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Motive Restrictions on Court Access: A First Amendment Challenge

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Motive Restrictions on Court Access: A First Amendment Challenge

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This Article examines whether the Petition Clause of the First Amendment overrides a variety of court rules and other laws that potentially limit a plaintiff's access to court based on his or her motive alone. It is a continuation of Professor Andrews' earlier article in this Law Journal *in which she examined the Petition Clause generally and concluded that the clause protects a limited right of court access. In this Article, Professor Andrews takes the analysis one step further and conducts her first case study of the Petition Clause right of court access. She tests the vast array of laws, ranging from court rules to civil rights statutes, that preclude or punish a plaintiff for filing an otherwise meritorious civil suit for an improper motive. Professor Andrews concludes that most such rules run afoul of the Petition Clause.*

I. INTRODUCTION

Civil litigants have a "new" constitutional right of court access. It is part of the First Amendment right to petition the government.[1] Though this right may come as a surprise to many legal analysts, the United States Supreme Court has recognized an individual's right of court access under the Petition Clause for thirty years, albeit in the unusual settings of antitrust and labor litigation.[2] Other courts[3] and legal scholars[4] have begun to apply the principle more broadly, but

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[1] The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and *to petition the Government for a redress of grievances*." U.S. CONST. amend. I (emphasis added).

[2] *See* Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60–61 (1993) (concluding that objectively reasonable lawsuits are immune from antitrust liability); Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 742–43 (1983) (holding that the "filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice" under the National Labor Relations Act); California Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (stating that the "right of access to courts is indeed but one aspect of the right to petition" and limits application of the antitrust laws).

[3] For example, the Rhode Island Supreme Court held that the Petition Clause protects access to court and thus limits common law torts, such as abuse of process and interference

this new right of court access remains ill-defined and needs thoughtful consideration. This Article is the second in a series in which I offer my analysis of the right to petition courts. I conclude that the Petition Clause invalidates, or at least limits, the diverse set of laws, ranging from Federal Rule of Civil Procedure 11 to the civil rights statutes, that potentially penalize plaintiffs for having improper motives in bringing a civil suit.

In my previous Article that was published in this *Law Journal*, I generally assessed the right of court access under the Petition Clause.[5] I first examined whether the right to petition properly extends to courts at all. I explored the language, history, policies, and recent interpretations of the Petition Clause and concluded that the Petition Clause includes a right of court access. I then attempted to define the parameters of the right. This was the most difficult and controversial aspect of my work. I proposed that the right to petition courts is a narrow right: the right of an individual or group only to file winning civil claims that are within the particular court's jurisdiction. Finally, I proposed how courts

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with contractual relations, that might otherwise impose liability based solely on a plaintiff's filing suit. *See* Cove Road Development v. Western Cranston Indus. Parks Assoc., 674 A.2d 1234, 1237–38 (R.I. 1996). For more cases applying the right to petition courts see *infra* notes 59–64.

[4] *See* 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) (arguing that the Petition Clause overrides the doctrine of sovereign immunity and protects the right to pursue claims against the government); *see also* Kara Shea, San Filippo v. Bongiovanni*: The Public Concern Criteria and the Scope of the Modern Petition Right*, 48 VAND. L. REV. 1697 (1995) (arguing that retaliatory discharge claims based on the Petition Clause right of court access requires independent analysis from retaliation claims based on speech); Gary Myers, *Antitrust and First Amendment Implications of* Professional Real Estate Investors, 51 WASH. & LEE L. REV. 1199 (1994) (questioning whether the Supreme Court's recent interpretation of the right to petition also applies to and limits procedural laws such as Federal Rule of Civil Procedure 11, the tort of abuse of process, and section 1927 of the Federal Judiciary Code); 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, 58–64 (1993) (arguing that the Petition Clause as applied to courts invalidates the reasonable inquiry prong of Federal Rule of Civil Procedure 11(b)); David Franklin, Comment, *Civil Rights vs. Civil Liberties? The Legality of State Court Lawsuits Under the Fair Housing Act*, 63 U. CHI. L. REV. 1607 (1996) (addressing the extent to which the Petition Clause limits application of the Fair Housing Act to the filing of civil suits for a discriminatory aim); Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 HARV. L. REV. 111 (1993) [hereinafter *Suits Against the Government*] (arguing that suits against the government are "double" petitions deserving of heightened protection under the Petition Clause and requiring relaxation of Federal Rule of Civil Procedure 11).

[5] *See* 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).

might protect this right, principally by borrowing First Amendment speech standards, such as the strict scrutiny and breathing room doctrines. I predicted that such protection likely would have the effect of broadening the right: For example, a court rule likely could not bar the filing of meritorious claims because such a rule would unduly chill access to file winning claims.

This and future articles apply my proposed Petition Clause analysis to test specific laws that touch on court access. This, my first case study, examines laws that restrict the motives with which a plaintiff may file a civil suit.[6] Many of these laws aim to deter frivolous suits, but they are indifferent to the merits of the claim and may even bar winning claims. Some, such as court rules, are obvious in their limitation on court access, but others, such as the federal antidiscrimination laws, are indirect motive restrictions on court access. Indeed, the Supreme Court's two principal decisions in which it recognized a right to petition courts involved laws that on their face did not purport to regulate court access, but nevertheless would have penalized plaintiffs who had the wrong motive in filing suit. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, the Court narrowly construed the antitrust laws so that they could not attach to the filing of an otherwise meritorious civil suit even though the plaintiff's actions otherwise qualified as an antitrust violation (*i.e.*, the plaintiff had an anticompetitive intent in filing the claim and the litigation actually caused injury to competition).[7] In *Bill Johnson's Restaurants v. NLRB*, the Court similarly narrowed the National Labor Relations Act and held that an employer who retaliates against striking employees by suing them for defamation could not be held liable for that act of retaliation if the employer prevails on the defamation claim.[8] In both cases, the Court recognized that the filing of a civil suit was a form of petitioning activity and was protected from liability so long as the plaintiff's original complaint met the requisite standard for

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[6] "Motive" can have different meanings in varying contexts. Unless I otherwise state, I use the term in this Article in a broad sense, to include the plaintiff's purpose, aim, feelings, and intent. However, I do not use the term to mean the plaintiff's awareness of other factors. In other words, I distinguish between a standard that regulates how much a plaintiff knows about the merits of his claim (an awareness standard) from one that turns on his purpose in filing the suit (a motive standard). A plaintiff could file the suit for a malicious motive (e.g., to ruin the defendant financially) and violate a motive restriction, yet believe that the suit has merit and thus complies with an awareness standard. Likewise, he could violate an awareness standard by recklessly disregarding that his claim has no merit but comply with a motive restriction because he had no "bad" purpose in filing suit. For further discussion of the different types and uses of "motive," see *infra* Part IV.

[7] 508 U.S. 49 (1993).

[8] 461 U.S. 731 (1983).

factual and legal merit.[9] This protection applied regardless of the plaintiff's anticompetitive or retaliatory motive.[10]

In this Article, I further explore whether the Petition Clause should limit these and other restrictions against filing suit for a "bad" purpose.[11] I start in Part II by describing the general parameters of the right to petition courts, as I examined in detail in my previous article. I recount the evolution, modern recognition, and scope of the right. I also outline briefly the standards that I propose should test and protect the right of court access.

In Part III, I survey the history and current array of laws that potentially restrict a plaintiff's access based solely on his or her motive in filing suit. In addition to the antitrust and labor laws already identified by the Court, laws such as Federal Rule of Civil Procedure 11, the tort of abuse of process, professional rules of conduct for lawyers, civil rights laws, and obstruction of government statutes all potentially serve to punish a plaintiff based on ill motive alone. The best example is Rule 11(b), which sanctions a plaintiff, a plaintiff's lawyer, or both, if they filed a civil suit in federal court for "any improper purpose."[12]

In Part IV, I generally assess whether the Petition Clause properly should invalidate or limit laws such as Rule 11. I take a closer look at the Court's precedent with regard to the motive and the exercise of First Amendment freedoms, including the right to petition courts, and conclude that the Court likely would invalidate laws that restrict court access based solely on motive. I also independently apply strict scrutiny and breathing room analysis and conclude that most motive restrictions impermissibly infringe the First Amendment right of court access. I conclude, in Part V, by outlining the changes necessary to bring the current laws into compliance with the First Amendment.

II. A GENERAL OVERVIEW OF THE RIGHT TO PETITION COURTS

Analysis of motive restrictions on filing suit requires a working definition of

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[9] *See Professional Real Estate Investors*, 508 U.S. at 60–61; *Bill Johnson Restaurants*, 461 U.S. at 745.

[10] *See Professional Real Estate Investors*, 508 U.S. at 60–61; *Bill Johnson Restaurants*, 461 U.S. at 741, 743.

[11] In another article, I focus exclusively on the motive restrictions in the professional rules of conduct for lawyers. There, I repeat much of the analysis of this Article, but I also address issues unique to professional rules and look at all professional motive restrictions applicable to civil litigation, not just those limiting the filing of the initial claim. Carol Rice Andrews, *The First Amendment Problem with the Motive Restrictions in the Rules of Professional Conduct*, J. LEGAL PROFESSION (forthcoming Spring 2000). (on file with author).

[12] For the text of FED. R. CIV. P. 11(b)(1) see *infra* text accompanying note 152.

the Petition Clause right of court access. That was the point of my previous article: assess the general validity and scope of the right to petition courts. I recap that analysis briefly in the four sections of this Part. First, I highlight the historical, textual, and policy bases for extending the right to petition to the courts. Second, I survey the judicial and academic development of the right. Third, I explain the key elements of my definition of the right—that it protects only the ability to file winning claims. In the final part, I briefly explain the basic standards by which courts should protect that right.

A. *The Historical, Textual, and Policy Bases for Applying the Right to Petition to the Courts*

The Anglo-American right to petition dates back to at least 1215, when King John in the Magna Carta agreed to a procedure by which barons could petition for redress if the King or the King's ministers breached other commitments in the Magna Carta.[13] By the time that England was colonizing America, the right had become part of the "fabric" of English constitutional law and had evolved into a right possessed by every English subject, not just the barons.[14] The right to petition was one of the few individual freedoms stated in the 1685 English Bill of Rights which guaranteed the "right of the subjects to petition the king" and provided "that for redress of all grievances . . . parliaments ought to held frequently."[15]

In the American colonies, English colonists retained the rights of English subjects and thus could petition the government in England.[16] Colonists also regularly petitioned their local colonial governments.[17] When the colonies

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[13] *See* 1215 MAGNA CARTA, ch. 61, *translated and reprinted in* J.C. HOLT, MAGNA CARTA 333–35 (1965) (stating that "if we or . . . any of our servants offend against anyone in any way . . . four barons shall come to us or our justices, if we are out of the kingdom, and shall bring it to our notice and ask that we have it redressed without delay").

[14] *See* Gregory A. Mark, *The Vestegal Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2169 (1998). Professor Mark notes that the right to petition traditionally belonged to all persons, not just enfranchised citizens. *See id.* at 2155–87.

[15] BILL OF RIGHTS (1689), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 43 (1971).

[16] Colonial charters typically granted colonists the "liberties of an Englishman." For a description of such charters and their relationship to the right to petition, see Don L. Smith, The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations 10–45 (1971) (unpublished dissertation in Government, Texas Tech University) (on file with author).

[17] Some colonial charters expressly preserved the right to petition the local government.

declared independence and formed their own state constitutions, many new states specifically preserved the right to petition.[18] Maryland, for example, declared that "every man hath a right to petition the Legislature, for the redress of grievances, in a peaceable and orderly manner."[19]

How, if at all, did this right of petition apply to the courts? At the time of American independence, the written statements of the right to petition referred to the King or the legislature but did not mention the courts. In fact, Sir William Blackstone, the English legal historian, in 1765 described the right to judicial relief as a right separate from the right to petition.[20] Likewise, many early state constitutions separately preserved the right to judicial relief, in clauses that are today termed "remedy clauses."[21] But this did not mean that the right to petition was distinct from the ability to seek private redress. Indeed, petitions to the legislature often included claims for resolution of private disputes.

In 1776, the concept of separation of powers was not as it is today. The legislature was the branch closest to the people, and the people turned to that branch when they needed help. That assistance often took the form of private relief. Both the English Parliament and the colonial legislatures took on the role of courts and regularly decided private disputes.[22] This was true even in the

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See, e.g., THE MASSACHUSETTS BODY OF LIBERTIES (1641), *reprinted in* 1 SCHWARTZ, *supra* note 15, at 73 (stating that "[e]very man . . . shall have libertie to come to any publique Court, Councel or Towne meeting, and either by speech or writeing, . . . to present any necessary motion, complaint, petition, Bill or information") (spelling as in original).

[18] For a complete listing and reproduction of the early state constitutional statements of the right to petition, see Andrews, *supra* note 5, at n.159.

[19] MARYLAND DECLARATION OF RIGHTS art. XI (1776), *reprinted in* 1 SCHWARTZ, *supra* note 15, at 281.

[20] *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *136–39.

[21] For example, Maryland had both a petition clause, *see supra* note 17, and a "remedy" clause, which stated:

> That every freeman, for any injury done him in his person or property, ought to have remedy, by the course of the law of the land, and ought to have justice and right freely without sale, fully without any denial, and speedily without delay, according to the law of the land.

MARYLAND DECLARATION OF RIGHTS art. XVII (1776), *reprinted in* 1 SCHWARTZ, *supra* note 15, at 281. For a complete listing and reproduction of the early state constitutional remedy clauses, see Andrews, *supra* note 5, at n.166.

[22] Gordon Wood, in his seminal work, *The Creation of the American Republic*, explained the practice of the American colonial legislatures acting as courts:

> [T]he assemblies in the eighteenth century . . . saw themselves, perhaps even more so than

postrevolution American state governments that had expressly declared a separation of powers in their constitutions.[23] Indeed, both James Madison and Thomas Jefferson complained that the Virginia legislature habitually decided disputes and encroached upon the judicial function despite Virginia's constitutional mandate of separated powers.[24] Thus, at the time of American independence, the right to petition included the right to ask for relief of a judicial nature even if that relief was granted by the legislative branch.

Political thinking about the proper distribution of governmental powers, however, was changing. The drafting of the Petition Clause reflects that evolution. The state model of government, and hence a person's right to petition that form of government, was one in which the legislature was supreme. When James Madison proposed the first version of the amendments to the federal Constitution that would later become the Bill of Rights, he followed the state example and stated the right to petition only in terms of the legislature.[25]

> the House of Commons, as a kind of medieval court making private judgments as well as public law. Because the courts themselves were so involved in governmental and administrative duties, it was inevitable that the line between what was political and what was judicatory would be blurred.... Although there is some evidence that by the mid-eighteenth century the distinction between legislative and judicial function was beginning to harden, the assemblies continued to exercise what we would call essentially judicial responsibilities, largely, it appears, because of the political nature of the court system, the fear of royally controlled judges, the dislike of gubernatorial chancery jurisdiction, and the scarcity of trained judges. The assemblies constantly heard private petitions, which often were only the complaints of one individual or group against another, and made final judgments on these complaints. They continually tried cases in equity.

GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 154–55 (1969). *See also* JAMES S. HART, JUSTICE UPON PETITION: THE HOUSE OF LORDS AND THE REFORMATION OF JUSTICE 3 (1991) (describing the judicial practices of the House of Lords in the seventeenth century).

[23] Six of the original thirteen states—Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, and Virginia—expressly declared a separation of powers in their constitutions. For a listing and reproduction of these provisions, see Andrews, *supra* note 5, at n.170.

[24] In the Federalist Papers, James Madison cited Thomas Jefferson's observations and stated that the Virginia legislature "*in many* instances, *decided rights* which should have been left to *judiciary controversy*" and that the intrusion was "*becoming habitual and familiar.*" THE FEDERALIST NO. 48, at 62 (James Madison) (Clinton Rossiter ed., 1961) (emphasis in original) (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 195 (Lester DeKoster ed., 1976)).

[25] James Madison proposed the following statement of the right to petition: "The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petition, or remonstrances, for redress of their grievances." 2 SCHWARTZ, *supra* note 15, at 1026.

However, just as the structure of government changed with the new federal Constitution, the formulation of the right to petition also evolved.

The Constitution authorizes a federal government of only limited powers with the courts alone having the judicial power.[26] Thus, Madison's proposed first draft of the Petition Clause, which envisioned only petitions to the federal legislature, would not have included the right to ask for judicial relief. To include the right to ask for judicial relief, the right to petition had to extend to all three branches of the government. This is exactly what the first Congress did. The House Select Committee, charged with reviewing Madison's proposed amendments, broke away from the state model of petition right and broadened Madison's language to include the right to petition the entire "government."[27] That broadened right to petition remained in the version approved by the first Congress and ratified by the states as part of the First Amendment.[28]

The actual reason for this change may never be known,[29] but it reasonably

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[26] Article III states that "[t]he *judicial power* of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1 (emphasis added). Congress, on the other hand, received under Article I only "*legislative powers*." *Id.* at art. I, § 1 (emphasis added).

[27] On July 21, 1789, the House of Representatives appointed a Select Committee, that included James Madison, to review Madison's proposed amendments. *See* 2 SCHWARTZ, *supra* note 15, 1050–55. One week later, the Select Committee reported back to the House with a modified version of Madison's proposal. *See id.* The Select Committee proposed the following Petition Clause: "The freedom of speech, and of the press, and the right of the people peaceably to assemble, and consult for their common good, and to apply to the government for redress of grievances shall not be infringed." House of Representatives Journal (Aug. 1789), *reprinted in id.* at 1122.

[28] U.S. CONST. amend. I. The House approved the proposed amendment on August 24, 1789. House Journal, *reprinted in* 2 SCHWARTZ, *supra* note 15, at 1138. The Senate modified slightly the House version, and, among other things, replaced "apply" with "petition." Senate Journal (Aug.–Sept. 1789), *reprinted in id.* at 1148. This change is consistent with a judicial application of the right to petition; some initial civil pleadings are today still termed "petitions." *See* BLACK'S LAW DICTIONARY 1145–46 (6th ed. 1990) (defining "petition" as a "formal written application to a court requesting judicial action of a certain matter" and a "recital of facts which give rise to a cause of action").

[29] Existing records do not reflect any debate or discussion of the broadened language. No records exist at all regarding the deliberation of the House Select Committee or of the Senate. 2 SCHWARTZ, *supra* note 13, at 1145. The House Journal records some debate touching upon the Petition Clause, but this debate centered on whether to delete the statement of the right to assemble and to add a right to instruct legislators. House Debates (July–Aug. 1789), *reprinted in id.* at 1089–1105. These debates give us some insight as to other aspects of the right to petition but not as to whether the right extends to the courts. *See* Andrews, *supra* note 5, at 630–33, 636–39 (discussing the House debates and their significance as to the meaning of the petition right).

may be read as reflecting the new distribution of power among all three branches of the federal government. The framers were mindful of the distinction between the "legislature" and the "government." The original federal constitution uses the term "the government" only three times and does so in reference to the entire government of the United States, not just selected branches.[30] Furthermore, in drafting the proposed amendments, the Select Committee was careful in its use of the term "government" and distinguished between the "government" and its individual branches.[31] Thus, the text of the federal Constitution, especially the Petition Clause itself, suggests that the new right to petition "the government" extends to the entire government, including the judiciary.

The policies of the Petition Clause also support application of the petition right to the courts. The Petition Clause shares many of the same policies as the Speech Clause. The right to petition is similar to the right of free speech in that it is a means by which the people may "communicate their will" to their

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[30] Article I grants Congress power over the District for the "Seat of the Government of the United States," and Article IV guarantees to "every State" a "Republican Form of Government." U.S. CONST. art. I, § 8, cl. 17 & art. IV, § 4. Most significant is the "Necessary and Proper Clause," in Article I, which gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [given in Article I to Congress], and all other Powers vested by this Constitution in the Government of the United States...." *Id.* at art. I, § 8, cl. 18. For a further discussion of the meaning and use of the term "government," see Pfander, *supra* note 4, at 956–57.

[31] For example, the Select Committee proposed the following separation of powers amendment:

> The powers delegated by the Constitution to the government of the United States, shall be exercised as therein appropriated, so that the legislature shall never exercise the powers vested in the executive or the judicial; nor the executive the powers vested in the legislative or judicial; nor the judicial the powers vested in the legislative or executive.

House of Representatives Journal (Aug. 1789), *reprinted in* 2 SCHWARTZ, *supra* note 15, at 1123. The Senate ultimately rejected this proposed amendment, but this rejection does not necessitate a narrow reading of the Petition Clause. *See id.* at 1145–46. Some members of the first Congress viewed the amendment as unnecessary because the Constitution already separated the three branches of government through its scheme of limited and enumerated powers. *See* House Debates (Aug. 18, 1789), *reprinted in id.* at 1117 ("Mr. Sherman conceived this [separation of powers] amendment to be altogether unnecessary, inasmuch as the constitution assigned the business of each branch of the government to a separate department."). More importantly, even if the first Congress believed that Congress could exercise judicial powers, that belief does not undercut application of the right to petition all three branches. Only the converse result—adoption of a separation of powers amendment and revision of the right to petition to extend only to Congress—would mandate a narrow reading of the Petition Clause.

government,[32] but the petition right protects a particular type of communication—requests to the government for a redress of grievances. By separately preserving this right, the Petition Clause helps to give persons a sense of participation in their government, to better inform the government, and to provide the opportunity for a peaceful settlement of disputes, advancement of the law, and correction of social problems.

These aims of the Petition Clause are served not just by petitions to Congress or to the executive, but also by application to the courts. Indeed, the courts are the official mechanism for dispute resolution. Courts achieve the other aims by allowing people in civil complaints to inform the government of their needs and to request change in the law. In some circumstances, civil suits are the only practical means to achieve change and correct social ills.[33] In sum, application of the right to petition to the judiciary may well be a novel concept to some legal observers, but it has support in the history, text, and policies of the Petition Clause.

B. *Modern Recognition and Application of the Right to Petition Courts*

The Supreme Court seemingly agrees that the Petition Clause protects access to court. The Court's first recognition that litigation is a form of petitioning activity came more than thirty years ago, in a line of cases in which it held that organizations, such as the National Association for the Advancement of Colored People (NAACP) and labor unions, have a First Amendment right to organize and advocate litigation by their members.[34] The Court relied principally on the right of association, but it also cited the right to petition. The most direct

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[32] James Madison explained how the Speech, Press, and Petition Clauses together protected the people's right to inform their government of their sentiment:

> The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this government; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiment by petition to the whole body; in all these ways they may communicate their will.

House Debates (Aug. 15, 1789), *reprinted in id.* at 1096.

[33] *See* NAACP v. Button, 371 U.S. 415, 430 (1963) (arguing that "litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances").

[34] In these cases, states applied a number of laws, primarily those banning solicitation of litigation and the unauthorized practice of law, to try to stop the group sponsorship of litigation. The seminal case was *NAACP v. Button*, in which the Court held that the First Amendment protected the NAACP's efforts to organize litigation to challenge school segregation. *See id.* at 428–29, 443–44. *See infra* notes 425–27; *see also* Andrews, *supra* note 5, at 571–76 (discussing the right of court access under the group litigation cases).

statement came in *Brotherhood of Railroad Trainmen v. Virginia* ex rel. *Virginia State Bar*,[35] in which Virginia tried to enjoin the union from advising its members about claims under the Federal Employer's Liability Act: "The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. *The right to petition the courts cannot be so handicapped.*"[36]

This pronouncement of a right to petition courts did not prompt widespread recognition or application of the right. Legal analysts, and even the Court itself, supposed that this new doctrine applied only where other First Amendment rights were implicated, particularly the freedom to assemble.[37] This narrow reading is not surprising given that the Court at the same time was rejecting claims that *due process* conferred a broad right of court access to individuals.[38] In a series of cases in the early 1970s, indigent plaintiffs charged that filing fees barred their access to court and violated due process. The Court held that plaintiffs had no due process right of initial court access except in extraordinary circumstances, where courts are the only means to resolve the dispute and the matter is one of fundamental importance.[39] Thus, an indigent divorce petitioner has a due process right of court access because marriage is a fundamental right and because judicial decree is the only means by which to obtain a legal

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[35] 377 U.S. 1 (1964).

[36] *Id.* at 7 (emphasis added).

[37] *See* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 335 (1985) (noting a "conceptual difficulty" in applying the union litigation cases to an individual claim because "the First Amendment interest at stake [in the union cases] was primarily the right to associate collectively"); Spanbauer, *supra* note 4, at 43–49 (interpreting the group litigation cases as requiring the presence of a First Amendment freedom other than petitioning).

[38] Also contributing to a narrow reading of the group litigation cases and of the general right of court access was the Court's development of a separate and unique right of court access for prisoners. *See* Andrews, *supra* note 5, at 571–76. The Court has struggled with the constitutional basis for this new right, at times suggesting that the right comes from the Habeas Clause, Equal Protection Clause, and Due Process Clause, and some members of the Court question whether the prisoner doctrine has any constitutional footing at all. *See* Bounds v. Smith, 430 U.S. 817, 838–40 (1977) (Rehnquist, J., dissenting) (noting that the Court's declaration of a "fundamental right of access to the courts [for prisoners] . . . is found nowhere in the Constitution").

[39] *See* Boddie v. Connecticut, 401 U.S. 371, 375–76, 382–83 (1971) (stating that due process typically does not protect "persons seeking access to the judicial process in the first instance . . . because . . . resort to courts is not usually the only available, legitimate means of resolving private disputes" and that judicial access may be "placed beyond the reach of any individual" unless resort to courts "is the exclusive precondition to the adjustment of a fundamental human relationship").

divorce,[40] but a bankruptcy petitioner[41] and a person challenging an adverse welfare determination[42] have no such right to gain access to the courts.

Recognition of an individual right of court access required further development of the Petition Clause. This came in the unlikely setting of antitrust, as part of the *Noerr* immunity doctrine. This doctrine has its roots in a 1961 case, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[43] There, a group of truckers brought antitrust claims against railroads that had lobbied the governor of Pennsylvania to veto a bill beneficial to truckers.[44] The alleged intent behind the railroads' lobbying efforts was to "destroy" the truckers.[45] Nevertheless, the Court narrowly construed the Sherman Act so that it did not apply to such lobbying activity, and in doing so, relied in part on the Petition Clause: The "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."[46] Ten years later, in 1972, the Court *in California Motor Transport v. Trucking Unlimited*[47] extended *Noerr* antitrust immunity to adjudication:

> The same philosophy governs the approach of citizens or groups of them to administrative agencies . . . and to courts, the third branch of the government.

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[40] *See id.* at 376, 383 (holding that "marriage involves interests of basic importance in our society" and that "a State may not, consistent with the . . . Due Process Clause, . . . pre-empt the right to resolve this legal relationship without affording all citizens access to the means it has prescribed for doing so").

[41] *See* United States v. Kras, 409 U.S. 434, 444–45 (1973) (noting that an alleged bankrupt's interest "does not rise to the same constitutional level" as the "associational" interest in dissolving a marriage and that "a debtor, . . . in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors").

[42] *See* Ortwein v. Schwab, 410 U.S. 656, 659 (1973) (per curiam) (noting that the interest in welfare payments "has far less constitutional significance" than divorce and that the welfare administration hearing process was an alternate form of dispute resolution, thus rendering access to courts nonessential).

[43] 365 U.S. 127 (1961); *see also infra* notes 383–85 and accompanying text.

[44] *See Eastern R.R. Presidents Conference*, 365 U.S. at 129. The literal terms of the Sherman Act could reach lobbying if the petitioner intended to monopolize trade or acted collectively with others to restrain competition. *See infra* Part III.C.1.

[45] *See Eastern Railroad Presidents Conference*, 365 U.S. at 139.

[46] *Id.* at 138. The Court also relied on the additional policy ground that political activity is essentially different from the commercial activity that the Sherman Act was meant to regulate. *See id.* at 137–38; *see also generally* David McGowan & Mark Lemeley, *Antitrust Immunity: State Action and Federalism, Petition and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293 (1994).

[47] 404 U.S. 508 (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.*[48]

In 1983, the Court gave further meaning to the doctrine in *Bill Johnson's Restaurants v. NLRB*.[49] There, a single employer sued picketing waitresses for allegedly defamatory statements in their pamphlets. The National Labor Relations Board (NLRB) found that the employer had brought the claim in retaliation for the workers' picketing and enjoined the employer's suit as a violation of the National Labor Relations Act (NLRA).[50] A unanimous Court reversed, by narrowly interpreting the NLRA, and as in *Noerr*, by relying in part upon the Petition Clause:

> In *California Motor Transport*... we recognized that the right of access to the courts is an aspect of the First Amendment right to petition.... "The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right [under the NLRA]."[51]

As long as the employer's suit met the requisite standard of merit,[52] the NLRB could not interfere with the employer's right of access to court. Thus, the Court opened the door to a universal right of court access by applying petitioning immunity to a single plaintiff in a "non-political"[53] case outside of antitrust.

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[48] *Id.* at 510 (emphasis added). The *California Motor Transport* pronouncement was dictum in that the Court ultimately held that the defendants' adjudication efforts were a "sham" (i.e., baseless claims) and therefore not protected petitioning. *See id.* at 510, 513; *see also infra* notes 56, 81–86, 383–97 and accompanying text (discussing the Court's "sham" exception to antitrust petitioning immunity).

[49] 461 U.S. 731 (1983).

[50] The NLRA, like the Sherman Act, is broad enough to attach to civil court filings if done with the requisite intent and resultant harm. *See infra* Part III.C.2.

[51] *Bill Johnson's Restaurants*, 461 U.S. at 741 (citations omitted); *see also id.* at 742–43 ("[c]onsidering the First Amendment right of access to the courts and the state interests... we conclude that.... [t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate"). Justice Brennan joined in the judgment and wrote a concurring opinion, but he agreed that the Petition Clause extended to the courts and that the narrow interpretation of the NLRA had "constitutional resonances." *Id.* at 751–52 (Brennan, J., concurring). See *infra* notes 83–87, 398–403 for a more detailed discussion of *Bill Johnson's Restaurants v. NLRB*.

[52] *See infra* notes 81–86, 389–403 (discussing the merit standard)

[53] Some courts and commentators previously had narrowly interpreted the right to petition courts to apply only to political cases. *See* Grip-Pak v. Illinois Tool Works, Inc., 694

In the fifteen years since *Bill Johnson's Restaurants*, the Court has reaffirmed three times the First Amendment right to petition courts. Two statements were dicta.[54] The third and most influential statement of the right came in 1993, in another antitrust case. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*,[55] the Court clarified its holding in *California Motor Transport* that certain "sham" litigation is not protected by *Noerr* petitioning immunity.[56] The Court in *Professional Real Estate Investors* held that, in order to constitute a "sham," and thus fall outside of *Noerr* petitioning immunity, litigation must be both objectively unreasonable and made in subjective bad faith.[57] If the claim is objectively reasonable, motive is irrelevant, the claim is not a sham, and its filing is immune from antitrust liability.[58]

It was this clear definition of the *Noerr* immunity as applied to litigation that apparently spurred recognition of the right to petition courts outside of antitrust and labor suits. Though wider application of the immunity already had begun in related fields, such as state antitrust, unfair trade, and other business tort litigation,[59] many courts read *Professional Real Estate Investors* as a

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F.2d 466, 471 (7th Cir. 1982) (rejecting "that the extent of protection is invariant to the nature of the lawsuit" and suggesting that political litigation is entitled to added protection over that extended to litigation between competitors).

[54] *See* McDonald v. Smith, 472 U.S. 479, 484 (1985) ("[F]iling of a complaint is a form of petitioning activity."); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 897 (1984) ("The First Amendment right protected in *Bill Johnson's Restaurants* is plainly a 'right of access to the courts . . . for redress of alleged wrongs.'").

[55] 508 U.S. 49 (1993).

[56] *See id.* In *Noerr*, the Court limited petitioning immunity by allowing certain "sham" lobbying activity to be subject to antitrust liability. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961). *California Motor Transport* carried the sham exception over to judicial petitions, but its definition of sham litigation prompted considerable confusion. *See infra* notes 81–86, 383–97 and accompanying text (discussing this confusion and the sham exception).

[57] *See Professional Real Estate Investors*, 508 U.S. at 57.

[58] *See id.* at 60 ("Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation."). *See infra* notes 82–89, 391–403 (discussing *Professional Real Estate Investors* in more detail).

[59] *See* McGuire Oil Co. v. MAPCO, Inc., 958 F.2d 1552 (11th Cir. 1992) (applying *California Motor Transport* and *Bill Johnson's Restaurants* and holding that the Alabama Unfair Trade Practices Act cannot be premised on civil litigation); Suburban Restoration Co. v. ACMAT Corp., 700 F.2d 98, 102 (2d Cir. 1983) (noting in dicta that the Petition Clause prevented plaintiffs from basing the Connecticut Unfair Trade Practices Act and tort of interference claims on previous civil filings); Surgidev Corp. v. Eye Tech., Inc., 625 F. Supp. 800, 804–05 (D. Minn. 1986) (relying on *California Motor Transport* to dismiss a tortious

constitutional protection applicable in all contexts.[60] Thus, state and lower federal courts have recognized that the Petition Clause limits some applications of the tort of abuse of process,[61] selected fee-shifting statutes,[62] and state billing

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interference claim premised on the filing of a civil suit); Pennwalt Corp. v. Zenith Lab., Inc., 472 F. Supp. 413, 424 (E.D. Mich. 1979) (applying *California Motor Transport* to dismiss counterclaims that alleged that a primary trademark suit constituted tortious interference and abuse of process); *see also* C. DOUGLAS FLOYD & E. THOMAS SULLIVAN, PRIVATE ANTITRUST ACTIONS: THE STRUCTURE AND PROCESS OF CIVIL ANTITRUST LITIGATION, § 4.4.17, at 582–84 & n.232 (1996) (collecting cases applying *Noerr* immunity for lobbying efforts to state business tort claims and concluding that "[t]his result appears to reflect the courts' implicit conclusion either that *Noerr* . . . is ultimately grounded in the First Amendment or, by analogy to the Supreme Court's reasoning in *Noerr*, that state tort law was not intended to govern essentially political activities").

[60] *See, e.g.*, Cardtoons v. Major League Baseball Players Assoc., 182 F.3d 1132, 1135 (10th Cir. 1999) (stating that "because it emanates from the First Amendment right of petition, *Noerr-Pennington* immunity stands independent of its aborigine roots in antitrust") (citations omitted); Monsky v. Moraghan, 127 F.3d 243, 246 (2d Cir. 1997) ("It is well established that all persons enjoy a constitutional right of access to the courts, although the source of this right has been variously located in the First Amendment right to petition for redress, the Privileges and Immunities Clause . . . , and the Due Process Clause . . . ."); San Filippo, Jr. v. Bongiovanni, 30 F.3d 424, 434–35 (3d Cir. 1994) (noting that the filing of "lawsuits . . . implicate[s] the petition clause . . . of the first amendment"); Lyon v. Vande Krol, 940 F. Supp. 1433, 1437–38 (S.D. Iowa 1996) (recognizing a fundamental right of court access under the right to petition); Gen-Probe, Inc. v. Amoco Corp., 926 F. Supp. 948, 955–56 (S.D. Cal. 1996) (applying *Noerr-Pennington* to state law claims attacking the filing of a patent suit: "[t]he majority of courts who have considered the issue have concluded that the immunity is constitutional and rooted in the First Amendment right to petition."); Armuchee Alliance v. King, 922 F. Supp. 1541, 1549 (N.D. Ga. 1996) ("It is well-established that 'the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.'"); Scioto County Reg'l Water Dist. No. 1 v. Scioto Water, Inc., 916 F. Supp. 692, 702 (S.D. Ohio 1995) ("This Court agrees that the *Noerr-Pennington* doctrine is not limited in application to antitrust claims. The doctrine is grounded on the First Amendment principle that an individual or entity has the right to pursue legitimate efforts to influence government decision-making and to approach the courts in order to obtain redress of grievances."); Computer Assoc. Int'l, Inc. v. American Fundware, Inc., 831 F. Supp. 1516, 1522 (D. Colo. 1993) ("Despite the lack of reasoned authority on this question, there are numerous federal, district and state court cases in which the *Noerr-Pennington* doctrine has been applied to non-antitrust claims. . . . These courts recognize that, while the doctrine arose in connection with antitrust cases, it is fundamentally based on First Amendment principles.").

[61] *See, e.g.*, Proportion Air, Inc. v. Buzmatics, Inc., No. 94-1426, 1995 U.S. App. LEXIS 25871, at *5–8 (Fed. Cir. June 14, 1995) (relying on *Professional Real Estate Investors* and remanding for specific finding as to whether the main claim was objectively baseless before ruling on propriety of tortious interference and abuse of process claims based on the main claim); Whelan v. Abell, 48 F.3d 1247, 1254–55 (D.C. Cir. 1995) ("As *Noerr-Pennington* rests on the conclusion that the filing of claims in court or before administrative agencies is part of

procedures.[63] The right has even wider use in civil rights litigation in which plaintiffs affirmatively use the Petition Clause to challenge a wide array of impediments to their access to court.[64] These developments in turn have prompted a few scholars to take notice and question other possible applications of the right.[65] In sum, a right of court access is now a recognized part of the Petition Clause.

C. *The Narrow Scope of the Right of Court Access Under the Petition Clause*

The right to petition courts is not well defined. In my previous article, I

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the protected right to petition, it is hard to see any reason why, as an abstract matter, the common law torts of malicious prosecution and abuse of process might not in some of their applications be found to violate the First Amendment."); DeVaney v. Thriftway Mktg. Corp., 953 P.2d 277, 284–85 (N.M. 1997) (recognizing a right of court access under the federal Petition Clause and narrowly construing the tort of misuse of process).

[62] The Eighth Circuit held that the Petition Clause overrode a statute that imposed all defense costs on any plaintiff challenging a workers' compensation refund statute, regardless of whether the plaintiff was successful. *See In re* Workers' Compensation Refund, 46 F.3d 813, 822 (8th Cir. 1995).

[63] *See generally* Acevedo v. Surles, 778 F. Supp. 179 (S.D.N.Y. 1991) (holding that a policy of state hospitals to bill indigent patients for medical services only if and when they sued the state violated the patients' right to petition courts).

