader and invoking his teachings as a model for black resistance to oppression in American South).

189. See Chayes, *supra* note 2, at 1284 (describing "public law litigation" as a type of lawsuit in which complaining party seeks liberation from a policy or act in violation of Constitution or federal statutes).

190. See MECKLIN, *supra* note 31, at 18 (describing American religious dissenters' practice of invoking Jesus' teachings of radical equality rather than other aspects of the Bible); FORTAS, *supra* note 144, at 53 (characterizing practitioners of civil disobedience as being "motivated by the highest moral principles").

191. See FORTAS, *supra* note 144, at 42, 48 (discussing moral and legal bases for actions of civil disobedience and lawsuits against government).

192. See KING, *supra* note 188, at 146 (describing King's willing submission to his own arrest and imprisonment, and noting how many of his non-violent followers had "rushed down to get arrested," adding that, among the non-violent protestors, "[n]o one . . . tried to evade arrest"); FORTAS, *supra* note 144, at 57-58 (characterizing

purposefully employs the legal process as a creative means to effect a transformation in government policy.¹⁹³ But make no mistake—the plaintiff-dissident’s actions are no less radical or communicative, they are simply more effective. Where the dissident of old focused his actions upon drawing attention to a particular issue, while ultimately relying on others to rally to his cause,¹⁹⁴ the mechanism of constructive change is more firmly within the modern dissenter’s grasp.¹⁹⁵ The goals, however, remain analogous at bottom: recasting government to be more in accord with enduring values.¹⁹⁶

3. *Legitimacy through ordeal*

Another characteristic shared by the civil disobedient and the plaintiff-dissident is that both derive their legitimacy from persecution. Each understands that his probability of success in reforming the political-legal order depends greatly upon his ability to persuade others to take action. It takes more than interesting ideas to move people; would-be sympathizers must be convinced that the individual has moral conviction and a chance of success. He seeks influence with two audiences simultaneously through his expressive conduct: repeat players within the electoral process who enjoy access to political authority, and the community of people who share his concerns, which may lack such access.

The dissident’s source of legitimacy is visible suffering at the hands of the authorities.¹⁹⁷ The suffering takes two distinct forms: systemic state persecution, as to which the dissident is powerless;¹⁹⁸ and suffering as a stature-building tool, over which the dissident has far greater control.¹⁹⁹ In the first sense, persecution offers the dissident

Martin Luther King’s acceptance of his prison sentence as an example of traditional civil disobedience, in which the dissenter willfully accepts the legal consequences of his actions).

193. See FORTAS, *supra* note 144, at 42 (discussing the availability of suit against the government as a means of dissent).

194. See KING, *supra* note 188, at 71-89 (elaborating on organizational costs involved in carrying out effective protests).

195. See FORTAS, *supra* note 144, at 42 (noting that individual dissidents may effect change in an immediate way by bringing a lawsuit directly against government).

196. Compare KING, *supra* note 188, at 62 (invoking “highest principles of law and order” as objective of King’s non-violent protests), with FORTAS, *supra* note 144, at 42 (suggesting that individuals may sue government when they believe that state has interfered with their constitutional rights).

197. See FORTAS, *supra* note 144, at 57-58 (discussing Martin Luther King’s submission to law he disregarded as unjust); KING, *supra* note 188, at 177-78 (urging non-violent protesters to wear down their opposition through their capacity to withstand suffering).

198. See generally KING, *supra* note 188, at 25-43 (discussing repressive consequences of state imposed segregation policies).

199. See *id.* at 217 (urging African Americans to adopt Gandhi’s principles of non-

the opportunity to represent a community of shared interests, and speak on behalf of those similarly victimized by the state's conduct.²⁰⁰ In the second, instrumentalist, step, persecution becomes appropriated from the state and transformed by the dissident; it becomes a tool for accomplishing his ends.²⁰¹

For the charismatic leader, the ordeal can take the form of incarceration, a propaganda campaign aimed at his broader movement or its goals, or surviving physical abuse by the authorities; undergoing the ordeal provides proof of moral stature and mental resolve.²⁰² Persecution invigorates, rather than defeats, the critic, and he turns it to his advantage.

Like the civil disobedient, the plaintiff-dissident often represents a community of shared interests.²⁰³ For the plaintiff-dissident, the legal process presents features of the ordeal over which he has less control, but also offers opportunities to use suffering to accomplish his objectives. It is not sufficient for the litigant to assert the violation of some constitutional right; to prevail, he must, in the course of a public proceeding, demonstrate the extent of the injustice wrought by state action.²⁰⁴ The more substantial the actual injury or likelihood of harm, the more likely the judge will rule in his favor and constrain the behavior of the state or order the reformation of the state entity.²⁰⁵ In this way, suffering may serve as an instrument by which a

violence and to use suffering as a means to win freedom from the repression of American segregation policies).

200. See *generally id.* at 62, 214-15 (speaking as an advocate for, and on behalf of, African Americans oppressed by repressive actions of segregationist states).

201. See *id.* at 217 (characterizing suffering as a strategy to overcome oppression).

202. See *generally id.* (recounting King's life-long efforts to overcome segregation and achieve racial and social equality, and non-violent movement that he initiated).

203. See William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1644-61 (1997) (providing an illuminating discussion on duties of a civil rights plaintiff to broader community in whose name he seeks structural reform).

204. See FORTAS, *supra* note 144, at 42-43 (explaining that "the citizen and the state are on terms of equality to advocate their contentions before an impartial court," and noting that while citizen may claim a violation of a constitutional right, state may assert that he acted beyond constitutional protections).

205. See, e.g., *Katz v. Georgetown Univ.*, 246 F.3d 685, 687 (D.C. Cir. 2001) (explaining that to obtain a preliminary injunction, a plaintiff must demonstrate a substantial likelihood of success on the merits of the action, that he would suffer irreparable injury in the absence of the injunction, that the balance of hardships weighs against the plaintiff, and that the public interest would be served by the injunction). The first prong of the inquiry is easily satisfied by the alleged abridgement of one's constitutionally guaranteed rights. See, e.g., *Conn. Dep't of Envtl. Prot. v. OSHA*, 138 F. Supp. 2d 285, 291 (D. Conn. 2001) (holding that an alleged violation of a constitutional right triggers a finding of irreparable injury) (citing *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996)). The second and third prongs typically present the more difficult hurdles. See *Katz*, 246 F.3d at 688 (noting that in spite of the relevance of all four factors, a preliminary injunction "never will

plaintiff-dissident can unlock the judicial power.²⁰⁶ The litigant must endure probing, sometimes hostile, cross-examination by government attorneys delving deeply into private matters of sexual practice or religious faith when the right to privacy is in issue; where free speech rights are at stake, he may be asked to explain the unexplainable in describing what intimate thoughts motivated him to draw, write, or otherwise express certain profane ideas.

Both types of dissenters frequently face the prospect of official retaliation for their anti-establishment views. The charismatic leader understands that engaging in civil disobedience, demonstrating in public, and decrying social ills will earn her greater scrutiny by the state—indeed, it may place her directly in harm's way.²⁰⁷ The civil rights plaintiff, too, must grapple with the possibility of official reprisal. The inmate who files a grievance against a correctional officer reasonably fears that her privileges may be cut off or that he may sustain physical abuse;²⁰⁸ the government employee fears that she may be denied a promotion or suffer other types of adverse employment action because she has asserted her legal rights against the state.²⁰⁹ The fact that an entirely separate body of law has developed to protect those who criticize the government demonstrates the profoundly subversive nature of asserting one's rights.²¹⁰

be granted unless a claimant can demonstrate 'a fair ground for litigation'). The novelty of an argument may weigh against a plaintiff in this calculus, whereas the egregiousness of the alleged facts may strengthen one's entitlement to temporary relief. While there is rarely a clear delineation between the third and fourth prongs, courts almost always balance the intrusiveness of the relief requested against the harm faced by the plaintiff. See, e.g., *Hoyle Invs., Ltd. v. Washburn*, 723 F. Supp. 42, 49 (N.D. Ill. 1989).

206. See, e.g., *Katz*, 246 F.3d at 687 (requiring a plaintiff to show, *inter alia*, that he has suffered "irreparable harm" before injunction may issue).

207. See HUGH DAVIS GRAHAM, *CIVIL RIGHTS AND THE PRESIDENCY* 22 (1992) (describing violent attacks on civil rights protesters and widespread incidence of their arrests); GREENBERG, *supra* note 83, at 272-73 (recounting violence, both official and private, faced by civil rights leaders and protesters).

208. See David M. Adlerstein, Note, *In Need of Correction: The "Iron Triangle" of the Prison Litigation Reform Act*, 101 COLUM. L. REV. 1681, 1691 (2001) (suggesting that fear of retaliation by correctional officials often discourages aggrieved inmates from bringing suit).

209. See generally Margo Pave, Comment, *Public Employees and the First Amendment Petition Clause: Protecting the Rights of Citizen-Employees Who File Legitimate Grievances and Lawsuits Against Their Government Employers*, 90 NW. U. L. REV. 304 (1995) (discussing consequences and solutions to the problem of retaliation against government employees who sue their government employers).

210. See *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (finding that a public school teacher's dismissal due to her outspoken criticism of board of education policy contravened free speech guarantee).

4. *Government as authoritarian*

The norms-challenging nature of public law litigation is underscored when one considers the role of the defendant-government as the principal obstacle to progress. According to the strongest variant of this perspective, which draws deeply from the American liberal political tradition, “government is . . . some hostile force, or at least some necessary evil, which constantly threatens to prey on its subjects.”²¹¹ An alternative account—one that is less hostile to the idea of government—recognizes government’s inherent capacity to stifle difference and change, but acknowledges the need for countervailing structures that have the power to check the passions of those who might employ the state’s coercive authority as a tool of oppression.²¹² Public officials might not actually be motivated by a desire to tyrannize—they may in fact have laudable goals in mind and a benevolent disposition—but as state agents they possess the capacity to abridge one’s rights. On this view, it is the regulatory state that presents the greatest threat to liberty.²¹³ In checking the authority of elected officials, courts “make sure that [their] attempts to make men free do not result in making them slaves.”²¹⁴

The manner in which the state responds to opposition, particularly aggressive dissent, reveals the anti-establishment quality of the speech at issue. When the government resorts to repressive measures against the protester, it acts in an authoritarian manner and reveals a dissonance between governing ideals and reality.

