Power-Conscious Professional Responsibility: Justice Black's Unpublished Dissent and a Lost Alternative Approach to the Ethics of Cause Lawyering

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Abstract

Public interest impact litigation as currently practiced raises significant legal ethics concerns. This Article excavates the historical foundations of two of these difficulties and, on the basis of original archival research, uncovers a way around them.

The Article focuses on two modern ethical dilemmas posed by impact litigation: conflicts of interest and the use of litigation for policy-making. It argues that, as a historical and doctrinal matter, these ethical puzzles trace back to Justice Brennan's decision to set cause lawyering on a putatively neutral First Amendment basis in NAACP v. Button. *That rationale, however, was not the case's original* ratio decidendi. *In fact, the egalitarian neutralism Brennan embraced had initially provided a reason for finding impact litigation improper. Only a pair of dramatic, unexpected resignations transformed it into a foundation for cause lawyering. Meanwhile, an unpublished draft opinion would have grounded impact litigation in Equal Protection and* Carolene Products*-type considerations. This race- and power-conscious alternative, championed by Justice Black, provided a competing ethical foundation for public interest impact litigation that would have better addressed our contemporary legal ethics concerns.*

This Article elucidates Justice Black's argument for the first time. It reconstructs the complicated dynamics that led to the abandonment of his dissent and its transformation into Justice Brennan's majority opinion. In telling this story,

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the Article denaturalizes the ethical regime that governs impact litigation today by showing how nearly it was radically different. The Article's contributions are descriptive and normative. On the descriptive level, it offers a revised account of NAACP v. Button *on the basis of new archival finds. Normatively, it seeks to champion Black's race- and power-consciousness against Brennan's neutralism, showing what Black's approach might have to offer legal ethics today.*

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INTRODUCTION

Public interest impact litigation raises significant ethical dilemmas.[1] Scholars have long examined the roots of these difficulties and pursued avenues for resolving them. This Article takes a historical approach to these same problems. It traces a pair of legal-ethics concerns back to the Supreme Court case of *NAACP v. Button*, which laid the ethical foundation for modern cause lawyering.[2] The Article argues that some of our ethics problems came from the frame that Justice Brennan adopted in his majority opinion. Although Brennan was aware of the legal ethics difficulties public interest impact litigation presented, he hoped his opinion would preempt them. It did not. This Article shows how that failure was a result of tactical decisions Brennan made to create his majority. It proposes that, from the perspective of legal ethics, an alternative approach, championed by Justice Black, would have been more appealing.

The Article's contributions are descriptive and historical as well as normative. It reconstructs, on the basis of original archival research in the unpublished papers of the Justices, how the *Button* regime emerged from the case of *NAACP v. Gray*. As we will see, only the most extreme historical accident led *Button* to come out as it did. As initially decided, the case looked very different.[3] There is a

1. *See infra*, Part I.
2. 371 U.S. 415 (1963).
3. *See infra*, Part III, "The Saga of *Button*."

complex legal and intellectual history to the move from *Gray* to *Button*—one that had significant consequences for American law in general and the legal ethics of cause lawyering in particular. This Article reconstructs that intellectual evolution for the first time.

In so doing, this Article expands on the work of previous scholars in legal history, legal ethics, and constitutional law, who have adumbrated the importance of *Button* for our codes of professional ethics.[4] It builds on their histories and analyses by resurrecting an abandoned, alternative approach to legal ethics hiding in the *Button* files, and shows why that archival artifact might be normatively appealing.

Part I canvasses the history of legal ethics to surface existing ethical issues with public interest impact litigation. It begins with the conceptual indeterminacy of "cause lawyering," seeking to isolate a definition of the practice and show its growing importance over time. It then demonstrates how, despite cause lawyering's prevalence, it fits uneasily into the history of American legal ethics. The section proceeds through an analysis of historical ethics codes and court cases to show that public interest impact litigation has generally been disfavored, and even disapproved of by legal ethics authorities.

The Part concludes by connecting the historical resistance to cause lawyering to a pair of ethical dilemmas. The first is conflicts of interest. In cause lawyering, there is a strong possibility that the interests of lawyers and the clients they represent slip out of alignment, which is a violation of basic ethical canons. The second legal ethics concern is about policy litigation. According to a leading strand of pluralist democratic theory, policy preferences are supposed to be elaborated in the political arena. Yet, public interest impact litigators routinely pursue policy aims through the courts.

Part II explores how these legal ethics difficulties emerged from the regime Brennan devised in *Button*. Brennan hoped that his opinion would create safeguards to ensure that cause lawyering presented no conflicts of interest and fit appropriately into our democratic system of courts and legislatures. The linchpin of his regime was the distinction between lucrative and non-lucrative lawyering activities—a distinction eventually instantiated in the still-leading cases of *Ohralick v. Ohio State Bar Ass'n*[5] and *In re Primus*.[6] Part II shows how this now-canonical distinction operated in the *Button* opinion itself. It further argues that, rather than eliminate the ethical issues surrounding public interest impact litigation, the *Button* regime helped create them.

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4. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 274–82 (1994); Susan D. Carle, *From* Buchanan *to* Button*: Legal Ethics and the NAACP (Part II)*, 8 U. CHI. L. SCH. ROUNDTABLE 281 (2001).

5. 436 U.S. 447 (1978).