[64] *See generally* Monsky v. Moraghan, 127 F.3d 243 (2d Cir. 1997) (claiming that the plaintiff was harassed and barred from court access by judge's dog); San Filippo v. Bongiovanni, 30 F.3d 424 (3d Cir. 1994) (claiming that the state interfered with court access by firing university professor in retaliation for his filing suit against state university); Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983) (alleging that county officers infringed on parents' access to court to file wrongful death claim through destruction of evidence regarding murder of plaintiffs' daughter); *In re* Addleman, 991 P.2d 1123 (Wash. 2000) (en banc) (holding that denial of parole, based in part on the applicant's "active history" of litigation against prison officials, violated the applicant's Petition Clause right of court access).

[65] *See supra* note 4 (collecting academic commentary). Not all scholarship concludes that *Noerr* is a constitutional concept. *See* Thies Kölln, Comment, *Rule 11 and the Policing of Access to the Courts After* Professional Real Estate Investors, 61 U. CHI. L. REV. 1037, 1066–67 (1994) (arguing that *Professional Real Estate Investors* should not be construed as a constitutional mandate to override such laws as Rule 11 and the tort of abuse of process). In addition, some courts continue to adhere to the view that the petition right of court access is dependent on other First Amendment rights, such as association or speech. *See* WMX Techs., Inc. v. Miller, 197 F.3d 367, 372–73 (9th Cir. 1999) (stating that "[t]he protections afforded by the Petition Clause have been limited by the Supreme Court to situations where an individual's associational or speech interests are also implicated"); *see also supra* note 37 and accompanying text.

proposed a narrow definition of the right: The right of an individual or group to file a winning claim within the court's jurisdiction. This is admittedly a controversial definition, but it is one that is consistent with, if not mandated by, existing Supreme Court precedent. Whether this definition comports with historical notions of the petition right is a bit of a guessing game; the record is thin even as to the existence of a right to petition courts. However, there is at least some basis in history and policy for each of the elements of my proposed definition of the right. Here, I recap only the two elements of my definition that are relevant to the evaluation of motive restrictions: the right to *file* civil complaints that allege *winning* claims.[66]

First, I contend that the right of court access is one of initial access only. This means that the petition right is merely the right to file a civil complaint. It does not affect the substantive rights of litigants or the ability of the legislature to define, limit, or even eliminate causes of action. Nor does it govern the procedure used by courts after the plaintiff files the complaint. This definition arguably is mandated by Supreme Court precedent. In *Minnesota State Board of Community Colleges v. Knight*,[67] the Court stated that "[n]othing in the First Amendment or in this Court's case law interpreting it suggest that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues."[68]

Some scholars, however, argue that the Court is wrong and that the government has a duty to respond.[69] They rely principally upon historical

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[66] I discuss the other two elements—that the right extends both to an individual and to groups of persons and that the right extends only to claims within the court's jurisdiction—at length in my earlier article. *See* Andrews, *supra* note 5, Parts III.A & III.D.

[67] 465 U.S. 271 (1984).

[68] *Id.* at 285.

[69] The advocacy of a duty to respond began principally with a Note in the *Yale Law Journal* by Stephen Higginson, in which he surveyed the history of colonial petitioning practice in Connecticut and concluded, among other things, that the colonial right to petition "was an affirmative, remedial right which required governmental hearing and response" and that "[t]he original design of the First Amendment petition clause . . . included a governmental duty to consider petitioners' grievances." Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 142–43 (1986). A number of other scholars also argue that the government has some form of duty to respond to petitions. *See* Edmund G. Brown, *The Right to Petition: Political or Legal Freedom?*, 8 UCLA L. REV. 729, 732–33 (1960–61); David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 LAW & HIST. REV. 113, 114–15 (1991); Mark, *supra* note 14, at 2169; Spanbauer, *supra* note 4, at 33–34, 49–51; Anita Hodgiss, Note, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569, 575 (1987); Comment, *On Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules*, 132 U. PA. L. REV. 1515, 1524–28 (1984); Note, *Suits Against the Government*, *supra*

petitioning practice in which the government, including the first Congress, regularly responded to citizen petitions. This argument is persuasive; a large part of the legislative agenda in the first Congress was set by citizen petitions.[70] Yet, the matter is by no means settled. In addition to the Court's holding in *Knight*,[71] some scholars point to contrary historical evidence and argue that the government has no First Amendment duty to respond to petitions.[72]

This historical debate need not be resolved in order to define the government's duty in response to petitions to *courts*. Indeed, the debate itself suggests some meaningful conclusions about the right. First, no one suggests that the Petition Clause requires the government to *grant* the relief requested by petitions. The government is free to grant or deny the request, subject only to possible problems at the next election. The First Amendment right to petition courts likewise should not impact the substance of the underlying request. The government may deny the claim or limit the substantive cause of action or remedy, free from any concerns under the First Amendment.

Even as to the *procedure* of the response, the First Amendment should have only a negligible, if any, impact on courts. If the view in *Knight* prevails, the courts have no First Amendment duty to respond to petitioners. If the academic critics prevail, the government may have some minimal duty to respond, but the duty of courts already exists under other provisions of the constitution, principally the Due Process Clauses.[73] Due process requires the government to give civil complaints fair and reasonable consideration once they are filed.[74] This

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note 4, at 1116–17.

[70] *See* 8 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789–1791 (Kenneth R. Bowling et. al. eds. 1998) (surveying actions on petitions presented to the first Congress).

[71] *See supra* notes 67–68 and accompanying text.

[72] *See* Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 740, 743–56, 766 (1999); 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, 1190–91 (1986). In my previous article, I too questioned the duty to respond. *See* Andrews, *supra* note 5, at 637–41. For example, there is evidence that members of even the first Congress viewed responses to petitions as a measure, though prudent, within their political discretion. *See* House Debates (Aug. 15, 1789), *reprinted in* 2 SCHWARTZ, *supra* note 13, at 1095 (statement of Representative Gerry: "the representative will, if he thinks proper, communicate his instructions to the House").

[73] Professor Lawson and Mr. Seidman, however, argue that the duty to respond to judicial petitions is part of the "judicial power" and thus derives from Article III. *See* Lawson & Seidman, *supra* note 72 at 757–58.

[74] A cause of action is a "property" interest subject to due process protection once suit is filed. *See* Phillips Petroleum, Co. v. Shutts, 472 U.S. 797, 807–08 (1985).

duty of reasonable response probably exceeds the duty owed under the Petition Clause.[75] Petitions to courts are unique in this respect. Due process does not require the other branches of government to respond.[76] Thus, there is a "fit" between the petition and due process rights and the Court's narrow construction of those rights, at least as applied to the courts. The Petition Clause,[77] with its attendant heightened scrutiny, protects the right to file the initial complaint, and the Due Process Clause, with its more relaxed reasonableness standard, steps in to govern procedure after the initial filing.[78]

Second, I propose that the absolute right to petition courts extends only to winning claims and does not include losing claims, even those that had some merit when filed. That I propose some form of a merits standard is not by itself controversial. A merits standard not only makes practical sense—it frees the courts and other parties of the burden of frivolous claims—but it also comports with the Court's definition of both protected speech and petitions. The Court has long held that not all speech is within the First Amendment right of speech. False speech, for example, is not within the core right protected by the First Amendment "freedom of speech."[79] In *McDonald v. Smith*,[80] the Court imposed

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[75] Even the proponents of a duty to respond disagree as to the extent of that duty. *Compare* Spanbauer, *supra* note 4, at 51 (stating that a "petitioner never possessed the right to a full legislative discussion or debate of a particular petition, nor to a public forum to present testimony relevant to a petition, nor to an investigation of a petition, nor to a detailed explanation for the denial or rejection of a petition" and that the response due "might be summary denial"), *with* Higginson, *supra* note 69, at 146 (arguing that the right to petition in colonial Connecticut included a right of hearing and consideration).

[76] *See generally* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (holding that citizens have no due process right to be heard on matters of general concern).

[77] The Speech Clause of the First Amendment also extends to the speech in the litigation process, but, due to the unique nature of courts, the Court has given states wide latitude in regulation of speech in the courtroom or speech related to judicial proceedings. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32–33 (1984) (noting that a litigant's First Amendment "rights may be subordinated to other interests that arise in [the litigation] setting").

[78] *See infra* notes 94–96 and accompanying text (comparing the two tests: "strict scrutiny" for First Amendment freedoms with the reasonableness test for due process). The First Amendment "breathing room" doctrine might apply to test rules that impact procedure. Under this theory, the rule, though not directly regulating the "core" right—initial access—nevertheless might chill exercise of that right. In other words, a lack of fair procedure might deter people from filing the initial claim. *See* Andrews, *supra* note 11, at Part III.B.3.b (on file with author) (discussing this issue in more depth).

[79] The Court balanced competing interests to determine that there is no constitutional value in false statements of fact:

> Neither the intentional lie nor the careless error materially advances society's interest in

on petitions the same false and defamatory standards applicable to speech; in other words, there is no absolute right to utter false speech in petitions. In *Noerr* and *California Motor Transport*, the Court similarly imposed a "sham" limitation on petitions.[81] Sham petitions, whether executive, legislative, or judicial, are not within the protection of the First Amendment.

The problem is defining the proper merits standard for judicial petitions. The Court in *Professional Real Estate Investors* defined the standard as one of objective reasonableness, even if the claim does not prevail.[82] But the Court in *Bill Johnson's Restaurants* gave civil suits less protection: Winning claims are absolutely immune from liability under the NLRA, but losing claims, even losing claims that had sufficient merit to withstand summary judgment, are not protected.[83] Which test did the Court intend to be the First Amendment

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> "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Gertz v. Welch, 418 U.S. 323, 340 (1974) (citations omitted).

[80] 472 U.S. 479 (1985).

[81] The definition of "sham" has prompted considerable debate and confusion, particularly as applied to judicial filings, but at a minimum it now seems to require some form of merit standard. *See supra* note 48; *infra* notes 383–97.

[82] *See supra* notes 57–58 and accompanying text; *infra* notes 391–403 and accompanying text.

[83] The Court in *Bill Johnson's Restaurants* gave two tests for determining whether, depending on the status of the litigation, a suit is protected under the First Amendment. For ongoing state court litigation, the Court adopted the test for summary judgment—whether employer's law suit presents "any genuine issues of fact." 461 U.S. 731, 745 (1983). If it does, the Board may not enjoin the suit:

> When a suit presents genuine factual issues, the state plaintiff's First Amendment interest in petitioning the state court for redress of his grievance, his interest in having the factual dispute resolved by a jury, and the State's interest in protecting the health and welfare of its citizens, leads us to construe the Act as not permitting the Board to usurp the traditional fact-finding function of the state-court jury or judge.

Id. However, once the state claim is concluded, the test is whether the employer won or lost his suit:

> In instances where the Board must allow the lawsuit to proceed, if the employer's case in the state court ultimately proves *meritorious and he has judgment against the employees*, the employer should also prevail before the Board, for the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice. *If judgment goes against the employer* in the state court, however, or if his suit is withdrawn *or is otherwise shown to*

standard? I contend that *Bill Johnson's Restaurants* sets the constitutional floor—only winning claims are within the core right of the Petition Clause.

Both cases were exercises in statutory construction, influenced only in part by the Petition Clause. The Court in *Bill Johnson's Restaurants* was reluctant to protect employers from liability under the NLRA because of the high risk of abuse by a powerful employer against individual employees and because Congress intended the NLRA to be a broad remedial statute.[84] Yet, the Court held that the Petition Clause, as well as the state interest in providing its citizens a civil remedy for defamation, mandated at least some protection of the employer's access to court—immunity when the employer wins its suit against the employee.

In *Professional Real Estate Investors*, the Court did not overrule *Bill Johnson's Restaurants* but instead cited it with approval. The Court had a different assignment in *Professional Real Estate Investors*: clarify the antitrust "sham" exception.[85] The Court thus was not limited by the narrow protection in *Bill Johnson's Restaurants*. It could give more protection as a matter of antitrust

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> *be without merit*, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the... unfair labor practice case. The *employer's suit having proved unmeritorious*, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation of the exercise of the employees'... rights. If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses.

Id. at 747 (emphasis added).

[84] The Court stated that "[s]ection 8(a)(1) and (4) of the Act are broad remedial provisions that guarantee that employees will be able to enjoy their rights...." *Id.* at 740. The Court went on to say that:

> [B]y suing an employee who files charges with the Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employers' suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it.... Furthermore,... the chilling effect of a state lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief.... Where, as here, such a suit is filed against hourly-wage waitresses or other individuals who lack the backing of a union, the need to allow the Board to intervene and provide a remedy is at its greatest.

Bill Johnson's Restaurants, 461 U.S. at 740–41. Section 8(a)(1) and (4) of the NLRA, 29 U.S.C. § 157 (1994), are reproduced *infra* at note 294 and accompanying text.

[85] *See supra* notes 57–58 and accompanying text; *infra* note 391 and accompanying text.

policy, and there is a policy basis for making a distinction between the antitrust and labor contexts. The danger of abuse is greater in the labor context, where the typical suit is by an employer against an individual employee, than in the antitrust context, where the dispute often is between commercial competitors. Though there may be disparity between the competitors, it usually is not as great as that between an employer and an individual employee. Thus, the different standard (and greater protection) in *Professional Real Estate Investors*—for losing but nonfrivolous claims—likely is a policy judgment as to the proper reach of the federal antitrust laws.[86]

Although the *Bill Johnson's Restaurants* winning claim standard may seem harsh, it has some basis in both history and policy. Losing suits have long borne penalties. Courts and even legislatures historically "punished" losing claims by assessing (sometimes substantial) cost and attorney's fees against plaintiffs who lost their claims.[87] The so-called American rule, against assessment of attorney's fees on a losing party, is a departure from the English and colonial custom, and even it is frequently overridden by statute as a matter of policy, to promote or deter certain litigation conduct.[88] If the constitutional standard were a different

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[86] Most observers do not make this distinction and assume that *Professional Real Estate Investors* sets the constitutional standard. *See generally supra* notes 59–64 (collecting cases and commentary). They also tend to take an all or nothing approach—the case is either a constitutional mandate or entirely a question of antitrust law. As discussed above, however, the question is more subtle—part of the protection in *Professional Real Estate Investors* is required under the Petition Clause and the remainder is a policy choice. A few courts have recognized this distinction. *See* United States v. Robinson, Fair Housing-Fair Lending ¶ 15,979 (P-H) (D. Conn. Jan. 26, 1995) (recognizing that *Professional Real Estate Investors* has both First Amendment and policy elements and taking a policy and interest balancing approach to determine the degree of petitioning immunity available under the Fair Housing Act).

[87] *See supra* Part II.A (discussing the history of *courts* imposing costs, fees, and other punishments against losing plaintiffs). In addition, at least some losing judicial petitioners to legislative bodies also bore the risk of fees and costs. For example, in 1746, Rhode Island passed a law requiring petitioners who asked the General Assembly for relief from a trial court judgment "to pay all lawful costs and damages, that he, she, or they have put his, her or their antagonists unto, in defending against such a petition" unless the petitioner won the requested relief. 6 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1757–1769, at 95–96 (Knowles, Anthony & Co. 1861) (discussing Jan. 27, 1746 Act); *see also* HART, *supra* note 22, at 37–38 (describing the costs and security procedure in the House of Lords in the seventeenth century).

[88] Today, a number of doctrines and statutes allow the assessment of attorney's fees against the losing party. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1570–90 (1993) (summarizing the common law exceptions and the more than two thousand state and two hundred federal statutes shifting attorney's fees). Moreover, the American rule applies only to attorneys' fees: American courts regularly make a losing plaintiff pay at least some of the

threshold of merit—for instance, to bring losing but meritorious claims within the First Amendment right—the government may not be able to make this policy choice and impose attorney's fees against losing plaintiffs who acted maliciously in filing their suit.[89] Finally, even though the right to file losing claims may not be within the literal right under the Petition Clause, the First Amendment does not give the government free rein to punish losing claims. As I discuss next, some of the same policies that require breathing room for speech likewise apply to court access and place some limits on the government's ability to punish losing claims.

D. *Standards for Protection of the Right to Petition Courts*

Mere definition of the right of court access is not the end of the analysis. We must understand how to protect that right. Constitutional protections take many forms, including general standards of review, such as strict scrutiny and rational basis analyses, and specific rules, such as the presumption against prior restraint of speech. Indeed, other clauses of the First Amendment, particularly the Speech Clause, have spawned a vast array of protective doctrines. The question is which, if any, of these are appropriate for the Petition Clause. The Court has tended to borrow from its Speech Clause jurisprudence when protecting rights under the Petition Clause.[90] I generally agree with that approach but urge some caution. I explore the proper methodology of First Amendment analysis and protection in more detail in Part IV. Here, I highlight the traditional speech doctrines that are best suited to protect the right of court access.

The 1945 case of *Thomas v. Collins*[91] set the basic standards for protection of the right to petition. There, the Court declared that the petition, speech, and press rights "though not identical, are inseparable"[92] and demand greater

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defendant's other expenses. *See* 28 U.S.C. § 1920 (1994) (providing that "[a] judge or clerk or any court of the United States may tax as costs" certain listed items, such as marshal and clerk fees, court reporter fees, printing costs, and witness fees).

[89] If a meritorious but losing suit were given identical protection as that given to winning claims, then a motive restriction on such suits seemingly would fail strict scrutiny. *See infra* Part IV.C.2. In other words, the NLRA could not apply to and punish an employer who files a suit against his employees to retaliate against and intimidate his striking employees so long as his suit had some merit.

[90] *See infra* note 97 and accompanying text.

[91] 323 U.S. 516 (1945).

[92] *Id.* at 530. The Court explained the relationship of petition and speech:

protection than other rights:

> [T]he preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standards govern the choice.
>
> For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly.[93]

This greater protection takes the form of "strict scrutiny" under which the government may intrude on a First Amendment right only if it has a compelling state interest and the government narrowly tailors its regulation to achieve that interest.[94] By contrast, protection of due process requires only that the state reasonably aim—not narrowly tailor—its regulation to achieve a legitimate state objective—not necessarily a compelling state interest.[95] This difference may explain why the Court rarely invalidates court access restrictions under due process: The government usually has some reasonable interest, such as maintenance of order in its courts, for controlling access to court.[96] But the difference also suggests that at least some court rules and restrictions might not

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> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, and therefore united in the First Article's assurance.

Id.(citations omitted).

[93] *Id.* (citations omitted).

[94] *See* NAACP v. Button, 371 U.S. 415, 438–44 (1963) (describing and applying the strict scrutiny test applicable to First Amendment freedoms). However, as I discuss below, the proper standards and application of strict scrutiny are the source of confusion. *See infra* Part IV.C.2, IV.C.3.b.

[95] *See* Jones v. Union Guano, Co., 264 U.S. 171, 181 (1924) (holding that a court will not invalidate a precondition to filing suit under due process if "the condition imposed has a *reasonable* relation to a *legitimate* object") (emphasis added).

[96] *See supra* notes 38–42 and accompanying text.

pass the more demanding strict scrutiny applicable to a right of court access under the First Amendment.

In addition to strict scrutiny, the Court has developed a number of other doctrines to protect First Amendment freedoms. Perhaps foremost among these is the "breathing room" doctrine, which extends protection to activity outside of the core First Amendment right so as to give breathing space to the core right. In *McDonald v. Smith*, the Court gave the right to petition breathing room when it applied the *New York Times* "actual malice" standard to defamatory speech in petitions.[97] This actual malice standard[98] is a form of "breathing room" for speech.[99] It immunizes from liability false and defamatory speech about public issues or public figures, unless the speaker spoke with actual knowledge or reckless disregard for the falsity of the statement. Though false speech is not within the absolute speech right of the First Amendment, this narrow class of false speech nevertheless gets some protection in order to avoid chilling the expression of *true* speech about important issues.

Breathing room for speech takes many forms, depending upon the relative interests at stake. For example, false and defamatory speech about private persons does not get the same "actual malice" protection as does speech about public officials, but such speech in some circumstances gets other forms of

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[97] 472 U.S. 479 (1985). There, McDonald wrote President Reagan to urge the President not to appoint Smith as a United States Attorney, and in the process, allegedly made false and defamatory statements about Smith. When Smith later sued for defamation, McDonald claimed that his statements were absolutely protected under the Petition Clause. The Court rejected this view:

> To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.

Id. at 485 (citations omitted).

[98] The seminal case applying the actual malice standard was *New York Times v. Sullivan*. *See generally* 376 U.S. 254 (1964). *See infra* notes 346–54 and accompanying text, 462–66 and accompanying text (exploring *New York Times* and the breathing room doctrine in more detail).

[99] *See* Gertz v. Welch, 418 U.S. 323, 342 (1974) ("[W]e have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise. To that end this Court has extended a measure of strategic protection to defamatory falsehood.").

breathing room, such as protection from punitive damages.[100] Likewise, courts look critically at prior restraints on improper speech—an injunction as opposed to subsequent punishment—because prior restraints have a particularly chilling impact on expression.[101] The vagueness and overbreadth doctrines share the concern about not chilling the exercise of First Amendment freedoms.[102] The vagueness doctrine demands specificity in laws so that persons have fair notice as to prohibited conduct.[103] The overbreadth rule invalidates laws that reach too widely and regulate both conduct within the state's police powers and the

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[100] *See Gertz*, 418 U.S. at 348–50; Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985). *See also infra* notes 464–66 and accompanying text.

[101] Professors Nowak and Rotunda explain this preference:

> Historically, prior restraint has always been viewed as more dangerous to free speech, but why? The marketplace theory of free speech supports this historical distinction between prior restraint and subsequent punishment. While subsequent punishment may deter some speakers, at least the ideas or speech at issue can be placed before the public. But prior restraint limits public debate and knowledge more severely. *Punishment of speech, after it has occurred, chills free expression. Prior restraint freezes free speech.*

JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.16, at 1020 (5th ed. 1995) (emphasis added); *see also generally* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH ch. 15 (1998).

[102] For a recent discussion of these two doctrines by the Court, see *City of Chicago v. Morales*, 119 S. Ct. 1849, 1863 (1999) (rejecting an overbreadth attack on an antiloitering ordinance, but ruling that the ordinance was unconstitutionally vague).

[103] The vagueness concern applies to all statutes and is a question of due process: Does the statute put a person on notice of what behavior is permissible and what is outlawed? *See* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."). The Court also has warned that statutes touching on First Amendment rights, including the right to petition, must be stated with "narrow specificity" in order to avoid chilling the exercise of those rights:

> [S]tandards of permissible statutory vagueness are strict in the area of free expression .... [T]he danger [is] tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

NAACP v. Button, 371 U.S. 415, 432–33 (1963) (citations omitted).

exercise of First Amendment freedoms.[104]

Because the right to petition is so closely related to speech, these special protections likewise should protect against any undue deterrent on the filing of winning civil suits. However, this protection will not precisely replicate that given to false speech. Indeed, the allowance and type of breathing room necessarily depends on the relative interests at stake. The personal and governmental costs and burdens in responding to a lawsuit are different than those incurred as a result of a defamatory statement.[105] Nevertheless, we should continue the general concerns about chilling effect, prior restraints, and vagueness, even though those concerns might be implemented in a different fashion.

In sum, we must view as a whole the analysis of the right to petition courts—whether in the initial confirmation of the right, definition of the right, or protection of the right. The argument that the Petition Clause protects access to court must take into account the scope of the right. It is quite a different matter to broadly pronounce that the First Amendment guarantees access to court than to say that it protects only the right to file winning claims. Even the latter statement is meaningless without a definition of the term "protects." The protection afforded First Amendment rights is greater than that given other rights, and the protection extends beyond the right itself. Yet, the protection is not absolute. We can best evaluate this analysis in its application. That is the point of this Article: to apply the general analysis in order to test laws that restrict court access based on the plaintiff's motive in filing suit.

III. A SURVEY OF MOTIVE RESTRICTIONS ON COURT ACCESS

Today a diverse set of laws potentially restricts the motives with which a

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[104] Not just any potentially improper application will invalidate a statute that otherwise properly reaches activity within the police power of government. The test is whether the statute substantially burdens protected activity. *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1077 (1991) ("The 'overbreadth doctrine' applies if an enactment 'prohibits constitutionally protected conduct.' To be unconstitutional, overbreadth must be 'substantial.'") (citations omitted). One of the more important functions of the overbreadth doctrine is its special rule of standing, under which a person may challenge a statute for applying impermissibly to protected speech even though the plaintiff's own conduct is not protected by the First Amendment. *See Button*, 371 U.S. at 432 ("[I]n appraising a statute's inhibiting effect upon [First Amendment] rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.").

[105] *See* Andrews, *supra* note 5 at 374–76, 682–88 (discussing different concerns of speech and court access and noting possible distinctions in the application of breathing room doctrines).

plaintiff may file a civil suit. Some do so directly while others do so only indirectly. The "direct laws" are those that lawmakers specifically intend to control the circumstances under which a plaintiff may file suit. Their aim is to curb litigation abuse. The prime example is Federal Rule of Civil Procedure 11(b)(1), which directs that a party in federal court must precertify that its civil pleadings are "not being presented for any improper purpose."[106] The laws that indirectly regulate a plaintiff's motive, by contrast, are not directly aimed at controlling court access, but instead are designed to deter general evils, such as, restraints of trade, retaliatory employment measures, and racial discrimination. Nevertheless, their terms are broad enough to punish a plaintiff who files suit with the requisite ill motive. The common element of these laws—whether indirect or direct—is that their application depends on the motive of the plaintiff, not the merit of the underlying suit. In Sections B and C below, I outline the primary examples of both types of laws, but first, I put these laws in context by examining the general history of motive restrictions and other penalties in litigation.

A. *The History of Motive Restrictions on Court Access*

Punishment of a plaintiff or his lawyer for having a bad purpose in filing a meritorious claim is a modern phenomenon. However, litigation penalties in general have a long history.[107] Before the Norman conquest, early English courts assumed that an unsuccessful suit was a false suit, and they made a losing plaintiff pay with the loss of his tongue.[108] These courts later allowed the losing

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[106] FED. R. CIV. P. 11(b)(1), *reprinted in full infra* text accompanying note 152.

[107] *See generally* Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218 (1979) [hereinafter Note, *Groundless Litigation*] (describing history of judicial methods to curb litigation abuse).

[108] Pollack and Maitland describe the old English view of wrongful litigation:

> Wrongful prosecution may be regarded as an aggravated form of defamation. It is a wrong which ancient law speaks fiercely. In England before the Conquest a man might lose his tongue or have to redeem it with his full *wer* if he brought a false and scandalous accusation. Probably the law only wanted to punish the accuser who made a charge which he knew to be false; but it had little power of distinguishing the pardonable mistake from the wicked lie, and there was a strong feeling that men should not make charges that they could not prove.

2 FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 539 (1968) (citations omitted); *see also* PERCY HENRY WINFIELD, THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE 4 (1921) ("The Laws of Edgar, [Edgar ruled England from 959–975 AD], provide that he who shall accuse

plaintiff to substitute a payment to his opponent, termed "wer," which was a fixed amount based on the plaintiff's status.[109]

The Normans replaced this wer system with "amercement," under which a losing plaintiff paid a penalty to the court, or King, rather than his opponent.[110] The amount of the penalty was a flexible determination based on the extent of the wrong and seemingly included factors such as the degree of harm done, the merits of the suit, and perhaps the motive of the plaintiff.[111] These factors, however, did not determine whether the plaintiff would pay amercement because all losing plaintiffs paid amercement. The factors influenced only the amount of the amercement.[112]

In the thirteenth century, Parliament began to enact cost statutes to allow the law courts to again award compensation to the victorious litigant.[113] The cost statutes originally provided only for a losing defendant to pay the litigation costs of the winning plaintiff, including attorney's fees, but in the fifteenth century, the statutes began to allow some winning defendants to collect the same fees from

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another wrongfully, so that he either in money or property be the worse, shall, on disproof of the charge by the accused, be liable in his tongue, unless he make compensation with his 'wer.'").

[109] *See* Note, *Groundless Litigation*, *supra* note 107, at 1221.

[110] *See id.* at 1222–23.

[111] *See id.* at 1223 n.44 ("Though virtually every losing plaintiff was amerced, amercements were proportional to the plaintiff's wrong in bringing the action rather than to the status of the wrongdoer, and hence could be nominal in a legitimate, though losing, suit."). *See also* 2 POLLACK & MAITLAND, *supra* note 108, at 513–19 (describing amercement in the thirteenth century as "flexible" and noting that "every defeated plaintiff could be amerced for a false claim").

[112] *See id.*

[113] Sir Holdsworth explains that the chancery courts retained the equitable power to order the losing party to pay the other's costs but that law courts previously had only amercement:

> [T]hough from an early date the Chancellor, in the exercise of his equitable jurisdiction, had assumed the fullest power to order the defeated party to pay costs, it was only by degrees that the principle made its way into the common law. The amercement of the vanquished party was perhaps considered a sufficient punishment. But a payment to the king or lord was not much satisfaction to the successful party; and so, side by side with the amercement, we get the gradual growth of the rule that the vanquished party must pay costs. The amercement gradually became merely formal, and finally disappeared; but the law about costs has increased in bulk and complexity from the thirteenth century onwards.

4 SIR WILLIAM HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 536–37 (1924) (citations omitted).

the losing plaintiff.[114] Loss of the suit, not the motive of the party, was the basis for awarding costs and fees.[115] In some cases, the courts apparently limited assessment of costs to egregious cases and motive played a part in that assessment. However, motive was a limit on the punishment, in other words, courts did not punish all losing litigants—only those who both lost and had bad purposes.[116] In addition, as early as the fifteenth century, English cost statutes began to address concerns such as malicious or unnecessary *delay*, but these statutes addressed conduct after the filing of the initial complaint and usually required an additional finding as to lack of merit.[117]

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[114] *See* BLACKSTONE, *supra* note 20, at 399 (noting that before the time of Henry VIII, "no costs were allowed to the *defendant* in any shape" but that new statues "very equitably gave the defendant, if he prevailed, the same costs as the plaintiff would have, in case he had recovered").

[115] In 1929, Arthur Goodhart reported that English courts at the time had the discretion to assess costs against winning plaintiffs, based in part on the plaintiff's motive. *See* Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 854, 861–62 (1929). Goodhart explained that the power for such imposition of costs had not arisen until an 1875 English law authorized such and that "in previous statutes costs had followed the event." *See id.* (noting that in 1929 "a party who brings a vexatious or unnecessary action, even if he succeeds to some extent, may be ordered to pay the whole costs of the other side" and that "the judge may take into consideration the fact that the claim is grossly exorbitant, . . . that the action is brought out of spite or purely for political motives").

[116] The exact standard for imposition of costs is unclear, due to the use of the term "vexatious." For example, some records state that early judicial petitioners, whether in courts or Parliament, could be sanctioned for "vexatious" complaints. *See* W.J. JONES, THE ELIZABETHAN COURTS OF CHANCERY 190–99, 192 n.3 (describing the requirements for a bill of complaint in the sixteenth century courts of chancery and noting that "[p]laintiffs had once been required to enter into sureties to satisfy the defendant's damages and expenses should the allegations in the bill prove groundless or vexatious, but this was no longer done in the latter half of the sixteenth century"). Vexatious complaints apparently were both groundless and particularly offensive. *See id.* at 196 (noting that most bills rejected by the chancery courts were described by the courts as "trifling, frivolous, or of small account" and that some "contained more vicious characteristics and were designated in the restrained language of the times, as vexatious or slanderous"); *see also* JAMES HART, *supra* note 22, at 196, 241–42 (describing efforts of the House of Lords in the seventeenth century to deter "vexatious litigants" by requiring them to assign error within eight days of the filing of a petition challenging a court judgment and noting that the House assessed fines and costs in the amount of ten to twenty pounds against "vexatious litigants" who filed frivolous suits).

[117] For example, Parliament in 1565 passed an act authorizing assessment of costs against some plaintiffs who acted with "malicious minds and without any just . . . [or] reasonable cause." 8 Eliz., ch. 2. The statute allowed the court in its discretion to award costs to a defendant who suffered a writ of "latitat" and was put to bail by a plaintiff who delayed his suit after filing the writ and did not properly file or pursue his declaration. *See id.* Plaintiffs used writs of latitat to get the defendant to the King's Bench rather than the court of common pleas.

In the American colonies, courts regularly awarded attorney's fees in litigation, and, as in England, they assessed fees based on whether a party won or lost the suit.[118] By the mid-nineteenth century, the presumption against assessment of attorney's fees came into vogue (the so-called "American rule"), but American legislatures and courts have always made exceptions. In the 1870s, American legislatures began to pass statutes that typically provided for a one-way shift of fees—only a losing defendant had to pay attorney fees, not a losing plaintiff—but some assessed costs against losing plaintiffs as well.[119] The American statutes traditionally controlled cost awards by specifying the types of cases in which fees might be awarded based on loss of the suit but apparently did not address the motive of the losing party.[120]

Anglo-American courts also punished litigation conduct through the striking of pleadings. This arguably began under the pleading system called "common law pleading." English courts started this system, and most American courts

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They alleged that the defendant engaged in an imaginary trespass in order to have the defendant arrested, and once in custody, the plaintiff followed with his actual complaint. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 51 (3d ed. 1990). Similarly, Parliament in 1486 acted to deter delay through failed appeals. It provided that whenever a winning party had a judgment to recover, the opposing party filed a writ of error, and the judgment was affirmed: "Said person or persons, against whom the said writ of error is sued, shall recover his costs and damage for his delay and wrongful vexation in the same, by discretion of the justice afore whom the said writ of error is sued." 3 Hen. 7, ch. 10.

[118] Colonial and early state legislatures set the amount that could be recovered as a means to control legal fees generally, but they freely awarded costs against losing parties, including plaintiffs:

> During much of the eighteenth century, virtually all the colonies tried to regulate attorney fees by statute. To be effective, such legislation had to prescribe both the fees a lawyer could charge his client and those that could be recovered from a defeated adversary. The laws governing attorney fee awards, in other words, served less as a way to shift or not shift fees from one party to another than as a way to limit the amount of those fees. *Once the fee was set, it was taken for granted that it could be recovered from a losing party.*

John Leubsdorf, *Toward a History of the American Rules on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 10–11 (1984) (emphasis added) (citations omitted).

[119] *See id.* at 25–30.

[120] *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247–50 (1975) (reviewing history of American rule and surveying statutory exceptions); Vargo, *supra* note 88 at 1578–90 (surveying the thousands of exceptions to the American rule against fee shifting). Some exceptions to the presumption against fee shifting are today broad enough to consider the motive of the plaintiff, such as the "bad faith" exception, but application to the filing of a *meritorious* complaint remains to this day largely theoretical. *See infra* Part IV.C.3.

followed it until at least the mid-nineteenth century.[121] Because the common law pleading system provided for a number of defensive pleas that could delay (seemingly endlessly) the progress of the case, courts sometimes struck pleadings to speed the case.[122] Common law courts may have considered motive (often phrased "honesty") in determining whether to strike a pleading, but they struck only defensive pleadings and apparently did not strike even a dilatory defensive plea unless it also was "false" or lacked merit.[123]

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[121] English common law was characterized by its lengthy and formal sets of pleadings. Early colonial courts were far more liberal as to form and procedure than the English courts, in large part because they did not have the trained lawyers to implement the procedure. As American courts developed, they tended to adopt more of the English practice so that by the early nineteenth century, the state courts followed much of the English procedure. *See generally* LARRY L. TEPLY & RALPH WHITTEN, CIVIL PROCEDURE, ch. 1 § E (1994).

[122] The extent to which American courts under common law procedure struck any pleadings is a matter of some confusion. An 1826 New York case (when New York still used common law pleading) reflects this confusion:

> Thus it will be seen that the English cases do not entirely agree as to the kind of pleas which the court will strike out. They do all agree, that the plea must be without pretense in point of fact; but when we come to its legal nature, we find precedents for setting aside both those which are plainly good, and others of a doubtful validity. Sometimes the criterion is delay and expense; and sometimes ingenuity and delusion. In truth, perhaps, no general rule can be laid down on the subject.... The power to set aside sham pleas is now well established. The great object is to prevent delay and expense to the plaintiff; and consuming the time of the courts in passing upon pleas which are a mere fiction, and an unseemly and expensive encumbrance upon the record, and a fraud upon the rule which allows double pleading.

Brewster v. Hall, 6 Cow. 34, 36–37 (N.Y. 1826). Professor Risinger believes that in America, this practice of striking defensive pleas at common law was restricted to New York. *See generally* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 26–29 (1977).

[123] Professor Risinger explains that at common law plaintiffs were not held to an honesty or motive standard in the filing of suits:

> During the 19th century, both in England and America, the term "sham" meant good in form but false in fact and dishonestly pleaded for some unworthy purpose. Frivolous, on the other hand, meant obviously false upon the face of a pleading.
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> ...
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> The common law seems to have been *procedurally* concerned with dishonesty only in the case of defensive pleas. Indeed,... the term "sham" only applied to defensive pleadings. This was not necessarily because the common law system was plaintiff or creditor oriented, though this may have been a factor. A more important factor may have been the effect of the primary mechanism for obtaining honesty in litigation, the system of

The practice of striking pleadings became more pervasive in America in the late nineteenth century when many states adopted a new form of pleading called "code pleading."[124] The new code pleading rules expressly authorized courts to strike "sham and irrelevant" defensive pleas but did not allow courts to strike a complaint.[125] Thus, to the extent that either system allowed courts to punish a litigant by striking his pleading, the punishment was limited to defensive pleas and rarely turned solely on motive.

Yet another traditional means by which courts avoided litigation abuse was through a verification or signature requirement. The requirement varied depending on whether the case was based in equity or in law. Beginning in the early sixteenth century, in the days of Sir Thomas Moore, English chancery courts required an attorney to sign every bill of complaint.[126] The exact meaning and effect of this early equity signature requirement are subject to debate—some contend that a signature attested that "good ground" supported the pleading and others say that it was merely an attestation as to form[127]—but no one contends

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fines and amercements.

> The fines and amercements system reflects the common law's failure to distinguish falsity and dishonesty in a very sophisticated manner. The losing party to a lawsuit had to pay a sum of money to the king for having been in the wrong before the king's court. In some actions this money was called an amercement and in others it took the form of a fine. . . . The private litigant who brought a sham suit merely to harass his opponent ran a high risk for his pleasure, and the actual danger of civil "strike suits" therefore was probably not very great. However, a defendant who was going to lose was going to be amerced or fined in any event, and was likely to plead anything in order to buy time.

Risinger, *supra* note 122, at 17–19 (footnotes omitted).