The same point is illustrated by the public stance frequently taken by government in the course of constitutional litigation. Until the point that a plaintiff-dissident actually prevails the government-defendant often treats the lawsuit as groundless and the complainant as an irritant at best, and a disloyal citizen at worst. This point is

211. WALTER BERNS, *FREEDOM, VIRTUE & THE FIRST AMENDMENT*, 67, 148-60 (1969).

212. See, e.g., *THE FEDERALIST* NO. 78 (Alexander Hamilton) (“[C]ourts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”); *THE FEDERALIST* NO. 51 (James Madison):

It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.

See generally BURNS, *supra* note 172, at 60-63 (1982) (discussing Framers’ efforts to create a government that could thwart various forms of tyranny, including tyranny of opinion).

213. See EMERSON, *supra* note 29, at 38 (arguing that “[t]he government has become an overpowering antagonist in any clash between state and individual”).

214. FREE SPEECH, *supra* note 29, at 13; see also EMERSON, *supra* note 29, at 35-46.

emphasized by the fact that, in some cases, the government has sought to discredit the complainant or whip up community sentiment against him.²¹⁵ In recognition of such possibilities, individuals are sometimes allowed to employ pseudonyms to protect themselves from undue threat of harm.²¹⁶ There are few accolades for the individual-dissident who questions authority in the courts.

But even where the individual prevails, he would be foolish to believe that a structural solution represents the end of the road. Defeated government-defendants are not always cowed by judicial authority, even when forced to submit to it. Additional skirmishes over the actual enforcement of the decree may serve as the occasion for an emboldened government to try new methods of achieving the same goals.²¹⁷

5. *Litigation as confrontational expression*

There are also more than passing similarities between the plaintiff-dissident and the dissenter of old in their method of expression. As experts have long understood, those engaged in civil disobedience employ confrontation as a strategy of communication.²¹⁸ The rhetoric of confrontation serves as the “mechanism through which adjustment

215. Cf. Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1, 2, 20 (1985) (noting that plaintiffs use pseudonyms to protect privacy, prevent stigma or retaliation, or challenge governmental activity).

216. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing right to terminate a pregnancy); *Doe v. Sante Fe Indep. Sch. Dist.*, 530 U.S. 290 (2000) (declaring unconstitutional student-initiated prayer at school-sponsored event); *Doe v. Pataki*, 3 F. Supp. 2d 456 (S.D.N.Y. 1998) (recognizing right of convicted sex offender to due process with regard to public registry). When an individual challenges government conduct, that fact weighs in favor of protecting a plaintiff-dissident's anonymity. See *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979) (listing, among those circumstances in which courts have allowed plaintiffs to use fictitious names, cases involving violation of state laws, challenge to government regulation, or desire to engage in illegal conduct).

217. Even where rights have been violated and the court has fixed a remedy, there has been an increased willingness on the part of the judiciary to abide “defiance” of court orders. See Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 768 (1992) (arguing that “the Court's doctrine is evolving in a fashion that permits some controlled defiance of judicial orders” to enforce the Constitution). For a fascinating case study of the limits of judicial authority to enforce constitutional norms in the face of state court resistance, see Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 YALE L.J. 1423 (1994).

218. See generally Harry A. Bailey, Jr., *Confrontation As An Extension of Communication*, in *DISSENT: SYMBOLIC BEHAVIOR AND RHETORICAL STRATEGIES* 181 (Haig A. Bosmajian ed., 1972) [hereinafter *DISSENT*] (discussing confrontation as a form of communication); Robert L. Scott & Donald K. Smith, *The Rhetoric of Confrontation*, *Quarterly J. of Speech* 1-8 (1969), in *DISSENT*, *supra* note 218, at 170 (discussing confrontation as a rhetorical device).

to new conditions can be brought about."²¹⁹ By participating in sit-ins and demonstrations, the dissident and his supporters attempt to provoke a heterogeneous society to dismantle official injustice; be it the institution of slavery, the system of segregation, or the repression of progressive intellectuals.²²⁰

Confrontation remains the strategy for the civil rights litigant, but takes new form: systematized conflict. The plaintiff-dissident forces the government to justify its actions by doggedly pursuing his claims of constitutional wrongdoing; the state denies that it has violated anyone's rights; the court eventually delineates the parameters of official authority by either upholding the government's conduct or reproaching it. Like the petition of an earlier era, the modern lawsuit vindicating an individual's constitutional rights "force[s] the government's attention on the claims of the governed when no other mechanism could."²²¹ Every step of the way, the government must respond or risk default.²²²

Within the litigation-centered model of conflict, the federal courts displace the media as the main facilitator of information to the public.²²³ To many members of the media and ordinary observers, the legal process is opaque; the language of the law, foreign. As a result, they must rely heavily on the participants in the process to translate and transmit the values that are involved, and explicate the real life consequences of court rulings for bystanders whose rights may be affected by the controversy.²²⁴

In overseeing a high-profile conflict over constitutional principles and policy priorities within the confines of narrow issues and relevant circumstances, and by providing a specialized forum for the focused expression of minority viewpoints, the legal system educates the

219. LEWIS A. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* 128 (1956), *quoted in* Harry Bailey, *Confrontation as an Extension of Communication*, in *DISSENT*, *supra* note 218, at 192-93.

220. *See, e.g.*, FORTAS, *supra* note 144, at 51 (describing civil disobedients' strategy to "publicize a protest and to bring pressure on the public or the government"); *id.* at 63 (noting that "protests awakened the nation's conscience to an intolerable situation . . . of fundamental rights and equal opportunity"); *see generally* GREENBERG, *supra* note 83, at 268-73 (describing spread of sit-ins and demonstrations during civil rights era).

221. Mark, *supra* note 53, at 2157.

222. *See, e.g.*, FED. R. CIV. P. 55 (authorizing default judgment when "a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend"); FED. R. CIV. P. 56(c) (providing that failure to present evidence raising issues of fact may result in summary judgment).

223. *See* GRAHAM, *supra* note 207, at 20 (discussing how *Brown v. Board of Education* transformed public responses to legal segregation and unofficial intimidation).

224. *See* Robert L. Rabin, *Lawyers For Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 252-54 (1976) (discussing public interest litigation as a pedagogical tool).

parties about the enduring values that shape and bind our community and give them contemporary meaning.²²⁵ The process, in turn, can provoke broader discourse about the moral controversies of the day.

6. *The rules of engagement*

Unlike the confrontation tactics of the streets, legal conflict is far more formal, more ritualized, and more focused. As distinguished from the unpredictable, free-wheeling vehicle of mass mobilization, the clash over constitutional rights is channeled through a pre-existing process regulated by a complicated web of procedures and standards accepted by both sides, though there may be hard-fought disputes over the application of these rules. The Federal Rules of Civil Procedure, rules of evidence, and local court rules require litigants to identify legal issues and sources of proof, and to abide by standards of ethical conduct. Failure to plead legal claims properly or support them at crucial stages of the proceedings will result in an adverse final judgment and an early end to the plaintiff-dissident's project;²²⁶ violation of disclosure demands or ethical rules could result in sanctions or the deprivation of evidence necessary to make one's case.²²⁷

At each step of the process, as issues are refined or cast aside, the participant accepts new duties, but also expects that the process will be handled impartially and that a remedy ultimately will be available if she prevails. No similar set of obligations and expectations flows from the highly unpredictable strategy of the street, which can be incredibly successful or disastrous.²²⁸

The rules governing this kind of communicative endeavor confirm the complainant's place as political dissident. Although the individual resorts to the courts in part because the new forum

225. See POLITICAL FREEDOM, *supra* note 164, at 32 (arguing that the "Supreme Court has a large part to play in our national teaching . . . because it interprets principles of fact and of value, not merely from the abstract, but also in their bearing upon concrete, immediate problems which are, at any given moment, puzzling and dividing us"); Fiss, *The Forms of Justice*, *supra* note 2, at 1 (arguing that "[t]he function of the judge is to give concrete meaning and application to our constitutional values").

226. See, e.g., FED. R. CIV. P. 12 (stating requirements for initial motions and pleadings); FED. R. CIV. P. 56(c) (stating requirements for motions and proceedings for summary judgment).

227. See, e.g., FED. R. CIV. P. 11 (setting forth sanctionable misconduct associated with pleadings); FED. R. CIV. P. 37(a)(4) (empowering courts to impose sanctions for violations of discovery rules).

228. See, e.g., FORTAS, *supra* note 144, at 67 (warning that violence can flow from mass demonstrations and civil disobedience could "lead to repression").

reduces some inequalities in prestige and resources, the rules do not universally place the parties on equal footing.²²⁹ By placing the burden of overturning a law on constitutional grounds squarely upon the challenger, the principles of constitutional adjudication emphasize her isolation and the subversive character of her speech.²³⁰

Official enactments are presumptively valid, and unless a challenged law is conclusively demonstrated to contravene a protected right, the legal system will not and should not make it easy for the nonconformist to prevail on the merits.²³¹ Within First Amendment doctrine, for instance, courts adhere to the maxim that a regulation affecting speech will not be struck down as overbroad unless it sweeps within its ambit a “substantial amount of speech” that is constitutionally protected.²³² This doctrine is justified on the ground that overturning a law on its face is a measure of “last resort.”²³³ Likewise, a court will not strike down a statute because a law is confusing or poorly written; the void for vagueness doctrine demands only that a hypothetical person of ordinary intelligence can understand its terms, and makes no allowances for subjective frailties or other individual conditions that might affect intelligibility.²³⁴

In other respects, substantive causes of action have been interpreted to make the plaintiff-dissident’s project more difficult. For example, the Court has sharply limited an individual’s ability to prove invidious racial discrimination that violates the Equal Protection Clause through the use of statistical evidence.²³⁵ Furthermore, the Court has expanded prison officials’ discretion to enact regulations so long as they are reasonably related to “legitimate

229. *But see id.* at 43 (asserting that “the citizen and the state are on terms of equality to advocate their contentions”).