6. 436 U.S. 412 (1978).

Part III, the core of the Article, uses original archival sources to show where Brennan's opinion came from and where it went wrong, by way of the recovery of an alternative that he rejected. It reconstructs how, under the name *NAACP v. Gray*, the case was first decided *against* the NAACP. Justice Frankfurter, in a studiously neutral opinion, held that public interest impact litigators were subject to the same legal ethics rules as all other lawyers. Justice Black, in dissent, relied on Equal Protection and *Carolene Products*-type considerations to come out differently. Under his race- and power-conscious analysis, cause lawyering could be ethical when done on behalf of certain groups in specific circumstances. The particular relations between the cause, the clients, their lawyers, and the broader political situation would be decisive.

Only a pair of historical accidents changed the case's outcome, causing Black's opinion to disappear. Before the opinion in *Gray* could be announced, Justice Whittaker unexpectedly resigned and Justice Frankfurter suffered a stroke. Both stepped down, robbing Frankfurter's *Gray* opinion of its majority. President Kennedy appointed two new Justices to fill the newly-vacant spots, and the case was set for reargument. Justice Brennan, sensing an opportunity, lobbied the two newly appointed Justices—White and Goldberg—to bring them to the side of the NAACP. To put together his majority, Brennan cannily adopted Frankfurter's neutralism, but put it in service of the NAACP and impact litigators everywhere. Along the way, he explicitly abandoned Black's race- and power-conscious conception of ethical propriety, although traces of it remained in Black's edits to Brennan's majority opinion.

Part IV assesses what was lost in Brennan's turn away from Black and towards Frankfurter. Ironically, Brennan's tactical maneuvering might have been unnecessary, as there may have been five votes on the Court after reargument for an opinion based on the Equal Protection Clause. Black's argument, like Brennan's, recognized that cause lawyering played an important role in democratic societies. By contrast with Brennan, however, Black did not defend the practice on neutral First Amendment grounds. Rather, he argued that unpopular positions might be unfairly excluded from the regular democratic process, and so needed access to the courts to get a fair hearing. His opinion thus rested cause lawyering on the duty to provide all parties with the equal protection of the laws, and *Carolene Products*-style considerations about the democracy-reinforcing role of courts.

Part IV shows that this approach better resolves the legal ethics difficulties canvassed in Part I. Black's positional analysis better handles conflicts of interest by explicitly putting the question of the relationship between the lawyers and the clients they represent before the court. And it better harmonizes impact litigation with the demands of a democratic society by limiting policy litigation to situations where, for reasons of structural power differentials, the ordinary political process is inadequate to protect or vindicate a group's rights. This approach provides a historical foundation for the "context-dependent" school of professional

regulation gaining scholarly traction today, and might have led to a different assessment of the ethics of representation in certain recent public interest impact litigation suits, such as *Fisher v. Texas*,[7] (although perhaps not in others, such as *Hobby Lobby*).[8]

A brief conclusion recapitulates the key differences between Black's race- and power-conscious approach and Brennan's egalitarian neutralism, and highlights the normative advantages of Black's approach for modern legal ethics.

Of course, Black's approach raises difficulties of its own.[9] This Article does not address them. To be clear: the Article's aim is not to defend a particular operationalization of Black's race- and power-conscious legal ethics.[10] Rather, it seeks to recover a lost history of professional responsibility, laid by the way in the midcentury turn to judicial neutralism.[11] Attending to that history denaturalizes our existing regime of professional responsibility by showing how nearly it was very different. And it raises questions about the moral foundations of an aspect of the contemporary regulation of impact litigation, by uncovering its roots in the never-released opinion in *Gray*, a problematic, pro-segregationist ruling that would have hobbled the NAACP's ability to protect Black civil rights. Restoring that backdrop helps us see what remains attractive about Black's alternative framework, and so makes it available anew for us to learn from today.

I. THE ETHICAL DILEMMAS OF PUBLIC INTEREST IMPACT LITIGATION

Cause lawyering has become a standard feature of the legal landscape. This should be surprising because, historically, it was ethically suspect. The practices at its core, which were made famous by the NAACP Legal Defense Fund, were largely disapproved of by American courts before 1963. Even today, those practices remain in tension with two fundamental tenets of American legal ethics: that lawyers should avoid conflicts of interest, and that courts should not be used for policy litigation.

This Part recovers the ethical strangeness of cause lawyering. It explores the meaning and history of cause lawyering to show how uneasily it sits in American law. This sets the stage for appreciating the significance of *Button*, discussed in Part II, which attempted to provide cause lawyering with its missing ethical foundations.

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7. Fisher v. Univ. of Tex. at Austin (Fisher I), 570 U.S. 297 (2013); Fisher v. Univ. of Tex. at Austin (Fisher II), 136 S.Ct. 2198 (2016).

8. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

9. *See infra* CONCLUSION.

10. For a discussion of some thoughtful scholarly attempts to elaborate a power-conscious professional ethics, see *infra* notes 370–77 and accompanying text.