[124] Code pleading began with reforms proposed by David Dudley Field. In 1848, Field revamped the New York system of procedure, and his new system became known as either the "Field Code" or code pleading. *See generally* Mildred V. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238, 242–44 (1942). New York revised the code in 1852, and it was this 1852 variation that a number of other states adopted as their system of procedure. *See id.*

[125] Section 152 of the 1852 New York Code provided: "Sham and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may in their discretion impose." Act of Apr. 16, 1852, ch. 379, § 152, 1852 N.Y. Laws.

[126] JOSEPH STORY, EQUITY PLEADINGS ch. 11 § 47 (1838) ("We may conclude, what is here said on the general structure and form of a bill, by the remark, that every Bill, whether original or not, must have the signature of counsel annexed to it. This rule appears to have been adopted at an early period, and at least as early as the time of Sir Thomas More. [1478–1535]").

[127] Justice Story claimed that the signature requirement assured that there was "good ground for the suit":

that the signature attested to the good motive of the pleader aside from the merits.

As American law makers began to codify the general equity practice in the early nineteenth century, they included the signature requirement in their new rules.[128] In 1842, Federal Equity Rule 24 provided that "[e]very bill . . . contain the signature of counsel . . . , which shall be considered as an affirmation on his part, that upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed."[129] Though the attorney had to attest to the merit of the pleading (*i.e.*, it had "good ground"), he did not have to vouch for his own or his client's motive.

On the law side, courts using common law pleading required an "offer of proof" that announced that the plaintiff could produce proof of his charges.[130]

> The great object of this rule is, to secure regularity, relevancy, and decency in the allegations of the Bill, and the responsibility and guaranty of counsel, that upon the instructions given to them, and the case laid before them, there is good ground for the suit in the manner, in which it is framed.

Id. Professor Risinger argues that Justice Story in this passage is rewriting history and imposing a merits standard that did not previously exist:

> In the quoted passage it seems as if the great man is as much dictating his view of what the role of counsel's signature should be as narrating what that role was in equity practice up to that time. It appears true that the rule stemmed from the time of Sir Thomas Moore, but the requirement of counsel's signature was originally a boon rather than a burden to counsel, for it ensured that they were consulted before a Bill was filed. Their task was the quasi-judicial function of examining the Bill as to form, and their signature certified nothing concerning the ground of the Bill, which apparently did not even have to be laid before them. This was how the office of counsel's signature was understood by Story's source, Cooper, and apparently by every other writer, but Story saw a better office for it and gave his viewpoint the stamp of history. And, since Story was then on the Supreme Court, it is not surprising that his vision was incorporated as Rule 24 in the Equity Rules of 1842, which required counsel's signature as an affirmation of good ground.

Risinger, *supra* note 122, at 10–13.

[128] The first set of codified rules, the 1822 Federal Equity Rules of Practice, did not contain any formal signature requirement, but courts sometimes required a signature as part of general equity practice. The 1822 rules consisted of only 33 rules, but Rule 32 allowed the equity courts to "make further rules and regulation, not inconsistent with the rules hereby prescribed, in their discretion." FED. EQUITY R.P. 32, 20 U.S. (7 Wheat) v, xiii (1822).

[129] FED. EQUITY R.P. 24, 42 U.S. (1 How.) xli, xlviii (1842).

[130] At common law, however, all affirmative pleadings that did not put the matter "in issue" had to include an offer of proof that took the form of a verification:

This offer of proof did not attest to any motive of the plaintiff.[131] The code pleading systems required the plaintiff to "subscribe" the complaint, but left to the plaintiff's discretion whether to also verify the complaint.[132] The subscription was merely a signature, and the optional verification attested to the pleader's belief and knowledge as to the truth of the pleading and did not address the motive of the pleader in filing suit.[133] In sum, American courts in the late

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> Where an issue is tendered to be tried by jury, it has been shown that the pleading concludes *to the country.* In all other cases pleadings, if in the affirmative form, must conclude with a formula of another kind, called a *verifications* or an *averment*... The common verification is... in the following form: 'And the said A.B. ... is ready to verify....'
>
> It was a doctrine of the ancient law... that every pleading affirmative in its nature must be supported by an offer of some *mode of proof*....

HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS, 378–79 (Samuel Tyler, ed., 3d Amer. ed. 1919); *see also* Henry Berry Pogson, *Truth in Pleading*, 8 N.Y.U. L.Q. 41, 43 (1931) ("Anciently it was essential to accompany every pleading, affirmative in its nature, by an averment that the pleader was prepared to furnish proof of a kind or character adapted to the occasion .... These constituted the so-called common law verification.").

[131] Professor Pogson in 1931 noted some confusion as to the meaning of the verification at common law, but he reported that *plaintiffs* did not attest to the "honesty" of their common law pleas:

> [T]here is noticeable during the lapse of the years the almost total discarding of any idea that the plaintiff must authenticate his complaint for the benefit of the defendant in any manner indicative of good faith or honesty in reasonable belief, other than by the signature of his attorney of record or by his own signature thereto.

Pogson, *supra* note 130, at 46–47.

[132] The New York Code originally required plaintiffs to verify all complaints, but one year after its enactment, a revised code made verification permissive. *See generally* JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE 271–73, nn.42 & 43 (3d ed. 1999). Section 156 of the revised 1852 New York Code stated:

> Every pleading in a court of record must be subscribed by the party, or his attorney, and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also.

Act of Apr. 16, 1852, ch. 379 § 156, 1852 N.Y. Laws.

[133] Section 157 of the 1852 New York Code stated the meaning of the verification:

nineteenth century were experimenting with a number of procedural tools to curb litigation abuse, but none of these procedural devices punished plaintiffs solely for their motives in filing the initial suit.

The first use of motive as the sole criterion for filing a complaint apparently was part of another movement, one that was closely related to, but separate from the procedural reform—the legal ethics movement. This movement began simply with lawyer oaths. Lawyer oaths date back to at least the thirteenth century.[134] Many early oaths were general—lawyers swearing to abide by the law—but some early oaths were particularized and set out a number of ethical precepts.[135] Some mentioned motive, and although their exact meaning and effect are open to question, they seemingly spoke to the *lawyer's* motive. For example, a common lawyer oath in the late nineteenth century required a lawyer to swear that he would not "encourage either the commencement or the continuance of a suit from any motive of passion or interest . . . ."[136] The interest language of the last clause reflects a concern about conflicts of interests and suggests that the lawyer's personal motives, and not those of the client, were at issue.

The legal ethics movement gained significant momentum in the mid-nineteenth century, primarily as a result of two influential legal essays by David Hoffman and George Sharswood. In 1836, Hoffman, a lecturer at the University

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> The verification must be to the effect, that the same is true to the knowledge of the person making it except as to those matters stated on information and belief and as to those matters he believes it to be true, and must be by the affidavit of the party, ... When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party. . . . The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony.

Id. at § 157. The New York Code did not define the meaning of "subscription." *See generally id.* An 1854 legal dictionary definition of subscription suggests that the term was primarily used in the field of contracts and meant merely a signature. 2 JOHN BOUVIER, A LAW DICTIONARY 555 (1854) ("SUBSCRIPTION, *contracts*. The placing of a signature at the bottom of a written or printed engagement.").

[134] *See* Andrews, *supra* note 11, Part I.A.

[135] *See* 31 AMERICAN BAR ASSOCIATION, REPORT OF THE THIRTIETH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, apps. D, E, I, at 714–16, 735–36 (1907) [hereinafter REPORTS OF THE AMERICAN BAR ASSOCIATION] (surveying lawyers' oaths); LUCIEN H. ALEXANDER, MEMORANDUM FOR USE OF ABA'S COMMITTEE TO DRAFT CANONS OF PROFESSIONAL ETHICS Part V (1908) (collecting different forms of oath).

[136] Alexander, *supra* note 135, at 112 (reporting that California, Idaho, Indiana, Iowa, Minnesota, North Dakota, Oklahoma, South Dakota, and Utah stated this provision as of 1908).

of Maryland, urged that lawyers should be filters for their client's actions and that they should refrain from taking even legally meritorious positions if the lawyer believed them to be unjust. Hoffman, for example, admonished that a lawyer should not present the defense of statute of limitations if he believes that the plaintiff's claim is otherwise good.[137] In the same vein, Hoffman suggested that lawyers should not take civil cases to further the client's, or the lawyer's, ill motives.[138] Judge Sharswood, writing in 1854, instructed law students that "truth, simplicity and candor" are the "cardinal virtues" of lawyers and that lawyers should avoid practices, such as being "hired to abuse the opposite party," that would impugn his character.[139]

In 1887, Alabama enacted the first formal code of legal ethics, relying in large part upon the writings of Sharswood and Hoffman.[140] The 1887 Alabama code instructed, among other things, that "[a]n attorney must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong."[141] This was significant in several respects. First, the rule's "satisfied" language seemed to set a test for determining the *client's* motive. Second, the rule apparently instructed a lawyer not to bring even a meritorious civil case if he believed that

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[137] *See* David Hoffman, *in* REPORTS OF THE AMERICAN BAR ASSOCIATION, *supra* note 135, app. H, at 717 (Res. No. 12) ("I will never plead the Statute of Limitations when based on the mere efflux of time; for if my client is conscious he owes the debt, and has no other defense than the legal bar, he shall never make me a partner in his knavery.").

[138] Hoffman's second and tenth resolutions provided:

> I will espouse no man's cause out of envy, hatred or malice toward his antagonist.
>
> Should my client be disposed to insist on captious requisitions, or frivolous and vexatious defenses, they shall be neither enforced nor countenanced by me. And if still adhered to by him from a hope of pressing the other party into a unjust compromise, or with any other motive, he shall have the option to select other counsel.

Id. (Res. Nos. 2 & 10). The first clause, Resolution No. 2, is somewhat ambiguous as to whose motives are at issue, but, when juxtaposed against the Tenth Resolution, it seemingly addresses the lawyer's motive.

[139] GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 118, 169, *reprinted in* 32 REPORTS OF THE AMERICAN BAR ASSOCIATION, *supra* note 135.

[140] The man who drafted the Alabama Code for the Alabama State Bar Association, Judge Thomas Jones, relied heavily on the Hoffman and Sharswood essays. *See generally* Allison Marston, *Guiding the Profession: The 1887 Code of Ethics for the Alabama State Bar Association*, 49 ALA. L. REV. 471 (1998).

[141] CODE OF ETHICS ALABAMA STATE BAR ASSOCIATION No. 14 (Dec. 14, 1887), *reprinted in* HENRY S. DRINKER, LEGAL ETHICS app. F, at 352–63 (1953).

his client had the specified ill motives. To be sure, the rule contained an important qualifier: "merely." In theory at least, a client could have the sole aim to harass, even if his claim has legal and factual merit. Finally, the rule spoke in mandatory terms and thus departed from the often aspirational language of the predecessor oaths. Indeed, the Alabama State Bar rejected proposals that would have given the lawyer more leeway. The provision, as originally drafted, read that the lawyer "may" decline the case, but the bar convention changed it to "must."[142]

The Alabama Code took hold. Other states began to form bar associations and enact their own codes modeled on the Alabama example. Eleven adopted the Alabama mandate against taking a civil case for malicious purposes.[143] In 1908, when the American Bar Association developed a national model for a legal ethics code, it used the Alabama Code as its model and continued the theme of lawyers acting only with the highest motives.[144] Canon 30 of the new ABA Canons thus prohibited a lawyer from taking initial claims "when he is convinced that it is intended merely to harass or to injure the opposite party or to work oppression."[145] Like the Alabama rule, Canon 30 was mandatory and seemingly spoke to the client's intent without regard to the merit of the claim.

Interestingly, these ethical provisions may have been the catalyst for

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[142] The bar also deleted other language that bound a lawyer to avail himself of all lawful advantages once he took a case. PROCEEDINGS OF THE TENTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION 19 (1887).

[143] *See* 31 REPORTS OF THE AMERICAN BAR ASSOCIATION, *supra* note 135, at app. B, at 695 (1907).

[144] The Preamble to the 1908 Canons stated:

> In America, where the stability of Court and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the republic, to a great extent, depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct *and the motives of the members of our profession* are such as to merit the approval of all just men.

AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Preamble (1908), *reprinted in* REPORTS OF THE AMERICAN BAR ASSOCIATION vol. XXXIII, at 575 (1908) (emphasis added).

[145] Canon 30 mandated that a lawyer decline a case when he is "convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong." AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS Canon 30 (1908). See *infra* Part III.B.5.a–b for a discussion of the ABA Canons and their successor standards.

broadening the procedural rules to ban improper purpose in filing complaints. In 1912, just four years after the ABA issued its national code of ethics, federal rulemakers added a modest motive element to the signature requirement in the equity rules. Rule 24 of the 1912 Federal Equity Rules stated that the signature of counsel on a pleading certified, among other things, that he did not interpose the pleading "for delay."[146] Like the new ethics rules, Rule 24 applied to complaints; it applied to all pleadings, including an otherwise meritorious complaint, if the purpose behind its filing was delay. Despite its broader language, Rule 24, in practice, was not an expansion beyond previous procedural rules. Rule 24, unlike the ethics rules, outlawed only "delay" and, as evidenced by the previous procedural practice, delay usually is a problem with defensive papers, not the initial complaint.[147] Moreover, in the twelve years in which the rule was in effect, no court struck *any* pleading for a delay motive unless it also was "false."[148]

Equity Rule 24 was just one step on the road to imposing unlimited procedural motive restrictions on complaints. As I explain in detail below, Equity Rule 24 soon evolved into Rule 11 of the Federal Rules of Civil Procedure, which in turn evolved into a much broader motive limitation: A signature now acts as a certification that the pleadings, including a complaint, are not presented for "any improper purpose."[149] Almost every state in turn has followed suit and adopted this broad motive prohibition.[150] Similarly, litigants and courts have begun to consider whether other laws also might bar a plaintiff's

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[146] The rule stated that the signature of counsel:

> shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the cases there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is *not interposed for delay.*

FED. EQUITY R.P. 24 (emphasis added).

[147] Although delay is best seen in defensive motions, an initial complaint can likewise be abused to cause delay. A plaintiff could file the complaint in order to delay matters collateral to the litigation, such as the schedule of a construction project, or the plaintiff could frame the complaint in such a way that it causes delay, such as filing multiple complaints and claims rather than a simple, unified pleading.

[148] *See* Risinger, *supra* note 122, at 15–16, 28 ("*There is not one reported case prior to the adoption of the Federal Rules where a finding of falsity was not required before a plea could be deemed a sham.*").

[149] FED. R. CIV. P. 11(b). For the current version of Rule 11(b) see *infra* text accompanying note 152.

[150] *See infra* notes 209–12 and accompanying text.

bad purpose. Thus today, in a marked departure from historical practice, a number of general laws, as well as procedural rules, arguably impose a restriction on the plaintiff's motive in filing civil suit. They break down into two broad categories: direct restraints on court access and general substantive statutes that only indirectly govern a civil plaintiff's motive.

B. *Current Direct Motive Controls on Court Access*

The most obvious use of motive as a condition on court access is as a tool to curb litigation abuse. Yet, as reflected by history of litigation rules and penalties, use of motive alone is a relatively uncommon means of regulating court access. The vast majority of court access regulations, whether an initial precondition to filing suit or a subsequent penalty for abuse, set objective criteria.[151] Only a very few single out the plaintiff's motive and bar or punish the filing of an initial claim based on that motive, regardless of the objective merit of that claim. Moreover, courts rarely have invoked these rules and punished litigants based solely on their ill motive. This reluctance may be due to the court's desire to focus their limited resources on egregious cases where the litigants both have ill motives and file meritless papers.

Nevertheless, a number of court rules, statutes, and legal doctrines would permit use of motive as a condition on court access. Some, such as Federal Rule of Civil Procedure 11(b)(1), unequivocally state that a plaintiff must have proper motive to file suit, and others, such as section 1927 of the Federal Judicial Code, have ambiguous language that potentially limits court access based on motive alone. I outline the prime examples of these "direct court access" statutes, rules, and doctrines below.

1. *Civil Pleading Rules—Rule 11(b)(1)*

Federal Rule 11 is the "ethics" rule of the federal procedural compilation. It serves both as a precondition to filing suit and as a form of subsequent punishment. Under Rule 11, a plaintiff must certify, before he files his complaint, that he has a proper motive and that his paper has legal and factual

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[151] Most pleading rules, for example, set only objective criteria. *See, e.g.*, FED. R. CIV. P. 8(a) ("A pleading which sets forth a claim for relief... shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends... (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks."); FED. R. CIV. P. 10(a) ("Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a [pleading type] designation....").

merit, and the court later may sanction the plaintiff and his lawyer if their certifications prove untrue.

The certification provisions of paragraph (b) are the heart of Rule 11:

> (b) *Representations to Court.* By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.[152]

These four standards, joined by the conjunctive "and," seemingly require that the pleader have a proper purpose *in addition to* a factual and legal basis for his pleading. Nevertheless, confusion surrounds how, if at all, Rule 11 regulates motive when a plaintiff otherwise has a meritorious paper. This confusion is widespread; most American court systems have rules identical to or modeled on Federal Rule 11(b)(1) and therefore present the same issues.[153] Because Rule 11(b)(1) is the most prevalent form of motive restriction and because it is the source of some confusion, I explore the evolution and application of the rule in some detail.

a. *The Evolution of the Rule 11 Improper Purpose Standard*

Rule 11 came into existence in 1938 with the Federal Rules of Civil Procedure. Prior to 1938, federal courts applied different procedural rules

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[152] FED. R. CIV. P. 11(b).

[153] *See infra* Part III.B.1.c.

depending on whether the cases were in equity or at law. Federal courts sitting in equity applied federal rules of procedure, but when they heard cases at law, they applied the procedure rules of the state in which they sat.[154] Only the federal equity rules required any form of certification or statement of good purpose in filing a complaint—the delay standard of Federal Equity Rule 24— and even they did so only from 1912 to 1938.[155]

In 1938, the new Federal Rules of Civil Procedure went into effect and merged procedure for law and equity. The new rules retained the key components of Equity Rule 24, including its delay standard, in Rule 11.[156] The 1938 version of Rule 11 provided in part:

> The signature of an attorney constitutes a certificate by him that he has read the pleading, . . . and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action.[157]

In addition to the delay clause, the 1938 rule had two other "subjective" elements that addressed the state of mind of the signing party or attorney. One was an "awareness" standard that addressed the merits of the pleading (*i.e.*, "that to the best of his knowledge, information, and belief there is good ground to

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[154] Prior to the 1930s, Congress enacted "conformity" statutes that directed federal courts in "actions at law" to use the procedure of the courts in the state in which the federal court sat. *See* Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93 (1789). As to equity cases, Congress instructed federal courts to use traditional rules of equity practice and authorized the Supreme Court to alter those rules as it thought proper. *See generally* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 61 (5th ed. 1994).

[155] *See supra* notes 146–49 and accompanying text.

[156] The advisory committee stated that it derived the Rule 11 provisions from former Equity Rules 21 and 24. Federal Equity Rule 21 had provided that "the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out [of pleadings]." FED. EQUITY R.P. 21, 226 U.S. 627, 654 (1912). *But see* Risinger, *supra* note 122, at 8–10 & n.20 (arguing that "Equity Rule 21 has nothing to do with Rule 11 as finally promulgated" in 1938). The rulemakers also noted that many code pleading systems required subscription of pleadings but, as discussed above, a subscription in the code pleading system meant merely a signature. *See supra* note 129 and accompanying text. For example, one of the code pleading provisions cited by the committee was a 1927 Minnesota rule, which like that in the 1852 New York Code, *see supra* note 132, merely stated that "every pleading . . . shall be subscribed by the party or his attorney, and may be verified" and did not spell out any unique meaning to the term subscribe. MINN. STAT. § 9265 (1927).

[157] FED. R. CIV. P. 11, 308 U.S. 645, 676 (1939).

support it").[158] This mirrored both the early equity signature and code pleading verification standards as to merits and extended only to matters within the knowledge and belief of the attesting party.[159] A second subjective element asked the court to consider whether the lawyer intentionally violated the rule's other provisions. It allowed the court to strike a pleading if signed with an intent to defeat the purpose of the rule, and it permitted "disciplinary action" against the lawyer in cases of "wilful [sic] violation."[160] These two elements asked distinct questions from the delay standard. That standard focused on whether the party filed the pleading for delay, regardless of the party's knowledge or belief as to the merits of that pleading.

For forty years, Rule 11 went virtually unnoticed.[161] In the late 1970s and early 1980s, however, federal rulemakers became concerned about litigation abuse and re-examined Rule 11. They concluded that Rule 11 was not curbing abuse,[162] and in 1983, they set out to strengthen Rule 11 through a major overhaul of the rule.[163] They viewed the subjective standard for determining the

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[158] *Id.*

[159] *See supra* notes 129, 133 and accompanying text (describing the equity rule and the code pleading verification standard).

[160] FED. R. CIV. P. 11, 308 U.S. at 676.

[161] The 1938 version of Rule 11 in its entirety was rarely the subject of substantial judicial or scholarly development. *See* Risinger, *supra* note 122 at 34–42 (criticizing the rule and surveying the 23 reported cases prior to 1977 in which one party attempted to employ Rule 11 to strike the opponent's pleading); *see also* 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1331 at 10–11 (2d ed. 1990) (reporting that the 1938 version of Rule 11 was "rarely used").

[162] In 1983, the federal rules advisory committee noted that "[e]xperience shows that in practice Rule 11 has not been effective in deterring abuses." FED. R. CIV. P. 11, advisory committee's note to 1983 amendment, 97 F.R.D. 165, 198 (1983) (citations omitted). Professors Wright and Miller give their opinion as to why the early rule failed:

> First, the element of the certification that the attorney had read the pleading basically was meaningless in actual practice. Second, a subjective standard had evolved as the test of the 'good grounds' element of the certification and it had proven to be virtually unenforceable. Third, the wording of the original rule limited malfeasance to delay, which meant that other improper motivations for violating the certification requirement were immune under a strict reading of the rule's language. Moreover, the original rule's sanction provisions were useless as a practical matter. They called for a striking of the offending document, which was too draconian, or, in the case of a 'willful' violation, 'appropriate disciplinary action,' which was too vague to be meaningful.

WRIGHT & MILLER, *supra* note 161 § 1331.

[163] The 1983 version of Rule 11 read in part:

merits of the pleading as particularly ineffective. Courts under the 1938 version of the rule typically imposed sanctions only if the party acted in bad faith and knew that the pleading was groundless,[164] and, as one court noted, "there is no position—no matter how absurd—of which an advocate cannot convince himself."[165] Accordingly, federal rulemakers in 1983 replaced the actual knowledge standard of the 1938 rule with an objective "should have known" standard for the factual and legal merit of the pleading.[166] The rule no longer would tolerate ignorance and required parties to conduct a reasonable inquiry into the factual and legal bases of their pleadings.[167]

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11, 97 F.R.D. 165, 167–68 (1983 amendment).

[164] *See* Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980) (noting that "Rule 11 speaks in plainly subjective terms" and that its "standard . . . is bad faith").

[165] Wells v. Oppenheimer & Co., 101 F.R.D. 358, 359 n.3 (S.D.N.Y. 1984), *vacated on other grounds*, 106 F.R.D. 258 (S.D.N.Y. 1985).

[166] The Advisory Committee explained that the reasonableness of the inquiry required under the new rule depended on the circumstances at the time the attorney or party filed the paper:

> The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation.

FED. R. CIV. P. 11, advisory committee's note to 1983 amendment, 97 F.R.D. 165, 198–99 (1983) (citations omitted).

[167] The Second Circuit described the move to an objective awareness standard in Rule 11:

The supposed problem with the "willful" standard of the original rule was not the standard itself. The problem instead was the vague and discretionary result that it triggered—that the court "may" strike the pleading or the attorney "may" suffer "appropriate" disciplinary action.[168] Thus, the 1983 rule made sanctions mandatory for all violations of the rule, regardless of whether such violations were willful.[169]

Finally, the 1983 rule broadened the scope of prohibited motives beyond delay and required litigants to certify that their pleadings were "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[170] The only possible problem cited by the rules committee was that the delay element of the 1938 rule was too narrow.[171] Delay had been the only improper purpose that the 1938 rule condemned, leaving other ill motives beyond the reach of the rule.[172] Whether this was actually a problem in practice is open to question; the only report of this concern seems to be the advisory committee note itself.[173] One critic had complained that the rule was narrow in the sense that it punished delay only if delay were the *sole* purpose behind a motion (*i.e.*, a motion filed both for delay

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> The addition of the words 'formed after a reasonable inquiry' demand that we revise our inquiry. No longer is it enough for an attorney to claim that he acted in good faith, or that he personally was unaware of the groundless nature of an argument or claim. For the language of the new Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did.

Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985).

168 *Id.*

169 *See* FED. R. CIV. P. 11, 97 F.R.D. 165, 167 (1983) ("If a pleading . . . is signed in violation of this rule, the court . . . shall impose . . . an appropriate sanction . . . ."); *see also id.* at 200, advisory committee note (noting that the "reference in the former text to willfulness as a prerequisite to disciplinary action has been deleted").

170 *Id.* at 167.

171 In 1983, when federal rulemakers expanded the clause, the advisory committee's only suggestion as to any problem with the delay clause of the 1938 rule was the following: "The expanded nature of the lawyer's certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay." *See, e.g.*, *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977); FED. R. CIV. P. 11, advisory committee's note to 1983 amendment, 97 F.R.D. 165, 198 (1983).

172 *See* 5A WRIGHT & MILLER, *supra* note 161, § 1331.

173 *See supra* note 163 and discussion *infra* at notes 185–89 and accompanying text (discussing advisory committee's statement of reasons for change).

and for a legitimate purpose escaped sanctions),[174] and another charged that the delay clause was redundant,[175] but neither criticized the rule as too narrowly defining the scope of prohibited purposes.

By 1993, the pendulum had swung the other way. Rulemakers were concerned that the 1983 revision had unduly chilled litigation advocacy, and they relaxed portions of Rule 11, principally the sanctioning provisions.[176] Rule 11 now makes sanctions permissive rather than mandatory,[177] and courts imposing sanctions may take into account a number of factors, including whether the violation was willful.[178] However, the rulemakers kept intact the 1983 changes

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[174] In 1976, David Edelstein, then Chief Judge of the Southern District of New York, wrote an article in which he pondered whether the delay clause of Rule 11 (the 1938 version) might be too narrow in that it arguably punished motions only if they were filed *solely* for delay; he proposed that the rule be amended to outlaw motions filed *primarily* for delay. *See generally* David N. Edelstein, *The Ethics of Dilatory Motion Practice: Time for Change*, 44 FORD. L. REV. 1069 (1976). Indeed, early drafts of the advisory committee notes accompanying the 1983 rule amendment cited Judge Edelstein's article as support for its proposal that the improper purpose clause refer to the "primary" motivation of the litigant. *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (on file with author and available on CIS microfiche #7903-05) (stating that the proposed revised rule "applies even when there is some other objective for the pleading, even a legitimate one"). However, Judge Edelstein's article addressed only delay in motion practice not other bad purposes or other civil papers and pleadings.

[175] Professor Risinger in a 1977 article noted, briefly, that the delay clause was flawed, but he argued that it was unnecessary and redundant, not too narrow:

> The insertion [in the 1938 rule] of the certification that the pleading has not been interposed for delay seems logically redundant, since a pleading interposed *only* for delay could not have 'good ground' no matter how that term is ultimately defined, and a pleading with independent 'good ground' is not likely to be rendered improper because tactical considerations of delay entered in to the ultimate decision of whether or not to file an otherwise honest, meritorious, and proper pleading.

Risinger, *supra* note 122, at 8.

[176] *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment ("This revision is intended to remedy problems that have arisen in interpretation and application of the 1983 revision of the rule."). Some scholars claimed that the 1983 Rule was too harsh and had a disproportionate effect on civil rights plaintiffs. *See generally id.* (surveying authorities and criticisms of the 1983 rule); 5A WRIGHT & MILLER, *supra* note 161, § 1332 (same).

[177] *See* FED. R. CIV. P. 11(c) (providing that "the court may, subject to the conditions stated below, impose an appropriate sanction"). One of the conditions is a new "safe harbor" provision which gives a party 21 days to withdraw offending pleadings and avoid sanctions. *See* FED. R. CIV. P. 11(c) (1)(A).

[178] *See* FED. R. CIV. P. 11 adivisory committee's note to 1993 amendment (noting that the "rule does not attempt to enumerate the factors a court should consider in deciding whether

to the other two "state of mind" elements of the rule. Although they clarified and modified slightly the merits standards, now embodied in Rule 11(b),[179] they retained the reasonable inquiry standard of the 1983 rule. Most importantly for this discussion, the rulemakers kept the broad language of the improper purpose clause, and they placed the clause in a more prominent position.[180] The improper purpose clause is now the first, rather than last, certification standard.

b. *Interpretation and Application of the Rule 11 Improper Purpose Standard*

Although there has been a relative "outpouring of scholarly writing" and litigation concerning Rule 11 since its overhaul in 1983,[181] legal observers have paid little attention to the improper purpose standard of Rule 11, in any of its evolving forms.[182] Instead, courts and scholars focus on the awareness element, and many legal observers describe the post-1983 Rule 11 as imposing an objective rather than subjective standard.[183] This is an overstatement.[184] To be

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to impose a sanction or what sanction would be appropriate" and that a relevant factor is "[w]hether the improper conduct was willful, or negligent").

[179] Rulemakers clarified the meaning of the merits portions of the certification. Rule 11(b)(4) now states a separate certification standard for denials of factual allegations, and Rule 11(b)(3) now requires that affirmative factual allegations have only "evidentiary support" (as opposed to the "well grounded in fact" standard of the 1983 rule) and allows some allegations to be based on the reasonable belief that the pleader will obtain evidentiary support. *See* text accompanying *supra* note 152 (stating Rule 11(b)).

[180] The advisory committee notes do not explain why improper purpose was given first priority. *See* FED. R. CIV. P. 11(b) advisory committee's note to the 1993 amendment.

[181] Lawrence C. Marshall, et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 948 (1992) (reporting generally on the results of an empirical study of the impact of Rule 11 on federal litigators and noting the growth in cases and scholarship concerning Rule 11 since its 1983 amendment).

[182] One of the few pieces of academic literature to focus solely on the improper purpose clause of Rule 11(b)(1) is a student note: *See generally* Barbara Comninos Kruzansky, Note, *Sanctions For Nonfrivolous Complaints?* Sussman v. Bank of Israel *and Implication for the Improper Purpose Prong of Rule 11*, 61 ALB. L. REV. 1359 (1998).

[183] *See, e.g.*, SHELDON NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 1.47 (stating that under Federal Rule 11, "an *objective* standard is applicable, not a subjective bad faith one); *see also infra* note 274 (statement of Geoffrey Hazard). Perhaps the most influential of these statements was that of Judge William Schwarzer in which he advocated that courts make only an objective rather than subjective inquiry, even under the improper purpose clause. *See* William W. Schwarzer, *Sanctions Under The New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 195–96 (1985) (stating that the court does not need to decipher an "attorney's subjective intent" and that "[t]he record [and] surrounding

sure, the willful and actual knowledge standards of the 1938 rule are gone, but the rule retains a subjective element—the "improper purpose" clause. Under the literal language of the rule, a plaintiff must certify *both* that he has conducted a reasonable inquiry into the factual and legal merit of the complaint *and* that he is not filing the complaint for any improper purpose. The problem is how to apply this standard.

As noted above, the 1983 advisory committee did not shed much light on the meaning of the expanded improper purpose clause other than its remark that litigants abuse the system for more reasons than delay.[185] The committee obviously meant to stop litigation abuse generally, not just the isolated example of delay, but it did not meaningfully define abuse, especially in the context of filing an initial complaint. Is it an abuse to file an otherwise valid complaint because you hate the defendant or because you want to obtain an advantage outside of litigation?

The advisory committee's only other comment with regard to the improper purpose clause—a case citation—merely confuses the question. The committee cited *Browning Debenture Holders' Committee v. DASA Corp.*,[186] a 1977 case in which the Second Circuit split its decision regarding sanctions. It reversed sanctions assessed against the plaintiffs for the initial complaint filing but upheld sanctions for plaintiffs' subsequent litigation activity. *DASA* was not a case under Rule 11; the court did not cite Rule 11 at all. Instead, the court relied upon its inherent power to sanction litigants, and applied a two-part test for such sanctions—the tactic must be both frivolous and in bad faith.[187] Thus, the court would not sanction the plaintiffs for filing a colorable claim even though they did so to achieve a collateral bargaining advantage,[188] but it did sanction plaintiffs'

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circumstances should afford an adequate basis for determining whether particular papers or proceedings caused delay that was unnecessary, whether they caused increase in the cost of litigation that was needless, or whether they lacked any apparent legitimate purpose").

[184] *See* Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1320 (1986) (noting that "[a]lthough courts and commentators have stressed that rule 11 introduces an objective standard to measure a lawyer's conduct, it is more accurate to say that the rule adds an objective layer to the subjective core of traditionally sanctionable bad faith conduct").

[185] *See supra* note 171 and accompanying text.

[186] 560 F.2d 1078 (2d Cir. 1977).

[187] The court applied a two-fold test for awarding sanctions under its inherent power: "the claim is entirely without color *and* has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons." *Id.* at 1088 (emphasis added). For further discussion of a court's inherent power to assess sanctions generally, see *infra* Part III.B.3.

[188] Plaintiffs, holders of convertible corporate debenture bonds sued the issuing

subsequent litigation tactics, which involved frivolous motions.[189]

This was a fairly standard application of the court's inherent powers.[190] The more difficult question is what the advisory committee intended when it cited this case in relation to its broadening of the improper purpose clause. Did the committee mean to broaden Rule 11 to bar behavior that the Second Circuit's common law power seemingly did not—the filing of colorable complaints for a bad purpose? Or, did the committee merely use the case as an example of a bad motive other than delay—obtaining a collateral bargaining benefit—that might motivate frivolous filings?

Case law applying Rule 11(b)(1) does not offer much guidance as to its meaning. Cases rarely present the improper purpose clause in isolation. Most cases in which the improper purpose clause is implicated also involve pleadings or motions that are factually or legally frivolous. This is especially true after the 1993 amendments, which reduced the opponent's ability and incentive to bring Rule 11 motions.[191] It is a rare case in which a court considers whether a plaintiff or other litigant should be sanctioned solely because of his improper motive.

Even the courts that have addressed the issue, primarily in dicta, are divided in their view of the proper application of the improper purpose provision of Rule 11(b)(1). Some have refused to follow the literal letter of Rule 11(b)(1), at least as applied to the filing of the initial complaint, and hold that a colorable *complaint* (as opposed to other litigation papers), no matter the plaintiff's purpose, is not sanctionable under Rule 11. The Ninth Circuit is perhaps the leading proponent of this view, beginning with its 1986 decision in *Zaldivar v. City of Los Angeles*,[192] and culminating in its 1991 en banc decision in

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corporation, the bank trustee, and its accountant for fraud. The trial court entered judgment for defendants, after trial on one count and summary judgment on all other counts, and awarded attorneys' fees to defendants. *See* 560 F.2d at 1087–88 (for a complete description of the trial court's decision).

[189] *Id.* at 1088–89.

[190] *See infra* Part III.B.3.

[191] Among other things, the 1993 revisions to Rule 11 made sanctions discretionary rather than mandatory. *See* FED. R. CIV. P. 11(c). Rulemakers also gave litigants a 21-day safe harbor period, during which they could withdraw an offending pleading or motion. *See* FED. R. CIV. P. 11(c)(1)(A). Finally, the new rule presumes that monetary fines will be paid to the court rather than the opposing party who files the Rule 11 motion. *See* FED. R. CIV. P. 11(c)(2).

[192] 780 F.2d 823, 831–35 (9th Cir. 1986). In *Zaldivar*, the Ninth Circuit reversed sanctions against the *Zaldivar* plaintiffs because they presented a colorable claim and held that Rule 11 sanctions should not attach to nonfrivolous complaints despite the literal language of the rule:

Townsend v. Holman Consulting Corp.[193] In *Townsend*, the Ninth Circuit explained why it singled out complaints (and counterclaims) for this special treatment under Rule 11:

> The reason for the rule regarding complaints is that the complaint is, of course, the document which embodies the plaintiff's cause of action and it is the vehicle through which he enforces his substantive legal rights. Enforcement of those rights benefits not only individual plaintiffs but may benefit the public, since the bringing of meritorious lawsuits by private individuals is one way that public policies are advanced. As we recognized in *Zaldivar*, it would be counterproductive to use Rule 11 to penalize the assertion of non-frivolous substantive claims, even when the motives for asserting those claims are not entirely pure.[194]

A few other circuits, including the Second, Fifth, and Tenth Circuits, also follow this interpretation of Rule 11 and do not allow sanctions for a plaintiff's improper purpose if his complaint is otherwise meritorious.[195]

The precise position of the remaining circuits is difficult to discern because the issue either has not been addressed by the court of appeals or has been stated

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> A more difficult question of interpretation exists as to whether a pleading or other paper which is well grounded in fact and in law as required by the Rule may ever be the subject of a sanction because it is signed and filed for an improper purpose. In short, may an attorney be sanctioned for doing what the law allows, if the attorney's motive for doing so is improper? The 'well grounded in fact and warranted by existing law' clause is coupled with 'improper purpose' clause by the conjunction 'and.' By signing the pleading or other paper, the attorney certifies to both, thus suggesting that the two clauses are to be viewed independently.
>
> For purposes of deciding this case, it is unnecessary to answer this difficult question in other situations. We deal here with the signing of a complaint that initiates the action. We hold that a defendant cannot be harassed under Rule 11 because a plaintiff files a complaint against that defendant which complies with the well grounded in fact and warranted by existing law clause of Rule 11.

Id. at 832.

[193] 929 F.2d 1358 (9th Cir. 1991) (en banc).

[194] *Id.* at 1362. In a footnote to this passage, the court stated that the special rule would also apply to counterclaims. *Id.* at n.1.