230. *See* *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983) (“We begin, of course, with the presumption that the challenged statute is valid.”).

231. *See id.* at 944 (acknowledging that a court should not judge wisdom of a statute and will only overturn a statute if it plainly violates Constitution).

232. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992) (explaining that overbreadth doctrine liberalized standing rules in First Amendment context by allowing an individual to call for nullification of a law even if he would not otherwise have standing to attack it in all of its applications). This expansion stemmed from the recognition that overbroad laws may chill the exercise of free speech. *Id.*

233. *Los Angeles Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 39 (1999) (emphasizing that overbreadth doctrine should be used sparingly because it is considered “strong medicine”).

234. *See* *Turner v. South-Western City Sch. Dist.*, 82 F. Supp. 2d 757, 766 (1999).

235. *See* *McClekey v. Kemp*, 481 U.S. 279 (1987) (holding that a study showing differential application of death penalty based on race was insufficient); *United States v. Armstrong*, 517 U.S. 456 (1996) (holding that a study used to make a selective prosecution claim failed, in part, because it did not show differential treatment among similarly situated people).

penological interests,”²³⁶ and, in the area of the death penalty, largely reduced the Eighth Amendment’s prohibition of “cruel and unusual punishment” to a mechanical tallying up of how many states persist in employing a particular method of administering the sanction in question.²³⁷ I do not mean to suggest that these particular rulings are inconsistent with a First Amendment right of access but only wish to point to these examples as illustrations of how substantive decisions can emphasize the speaker’s role as dissident.

Paradoxically, many of the procedural rules have been relaxed in the last thirty years so as to facilitate the assertion of constitutional claims.²³⁸ Perhaps this is recognition of the importance of Constitution-based dissent and the practical difficulties in successfully advancing one’s reform agenda. It is easier today to get in the courthouse door under modern pleading and standing requirements,²³⁹ particularly if one is indigent,²⁴⁰ and harder to be thrust rudely into the cold on mootness grounds once circumstances have changed.²⁴¹

236. See *Turner v. Safley*, 482 U.S. 78, 89 (1987) (reinforcing that a “lesser standard” is more appropriate when assessing whether a prison regulation infringes inmates’ constitutional rights).

237. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 370-71 (1989) (ruling that execution of an individual who was 16 or 17 years old when he committed a capital offense did not violate “evolving standards of decency” because majority of death penalty states permit such executions).

238. See Fiss, *Social and Political Foundations*, *supra* note 2, at 122 (referring to *Brown v. Board of Education* opinion as a catalyst for structural reform movement).

239. See *Virginia v. Am. Booksellers Assoc.*, 484 U.S. 383, 393 (1988) (holding that standing and mootness doctrines are most favorable to plaintiffs when First Amendment rights are at stake); see generally ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.5, at 131 (3d ed. 1999) [hereinafter *FEDERAL JURISDICTION*] (claiming that a case is not moot so long as plaintiff continues to suffer injury). *But see* *Lyons v. Los Angeles Police Dep’t*, 461 U.S. 95 (1983) (contradicting trend toward easing standing rules for individuals pursuing constitutional claims by denying department-wide injunctive relief for illegal choke holds committed by police officers because it was speculative that plaintiff would suffer same injury in future).

240. See *Hughes v. Rome*, 449 U.S. 5, 9 (1980) (reiterating that *pro se* pleadings are to be read by courts under a more lenient standard); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that court fees and costs must be waived if one is indigent). *Accord* *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (restating leniency standard). Federal Rule of Civil Procedure 9(b) singles out only certain claims for particular specificity, namely fraud or mistake. See generally *FEDERAL JURISDICTION*, *supra* note 239, at 489-90 (criticizing heightened pleading requirements for civil rights lawsuits because “[e]xclusion of many meritorious claims seems inescapable if plaintiffs must present facts supporting the existence of a municipal policy even before they engage in discovery”).

241. When circumstances have changed, one may continue to litigate a claim if he continues to have “concrete interest in the action,” or the matter comes within the “capable of repetition yet evading review” exception. See *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976) (indicating that a well-pleaded claim for damages will defeat mootness); *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 121 S. Ct. 1835, 1842 (2001) (stating that as long as a plaintiff

There have been recent signs of a conservative reaction in many critical areas of civil rights litigation, such as the Eleventh Amendment²⁴² and qualified immunity.²⁴³ Courts have begun to erect greater obstacles in the path of the plaintiff-dissident.²⁴⁴ Whether the confluence of these burdens and rules work ultimately to the net benefit of the individual or against him is an open question. The point here, however, is that descriptively they reinforce the complainant's position as the nonconformist when she attacks existing law.

7. *The reconstructive endeavor*

Success for the modern dissident means forcing government to do what it has strongly resisted doing. Where institutional resistance is the problem, reformative power of the courts offers the solution. Injunctive relief, when granted by a judicial body, is a reconstructive and disruptive force, but in its more innocuous forms, the equitable power can be utilized to compel an entity or official, under threat of contempt of court, to cease and desist from enforcing unconstitutional policies.²⁴⁵ This form of injunction is equivalent to a coerced repeal of the offending law or policy. The level of intrusiveness of this remedy, measured in terms of the degree and duration of control exercised over a coordinate or subordinate branch of government, is very low.²⁴⁶ To comply with both the letter and spirit of the court order, the state need only refrain from implementing the enjoined enactment or exempt the complainant from the rules that normally apply to other citizens.²⁴⁷

has a valid cause of action, a change in defendant's conduct will not render case moot).

242. See FEDERAL JURISDICTION, *supra* note 239, at 403 (emphasizing that Supreme Court consistently has held that Eleventh Amendment bars citizens from suing states for damages).

243. See *id.* at 389-90, 493-500 (noting that qualified immunity provides an affirmative defense for those acting on behalf of the state).

244. See generally Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. REV. 341, 359-81 (1990) (discussing disproportionate use of Rule 11 sanctions against civil rights plaintiffs and a recent tendency by federal courts to disfavor civil rights cases).

245. See Chayes, *supra* note 2, at 1292-93 ("Officials will almost inevitably act in accordance with the judicial interpretation in the countless similar situations cast up by a sprawling bureaucratic program.").

246. See *id.* (elaborating that equitable remedy requires a "balancing of the interests of the parties").

247. This happens when, for example, a court upholds a law as valid but forbids its application to the conduct of the individual before it. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) ("[A] statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question.").

Where the constitutional violation infects the government as a whole, more affirmative solutions may be required. Under that scenario, the court's entire authority may be used to require the expenditure of significant public funds, the hiring of new staff, or a complete overhaul in the way a governmental agency performs its essential functions. The court may impose strict timetables for carrying out these tasks and appoint a special master to assist the court in creating, implementing, and managing an effective institutional solution.²⁴⁸ Losing a complex civil rights case may very well expose the government to the embarrassing prospect of direct, extensive, and prolonged supervision by the judiciary.²⁴⁹

Commentators have described the crisis of legitimacy that can arise when courts impose structural reform to remedy constitutional transgressions.²⁵⁰ Equitable relief taking the form of structural reform does not represent a return of the parties to the *status quo ante*, but "represents an attempt to construct a new social reality."²⁵¹ The remedy "may have to last as long as the social reality it attempts to create."²⁵² On the occasions where sustained, structural remedies are warranted, ironically, the dissident and government swap roles. The state now complains that its sphere of power has been abridged, and invokes higher principles of constitutional law (i.e., federalism, separation of powers) against the plaintiff, whom the state argues has become the oppressor by usurping political authority with the assistance of the courts.

248. See *id.* (citing examples of school desegregation, employment discrimination, and prisoner rights as classes of cases that may involve structural reform); see also Fiss, *Social and Political Foundations*, *supra* note 2, at 126 (discussing judge's supervisory role over institutional changes in civil rights cases).

249. See Chayes, *supra* note 2, at 1298 (explaining that civil rights injunction "provides for a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer . . . it prolongs and deepens, rather than terminates, the court's involvement with the dispute").

250. See Fiss, *The Forms of Justice*, *supra* note 2, at 46-58. For additional criticism of the role of the court in overseeing structural reform, see William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982) (arguing that many public law remedies are problematic from a standpoint of institutional legitimacy); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978) (urging use of separation of powers doctrine to limit scope of structural remedies).

251. See Fiss, *Social and Political Foundations*, *supra* note 2, at 121.

252. See *id.* at 124 (distinguishing between "dispute resolution" model of adjudication and "structural reform" model).

IV. ENFORCING A SPEECH-BASED RIGHT OF ACCESS

A. *Interlude: Defining the Parameters of Access*

As we move from our discussion of constitutional litigation and its theoretical underpinnings, let us tackle the doctrinal implications of a speech-bound ideal of court access.

Although there may be no right to actually receive any *particular* remedy unless it is the only feasible way to address a constitutional violation,²⁵³ or even to demand that a suit is resolved on the merits, several general principles should frame our understanding of the right of access. The right to engage in constitutional litigation effectively is evidenced in the First Amendment's Petition Clause, which was "inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble," and thus should be construed as generously as these other freedoms, from which it is "inseparable."²⁵⁴

As to suits to establish constitutional wrongdoing by government, which represents "the core of the First Amendment's protective ambit,"²⁵⁵ the right to seek redress is meaningful only if it encompasses more than simply the ability to file a complaint. Rather, it logically includes the right to articulate one's claim intelligently. The right to engage in this form of contrariaous speech extends to the "collective activity undertaken to obtain meaningful access to the courts,"²⁵⁶ as well as the individual right to dissent by pursuing well-founded appeals to constitutional limits on governmental authority. This principle should apply to all stages of the proceedings, protecting not only the legal theories and arguments advanced in court, but also the actions taken to bring client and attorney together to prepare for the case and to publicize their activities. The Constitution's free speech guarantees consistently have been construed to encompass one's ability to engage in speech "effectively."²⁵⁷

253. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 273 (3d ed. 2000).