11. *See, e.g.*, Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

A. THE CONCEPT OF CAUSE LAWYERING

Cause lawyering is best understood by analogy. The practice is notoriously hard to define.[12] As two of its most distinguished scholars have observed, "providing a single, cross-culturally valid definition of the concept is impossible."[13] A recent leading analysis concluded that, despite "years of research, we still seem far from a settled picture of cause lawyering and cause lawyers."[14]

Nevertheless, most analysts agree on some general "parameters."[15] Public interest impact litigation seeks to do more than vindicate the rights of a single aggrieved individual. It tries, at a minimum, "to stretch th[e] ideals [of the legal profession] from the representation of individual litigants to causes."[16] To that extent, cause lawyering is about aggregates, systems, and structural relationships. It invokes "the set of social, professional, political, and cultural practices engaged in by lawyers and other social actors to mobilize the law to promote or resist social change."[17] In the perceptive formulation of Martha Minow, it "involves deliberate efforts to use law to change society or to alter allocations of power."[18]

Though hard to define, cause lawyering is easier to identify. The "iconic cause lawyer"[19] and the "influential model"[20] remain Thurgood Marshall and the NAACP Legal Defense Fund. Their work suing in courts to fight racial segregation helped spur cause lawyering as a movement. *Brown v. Board of Education*,[21] which they litigated, inspired the "first wave" of "institutionalization" of public interest impact litigation.[22] In the wake of their success, public interest legal crusaders adopted an organizational model that "emphasi[zed]" the Legal Defense Fund's ground-breaking court-centered approach.[23]

Whatever else cause lawyering is, it can be understood by analogy with what Marshall and his team accomplished. When scholars talk of "public interest impact litigation" and "cause lawyering," they mean at least work like that. Terms like "cause lawyer" or "public interest impact litigator" can be understood

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12. This Article uses the terms "public interest impact litigation" and "cause lawyering" interchangeably. For a critical reflection on the work done by the labelling and renaming of varieties of public interest legal practice, see Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1660–61 (2017).

13. CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 5 (Austin Sarat & Stuart Scheingold, eds., 1998).

14. Anna-Maria Marshall & Daniel Crocker Hale, *Cause Lawyering*, 10 ANN. REV. L. & SOC. SCI. 301, 302 (2014); *see also* Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of "Public Interest Law"*, 52 UCLA L. REV. 1223, 1236 n.54 (2005) (cataloging failed attempts to define "public interest law").

15. CAUSE LAWYERING, *supra* note 13, at 5.

16. *Id.* at 7.

17. Marshall & Hale, *supra* note 14, at 303.

18. Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287, 289 (1996).

19. Marshall & Hale, *supra* note 14, at 304.

20. Minow, *supra* note 18, at 289.

21. 347 U.S. 483 (1954).

22. Cummings, *supra* note 12, at 1676.

23. *Id.*; *see also* Stephen C. Yeazell, *Brown, The Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1977-85 (2004).

to designate practitioners who take inspiration from and seek to emulate the way the Legal Defense Fund developed and implemented a program of social change through the courts.[24]

Although not many lawyers self-describe as "cause" or "public interest" lawyers, their impact has been outsize.[25] Cause lawyering first came to prominence as a progressive legal project.[26] And some of the most significant public interest impact litigation victories have been in the area of expanding rights for marginalized groups and in achieving other liberal priorities.[27] But, in recent years, conservative political projects have also adopted the tools of cause lawyering with considerable success.[28] As a result, public interest impact litigation has become ubiquitous and widely accepted. It is now an entrenched feature of the American legal landscape and has even spread internationally.[29]

B. CAUSE LAWYERING ETHICS: A HISTORICAL PROBLEM

The prevalence of public interest impact litigation can make it seem unremarkable. However, it is in tension with traditional understandings of the lawyer's role. And it has been out of step with legal ethics codes since the profession first began self-regulating.

1. EARLY PRECEDENTS

Cause lawyering does have early antecedents in the Anglo-American legal tradition. Individual instances of test-case litigation, a key part of modern cause

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24. *See* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925-1950 (1987).

25. Exact data on the number of public interest impact litigators/ cause lawyers is hard to come by. "[I]t is clear that public interest lawyers remain a tiny fraction of the overall bar," and discrete historical data points have put their number at 0.7% and 1.3% of the bar at different times in the past. PUBLIC INTEREST LAWYERING: A CONTEMPORARY APPROACH 90 (Alan K. Chen & Scott Cummings, eds., 2013).

26. *See* CAUSE LAWYERING, *supra* note 13, at 25 n.13 (observing in 1998 that, "until very recently in the United States, moral activism was almost entirely associated with lawyering for progressive causes" and that it was at that time "too soon in the development of conservative cause lawyering" to study it).

27. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (litigated in part by Lambda Legal); Goldberg v. Kelly, 397 U.S. 254 (1970) (litigated in part by the Center on Social Welfare Policy and Law and the ACLU); *see also* Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2075 (2008).

28. *See, e.g*, Burwell v. Hobby Lobby Stores, Inc., 573 US 682 (2014) (litigated in part by The Becket Fund for Religious Liberty); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (litigated in part by the Center for Individual Rights); *see also* ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION Ch. 2 (2008); Southworth, *supra* note 14.