[195] *See, e.g.*, Sussman v. Bank of Israel, 56 F.3d 450, 458–59 (2d Cir. 1995) (noting split in circuits and adopting *Townsend*); National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees, 844 F.2d 216, 223–24 (5th Cir. 1988) (adopting *Zaldivar* distinction between complaints and subsequent papers in applying the improper purpose clause of Rule 11); Burkhart v. Kinsley Bank, 852 F.2d 512, 514–15 (10th Cir. 1988) (holding that if a plaintiff filed a meritorious complaint "then any suggestion of harassment would necessarily fail").

only in broad dicta. Nevertheless, the cases suggest that these other courts will follow the literal terms of the rule and will sanction a plaintiff if he files a complaint for an improper motive, even if the complaint states a colorable claim.[196] The Seventh Circuit is cited as the leading proponent of this view.[197] In *Szabo Food Service, Inc. v. Canteen Corp.*,[198] the Seventh Circuit, in remanding to the district court for more factual findings, gave the following guidance with regard to application of the Rule 11 improper purpose clause:

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[196] For example, Justice Breyer, then sitting on the First Circuit, stated in dictum that proper purpose was a requirement independent of and in addition to merit under Rule 11:

> Although the wording of the amended Rule may possibly be ambiguous in this respect, the historical context and advisory committee notes unquestionably override any syntactical uncertainties. Not surprisingly, then, the amended Rule has rather consistently been read by federal appellate courts to reach groundless but 'sincere' pleadings, as well as those which, while not devoid of all merit, were filed for some malign purpose.

Lancelloti v. Fay, 909 F.2d 15, 18–19 (1st Cir. 1990). The Fourth Circuit likewise stated in dictum that an improperly motivated filing of a meritorious complaint could subject the plaintiff to Rule 11 sanctions. *See In re* Kuntsler, 914 F.2d 505, 518 (4th Cir. 1990) ("[F]iling a motion or pleading without a sincere intent to pursue it will garner sanctions"); *see also infra* note 204. The remaining circuits suggest that they would sanction plaintiffs for improper motive in that they describe the certification elements of Rule 11 as independent standards. *See* CTC Imports & Exports v. Nigerian Petroleum Corp., 951 F.2d 573, 578 (3d Cir. 1992) (noting in dictum that "[e]ach duty is independent; the violation of one triggers Rule 11 sanctions"); INVST Financial Group, Inc. v. Chem-Nuclear Sys., Inc., 815 F.2d 391, 402 (6th Cir. 1987) (noting that motion "violates all three sanctionable circumstances of Rule 11," including "improper purpose of delaying the default judgment"); United States v. Milam, 855 F.2d 739, 742 (11th Cir. 1988) (noting in dictum that "at least three distinct, but at times overlapping, types of conduct... might warrant the imposition of Rule 11 sanctions," including improper purpose). The Eighth Circuit and the District of Columbia Circuit apparently have not addressed the issue, but their district courts have suggested that they would impose sanctions for bad motive alone. *See* Kerner v. Cult Awareness Network, 843 F. Supp. 748, 750 (D.D.C. 1994) (refusing sanctions based on lack of legal merit and noting that "defendant's stronger charge is that plaintiff's suit... is motivated by an 'improper purpose'"); Bryant v. Brooklyn Barbeque Corp., 130 F.R.D. 665, 670 (W.D. Mo. 1990) (noting that even if it found that the complaint had merit, "the court would find that sanctions must be assessed based on the Rule 11 language prohibiting the filing of a pleading for an improper purpose").

[197] *See* Kruzansky, *supra* note 176, at 1382–85 (stating that of the five circuit courts addressing the issue only the Seventh Circuit has consistently held "that a court may freely impose sanctions" for filing nonfrivolous complaints that were brought for an improper purpose).

[198] 823 F.2d 1073 (7th Cir. 1987).

> Much of [plaintiff's] brief in this court is devoted to a demonstration that it had an objectively sufficient basis for its claims of racial discrimination. Perhaps it can persuade the district court that it did, but this is not enough. Because Rule 11 has a subjective component as well, the district court must find out why [plaintiff] pursued this litigation.[199]

But *Szabo*, like so many other cases touching upon the improper purpose clause, did not directly apply the improper purpose clause to sanction an otherwise meritorious complaint.

One of the rare cases in which a court relied solely upon the improper purpose clause to sanction a plaintiff is *Ballentine v. Taco Bell Corp.*[200] There, Stanley Ballentine, a manager of a Taco Bell restaurant, sued Taco Bell Corporation and Denny Koenig, Ballentine's supervisor, for sexual discrimination in staffing procedures.[201] During discovery, Ballentine acknowledged that he named Koenig as a defendant in order to harass Koenig and to cause Koenig to lose his job.[202] The court found that this intent warranted sanctions under Rule 11 even though Ballentine's claim was arguably colorable and even though Ballentine also had the legitimate motive of wanting to remedy the alleged discrimination:

> I found that Ballentine had made a reasonable inquiry into the facts and law. Despite this, I have found that Ballentine had a dual motive in filing the lawsuit: the legitimate purpose of seeking relief for the loss of his job and the improper purpose of harassing Koenig. Under these circumstances, I conclude that even though the pleading may have been well grounded in law or fact, the fact that it was filed for an improper purpose violates Rule 11.[203]

Ballentine highlights other problems in applying the improper purpose standard. What type of motive is "improper" and must the bad purpose be the only purpose in order to trigger Rule 11 sanctions? The Fourth Circuit has tried to give some guidance on these questions and narrow the potential reach of Rule 11(b)(1):

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[199] *Id.* at 1083. *See also* Mars Steel Corp. v. Continental Bank, 880 F.2d 928, 931–32 (7th Cir. 1989) (en banc) (stating that Rule 11 "has both a subjective and an objective component" and that a paper filed for an improper purpose "is sanctionable whether or not it is supported by the facts and the law, and no matter how careful the prefiling investigation").

[200] 135 F.R.D. 117 (E.D.N.C. 1991).

[201] Ballentine charged that Koenig gave preferential schedules to a female manager because she was female. *Id.* at 119.

[202] *Id.* at 120.

[203] *Id.* at 122.

> The factors mentioned in [Rule 11(b)(1)] are not exclusive. If a complaint is not filed to vindicate rights in court, its purpose must be improper. However, if a complaint is filed to vindicate rights in court, and also for some other purpose, a court should not sanction counsel for an intention that the court does not approve, so long as the added purpose is not undertaken in bad faith and is not so excessive as to eliminate a proper purpose. Thus, the purpose to vindicate rights in court must be central and sincere.[204]

The literal terms of Rule 11, however, are not so limited. It bars "any" improper purpose, and, unlike some of its state counterparts,[205] it does not say that the bad purpose must be the primary purpose.[206] In sum, Rule 11 is broad-sweeping. It has the potential for barring a plaintiff from filing a meritorious complaint even if he has an actual desire to obtain redress, and also if he has some unspecified "improper purpose."

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[204] *In re* Kuntsler, 914 F.2d 505, 518 (4th Cir. 1990). This declaration prompted the *Ballentine* court to later supplement its findings to clarify that Ballentine's bad motive was his primary motive:

> Although Ballentine, at the time of the filing of the complaint, felt that he had a legitimate claim, he also filed the suit in bad faith to harass and intimidate Koenig and in an attempt to make Koenig lose his job with Taco Bell. Ballentine's central purpose in adding Koenig to the lawsuit was to harass him. Ballentine's purpose in naming Koenig to the lawsuit was so excessive as to eliminate any proper purpose. Ballentine's purpose of vindicating rights in court was not central and sincere.

Ballentine, 135 F.R.D. at 125.

[205] *See, e.g.*, CAL. CIV. PROC. CODE § 128.7(b)(1) (West Supp. 2000) (requiring certification that the paper is not filed "primarily" for an "improper purpose").

[206] Federal rulemakers, in amending Rule 11 in 1983, considered but rejected adding the word "primarily" to the improper purpose clause. A proposed draft required that a litigant certify, among other things, that the pleading "is not interposed primarily for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation," but the advisory committee changed the language by deleting "primarily" and by qualifying both the delay ("unnecessarily") and cost ("needless increase") clauses. *See* Letter of Walter R. Mansfield, Chairman, Advisory Committee on Civil Rules, to Judge Edward T. Gignoux, Chairman of the Standing Committee on Rules of Practice and Procedure (Mar. 9, 1982) (on file with author and also available on CIS microfiche #7906-63). Among other things, critics complained that the term "primarily" would immunize motions filed partly to harass or delay. *See* Summary; classified by rule, of public comments on proposed Rule 11 (on file with author and also available on CIS microfiche #7920-05). The advisory committee stated that the reason for the change was "to eliminate any ambiguity arising out of the use of the word 'primarily.'" Mansfield letter *supra*.

c. *Other Civil Pleading Rules Based on Federal Rule 11(b)(1)*

A number of other procedural compilations have rules virtually identical to Federal Rule 11(b)(1). Even the federal courts have elsewhere implemented rules identical to Rule 11.[207] Most states model their procedural system on the federal rules of civil procedure and thus have a rule that mirrors Federal Rule 11.[208] Though some states have not yet "caught up" to the recent changes in Federal Rule 11, almost all states have some form of motive standard modeled after the federal rule, either the delay ban of the 1938 version[209] or the broader "any improper purpose" prohibition of the 1983 and 1993 versions.[210] Only two states

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[207] Rule 9011 of the federal bankruptcy rules is an example. FED. R. BANKR. PROC. R. (Supp. 9011, 11 U.S.C.A. app. IV 1998).

[208] *See generally* Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067 (1994) (listing and discussing the state versions of Federal Rule 11); JEROLD S. SOLOVY ET AL., SANCTIONS IN FEDERAL LITIGATION app. A (1991) (surveying state sanction provisions).

[209] Thirteen states and Puerto Rico have rules that contain certification standards that mirror the delay clause in the 1938 version of Federal Rule 11. *See* ALA. R. CIV. P. 11; CONN. SUPER. CT. R. CIV. §4-2; FLA. R. JUD. ADMIN. 2.060(d); GA. CODE ANN. § 9-11-11(a) (1999); IND. R. CIV. TRIAL P. 11; ME. R. CIV. P. 11; MD. CODE ANN. 1-311(b); MASS. R. CIV. P. 11(a); MISS. R. CIV. P. 11(a); N.M. R. CIV. P. 1-011; OHIO R. CIV. P. 11; PENN. R. CIV. 11; PUERTO RICO R. CIV. P. 11; S.C. R. CIV. P. 11.

[210] Twenty-four states have certification provisions similar to that in the 1983 version of Federal Rule 11. *See* ALASKA R. CIV. P. 11; ARIZ. R. CIV. P. 11; ARK. R. CIV. P. 11; CONN. SUPER. CT. R. CIV. §4-2; HAW. R. CIV. P. 11; IDAHO R. CIV. P. 11; ILL. SUP. CT. R. 137; IOWA R. CIV. P. 80; KAN. CIV. PROC. CODE ANN. § 60-211 (West 1994 & Supp. 1999); KY. R. CIV. P. 11; LA. C.C.P. ART. 863; MICH. R. CIV. P. 2.114(D)(3); MINN. R. CIV. P. 11; MONT. R. CIV. P. 11; NEV. R. CIV. P. 11; N.C. R. CIV. P. 11; OR. R. CIV. P. 17; R.I. R. CIV. P. 11; S.D. R. CT. 15-6-11(a); UTAH R. CIV. P. 11(b)(1); VA. CODE ANN. § 8.01-271.1; WASH. R. CIV. P. 11; W. VA. R. CIV. P. 11(b)(1); WIS. STAT. ANN. § 802.09. Eight states, the District of Columbia and the Virgin Islands have a certification provision similar to that in the 1993 version of Federal Rule 11. *See* DEL. SUPER. CT. R. CIV. P. 11(b)(1); D.C. SUPER. CT. R. CIV. P. 11(b)(1); MO. R. CIV. P. 55.03 SS.03(b)(1); N.J. CT. R.1:4-8; N.D. R. CIV. P. 11(b)(1); OKLA. STAT. ANN. tit. 12, § 2011 (West 1998 & Supp. 2000); TENN. R. CIV. P. 11.02(1); VT. R. CIV. P. 11(b)(1); V.I. R. CIV. P. 11; WY. R. CIV. P. 11. California's certification standard is almost identical to the 1993 federal rule except that it narrows its improper purpose clause to papers filed "primarily" for "an" improper purpose. CAL. CIV. PROC. CODE § 128.7(b)(1) (West Supp. 2000). Nebraska instructs a court to assess attorney's fees and costs if the court finds that "the action or any part of an action was frivolous or that the action or any part of the action was interposed solely for delay or harassment." NEB. REV. STAT. ANN. § 25-824(4) (Michie 1995). New York does not have an attorney signature requirement but instead retains the verification rule of Code pleading and has no motive element. N.Y. C. P.L.R. § 3020 (McKinney 1991). However, New

do not have pleading rules that require a plaintiff to have a proper motive, irrespective of the merit of the suit.[211] Thus, in almost every court in the nation, plaintiffs face an initial procedural ban on access to court if they have "any improper" motive.[212]

2. *State Statutory Efforts to Curb Litigation Abuse*

In addition to their procedural rules, some states have enacted statutes to curb perceived litigation abuse. The statutes vary as to their approach and application. Some set out certification standards, similar to Rule 11, some provide for postlitigation sanctions, and a few take more innovative approaches, such as redefining the underlying suit. Some apply only to particular types of lawsuits or litigants. I do not outline all of the state statutes, but instead discuss a few key examples, all of which have one common element: they potentially restrict or penalize a plaintiff for filing a meritorious suit for an improper motive.

York does have a sanctions provision that roughly approximates the standards of Rule 11 and allows a court to impose sanctions for frivolous conduct, which it defines as:

> [C]onduct is frivolous if: (1) it is completely devoid of merit in law and cannot be supported by a reasonable argument for an extension or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

N.Y. COMP. CODES R. & REG. tit. 22, § 130-1.1.

[211] New Hampshire imposes sanctions against only losing parties and allows a court to enter summary judgment or impose attorney's fees and costs if "it clearly appears . . . that the action or any defense is frivolous or intended to harass or intimidate the *prevailing party*." N.H. REV. STAT. ANN. § 507:15 (1999) (emphasis added). Texas's certification provision links improper purpose with lack of factual and legal merit so that a court must make both findings before it may impose sanctions. TEX. R. CIV. P. 13 (the attorney signature certifies that the action is "not groundless and brought in bad faith or groundless and brought for the purpose of harassment").

[212] As is the case in federal court, only a very few state courts have addressed whether the state provision will support sanctions against a plaintiff who files an otherwise colorable claim for an improper purpose. The New York courts, however, have so applied the New York statute. *See* Tyree Brothers Envtl. Servs., Inc. v. Ferguson Propeller, Inc., 669 N.Y.S.2d 221, 222 (App. Div. 1998) (stating that "the prosecution of a colorable claim for primarily improper purposes constitutes frivolous conduct within the meaning of the court rule [N.Y. COMP. CODES R. & REG. tit. 22, § 130-1.1, discussed *supra* note 210]"); Gordon v. Marrone, 616 N.Y.S.2d 98, 101–02 (same).

a. *General Sanction Statutes*

A number of states supplement their procedural rules with sanction statutes that apply to all civil filings. These statutes are aimed at curbing litigation abuse generally.[213] Many apply to egregious cases, such as claims lacking any merit,[214] but some outlaw improper motive, independent of the merit of the action. Two states at the top of the alphabetical listing, Alabama and Arizona, provide examples.

Alabama's Litigation Accountability Act provides for sanctions against "any attorney or party, or both, who has brought a civil action... that a court determines to be without substantial justification."[215] The statute in turn defines "without substantial justification" as an action that is "frivolous, groundless in fact or in law, or vexatious, *or interposed for any improper purpose*, including without limitation, to cause unnecessary delay or needless increase in the cost of litigation."[216] No reported decisions record the Act's application to a meritorious complaint filed for an improper purpose—indeed, there are very few reported decisions addressing the statute in any application—but the statute's broad terms leave open that possibility.

Arizona has a similar statute.[217] It instructs the trial and appeal courts to assess attorney's fees and expenses and punitive damages in the form of "double damages" if an attorney or party does *any* of a list of proscribed acts,[218] including bringing "a claim solely or primarily for delay or harassment."[219] As in Alabama, there are no reported cases of an Arizona court assessing damages against a plaintiff who filed a meritorious complaint for a bad purpose, but the statute suggests such an application. This pattern is repeated in other states.[220]

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[213] Most of these statutes are supplements to the state's modified version of Rule 11. *See supra* notes 209–10. *See generally* Keeling, *supra* note 208 (surveying and discussing the state supplemental sanctions provisions).

[214] Many, however, trigger sanctions on the merit of the complaint, or both the merit and the motive of the plaintiff. *See, e.g.*, FLA. STAT. ANN. § 57.105(1) (West 1994 & Supp. 2000) (instructing the court to award attorney's fees only to the prevailing party and only where the court finds "that there was a complete absence of a justiciable issue of either law or fact raised by the complaint... of the losing party").

[215] ALA. CODE § 12-19-272 (a) (1995).

[216] *Id.* § 12-19-271(1) (emphasis added).

[217] ARIZ. REV. STAT. ANN. § 12-349 (West 1992).

[218] *Id.* § 12-349(A).

[219] *Id.* § 12-349(A)(2).

[220] *See, e.g.*, MINN. STAT. ANN. § 549.211 (West Supp. 2000) (providing a sanctions procedure almost identical to the 1993 version of Federal Rule 11 in addition to the Minnesota

b. *Vexatious Litigant Statutes*

Some states have enacted statutes aimed at repeat abusers of the judicial system. California's Vexatious Litigant statute, enacted in 1963, is the prime example.[221] It sets forth a procedure by which a court may declare a person to be a "vexatious litigant" and thereafter limit the litigant's access to California state courts. The court can limit access through one of two methods: the court in pending litigation can require the vexatious litigant to post security to cover defendant's costs,[222] or the court can condition the filing of new suits upon prior court approval.[223] This procedure may raise other First Amendment concerns, such as the presumption against prior restraints, but it raises the motive issue in two respects.[224]

First, the statute defines a vexatious litigant based on the litigant's motive. A "vexatious litigant" includes any person who in representing himself in litigation "repeatedly files unmeritorious . . . pleadings . . . *or* engages in other tactics that are frivolous *or* solely intended to cause unnecessary delay."[225] Second, the statute restricts that litigant's subsequent court access based again on his motive. A court may allow a new complaint by this litigant "only if it appears that the litigation has merit *and* has not been filed for the purposes of harassment and delay."[226] Presumably if someone files a meritorious complaint for the purpose of harassing the defendant, that individual cannot go to court. Thus, though the statute is aimed at litigants who file repeated frivolous pleadings, its literal language could restrain plaintiffs based on their motive alone.

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rule of procedure that is modeled on the 1983 version of Rule 11). *See generally* Keeling, *supra* note 208 (listing and discussing the state versions of Rule 11). Some states express the motive standard in a way that is capable of objective interpretation; in other words, whether the effect is one of harassment or delay. *See* IDAHO CODE § 12-123(b) (1998) (defining "frivolous conduct" as conduct that, among other things, "obviously serves merely to harass or maliciously injure another party").

221 CAL. CIV. PROC. CODE §§ 391 et seq. (West 1973 & Supp. 2000).

222 *Id.* § 391.1–391.6.

223 This procedure was added to the security provisions in 1990. *See id.* § 391.7.

224 The federal courts sometimes issue injunctions against those who abuse the systems, under the All Writs Act, 28 U.S.C. § 1651(a) (1994), but these restraints apparently do not turn on motive. *See* Abdul-Akbar v. Watson, 901 F.2d 329, 332 (3d Cir. 1990) (noting that the All Writs Act is a "remedy" that must be "narrowly tailored" when used to enjoin "the filing of *meritless* pleadings") (emphasis added). The propriety of such prior restraints is beyond the scope of this article.

225 CAL. CIV. PROC. CODE § 391(b)(3) (emphasis added).

226 *Id.* § 391.7(b).

c. *Substantive Sanction Statutes*

Some sanction provisions apply only to particular types of lawsuits and are part of the substantive codes. New Mexico, for example, has a provision in its securities laws that imposes sanctions against plaintiffs in state security suits who bring suit "for purposes of harassment."[227] Because these laws are usually included within the particular substantive codes, they are difficult to collect and accurately categorize. Nevertheless, as the New Mexico statute illustrates, they too potentially penalize a plaintiff for having a wrong motive when filing suit.

d. *Anti-SLAPP Statutes*

Finally, some states have enacted a very specific form of restriction on court access, the anti-SLAPP statute. These laws are aimed at a unique harm—the use of lawsuits to deter persons from exercising their First Amendment right to petition. The lawsuits at issue are "SLAPP" suits—suits against public (or political) participation—the paradigm of which is a defamation or trespass suit brought by a real estate developer against persons who protest his development.[228] The supposed intent of the SLAPP plaintiff (the real estate developer) is not necessarily to recover on the claim, but instead to punish or at least deter the protesters through imposition of the cost and burden of defending civil litigation. These suits and the state efforts to regulate their use thus raise First Amendment and Petition Clause issues on behalf of both the plaintiff and the defendant.

Most anti-SLAPP statutes protect defendants through extension of a form of statutory petitioning immunity.[229] In other words, the laws create an absolute or qualified immunity to suits based on the exercise of a person's petitioning right.[230] They resemble to some extent the protection in *New York Times*, applied

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[227] N.M. REV. STAT. ANN. § 58-13B-40 (H) (1978).

[228] The term "SLAPP" was coined in 1988 by Professors George Pring and Penelope Canan. *See generally* Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC'Y REV. 385 (1988); Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988). Many other scholars have joined in the analysis of such suits in the last decade. *See generally* Joseph W. Beatty, Note, *The Legal Literature on SLAPPS: A Look Behind the Smoke Nine Years After Pring and Canan First Yelled "Fire!"*, 9 U. FLA. J.L. & PUB. POL'Y 85 (1997) (collecting SLAPP commentary).

[229] For a survey and discussion of the various anti-SLAPP statutes, as of January 1998, see generally Barbara Arco, Comment, *When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. MIAMI L. REV. 587 (1998).

[230] *See* MINN. STAT. ANN. § 554.03 (West Supp. 2000) ("Lawful conduct or speech that

to petitions in *McDonald v. Smith*, in that a person cannot be held liable in tort for certain exercises of their First Amendment rights of free speech or petition.[231] Most therefore define the substantive cause of action and do not purport to directly regulate the motive of the SLAPP plaintiff.[232]

Georgia is an exception. Georgia has an anti-SLAPP statute that turns on the SLAPP plaintiff's motive.[233] Georgia requires a person who is asserting a SLAPP claim, which it defines as a claim premised on the defendant's exercise of his First Amendment rights of speech or petition, to accompany the complaint with a written verification. That verification mirrors the certification standards of Federal Rule 11 and requires the SLAPP plaintiff to certify "that the claim is not interposed for any improper purpose such as to suppress a person's or entity's right of free speech or right to petition government, or to harass, or to cause unnecessary delay or needless increase in the cost of litigation."[234] Thus, this statute theoretically imposes a motive restriction on filing suit even if the suit is otherwise meritorious.[235]

3. *A Court's Inherent Power to Sanction*

In addition to the authority conferred by procedural rules and statutes, courts

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is genuinely aimed in whole or in part at procuring favorable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights.").

[231] For a discussion of *New York Times* and *McDonald*, see *supra* notes 97–100; *infra* at notes 346–54 and accompanying text.

[232] In this article, I address only motive restrictions and do not address the propriety of such restrictions.

[233] *See* GA. CODE ANN. § 9-11-11.1(b) (Supp. 1999).

[234] *Id.* § 9-11-11.1(b).

[235] The Georgia statute has a complex structure, and its application to an otherwise meritorious complaint is not readily apparent. First, the statute applies only in cases in which the plaintiff is asserting a claim premised on the defendant's arguable exercise of his right of speech or petition. *See id.* Second, the verification standard requires such a plaintiff to verify his proper motive and the other elements of the Federal Rule 11(b) certification, and also to certify that "the act forming the basis of the claim is not a privileged communication under paragraph (4) of Code section 51-5-7." *Id.* Third, § 51-5-7 defines privileged communications to be "[s]tatements made in good faith" as part of an exercise of the speech or petition rights "in connection with an issue of public interest or concern." *Id.* §§ 51-5-7 & 9-11-11.1(c). Thus, the statute could bar a SLAPP plaintiff's access to court, based on his motive alone, if his suit states either a nonfrivolous claim based on the defendant's bad faith exercise of the speech or petition rights or a nonfrivolous claim based on the defendant's exercise of speech or petition rights on nonpublic issues. In these instances the statute would impose a motive restriction on the SLAPP plaintiff.

have inherent power to sanction litigants who abuse the court system.[236] The sanction takes many forms, including an award of attorney's fees.[237] Most courts, as reflected in the *DASA* case discussed above,[238] impose such sanctions only in extraordinary cases, for example, when the party has acted in bad faith *and* filed a frivolous pleading.[239] Under this majority approach, this form of sanction does not restrict court access based solely on the plaintiff's motive.

However, case law and academic commentary suggest that a court could use its inherent power to sanction a litigant solely for his motive. One such suggestion came from the Supreme Court, in dictum in *Chambers v. NASCO, Inc.*[240] There, the Court affirmed the continuing power of federal trial courts to invoke their inherent power, as opposed to Rule 11 and other procedural rules and statutes, to impose sanctions against a litigant who has "acted in bad faith, vexatiously, wantonly or for oppressive reason."[241] In a footnote, the Court equated this sanction to the improper purpose clause of Rule 11(b)(1): "the bad-faith exception resembles the third prong of Rule 11's certification requirement,

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[236] Most discussions of the inherent power of the court to sanction have addressed the power of federal courts to do so. State law would determine the ability of state courts to exercise a similar power.

[237] This inherent power is one of the few exceptions to the so-called American rule against imposition of attorney's fees. The Court's most thorough discussion of the American rule and its exceptions is in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). There, the Court noted that a court may award attorney's fees "when the losing party has 'acted in bad faith, vexatiously, wantonly or for oppressive reasons.'" *Id.* at 258–59; *see also* Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980) (noting in dictum that attorney's fees can be awarded when "the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons").

[238] *See supra* notes 186–90 and accompanying text.

[239] The Second Circuit is a leading proponent of this view:

> To ensure . . . that fear of an award of attorneys' fees against them will not deter persons with colorable claims from pursuing those claims, we have declined to uphold awards under the bad-faith exception absent *both* "'clear evidence' that the challenged actions 'are entirely without color, and [are taken] for reasons of harassment or delay or for other improper purposes,'" and 'a high degree of specificity in the factual findings of [the] lower courts.'

Dow Chemical Pacific Ltd. v. Rascator Maritime S.A., 782 F.2d 329, 344 (2d Cir. 1986) (citations omitted) (emphasis added); *see also* discussion of *DASA* case *supra* at notes 186–90. Even the Court in *Alyseka* referred to the bad faith exception as applying against losing parties and thus suggested at least a winning claim limitation on the ability of courts to sanction parties for their motives. 421 U.S. at 258–59.

[240] 501 U.S. 32 (1991).

[241] *Id.* at 50.

which mandates that a signer of a paper filed with court warrant that the paper 'is not interposed for any improper purpose.'"[242] Though no court apparently has used this power to sanction a plaintiff who filed a meritorious complaint for a bad reason,[243] this dictum and a few other authorities suggest that it is a possibility even against plaintiffs who prevail on their claims.[244]

4. *State Common Law Tort of Abuse of Process*

States also punish plaintiffs through a variety of litigation torts in which the original defendant sues the former plaintiff for damages arising from the prior suit. The common law[245] tort of abuse of process applies to litigants who use litigation for ulterior purposes. The Restatement defines the tort as "[o]ne who uses a legal process, whether criminal or civil, against another primarily to

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[242] 501 U.S. at 46 n.10. This was dictum. The defendants in *Chambers* engaged in a number of activities outside court in order to frustrate the proceedings, but the trial court concluded that Rule 11 did not apply to these acts because the rule reached only court filings. The Supreme Court stated that trial courts retain additional "inherent power" to sanction litigants for such activity. *Id.* at 50.

[243] A few courts have assessed attorney's fees against prevailing parties, but these awards have been against winning defendants who somehow abused the litigation process on their way to victory. *See* Weaver v. Bowers, 657 F.2d 1356, 1362 (3d Cir. 1980) (assessing fees against prevailing defendants who unjustifiably delayed in raising defense of nonretroactivity); McEnteggart v. Cataldo, 451 F.2d 1109, 1111–12 (1st Cir. 1971) (assessing fees against defendant college trustees who ultimately prevailed on a dismissed professor's employment claim, but who unreasonably forced plaintiff to file suit to get a statement of the reasons why his contract was not renewed).

[244] *See In re* TCI Ltd., 769 F.2d 441, 445 (7th Cir. 1985) (noting in dictum that a court's inherent power to sanction has alternative objective and subjective components and allows imposition of attorney's fees, like damages in the tort of abuse of process, against a plaintiff "who pursues a plausible claim because of the costs the suit will impose on the other side, instead of the potential recovery on the claim" and against "[e]ven those who prevail"); Wright v. Jackson, 522 F.2d 955, 958 (4th Cir. 1975) (characterizing *Alyeska Pipeline Serv. Co.*, 421 U.S. 240 (1975), discussed *supra* note 237, as creating an "obstinacy" exception to the American rule and noting that "even a winner may have to pay obstinacy fees"). Commentators argue that a court has power to sanction even meritorious filings if they were made in bad faith. *See* SOLOVY, *supra* note 208, § 4.03, 4-4 to 4-5 (1991) ("under the inherent power of the court, harassment and obstructive conduct may result in sanctions regardless of the merits of any positions taken"); JOSEPH, SANCTIONS: THE FEDERAL LAW OF ABUSE § 26(C) (2d ed. 1994) (noting language in *Alyeska Pipeline Serv. Co.*, discussed *supra* note 237, that awards are to be made only to losing parties and stating that "inherent power sanctions, however, are not so limited" and "culpable prevailing parties may be sanctioned").

[245] Some states have codified this tort and condensed it with others to create a single statutory cause of action. *See* GA. CODE ANN. §§ 51-7-81 & 51-7-85 (Supp. 1999).

accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."[246]

The tort of abuse of process is related to the tort of "wrongful civil proceedings," formerly called malicious prosecution,[247] but the tort of wrongful civil proceedings requires that the underlying suit be brought "without probable cause," or, in other words, that the suit be without objective merit.[248] Thus, liability under that tort requires lack of merit. By contrast, motive, not merit, is the distinctive element of the tort of abuse of process:

> The gravamen of the misconduct [in the tort of abuse of process] . . . is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them.[249]

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[246] RESTATEMENT (SECOND) OF TORTS § 682 (1977).

[247] The Restatement defines the tort of wrongful civil proceedings as:

> One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if:
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> (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and
>
> (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

RESTATEMENT (SECOND) OF TORTS § 674.

[248] The Restatement defines "probable cause" using a reasonableness standard of merit:

> One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either
>
> (a) correctly or reasonably believes that under those facts the claim may be valid under the applicable law, or
>
> (b) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information.

Id. § 675.

[249] *Id.* § 682, cmt. a. The Restatement comments further explain the nature of the tort:

Indeed, Professor Prosser credits this distinction as the reason why English courts created the tort of abuse of process in the mid-nineteenth century.[250]

Many courts are reluctant to apply the tort of abuse of process to the filing of a suit that is otherwise meritorious but done for an ulterior purpose. Some courts base this limitation on the reasoning that the abused "process" must come from the court, not the party, and therefore does not include the party's filing of a civil suit.[251] Other courts reason that when a plaintiff serves process on a defendant,

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> The significance of [the word "primarily"] is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant. Thus . . . the instigation of justified bankruptcy proceedings [does not] become abuse of process merely because the instigator hopes to derive benefit from the closing down of the business of a competitor.
>
> For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended. The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it.

RESTATEMENT (SECOND) OF TORTS § 682 cmt. b.

[250] Professor Prosser describes the history of the tort of abuse of process:

> The action for malicious prosecution, whether it be permitted for criminal or civil proceedings, has failed to provide a remedy for a group of cases in which legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed. In such case a tort action has been developed for what is called abuse of process. In the leading English case [*Grainger v. Hill*, 132 Eng. Rep. 769 (1838)] the defendant had the plaintiff arrested under civil process in order to compel him through duress to surrender the register of a vessel, without which the plaintiff could not go to sea. Although malicious prosecution would not lie because the proceeding had not been terminated, the court refused to permit its process to be misused for such an end, and held the defendant liable. This decision has been widely followed, and the tort is now well established.

W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 121, at 897 (5th ed. 1984). *See infra* note 426 (discussing the *Grainger* case).

[251] *See* Blue Goose Growers, Inc. v. Yuma Growers, Inc., 641 F.2d 695, 697 (9th Cir. 1981) (noting that the abuse of process tort "focuses on '[t]he purpose for which the process is used, *once it is issued*,'" and that for the same reason, the filing of a suit is not enough); Business Publications, Inc. v. Stephen, 666 A.2d 932, 933–34 (N.H. 1995) (holding that the institution of a suit is an action by the party, not a process of the court, and that the mere filing of a suit therefore cannot support the tort of abuse of process); Holiday Magic Inc. v. Scott, 282 N.E.2d 452, 456 (Ill. App. Ct. 1972) ("Pleading must be distinguished from process. . . . Process is issued by the court, under its official seal.").

he is fulfilling the purpose of process and therefore is not "abusing" process.[252] Still others distinguish between an outside threat—one akin to extortion—and the filing of the underlying suit and hold that the threat, not the complaint filing alone, constitutes the tort.[253] Finally, some courts hold that application of the abuse tort to the filing of a meritorious complaint would improperly side-step the stricter standards of the tort of wrongful civil proceedings—primarily, the probable cause or merit standard—thereby rendering the latter tort superfluous and weakening its protection of plaintiffs.[254] This rationale resembles the right to petition argument,[255] which I explore in more detail in Part IV of this Article.

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[252] *See* Jacobsen v. Garzo, 542 A.2d 265, 268 (Vt. 1988) ("[T]he filing of the lawsuit and the summons which notified plaintiff of the action accomplished that which the law intends. There was no improper or unauthorized use of legal process.").

[253] The New Hampshire Supreme Court explained this view of the abuse tort:

> [I]mproper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.

Cabletron Sys., Inc. v. Miller, 662 A.2d 304, 306 (N.H. 1995) (quoting KEETON, ET AL. *supra* note 250). *See also* Heck v. Humphrey, 512 U.S. 477, 486 n.5 (1994) ("It is true that favorable termination of prior proceedings is not an element of that cause of [an abuse of process] action .... The gravamen of that tort is not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends.").

[254] The California Supreme Court explained this rationale for limiting the tort of abuse of process:

> If, as [the plaintiff] maintains, the filing of an action for an improper 'ulterior' purpose itself sufficient to give rise to an abuse of process action, the 'lack-of-probable-cause' element of the malicious prosecution tort would be completely negated.... Because the lack-of-probable-cause requirement in the malicious prosecution tort plays a crucial role in protecting the right to seek judicial relief, [the court] agree[s] with the prior decisions which have concluded that this element may not be circumvented through expansion of the abuse of process tort to encompass the alleged improper filing of a lawsuit.

Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. 728 P.2d 1202, 1209–10 (1986).

[255] The court in *Baker Driveaway Co. v. Bankhead Enterprises, Inc.*, 478 F. Supp. 857 (E.D. Mich. 1979), for example, dismissed claims for abuse of process, as a "thinly veiled" claim for malicious prosecution:

Despite this reluctance, some courts hold that the tort of abuse of process may be premised on the mere filing of a suit, even one that is successful and even when the plaintiff has mixed motives in filing suit.[256] In *Poduska v. Ward*, an employer and his former employee fought over who had to pay operating expenses of an airplane.[257] The employer sued for breach of contract, and the jury awarded him slightly over $1000.[258] The employee counter-claimed for abuse of process, and the jury awarded the employee almost $22,000 on this claim of abuse.[259] The employee's only evidence of abuse was that the employer gained emotional satisfaction from the suit and wanted to cause the employee to feel awkward in the industry.[260] The First Circuit affirmed the award for abuse of process, even though the employer had won the underlying claim.[261] The

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> At the outset, the court would like to emphasize the fact that the actions complained of in count 2 involve exclusively the efforts of the defendants to convince a governmental agency to exercise its power in certain ways. Our system of government places a high value on the freedom of the public to petition the government, and such activity will not be curtailed without some extraordinary showing of abuse.

Id. at 859 (*citing California Motor Transport* and *Noerr*). *See also* Jacobsen v. Garzo, 542 A.2d 265, 268, 269 (Vt. 1988) (holding that the tort of abuse of process did not apply to the mere filing of a complaint, even if done maliciously: "Free and uninhibited access to the courts is an important right of all citizens.... Remedies are available to those who are harmed by abuses of this right of access to legal process. However, those remedies are carefully limited so as not to produce an unwarranted chilling effect on the exercise of the right.").

256 An interesting example of this position is *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1983). There, Judge Posner in dictum used the tort of abuse of process as a basis for arguing that the Petition Clause does not immunize all meritorious pleadings:

> If all nonmalicious litigation were immunized from government regulation by the First Amendment, the tort of abuse of process would be unconstitutional—something that, as far as we know, no one believes. The difference between abuse of process and malicious prosecution is that the former does not require proving that the lawsuit was brought without probable cause.

Id. at 471.

257 895 F.2d 854 (1st Cir. 1990).

258 *Id.* at 855.

259 *Id.*

260 *Id.* at 856.

261 The court seemed to rely on the fact that the employer's recovery—$1,105.80—was small in comparison to his original claim—in excess of $70,000—and that the employee had conceded that he owed small amounts of operating expenses. *Id.* at 857. Nonetheless, the court noted that under the Restatement, recovery, in any form, does not defeat the tort of abuse of process. *Id.*

employer's "bad" motive constituted abuse. Thus, at least some courts impose liability under the tort of abuse of process against a plaintiff who files a *winning* claim if that plaintiff had an abusive motive in filing the suit.