254. *McDonald v. Smith*, 472 U.S. 479, 485 (1985) (recognizing venerable right to petition).

255. *In re Primus*, 436 U.S. 412, 424 (1978) (adding that any regulation designed to limit these rights must do so with "narrow specificity").

256. See *United Transp. Union v. Michigan Bar*, 401 U.S. 576, 585 (1971) (acknowledging group legal action as a fundamental right).

257. See, e.g., *Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects [the] appellee's right not only to advocate their cause but also to select what they believe to be the most effective means for doing so"); *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940) (holding that state may not impair effective exercise of right to free speech); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 802-03 (1989)

Professor Laurence Tribe makes a similar point when he notes that the Free Speech Clauses impose additional “external” constraints on the lawmaking branches’ power to regulate, directly or indirectly, federal courts’ jurisdiction or the process of adjudication.²⁵⁸ The First Amendment would impose limits on laws that

restrict access to the federal courts on the basis of a litigant’s race, religion, gender or political affiliation or viewpoint. Moreover, laws *designed* to hinder the exercise of constitutional rights are, to that degree, unconstitutional. Likewise, even those jurisdictional statutes which unintentionally *burden* the exercise of such rights warrant strict scrutiny.²⁵⁹

The underlying point, however, is the same: the Constitution guarantees by implication, a “meaningful” opportunity to contest government policy and relief where it is warranted.²⁶⁰

Even those who emphatically deny that Congress or the Executive must reply to petitions agree that federal courts are under a special duty to address the lawsuits presented. Professors Lawson and Seidman argue in favor of a more context-dependent approach to understanding this duty to respond.²⁶¹ While they see a “clear obligation to consider and respond to petitions” on the part of federal courts, they find no constitutional duty on the part of Congress or the Executive to respond to citizen grievances.²⁶² This debate, however, obscures more central questions as to what constitutes meaningful access. In all events, the First Amendment should reach any rule or enactment having the effect of burdening or discouraging one’s ability to pursue constitutional claims, or which presents the danger of “distorting” the process by which constitutional rights are adjudicated.²⁶³

(holding that even content-neutral restriction on speech must leave channels of “effective communication”).

258. See TRIBE, *supra* note 253, at 270-86 (distinguishing “external” constraints on lawmaking branches from “internal” constraints imposed by Article III).

259. *Id.* at 273. This principle would extend in theory to rules that govern how constitutional claims are presented to the court, even though Congress has broad authority “to make rules governing the practice and pleading in [federal courts].” *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965).

260. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972) (declaring that First Amendment guarantees “meaningful access to the agencies and courts”).

261. See Lawson & Seidman, *supra* note 36, at 740 (asserting that an examination of history and inferences drawn from the structure and text of the Constitution demonstrate that the right to petition does not oblige Congress to consider all petitions submitted).

262. See *id.* at 758 (arguing that “the First Amendment right to petition restates and emphasizes the federal courts’ obligations to consider filings—petitions brought to their attention—and to respond in some fashion to those filings”).

263. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001). See *United States v.*

Consistent with the strong protections afforded criticism directed explicitly at the state, “[b]road, prophylactic rules in the area of free speech are suspect.”²⁶⁴ What is more, any interest advanced by the state in support of its restriction must be well supported by the facts, not based on conjecture.²⁶⁵ Finally, the means by which government addresses its concerns must be closely tailored to meet the problem and burden no more speech than is absolutely necessary. Because the right to challenge existing law lies at the heart of the First Amendment, “government may regulate in the area only with narrow specificity.”²⁶⁶

Additionally, irrespective of whether there is a close fit between goals and methods, any official action taken with the actual intent to suppress or discourage the pursuit of colorable claims because the authorities are hostile to the individual’s message would violate an independent principle: the ban on viewpoint discrimination.²⁶⁷ In other words, if the rule or law is created to deter the exercise of one’s constitutional rights or because the state disagrees with the litigant’s point of view, the law must be stricken under the principle of speech neutrality. As the *Velazquez* decision suggests,²⁶⁸ the rule against taking sides in matters of opinion might very well be transgressed when government restricts a plaintiff-dissident’s capacity to articulate, or the courts’ ability to intelligently consider, constitutional claims.

1. Possible objections

A skeptic might object to this conception of a right of court access for fear that constitutional issues would be presented every time a new law or rule governing the legal process was enacted. These fears, however, are overstated. Where procedural rules are challenged, a court must begin with the well-established principle that each distinct mode of speech must be evaluated on its own terms. Here, constitutional litigation plainly contemplates the existence of rules that govern the manner in which that dissent is expressed. The mere

Jackson, 390 U.S. 570, 583 (1968) (holding that Congress penalize assertion of a constitutional right); *see also* Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (declaring that residency requirement burdened right to travel).

264. *In re Primus*, 436 U.S. 412, 432 (1978).

265. *Id.* at 434 n.27.

266. *Id.* at 424 (citing NAACP v. Button, 371 U.S. 415, 433 (1963)); *see also* Sable Communications v. FCC, 492 U.S. 115, 126 (1989) (“The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”).

267. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989).

268. *See Velazquez*, 31 U.S. at 544-46; *see supra* Part II.B.

existence of procedural and evidentiary rules, therefore, would not violate the principle of meaningful access.

Not every law having an impact on litigation implicates free speech, associational, or petition concerns. The vast majority of the procedural rules that courts use to manage cases should not implicate First Amendment concerns if they are neutral rules of general applicability and are genuinely designed not to suppress speech but to facilitate the orderly and fair consideration of legal claims.

A mainstay of First Amendment jurisprudence, the “time, place or manner” doctrine, is most helpful here.²⁶⁹ Content-neutral rules intended to facilitate where and how speech takes place, rather than suppress expression, trigger more lenient review so long as the procedures in question advance a significant governmental interest, burden expression only incidentally, and leave ample alternative channels of expression.²⁷⁰ The vast majority of procedural rules pass this test.²⁷¹

Such procedural rules are intended to ensure the orderly and efficient resolution of facts and legal issues rather than suppress speech outright; the effect of the rules in most instances leaves the plaintiff-dissident free to articulate her legal theories and claims. With a few exceptions, the mechanics of civil procedure apply regardless of the claims involved.

Even under the strict scrutiny test, rules that provide for special treatment of certain kinds of claims, such as bankruptcy cases or allegations of fraud, would pass muster if the particular claims present special problems of complexity, the manner in which the rule addresses such concerns is closely related to the identified concerns, and the rules do not abridge one’s ability to articulate constitutional

269. See *Perry Ed. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (observing that time, place and manner regulations may be necessary to further significant governmental interest); see also *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (asserting that a forum’s nature and normal pattern of activities therein dictate whether time, place and manner regulation is reasonable).

270. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (outlining general framework for sustaining a content neutral regulation).

271. One interesting situation in which a speech-centered right of access has particular relevance concerns content-based rules as to the content of pleadings. In *Anastasoff v. United States*, the Eighth Circuit held that a court rule declaring that unpublished opinions are not precedent and should not be cited in pleadings was unconstitutional because it granted federal courts judicial power beyond the limits of Article III. *Anastasoff*, 223 F.3d 898, 905 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054, 1056 (8th Cir. 2000). One might think that Article III would be a source of authority for federal courts to govern themselves rather than a limitation on courts’ ability to do so. A better basis for striking down the rule is that barring litigants from citing precedent or penalizing them for doing so interferes with plaintiffs’ abilities to articulate their legal theories and fairly present their claims, and therefore violates the First Amendment right of court access.

claims or impose unjustified conditions on relief. Where rules are carved out for classes of litigants (e.g., prisoners) *and* those rules have a reasonably likely effect on the ability of that class of individuals to articulate constitutional claims (or were enacted because of hostility to that group's views), the First Amendment would come strongly into play.

Accepting the notion that free speech principles limit the government's authority to impair the assertion of constitutional claims does not mean that the flexibility of the Speech and Petition Clauses need be abandoned. The First Amendment should retain its resilient capacity to measure the effect of any rule affecting speech in kind and degree, and permit courts to consider laws in light of the unique circumstances that shape each distinct mode of expression.²⁷²

2. *Due process v. first amendment*

It is best to think of a First Amendment right of court access as complementing the protection afforded by the Due Process Clause, rather than displacing it. While both provisions safeguard access to judicial relief, the Court's due process rulings recognize a right of access in more limited situations: when a fundamental right is at stake and a "judicial proceeding . . . [is] the only effective means of resolving the dispute at hand."²⁷³ While *Boddie* and its progeny explicitly require these conditions to be met before due process would apply,²⁷⁴ fundamental values and exclusivity of remedy do not comprise necessary conditions for First Amendment protection. Instead, under a speech-centered theory of access, the critical question might be whether a rule unduly burdens one's right to engage in constitutional litigation.

There are obvious temporal differences as well. Whereas the *Boddie* line of cases focuses exclusively on initial access to the legal system, the First Amendment reaches expressive conduct related to dissident

272. The Supreme Court has recognized, for example, that each medium of expression possesses its own unique features and that free speech analysis must take account of these circumstances. *See, e.g.,* *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (asserting that different mediums present their own problems for First Amendment analysis); *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978) (noting that offensive language is accorded different constitutional protection depending on its context).

273. *United States v. Kras*, 409 U.S. 434, 443-46 (1973) (explaining and limiting applicability of *Boddie*).

274. *See Boddie v. Connecticut*, 401 U.S. 371, 377-79 (1971) (involving access fees for divorce); *Kras*, 409 U.S. at 444-50 (distinguishing *Boddie* and holding that elimination of debt burden does not implicate constitutional issues requiring a judicial hearing).

activity both within and without the political-legal order.²⁷⁵ These decisions also pave the way toward a right of meaningful adjudication once proceedings are under way; instead of securing the opportunity simply to be heard, as is true with due process principles, the free speech approach ensures the dissenter's ability to convey important and useful information to the courts.