29. *See* Fabio de Sa e Silva, *Radicalism, Mythification, and Hard Issues in the Diffusion of Public Interest Law Across the Americas*, 31 GEO. J. LEGAL ETHICS 421, 423 (2018) (observing that, after becoming part of US legal culture, cause lawyering "went global, attracting significant investments from international organizations and engagement from legal professionals around the world"); *see also* Stuart Scheingold, CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat ed., 2001); Scott L. Cummings & Louise G. Trubek, *Globalizing Public Interest Law*, 13 UCLA J. INT'L L. & FOREIGN AFF. 1 (2008).

lawyering, go back to at least the first half of the 19th century.[30] Famously, *Plessy v. Ferguson*,[31] the notorious "separate but equal" decision that *Brown* overturned, was itself a test-case gone wrong.[32]

But these examples do little to establish the ethical *bona fides* of cause lawyering. Significantly, at the time early test-cases were litigated, the very idea of "legal ethics" was something different. As a result, the reality that courts allowed some test case litigation to proceed tells us little about whether public interest impact litigation is or should be considered ethical.

Legal ethics, back then, was fundamentally a question of moral accountability, not professional regulation. The leading legal ethics treatises of the 19th century elaborated a "religious jurisprudence" that stressed lawyers' "duty to do justice."[33] Such an ethics was ultimately about bringing human law and conduct into harmony with other, more authoritative forms of order (whether natural or divine).[34] For that reason, the legal ethics of the time stressed the lawyer's moral responsibility for the positions he (and it was always supposed to be a "he")[35] took in court. The duty of zealous advocacy, the proverbial "master norm" of modern legal ethics,[36] was not accepted in the United States as a guiding professional standard.[37] Nor, in any case, were legal ethics concerned with regulating the profession more generally.

From the perspective of legal ethics, then, early antecedents do not tell us much. They suggest, at most, that in some circumstances in which test cases were brought, the lawyers who did so may well have decided that they could bring suit without violating their moral intuition.

2. ORIGINS OF MODERN LEGAL ETHICS

The development of a recognizably modern legal ethics, tied to a bar association with the avowed aim of professional regulation, only happened in the last

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30. Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 L. & HIST. REV. 97, 100-01 (2002).

31. 163 U.S. 537 (1896).

32. *See* STEVE LUXENBERG, SEPARATE: THE STORY OF *PLESSY V. FERGUSON* AND AMERICA'S JOURNEY FROM SLAVERY TO SEGREGATION 16 (2019) (observing that *Plessy* emerged from a "prearranged arrest, the second of two such test cases . . . engineered" by a group of New Orleans citizens to challenge Louisiana's so-called "separate-car law").

33. Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 10 (1999).

34. *See id.* at 11, 13.

35. *See, e.g.*, Bradwell v. Illinois, 83 U.S. 130, 140 (1872) (Bradley, J., concurring) (approving of the Illinois Supreme Court's finding that allowing a woman to practice law would be "contrary to the rules of the common law and the usages of Westminster Hall from time immemorial").

36. Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM. L. REV. 709, 727 (1998); *see also* Lawrence J. Vilardo & Vincent E. Doyle III, *Where Did the Zeal Go?*, 38 LITIG. 53, 56 (2011).

37. *See* Michael Ariens, *Brougham's Ghost*, 35 N. ILL. U. L. REV. 263 (2015).

decades of the 19th century.[38] Under the new formal rules, many cause lawyering practices were considered unethical.

There are many reasons why legal ethics took on a codified, regulatory form at that time. They include the rise of a more positivistic mode of thought in the social sciences in general and "legal science" in particular, an influx of new legal practitioners from immigrant backgrounds that discomfited white Anglo-Saxon legal elites, an emerging critique of the ethics of the corporate bar, and a general professionalizing urge that cut across the learned professions.[39] These forces combined to create a powerful movement for professionalization and professional self-regulation in the law. In response, bar associations drafted and adopted strong ethics codes that sought to shore up the respectability of lawyers by making their ethical responsibilities clear and enforceable in court.[40]

These codes did not, however, seek to legitimate the practices that undergird contemporary public interest impact litigation. In fact, to the contrary, they included several precepts that were quite hostile to practices central to cause lawyering as we know it today. The 1887 Alabama State Bar Association Code of Ethics and the 1908 American Bar Association (ABA) Canons of Ethics are exemplary. The Alabama Code was the first and most influential of the modern state bar codes from the end of the 19th century; after its promulgation, it was adopted by eleven other states, and it became the inspiration for the American Bar Association's own efforts two decades later.[41] The 1908 ABA Canons, for their part, became the first nationwide collection of lawyering standards and had an immediate and lasting effect on ethics codes across the country.[42] The Canons would go on to dominate legal ethics for the next seventy years, and were the progenitors of the ABA Model Rules of Professional Conduct which remain influential today.[43]

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38. *See* Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics - I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 479 (2001).

39. *See, e.g.*, Ariens, *supra* note 37, at 289-291; JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1974); Carle, *supra* note 33, at 7; Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 473-77, 486-93 (1998); DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE (1991).

40. Thus, Alabama's 1887 ethics code—the first and most influential of the state bar codes, *see infra* note 41 and accompanying text— charged lawyers with with "uphold[ing] the honor, maintain[ing] the dignity, and promot[ing] the usefulness of the profession," and specifically admonished them "not [to] speak slightingly or disparagingly of [the] profession, or pander in any way to unjust popular prejudices against it; and [to] scrupulously refrain at all times, and in all relations of life, from availing [themselves] of any prejudice or popular misconception against lawyers, in order to carry a point against a brother attorney." ALA. BAR ASS'N CODE OF ETHICS OF 1887 (hereinafter ALA. CODE), RR. 8 & 9, *reprinted in* 2 ALA. LAW. 247, 262-263 (1941).