5. *Regulation of Lawyers*

Most states and court systems also regulate court access by setting standards of conduct for lawyers and thus the plaintiffs they represent. This regulation of lawyers takes place primarily at the state level. States differ in the format and content of their rules of conduct, but most loosely follow one of the American Bar Association's model proposals—either the Model Code of Professional Responsibility or the Model Rules of Professional Conduct.[262] In addition, the federal government regulates lawyers to some degree, but this regulation tends to mirror that of the states. A notable exception is section 1927 of the Federal Judicial Code, which punishes lawyers who unnecessarily prolong litigation in federal court.

a. *State Codes and Rules of Professional Conduct*

As I discuss in Part III.A, the legal ethics codes may have been the origin of the duty not to bring civil claims for bad motives. Over the years, notions of proper lawyer behavior have changed. The ethics codes are moving away from lofty statements of aspiration toward more precise and practical rules. As part of this reform, the American Bar Association has suggested that it wants an objective, rather than subjective, standard for establishing the circumstances under which a lawyer may properly file a complaint. Thus, ironically, the ethics codes which started the motive restriction on filing complaints are now abandoning that admonition. Yet, despite these efforts at reform, the improper motive standard arguably survives in most codes of professional conduct.[263]

As I note in my discussion of the history of motive restrictions, the ABA's first statement of legal ethics, the 1908 American Bar Association's Canons of Professional Ethics, followed the Alabama example and stated, in Canon 30, a

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[262] Most states use the Model Rules format which the ABA adopted in 1983, as a replacement for the 1970 Model Code. The Model Code replaced the 1908 Canons. *See generally* STEPHEN GILLERS & ROY SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS (1999). The ABA currently is reassessing the Model Rules in a project called "Ethics 2000." For the ABA website that reports on the status of this reform see American Bar Assoc. Commission on the Evaluation of the Model Rules of Professional Cond uct (visited Apr. 10, 2000) <http://www.abanet.org/cpr/ethics2k.html>.

[263] For a detailed discussion of the motive elements in the professional rules, see Andrews, *supra* note 11.

motive limitation on filing civil suits.[264] In 1970, when the ABA issued the replacement to the Canons, the Model Code of Professional Responsibility, it modified slightly this motive prohibition. Disciplinary Rule (DR) 7-102(A)(1) of the Model Code provides that in the representation of a client, a lawyer shall not "[f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."[265]

The meaning of this rule is open to question. DR 7-102(A) departs from the "intended merely to harass" language of Canon 30,[266] and substitutes a "serves merely to harass " standard language that would seem to suggest an effect test. Nevertheless, DR 7-102 arguably also would bar an attorney from filing a complaint for the sole purpose of harassing the defendant. As was true with the Alabama Code,[267] the "obvious" language would suggest that the client's purpose is key. In other words, if the lawyer knew that his client wanted only to harass the defendant then the lawyer would know that the pleading would serve merely to harass.[268] To be sure, this is not the only reading of DR 7-102(A), but a lawyer might so interpret the rule.

In 1983, the ABA again revamped its code in an effort to move to more concrete rules. The new "Model Rules of Professional Conduct" adopted a supposed "frivolous" standard for filing claims. Model Rule 3.1 states: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[269] This move, however, did not spell the end for motive restrictions in the professional rules of conduct.

First, not all states have adopted Model Rule 3.1. Some states continue to follow the Model Code and thus impose the "harass and maliciously injure" standard.[270] In addition, some states have adopted the Model Rules format but

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[264] *See supra* note 145.

[265] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1970).

[266] *See supra* note 145.

[267] *See supra* note 141.

[268] On the other hand, if the lawyer, as opposed to the client, wanted to harass the defendant, and the client had a good intention to recover, the pleading likely would not meet the rule's qualification that the pleading serve merely to harass.

[269] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1999) (entitled "Meritorious Claims and Contentions").

[270] New York, for example, still generally follows the Model Code approach and retains its version of Model Code DR 7-102(A)(1). *See* N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1993); *see also* GILLERS & SIMON, *supra* note 262 (reporting that as of 1999,

have retained the Model Code rule for filing claims. For example, Alabama has adopted the Model Rules generally, but it has modified its version of Rule 3.1(a) so that it is virtually identical to the DR 7-102(A)(1).[271]

Moreover, even Model Rule 3.1 arguably retains a motive prohibition. The official comments to Model Rule 3.1 define a "frivolous" suit as including an improperly motivated but otherwise meritorious claim:

> The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. *The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or,* if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.[272]

The comment clarifies the ambiguity of its predecessor DR 7-102(A). Purpose, and not mere effect, is an element, and the relevant purpose is that of

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"about forty jurisdictions have adopted substantial portions of the Model Rules" and that "several states, including California, New York, Oregon, and Vermont, have rejected the Model Rules" though some have included isolated portions of the Model Rules).

[271] ALABAMA RULES OF PROFESSIONAL CONDUCT Rule 3.1(a) (1990). The only difference is that Alabama has made the rule's language gender neutral.

[272] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1, cmt. 2 (1999) (emphasis added). Furthermore, the Model Rules, in comparing Rule 3.1 to the Model Code, state that:

> Rule 3.1 is to the same general effect as DR 7-102(A)(1), with three qualifications. First, the test of improper conduct is changed from "merely to harass or maliciously injure another" to the requirement that there be "reasonable basis for" the litigation measure involved that is "not frivolous." This includes the concept stated in DR 7-102(A)(2) that a lawyer may advance a claim or defense unwarranted by existing law if "it can be supported by good faith argument for an extension, modification, or reversal of existing law." Second, the test in Rule 3.1 is an objective test, whereas DR 7-102(A)(1) applied only if the lawyer "knows or when it is obvious" that the litigation is frivolous. Third, Rule 3.1 has an exception that in a criminal case . . . the lawyer may put the prosecution to its proof even if there is no nonfrivolous basis for defense.

Id. at 16–17. This description of the change could be read as retaining the subjective element of the code. Under this view, the "first" change expanded the definition of prohibited claims to include all frivolous claims, but it also included those brought to harass or injure. The "second" change substituted a "should have known" standard for the former standard of actual knowledge or reckless lack of knowledge (i.e., the "obvious" clause).

the client.

Although this comment is not binding authority,[273] it certainly could prompt a reasonable lawyer or court to read Model Rule 3.1 as imposing a motive barrier to filing factually and legally meritorious claims. The history of the rule does little to refute this reading. One report says that the intent of the ABA rulemakers in drafting Model Rule 3.1 was to track the law of procedure,[274] but as discussed with respect to Rule 11 above,[275] the procedural law imposes both an objective standard for merit and a broad improper purpose prohibition. In sum, a motive element still lingers in most state professional rules for lawyers, whether under the Model Code or the Model Rules approach. Virtually all lawyers are under a professional obligation to not file civil suits, even meritorious and winning claims, for an improper motive.

b. *Federal Rules of Professional Conduct*

The federal government sets ethical standards for lawyers practicing before federal courts or agencies.[276] These standards, however, do not significantly depart from that of the states with regard to motive limitations on civil filings. Most federal courts simply adopt the rules of conduct applicable in the state in

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[273] The "Scope" section of the Model Rules of Professional Conduct explains that the comments "are intended as guides to interpretation, but the text of each Rule is authoritative." *Id.* at 8.

[274] At the February 1983 Midyear Meeting of the ABA House of Delegates, Professor Geoffrey Hazard, the reporter for the Commission on Evaluation of Professional Standards, described the Commission's aim in drafting Model Rule 3.1:

> Professor Hazard pointed out that the proposed rule required a minimum of merit with regard to both claims in litigation and contentions outside the litigation sphere on behalf of a client. A "not frivolous" standard was adopted rather than one based on the concepts "harass" or "maliciously injure" to track the standard generally used and defined in the law of procedure.

ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 119 (1987).

[275] *See supra* Part III.B.1.

[276] The federal government also sets ethical standards for lawyers who are employed by the government, but these typically address questions of confidentiality and conflicts of interest and do not set standards for the filing of a civil complaint. *See generally* GILLERS & SIMON, *supra* note 262, at 631–93 (describing and collecting selected federal statutes and regulations governing conflicts of interests and confidentiality of federally employed lawyers).

which they sit and some use the ABA Model Rules.[277] Though there is some effort to develop one national set of rules of professional conduct for lawyers practicing in federal court, the concept is subject to debate and a national code has not yet come to pass.[278] This means that a lawyer who practices in federal court is under essentially the same standards as when he is practicing in state court, including an arguable ban on harassing intent.

c. *The Federal Vexatious Lawyer Statute (Section 1927)*

Congress also has enacted section 1927 of the Judicial Code, a national procedural statute that regulates the conduct of lawyers in federal courts.[279] The statute imposes sanctions on lawyers (not their clients) who unnecessarily prolong judicial proceedings. It provides: "Any attorney or other person admitted to conduct cases in any court of the United States ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."[280] Courts have long debated how

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[277] For example, the local rules of all three United States District Courts in Alabama provide that attorneys admitted to practice in the respective districts shall be governed by the Alabama Rules of Professional Conduct to the extent that they are not inconsistent with any other local rules of the district. *See* RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, Rule 83.1(f) (1993); RULES OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, Rule 83.1(f) (1998); RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, Rule 83.5(f) (1979). The Eleventh Circuit, on the other hand, uses both the ABA's Model Rules and state rules, but provides that the Model Rules will govern when there is a conflict. *See* RULES OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, ADDENDUM EIGHT: RULES GOVERNING ATTORNEY DISCIPLINE IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT Rule 1 (1987). For a listing and discussion of the approach of each federal court as of 1995, see Linda Mullinex, *Multiforum Federal Practice: Ethics and Erie*, 9 GEO. J. LEGAL ETHICS 89, 98–113 (1995).

[278] *Compare* Fred Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 345 (1994) (advocating a national code of conduct for lawyers practicing in all courts) *with* Geoffrey Moulton, *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 117 (1997) (criticizing the federalization movement).

[279] 28 U.S.C. § 1927 (1994). The predecessor to § 1927 was enacted in 1813. The 1813 version provided that any person who "multiplied the proceedings in any cause fore the court ... so as to increase costs unreasonably and vexatiously" could be held liable for "any excess of costs so incurred." Act of July 22, 1813, 3 Stat. 21.

[280] 28 U.S.C. § 1927 (1994). Congress also amended § 1927 in 1980 in order to allow an award of attorney's fees, following the decision in *Roadway Express Inc. v. Piper*, 447 U.S. 752, 759 (1980), in which the Court construed the original statute as allowing only taxable costs, not attorney's fees. *See* H.R. CONF. REP. NO. 96-1234, at 8–9 (1980); *see also* JOSEPH,

to interpret and apply section 1927 and that debate includes whether its sanctions apply to meritorious complaints.

First, the circuits are split as to whether the filing of any initial complaint, as opposed to later pleadings and papers, is sanctionable under section 1927.[281] Those that say the filing of a complaint is not sancitonable rely on the language of the statute and hold that an initial complaint commences rather than "multiplies" a proceeding.[282] The apparent majority of scholars and courts, however, rely upon the history of the statute and hold that section 1927 may apply to the filing of some initial complaints. Congress enacted the statute in part due to a concern that United States Attorneys were filing piecemeal litigation in order to earn higher compensation.[283] Some observers read this history as allowing sanctions against complaints generally,[284] but others read it more narrowly and limit section 1927 sanctions to the relatively rare cases in which the plaintiff filed unnecessary multiple complaints rather than a single suit.[285]

Second, even if the initial complaint is subject to section 1927, authorities are split as to whether mere bad motive is enough to trigger its sanctions. The statutory test is whether the lawyer "multiplies the proceedings . . . unreasonably

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supra notes 244, at 315–18.

281 *See* JOSEPH, *supra* note 244, at 351–53, 383–87 (surveying split in authorities).

282 *See* Yagman v. Baden, 796 F.2d 1165, 1187 (9th Cir. 1986) ("Section 1927 does not apply to initial pleadings, since it addresses only the multiplication of proceedings."); Sussman v. Bank of Israel, 154 F.R.D. 68, 71 n.2 (S.D.N.Y. 1994) (applying Rule 11 sanctions to nonfrivolous complaint filed for an improper purpose, but adopting a "stricter construction" of § 1927 and holding that a complaint is not sanctionable because it "initiates a proceeding" and does "not 'multiply' an existing one"), *rev'd on other grounds*, 56 F.3d 450, 459 (2d Cir. 1995) (affirming denial of § 1927 sanctions on ground that filing of complaint at issue was not in bad faith or for other bad purpose).

283 *See Roadway Express*, 447 U.S. at 759 n.6 (recapping the history of § 1927 and noting that United States Attorneys "who were paid on a piecework basis, apparently had filed unnecessary lawsuits to inflate their compensation").

284 *See In re* TCI Ltd., 769 F.2d 441, 448 (7th Cir. 1985) (reviewing 1980 legislative history and holding that a court has authority to issue § 1927 sanctions for the filing of the initial complaint because "Congress rejected the theory that the common litigant gets one free pleading"); *In re* Keegan, 154 F.R.D. 237, 240 (N.D. Cal. 1994) (noting that though the "statutory language implies that it covers conduct taking place during the pendency of an action, it has also been applied to the improper filing of a complaint").

285 *See* Kerner v. Cult Awareness Network, 843 F. Supp. 748, 750 (D.D.C. 1994) (refusing to impose sanctions under both Rule 11 and § 1927 but noting that § 1927 sanctions might be applicable to the "filing of identical lawsuits . . . . in various jurisdictions . . ." if "plotted . . . in bad faith"); McLaughlin v. Bradlee, 803 F.2d 1197, 1205 (D.C. Cir. 1986) (imposing sanctions under Rule 11 and § 1927 for the filing of a lawsuit that raised virtually identical claims to those previously raised and rejected in other state and federal suits).

and vexatiously." One interpretation of the "unreasonably" language is that the motion or pleading must be objectively baseless. In other words, an otherwise meritorious motion or pleading cannot "unreasonably" multiply the proceedings. A few circuits follow this view,[286] but the majority appears to hold that a filing made for the purpose of delay violates section 1927 even if the filing has merit.[287] Indeed, the Supreme Court, in dictum, interpreted section 1927 as potentially subjecting *winning* papers and pleadings to liability. The Court stated that "section 1927 does not distinguish between winners and losers, or between plaintiffs and defendants. The statute is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned only with limiting the abuse of court processes."[288]

Finally, to the extent that section 1927 addresses subjective motive, it is ambiguous as to whether that proscribed motive is that of the lawyer or his client. It unquestionably would pick up the lawyer's motive, since the rule is aimed at lawyers, but it likely also would bar a lawyer who acts to fulfil his client's ill motive. Thus, section 1927 could impose liability on a plaintiff who files a complaint for the improper purpose of delay or imposition of costs even if that complaint states a winning claim.

C. *Potential Indirect Controls on Court Access*

In addition to the court procedure and professional rules, many laws and statutes outside of the litigation context arguably limit the motives with which a plaintiff may permissibly file a civil lawsuit. These laws are aimed at general "evils," such as discrimination, and not the integrity of court process. These substantive statutes typically define the prohibited conduct broadly as

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286 *See, e.g.*, Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986) (holding that sanctions under § 1927, like those under the court's inherent power, require "that the challenged actions [be] entirely without color" and taken for improper reasons) (quoting *Dow Chem. Pac. Ltd. v. Rascator Maritime S.A.*, 782 F.2d 329, 344 (2d Cir. 1986).

287 *See, e.g.*, *Yagman*, 796 F.2d at 1187 ("[D]amages under section 1927 are appropriate where there is no obvious violation of the technical rules, but where, within the rules, the proceeding is conducted in bad faith for the purpose of delay or increasing costs."); *In re* TCI Ltd., 769 F.2d 441, 441–47 (7th Cir. 1985) (holding that "[e]ven those who prevail may be liable for fees if in bad faith they cause their adversaries to bear excessive costs"); *see also* JOSEPH, *supra* note 244, at 392 ("conduct that, viewed under an objective standard, evinces the intentional or reckless pursuit of a claim, defense of position (1) that is, or should be, known by the lawyer to be unwarranted in fact or law, or (2) that is advanced for the primary purpose of obstructing the orderly progress of a litigation"); Schwarzer, *supra* note 183, at 195 (noting that the improper purpose clause of Rule 11 "is similar to 28 U.S.C. § 1927").

288 *Roadway Express*, 447 U.S. at 762.

"intimidation" or "interference," often with motive being the only narrowing factor in the statute. In each, the proscribed motive is targeted to the substantive issue at hand. The precise number of these laws may be impossible to determine because they are spread throughout the code compilations of every jurisdiction. Nevertheless, innovative plaintiffs have already identified some key examples by attempting to base liability on the defendant's earlier filing of civil claims against them. In most of these cases, courts have limited application of the law so as to avoid a Petition Clause problem. In other words, at least some courts already have done what this Article argues all courts should do. I list the statutes here because the narrowing interpretation is not yet uniform and because the literal terms of the laws could prohibit the filing of a complaint for an improper purpose regardless of the merit of the complaint.

1. *Antitrust and Unfair Trade Statutes*

Absent the restrictive reading dictated in *California Motor Transport* and *Professional Real Estate Investors*, the antitrust laws would punish the filing of a meritorious civil lawsuit for an anticompetitive motive, if such filing met the other elements of an antitrust violation. Section 1 of the Sherman Act prohibits "[e]very contract, combination..., or conspiracy, in restraint of trade or commerce."[289] Section 2 of the Sherman Act punishes "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce...."[290] State antitrust laws, as well as other state unfair trade laws, have similar provisions.[291]

These laws have the potential for restricting court access because a lawsuit could constitute a restraint of trade, an attempt at monopolization, or other unfair trade practice. Take, for example, a group of truckers, who file adjudicatory protests in order to block issuance of operating licenses to a competing trucker. They would violate the literal terms of the Sherman Act if they intended to restrain competition and were successful. This is what happened in *California Motor Transport Co. v. Trucking Unlimited*.[292] There, the truckers' claims were baseless,[293] but without a narrowing construction of the Sherman Act, its terms would apply equally to meritorious claims, even protests that ultimately

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289 15 U.S.C. § 1 (1994).

290 *Id.* § 2.

291 *See generally* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ch. 2B (Aspen Supp. 1997). *See also* cases collected at note 59.

292 404 U.S. 508 (1972).

293 *See id.* at 509.

prevailed. To be sure, the Supreme Court has limited the federal antitrust laws to avoid such a result, but the Court did not address and therefore did not purport to so limit the many state antitrust and related laws.

2. *Labor Statutes.*

The Court in *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board* narrowly read the NLRA to avoid collision with the Petition Clause. The NLRA provides that it is an "unfair labor practice for an employer—

> to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [section 7 of the NLRA, which guarantees employees the right to self-organize, form unions, and engage in other concerted actions of their mutual aid or protection]; [or] . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this chapter.[294]

By stating its prohibitions in broad terms, such as "interfere" or "otherwise discriminate," the Act sweeps up any number of activities, including the filing of a lawsuit, if done for retaliatory purposes.

Bill Johnson's Restaurants provides a good example.[295] In that case, the employer filed a defamation claim against its employees, and the National Labor Relations Board found that it did so with the intent to penalize employees for picketing and filing a complaint with the Board. The Board declared the employer's suit to be an unfair labor practice in violation of the NLRA. This finding did not depend on the status or success of the underlying defamation claim, but instead turned principally on the "retaliatory purpose" of the employer.[296] Indeed, it was the position of the Board that retaliatory motive, not lack of merit of the underlying suit, was the "*only* essential element . . . ."[297] Again, the Court's holding in *Bill Johnson's Restaurants* avoids a Petition Clause problem with the federal NLRA, but the ambiguity of its literal terms and that of similar statutes remain.

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[294] 29 U.S.C. § 157 (1994).

[295] 461 U.S. 731 (1983). *See supra* notes 49–53, 83–84 and accompanying text; *infra* notes 398–403 and accompanying text.

[296] The Administrative Law Judge and the Board attempted to examine the merits of the underlying claim and pronounced the claim baseless "in fact," 461 U.S. at 737, but they overlooked that the employer's defamation claim had survived summary judgment in the state court and had been ordered for trial. *See id.* at 736 nn.2–3.

[297] *Id.* at 740.

3. *Civil Rights Statutes*

Many federal (and state[298]) civil rights laws present the same problem—they could potentially apply to the act of filing a civil lawsuit if done with the requisite discriminatory intent. Section 1983 is a general federal civil rights provision and the most common basis for civil rights suits.[299] Section 1983 does not itself create any right but instead imposes a remedy for deprivation of civil rights elsewhere protected under the Constitution or by statute. The section states that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State... subjects, or causes to be subjected, any citizen of the United States.... to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....[300]

Though section 1983 is rarely invoked to attach liability to the bringing of a meritorious lawsuit, it has that possible application. It could apply whenever a person acting under color of state law sues another with an allegedly discriminatory aim, or where a private person allegedly conspires with local governmental personnel to bring such suit. These possibilities have prompted courts and scholars to argue that *Noerr* petitioning immunity limits section 1983 claims.[301]

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[298] I discuss primarily the federal civil rights statutes here, but many states have their own civil rights statutes, some of which are broader than the federal statutes and protect persons on bases not protected under federal law (e.g., sexual orientation). I mention a few state statutes in connection with the Court's rulings as to whether the state statutes unduly infringe on the right of association. *See infra* notes 444–57 (discussing Minnesota and Massachusetts statutes).

[299] For an in-depth discussion of § 1983 litigation, see NAHMOD, *supra* note 183.

[300] 42 U.S.C. § 1983 (1994 & Supp. III 1997).

[301] *See* Boulware v. State of Nevada Dep't of Human Resources, 960 F.2d 793, 800 (9th Cir. 1992) (affirming summary judgment entered against a § 1983 claim in which the plaintiff contended that defendants, in bringing a state court action against him, had violated due process: "activity protected by *Noerr-Pennington* cannot form the basis of Section 1983 liability"); NAHMOD, *supra* note 183 § 2:20 (stating that "[a]fter *Professional Real Estate Investors*, a plaintiff who alleges that the defendant instituted litigation violative of... § 1983 will be confronted by *Noerr-Pennington* immunity of the defendant unless the plaintiff can demonstrate that the defendant's litigation was a sham within the meaning of the Courts' two-part test"). Most courts that have looked at the issue have done so in the context of petitioning activity other than the filing of civil litigation. These courts have split as to whether the Petition Clause immunizes lobbying or other petitioning activity done for and with a discriminatory effect. *Compare* LeBlanc-Sternberg v. Fletcher, 781 F. Supp. 261, 267 (S.D.N.Y. 1991)

Other civil rights laws regulate the behavior of private persons (not just persons acting under color of state law).[302] These laws typically bar a particular type of discrimination, and most narrowly define the prohibited act—such as an employment decision—and thus exclude the act of filing suit.[303] But other civil rights laws speak in broad terms, such as "interference," and could apply to the act of filing a civil action. The federal Fair Housing Act, for example, makes it unlawful "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of [their rights under the Housing Act]," including their right not to suffer discrimination in housing on the basis of sex, religion, and race.[304] If a landlord or neighbor brings a claim against a person for one of these discriminatory aims, he has violated the literal terms of the Act regardless of whether his claim had merit.[305] Indeed, the government has prosecuted persons under the Fair Housing Act because they filed lawsuits against their neighbor for an allegedly discriminatory intent.[306]

(holding that the Petition Clause does not protect from § 1983 liability defendants who petitioned for incorporation as a village and zoning laws limiting places of worship for the alleged purpose of excluding orthodox Jewish persons from their village) *with* Barnes Found. v. Township of Lower Merion, 927 F. Supp. 874, 877 (E.D. Pa. 1996) (dismissing § 1983 and 1985 claims against neighbors who petitioned for zoning enforcement allegedly with the intent to discriminate and stating: "It is irrelevant that the neighbors' petitioning may have been motivated by racism.... As long as there is petitioning activity, the motivation behind the activity is unimportant.").

[302] For an overview and analysis of the various federal civil rights acts, see RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS (3d ed. 1999).

[303] Title VII, for example, outlaws discriminatory employment practices, such as discharge or refusal to hire based on a person's "race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a) (1994). Because the filing of a civil action by itself is not a discharge, refusal to hire or other banned employment practice, Title VII likely would not place a motive restriction on filing suit.

[304] 42 U.S.C. § 3617 (1994).

[305] For a discussion of the interplay between the Fair Housing Act and court filings, see Franklin, *supra* note 4. *See also supra* note 86.

[306] The government's efforts to prosecute persons for allegedly discriminatory petitioning activity has sparked controversy and the Department of Housing and Urban Development (HUD) has issued guidelines directing HUD investigators not to pursue complaints based on any petitioning activity, including nonfrivolous lawsuits. However, the Justice Department has not limited its staff in this way. *See generally* Katherine Pfleger, *Rights in Conflict*, GOV'T EXEC. Nov. 1995, at 54; Sigfredo A. Cabrera, *Rule of Law: HUD Continues its Attack on Free Speech*, WALL ST. J., June 7, 1995, at A15; Nat Hentoff, *HUD's Attack on the First Amendment*, WASH. POST. Sept. 17, 1994, at A15.

4. *Obstruction of Government Statutes*

Most obstruction of government statutes is narrow and specifically defines the obstruction as particular conduct, such as violence or bribery, and thereby does not outlaw the filing of a civil suit.[307] Nevertheless, some statutes outlaw "interference" and are broad enough to encompass the filing of a civil suit, if done for the requisite purpose of impeding government operations. An example is the provision within the Internal Revenue Code that outlaws interference with Internal Revenue Agents in the performance of their duties. Section 7212 provides:

> Whoever corruptly or by force or threats of force ... endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both ....[308]

In *United States v. Hylton*, the Fifth Circuit concluded that the literal terms of section 7212 were broad enough to encroach upon the petitioning rights of citizens.[309] There, a rebellious taxpayer filed criminal trespass charges against IRS agents who came on her property to investigate her son. The County Attorney found, and the Fifth Circuit agreed, that her "complaint was filed upon accurate factual allegations that did constitute a basis for a criminal trespass complaint."[310] Yet, the federal government prosecuted her under section 7212 for criminal interference with IRS investigations.[311] Both the district court and the Fifth Circuit held that her acts constituted a "technical violation" of section 7212, but that such application of the statute would infringe on her right to

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[307] For example, the general federal statute outlawing obstruction of criminal investigations defines the prohibited conduct to be "bribery." 18 U.S.C. § 1510 (1994). Likewise, the Model Penal Code provision entitled "Obstructing Administration of Law or Other Governmental Function" limits the outlawed obstruction to that done "by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act ...." MODEL PENAL CODE § 242.1 (1980).

[308] I.R.C. §7212 (1994).

[309] *See* United States v. Hylton, 710 F.2d 1106, 1111–12 (5th Cir. 1983).

[310] *Id.* at 1111.

[311] The government also charged Ms. Hylton under a general obstruction statute, 15 U.S.C. § 1510, but these charges never went to trial. *See id.* at 1109–10. As noted, *supra* at note 307, § 1510 outlaws only obstruction through bribery.

petition the government.[312] Without this narrowing construction, therefore, this and similarly worded obstruction statutes, also could apply to a plaintiff who files a meritorious civil suit against a government agent.[313]

5. *State Common Law Tort of Intentional Interference with Contractual or Economic Relations*

Like the obstruction of justice statutes, the common law "interference" torts possibly could intrude on the right of court access. The Restatement generally defines the interference torts as intentionally and "improperly" interfering with the performance of a contract (or prospective economic relations) between other persons.[314] The key to the tort is whether the interference is "improper," and the Restatement sets out several factors, such as the motive of the actor, that govern

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[312] 710 F.2d at 1110–12 (finding a technical violation because she had the motive to impede the IRS investigation and achieved that goal).

[313] *Cf.* Quiñon v. Federal Bureau of Investigation, 86 F.3d 1222, 1229 (D.C. Cir. 1996) (citing *Hylton* and holding that the filing of a motion to disqualify judges "cannot, taken alone, form the basis for a legitimate obstruction of justice investigation").

[314] The Restatement states three closely related torts, which I discuss collectively as the "interference tort" in the text. All three assume a contract, or potential contract, between the tort plaintiff and a third person. The first two torts address the defendant's interference with an actual contract between the (interference tort) plaintiff and a third person, the only difference being whose performance is frustrated—that of the third person or of the plaintiff himself. Section 766 addresses cases in which the defendant intentionally interferes with the third person's performance of a contract:

> [O]ne who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

RESTATEMENT (SECOND) OF TORTS, § 766 (1979). Section 766A addresses the cases where the defendant interferes with the plaintiff's performance:

> [O]ne who intentionally and improperly interferes with the performance of a contract . . . between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Id. § 766A. Finally, § 766B sets out a similar tort for interference with relations not yet reduced to contract. *See id.* § 766B ("One who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability . . . .").

this question.[315] This approach is different than the Restatement's approach to other torts because it contemplates a case-by-case analysis to determine whether the action is improper, and does not set out specific exceptions or "privileges" to act.[316] Because the tort turns on a weighing of interests, it is possible that one who files a civil suit, for the motive of impairing and frustrating another's contract rights, might under particular circumstances, be subject to liability.

The comments to the Restatement recognize that the bringing of civil suits may constitute actionable wrongful interference:

> *Prosecution of civil suits.* In a very early instance of liability for intentional interference, the means of inducement employed were threats of 'mayhem and suits,' and both types of threats were deemed tortious. Litigation and the threat of litigation are powerful weapons. When wrongfully instituted, litigation entails harmful consequences to the public interest in judicial administration as well as to the actor's adversaries. The use of these weapons of inducement is ordinarily wrongful if the actor has no belief in the merit of the litigation *or if, though having some belief in its merit, he nevertheless institutes or threatens to institute the litigation in bad faith, intending only to harass the third parties and not to bring his claim to definitive adjudication.* (See § 674-681B). A typical example

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[315] *See id.* § 767 (listing seven factors, including "the nature of the actor's conduct," "the actor's motive," and "the social interests in protecting the freedom of action of the actor and the contractual interests of the other"). The comments explain that the actor's motive to interfere with the contract need not be his sole motive:

> [I]n determining whether the interference is improper, it may become very important to ascertain whether the actor was motivated, in whole or in part, by a desire to interfere with the other's contractual relations. If this was the sole motive the interference is almost certain to be held improper. A motive to injure another or to vent one's ill will on him serves no socially useful purpose.
>
> The desire to interfere with the other's contractual relations need not, however, be the sole motive. If it is the primary motive it may carry substantial weight in the balancing process and even if it is only a casual motive it may still be significant in some circumstances.

Id. cmt. d.

[316] The Restatement explains this case-by-case approach:

> [T]his Section is expressed in terms of whether the interference is improper or not, rather than in terms of whether there was a specific privilege to act in the manner specified. The issue in each case is whether the interfere is improper or not under the circumstances.... The decision therefore depends upon a judgment and choice of values in each situation.

Id. § 767 cmt. b.

> of this situation is the case in which the actor threatens the other's prospective customers with suit for the infringement of his patent and *either* does not believe in the merit of his claim or is determined not to risk an unfavorable judgment and to rely for protection upon the force of his threats and harassment. [317]

This comment is unclear as to whether improper interference includes the filing of an otherwise meritorious civil suit. The comment's citation to sections 674 through 681B of the Restatement refers to the discussion of the tort of wrongful civil proceedings, which requires that the underlying suit be "without probable cause" or merit.[318] On the other hand, these comments nowhere except meritorious civil suits and instead emphasize the intent to harass.

The Restatement elsewhere accepts, as a defense, situations where the actor has a bona fide claim.[319] Because the defense applies to an assertion of a "legally protected interest," it would seem to encompass and therefore immunize meritorious litigation. But that is not the only prerequisite to application of the defense. It applies only if the original plaintiff asserted his claim in "good faith."[320] Thus, a plaintiff's bad faith seemingly would disqualify him from using the defense even if he has a meritorious or winning claim.

Few courts have addressed the question. Most all of those that have done so, however, have refused to premise the interference tort on meritorious litigation.

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[317] *Id.* § 767, cmt. c (emphasis added).

[318] *See id.* §§ 674, 675, *reproduced supra* notes 247–48.

[319] Section 773 states the defense of "Asserting Bona Fide Claim":

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

RESTATEMENT (SECOND) OF TORTS § 773.

[320] The comments to § 773 explain the defense:

> The rule stated in this Section gives to the actor a defense for his legally protected interest. It is of narrow scope and protects the actor only when (1) he has a legally protected interest, and (2) in good faith asserts or threatens to protect it, and (3) the threat is to protect it by appropriate means. Under these circumstances his interference is not improper although he knows that his conduct will cause another to break his contract or otherwise refuse to do business with a third person. If any of these elements is lacking, the rule stated in this Section, does not apply but he may have some other justification.

Id. § 773 cmt. a.

Some courts may balance the Restatement factors so that the tort does not reach civil court filings, but others have expressed their concern that an expansive reading of the interference tort would undermine the tort of wrongful civil proceedings and its protection of plaintiffs.[321] Nevertheless, because the Restatement approach to this tort involves a balancing of interests rather than clear rules or privileges, it is possible that some courts will apply the interference tort to the filing of a meritorious lawsuit.[322] Indeed, a number of courts have felt compelled to limit the interference tort to avoid violating the Petition Clause right of court access.[323] In the next Part, I discuss whether this is a proper

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[321] In *Blake v. Levy*, 464 A.2d 52, 56 (Conn. 1983), for example, the court held that previous litigation that ends in a settlement cannot support a claim for tortious interference with contract:

> In suits for vexatious litigation [wrongful civil proceedings], it is recognized to be sound policy to require the plaintiff to allege that prior litigation terminated in his favor. This requirement serves to discourage unfounded litigation without impairing the presentation of close but uncertain causes of action to the courts. . . .
>
> When a lawsuit ends in a negotiated settlement . . . [it] will not support a subsequent suit for vexatious litigation. . . . This conclusion recognized that the law favors settlements, which conserve scarce resources and minimize the parties' transaction costs, and avoids burdening such settlement with the threat of future litigation.

Id. at 56. *Cf.* KEETON ET AL., *supra* note 250, § 129 at 992 ("The bulk of the cases involving interference as distinct from inducement involve . . . the commission of some independent tort . . . . Thus in many cases interference with contract is not so much a theory of liability in itself as it is an element of damage resulting from the commission of some other tort").

[322] *See* Powers v. Leno, 509 N.E.2d 46 (Mass. App. Ct. 1987) (allowing claims for abuse of process and tortious interference to proceed based on allegations of ulterior purpose in filing a judicial appeal of zoning decision without consideration of the merit of the appeal). *Cf.* C.N.C. Chemical Corp. v. Pennwalt Corp., 690 F. Supp. 139 (D.R.I. 1988) (dismissing claims for malicious prosecution because prior litigation had not ended in current plaintiff's favor but allowing claim for tortious interference with contract to proceed).

[323] *See, e.g.*, Phillips v. MacDougald, 464 S.E.2d 390, 395–96 (Ga. Ct. App. 1995) (holding that "proliferation of unnecessary causes of action for the alleged improper filing of lawsuit would have a chilling effect on the exercise by citizens of their right of access to the courts" thereby "precluding a claim of tortious interference as a remedy for the alleged improper or unwarranted filing of a lawsuit"); King v. Levin, 540 N.E.2d 492 (Ill. App. Ct. 1989) (holding that First Amendment limits and creates a conditional privilege from tort of interference with prospective economic advantage); Jacobsen v. Garzo, 542 A.2d 265, 268 (Vt. 1988) (applying state right of court access to "hold that a claim for tortious interference with contractual relations cannot be predicated upon an allegedly improper filing of a lawsuit" and that the "appropriate remedy, if any, lies in an action for malicious prosecution"). *See also supra* note 59 (collecting cases applying Petition Clause to narrow interference tort).

reading of the Petition Clause, not only with respect to the interference torts, but also as to all motive restrictions.

IV. A FIRST AMENDMENT ANALYSIS OF MOTIVE RESTRICTIONS ON COURT ACCESS

Motive restrictions present an interesting case study under the Petition Clause. They appear to be "easy" cases because they are what prompted the Court to recognize and apply an individual right of court access in *Professional Real Estate Investors* and *Bill Johnson's Restaurants.* In both cases, the Court held that ill motive alone could not subject a plaintiff to liability. The Court similarly has rejected motive restrictions on speech. Although these holdings suggest that all motive restrictions are invalid, the Court has never directly stated that the First Amendment bars the government from ever imposing motive restrictions on First Amendment freedoms.

In this Part, I examine whether the Petition Clause properly should override motive restrictions on filing civil suit. I begin by surveying the methodology of First Amendment analysis. I next review the Court's specific holdings with regard to motive and First Amendment rights. I then apply the Court's general First Amendment tests, such as strict scrutiny and breathing room analysis, to independently test motive restrictions on court access. I conclude that motive is rarely a permissible basis on which to regulate civil court filings.

A. *The Methodology of First Amendment Analysis*

In analyzing the right to petition courts here and in my other articles, I follow the Court's example in its cases under the Petition Clause and borrow from speech cases. I use as my guide the general approach of the Court, rather than its specific rules and doctrines. Unfortunately, however, the Court's approach in speech cases is not easy to discern. The Court's decisions under the Speech Clause have always presented a complex matrix of rules and doctrines, and the Court recently has complicated the question by suggesting changes in its approach to analyzing government regulation of speech.

Theoretically, the Court's standard for regulation of speech has always been a single test—the strict scrutiny test, which requires a narrowly tailored regulation of speech based on a compelling state interest.[324] The Court, however, has instead tended to categorize speech and develop specific rules to govern those categories. Thus, in the *New York Times* line of defamation cases, the

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[324] This was the holding of the Court in 1945, in *Thomas v. Collins. See* discussion *supra* notes 91–93 and accompanying text.

Court holds first that false speech is a category of speech not within the absolute right of free speech.[325] It next looks to whether certain types of false speech nevertheless merit some First Amendment protection against governmental interference so as not to chill the exercise of the protected right of true speech (what I term the breathing room approach). The Court also has suggested that speech on the other side of the line—true speech—merits (nearly) absolute protection.[326]

Recently, however, members of the Court have suggested changes to this approach. Perhaps the most significant statement was issued in 1992, by Justice Scalia, writing for the Court in *R.A.V. v. St. Paul*, a case testing a hate speech ordinance.[327] Justice Scalia's majority opinion suggested that all speech may be potentially protected or proscribed, depending on the regulation at issue and the outcome of strict scrutiny analysis.[328] This opinion sparked sharp dissent by

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[325] For a discussion of *New York Times*, see *supra* notes 97–100 and accompanying text; *infra* notes 462–63. This is just one example of the Court's categorization of speech. The Court also groups speech according to whether it is "commercial" speech and whether it is spoken in a private or traditionally public forum. The government has greater leeway in regulating commercial speech and speech in private fora. *See generally* SMOLLA, FREEDOM OF SPEECH, *supra* note 101.