Moreover, there is a difference in *who* is protected: the attorney has an independent expressive interest under the First Amendment; the right of due process, on the other hand, usually attaches to the client alone.²⁷⁶ In short, a speech-centered right of access is more flexible than the traditional due process-oriented approach, both in its protection of expressive conduct even before proceedings have begun, and in its focus on the quality of information—the arguments, theories and facts—essential to the adjudicative process.

B. A Test Case:

Restricting Attorney's Fees in Successful Prisoner's Rights Actions

The constitutionality of limitations on the availability of attorney's fees for prisoner's rights cases presents an illuminating opportunity to explore the implications of a reinvigorated First Amendment right to pursue redress of constitutional injuries. The Prison Litigation Reform Act of 1995 (the "PLRA"),²⁷⁷ codified at 42 U.S.C. § 1997e(d), "significantly limits"²⁷⁸ the attorney's fees that may be awarded in a civil rights action brought by an inmate.²⁷⁹ This statutory provision, which to date has been challenged unsuccessfully under the Equal

275. See *In re Primus*, 426 U.S. 412, 426 (1978); *NAACP v. Button*, 371 U.S. 415, 437-38 (1963).

276. The right of due process during court proceedings generally is understood as the client's right, not the lawyer's. In *Velazquez*, for example, the client was free to raise constitutional claims on her own or hire a private attorney to assist. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 556 (2001) (Scalia, J., dissenting) (noting that restriction did not stop a litigant from hiring a private, non-LSC attorney to argue constitutional claims regarding welfare benefits). Under such circumstances, it is not easy to see how the individual is denied an opportunity to be heard. By contrast, the lawyer has an independent First Amendment interest in engaging in speech separate and apart from his client. *Id.*

277. 42 U.S.C. § 1997(e) (1994 & Supp. V 1999).

278. *Collins v. Montgomery County Bd. of Prison Inspectors*, 176 F.3d 679, 681 (3d Cir. 1999).

279. 42 U.S.C. § 1997e(d). The PLRA substantially altered the landscape for bringing prisoner's rights cases by requiring inmates to exhaust available administrative remedies even if the grievance procedure at issue could not possibly provide the relief sought. *Id.* § 1997e(a)(1). The statute also denies *in forma pauperis* status to inmates who have had three or more lawsuits or appeals dismissed, 28 U.S.C. § 1915(g) (1994 & Supp. V 1999), and authorizes dismissal of damages claims that are not accompanied by any "physical injury." 42 U.S.C. § 1997e(e).

Protection Clause,²⁸⁰ restricts the recovery of fees to no greater than “150 percent of the hourly rate established . . . for payment of court-appointed counsel,”²⁸¹ and where damages are obtained, the PLRA imposes an absolute limit on the amount of fees that a successful attorney may recover to 150 percent of the monetary judgment.²⁸²

Unlike most court rules that authorize the dismissal of actions or the imposition of sanctions for bringing suits for an improper purpose,²⁸³ the PLRA’s fees cap does not directly penalize the inmate for asserting a constitutional claim. Rather, by depriving attorneys of value for their work, the law discourages attorneys from taking on prisoners as clients, and creates disincentives to perform the work competently when representation is undertaken. While the entitlement to fees is ascribed to the “prevailing party,”²⁸⁴ in practice fees are awarded to the prevailing party’s counsel if the plaintiff has retained one, and to no one if the case is pursued *pro se* (neither an attorney who handles his own case *pro se* nor a non-lawyer is entitled to fees).²⁸⁵ Nevertheless, the sweeping rule substantially affects an inmate’s ability to litigate complex constitutional claims by reducing the only incentive for a competent attorney to take up an inmate’s cause. Hence, the PLRA’s fees cap presents a problem for theories of access under which the right of access would end when a claim is filed.²⁸⁶

C. *Failing to Appreciate the Speech-Curbing Impact of the Cap*

In upholding this limitation on available attorney’s fees, some courts have denied that a “fundamental right,” which warrants heightened judicial scrutiny, is at stake;²⁸⁷ others have mouthed the

280. Every constitutional challenge to the fees cap thus far has been rejected by the courts of appeals. See, e.g., *Hadix v. Johnson*, 230 F.3d 840, 846 (6th Cir. 2000); *Boivin v. Black*, 225 F.3d 36, 46 (1st Cir. 2000); *Madrid v. Gomez*, 190 F.3d 990, 996 (9th Cir. 1999). The Third Circuit was divided evenly on this question, leaving intact the lower court’s rejection of the constitutional attack. See *Collins*, 176 F.3d at 686.

281. 42 U.S.C. § 1997e(d).

282. *Id.*

283. See generally FED. R. CIV. P. 11.

284. See 42 U.S.C. 1988(b) (awarding attorney’s fees to prevailing party for civil rights actions).

285. See *Kay v. Ehrler*, 499 U.S. 432, 436-37 (1991) (holding that a *pro se* litigant is not entitled to fees under the Civil Rights Attorney’s Fee Awards Act, regardless of whether the litigant is a lawyer or a non-lawyer). See also The Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976).

286. See *Andrews, Motive Restrictions*, *supra* note 35, at 683 (defining right to mean only initial access).

287. See *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir.) (concluding that “prisoners are not a suspect class, . . . and plaintiffs have not alleged that a

words, but in practice have diluted their meaning by failing to treat access to the courts as a basic right.²⁸⁸ The decisions are flawed on several counts. First, these rulings have relied on an overly narrow understanding of the right of access to mean little more than the ability to file intelligible legal pleadings with the court.²⁸⁹ The courts have employed the most cramped concept of court access available in the case law, with little attempt to harmonize the different lines of cases or weigh the values at stake.

In none of these cases has the court acknowledged the value of the anti-government expression presented by inmates' lawsuits. Nor have the lower courts heeded the Supreme Court's admonition that the assertion of civil rights claims, with which 42 U.S.C. §§ 1983 and 1988 are exclusively concerned,²⁹⁰ stands on special footing under the First Amendment because it constitutes expression going to the very core of the judicial function.²⁹¹ The diminution of this fundamental right strains the notions that access must be meaningful, that rules should not negatively affect the ability of individuals to present claims of constitutional injury without "distorting" the system,²⁹² and that lawyers are critical to the proper adjudication of constitutional questions (i.e., Congress' longstanding policy that the availability of fees is crucial to the vindication of civil rights).²⁹³

These courts commit a second error by inexplicably imposing a higher standard for stating a First Amendment injury. The courts have mistakenly required that inmates show that the fee cap "make[s] it impossible for a prisoner to secure the services of a lawyer."²⁹⁴ Cognizable injury occurs when government unjustifiably burdens the

fundamental right is at issue").

288. *See, e.g.*, *Walker v. Bain*, 257 F.3d 660, 668 n.3 (6th Cir. 2001) (recognizing tension between PLRA's cap on attorney's fees and fundamental right of access to courts, but ultimately upholding fee cap under rational basis scrutiny).

289. *See, e.g.*, *Boivin v. Black*, 225 F.3d 36, 42 (1st Cir. 2000) (holding that right of access is "narrow in scope" and that the fees cap "does not implicate the right of access to the courts in any cognizable way").

290. *See* 42 U.S.C. § 1983 (1994 & Supp. V 1999) (discussing elements of a cause of action for violation of civil rights by a state actor); *id.* § 1988 (awarding attorney's fees in civil rights cases).

291. *See* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544-45 (2001) (criticizing restriction imposed by the statute in question, as insulating the laws of the legislative branch from judicial scrutiny).

292. *Id.* at 544.

293. The encouragement of private attorneys to take civil rights cases is a policy "Congress considered of the highest priority." *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968). As the Court explained, "[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Id.*

294. *Boivin*, 225 F.3d at 43.

exercise of a constitutional right,²⁹⁵ or when official action poses a real likelihood of chilling protected expression.²⁹⁶ One need not demonstrate conclusively that the right cannot be exercised in order to prevail.²⁹⁷

Third, in upholding the cap, courts have accepted the government's justifications for imposing the cap on prisoners without the requisite skepticism. Granted, much of the cause for this situation can be attributed to the use of rational basis review in the first place, which provides that the government "need not actually articulate at any time the purpose or rationale supporting its [decision],"²⁹⁸ and asks whether "there is any reasonably conceivable state of facts that could provide a rational justification for the classification."²⁹⁹

But the rational basis test still demands reasonable explanations.³⁰⁰ Thus far, courts have uniformly accepted the government's explanations, even when they defy logic.³⁰¹ For example, by the plain terms of 42 U.S.C. § 1988, fees are available only to civil rights plaintiffs who prevail. Therefore, limiting the amount of fees

295. See, e.g., *Gomez v. Vernon*, 255 F.3d 1118, 1127-28 (9th Cir. 2001) (finding a First Amendment violation where plaintiff was threatened with revocation of privileges by prison officials for continuous complaints about the state of prison law library).

296. See *id.* (holding that threat of revocation of privileges chilled inmates' expression of complaints).

297. It is quite possible that courts have confused the distinction between *affirmative accommodations* that the right of access may require, which are narrower in scope, and the right to be free from restrictions that unduly *restrict* access, which is broader in scope. See *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding that right of access to courts required providing prisoners with adequate law libraries or assistance of legal professionals).

298. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993); see also *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000) (holding that government "may rely entirely on rational speculation unsupported by any evidence or empirical data") (citing *FCC v. Beach Comm., Inc.*, 508 U.S. 307, 315 (1993)).

299. *Heller*, 509 U.S. at 320.

300. See *Mathews v. Lucas*, 427 U.S. 495, 510 (1976) (explaining that rational basis standard "is not a toothless one"); *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (holding that distinction based on illegitimacy was not reasonably related to any government interest of avoiding spurious benefits claims); see generally Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act's Disparate Restrictions on Attorney's Fees*, 89 CAL. L. REV. 999 (2001) (arguing that PLRA's limitation on attorney's fees for prevailing prisoners should fail rational basis test); Karen M. Klotz, Comment, *The Price of Civil Rights: The Prison Litigation Reform Act's Attorney's Fee-Cap Provision As a Violation of Equal Protection of the Laws*, 73 TEMP. L. REV. 759 (2000) (same).