41. *See* Walter B. Jones, *First Legal Code of Ethics Adopted in the United States*, 8 A.B.A. J. 111 (1922). On the history and significance of the 1887 Alabama Code, see Marston, *supra* note 39; *see also* Walter B. Jones, *Canons of Professional Ethics, Their Genesis and History,* 2 ALA. LAW. 247 (1941).

42. James M. Altman, *Considering the ABA's 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2395-96 (2003); Carle, *Lawyers' Duty*, *supra* note 33, at 31.

43. Altman, *supra* note 42, at 2395.

Both codes explicitly sought to regulate and professionalize the bar by articulating a set of enforceable ethical standards that lawyers should follow (including, incidentally, the duty of zealous advocacy).[44] And both sets of codes specifically included precepts that made cause lawyering suspect.

Start with the Alabama Code. It noted that "special solicitation [by lawyers] of particular individuals to become clients ought to be avoided" and that "[i]ndirect advertisement for business, by furnishing or inspiring editorials or press notices, regarding causes in which the attorney takes part, the manner in which they were conducted [and so on] is of evil tendency and wholly unprofessional."[45] By "causes," the Code likely meant "causes of action" or "cases," not "causes" in the sense in which a "cause lawyer" fights for a "cause."[46] Nevertheless, the rule is hostile to the would-be cause lawyer. The modern cause lawyer *does* go around soliciting particular individuals to become clients. And modern cause lawyers *do* cultivate publicity to advertise themselves as skilled in bringing specific kinds of cases. Indeed, both of these would become standard practice for the lawyers at the NAACP Legal Defense Fund.[47] Yet the Alabama Code would deem the behavior ethically improper.

More directly damning, the Alabama precepts prohibited drumming up litigation of any kind. Rule 20 of the 1887 Code, simply entitled "Disreputable To Stir Up Litigation," announced that:

> [I]t is indecent . . . to seek out a person supposed to have a cause of action and endeavor to get a fee to litigate about it. Except where ties of blood, relationship or trust, make it an attorney's duty, it is unprofessional to volunteer advice to bring a law suit. Stirring up strife and litigation is forbidden by law, and disreputable in morals.[48]

The thrust of the rule is clear: a lawyer should not be in the business of encouraging others to bring lawsuits. The question of the fee is slightly ambiguous, and would become, as we will see, a linchpin of the modern cause lawyering legal ethics settlement. But the Code is plain that for a lawyer to encourage a plaintiff to bring a suit, even a plaintiff with a meritorious claim, is ethically suspect, whether or not the lawyer will be paid. Only in exceptional circumstances—"where ties of blood, relationship or trust" predominate—can a lawyer ethically encourage a would-be plaintiff to come to court. Yet, finding meritorious plaintiffs and bringing suits on their behalf is the bread-and-butter of a modern public interest impact litigator's work.

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44. *See* ALA. CODE R. 10, 2 ALA. LAW. at 263; 33 ANNU. REP. A.B.A. 579 (1908) (citing the CANONS OF PROF'L ETHICS Canon 15 (1908)).

45. ALA. CODE R. 16, 2 ALA. LAW. at 265.

46. *See Cause*, I BOUVIER'S LAW DICT. 291 (15th ed. 1892) (defining "cause" "[i]n [p]ractice" to mean "[a] suit or action[; a]ny question, civil or criminal, contested before a court of justice").

47. *See* Brief for Petitioner at 7–12, NAACP v. Button, 371 U.S. 415 (1963) (No. 5).

48. ALA. CODE R. 20, 2 ALA. LAW. at 266.

On this score, too, then, the ethics rules put what is now standard cause lawyering practice beyond the pale.

The American Bar Association's 1908 ethics canons were, if anything, even more hostile to cause lawyering than Alabama's rules. The adopted version of the Canons was prefaced by a paragraph-long quotation from Abraham Lincoln on the evil of bringing disputes into court. "Discourage litigation," it began.[49] "Never stir up litigation," it went on.[50] "A worse man can scarcely be found than one who does this."[51]

ABA Canon 27, on attorney advertising, largely tracked the Alabama Code, and similarly proscribed seeking out specific categories of clients or touting one's particular area of legal expertise. "[S]olicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional," it explained.[52] Using third parties to the same end was similarly improper.[53]

On the question of encouraging plaintiffs to bring cases to court, the ABA went further than Alabama in reining lawyers in. The Canons agreed with the Alabama Code that, "except in rare cases where ties of blood, relationship or trust" created a duty, "[i]t [wa]s unprofessional for a lawyer to volunteer advice to bring a lawsuit."[54] The ABA rules went further, however, in noting that "[s]tirring up strife and litigation is not only unprofessional, but it is indictable at common law," and that, more generally, it was "disreputable . . . to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients."[55] Canon 28 closed by instructing lawyers that anyone "having knowledge of such practice upon the part of any practitioner" had a duty to "immediately inform" on the "offender," "that [he] may be disbarred."[56]

The ABA's position on fostering public interest impact litigation was thus clear and uncompromising. The practitioner who sought out even meritorious clients to bring suit was potentially a criminal. At a minimum, they were acting unprofessionally, threatening the integrity of the profession so much that fellow lawyers had a duty to turn them in.