[326] The Court has not been consistent or precise in addressing whether speech on the other side of the line—speech, such as a true statement, that is within the narrow right protected by the First Amendment—is absolutely protected or protected through the strict scrutiny test, which at least opens the door for some regulation. *See, e.g.*, Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 124–28 (Kennedy, J., concurring) (arguing that the majority improperly applied the strict scrutiny test to legislation that regulated speech by content and that the strict scrutiny test found its way into First Amendment jurisprudence only "by accident").

[327] 505 U.S. 377 (1992).

[328] Justice Scalia, writing for the Court, acknowledged that the Court had previously said that certain "categories of expression are 'not within the area of constitutionally protected speech,'" but he instead characterized the cases as follows:

> What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may made the vehicle for content discrimination unrelated to their distinctively proscribable content. Thus, the government may prescribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

Id. at 383–84. Later in the opinion, Justice Scalia suggested that the First Amendment may permit content and viewpoint discrimination as to speech but only if the regulation passes strict scrutiny. *Id.* at 395–96. The statute at issue was a St. Paul ordinance that outlawed hate speech. The majority held that the law punished speech on the basis of the content and viewpoint of the

members of the Court, who argued that Justice Scalia's majority, departing from the Court's long-standing approach, protected speech not traditionally considered worthy of protection.[329]

In the ensuing years, however, *R.A.V.* has not caused a marked change in First Amendment analysis. A number of factors explain why. First, the Court's traditional approach already included heightened scrutiny; many of the Court's doctrines, such as the prior restraint and vagueness rules, could be characterized as particular applications of a form of strict scrutiny.[330] Furthermore, the Court in *R.A.V.* was concerned about a type of speech regulation—content and viewpoint discrimination against speech—that always has been suspect, even under the Court's traditional approach.[331] Indeed, Justice Scalia claimed that he was following existing speech doctrine,[332] and even he continued to put speech into categories.[333]

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speech and that such regulation did not survive strict scrutiny. For a more detailed discussion of the statute and the majority's holding, see *infra* Part IV.C.3.b.

[329] Justice White wrote the lead dissenting opinion in *R.A.V.*:

> This Court's decisions have plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression ....
>
> ....
>
> The present Court submits that such clear statements 'must be taken in context' and are not "literally true."
>
> To the contrary, those statements meant precisely what they said: The categorical approach is a firmly entrenched part of our First Amendment jurisprudence.

Id. at 399–400 (White, J., concurring); *see also* Andrea L. Crowley, R.A.V. v. City of St. Paul: *How the Supreme Court Missed the Writing on the Wall*, 34 B.C. L. REV. 771, 797 (1993) (arguing that the Court "distorted traditional First Amendment jurisprudence in *R.A.V.*").

[330] *See generally* SMOLLA, *supra* note 101, ch.2 (providing an overview of free speech methodology and noting that the term "heightened scrutiny" describes the Court's approach in most speech cases).

[331] *See id.* ch. 3 (surveying the Court's treatment of laws that regulate speech based on content or viewpoint).

[332] Justice Scalia stated that "[t]he proposition that a particular instance of speech can be proscribable on the basis of one feature (*e.g.*, obscenity) but not on the basis of another (*e.g.*, opposition to the city government) is commonplace and has found application in many contexts." 505 U.S. at 385.

[333] Justice Scalia, for example, concluded that the St. Paul ordinance did not come within "any of the specific exceptions" to the prohibition against viewpoint discrimination. *Id.* at 387–90, 393; *see also* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 804 (1996) (Kennedy, J., concurring) (citing *R.A.V.* for the proposition that "a few categories of

Nevertheless, *R.A.V.* may change the approach in one type of case: where the government regulates, on the basis of content or viewpoint, speech that the Court previously had described as outside the protection of the First Amendment. The *R.A.V.* case itself involved such a category—fighting words—but the change in approach may be easiest to see in the defamation context. The potential change would arise where the government makes a distinction in the type of false and defamatory speech it seeks to punish and bars only such speech critical of a particular view. The *R.A.V.* majority would analyze such a restraint under strict scrutiny. In contrast, the traditional categorical approach would start with the proposition that such speech is outside protection of the First Amendment because it is false, and then look to whether the punishment of false speech would unduly chill the exercise of true speech. The Court applies a balancing approach in deciding whether to extend "breathing room" to true speech by protecting some forms of false speech from punishment.[334] Although, as discussed below,[335] the two approaches likely will reach the same result, to the extent that they are different, the traditional breathing room balancing is seemingly more forgiving than the *R.A.V.* strict scrutiny analysis.[336]

Finally, other members of the Court also have hinted at new approaches to First Amendment analysis. Justice Breyer, for example, recently has written influential opinions in which he balances a number of interests.[337] It is still too

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speech . . . can be proscribed"); Stephen Reinhardt, *The First Amendment: The Supreme Court and the Left—With Friends Like These*, 44 HASTINGS L.J. 809, 822 (1993) (observing that "[i]n *R.A.V.*, Justice Scalia creates sub-categories of unprotected speech and then distinguishes among them" and that "[m]ost people have difficulty in understanding the *R.A.V.* doctrine").

[334] Justice White, in his concurring opinion in *R.A.V.*, suggested that the categorical approach meant either no protection at all, or, heightened strict scrutiny protection, depending on which side of the line the speech fell. He stated that "[t]his categorical approach has provided a principled and narrowly focused means for distinguishing between expression that the government may regulate freely and that which it may regulate on the basis of content only upon a showing of compelling need." 505 U.S. at 400 (White, J., concurring). This is not a correct statement of the Court's speech doctrine, at least as applied to defamation, where the Court has extended some protection, under the *New York Times* breathing room doctrine, to false speech. *See infra* notes 346–54.

[335] *See generally infra* Part IV.C.3.a-b.

[336] Some observers find irony in the fact that the majority opinion in *R.A.V.*, written by and joined in by the more "conservative" members of the Court (Justice Scalia writing the opinion in which Chief Justice Rehnquist and Justices Thomas, Souter, and Kennedy joined), set a standard of review that is more protective of speech—strict scrutiny rather than a balancing analysis of traditionally nonprotected speech—than that advocated by the dissenting members. *See generally* Reinhardt, *supra* note 333.

[337] *See generally* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) (Breyer, J., concurring in judgment) (upholding federal "must-carry" provisions under which cable

early to determine the exact nature and application of his balancing approach. Justice Breyer uses "strict scrutiny" terminology and claims that his approach is not a replacement for existing doctrine but instead a tool by which the Court should carefully approach novel questions of speech, such as cable access, especially where they involve competing First Amendment concerns.[338] Nevertheless, other members of the Court and academic commentators have argued that his approach is a new, reduced form of scrutiny.[339]

Thus, an analyst, today, cannot easily determine the proper approach to speech cases, let alone how that approach should apply to the right to petition courts.[340] In my previous article, I generally took a categorical approach, similar

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systems must include local station broadcasts); *Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. at 727 (Breyer, J., plurality opinion) (upholding portions of FCC orders allowing local operator to ban patently offensive material and invalidating provision that required segregation and blocking of same material).

[338] In *Denver Area Educ. Telecomm. Consortium, Inc.*, a cable access case, Justice Breyer described his approach as follows:

> Over the years, this Court has restated and refined these basic First Amendment principles, adopting them more particularly to the balance of competing interest and the special circumstances of each field of application. . . .
>
> This tradition teaches that the First Amendment embodies an overarching commitment to protect speech from Government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems. . . . [A]ware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications, we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now. . . .
>
> Rather than decide these issues, we can decide this case more narrowly, by closely scrutinizing [the governmental restriction] to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech.

Id. at 740–43 (citations omitted).

[339] *Id.* at 786 (Kennedy, J., concurring) (stating that Justice Breyer's plurality opinion "cannot bring itself to apply strict scrutiny, yet realizes it cannot decide the case without uttering some sort of standard; so it has settled for synonyms [of 'strict scrutiny']"); *see generally* Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH. J.L. REFORM 817 (1998) (discussing Justice Breyer's approach and comparing it to historical and modern levels of scrutiny).

[340] For further discussion of the difficulty in deriving one approach to speech cases see generally Alan E. Brownstein, *Alternative Maps for Navigating the First Amendment Maze*, 16

to the Court's traditional approach in defamation cases, in that I first defined what form of civil court filings are within the core right to petition: winning claims. I then suggested that courts look to whether the exercise of the narrow right to file winning claims needed breathing room via some protection of the ability to file losing suits. I also suggested that any regulation that purported to directly restrict the core right to file winning claims mandated strict scrutiny. My suggested approach simply extended what the Court already has done in petition cases, such as *Button, McDonald* and *Bill Johnson's Restaurants*.[341]

In this Article, I conduct the same analysis, using the traditional categorical approach. However, because motive restrictions raise some of the same concerns as the viewpoint discrimination at issue in *R.A.V.*, I analyze motive restrictions under *R.A.V.* as to the one area in which *R.A.V.* might change the analysis—the question of motive restrictions on nonwinning claims. I do not attempt to replicate the balancing approach of Justice Breyer, but to the extent that his approach advocates caution in applying existing speech doctrines to new issues, I heed his concern. As I argued in my first article, the Court's speech doctrines must not be blindly applied to court access questions but instead should be only a general guide.[342]

However, before I begin my own analysis, I highlight the Court's existing jurisprudence regarding motive and the exercise of the speech or petition rights.[343] For the most part, the Court's motive cases are difficult to characterize

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CONST. COMMENT 101 (1999) (review essay of DANIEL FARBER, THE FIRST AMENDMENT (1998)).

[341] In *NAACP v. Button*, the Court first looked to see if the activity at issue—the NAACP's organization of school desegregation litigation—was within the protection of the First Amendment. *See* 371 U.S. 415, 429–31 (1963). Concluding that it was so protected, the Court then applied a number of protective doctrines, such as the vagueness and overbreadth doctrines, *see id.* at 432–33, and strict scrutiny, *see id.* at 438–44. In *McDonald v. Smith*, the Court categorized false and defamatory speech in petitions as outside the absolute protection of the First Amendment, but allowed breathing room through the use of the *New York Times* actual malice standard. *See* 472 U.S. 479, 484–85 (1985); *see also* discussion of *McDonald*, *supra* notes 97–100; discussion of *New York Times*, *infra* notes 346–54. In *Bill Johnson's Restaurants v. NLRB*, the Court categorized civil complaints as being within or outside protection of the Petition Clause, depending on the status of their proceeding and on the merit of the underlying claim. *See* 461 U.S. 731, 747 (1983). It simply pronounced a "rule" and did not purport to label its analysis as strict scrutiny, breathing room, or application of any other specific doctrine. For further discussion of *Bill Johnson's Restaurants*, see *supra* notes 49–53 and accompanying text, 81–86 and accompanying text; *infra* notes 398–403 and accompanying text.

[342] *See* Andrews, *supra* note 5, at 673–76.

[343] The Court also has addressed regulation that touches on the religious motive or beliefs of the action. *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547

as taking a particular approach. The Court rarely applies strict scrutiny or the breathing room doctrine, in their formal sense, to test motive restrictions on speech or petitioning. The Court merely has invalidated use of motive as the sole criterion for exercise of the right, without giving much guidance as to how to analyze motive restrictions.

B. *The Court's Treatment of Motive and the Exercise of First Amendment Freedoms*

Any assessment of the Court's view on the propriety of motive restrictions requires an understanding of the multiple roles that motive can play in protecting or regulating First Amendment freedoms.[344] Motive or another state of mind element can *protect* First Amendment values by narrowing the circumstances under which the government may restrict exercise of the right. Thus, in some cases, the Court affirmatively uses the state of mind of the speaker as a prerequisite for, and therefore a guard against, the state's imposition of liability. On the other hand, motive can act to *restrict* activity if it is the lone factor distinguishing permissible and impermissible behavior. The Court permits this use of motive, so long as it punishes only "conduct" outside the literal protection of the First Amendment. The Court, however, is hostile to use of motive as the sole criterion for limiting or punishing the exercise of a First Amendment freedom. The restrictive use of motive is my focus in this article,[345] but I review its other functions in order to distinguish and give insight into the restrictive use.

(1993) (invalidating, under the Free Exercise Clause, ordinances that outlawed animal sacrifice performed for religious ceremony). However, because protection of freedom of religious belief is separately protected by the First Amendment, under the Free Exercise Clause, such cases are not generally applicable to regulation of other motives, and I do not address them here. The full text of the First Amendment is reprinted at *supra* note 1.

[344] In conducting First Amendment analysis, one must distinguish "motives" not only as to the state of mind of the speaker or the petitioner (i.e., the person attempting to exercise the First Amendment freedom), *see supra* note 6, but also as to the governmental purpose or aim behind a particular regulation. All such intentions or purposes are potentially relevant, but unfortunately the terms often are used loosely without sufficient thought as to their different meaning. *See generally* Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 5 (noting that "motive is by no means a unitary concept, and that the First Amendment has very different implications depending on what aspect of an actor's motive is being singled out for punishment, and what is meant by motive").

[345] All of the laws outlined in Part III have the potential for using motive to restrict activity—the filing of winning claims—that is within the narrow right to petition.

1. *The Court's Holdings Regarding Motive and Freedom of Speech*

An obvious starting point for assessing the proper role of a speaker's state of mind and the protection of speech is *New York Times v. Sullivan*,[346] the Court's seminal case concerning free speech and defamation liability. There, Sullivan, a Montgomery, Alabama city commissioner sued and won a $500,000 defamation verdict against the *New York Times*, based on a political advertisement that the newspaper published concerning civil rights events in Montgomery.[347] The newspaper conceded that some of the factual statements were false but contested the judgment as an infringement of the First Amendment.[348] The Court reversed and held that the First Amendment mandates a number of protections before civil liability may be imposed against speech. One protection is the "actual malice" standard, under which a speaker of false speech cannot be liable for defamation unless he spoke with actual malice or reckless disregard for the falsity of his statement.[349]

Although the Court called this protection the "actual malice" standard, it is not a test of ill will, but instead an awareness standard. It specifies the degree to which the speaker must appreciate the falsity of his speech. To be liable under *New York Times*, the speaker's statement must not only be false (and otherwise defamatory), but the speaker also must actually know, or recklessly disregard, that it is false. A speaker could have ill will toward the plaintiff but not appreciate that his statement is false and thus not be liable. Indeed, the Court in *Beckley Newspapers Corp. v. Hanks*,[350] held that it was "clearly impermissible" to confuse "bad or corrupt motive," "personal spite," and "ill will" with the "high degree of awareness of probable falsity demanded by *New York Times*."[351]

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[346] 376 U.S. 254 (1964).

[347] *See id.* at 256.

[348] *See id.* at 258, 265–68.

[349] The Court summarized this standard:

> The constitutional guarantees require, we think, a federal Rule that prohibits a public official form recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279–80. The Court also imposed an additional protection in *New York Times*: it required that the defamation plaintiff prove actual malice under a higher standard of proof—clear and convincing evidence—than the usual preponderance of evidence standard applicable in civil cases. *See id.* at 285.

[350] 389 U.S. 81 (1967) (per curiam).

[351] *Id.* at 82, 84.

The actual malice standard avoids the chilling effect that a negligence standard might have on speech. If a speaker fears that he could be held liable for speech that he does not know was false, he might not speak at all.[352] But, because the standard acts to protect speech not otherwise within the ambit of the First Amendment (*i.e.*, false speech), the Court uses the actual malice standard only where there is a particularly strong interest in not chilling speech. Take, for example, the Court's treatment of the same issue as applied to private individuals in *Gertz v. Welch*.[353] The Court held that where the defamation plaintiff is a private person, the balance of interests does not mandate the same protection as in *New York Times*, where the plaintiff was a public official.[354] In other words, the defendant-speaker does not get the protection of the awareness standard and can be held liable for merely negligent false speech.

The actual malice standard is an *additional* protection of speech. It is a supplement to other standards, such as the requirements that the speech be both false and defamatory. In *New York Times*, the speech had to be false, defamatory, *and* spoken with actual malice before the state could impose civil liability. In *Gertz*, the Court merely chose not to require the added protection of the actual malice standard. It did not eliminate the other prerequisites for liability, such as falsity.

The flip side of the *New York Times* issue is whether defamation liability can be based on the speaker's motive alone, regardless of the character of the speech (*e.g.*, whether it is true or false). The Court has addressed this question in only a few isolated settings. One was *Garrison v. Louisiana*.[355] Louisiana outlawed true speech if it was defamatory and spoken with malice.[356] New Orleans District Attorney, Jim Garrison, spoke out against the conduct of sitting judges, and the state prosecuted and convicted him of criminal defamation.[357] The Court reversed, holding that the First Amendment barred criminal sanctions against a speaker whose statements were true but spoken with ill will:

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352 The Court explained that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.'" *Id.* at 279.

353 418 U.S. 323 (1974).

354 *Id.* at 344–46.

355 379 U.S. 64 (1964).

356 The statute defined "defamation" to be, among other things, expression of "anything which tends" to "expose any person to hatred, contempt or ridicule" or to "injure any person . . . in his . . . business." *Id.* at 66 n.1 (reprinting LA. REV. STAT. 1950, tit. 14 § 47). It further provided that if the defamatory speech was false, it was presumed to be malicious, but that if true, the state must prove actual malice to convict. *See id.*

357 *See id.* at 64–66.

> [W]e hold that the Louisiana statute... incorporates constitutionally invalid standards in the context of criticisms of the official conduct of public officials. For, contrary to the *New York Times* rule, which absolutely prohibits punishment of truthful criticism, the statute directs punishment for true statements made with 'actual malice.'[358]

The *Garrison* Court, however, expressly limited its holding to statements about the performance of public officials in their jobs. As in *New York Times*, these statements involve the "paramount public interest in a free flow of information to the people concerning public officials, their servants."[359] This is a significant limitation. *Gertz*, and other cases following *New York Times*, demonstrate that the same standards of protection do not necessarily apply to speech about private persons or private issues. Indeed, the *Garrison* Court noted that twenty-seven states and the District of Columbia at that time (1964) made truth a defense only if spoken with good motives.[360] Thus, in these twenty-eight jurisdictions, bad motive could render a speaker liable for true but defamatory statements. Yet, the Court did not suggest that the statutes were invalid in all of their applications.[361]

Twenty-five years later, in *Hustler Magazine v. Falwell*,[362] the Court extended the doctrine to public figures and to civil liability other than defamation. *Hustler Magazine* published a parody that, among other things, suggested that Jerry Falwell had a drunken incestuous relationship with his mother.[363] Falwell sued the magazine and its publisher, Larry Flynt, for libel, invasion of privacy, and infliction of emotional distress. The trial court directed

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[358] *Id.* at 78.

[359] *Id.* at 77.

[360] *Id.* at 73 n.7.

[361] The Court, however, adopted an 1837 statement of the New Hampshire Supreme Court which was not limited to public defamation:

> If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice....
>
> It has been said that it is lawful to publish truth for good motives, and for justifiable ends. But this rule is too narrow. If there is a lawful occasion—a legal right to make a publication—and the matter true, the end is justifiable and that, in such case, must be sufficient.

Id. at 73 (quoting *State v. Burnham*, 9 N.H. 34, 42–43 (1837)).

[362] 485 U.S. 46 (1988).

[363] *See id.* at 47–48.

the verdict on the privacy claim, and the jury went against Falwell on the libel claim, finding specifically that the parody could not be reasonably understood as communicating actual facts.[364] The jury, however, awarded Falwell over $100,000 and additional punitive damages on the emotional distress claim.[365] The Court reversed, holding that this emotional distress award impermissibly infringed speech protected by the First Amendment.

A critical question before the Court was whether motive, or more precisely intent to cause harm, could serve as the basis for imposing liability on speech.[366] The parody was not subject to defamation liability because it was opinion, not a statement of facts.[367] But unlike defamation, the Virginia tort of emotional

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[364] *See id.* at 48–49.

[365] *See id.* at 49.

[366] The Court questioned in oral argument whether intent alone could ever trigger civil liability for speech and struggled with the proper relationship, if any, of the *New York Times* actual malice standard to this intent issue. *See* RODNEY SMOLLA, JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL ch. 37 (1988) (reprinting excerpts of oral argument). For example, Justice Scalia asked:

> [W]hy can't [the *New York Times*] principle be extended to say you can cause emotional harm to your heart's content, just as you can state falsity to your heart's content, but where you intend to create that emotional harm, we have a different situation? Isn't that a possible line?

Id. at 268. Flynt's attorney, Alan Issacman, argued that intent to cause harm should not by itself be enough, but that knowing falsity may be. *See id.* at 269.

[367] This distinction between fact and opinion and its import under the First Amendment, like so much else in the Court's speech jurisprudence, are "elusive" concepts. *See generally* RODNEY SMOLLA, LAW OF DEFAMATION ch. 6 (1998). In *Gertz*, the Court strongly suggested such a distinction when it stated in dictum:

> Under the First Amendment there is no such thing as a false idea. However pernicious an *opinion* may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of *fact*.

418 U.S. at 339–40 (emphasis added). This and similar statements prompted courts and scholars to make distinctions between fact and opinion, but the Court in 1990 unsettled this approach by noting that the *Gertz* passage was dictum and that the Court did not mean to create "a wholesale defamation exemption for anything that might be labeled 'opinion.'" Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990). But the Court's substituted test—whether the statement "could be provable as false"—works to achieve the same result as the fact versus opinion distinction in most cases. *Id.* at 19–20. In *Falwell*, for example, the jury found that the statements in the magazine parody could not reasonably be read to be statements of actual facts. *See* 485 U.S. at 49.

distress turned on intent (as well as the "outrageous" character of the speech), regardless of whether the speech was true, false, or opinion.[368] Flynt admitted in deposition that he intended to "assassinate" Falwell's integrity through his magazine parody.[369] The Court held that this intent alone could not subject his speech to liability:

> Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently 'outrageous.' But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In [*Garrison*], we held that even when a speaker or writer is motivated by hatred or ill will his expression was protected by the First Amendment.... Thus, while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.[370]

This passage contains a key qualifier—the reference to public figures. In oral argument, members of the Court pondered whether, and Flynt argued that, the First Amendment protected all parody, regardless of intent and regardless of whether it concerned a public or private figure.[371] But the Court limited its holding to the facts before it—protection of improperly motivated speech concerning a public figure—and left unaddressed whether a speaker's intent or ill motive might in other circumstances be a proper basis for civil liability.

The question remains unanswered, though the Court has come close to foreclosing motive as a basis of liability, at least as to true statements. The Court repeatedly has suggested that truth is an absolute defense to defamation liability, even as to speech about private persons. In *Philadelphia Newspapers Inc. v. Hepps*, for example, the Court held that the First Amendment required a private

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[368] "[I]n the view of the Court of Appeals, so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false." *Id.* at 52–53.

[369] *See* SMOLLA, *supra* note 367, at 59–60. The jury found that Flynt intended to cause Falwell emotional distress, a necessary element of the claim. *See* 485 U.S. at 49–50 & n.3.

[370] *Id.* at 53.

[371] When questioned in oral argument by Justice White on the extent of the argument, Flynt's attorney, Alan Issacman, stated: "I would say that if it does not contain a false statement of fact or something that can be perceived as a false statement of fact, then even if it's a private figure, it's protected speech." SMOLLA, *supra* note 367, at 271 (reprinting excerpts of oral argument).

figure plaintiff to prove the falsity of the statement (as opposed to placing the burden of proof and risk of doubt on the speaker).[372] Implicit in this decision is that truth is an absolute defense. If this is the case, true speech motivated by ill motive, such as hatred, is not subject to liability. However, even the *Hepps* decision leaves some gaps. The case involved a media defendant and speech of public concern, and the Court limited its holding to these facts.[373] Thus, the Court has not stated expressly that all true speech is absolutely immune from civil liability, regardless of the motive of the speakers.

But it likely would do so. The balancing done by the Court to reach distinctions between private and public speech under *New York Times* and its progeny is part of the Court's process to determine how much protection to give to false speech, speech not otherwise protected by the First Amendment. Even *Hepps* involved protection of false speech; its assignment of the burden of proof on the plaintiff meant that some false speech, that which the plaintiff cannot prove is false, is protected.[374] True speech, however, is within the core right of free speech, which the Court has suggested merits greater (and perhaps absolute) protection than a mere balancing of interests.[375]

Finally, the Court recently has addressed motive in relation to criminal laws, most notably laws outlawing hate crime or hate speech. These are interesting cases because they do not typically involve the public versus private distinction at issue in the defamation setting. Indeed, the speaker and target or "victim" of such speech are typically private individuals. When it comes to regulating speech, a private individual's interest in compensation differs from the state's interest in avoiding violence and racial hatred.

The Court makes an important distinction in these hate crime cases. To the extent that the law uses motive as a basis for isolating a speaker's viewpoint—racial hatred—and outlaws expression advocating that viewpoint, the law violates the First Amendment. Thus, in *R.A.V.*,[376] the Court held that a St. Paul, Minnesota ordinance that prohibited messages based on "bias-motivated hatred" and "virulent notions of racial supremacy" violated the First Amendment

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372 *See* 475 U.S. 767, 768–69 (1986).

373 *Id.* at 778 & 779 n.4.

374 The *Hepps* Court acknowledged this effect: "[W]e recognize that requiring the plaintiff to show falsity will insultate from liability some speech that is false, but unprovably so." *Id.* at 778. The Court accepted this result because "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* (quoting *Gertz v. Welch*, 418 U.S. 323, 341 (1974)).

375 For further advocacy of this position, see SMOLLA, *supra* note 367, ch. 5.

376 R.A.V. v. St. Paul, 505 U.S. 377 (1992).

because it barred speech based on content and viewpoint.[377] On the other hand, as the Court explained in *Wisconsin v. Mitchell*, the government may appropriately use the same motive as a penalty enhancement where the underlying conduct outlawed by the statute is not itself within the protection of the First Amendment.[378] Thus, Wisconsin may use the actor's racial hatred to enhance the penalty for a crime such as battery, even if the state uses the actor's speech to prove his racial motive.[379]

The key is whether the underlying act is a protected First Amendment activity. *R.A.V.* would suggest that if the act is protected speech, as opposed to other conduct, then motive cannot be a limitation on the exercise of that act. But *R.A.V.* is not necessarily a motive case. Though the Court and Minnesota state courts had characterized the ordinance as outlawing racially motivated messages, the actual terms of the statute addressed the effect and content of the expression.[380] The ordinance outlawed, among other things, the placement of a "symbol" that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[381] It did not outlaw speech based solely on the

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[377] This was the characterization of the Minnesota statute made by the Minnesota Supreme Court and used by the United States Supreme Court. As noted by the Court, the Minnesota Supreme Court "repeatedly emphasized" that the statute was "a prohibition of fighting words that contain... messages of 'bias-motivated' hatred and in particular... messages 'based on virulent notions of racial supremacy.'" *Id.* at 392 (quoting *In re* R.A.V., 464 N.W.2d 507, 508, 511 (Minn. 1991)).

[378] 508 U.S. 476, 479 (1993).

[379] *Id.* at 487 (distinguishing *R.A.V.* on the ground that the Minnesota statute in *R.A.V.* "was specifically directed at expression" but the Wisconsin statute in *Mitchell* was "aimed at conduct unprotected by the First Amendment").

[380] The actual text of the statute did not speak directly to the speaker's motive:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

505 U.S. at 380 (reprinting ST. PAUL MINN. LEGIS. CODE § 292.02); *see also id.* at 391 (noting that "[i]n its practical operation... the ordinance goes even beyond mere content discrimination, to the actual viewpoint discrimination"); Mitchell v. Wisconsin, 508 U.S. at 487 (noting that the statute in *R.A.V.* "violated the rule against content-based discrimination"); SMOLLA, *supra* note 101, § 3.10 (noting that the Court in *R.A.V.* "appeared close to adopting a per se rule or, at the very least, an extremely heavy presumption against" viewpoint discrimination).

[381] 505 U.S. at 380.

racial hatred of the speaker. Such a statute would be technically neutral as to the content of the speech, and could outlaw even pleasant words if spoken with hate. The Court may invalidate this type of restriction as well, but, as in the context of civil liability, the Court has not yet closed the door and pronounced all such motive laws to violate the Speech Clause.[382]

2. *The Court's Holdings Regarding Motive, The Right to Petition and Court Access*

The Court's cases addressing motive under the Petition Clause follow the same general pattern as the speech cases. The Court's treatment of motive and court access is best seen in *Professional Real Estate Investors* and *Bill Johnson's Restaurants*, but it begins with *Noerr*.[383] In *Noerr*, the Court noted in dictum that not all activity that resembles petitioning is immune from antitrust liability; "sham" petitions are not protected. In making this determination, the Court distinguished between the motive of the defendant railroads in lobbying the governor—"to destroy the truckers as competitors for the long-distance freight business"—and their genuine intent to influence government action.[384] Because "the railroads were making a genuine effort to influence legislation and law enforcement practice," their lobbying did not constitute "sham" petitioning and was protected.[385] So long as the railroads were seeking to influence governmental action, their actual motive in doing so was irrelevant; they could not be liable under the antitrust laws, despite their anticompetitive intent.

The Court blurred this distinction in *California Motor Transport*.[386] There, the Court extended the *Noerr* petitioning immunity and its sham exception to adjudicatory petitioning but caused a great deal of confusion as to both the definition of sham petitioning and the proper role of motive. The Court held that the trucker defendants' previous litigation efforts—judicial and administrative protests to the issuance or transfer of operating licenses to their competitors, the trucker plaintiffs—were a sham and not protected.[387] However, in describing these litigation efforts, the Court suggested a number of ways in which they were sham. The Court, for example, seemed particularly concerned about the intent of

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[382] For a further comparison of motive and veiwpoint regulation under *R.A.V.*, see *infra* Part IV.C.3.b. notes 479–93.

[383] Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). *See* discussion *supra* notes 43–46 and accompanying text.

[384] *Id.* at 138.

[385] *Id.* at 144.

[386] 404 U.S. 508 (1972).

[387] *Id.* at 516.

the trucker defendants to deprive the plaintiffs, their competitors, of meaningful access to the agencies and courts in order to acquire licenses.[388] Yet, the Court also emphasized that their pleadings lacked merit.[389]

This imprecise definition of sham litigation led to a conflict in the circuits and to scholarly debate as to what constituted sham litigation.[390] Was a sham lawsuit defined by its lack of merit, the plaintiff's ill motives, or both? Twenty years later, in 1993, the Court in *Professional Real Estate Investors* granted certiorari to answer the question "left unresolved" in *California Motor Transport*: "whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant."[391] The Court answered no.

The Court acknowledged that in *California Motor Transport* it had used both subjective and objective terminology to describe the sham cases.[392] Yet, in the years following *California Motor Transport*, the Court had not used intent to define what petitioning activity would be permitted. It stated that "[w]hether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone

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[388] The Court stated:

> More critical are other allegations, . . . which elaborate on the 'sham' theory by stating that the power, strategy, and resources of the petitioners were used to harass and deter respondents in their use of administrative and judicial proceedings so as to deny them 'free and unlimited access' to those tribunals. The result, . . . was that the machinery of the agencies and the courts was effectively closed to respondents, and petitioners indeed became 'the regulators of the grant of rights . . . .'

Id. at 511.

[389] *See id.* at 512 (stating that the "petitioners instituted the proceedings and actions . . . with or without probable cause and regardless of the merits of the cases"); *see also id.* at 513 (suggesting that defendants' actions constituted "a pattern of baseless, repetitive claims"). The Court also suggested that sham *litigation* might include activities—unethical or fraudulent acts—that might merit protection if part of political lobbying efforts, such as those in *Noerr*, as opposed to litigation. *See id.* at 512–13.

[390] *See* Thomas A. Balmer, *Sham Litigation and the Antitrust Law*, 29 BUFF. L. REV. 39, 47 (1980) (discussing the "perplexity" of *California Motor Transport*); William R. Jacobs, *The Quagmire Thickens: A Post-*California Motor *View of the Antitrust and Constitutional Ramifications of Petitioning the Government*, 42 U. CIN. L. REV. 281, 301 (1973) (noting problems created by *California Motor Transport*).

[391] Professional Real Estate Inv. Inc., v. Columbia Pictures Indus., Inc., 508 U.S. 49, 57 (1993); *see also id.* at 55 (noting that "[t]he courts of appeals have defined 'sham' in inconsistent and contradictory ways").

[392] *See id.* at 57, 58.

cannot transform otherwise legitimate activity into a sham."[393]

The *Professional Real Estate Investors* Court explained that some of the confusion may have resulted from the Court's earlier use, beginning in *Noerr*, of the term "genuine" to denote the opposite of sham. Though "genuine" may be thought of as a subjective term, it has both objective and subjective components, as does "sham."[394] The Court clarified that sham litigation must be objectively baseless *and* improperly motivated:

> We now outline a two-part definition of 'sham' litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claims premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals 'an attempt to interfere *directly* with the business relationships of a competitor' through the 'use [of] the government *process*—as opposed to the *outcome* of that process—as an anti-competitive weapon.'[395]

Because sham litigation must have both components, litigation with objective merit is protected, regardless of the actual motive of the plaintiff. The Court's definition of the second element of motive is significant. The second prong—motives that are irrelevant if the claim has objective merit—includes not only an intent to harm a competitor through the ultimate judgment but also the intent to use the process as a weapon regardless of the ultimate outcome. The Court thus departed from its prior suggestions that abuse of process was a form

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[393] *Id.* at 59.

[394] The Court explained the subjective and objective components of both the term "genuine" and "sham" litigation:

> Some of the apparent confusion over the meaning of 'sham' may stem from our use of the word 'genuine' to denote the opposite of sham. . . . The word genuine has both objective and subjective connotations. On one hand, 'genuine' means 'actually having the reputed or apparent qualities or character.' 'Genuine' in this sense governs Federal Rule of Civil Procedure 56, under which a 'genuine issue' is one 'that properly can be resolved only by a finder of fact because [it] may *reasonably* be resolved in favor of either party." On the other hand, 'genuine' also means 'sincerely and honestly felt or experienced.' To be sham, therefore, litigation must fail to be 'genuine' in both senses of the word.

Id. at 61 (citations omitted).

[395] *Id.* at 60–61 (citation omitted).

of sham petitioning and not protected.[396] Under *Professional Real Estate Investors*, so long as the underlying claim has requisite merit, the litigation is immune from antitrust liability even if the original plaintiff intended to use the process of litigation to inflict harm on his competitor.

Unfortunately, *Professional Real Estate Investors* did not completely end the confusion with regard to the plaintiff's motive. The Court in the quoted passage used the term "expect" to define objective merit. In addition, the Court, elsewhere in the opinion equated the objective first prong with the "probable cause" inquiry in the tort of wrongful civil proceedings: "a 'reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication.'"[397] The terms "belief" and "expectation" traditionally connote a subjective state of mind, but not here. The belief or expectation is not the actual belief of the plaintiff, but instead what a reasonable person would expect or believe. Thus, it is an objective standard used as a test of merit, not of the motive of the plaintiff.

The Court used a different objective test of merit in *Bill Johnson's Restaurants*, depending on the status of the litigation, but objective merit nevertheless was the essential prerequisite to petitioning protection.[398] Indeed, the issue as stated by the Court was the propriety of the NLRB's position that it can base NLRA liability solely on the employer's retaliatory motive in filing suit, regardless of the merit of the underlying claim.[399] However, "weighty countervailing considerations," particularly the First Amendment right of access to courts, mandated that the Court reject the Board's position.[400] Thus, *Bill*

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[396] In *California Motor Transport*, the Court suggested that abuse of process constituted sham litigation. 404 U.S. 508, 513 (1972) (noting that the line between legitimate resort to litigation and abuse of process is difficult to draw, but that "once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz.*, effectively barring respondents from access to the agencies and courts"). In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), a lobbying case, the Court stated that sham lobbying "encompasses situations in which persons use the governmental *process*—as *opposed* to the outcome of that process—as an anticompetitive weapon." *Id.* at 380.

[397] 508 U.S. at 62–63 (citation omitted).

[398] *See supra* Part II.C. The standard for completed suits was whether the plaintiff won or lost, and the standard for ongoing suits was whether the suit had sufficient merit to withstand summary judgment. *See supra* note 83.

[399] The Court summarized the Board's position: "[T]he Board does not regard lack of merit in the employer's suit as an independent element of the § 8(a)(1) and § 8(a)(4) unfair labor practice. Rather, it asserts that the *only* essential element of a violation is retaliatory motive." 461 U.S. at 740.

[400] The Court explained the relationship of motive and the right to petition courts:

Johnson's Restaurants and *Professional Real Estate Investors* have a common element—an objective standard. The government can punish (under the antitrust and labor laws) a plaintiff for having improper motives only if his claim lacks the requisite merit, regardless of his motives.

The question is whether the First Amendment requires an objective merit standard. As I discuss above, both *Professional Real Estate Investors* and *Bill Johnson's Restaurants* were exercises in statutory interpretation based on both policy and the Petition Clause.[401] Just as I contend that policy prompted the Court to grant added protection to losing but meritorious claims in *Professional Real Estate Investors*, it is possible that policy, and not the First Amendment, prompted the Court to hold that bad motive alone could not render a plaintiff liable under either statute.

This possibility is best assessed under *Bill Johnson's Restaurants*, which gave the least amount of protection. There, the Court said that both the First Amendment and the state interest in providing a civil remedy to its citizens drove its decision to override the Board's imposition of liability based solely on motive.[402] As a result of these two influences, the Court set a dual standard for protection, liability could not be imposed unless the employer had bad motive *and* lost the suit. One could argue that the First Amendment, when viewed in isolation, requires only one of the two before the government may punish a plaintiff for going to court, the "fault" can be either filing a losing claim *or* filing

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> In *California Motor Transport*... we recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. Accordingly, we construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose in doing so, unless the suit was a 'mere sham' filed for harassment purposes.... We should be sensitive to these First Amendment values in construing the NLRA in the present context.... The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right.

Id. at 741 (quoting *Peddie Buildings*, 203 N.L.R.B. 265, 272 (1973)); *see also id.* at 743 ("The filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act.").

[401] *See supra* notes 81–86 and accompanying text.