301. See *Fouk v. Charrier*, 262 F.3d 687, 702-03 (8th Cir. 2001) (accepting government's explanation that PLRA fee caps discouraged frivolous lawsuits); *Walker v. Bain*, 257 F.3d 660, 669-70 (6th Cir. 2001) (accepting government's explanation that fee caps protect public fisc); *Norton v. Dimazana*, 122 F.3d 286, 291 (8th Cir. 1998) (accepting government's explanation that fee caps level playing field between incarcerated and non-incarcerated litigants).

available to winners can have no appreciable effect in deterring frivolous § 1983 suits.

Even where courts have recognized that the government's arguments are on shaky grounds, they have nevertheless felt bound to uphold the fees cap because of their use of the rational basis test.³⁰² In minimizing the practical effect of the provision on indigent prisoners' ability to find competent attorneys to pursue well-founded claims, courts have felt free to engage in pure speculation rather than any actual fact finding.³⁰³ For example, in discounting the problem of over-deterrence that the fee caps pose, i.e., discouraging attorneys from taking on colorable claims or providing competent representation, the First Circuit declared: "We doubt that a lawyer who believes that a prisoner has a meritorious claim for damages will be deterred by that limitation."³⁰⁴ The court disingenuously reached its conclusion by blurring the different incentive structures in civil rights cases and ordinary civil lawsuits, announcing that the civil rights attorney receives "150% more than the norm in civil litigation."³⁰⁵ If one were to accept this reasoning, any effect of the law on one's ability to challenge existing law could be brushed aside simply because the successful civil rights plaintiff is entitled to *some* measure of fees.

The proper inquiry would be to ask whether the fees cap discourages private attorneys from taking prisoners' rights cases or impairs their work when they accept such cases, a question that turns on a comparison of the conduct of civil rights attorneys before and after the enactment of the PLRA restrictions (not a comparison between capped civil rights attorneys and civil attorneys who engage in non-civil rights legal work). By equating dissimilar categories of cases, the First Circuit and courts embracing its analysis have misunderstood entirely the impact of the law on dissident speech.

D. Burdening the Exercise of a Fundamental Right

Under the theory of access set forth in this Article, the fees cap chills the exercise of two related, fundamental First Amendment

302. See *Hadix*, 230 F.3d at 846 (characterizing prisoner's legal complaints about fees cap as "well founded criticisms"); *Madrid v. Gomez*, 190 F.3d 990, 996 (9th Cir. 1999) (accepting at face value government's "speculation" that limitation on fees will curtail frivolous prisoner's suits).

303. See *Madrid*, 190 F.3d at 996 (arguing that it is "certainly conceivable" that prisoners are involved in a "disproportionate number" of suits which lack merit when compared to the rest of population, and that court need not undergo a search for facts or empirical data to confirm this theory).

304. *Boivin v. Black*, 225 F.3d 36, 43 (1st Cir. 2000).

305. *Id.*

rights: the right to seek redress of constitutional violations, and the corollary right to seek assistance from, and associate with, sympathetic persons who are able to articulate effectively the message of constitutional reform.³⁰⁶ As in the case of individuals on public assistance, restrictions on legal assistance impair aggrieved prisoners' abilities to obtain competent counsel to challenge government authority and affect the quality of the representation received by reducing any incentive for an attorney to expend the resources necessary to investigate and litigate the claims effectively.³⁰⁷ The fees cap, as even the courts have candidly acknowledged, "affects how claims are presented."³⁰⁸ Such a burden on a litigant's ability to articulate his challenge to government policy threatens to create a two-tiered system for civil rights cases: inmates' constitutional claims, which are articulated in a less thoughtful manner, and the civil rights lawsuits in other contexts, which on the whole would likely be presented more completely and intelligently.³⁰⁹

The impairment of an inmate's ability to present his claims of constitutional wrongdoing, moreover, runs counter to the broader policies animating the federal fee-shifting statute.³¹⁰ Section 1988 was explicitly "designed to give [aggrieved] persons effective access to the judicial process,"³¹¹ many of whom, as the Supreme Court has

306. Cf. *TRIBE*, *supra* note 253, at 55 (explaining that "[i]t is immaterial that the benefits might have been abolished altogether; the point is that, having been provided generally, such benefits may not be withdrawn simply because the designated rights have been, or are being, exercised").

307. See *Madrid*, 190 F.3d at 995 (acknowledging that fee cap deters attorneys from accepting prisoners' rights cases, but claiming that it would only "restrict prisoners' access to the most sought-after counsel who insist on their going rate for representation"); see also *Boivin*, 225 F.3d at 43 (adopting this speculative reasoning). Content-based rules that affect the availability or competency of counsel in this context raise First Amendment concerns. In striking down the rule restricting challenges to existing welfare rules, the *Velazquez* Court explained that in many cases, clients would not be able to find alternative lawyers, and that there would be "no alternative source for the client to receive vital information respecting constitutional and statutory rights bearing upon claimed benefits." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001).

308. *Boivin*, 225 F.3d at 45.

309. See *Velazquez*, 531 U.S. at 545 (warning against rules that create a two-tiered system where quality of representation would affect presentation of constitutional claims). Because the attorney's fees restriction implicates a fundamental right protected by the First Amendment—the right to engage in constitutional litigation free from arbitrary or unjustified government restrictions—strict scrutiny under the Equal Protection Clause also would be appropriate.

310. See H.R. REP. NO. 94-1558, at 1 (1976) (stating that because the effective enforcement of federal civil rights statutes depends largely on the efforts of private citizens, the judicial remedy will remain a "meaningless right" unless victims can afford legal counsel to present their claims to courts).

311. *Id.*

acknowledged, “might have little or no money.”³¹² Congress enacted the law with the full understanding that “effective enforcement depends largely on the efforts of private citizens,”³¹³ and in an effort to “preserv[e] access to the courts and encourag[e] public interest litigation”³¹⁴ to be undertaken by competent counsel.

Understandably, most private attorneys have shied away from taking prisoner’s rights cases, which generally are difficult to investigate, costly to pursue, and rarely are financially rewarding.³¹⁵ In many cases, damages for constitutional torts are of low or nominal value.³¹⁶ Therefore, in most cases the private attorney will expect to recoup little, if anything, from a contingency-fee arrangement.³¹⁷ In light of these circumstances, the prospect of recovering fees under § 1988 represents the only realistic way that a competent, private attorney can afford to represent an inmate, much less expend adequate resources on his case.³¹⁸ The fees cap makes it even more difficult to encourage competent counsel to pursue prisoner’s rights cases.³¹⁹

Other factors weigh in favor of evaluating the fees cap under the First Amendment’s more restrictive standards. Like other minority groups without access to traditional avenues of political power, inmates comprise a discrete category of individuals without the

312. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 108 (1991) (Stevens, J., dissenting) (noting that Congress intended to give those without financial resources the ability to act as “private attorney[s] general” to enforce civil rights laws); *accord Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994) (same).

313. H.R. REP. NO. 94-1558, at 1.

314. *W. Va. Univ. Hosps.*, 499 U.S. at 110 (Stevens, J., dissenting).

315. See *Martin v. Hadix*, 527 U.S. 343, 370 n.2 (1999) (Ginsburg, J., concurring in part and dissenting in part) (“An attorney’s decision to invest time and energy in a civil rights suit necessarily involves a complex balance of factors, including the likelihood of success, the amount of labor necessary to prosecute the case to completion, and the potential recovery.”).

316. See *Boivin v. Black*, 225 F.3d 36, 38 (1st Cir. 2000). In *Boivin*, the plaintiff-inmate lost consciousness after being locked in a restraint chair with a towel covering his mouth. *Id.* After a full trial, the jury rendered a verdict in the complainant’s favor, but awarded only \$1.00 in nominal damages. *Id.* Although the plaintiff’s attorneys’ fees reached \$ 3,892.50, under the cap, they were entitled to only \$1.50 for their hard work. *Id.*; see also JOHN BOSTON, PRISONERS’ SELF-HELP LITIGATION MANUAL 215-16 (1995) (asserting that most damage awards for substantive violations of one’s rights typically are very modest compared to time and costs expended by an attorney, unless violations are accompanied by serious bodily harm or dehumanizing treatment).

317. See *City of Burlington v. Dague*, 505 U.S. 557, 568-69 (1992) (Blackmun, J., dissenting) (discussing fee recovery’s role in counsel’s evaluation of whether to represent a potential civil rights plaintiff).

318. See *id.* at 568 (explaining that Congress attached fee-shifting provisions to statutes that typically generate little or no damages).

319. See *id.* (“The strategy of the fee-shifting provisions is to attract competent counsel to selected federal cases by ensuring that if they prevail, counsel will receive fees commensurable with what they could obtain in other litigation.”).

means to effect legislative change (or oppose change hostile to their interests).³²⁰ They do not form any natural constituency and therefore provide no political benefit to their advocates; nor is any price paid by leaders who vote for laws that abridge prisoners' rights.³²¹

As the late Professor Thomas Emerson once explained, "[t]he expansion of organization in our society has left the unorganized sectors peculiarly vulnerable to infringement of their rights."³²² The inmate, a classic "deviant" whom the modern state separates, isolates, and controls absolutely, must seek relief from non-traditional quarters.³²³ Even more so than other political minorities for whom some measure of progress has been made in improving accountability and influence, the courts remain for these despised individuals "the sole practical avenue open to . . . petition for redress of grievances."³²⁴

E. Restricting Fees for Prevailing Prisoners as Content-Based Regulation

One might object that the Constitution does not guarantee a litigant an entitlement to a skilled lawyer to pursue civil causes of action and that, additionally, there is no particular constitutional right to be compensated when a party prevails.³²⁵ After all, 42 U.S.C. § 1988 is a statutory grant of attorney's fees, and in the absence of such a fee-shifting mechanism, the default American Rule would simply leave the expenses of litigation where they lie without

320. In emphasizing the political vulnerability of the incarcerated, I have deliberately avoided the test for suspect classification articulated in the famous *Carolene Products* footnote. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting strict scrutiny for laws affecting "discrete and insular" minorities). But see Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 716 (1985) (arguing that discreteness and insularity are not necessarily the best indicators of political powerlessness). I am comforted by the fact that the First Amendment cases have not employed the narrow "discrete and insular" test in determining whose speech and access to the court are worth protecting, but have recognized a general policy of protecting contrarians from all walks of life, even those who seek to engage in distasteful or socially questionable expression.