Nor did the Canons soften their position over time. In 1928, the ABA adopted several additional canons to supplement the 32 already promulgated.[57] Among these was Canon 35, on intermediaries, which put new hurdles in the way of the

49. 33 ANNU. REP. ABA, *supra* note 44, at 574.
50. *Id.*
51. *Id.*
52. *Id.* at 582.
53. *See Id.*
54. *Id.* at 582-583.
55. *Id.* at 583.
56. *Id.*
57. Proceedings at the Fifty-First Annual Meeting of American Bar Association Held at Seattle, Washington, 51 ANNU. REP. A.B.A. 29 (1928).

would-be cause lawyer. It clarified that "[t]he professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer."[58] The Canon further stated that "[a] lawyer's relation to his client should be personal, and the responsibility should be direct to the client"; no "relations" should be allowed that might "direct the performance [of the lawyer's duties] in the interest of [any] intermediary."[59] This would put modern cause lawyers, who litigate on behalf not just of their clients, but according to a legal strategy endorsed and elaborated by cause lawyering organizations, in an ethically compromised position.[60]

3. CAUSE LAWYERING PRACTICES IN COURT AND COMMISSION

Given the hostility of the legal ethics codes, lawyers who sought to engage in impact litigation had to tread carefully. Susan Carle has documented how some elite lawyers, secure in their status in the profession and moral rectitude, felt able to bring public interest impact litigation without running afoul of state bar ethics rules.[61] But her pioneering research has also established that, in the first decades of the twentieth century, the ABA and the bar associations in New York, the country's leading legal market, consistently "disapproved of practices in which lawyers served as advisors to groups or organizations established for the purposes of promoting individuals' abilities to pursue potential causes of legal action."[62] In other words, the bar associations were actively hostile to most lawyers who engaged in the kinds of practices modern public interest impact litigators rely on now.

They expressed this hostility in consequential ways. They issued advisory opinions critical of cause lawyering practices,[63] and they disciplined attorneys who refused to heed their warnings, including by suspending or revoking their license to practice.[64] Only in exceptional cases did the ABA relax its ethical rules around cause lawyering.[65] When it did, its principles could be hard to discern.

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58. *Id*. at 497.

59. *Id*.

60. The NAACP argued that it never acted as such an intermediary, and that, "once legal action is begun, the [NAACP] exercises no further control," leaving a direct lawyer-client relationship. Brief for Petitioner, *supra* note 47, at 8. The historical record is less clear. In its school litigation, the NAACP eventually adopted the position that it would pursue integration/desegregation suits, but not equalization suits, as a matter of national policy. *See* TUSHNET, *supra* note 24, at 115.

Note that the canons operate to make cause lawyering improper not only singly, but in combination. A would-be cause lawyer might seek to get around the prohibition on having litigation directed by an intermediary by finding a client whose interests lined up with their organization's. But this would run afoul of the prohibition on client solicitation. I am indebted to the editors of the *Georgetown Journal of Legal Ethics* for this fine observation.

61. *See* Carle, *supra* note 30, at 115, 138-144.

62. *Id*. at 137.

63. *Id*. at 135–37.

64. *Id*.

65. One commentator, writing in the 1960s, observed that the Bar Association departed from its traditional rules that hampered cause lawyering "[o]nly once"—in the Liberty League case described *infra*, note 66 and

Consider the matter of Legal Ethics Opinion 148. In 1935, the ABA issued a notorious opinion that clarified that "[o]ffering publicly to render legal services without charge to citizens who are unable to pay for them is not unethical."[66] This apparently anodyne conclusion in fact legitimated an unusual bit of cause lawyering. In September 1935, a wire agency had reported that the American Liberty League was preparing "[a] vast 'free lawyer' service for firms and individuals bucking New Deal laws on constitutional grounds."[67] A member of the ABA quickly wrote to the Committee on Professional Ethics and Grievances to complain, observing, among other things, that the League was "encouraging litigation[,] which is not only reprehensible according to the ethics of the profession, but which also violates the criminal provisions of the statutes in nearly every state in the union."[68] The League promptly disavowed the wire article, but did own that, "when any American citizen, however humble, is without means to defend his constitutional rights in a court of justice, one or more of [the League's] lawyers will, without any compensation from any source, defend the rights of the individual."[69]

Ruling on the League's public statement and proposed course of conduct, the ABA Committee found it ethical. The Committee observed that, at root, the League's lawyers were simply offering to provide free legal services to indigent citizens.[70] This, it concluded, was unproblematic. "There is nothing whatever in the Canons to prevent a lawyer from performing such an act, nor should there be."[71] To advertise those services was similarly fine. The prohibitions against advertising were, in the Committee's mind, "aimed at the commercialization of the profession."[72] That is to say, the Canons proscribed only "effort[s] to obtain remunerative business," and so were "never aimed at a situation such as this."[73] Moreover, the League's statement was unlikely to stir up litigation, since "the offer made . . . is to defend citizens" who were already prepared to assert their rights.[74]

But the reasoning of the opinion is frankly unpersuasive. Bar associations had previously taken the position that even pro-bono attorney advertising could be

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accompanying text. *State Statute Barring Solicitation of Legal Work Held to Violate Due Process as Applied to NAACP*, 63 COLUM. L. REV. 1502, 1506 (1963) [hereinafter *State Statute Barring Solicitation*].

66. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 148 (1935) [hereinafter Op. 148], *in Professional Ethics Committee Rules Organization and Offer of National Lawyers Committee Not Unethical*, 21 A.B.A. J. 776, 777 (1935) [hereinafter *ABA Ethics Article*].

67. *ABA Ethics Article*, *supra* note 66, at 776 (quoting *Liberty League Plans Free Lawyer Service*, UNITED PRESS INT'L, Sept. 19, 1935).

68. *Id.*

69. *Id.* at 777.

70. *See Id.* at 778.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

impermissible,[75] and courts had sanctioned lawyers who disobeyed.[76] Moreover, as the ABA itself knew, the aim of the League's attorneys was not merely to defend impecunious aggrieved citizens but to actively foment anti-New Deal litigation to resist President Franklin Roosevelt's agenda.[77] The League hoped that the knowledge that it had lawyers ready to fight the New Deal would inspire citizens to assert their rights against the government; indeed, it was for just that reason that the League sought to broadcast news of its legal services program widely. The ABA's decision to allow the League's public interest impact litigation campaign to go forward, then, seems oddly under-justified.

It conceded as much. "This opinion is written," the Committee remarked, "with full knowledge of the controversial questions involved; of the tremendous issues which are now before the American people and in which the American Liberty League and [its] National Lawyers Committee are vitally interested on one side."[78] The American Bar Association did not want to be seen as backing the Liberty League's challenges to the New Deal. But "[t]he question presented, with its implication, involves problems of political, social and economic character that have long since assumed the proportions of national issues[,] which transcend the range of professional ethics."[79] The question was simply too large to think of merely in ethical terms. Where a problem as big as the constitutionality of the New Deal was involved, the Committee seemed to conclude, the ordinary rules of professional ethics did not apply.

We can wonder, in hindsight, whether the Committee's decision was merely special pleading to give conservative lawyers additional tools to challenge Roosevelt's threatening reforms. In any case, as a piece of legal ethics guidance, the opinion was not helpful or influential, at least at the time. The "national issues" exception to the rules of legal ethics it announced was of little use to courts asked to confront whether given legal practices conformed to the ethical prohibitions embodied in the various state codes and ABA Canons.

So, in 1940, in the important case of *Gunnels v. Atlanta Bar Association*,[80] the Supreme Court of Georgia gave its sanction to a scheme by the local bar to combat exploitative interest rates, without once referencing the new ethics opinion or its national issues exception. At the time, Georgia was plagued by a rash of "salary buyers," an early form of payday lending.[81] The Atlanta Bar Association, concerned that these businesses charged interest rates above the maximum set by

75. *See* Carle, *supra* note 30, at 135–37.

76. *See Attorney and Client—Ethical Propriety of Lawyers Forming Organizations and Offering Gratuitous Legal Services*, 36 COLUM. L. REV. 993, 993 & n.6 (1936) (collecting cases).

77. *See generally* Frederick Rudolph, *The American Liberty League, 1934–1940*, 56 AM. HIST. REV. 19 (1950).

78. *ABA Ethics Article*, *supra* note 66, at 778.

79. *Id.*

80. 12 S.E.2d 602 (Ga. 1940).

81. JOHN CASKEY, FRINGE BANKING 31–32 (1994).

state law, organized a campaign to, *inter alia*, inform borrowers of their rights, investigate the effective rates salary buyers charged, and, if necessary, represent aggrieved borrowers without pay.[82] The salary buyers sued, alleging that the Bar Association's activities amounted to a violation of legal ethics rules and their common law analogs, including stirring up litigation and improper advertising.[83]

The Georgia Supreme Court was unconvinced. But its reasoning was less legal than intuitive, flecked with invective and patrician bonhomie. As the court saw it, the salary buyers were alleged "usurious moneylenders," seeking potentially "illegal exactions."[84] The good members of the bar were respected elders, about whose "position in the community" "[m]uch could be said."[85] It was self-evident that the lawyers were engaged in ethical behavior. For "offer[ing] to represent free of charge persons caught in the toils of the [salary buyers], and to represent them in bringing actions to recover amounts illegally paid under loan contracts," the bar's lawyers "should be commended rather than condemned."[86] Why this was so was never made clear. Reading between the lines, it seemed enough for the court that the lawyers were respectable and the salary buyers presumably not.

Given the absence of reasoning in *Gunnels* or Opinion 148, it is unsurprising to find that courts often concluded that lawyers engaging in forms of group representation were, in fact, acting unethically, and ordered them to stop.[87] Thus, in 1935, the Illinois Supreme Court considered a case that, just like *Gunnels*, involved a group of lawyers organized to vindicate the rights of a discrete set of citizens.[88] The case concerned the Chicago Motor Club, a not-for-profit membership organization that protected the interests of automobile owners.[89] Among its activities, the Club employed a team of eighty-one attorneys, who offered to "represent [Club members] in automobile damage or traffic violation cases[, or] if [their] car is damaged or if [they are] sue[d]."[90] The court observed that the evidence established that the Club's lawyers were paid only a fixed salary, and that neither they, nor the Club, "derive[d] any direct profit from the performance of [legal] duties[.]"[91] In other words, there was no fee or contingency arrangement, and the lawyers had no direct incentive to drum up business. Moreover, the Court agreed with findings to the effect that the Club had provided "beneficial services . . . to its members and to the public generally."[92]

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82. *See Gunnels*, 12 S.E.2d at 604–06.
83. *Id.* at 603–04.
84. *Id.* at 610.
85. *Id.* at 610–11.
86. *Id.* at 610.
87. *See State Statutes Barring Solicitation*, *supra* note 65, at 1505-07.
88. *See* People *ex rel.* Chi. Bar Ass'n v. Chi. Motor Club, 199 N.E. 1 (Ill. 1935).
89. *Id.* at 3–4.
90. *Id.* at 2–3.
91. *Id.* at 3.
92. *Id.* at 4.