[402] *See* 461 U.S. at 742–43. The Court described the state interests as "maintenance of domestic peace," the need to provide "a civil remedy for conduct touching interests 'deeply rooted in local feeling and responsibility,'" and "'protecting the health and well-being of its citizens.'" *Id.* at 741–42 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) and *Farmer v. United Bhd. of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 302–03 (1977)).

any claim, even a winning claim, for a bad motive.[403] This is a doubtful interpretation of *Bill Johnson's Restaurants*. The state interests that the Court relied upon in *Bill Johnson's Restaurants*—providing a forum for civil remedy—mirror the First Amendment's interest in safeguarding court access. They are not sufficiently distinct to justify the argument that they together require the two standards of protection (losing the suit and bad motive), but alone only one.

In sum, these cases likely provide the "easy" answer to the question that I address in this Article. The Court has strongly suggested that the government cannot use a plaintiff's motive to limit the plaintiff's ability to file a civil claim.[404] Nevertheless, because the Court has not completely foreclosed such a restriction, some doubt remains as to the proper role of motive and court access under the Petition Clause. In the next Part, I fill these gaps by testing the laws under the Court's general analytical framework for protecting First Amendment freedoms.

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[403] Justice White pondered a similar possibility with respect to speech in the oral argument in *Falwell*. *See supra* note 371. The Court rejected such a motive standard for speech about public figures. *See supra* notes 362–71 and accompanying text.

[404] In 1996, the Court again expressed its view that motive should not limit the ability to file an otherwise valid claim, but it did not base this view on the First Amendment. In *Lonchar v. Thomas*, a state prisoner filed a federal habeas petition and admitted that he was litigating his many claims "only to delay his execution, with the hope that the State would change the execution method to lethal injection so he could donate his organs." 517 U.S. 314, 318 (1996). The Court held that the district court must use only specific habeas rules and not general equitable doctrines in deciding whether to dismiss his habeas petition. *See id.* at 1303. In dictum, the Court noted that Lonchar's motive in filing his petition was irrelevant:

> Normally courts will not look behind an action that states a valid legal claim on its face in order to try to determine the comparative weight a litigant places on various subjective reasons for bringing the claim. *A valid antitrust complaint or environmental action, for example, does not suddenly become invalid simply because the litigant is subjectively indifferent about receiving the requested equitable relief, but instead primarily wants to please his or her family or obtain revenge.* More importantly, litigation about a petitioner's subjective motivations risks adding to the complexity of habeas litigation, asking a subjective question (about the petitioner's *true* motives) that is often unanswerable and the very asking of which may encourage and reward the disingenuous.

Id. at 332 (emphasis added).

C. *Testing Motive Restrictions on Court Access*

I analyze the propriety of motive restrictions in four steps. First, I look to whether motive might define the right, or in other words, whether an improperly motivated complaint is a "petition for redress of grievances" within the meaning of the First Amendment. This requires an analysis of the text, history, and policy of the Petition Clause and of court access generally. Furthermore, as will become apparent, it requires a distinction between the intent to abuse the process of litigation and the intent to obtain favorable relief for ill motives. I conclude that neither state of mind defines the right and that a winning claim is part of the right to petition courts regardless of the plaintiff's intent in filing the claim.

Second, I take the right as defined—without any form of motive element—and examine whether the government might still impose a motive restriction. This requires a "strict scrutiny" analysis of the law: Does the government have a compelling interest in barring poorly motivated winning claims and has it narrowly tailored the law to reach that aim? I conclude that motive restrictions do not survive such scrutiny to the extent that they punish a plaintiff for having an improper motive in filing a *winning* claim.

Third, I apply the traditional breathing room doctrine. In this analysis, I assume that the law is rewritten to apply only to nonwinning claims. I look to whether motive restrictions on the ability to file *losing* suits might have an undue chilling effect on the ability to file winning claims. I conclude that some, but not all, motive restrictions have an undue chilling effect on the ability to file winning claims and therefore must be narrowed.

Fourth, I look at this same hypothetical law, one that restricts motive only as to losing claims, under the Court's approach in *R.A.V.* I look to see whether the *R.A.V.* analysis might change the result of my preceding breathing room analysis. I conclude that it does not.

In all steps of this analysis, I use as my foundation the right to petition courts as I narrowly defined the right in my previous article—the right to file a winning claim. I recognize that this is a controversial definition and that an argument can be made to expand the right to include all nonfrivolous claims regardless of whether they ultimately prevail.[405] In some respects, the merit standard does not affect my analysis of motive restrictions because the laws that I outline above in Part III are indifferent to merit, regardless of how merit is defined. Yet, use of a particular merit standard is essential for much of the analysis because both strict scrutiny and breathing room analysis requires an identification and balancing of interests. The government's interest in restricting a claim necessarily varies with

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[405] *See* Andrews, *supra* note 5, at 648–64.

the merit of the claim—it has less interest in restricting winning claims than it does in restricting losing claims, and the substance of the analysis thus will change with a different merits standard.

1. *Determining Whether Motive Defines the Right to Petition Courts*

The first step is one of definition. In other words, if the plaintiff has an improper motive, is he filing a petition within the meaning of the Petition Clause? If not, a restriction against bad motives is likely not a problem. Such laws, by definition, would not infringe the exercise of any activity protected by the First Amendment. Thus, strict scrutiny and most other protections of First Amendment rights would not apply.[406]

The best argument for defining the right to petition courts to exclude improperly motivated complaints is textual. It rests primarily on defining the word "for" to mean the petitioner's intent.[407] If a plaintiff does not genuinely seek relief from his claim, regardless of its merit, he arguably does not petition "*for* redress for grievances."[408] This argument extends only to a very specific motive or state of mind of the plaintiff—the absence of intent to obtain a judgment (although such intent usually is accompanied by an intent to use the litigation for some other purpose such as to harm the defendant). If a plaintiff does not actually want relief, his claim (no matter how meritorious) arguably is not a petition "for" redress of grievances, but if he wants relief and acts out of some other ill motive, his claim nevertheless is "for" redress. Thus, there may be some textual basis for excluding cases where the plaintiff has no intention of actually obtaining judgment, but there is no such support for excluding cases where the plaintiff has an ill motive in addition to the intent to obtain relief.[409]

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[406] The breathing room doctrine might apply. This doctrine protects activity at the fringe of the absolute right, false speech for example, in order to not chill exercise of the absolute right. *See* discussion *supra* notes 97–100 and accompanying text; *infra* Part IV.C.3.a. In other words, the ability to file a properly motivated claim (if that were the constitutional definition of the right to petition courts), might require some breathing room, such as a ban on punitive damages for some ill motives.

[407] A late eighteenth century dictionary defines the word "for" as meaning, among other things, "for the reason." SAMUEL JOHNSON'S DICTIONARY OF THE ENGLISH LANGUAGE (1784) [hereinafter JOHNSON'S DICTIONARY].

[408] The Court suggested this narrow reading of the Petition Clause in its definition of sham petitions in *Noerr*, by excluding from petitioning immunity certain "sham" petitions that were not genuinely aimed at influencing governmental action. 365 U.S. 127, 144 (1961).

[409] For the same reason, there is no basis to exclude petitions in which the lawyer, not the client, has a bad motive. If the client has a good motive, his winning claim still is a petition for redress regardless of whether his lawyer has ill motives. *See infra* notes 421–23 and

Because of this difference, I separately analyze the two states of mind.

I start with the plaintiffs who have bad motives but who still want judicial relief. What is the policy basis for protecting these plaintiffs? The Court in *Noerr* gave the practical explanation that most petitions are accompanied by some selfish or other "less than ideal" motive:

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.... A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.[410]

This practical reality extends to judicial petitions. Rarely will a civil plaintiff have only good feelings about the defendant. In fact, plaintiffs and defendants often are hostile to each other. If a plaintiff could avail himself of the courts only when he had good feelings for the defendant, the courts might very well be idle. It is precisely when the plaintiff bears ill feelings for the defendant that a court is needed. Indeed, one of the primary policy bases for extending the right to petition to the courts—the opportunity for peaceful resolution of disputes—assumes such hostility.

The First Amendment protects petitions for the further reason that they inform the government and thus create the potential for advancement of the law and cure of societal problems. These aims are achieved by the filing of a winning claim, no matter what the plaintiff thinks. Indeed, society might be deprived of important changes if the right to go to court were limited by the plaintiff's motive. Often, only one who has strong feelings will be willing to expend the time, effort, and resources necessary to prosecute a civil claim. Take, for example, the civil litigation that victims of Klan violence instituted in the 1980s against the United Klans of America.[411] The attorneys leading the litigation

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accompanying text, 440–42 and accompanying text (discussing the role of the attorney motive); *see generally* Andrews, *supra* note 11, at III.A.3.

[410] 365 U.S. at 139.

[411] Beulah May Donald brought civil claims against the United Klans of America, the oldest and largest Klan organization in the nation, for its role in the murder, via beating and hanging, of her teenage son in Mobile, Alabama. She won a $7 million verdict. *See generally* Frank Judge, *Slaying the Dragon*, THE AMERICAN LAWYER, Sept. 1987, at 83.

admitted to motives that might run afoul of some court rules—a desire to burden and destroy the defendant financially.[412] The unspoken motives and feelings of the plaintiffs, the victims of Klan persecution, undoubtedly were more hostile. They won and, as a result, the United Klans is considerably weaker.[413] Had the plaintiffs paid more attention to and worried about court rules regarding their motives, they might not have filed suit.

Moreover, the idea that motive might limit the right to petition seems inconsistent with the freedom of thought inherent in the First Amendment.[414] Implementation of the Petition Clause, like the Speech Clause, demands neutrality. Use of motive to restrict exercise of the right to petition courts creates the risk of imposing community preferences.[415] Today, society might applaud a

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[412] Morris Dees, of the Southern Poverty Center in Montgomery, Alabama, spear-headed the litigation. *See id.* Dees described his litigation strategy as an effort "to drain the Klan's financial resources" and said that "we never entered this lawsuit to get any money, the purpose of the verdict is punitive." *See* Walter W. Miller, *Slain Youth's Mother Gets Klan Building*, ATLANTA JOURNAL-CONSTITUTION, May 20, 1987, at A2; Strat Douthat, *Suit Knocks Wind Out of Klan Sheets; Hard Times for KKK in Stomping Grounds*, WASH. POST, Nov. 26, 1987, at F10.

[413] The United Klans of America could not pay the $7 million judgment to Ms. Donald, so it had to deed its headquarters to her, which, as Dees described it, was a "virtual death blow" to the United Klans. Miller, *supra* note 412, at A2. Dees has kept up the pressure by bringing and winning other civil suits against the Klan. *See* Douthat, *supra* note 412, at F10.

[414] In this respect, motive resembles the "viewpoint" regulation on speech that the Court usually invalidates. For a further comparison of motive, viewpoint, and belief, see *infra* Part IV.C.3.b.

[415] Unlike the use of the speaker's state of mind as an awareness standard to put the speaker in control of his First Amendment rights, this use of motive limits the exercise of First Amendment freedoms and raises the specter of thought control. Professor Tribe analyzes these different functions of motive and their implications on the First Amendment in his essay on public and private motives. *See generally* Tribe, *supra* note 344. He concludes that government may use motive to define what facts the actor knows and what he perceives about his injury, but not to regulate his beliefs:

> [E]ven this justification for inquiring into motive stops short of a general invitation to unearth the inner belief systems that give to particular facts their motivating effect for . . . actors. It is true that, in relatively rare circumstances, one might be able to justify focusing on these belief systems in the private context as the only practical way of distinguishing isolated violations from violations that are likely to recur, and that one may thus be able to justify a differential response, on grounds of deterrence, to private acts motivated by different underlying beliefs. But few rights, if any turn on the beliefs or values that make various perceptions count for the people who act on them. On the contrary, one of the presumptive rights people . . . have under our constitutional system is that their values and beliefs ordinarily should not define what they are permitted to do, or shape the consequences that attach to how they choose to act.

plaintiff who wants to destroy the Ku Klux Klan or the big tobacco companies through the filing of a winning claim and frown upon plaintiffs who have the same intentions with regard to an hourly wage earner or a political protester.[416] But society in a different time or place might have an opposite reaction. The availability of the courts to hear winning claims should not turn on such mood swings and popularity contests. For the same reasons that the First Amendment right of speech is not defined by such community preference,[417] the right to petition courts should not be.

Historical practice likewise supports the view that a plaintiff's motive in seeking relief does not define the right to petition the courts. As discussed in Part III above, the requirement that the plaintiff have a proper motive in filing suit is a modern one.[418] Such standards apparently began in the late nineteenth century as an effort to improve the ethics of lawyers and did not appear in the procedural

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Id. at 35–36.

[416] These are real examples. The societal approval of litigation is demonstrated by the positive publicity surrounding Ms. Donald's and Morris Dees' other litigation against the Klan, *see supra* notes 411–413, and the movie *The Insider*, where the audiences applaud litigation efforts against the cigarette manufacturers. The societal disapproval of litigation is demonstrated by the NLRB's efforts to apply the NLRA to protect the hourly wage earner in *Bill Johnson's Restaurant*, *see supra* notes 49–53, and by the state anti-SLAPP statutes designed to protect political protesters from litigation. *See supra* Part.III.B.2.d.

[417] Professor Post argues that this is the reason for the result in *Falwell v. Hustler*. *See generally* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603 (1990). See *supra* notes 362–71 for a discussion of *Falwell*. Professor Post argues that "[b]ecause it enforces a civility rule, the intent element at issue in *Falwell* maintains a particular vision of community life, and so is inconsistent with the neutrality necessary for public discourse." Post, *supra*, at 648. He also explains how this type of motive element is distinct from the *New York Times* actual malice standard, which he views as protective of speech:

> The reason the use of an intent requirement is constitutionally impermissible in the tort of intentional infliction of emotional distress, but constitutionally acceptable in the actual malice standard, is that the latter does not use the criterion of intent to enforce a civility rule. . . . The purpose of the actual malice standard is not to demarcate any such 'boundary between morally acceptable and unacceptable modes of political discussion;' it is rather to forge 'an instrument of policy, to attain the specific end of minimizing the chill on legitimate speech.' The element of intent in the actual malice standard accomplishes this objective by placing a defendant, to the maximum extent possible, in control of the legality of his own speech.

Id. at 649 (citations omitted).

[418] The practice likely was the same for judicial petitions presented to legislative bodies. In England and colonial America, when legislatures heard judicial petitions, they generally followed court practice. *See supra* note 85.

rules until federal rulemakers added the delay element to the 1912 Federal Equity Rules.[419] Application of other laws, such as the civil rights statutes, to punish meritorious but poorly motivated complaints are either recent developments or, in some cases, merely theoretical applications of the laws.[420] Put simply, until relatively recently, courts did not seem to care why the plaintiffs themselves came to court, so long as the plaintiffs met other requirements as to matters such as pleading and merit.

Some lawyer oaths prior to the adoption of the First Amendment may have imposed a motive restriction on lawyers who filed civil claims.[421] However, such a restraint did not seem to define the right to petition. First, it restricted only the lawyer from assisting the client and did not directly bar the plaintiff from petitioning the government. Even a complete bar on lawyer assistance would not have been a significant impediment to court access in colonial America. Early Americans usually represented themselves, without the help of lawyers.[422] Moreover, these early oaths likely spoke to the motives or self-interests of the lawyer, not of the client, and thus would have barred the assistance only of lawyers who personally had ill intentions.[423] Thus, the text, policies, and history of the Petition Clause and court access all argue against narrowly defining the right to petition to exclude plaintiffs who have ill motives but nevertheless seek relief through winning claims.

The other type of case, where the plaintiff does not want relief but instead intends to use the process of civil litigation as a weapon, presents a closer question of definition. First, as explained above, there is a good textual argument for excluding this case because the plaintiff is not filing his petition "for" redress of grievances. However, this is not the only possible reading of the Petition Clause. "For" could be descriptive in the sense that it distinguishes one form of petition from another—those that request relief and those that do not.[424] The Petition Clause arguably does not include petitions that do not, in some loose form, ask for relief, whether legislation or civil relief. A complaint that states a winning claim certainly requests relief, regardless of whether the plaintiff

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[419] *See supra* notes 146–48 and accompanying text.

[420] *See supra* Part III.B.–C.

[421] The use and meaning of motive oaths in early America is open to question and warrants further study. *See* discussion *supra* notes 134–36 and accompanying text.

[422] *See generally* CHARLES WARREN, THE HISTORY OF THE AMERICAN BAR 4–8 (1911) (describing the lawyers' disrepute in colonial America and their absence from the legal system of the time).

[423] *See supra* note 137 and accompanying text.

[424] The 1784 dictionary lists "with respect to" as an alternative meaning of the word "for." JOHNSON'S DICTIONARY, *supra* note 409.

actually wants or expects that relief.

The policy arguments likewise are mixed as to this form of motive. A claim that the plaintiff filed with the sole aim of using the process to harass the defendant does not advance the plaintiff's interest in peaceful resolution of his suit because he does not care about the resolution. The filing of such a claim is an alternative to force, but this policy is less compelling where that alternative is used to inflict another form of injury (*i.e.*, the burdens and costs of litigation rather than physical injury). But the differences end there. Assuming, as we must here, that the suit states a winning claim, it serves the other aims of the Petition Clause irrespective of the plaintiff's intent to use the process as a weapon. Winning claims will inform the government of problems, may advance the state of the law, and may help other persons who might suffer similar wrongs at the hands of the defendant or others. They serve these aims even if the plaintiff himself wants to use the prosecution of his winning claim to harass the defendant. To use the Klan example, the benefits of ultimately winning would be the same, regardless of whether the plaintiffs originally intended only to use the suit as a form of harassment or weapon to harm the Klan.

Finally, historical practice suggests that courts and legislatures were as indifferent to this motive as they were to other ill motives of the plaintiff. As noted above, courts and legislatures prior to the nineteenth century typically did not care what motivated a plaintiff.[425] The tort of abuse of process, designed to redress the use of process as a weapon, is a relatively modern creation. English courts developed the tort in the mid-nineteenth century, to cover situations not addressed by the tort of malicious prosecution (today called wrongful civil proceedings).[426] Even today, application of the tort of abuse of process to the

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[425] *See supra* Part III.A.

[426] Professor Prosser credits the 1848 English case of *Grainger v. Hill*, 132 Eng. Rep. 769 (1838), as the origin of the tort of abuse of process. *See supra* note 250, at 897; *see also* Jacobsen v. Garzo, 542 A.2d 265, 267 (Vt. 1988) (noting that "[t]he tort known as abuse of process first appeared in *Grainger v. Hill*"). The *Grainger* court described the new cause of action as follows:

> [T]his is an action for abusing the process of the law, by applying it to extort property from the Plaintiff, and not an action for a malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved.

Grainger, 132 Eng. Rep. at 773. One of the several judges deciding the case stated that it was one of first impression:

filing of an otherwise meritorious lawsuit is not universally accepted.[427]

In sum, the arguments are mixed as to whether the single purpose of abusing process might take a winning claim outside the protection of the Petition Clause. However, given the textual argument that a winning claim is always a claim for redress, the policy that winning claims, regardless of motive, serve some social function, and the absence of such limitation in historical practice leads me to conclude that a motive limitation is not inherent in the right to petition courts. A plaintiff's bad motive does not take his claim outside of the protection of the First Amendment so long as his suit states a winning claim.

2. *Strict Scrutiny of Motive Restrictions on Winning Claims*

That a claim is protected by the First Amendment does not mean that it is free from any form of regulation or limitation. The government may regulate exercise of the right to petition courts so long as the regulation passes strict scrutiny analysis: The government must have a compelling interest in imposing its restriction, and the regulation must restrict no more First Amendment activity than necessary to achieve that aim. The process of strict scrutiny is neither simple nor analytically precise. For example, the Court and its observers seemingly cannot agree on what constitutes strict scrutiny, as opposed to some "lesser" form of review or absolute protection.[428] In addition, courts often confuse the two prongs of strict scrutiny, considering the same facts under both prongs.[429] Nevertheless, strict scrutiny, in broad strokes, requires that any governmental restriction on a First Amendment right both have a compelling aim and be narrowly tailored to achieve the aim.

Because strict scrutiny depends on the aims and effects of the statute, it necessarily requires an examination of each law in isolation. As outlined in Part

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> [T]his is a *case primæ impressionis*, in which the Defendants are charged with having abused the process of the law, in order to obtain property to which they had no colour of title; and, if an action on the case be the remedy applicable to *a new species of injury*, the declaration and proof must be according to the particular circumstances.

Id. at 773 (Park, J.) (emphasis added).

[427] Many courts rely on policy and doctrinal grounds other than the Petition Clause and refuse to extend the tort of abuse of process to the filing of a meritorious complaint for an abusive purpose. *See supra* Part III.B.4.

[428] The debate concerning Justice Breyer's analysis in the cable access cases is an example. *See supra* notes 337–39 and accompanying text.

[429] For an example of such confusion, see the discussion of the Court's treatment of civil rights laws against challenges based on the right to assemble *infra* notes 443–59 and accompanying text.

III, however, there are countless laws that arguably regulate the motive of a plaintiff. Thus, in this Part, I address the issue of motive restrictions in the two broad categories in which I previously outlined them: the direct court access restrictions, such as Federal Rule of Civil Procedure 11(b)(1), and the indirect restrictions, such as the civil rights laws. I start with the direct court access regulations.

a. *Court Access Rules*

The first question is to determine the governmental interest behind the court rules that regulate motive. This is easily answered. Most systems describe the aim of these laws as deterring abuse, principally frivolous lawsuits.[430] Deterrence of baseless litigation is likely a compelling state interest. Frivolous litigation causes a number of harms that the government legitimately may seek to avoid. First, the government has an interest in ensuring that the limited resources of the courts are not consumed by frivolous claims. As noted by the Court in *United States v. Harriss*[431] (a Petition Clause challenge to federal restrictions on lobbying), the government has a "vital" interest in ensuring that the voices of all of the people are not drowned out by some of the people.[432] A restriction against frivolous claims conserves judicial resources and helps guarantee that persons with meritorious claims have access to court.

A baseless lawsuit also can harm the defendant in a number of ways. He can suffer the same reputational harm that a defamation plaintiff suffers, as well as

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[430] The advisory committee notes to the 1983 amendments to Federal Rule 11 state the aims of the rule and its revision:

> Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings.
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> ....
>
> Experience shows that in practice Rule 11 has not been effective in deterring abuses.
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> ....
>
> Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

FED. R. CIV. P. 11 advisory committee's note (1983 amendment). *See also supra* Part III.B.1.a.

[431] 347 U.S. 612 (1954).

[432] *See id.* at 625–26 (stating that Congress had a "vital national interest" in regulating lobbying to prevent the voice of the people from otherwise being "drowned out by the voice of special interest groups").

the considerable expense of defending a suit. The taxpayers similarly pay a high cost. They must, through their government, build court houses, hire judges and court staff, and otherwise process every claim, but these efforts are virtually wasted if a claim is baseless.

The conclusion that the government has a compelling interest does not end the analysis. The restriction also must pass the second prong of the strict scrutiny test. That is the problem here. Motive restrictions are not narrowly tailored to achieve the end of avoiding frivolous claims. To be sure, motive restrictions penalize some frivolous lawsuits. Many improperly motivated claims are also factually or legally frivolous, but a motive restriction is not necessary to curb frivolous lawsuits. Indeed, many of the laws that contain a motive restriction independently prohibit frivolous claims. The second and third clauses of Federal Rule 11(b), for example, bar claims that do not have evidentiary support or are not supported by the law.[433] The addition of a motive restriction accomplishes nothing other than prohibition of meritorious and winning claims. In sum, if deterrence of frivolous claims is the sole interest behind motive restrictions, they fail strict scrutiny.

The analysis now returns to the first prong. Does the government have any direct interest in restricting a plaintiff's motive in the filing of winning claims? One possibility is the interest in avoiding use of the litigation *process* as a weapon. The state certainly has some interest in requiring that plaintiffs not use its courts as a weapon. Such a prohibition maintains the integrity of courts and protects citizens from this type of harm. In the end, however, this interest does not justify restriction of winning claims.

By definition, the activity at issue in this analysis is narrow—the filing of a *winning* claim with the intent to use the process of litigation as a weapon. Such claims do not present the type or degree of harm presented by frivolous claims. Other plaintiffs suffer no more from these filings than they do with any other winning claim. The defendant certainly suffers when the plaintiff strives to use the process of litigation as a weapon, but the defendant incurs the expense and burden of litigation any time a plaintiff files a winning claim. Absent some other wrongful act, the plaintiff's ill motive alone does not add any harm to the defendant, other than perhaps emotional harm if the defendant knows the plaintiff's ill feelings. The taxpayers pay a cost, as they do with every claim, but they also get the benefits arising from the filing of a winning claim: advancement in the law and a cure of wrongdoing by the defendant or by others. In short, it is difficult to conclude that the state has a *compelling* interest in avoiding the filing of any winning claim, no matter what the plaintiff's actual motive is in doing so.

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[433] *See* FED. R. CIV. P. 11(b)(2), (3), *reprinted in* text accompanying *supra* note 152.

The government may have a compelling interest in avoiding other abuses of its process, such as violation of its court rules, undue expansion of the suit, or outside threats and extortion related to litigation. Indeed, this is often the definition of the tort of abuse of process.[434] But the motive restrictions as I define them (and identify them in Part III.B) are not narrowly aimed to achieve this interest. They potentially bar the filing of winning claims. They are not limited to cases where the plaintiff violates rules or makes outside threats. Instead, they may apply based solely on the plaintiff's motive in filing the original complaint, even if the plaintiff otherwise behaves properly.

Another justification for at least some of the motive restrictions, those that apply to the plaintiff's lawyer, is the professionalism of the plaintiff's lawyer and the integrity of the legal profession as a whole. Interestingly, as noted in Part III.A, this concern, embodied in lawyer oaths and early ethics codes, apparently was the catalyst for more wide-spread adoption of motive restrictions on complaint filings. The concern about the ethics of lawyers is at least as strong today as it was in the nineteenth century.[435] The government continues to have an interest in maintaining the integrity of and public confidence in the legal profession, and lawyers who act with spite, ill will, or other bad motives certainly undermine that aim.

The issue here is more complex than it might seem. Analysis of the sufficiency of the interest requires a further breakdown of the state's professionalism concern. One such concern might be that baseless lawsuits damage the reputation of lawyers. If this is the concern, the motive restrictions fail. They are not narrowly tailored to achieve the goal of deterring baseless suits.[436]

Another concern might be that poor motives alone hurt the profession. The Court's decisions in the group litigation cases of the 1960s, however, suggest that such general professionalism concerns usually are too speculative to support a significant intrusion on the right to petition courts.[437] In those cases, the states sought to use their professional regulations to bar the NAACP and labor unions from encouraging and sponsoring litigation among its members.[438] The

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[434] *See supra* Part III.B.4.

[435] The outcry about professionalism among lawyers has become so great that in 1993, the ABA created a special committee to engage in a two-year study of professionalism among American lawyers. *See Teaching and Learning Professionalism*, 1996 A.B.A. SEC. OF LEGAL EDUC. & ADMISSION TO BAR 1, 2–3, nn.5–7, app. G (listing recent literature on professionalism).

[436] *See supra* note 433 and accompanying text.

[437] *See supra* notes 33–36 and accompanying text (discussing group cases).

[438] *See* United Mine Workers of America v. Illinois State Bar Assoc., 389 U.S. 217

purported justification was the state's interest in regulating lawyers and, more specifically, in avoiding conflicts of interests and baseless litigation. The Court held that these concerns were "too speculative" to justify the substantial intrusion into First Amendment rights.[439]

Whether motive restrictions similarly fail under this justification depends on the motive the rule seeks to regulate. If the rule regulates the motive of the client, as opposed to the lawyer, the danger to the profession is too remote to justify such a broad ban on the client's access to court. A lawyer who personally has pure motives will not do much, if any, harm to the profession when he files a winning claim, even if his client has ill motives.

This is not to say that reputational concerns are never enough.[440] To the

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(1967) (invalidating application of the state unauthorized practice of law statute to enjoin union employment of lawyers to advise and represent members on worker compensation claims); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964) (invalidating application of Virginia statutes against solicitation and unauthorized practice of law to enjoin union advisory and referral service for members' FELA claims); NAACP v. Button, 371 U.S. 415 (1963) (invalidating application of a Virginia statute against solicitation of legal business to bar NAACP from advising Virginia citizens of potential grounds for litigation to achieve school desegregation).

[439] The Court in *United Mine Workers of America* described the holdings in *Button* and *Railroad Trainmen* and its own:

> [In *Button*], we held the dangers of baseless litigation and conflicting interest between the association and individual litigants far too speculative to justify the broad remedy invoked by the State, a remedy that would have seriously crippled the efforts of the NAACP to vindicate the rights of its members in court. Likewise in the *Trainmen* case there was a theoretical possibility that the union's interests would diverge from that of the individual litigant members, and there was a further possibility that if this divergence ever occurred, the union's power to cut off the attorney's referral business could induce the attorney to sacrifice the interest of his client. Again we ruled that this very distant possibility of harm could not justify a complete prohibition of the Trainmen's efforts to aid one another in assuring that each injured member would be justly compensated for his injuries.
>
> We think that both the *Button* and *Trainmen* cases are controlling here.
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> . . . .
>
> The decree at issue here thus substantially impairs the associational rights of the Mine Workers and is not needed to protect the State's interest in the high standard of legal ethics.

389 U.S. at 223, 225.

[440] The Court, in the group litigation cases easily dismissed such concerns, but it recently seemed to resurrect the "reputational" interest as a possible justification for limitation of lawyer commercial speech. In *Florida Bar v. Went For It*, 515 U.S. 618 (1995), the Court relied in part

extent that the state is concerned that the lawyer's own motives might damage the profession, the concern may be sufficient to justify the limitation. The impact of such a rule would have negligible impact on the client. He could hire another lawyer without these personal motives. More importantly, such a rule would benefit most clients by avoiding the conflict inherent in a representation where the lawyer is burdened by personal ill motives.[441] The problem with most motive rules, however, is that they are not narrowly tailored to address only the lawyer's ill motives.[442]

In sum, none of the purported justifications for the direct motive controls on court access justify the broad impact of such rules on court access. The first category of motive restrictions therefore fail strict scrutiny.

b. *Substantive Statutes*

The second broad category of motive restrictions—those not aimed directly at controlling court access but instead at "substantive evils"—present a closer case under strict scrutiny. The governmental purpose behind such laws is markedly different than that behind court rules. The government's interest is not in judicial management or regulation of the legal profession, but instead in stopping persons from acting with racial hatred, anticompetitive intent, or retaliatory aims in employment. Because the civil rights laws protect against discrimination and arguably present the most compelling justification for governmental action, I use them as the basis for my evaluation. If the civil rights laws fail to justify governmental limitation on the right to file winning claims, as

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on such an interest in upholding a 30-day waiting period on lawyer solicitation of accident victims and surviving family members. *Id.* at 631–32. The Court noted that the state presented substantial record evidence of "the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered," *id.* at 631, and concluded that the state "has a substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered." *Id.* at 635. This prompted some Justices to dissent; they challenged reliance on the "reputation and dignity of the legal profession" as antithetical to the First Amendment principles of free expression. *Id.* at 639–40 (Kennedy, J., dissenting). This debate, however, arose in the context of commercial speech, on which the Court has more freely allowed regulation than on traditional speech, which the Court subjects to strict scrutiny. *See supra* note 325.

[441] The rules barring conflicts of interests might bar such a representation. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983).

[442] *See generally supra* Part III.B. Rule 11(b)(1), for example, apparently applies to both lawyers and litigants and seemingly prohibits both from filing for "any improper purpose." *See supra* text accompanying note 152. For a more detailed discussion of the breadth and impact of the professional rules of conduct for lawyers, see generally Andrews, *supra* note 11.

I conclude they do, the other laws that I list in Part III.C fail strict scrutiny as well.

The government has a strong interest in stopping discrimination—the interest in protecting basic human dignity and in avoiding the societal problems caused by discrimination. The civil rights laws attempt to assure that persons are judged and treated based on their actions and abilities, not their race, sex, or religion. Although we all might suffer adverse employment or housing decisions, we should not have to suffer them solely because we are black, female, or of the Jewish faith. Congress has wisely chosen to protect us from these special harms. But housing and employment decisions are not protected by the Bill of Rights. The question here is whether the government can insist upon a nondiscriminatory motive in exercise of a First Amendment freedom, such as speech or the right to file a winning civil claim. In other words, does the government's interests in stopping discrimination override the individual's interests in these basic freedoms?

The Court has given little guidance on this issue. Where the Court has considered civil rights laws that impact First Amendment rights (most notably, the right of association) the key factor in its analysis has been the degree to which the civil rights law affects core activity protected under the First Amendment. A civil rights law that substantially intrudes on the First Amendment does not pass muster, but one that has lesser effect will survive strict scrutiny. Seemingly, this factor would be relevant to the second prong of strict scrutiny—the statute is not narrowly tailored if it intrudes "substantially" on First Amendment freedoms—but the Court has suggested it under the first prong as well—the government does not have a compelling interest in regulating core First Amendment activities, even if its aim is to promote civil rights. Two cases illustrate this "substantial intrusion" test.

In *Roberts v. United States Jaycees*,[443] Minnesota applied its "Human Rights Act"[444] to compel the Jaycees to accept women as members, and the Jaycees challenged the order as a violation of their First Amendment right of association. The Court rejected their claim, and in doing so, went to great pains to assess the effect on First Amendment freedoms. First, the Court distinguished between forms of association. If the association is particularly intimate, such as that in marriage and family, or if the association is for the purposes expressed in the First Amendment, such as speech, religion, and petition, the Court extends

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[443] 468 U.S. 609 (1984).

[444] The Minnesota Human Rights Act is an example of the public accommodations laws that some states enacted a decade before the federal government passed the Civil Rights Act of 1875. Minnesota progressively has broadened the statute, adding sexual discrimination in 1973. *Id.* at 624.

greater protection than to other forms of association.[445] According to the Court, the Jaycees were not an intimate form of relationship,[446] but they did engage in some expressive activity that the state impaired through its order that the Jaycees admit women.[447]

Second, the Court looked at the degree of this impairment and balanced it against the state interest behind the intrusion. This was in essence its strict scrutiny analysis. The Court concluded first that Minnesota's interest "in eradicating discrimination against its female citizens... plainly serves compelling interests of the highest order."[448] Second, the law, as applied to compel admission of women, did not impose "any serious burdens on the male members' freedom of expressive association."[449] The Jaycees could still continue its creed of promoting the interests of young men and exclude persons with ideologies different from its existing membership. Thus, the state's

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[445] The Court explained these distinctions:

> Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secure against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

Id. at 617–18.

[446] The Court found that "the local chapters of the Jaycees are neither small nor selective" and that "much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship." *Id.* at 621.

[447] *Id.* at 622–23.

[448] *Id.* at 623–24. The Court examined the history of the Minnesota law and other civil rights laws and noted that they protect citizenry from both personal and societal harms:

> [T]his Court has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

Id. at 625. The Court emphasized that these "concerns are strongly implicated with respect to gender discrimination in the allocation of publicly available goods and services." *Id.*

[449] *Id.* at 626.

requirement that they not exclude women based solely on their sex (as opposed to their ideology) did not work a substantial intrusion on the Jaycees' expressive activity and therefore passed constitutional muster.[450]

The Court came to the opposite conclusion—that a civil rights law was too intrusive—in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.[451] There, private organizers of a St. Patrick's Day parade in Boston refused to allow a gay and lesbian group (GLIB) to participate in the parade as a separate marching unit with its own banner. The Massachusetts courts, relying on a Massachusetts statute that barred discrimination based on sexual orientation, ordered the sponsors to include GLIB in the parade.[452] The Supreme Court reversed.

The Court acknowledged Massachusetts' strong interest in remedying discrimination but held that interest was not enough.[453] Because the formation of the various parade units, including their banners, were inherently expressive activity, the forced inclusion of GLIB and its banner would impede the sponsors' freedom to shape their own expressions.[454] Unlike that in *Roberts*, this application of a civil rights law substantially intruded on expression. The Court suggested that the problem was under the first prong of strict scrutiny. The Massachusetts statute did not announce a purpose to regulate expressive activity,

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[450] In *Hishon v. King & Spalding*, the Court conducted virtually the same analysis to uphold application of Title VII of the federal civil rights laws. 467 U.S. 69, 73–78 (1984). Title VII bars discrimination in employment on the basis of sex. *See* 42 U.S.C. § 2000e-2(a) (1994). A female lawyer at an Atlanta law firm sued the firm, charging that the firm failed to promote her to partner because of her sex. *See Hishon*, 467 U.S. at 72. The firm argued that application of Title VII would infringe upon its partners' constitutional rights of expression and association. *Id.* at 78. The Court summarily rejected this argument, noting, as in *Roberts*, that application of the statute to force the firm to consider Ms. Hishon for partner on her merits, as opposed to her sex, would not impede the firm's ability to function as lawyers or to express ideas:

> Although we have recognized that the activities or lawyers may make a 'distinctive contribution . . . to the ideas and beliefs of our society,' respondent [King & Spalding] has not shown how its ability to fulfill such a function would be inhibited by a requirement that it consider petitioner [Ms. Hishon] for partnership on her merits.

Id. at 78 (citation omitted) (quoting *NAACP v. Button*, 371 U.S. 415, 431 (1963)).

[451] 515 U.S. 557 (1995).

[452] *Id.* at 561–65.

[453] *See id.* at 571–72.

[454] *See id.* at 572–73 (noting that "every participating unit affects the message conveyed by the private organizers" and that the Massachusetts order "essentially requir[ed] petitioners to alter the expressive content of their parade").

and even if it had, that aim would not be compelling, precisely because it restricted First Amendment freedoms.[455]

The Court in these association cases arguably is not applying strict scrutiny. The Court suggests absolute protection for core First Amendment activity; in other words, if the law restricts core activity, it does not pass strict scrutiny, under either prong.[456] If this is true, then the analysis is one of definition and is not a test of interests, compelling or otherwise. Presumably, under the strict scrutiny test, some interests are compelling enough to justify intrusion on First Amendment rights, or, otherwise the analysis is not a test at all. Nevertheless, the Court is using some sort of test, as opposed to granting absolute protection. The Court does not absolutely protect even the activity that it claims is at the heart of the First Amendment. In *Roberts*, the Court acknowledged that the law interfered with the Jaycees' expression, but upheld the law because it did not place a "serious burden" on expression.[457] If the test were one of absolute protection, even an insubstantial intrusion on expression could not survive. Thus, the Court's analysis is in fact a test, though it may not be strict scrutiny in its traditional formulation.