321. See *Rhodes v. Chapman*, 452 U.S. 337, 358 (1981) (Brennan, J., concurring) (explaining that prison inmates are "voteless, politically unpopular, and socially threatening"); see also Barry R. Bell, Note, *Prisoner's Rights, Institutional Needs, and the Burger Court*, 72 VA. L. REV. 161, 190 (1986) (asserting that prisoners are isolated from public view, regarded with distaste by political community, and exert little or no political leverage of their own).

322. EMERSON, *supra* note 29, at 37.

323. See *id.* at 38 (asserting that "deviant individuals" are forced to pursue their interests through judicial process because of a lack of access to traditional avenues of influence).

324. *NAACP v. Button*, 371 U.S. 415, 430 (1963).

325. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (reaffirming the "American Rule" whereby each party bears its own attorney's fees unless there is a statute providing for fees).

offending the Constitution.³²⁶ Even if the fees cap restricts “speech,” one could conceivably argue that the cap seeks to control only the secondary effects of the protected expression.³²⁷

The main flaw in this argument, however, is that for no other category of speakers has the government limited the availability of attorney’s fees in this fashion. While there is no general constitutional entitlement to counsel to pursue civil rights claims (let alone to one who is well paid), Congress chose to provide for fees to facilitate constitutional litigation.³²⁸ The First Amendment requires that this entitlement be provided on an equal basis unless justified by a compelling purpose.³²⁹ As Professor Tribe explains, “[e]ven the withdrawal of a gratuity—whether in the form of a welfare payment that a state is not independently required to make or in the form of an extension of court jurisdiction that Congress is not independently compelled to provide—may be forbidden if it penalizes a separately secured right.”³³⁰

The PLRA imposes a content-based classification of speech in that it distinguishes between the lawsuits initiated by inmate-dissidents and other kinds of grievances based on the content of the speech—namely, “prisoners’ suits.”³³¹ Even a cursory examination of the PLRA’s provisions reveal that prisoner litigation, a protected form of anti-government expression, is the target of these restrictions.³³² The government itself concedes that it has singled out prisoner rights litigation, insisting that it seeks to reduce the overall volume of legal filings by prisoners.³³³

326. *Id.*

327. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-43 (1994) (stating that as a general rule, laws that distinguish based on favored or disfavored ideas or views are content-based); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (explaining that government regulation of expressive activity is content-neutral so long as, *inter alia*, it is justified without reference to content of regulated speech).

328. See H.R. REP. NO. 94-1558, at 1 (1976) (stating that Congress intended to encourage suits based on violations of federal laws guaranteeing civil and constitutional rights).

329. See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (asserting that to survive strict scrutiny, a content-based regulation must be necessary to serve a compelling state interest and narrowly tailored to achieve that end).

330. TRIBE, *supra* note 253, at 273.

331. Perhaps the most powerful evidence of a content-based restriction on constitutional litigation is that the cap applies explicitly to “any action brought by a prisoner . . . in which attorney’s fees are authorized under section 1988.” 42 U.S.C. § 1997e(d)(1).

332. See *Boivin v. Black*, 225 F.3d 36, 39 (1st Cir. 2000) (noting that PLRA specifically targeted prisoner litigation in restricting attorney’s fees).

333. See *id.* at 41 (“Congress enacted the PLRA out of a concern that prisoner litigation . . . was wasting taxpayer money and clogging the courts . . . thus reducing the overall number of prisoner suits and easing the perceived burden of prisoner

The limitation on fees should be treated as a content-based regulation of protected speech for the added reason that it was explicitly enacted because of the effect of the speech upon the listener—here, the government institutions about whose policies the plaintiff complains of in court. The federal government wished to shield state and local entities from prisoners' lawsuits and reduce the federal courts' supervision of errant institutions.³³⁴ Although there is no First Amendment protection for frivolous lawsuits, this particular rule sweeps far too broadly to include obviously meritorious cases, as well as colorable claims that eventually may be decided adversely to the plaintiff.³³⁵ No similar across-the-board restriction on the availability of fees has been imposed on other kinds of civil rights actions.³³⁶ For these reasons, a more skeptical evaluation of the restriction is warranted.

As for the "secondary effects" doctrine,³³⁷ it is simply inapplicable. Even if one accepts at face value the government's explanations for adopting the law,³³⁸ the provision is directed at speech itself, even though some of the speech captured by the rule, i.e., patently frivolous lawsuits, is not protected. Moreover, the rationale may justify speech restrictions only where the actual effect on speech is incidental. The principle should find no traction here, as the fees

litigation on the justice system."); *see also* Madrid v. Gomez, 190 F.3d 990, 993 (9th Cir. 1999) (explaining that PLRA "limit[ed] the amount of attorney's fees that can be awarded to prisoners' counsel, thereby reducing the burden that prisoners' suits have on the public fisc").

334. *See infra* note 347 and accompanying text (describing Congress' desire to reduce judicial supervision of state and local prisons).

335. *See* Hadix v. Johnson, 230 F.3d 840, 844 (6th Cir. 2000) (noting that government argued that the fees cap was enacted not only to discourage frivolous cases, but also to "reduce trivial or inconsequential suits"); *see id.* at 845 (stating that the PLRA intended to "decreas[e] marginal or trivial lawsuits"); *Boivin*, 225 F.3d at 46 (conceding that fees cap may discourage filing of "low-value suits"); H.R. REP. NO. 104-21, at 28 (1995) (stating that fee cap "will discourage burdensome litigation of insubstantial claims where the prisoner can establish a technical violation of a federal right but he suffered no real harm from the violation"). The Court has repeatedly held that the right of court access cannot be infringed where litigants in good faith pursue constitutional claims. *See, e.g.*, *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971).

336. *See Boivin*, 225 F.3d at 39 (noting that by enacting the PLRA, Congress deviated from the general pattern of providing attorney's fees to prevailing civil rights litigants by explicitly choosing to limit the fees that courts can award to a prisoner's lawyer in a civil rights case).

337. *See* *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986) (asserting that a content-based regulation will be considered content-neutral if it was enacted for the purpose of controlling the secondary effects of the speech and not to restrict speech).

338. *See Boivin*, 225 F.3d at 41 (stating that Congress enacted the PLRA out of the concern that prisoner litigation was wasting taxpayer money and clogging courts because much of it was considered frivolous).

cap is reasonably likely to deter or frustrate legitimate dissident speech within the legal system.

F. Familiar Terrain:

Demanding a Powerful Government Interest and Narrow Tailoring

The PLRA should receive exacting review by the Court and be upheld only if the government can narrowly tailor its restrictions and put forth a compelling government interest, because the fees cap constitutes a limitation on a mode of speech rather than an affirmative accommodation. The government has argued that the cap is rational because it discourages prisoners from lodging frivolous claims,³³⁹ that it “levels the playing field” by imposing additional disincentives to prisoners, who unlike the average civil litigant, have both the time and energy to file frivolous lawsuits repeatedly in the hopes of a windfall,³⁴⁰ that it reduces federal courts’ intrusion into the management of prisons,³⁴¹ and that it protects the public fisc.³⁴² Under the more demanding test, sheer “speculation” by lawmakers that the fees cap will reduce frivolous prisoners’ suits simply will not be adequate. While reducing the volume of patently frivolous litigation is a sufficient government interest in the abstract,³⁴³ a speech-centered model would require Congress to show that private lawyers pursuing unfounded claims on behalf of inmates actually has contributed to the sharp rise in the volume of frivolous prisoners’ suits.³⁴⁴ No such hard evidence supported Congress’ decision to enact the fees cap.

Many of the remaining goals advanced by the federal government in support of the limitation, such as protecting the public treasury or “reducing judicial intervention into the management of prisons,”³⁴⁵

339. See *Fouk v. Charrier*, 262 F.3d 687, 702-03 (8th Cir. 2001) (agreeing with government’s argument that PLRA cap on attorney’s fees was rationally related to government interest in discouraging frivolous lawsuits).

340. See *Norton v. Dimazana*, 122 F.3d 286, 291 (8th Cir. 1998) (discussing how PLRA fee provisions limit opportunities of prisoner litigants to file suit to those of “other litigants in the federal court”).

341. See *Walker v. Bain*, 257 F.3d 660, 677 (6th Cir. 2001) (presenting, yet finding unpersuasive, government’s argument that fees cap prevents federal court intrusion into the management of prisons).

342. See *id.* at 669-70 (holding that fee caps in PLRA protect the public fisc, which is a legitimate government interest); see also *Hadix v. Johnson*, 230 F.3d 840, 843-45 (6th Cir. 2000) (holding that fee caps are a valid means to prevent frivolous lawsuits by prisoners, thereby protecting treasury).

343. See *Hadix*, 230 F.3d at 845 (explaining that Congress believed that there has been an explosion of prisoner civil rights litigation that has burdened prison administration, the state treasury, and the federal judiciary).

344. *Madrid v. Gomez*, 190 F.3d 990, 995 (9th Cir. 1999).

345. *Hadix*, 230 F.3d at 844.

should be rejected outright. Saving money does not constitute a compelling justification for abridging one's constitutional rights.³⁴⁶ Moreover, Congress' chosen solution strikes where its regulatory interest is weakest (successful actions) or where the state has voluntarily assented to the jurisdiction of the courts (and therefore needs no protection). Worse, it slips perilously close to unconstitutionally interfering with the federal judiciary's Article III authority and penalizing inmates, as a class of persons, from exercising their right to seek redress for constitutional harms.³⁴⁷

The answers are more lucid when it comes to the question of whether the fees cap is narrowly tailored. As the nervousness exhibited by some of the courts examining this question strongly suggests,³⁴⁸ the elixir mixed by Congress simply does not cure the diagnosed illness. Claims resulting in an award of fees are, by definition under § 1988, neither frivolous nor insubstantial, because the statute only awards fees to the prevailing plaintiffs.³⁴⁹ Restricting the amount of fees attorneys can recover in successful suits, therefore, can have no material reduction in the amount of frivolous suits actually brought in the federal courts, which inmates remain free to do *pro se*.³⁵⁰ This is particularly true if, as the supporters of the legislation urge, the underlying causes of the rise in frivolous prisoner's suits are: (1) low opportunity costs because prisoners have an unlimited amount of time on their hands and (2) low transaction

346. See *Palmer v. Thompson*, 403 U.S. 217, 226 (1971) ("Citizens may not be compelled to forgo their Constitutional rights because officials . . . desire to save money."); see also *Griffin v. Illinois*, 351 U.S. 12, 17-18 (1956) (holding that state requirement of transcript fee impermissibly blocked indigent's access to judicial process).

347. Perhaps aware of the grave consequences, the Sixth Circuit declined to address whether reducing the involvement of the courts in the administration of prisons was a rational basis for enacting the law. *Hadix*, 230 F.3d at 846 n.7; see also 141 CONG. REC. S14,611, 14,626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole) (declaring that "[t]hese guidelines will work to restrain Federal judges . . . who have used these complaints to micromanage state and local prison systems"); *id.* (statement of Sen. Hatch) (asserting that "the courts have gone too far in micromanaging our Nation's prisons"); *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 400, S. 866, S. 930 and H.R. 667 Before the Senate Comm. on the Judiciary*, 104th Cong. 3-7 (1995) (statement of Sen. Abraham) (stating that prisoners, lawyers, and unelected judges have replaced the legislators in controlling the character of prisons); *id.* at 26-32 (statement of William P. Barr, Former U.S. Attorney General) (asserting that judicial micromanagement of prison system was hamstringing state and local officials managing prison resources).

348. See *Hadix*, 230 F.3d at 847 (acknowledging that "the means that Congress employed do not tightly fit the ends it sought to achieve").

349. See *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992) (holding that plaintiff does not prevail within meaning of § 1988 unless "actual relief on the merits of his claim alters the legal relationship between the parties").

350. See *Hadix*, 230 F.3d at 845 (recognizing that some prisoners will continue litigation of their claims even without assistance of an attorney).

costs to engage in litigation because fees and costs are often waived.³⁵¹

The restriction on the availability of counsel's fees, which does not actually penalize the inmate who files a frivolous action or affects an entitlement that would accrue to him directly, cannot conceivably curb the *pro se* inmate's wasteful behavior. Indeed, the proponents of the legislation were well aware that the vast majority of civil rights cases brought by prisoners in the federal courts were litigated *pro se*, and not with the assistance of counsel.³⁵² On the other hand, insofar as one might be able to predict the cap's effect on the exercise of protected speech, it is just as likely that the law will deter more private attorneys from taking on meritorious cases with a lower projected payoff.

Even assuming that it is possible for such an ill-conceived approach to reduce frivolous inmate lawsuits, the strict scrutiny standard would put the proposal to the test by requiring the government to come forward with: (1) concrete evidence that attorneys actually pursue meritless prisoners' suits in the hope of a big payoff; and (2) a factual basis for believing that the restriction would materially reduce the number of baseless inmate filings in the federal courts. The current legislative record consists entirely of statistics reflecting a rise in the total number of prisoner filings, from which the legislators have drawn unreasonable assumptions,³⁵³ and a handful of widely-circulated anecdotes about inmates suing over silly grievances.³⁵⁴

If the government is taken at its word that it honestly desires to reduce frivolous lawsuits rather than suppress prisoners' lawful anti-government expression, the government still must resort to less restrictive mechanisms directed at those who actually file frivolous cases, rather than enact restrictions on all prisoner-plaintiffs.³⁵⁵

351. See *Madrid v. Gomez*, 190 F.3d 990, 996 (9th Cir. 1999) (noting that "low opportunity costs" may lead prisoners to file more frivolous lawsuits than public in general); see also *Gabel v. Lynaugh*, 835 F.2d 124, 125 n.1 (5th Cir. 1988) (per curiam) (asserting that *pro se* civil rights litigation has become a "recreational activity" for state prisoners); 141 CONG. REC. S7,526 (daily ed. May 25, 1995) (statement of Sen. Kyl) (stating that for prisoners, there is "no cost to bring a suit" because courts routinely waive filing fee and prisoners have all the "necessities of life supplied" to them).

352. See 141 CONG. REC. S7,526 (statement of Sen. Kyl) (explaining that between July and October 1987 "section 1983 prisoner appeals prosecuted without counsel were [the Fifth Circuit's] largest single category of cases" and further noting that the number of these cases stands at almost 22%, with the next largest category, diversity cases, standing at 16% of the court's docket).

353. See 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl) (insisting that majority of prisoner suits were frivolous because of 39,000 lawsuits filed in federal courts by inmates, only 3.1% reached trial).

354. See *id.* (claiming that prisoners have sued for being served chunky rather than creamy peanut butter and for being denied the use of a Nintendo Gameboy).

355. See, e.g., *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966) (striking down, on Equal

Government-defendants already have at their disposal a plethora of tools to handle frivolous lawsuits, including the vigorous use of motions to dismiss and/or summary judgment,³⁵⁶ sanctions under Rule 11,³⁵⁷ existing federal law,³⁵⁸ as well as the court's inherent authority to oversee its own work. Furthermore, other elements of the PLRA arguably are more closely tethered to the objective of discouraging frivolous filings by penalizing misconduct directly.³⁵⁹ All of these methods are far less intrusive than an across-the-board limitation on fees, and are more reasonably calculated to address the problems identified by the government.³⁶⁰ Officials should be required to show that these less restrictive methods of curbing the disfavored conduct do not work before resorting to blanket rules that affect all prisoners' abilities to secure attorneys and present colorable claims.³⁶¹

The method that Congress used to fulfill its professed goal of deterring frivolous filings in this case can be closely analogized to other types of laws enacted to attack certain categories of unprotected speech, but which cast far too wide a net.³⁶²

Protection grounds, transcription fee requirement that "impos[ed] a financial obligation only upon inmates of institutions, . . . inevitably burden[ing] many whose appeals, though unsuccessful, were not frivolous, and leav[ing] many whose appeals may have been frivolous indeed").

356. See FED. R. CIV. P. 12(b)(6) (providing for dismissal of a case for failure to state a claim upon which relief can be granted).

357. See *id.* at 11 (exposing attorney to possible sanctions for filing a frivolous lawsuit).

358. See 28 U.S.C. § 1927 (1994) (authorizing federal courts to sanction a party or his counsel for engaging in "unreasonabl[e] and vexatious" litigation).

359. See *id.* § 1915(g) (stating that under PLRA prisoners who file more than three frivolous actions will be denied *in forma pauperis* status for subsequent claims as a penalty for abusing the right to court access). I leave for another day an analysis of the constitutionality of such provisions, which single out inmates for these special kinds of penalties, but simply note that Congress is well equipped to enact less restrictive solutions.

360. The Court made this point in *Boddie* when it firmly rejected the argument that the state's interest in preventing frivolous lawsuits and allocating scarce resources justified the imposition of filing fees where constitutional rights are at stake. See *Boddie v. Connecticut*, 401 U.S. 371, 381-82 (1971). The *Boddie* Court noted that there were alternatives to fee and cost requirements "as a means for conserving the time of courts and protecting parties from frivolous litigation, such as penalties for false pleadings or affidavits, and actions for malicious prosecution or abuse of process, to mention only a few." *Id.*

361. See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (asserting that in order for a content-based speech restriction to withstand strict scrutiny, it must be narrowly tailored and employ the least restrictive means available).

362. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 878-79 (1997) (invalidating provisions of the Communications Decency Act of 1996 as overly broad content-based restrictions on speech); *ACLU v. Miller*, 977 F. Supp. 1228, 1235 (N.D. Ga. 1997) (issuing preliminary injunction against enforcement of criminal statute prohibiting Internet transmissions that falsely identified sender because it would hamper access

Consequently, the law poses an intolerable risk of chilling protected dissent.³⁶³ In this instance, the restriction on attorney's fees present dangers that are interrelated: fewer competent attorneys will be available to assist prisoners in articulating valid constitutional claims, and when counsel is retained, there are strong reasons for lawyers to give these cases less attention and resources than they require.

CONCLUSION

In this Article, I have outlined an alternative way of thinking about the right of court access. I have tried to move beyond an entry-focused notion of access to one that is rooted in political theory and more concerned with the goal of meaningful access. In describing a speech-centered right of access, I have tried to demonstrate that the assertion of one's constitutional rights is equivalent to the expression of anti-government sentiment. The project had a descriptive component and a normative one. I endeavored to show that constitutional litigation is most fruitfully understood within the prism of contrariant speech protected by the First Amendment. I also sought to demonstrate that this makes considerable sense because the structure by which constitutional values are made concrete—i.e., the essential expressive features of the civil rights plaintiff's transformative project and the adjudicative apparatus—reinforces the plaintiff's status as a dissident.

Popular disenchantment with the structural model of adjudication threatens to erode the institutions, rules, and legal methods that allow the federal courts to fulfill their essential function of safeguarding the forum in which our individual rights are given tangible meaning. Now, more than ever, we should strive to recapture the essentially anti-government nature of constitutional litigation. My hope is that in acknowledging the norms-challenging character of constitutional litigation firmly within First Amendment jurisprudence, courts would more fully appreciate the truly political nature of this form of expression, and return the fundamental right of court access to its proper place in the constitutional order. Sensitized to the peculiar nature of constitutional litigation as speech, courts might then be better equipped to confront the unique

to constitutionally protected speech).

363. See *Reno*, 521 U.S. at 875 (asserting that the "governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults" on the Internet); see also *Miller*, 977 F. Supp. at 1233 (explaining that statutes restricting speech require precision drafting to prevent an unconstitutionally broad category regulation).

problems posed by government efforts to burden, limit, or frustrate citizens' efforts to invoke their individual rights. Let the debate over the ideal of court access begin anew.