Applying these principles here, the First Amendment bars use of the civil rights laws to prevent a plaintiff from filing a winning claim. The ability to file a winning claim is at the core of the right protected by the Petition Clause, and the civil rights laws can work a substantial intrusion on that core activity. For example, under the Fair Housing Act, a plaintiff arguably cannot file a winning claim if he has a discriminatory motive.[458] The Act does not just regulate the manner in which he may file the claim, but it stops the exercise of the right altogether. To use one of the analogies in *Roberts*, a law cannot totally bar access to court based on ill racial motives, just as the state cannot force a person to choose a marriage partner without consideration of sex, race, or religion.[459]

Application of the civil rights laws to bar winning claims does not pass First Amendment scrutiny, whatever that analysis may be called. If the civil rights

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[455] The Court also considered whether the statute might be justified by the objective of achieving a bias-free society and held that this was just a means of limiting speech "in the service of orthodox expression," which was "a decidedly fatal objective." *Id.* at 578–79.

[456] That absolute protection, as opposed to strict scrutiny protection, applies to the content of speech is the view of Justice Kennedy. *See supra* note 326.

[457] In *Roberts*, the Court stated that "[t]he right to associate for expressive purposes is not . . . absolute." Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

[458] *See supra* notes 304–06 and accompanying text.

[459] *See Roberts*, 468 U.S. at 620 ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.").

statutes, with their aim of achieving a discrimination-free society, do not pass scrutiny, the other indirect restrictions on court access—the obstruction of justice statutes, the labor laws, and the antitrust laws—also fail. Indeed, the Court's holdings in *Bill Johnson's Restaurants* and *Professional Real Estate Investors* certainly suggest that the governmental interests behind the latter two laws are not compelling enough to justify their impact on court access. The government cannot use a plaintiff's motive to limit his access to court when he has a winning claim, no matter how high or noble the governmental aim.

3. *Analysis of Motive Restrictions on Losing Claims*

In the foregoing strict scrutiny analysis, I did not address whether the government may regulate the motive of the plaintiff in filing nonwinning claims.[460] This is the concern of the breathing room doctrine and related rules, such as the presumption against prior restraints. These doctrines look at whether a regulation that addresses noncore activity unduly chills the exercise of core activity protected under the First Amendment. In addition, to the extent that the *R.A.V.* approach differs from traditional doctrine, this application is where it would differ. These tests all look to the validity of a restriction on activity that, under traditional doctrine, is not within the literal First Amendment right. Here, that activity is the filing of losing claims.[461]

a. *Breathing Room Balancing Analysis of Motive Restrictions on Nonwinning Claims*

Both the *New York Times* breathing room doctrine and the prior restraint rule look to the impact of punishment of nonprotected speech.[462] The Court's two-tiered merit test in *Bill Johnson's Restaurants* reflects the concerns of both these doctrines. [463] The Court did not apply the win-lose test to ongoing suits but

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[460] As noted in Part III, none of the laws is so limited. All potentially apply to penalize the plaintiff from filing a winning claim. This analysis assumes that the statutes and laws are rewritten or given a narrowing construction by courts to apply only to nonwinning claims. Without such limitation, the laws would likely fail under the overbreadth doctrine, simply because of their substantial impact on the filing of a winning claim, *see supra* note 104 and accompanying text.

[461] The breathing room doctrine also would apply to assess the effect of a motive restriction on other noncore but related activity, such as the filing of papers other than claims for relief. I assess this postfiling application of the professional rules of conduct under a breathing room analysis in Andrews, *supra* note 11 & Part III.B.3.b.

[462] *See supra* notes 97–100, 346–54 and accompanying text.

[463] *See supra* note 83 (setting forth the Court's two-tiered test).

instead granted ongoing suits more protection through a lower standard of merit. It held that the NLRB could not enjoin the employer's suit simply because he had a retaliatory motive if his suit would pass the summary judgment test for merit (*i.e.*, it presented a genuine issue of fact). Thus, the Court protected suits from injunction (a reflection of the hostility toward prior restraints) and lowered the standard by which on-going suits are protected—meritorious as opposed to winning claims (a reflection of the breathing room doctrine). The Court did not expressly cite the doctrines and did not elaborate on their application. I consider them more fully here.

The concept of breathing room is fluid. In *Gertz*, the Court refused to extend the protection of the actual malice standard to persons who defamed private persons, as opposed to public figures.[464] The potential for defamation liability based solely on negligent speech would certainly have a chilling effect on that speech, but the Court allowed this chilling effect. It did so because the speech was not as important as speech about public figures and because the state interest in protecting a private person is greater than for the public official.[465] Yet, the *Gertz* Court gave some breathing room to such speech, by forbidding the imposition of presumed or punitive damages.[466]

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[464] *See Gertz*, 418 U.S 323, 334, 342 (1974).

[465] The *Gertz* Court explained these different interests:

> [W]e have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.
>
> [Public officials and public figures also assume some of the risk of defamation]. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an "influential role in ordering society." . . . Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.
>
> For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.

Id. at 344–46.

[466] *See id.* at 349. The Court explained the concern of punitive and presumed damages:

The defamation distinctions between public and private speech are likely not appropriate for judging court access, in part because all civil lawsuits involve matters of public concern.[467] The Court, however, developed the public-private distinctions in speech cases by looking at the effect of the law (the "chilling effect" of a negligence standard and of punitive damages) and at the competing interests (the greater First Amendment value of public speech and the greater government interest in compensating private plaintiffs who do not have easy access to media to otherwise counter defamation). These fundamental factors—effect of the statute and the relative interests—determine the degree and type of breathing room necessary to protect the ability to file winning claims.

First, we must examine the effect of the law, and in doing so, draw a distinction between laws that stop exercise of the right to petition and those that merely chill or deter that activity. As reflected by the prior restraint rule, if a statute actually stops the exercise of the core right of petition (the filing of a winning claim based solely on motive), its effect usually is too great to tolerate, no matter the government interest. If the statute only chills or deters the filing of winning claims, the propriety of that effect turns on the relative interests at stake.

> The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss.... The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.... More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.
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> We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved.

Id. The Court later refined this aspect of breathing room by distinguishing *Gertz* as involving speech of public concern, albeit about a private person, and holding that presumed and punitive damages could be awarded if the speech concerned purely private persons. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). Although the *Gertz* Court did not limit this aspect of its holding to speech of public concern, the Court in *Dun & Bradstreet, Inc.*, allowed states to impose presumed and punitive damages for defamatory speech about private individuals and about private issues. *See id.* at 761 ("In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.'").

[467] *See* Andrews, *supra* note 5, at 675–76 (explaining differences between court access and speech).

Thus, any injunction barring a plaintiff from filing suit is invalid, at least to the extent that the court enters the injunction solely because the claim may not win and because the plaintiff has an ill motive.[468] An injunction based on the mere possibility that the claim may lose (if filed) necessarily stops the filing of some winning claims. It therefore directly infringes on the core activity protected by the right to petition courts.

Prefiling certification requirements, such as that in Federal Rule 11, can produce a similar effect on winning claims. The Court has explained that preconditions to the exercise of First Amendment freedoms can act as a prior restraint, just as an injunction might.[469] A prefiling certification is a condition to filing suit. Although it does not require prior state permission, it nevertheless makes the plaintiff stop and take affirmative action—he must attest to his motive and to the merits of his claim—before he exercises his right to file suit. The certification rules thus achieve a special deterrent effect above and beyond that in a subsequent punishment. In fact, federal rulemakers specifically intended this added deterrent effect of prefiling certification in Federal Rule 11, which they describe as a "stop-and-think" standard.[470]

The First Amendment likely does not permit the government to condition access to court on the plaintiff's precertification that he has a winning claim. No plaintiff or attorney can know that he has a winning claim at the time he files the suit. Too many unknown factors, including the outcome of discovery, contribute to the resolution of suit. An honest litigant and ethical lawyer could not make this certification. Thus, even though a winning claim certification on its face would

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[468] This is not to say that all injunctions against suits are inappropriate. In fact, the Court in *Bill Johnson's Restaurants* stated that the NLRB properly could enter an injunction against the employer's ongoing state court suit if it lacked merit and was filed for a retaliatory purpose. *See supra* note 83. The Court did not attempt to reconcile this ruling with its prior restraint doctrine. If the right to petition courts is the right as I have defined it—the right only to file the initial complaint—then an injunction against an ongoing suit is technically not a restraint against the protected right—the right to file the suit. The more general breathing room doctrine, however, likely would act as some limitation. Whether, and under what conditions, courts can properly enter injunctions against the initial filing or later prosecution of a civil suit are questions beyond the scope of this Article.

[469] *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) (noting that an "ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in 'the archetype of a traditional public forum' is a prior restraint on speech") (citation omitted).

[470] The advisory committee notes to the 1993 revision to Federal Rule 11, for example, state that "[t]he rule continues to require litigants to 'stop-and-think' before initially making legal or factual contentions." FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

bar only those claims outside of the protection of the Petition Clause—nonwinning claims—its actual effect would be to stop the filing of some winning claims.

By contrast, a plaintiff can meet a lesser standard of merit certification, such as that currently in Federal Rule 11(b)(2) and (3), that the claim has evidentiary support and a basis in the law.[471] These are ascertainable facts at the time the suit is filed. It does not require the plaintiff to guess as to the future. To be sure, any prefiling standard of merit, even one of objective reasonableness, might deter some plaintiffs from filing a winning suit, but not nearly to the degree of a winning claim certification, which is a practical impossibility. For these reasons, the First Amendment allows the government to require plaintiffs to precertify the merit of their complaints if the merit standard is one of objective reasonableness, as opposed to winning claims.

Similarly, the First Amendment does not allow the government to force a plaintiff to precertify his proper motive. A plaintiff of course knows his motive when he files suit. The problem is that, at the point of initial filing, a motive standard cannot be isolated to apply only to losing claims because a plaintiff cannot know which claims are winning or losing. By definition, some of the claims that the plaintiff may file under a reduced merit standard of objective reasonableness will be winning claims. The plaintiff therefore would have to certify that he has good motive as to those winning claims, and presumably not file the claims for which he does not have a good motive. As I discuss above, the First Amendment does not allow a motive limitation on winning claims.[472] Thus, all prefiling certification conditions as to motive on meritorious claims are invalid because such certification would necessarily condition and limit some winning claims.[473] In other words, their effect on the core First Amendment right is too great, regardless of the government interest in requiring certification.

By contrast, subsequent punishment for bad motive does not necessarily impact the filing of a winning claim. To be sure, such penalties have a chilling effect. Because no one can know whether the suit ultimately will prevail, some

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[471] *See* FED. R. CIV. P. 11(b), *reprinted at supra* note 152.

[472] The restriction does not pass strict scrutiny. *See supra* Part IV.C.2.

[473] The government theoretically could impose a motive certification as to baseless claims, but this would not make sense. Most systems (properly) bar frivolous claims: A plaintiff cannot file a baseless complaint, regardless of his motive. Certification as to proper motive therefore would be irrational because the act itself is prohibited. The government could choose to ban only those baseless claims that are improperly motivated (and thereby allow frivolous claims accompanied by a good motive), but such a regulation would be more narrow than most current standards and would not achieve the aim of fully deterring frivolous litigation.

plaintiffs might elect not to file claims that they could win if they know they also have an "improper" motive. Yet, subsequent punishment does not punish actual winning claims because by definition, it is assessed only after the plaintiff has tried and lost his case. Nor does it require the plaintiff to do the impossible. It does not require him to vouch at the beginning that he has a winning claim, or to separate those claims that are winning and losing, and certify his motive only as to the losing claims.

Whether this chilling effect of subsequent punishment is "undue" requires an examination of the governmental interests and a balancing of those interests against the particular effect of the punishment. Subtle distinctions in either the effect or purpose of a statute can change the result. In the final analysis, we must look at each law and cannot make global conclusions. Nevertheless, in this Part, I illustrate my analysis by drawing a distinction between the two broad categories of motive restrictions—the direct court access rules and the substantive evil statutes. As in my discussion of strict scrutiny, I use the civil rights laws as my example of the latter category and compare them to court rules and statutes similar to Federal Rule 11 (using only the subsequent punishment aspect of such rules and not their precertification provisions). I contend that the differences between these two types of motive restrictions are enough to tip the scale in the breathing room analysis. The governmental interest in the civil rights laws outweighs the chilling effect of their subsequent punishment, but the governmental interest behind Rule 11 provisions does not outweigh the chilling effect of these rules.

Before I explore the reason for this difference in result, I must note that it applies only to subsequent punishment of meritorious claims, as opposed to frivolous claims. The government is free, under either set of laws, to assess subsequent punishment on baseless claims because the effect on winning claims is negligible and the governmental interests are strong. Unlike a punishment of meritorious but losing claims, a penalty assessed only against nonmeritorious claims will not deter many winning lawsuits. A plaintiff can use objective criteria to distinguish between baseless and meritorious claims, especially those that are strong enough to win. Thus, the chilling effect of such a rule is minimal. Moreover, the government's interest in stopping frivolous claims through its court access rules, like its interest in curbing racial discrimination, is sufficiently strong to justify the negligible chilling effect on winning claims.

This balance changes when the law is applied to punish losing but meritorious claims. Subsequent punishment of meritorious claims, as opposed to purely frivolous claims, has a greater effect on the filing of winning claims. As I note above, plaintiffs cannot know if a meritorious claim is winning or not; there are no objective criteria for making this prediction. This effect, however, is the same for any motive restriction that applies to meritorious claims, regardless of

whether the ban is in a court access rule or civil rights law.

The difference in effect derives from the ways in which the two categories of laws define the improper motive. The civil rights laws narrowly define the prohibited motive and therefore have only an isolated impact on the filing of winning claims (only those claims that are filed for the specified discriminatory motive). The court access rules have a much wider sweep. Rule 11 prohibits all "improper" motives and thus deters far more claims. Moreover, Rule 11 is vague in its prohibition. Even if a plaintiff is conscious of his motives (*e.g.*, he bears great ill will toward and wants to "ruin" the defendant), the plaintiff cannot easily determine whether he is presenting the complaint for "any improper purpose" in violation of Rule 11.[474] Rule 11 thus has a more chilling effect on the plaintiffs who want to comply with the law than the civil rights statutes that precisely define a single motive.[475]

On the other side of the scale, the government purposes behind the two laws also differ. As I note above, the primary aim of a court access rule such as Rule 11(b)(1) is to deter baseless suits. To be sure, the government has some interest in stopping general ill motives through its court access rules—the integrity of the process and attorney professionalism interests that I discuss above in applying strict scrutiny[476]—but these interests are secondary to the primary aim of court access rules, which is to deter frivolous claims. By contrast, the government's primary aim in the substantive evil statutes is to stop acts that are defined by the ill motives, such as racial discrimination. Those statutes aim to achieve substantive societal goals, such as the assurance of fair and nondiscriminatory access to housing, that are above and apart from the integrity and procedural justifications for court access rules. This is not to say that there is a wide gulf between the two sets of interests, only that there is some difference.[477]

These differences in both effect and purpose are enough to tip the scales. Court rules, such as Rule 11, do not give enough breathing room to the plaintiff's

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[474] *See supra* Part III.B.1.b. (discussing the conflicting opinions and ambiguities regarding the "any improper purpose" standard of Rule 11(b)(1)).

[475] Indeed, this is the reason why courts look particularly harshly on vague statutes that touch upon the exercise of First Amendment freedoms—vague statutes have a chilling effect. *See supra* notes 102–03.

[476] *See supra* Part IV.C.2.a.

[477] Indeed, as to some of the statutes, courts or the legislature may decide that the governmental interest is not great enough to justify punishment of losing but meritorious claims. But this would be a policy choice, not one mandated by the First Amendment. This policy distinction is reflected in the different outcomes for the labor and antitrust laws in *Bill Johnson's Restaurants* and *Professional Real Estate Investors*. *See supra* notes 84–86 (arguing that the added protection for meritorious claims in *Professional Real Estate Investors* is a policy choice).

ability to file winning claims and therefore run afoul of the Petition Clause. The balance is slightly different for the civil rights laws, and they may be applied to punish plaintiffs for filing losing suits if they acted with the proscribed discriminatory motive.

We must keep this conclusion in context. The government interest in stopping racial discrimination or other substantive evils is not compelling enough, under strict scrutiny, to justify restriction on the plaintiff's ability to file a *winning* claim. Nor is such governmental interest sufficient to justify a prefiling restriction. Congress, for example, cannot expand the Fair Housing Act to require all citizens to affirmatively precertify to the federal department of Housing and Urban Development (HUD) that they do not have a discriminatory aim in filing suit against their neighbor. This requirement, like the precertification standards of Rule 11, would have too great a chilling effect on the ability to file a winning claim. For the same reason, HUD could not enjoin a meritorious suit solely on the basis that the plaintiff filed it for a discriminatory intent.

Subsequent punishment of losing suits due to their discriminatory motive presents a different balance. Unlike an injunction or precertification standard, the subsequent punishment would never apply to a winning claim.[478] To be sure, punishment in any form causes some deterrent effect, but the government's

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[478] The definition of a "losing claim," in order to apply this form of subsequent punishment, is itself problematic. The definition of a losing claim is easy only when the case is completed after trial, affirmed on appeal, and the party has lost the case in its entirety. The analytical difficulty of other cases arises in two respects: first, in defining the extent to which the plaintiff must lose where he has multiple claims, and second, in defining a "loss" in cases that end in early stages of the proceedings. As to the first, I suggest that the First Amendment would permit the plaintiff to suffer subsequent damages for the filing and loss of a single claim (as opposed to his win on other claims in the same complaint), but only to the extent that the defendant suffers unique harm from the filing of the particular losing claim and can prove the other elements of the substantive cause of action. As to the second problem of definition, I contend that any judicial determination of the claim is sufficient to trigger the "win-lose" distinction. A dismissal of the suit, other than the plaintiff's voluntary dismissal of his own suit, for whatever grounds (including for nonmeritorious reasons), is sufficient to constitute a "loss" so long as it is not reversed on appeal. The defendant's damages for such an early dismissal will be appreciably less than for a suit that is prosecuted through jury trial, but if the defendant suffered harm and can satisfy the other elements of a cause of action, the First Amendment does not bar his recovery. This leaves the question of the plaintiff's voluntary dismissal of his own suit. I suggest that the plaintiff may be held liable under these circumstances only if the defendant can prove that the plaintiff would have lost had he pursued his claim (at jury trial or earlier motion). This procedure would be analogous to that in attorney malpractice claims, where the plaintiff-client must prove that he would have prevailed on his underlying claim absent attorney error.

interest in deterring discrimination is sufficient to offset this lesser chilling effect. In other words, we are willing to tolerate the fact that some plaintiffs may decide not to file a lawsuit for a discriminatory motive, so long as the laws do not punish him if he prevails or require him to affirmatively certify his motive before he tries his case. Thus, the substantive evil statutes such as the civil rights laws, imposed as subsequent punishment, are the lone form of motive restriction that survives traditional First Amendment analysis.

b. R.A.V. *Strict Scrutiny Analysis of Motive Restrictions on Nonwinning Claims*

The breathing room analysis of nonwinning claims is the one area in which the Court's "new" approach in *R.A.V.* might make a difference—cases where the activity at issue falls outside the categorical approach's definition of an absolutely protected right. The difference is in the analysis.[479] *R.A.V.* would require strict scrutiny, as opposed to the balancing test of the breathing room doctrine. As we shall see, just what this strict scrutiny requires is open to debate, but to the extent that there is any difference, the *R.A.V.* strict scrutiny approach is more demanding. Thus, any potential difference between *R.A.V.* and my proposed breathing room analysis would arise only with regard to use of the substantive statutes, such as the civil rights laws, as subsequent punishment. This is the one application of a motive restriction that I contend survives breathing room analysis. In all other respects, motive restrictions fail the balancing test and thus should fail a more strict analysis.

The one thing that is clear about *R.A.V.* is that it requires a very strict scrutiny of any speech regulation that discriminates by viewpoint. The ordinance in *R.A.V.* singled out for prohibition only those words that insulted or provoked violence on the basis of race, color, creed, religion, or gender.[480] The Court held that such viewpoint discrimination was not justified, even among "fighting words."[481] The specific effect of this statute, as opposed to a broader fighting words statute, was to invoke the viewpoint of the city council: "[T]he only interest distinctively served by the content limitation is that of displaying the city

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[479] In the actual case, the difference did not cause a different result as illustrated by the concurring Justices who used another existing doctrine—overbreadth—to invalidate the ordinance. Justice White stated that "[a]lthough the ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment. The ordinance is therefore fatally overbroad and invalid on its face." 505 U.S. at 414 (citation omitted) (White, J., concurring).

[480] For the terms of the St. Paul ordinance, see *supra* note 380.

[481] 505 U.S. at 391.

council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids."[482] Thus, although the city's interest in presenting racial or other discrimination was itself "compelling," its interest in imposing the city's viewpoint on race was not.[483] The law did not pass strict scrutiny.

The Court thus suggested that viewpoint regulation is never permissible under strict scrutiny. A critical question is whether motive is the same as (or close enough to) viewpoint regulation. The two types of laws have similarities. Regulation of racial motives in litigation, to prohibit racially motivated lawsuits, necessarily reflects governmental preferences about how a plaintiff should think and feel about race. Motive restrictions tend to reflect community preferences rather than the neutrality inherent in the First Amendment.[484] Indeed, in *R.A.V.*, the Court used motive terminology in describing the effect of the ordinance as barring bias-motivated speech.[485]

If motive restraints are considered the equivalent of a viewpoint regulation, they fail strict scrutiny for the same reason that the ordinance failed in *R.A.V.* They would fail because their special effect would be to limit the motive (viewpoint) of the plaintiff to that condoned by the government. That aim would not be compelling even though the broader aim of preventing racial, religious, or sex discrimination is compelling. Such a linking of motive and viewpoint regulation under *R.A.V.* would mean that baseless suits could not be regulated by motive. Just as the city of St. Paul could not ban fighting words—speech not usually afforded any protection—based on racial hatred, it could not single out frivolous suits filed for racial hatred for special punishment. If motive restrictions fail under this reasoning, they fail because they are viewpoint discrimination, not because of the value of the underlying claim, whether winning, frivolous, or somewhere in between.

I do not think that *R.A.V.* mandates this result. First, of course, *R.A.V.* involved speech and not court access. Even in the speech context, however, motive is not the same as viewpoint. A comparison of hypothetical laws

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[482] *Id.* at 396.

[483] The Court held that the government's asserted interest in enacting the ordinance was compelling—"to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish." *Id.* at 395. Although the ordinance seemingly achieved that end, the Court held that because the city council could have achieved the end through other more benign means, such as through a prohibition on all fighting words, it failed strict scrutiny. *See id.* at 395–96.

[484] *See supra* notes 414–17 and accompanying text.

[485] *See supra* note 377 and accompanying text.

regulating speech illustrates this difference—first, a law that outlaws speech motivated by racial hatred, regardless of its actual content, and second, a law that regulates speech that reflects or incites racial hatred. The first is a motive restriction. The second regulates viewpoint. It controls the content of the speech and it achieves the (improper) government aim of controlling the type of speech that enters the marketplace of ideas. It is a more effective control of the debate of ideas, and is therefore more offensive to First Amendment principles than the motive restriction.

Motive is also different from belief. It is one thing to say that a person generally is a racial bigot than it is to say that he acted with regard to a particular person because of his racial hatred. A restriction based on the first sense of the word, the plaintiff's general belief system, seemingly would be more offensive to First Amendment principles than the second. Government has more interest in regulating motive in the second sense because it creates a higher risk of harm and more particularized damage to a particular person.[486] The Court in *Wisconsin v. Mitchell* suggested this when it distinguished the case where government sought to punish a defendant for his "abstract beliefs"[487] from the Wisconsin statute which addressed the particular harms caused by racially-inspired conduct.[488]

Three (admittedly) extreme variations on court restrictions illustrate these distinctions as applied to civil complaints. First, a belief regulation might bar persons with certain feelings about race from using the courts, no matter how meritorious the complaint. Second, a viewpoint regulation might bar a plaintiff from bringing a legal challenge to a government affirmative action program,

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[486] *See* Tribe, *supra* note 34.4

[487] 508 U.S. 476, 486 (1993). The Court stated that where evidence admitted by a sentencing judge "proved nothing more than [the defendant's] abstract beliefs, . . . its admission violated the defendant's First Amendment rights." *Id.*. "[A]bstract beliefs, however obnoxious to most people, may not be taken into consideration. . . ." *Id.* at 485 (citations omitted).

[488] The Court stated:

> [T]he Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, . . . bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases.

Id. at 487–88 (citations omitted).

regardless of the legal merit of the claim.[489] Third, a motive restriction might bar a plaintiff from filing any suit for a racially discriminatory purpose, regardless of the merit of his claims. The first statute would fail First Amendment scrutiny because it addresses only belief, not any particular harm resulting from that belief, and it stops a white bigot from suing a white person for reasons unrelated to race. It infringes on the person's freedom to think and believe as he wishes, irrespective of any harm that his belief might cause. The second statute is offensive to First Amendment principles because it suppresses ideas and challenges to government action. The third statute, the motive restriction, is not as offensive. It does not bar all bigots from going to court, but instead only those who are actually suing because of their racial hatred. Nor does it suppress all ideas and challenges to government. So long as the plaintiff possesses the requisite good intentions as to his challenge to the affirmative action program, he can present the challenge. The public has at least a chance that the merits of the challenge will be presented and publicly aired. This is not to say that motive restrictions are permissible, only that they are not as offensive to First Amendment values as a belief or viewpoint regulation.

R.A.V. may simply mean that courts must scrutinize all regulation of speech, and that viewpoint discrimination is particularly suspect because it has a highly adverse effect on First Amendment principles.[490] As in *Roberts* and *Hurley*, the test is likely the degree of intrusion.[491] In other words, the St. Paul ordinance in *R.A.V.* was invalid because it worked a substantial intrusion on the core First Amendment right to shape one's own expression. If this is the case, the government is likely free to regulate frivolous claims by motive (*i.e.*, ban only those claims that lack both legal or factual merit and are filed for an improper motive). Frivolous lawsuits serve no societal good, and they are particularly offensive if filed for an insidious motive. Thus, the governmental interest in restricting baseless claims is compelling, and the First Amendment effect of a motive restriction is less intrusive than a viewpoint regulation.

But does a motive restriction on a *meritorious* (but losing) claim survive

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[489] The government sought to protect itself from challenge in In re *Workers' Compensation Refund*, 46 F.3d 813 (8th Cir. 1995). There, Minnesota attempted to deter challenges to its new worker's compensation statute by making any plaintiff bear the state's costs in defending such challenges, win or lose. *See id.* at 821. The Eighth Circuit invalidated the provision as an infringement on the right to petition courts. *See id.* at 822.

[490] To some extent this reading is borne out by *Wisconsin v. Mitchell*, 508 U.S. at (1993), where the Court permitted use of racial motive as factor in enhancing the punishment for other crimes, even though the punishment had some effect on speech. As the Court noted in application of the overbreadth doctrine, the predicted effect on speech was "attenuated" and "unlikely." *Id.* at 488.

[491] *See supra* notes 443–59 and accompanying text.

such scrutiny? This case falls somewhere between my prior two applications of strict scrutiny. It is less likely to pass strict scrutiny than the immediately preceding example of motive regulation of baseless claims. The government does not have as strong an interest in restricting meritorious claims, and meritorious claims have greater First Amendment value than frivolous suits. On the other hand, a motive restriction on meritorious (but losing) claims is more likely to survive strict scrutiny than a motive restriction on winning claims. To use *Roberts* and *Hurley* terminology, a restriction on meritorious but losing claims intrudes less on First Amendment interests than a restraint on winning claims.[492] Whether this lesser intrusion is permissible likely depends on the relative governmental interest at stake. The governmental interest behind civil rights laws are likely sufficiently compelling to justify this lesser intrusion.

In sum, *R.A.V.* does not change the result. If the governmental interest is great (such as to prevent discrimination) and the effect on core activity is not substantial, a restriction might survive *R.A.V.* strict scrutiny. Under this view, losing claims are still within the protection of the First Amendment, but the analysis recognizes that losing claims have less First Amendment value than winning claims (just as clubs such as the Jaycees have less First Amendment value than more intimate associations such as marriage). Some laws that intrude upon the filing of losing but meritorious claims may not pass strict scrutiny—such as the court access rules, where the government has only a secondary interest in regulating motive beyond the primary interest in regulating frivolous claims. Thus, I have come full circle and reach the same result as under the breathing room doctrine.[493] The substantive statutes, such as the civil rights laws, are likely the lone form of motive restriction that, in some applications (against losing claims), survive First Amendment analysis, whether under the breathing room or *R.A.V.* "strict scrutiny" analysis.

V. CONCLUSION

Although the right to petition courts is a new and untested right, we now know something more about that right. It means that plaintiffs may come to court and pursue winning claims, regardless of their personal motives. In the preceding Part, I set out a general analysis and applied broad principles to categories of motive restrictions. In conclusion, I note some specific faults of particular types of statutes and suggest general cures. However, proper analysis requires an even more detailed evaluation of each law, according to its individual aim and

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[492] *See supra* notes 443–59.

[493] *See supra* Part IV.C.3.a.

effect.[494] Here, I provide only a starting point for that careful examination.

A. Federal Rule 11(b) and Its State Counterparts

Federal Rule 11(b)(1), and the many other rules based upon it, violate the First Amendment. They do not pass strict scrutiny to the extent that they penalize a plaintiff for filing a winning claim. They do not give sufficient breathing room to the extent that they require a plaintiff to precertify that he has a proper purpose in filing a losing but nonfrivolous claim.[495] Moreover, they are vague in that they proscribe "any improper purpose." Although they reach some activity not protected by the First Amendment, such as the filing of motions,[496] they substantially burden First Amendment activity and are thus overbroad. Federal Rule 11 and its state counterparts are invalid on their face.[497]

The improper purpose clause of these rules must be eliminated in its entirety

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[494] I have attempted to provide this more detailed analysis of the professional rules of conduct in Andrews, *supra* note 11. That each form of law needs individual analysis is illustrated by two unique features of the professional rules: that they bar only lawyer's assistance, not the client's literal court access, and that they may regulate lawyer motive as well as client motive. These features require refinement of the general analysis I propose here.

[495] In Part IV.C.3.a, I argued that rules cannot require a plaintiff to precertify that he has a winning claim. Rule 11 does not impose such a standard. Indeed, it requires in paragraph (b)(2) and (b)(3) that the plaintiff certify only as to a minimal amount of factual and legal basis for his claim. *See* FED. R. CIV. P. 11(b)(2)–(3). This gives the plaintiff sufficient breathing room. Other academic commentators argue that Rule 11 may run afoul of the First Amendment because it applies a negligence standard (the reasonable inquiry test) to this merit certification, rather than the *New York Times* actual malice standard. *See supra* note 4 (collecting academic commentary). Although that question is beyond the scope of this Article, I addressed the issue briefly in my previous article. *See* Andrews, *supra* note 5, at 683–85.

[496] Because motions are part of the procedure that follows the filing of a claim, their regulation is subject to the reasonableness standards of due process, and not heightened scrutiny under the First Amendment. Whether due process would permit a motive limitation on the filing of motions is beyond the scope of this Article. Likewise, I do not address the propriety of rules that set motive limitations on other civil papers, such as discovery. *See, e.g.*, FED. R. CIV. P. 26(g)(2)(B) (providing that a person filing a discovery request, response, or objection certify that the paper was "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"). All such rules, however, arguably implicate First Amendment breathing room analysis, to the extent that a ban on filing subsequent litigation papers might chill exercise of the right to file the pretrial claim. I look at this issue and its relation to the professional rules of conduct in my previous article. *See* Andrews, *supra* note 11, Part III.C.3.

[497] For this reason, a judicial limitation on the rule, such as that applied by the Ninth Circuit in *Townsend*, *see supra* notes 194–95 and accompanying text, would not cure the First Amendment problem with Rule 11.

or substantially rewritten. The rules may use motive as a means of limiting frivolous claims, such that a claim is barred only if the plaintiff files it for an improper purpose and the claim lacks factual and legal merit, but this use of motive would substantially narrow the effect and aim of the rules.[498] In other words, the rules would bar only those frivolous claims that are also filed for a bad motive and would not reach frivolous claims filed for good intentions. To remain consistent with the intent of the federal rulemakers—to bar frivolous suits—motive should not limit the penalties for frivolous suits, but instead enhance the penalty for other violations.[499]

B. *State Statutory Efforts to Cure Litigation Abuse*

I cannot list and describe all of the state sanction statutes, let alone their specific faults. However, to the extent that the statutes closely mirror the certification provisions of Federal Rule 11(b)(1), such as the Georgia anti-SLAPP statute,[500] they have the same defects. A few additional examples illustrate other possible defects and cures. For instance, the Alabama Litigation Accountability Act refers to improper purpose in defining pleadings that are prohibited as "without substantial justification."[501] Alabama can cure its statute by simply deleting this reference. Likewise, Arizona can cure its statute by deleting as one basis for assessing double damages, the bringing of claims solely or primarily for delay or harassment.[502]

The California Vexatious Litigant statute[503] raises unique concerns because it can act as a prior restraint on access to court. The general problem of the statute's allowance of prior restraints is beyond the scope of this Article, but to the extent that the court relies on motive to curb access, it is invalid. California lawmakers must either drop motive as a condition on the ability to go to court, or at least tie motive to an additional finding that the claim is frivolous. This may not cure all of the problems of such a prior restraint, but it will cure those arising from use of a motive standard.

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498 *See supra* note 473.

499 Federal Rule 11 already allows a court to consider the litigant's state of mind when assessing sanctions. *See supra* note 178–79 and accompanying text.

500 *See supra* notes 233–35 and accompanying text.

501 *See* ALA. CODE §12-19-271(1) (1995); *see also supra* notes 215–16 and accompanying text.

502 *See supra* notes 213–15 and accompanying text.

503 *See supra* notes 217–22 and accompanying text.

C. The Inherent Power of the Court

This doctrine needs only clarification to conform to the First Amendment. Even as the inherent power doctrine now stands, it runs afoul of the Petition Clause only in its most extreme application. Most courts do not now interpret this doctrine to reach meritorious civil claims and instead require both bad faith and objectively unreasonable conduct before they will impose sanctions.[504] This needs to become the uniform practice.

D. The Tort of Abuse of Process

The tort of abuse of process likewise needs only a judicial clarification to avoid problems under the Petition Clause. Most courts already narrowly interpret the tort so that it does not apply to the filing of meritorious suits.[505] So long as all courts similarly read the tort, assessment of damages against the plaintiff for abuse of process will comport with the First Amendment.

E. Regulation of Lawyers

The appropriate fix to the disciplinary regulation of lawyers depends on the particular rule employed by the state or federal court.[506] For example, if the rule currently in effect is Model Rule 3.1, only a minor correction is likely necessary: Delete the suggestion in the comments that the rule bars meritorious but improperly motivated complaints.[507] Absent this confusing comment, the black letter rule, which uses a "frivolous" standard, is sufficiently narrow. The systems that use the former Code provision, based on Model Code DR 7-101(A)(1),[508] can adopt Model Rule 3.1 (without the offending comment), or otherwise rewrite their rule so that they eliminate the current harassment-malicious injury standard.

The federal vexatious lawyer statute should require only judicial restraint and clarification in order to conform to the Petition Clause. The statute as written applies only to "unreasonable" activity. Courts need to interpret this language so that section 1927 does not apply to a lawyer who files an objectively reasonable

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504 *See supra* notes 238–39 and accompanying text.

505 *See supra* notes 251–54 and accompanying text.

506 I discuss in more detail the appropriate reform of the professional rules of conduct in Andrews, *supra* note 11, at Part IV.

507 *See supra* note 269 and accompanying text. However, a clarifying sentence would better alleviate the confusion caused by the near 20-year presence of this sentence.

508 *See supra* note 265 and accompanying text.

lawsuit.[509] With this judicial restriction, the statute can stand as written. Although the statute presents a close question, on balance its terms are not so overbroad or vague that it is invalid on its face.

F. The Indirect Controls on Court Access.

The various antitrust, labor, obstruction of government, and civil rights statutes (as well as the interference torts) violate the First Amendment to the extent that they are applied to penalize the filing of winning lawsuits. All that is required to cure the current problem with these laws is judicial limitation, not legislative revision. The laws primarily reach other activity, and are not so overbroad or vague that they are invalid on their face. Indeed, the Court already has cured the problem in the federal antitrust and labor laws through judicial limitation in *Professional Real Estate Investors* and *Bill Johnson's Restaurants*.[510] To the extent that these statutes authorize injunctive authority, the courts need to limit that power, at least as in *Bill Johnson's Restaurants*, to claims that lack merit.[511] However, unlike the court access rules, these "substantive evil" statutes may apply to assess subsequent punishment against plaintiffs who file losing but meritorious claims. Whether the courts, Congress, or the state legislatures want to further limit application of the laws so that they do not penalize a losing but meritorious claim, as the Court did in *Professional Real Estate Investors*, is a policy judgment, not a First Amendment question.

G. Summary

In future articles, I will explore other rules or governmental actions that might run afoul of the Petition Clause, but these foregoing motive restrictions are likely the most pervasive form of law that violates the right to petition courts. This is the logical reading of *Bill Johnson's Restaurants* and *Professional Real Estate Investors*, but the conclusion also follows from independent strict scrutiny and breathing room analysis. The only way in which the government may use motive to punish resort to courts is through laws, such

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[509] Federal lawmakers may want to punish lawyers who personally have this ill motive (as opposed to the client having such a motive). I discuss the general propriety of such a limit on a lawyer's motives in Andrews, *supra* note 11, at Part III.B.2.

[510] *See supra* notes 49–51, 55–58. Some courts and commentators already have taken on this task with regard to other laws. *See* United States v. Robinson, 3 Fair Housing & Fair Lending Cases 15–979 (D. Conn. Jan. 26, 1995), discussed *supra* note 86; *see also supra* notes 59–63 and accompanying text.

[511] *See supra* notes 83 and accompanying text, 463 and accompanying text

as the civil rights statutes, which aim to deter substantive evils other than litigation abuse. Even in this case, punishment is permissible only after the plaintiff has lost the underlying suit. A plaintiff's motive is never a permissible basis on which to punish his filing of a *winning* suit or to bar his initial access to file a meritorious claim. In sum, except in very narrow circumstances, motive is an improper basis on which to limit the fundamental First Amendment right of a person to "petition the government for redress of grievances."