Nevertheless, the court held that the Club's legal staff was improper.[93] Despite the absence of a fee, the Club's non-profit status, and its beneficial conduct, retaining attorneys to represent clients was an unauthorized, unethical practice of law. The Club's advertisements, solicitations, and legal work structure were simply not allowed. Accordingly, the court held the Club in contempt and stated explicitly that it could not continue its legal work as then practiced.[94]

More than twenty years later, the court adhered to this position in a similar case, notwithstanding the dissemination of A.B.A Ethics Opinion 148 and the Georgia Supreme Court's decision in *Gunnels* in the interim.[95] The case centered on one of the more famous group representation schemes of the time. In 1930, the Brotherhood of Railway Trainmen, an old trade union, established a "Legal Aid Department" to provide legal representation to Brotherhood members who suffered workplace accidents.[96] The Brotherhood worried that its members were being pressured to accept lowball settlement offers, and, if represented by attorneys at all, were retaining incompetent counsel that charged exorbitant contingency fees. To address these problems, the Brotherhood hired its own legal staff.[97] These experienced lawyers paid all the costs of investigating and litigating cases and charged only a 25% contingency fee.[98]

The Illinois Supreme Court nevertheless disapproved of the scheme on ethical grounds.[99] It acknowledged that good policy reasons militated in favor of the Brotherhood's actions.[100] But it concluded that "[w]hile these [policy] considerations ha[d] weight, they [we]re insufficient . . . to override the principles that must govern the members of the legal profession in their relations with clients."[101] The Brotherhood's arrangement ran too directly afoul of the ethical prohibitions against solicitation, and interposed the Brotherhood as too much of an intermediary between its members and the conduct of their lawsuits.[102] The Brotherhood might well have a legitimate interest in making sure its members were not preyed on by management or incompetent and overpriced counsel. But it could not advance that interest in any way that would create or require a "financial connection of any kind between the Brotherhood and any lawyer," even something as loose as an attempt to "fix the fees to be charged [by other attorneys] for services to its members."[103] Such ties could interfere with the relationship between the

93. *Chicago Motor Club*, 199 N.E. at 4.
94. *See id.*
95. *In re* Bhd. of R.R. Trainmen, 150 N.E.2d 163 (Ill. 1958).
96. *See id.* at 165.
97. *See id.*
98. *See id.*
99. *See id.* at 167.
100. *In re* Bhd. of R.R. Trainmen, 150 N.E.2d at 166.
101. *Id.* at 167.
102. *See id.* at 166–67.
103. *Id.* at 167.

lawyer and client. That relationship, the Court admonished, "must remain an individual and a personal one."[104]

The Illinois Supreme Court's position was not unusual. Although programs like the Brotherhood's and the Chicago Motor Club's made it possible for particular groups to assert their legal rights at below market rates or even at no direct cost to individual litigants, like the Atlanta Bar Association program, courts generally found them improper.[105] Ironically, industrial accidents on rail lines and the rise of the automobile *did* raise pressing national issues.[106] But that turned out to be irrelevant, Opinion 148's language about a national issues ethics exception notwithstanding.

Only on rare occasions were cause lawyering practices blessed by the legal ethics authorities. And, as was true in the 1920s, so it remained into middle of the 20th century. When the authorities did give their approval, their reasons were unclear, and had more to do with the sociology of the legal profession than coherent ethical precepts. At least as late as 1958, some of the key practices on which cause lawyering depended were not ethically sanctioned by American law.

C. CAUSE LAWYERING ETHICS: A CONCEPTUAL PROBLEM

The historical hostility to cause lawyering is not hard to understand. As an analytic matter, cause lawyering exists in tension with some of our fundamental legal ethical commitments. American law, and in particular, American legal ethics, takes as the prototypical legal situation a lawyer representing a concrete client with tangible interests in a discrete legal dispute.[107] The foundation of that relationship, as every first-year law student learns, is the "master norm of zealous representation."[108] According to the ethics codes, lawyers should use their "special knowledge and skill" to advance their client's interest.[109] But the client should maintain "ultimate authority to determine the purposes to be served by legal representation,"[110] along with specific authority over particular actions.[111] The lawyer is not the principal, merely the client's servant.

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104. *Id.*

105. *See Union's Attorney Solicitation Program Unethical: Legal Ethics. Solicitation. Financial Relationship between Union and Attorney*, 11 STAN. L. REV. 394, 394-95 (1959) (observing that the Illinois Supreme Court followed other "decisions which applied canons of legal ethics in condemning identical programs").

106. On industrial accidents on railways as a pressing national issue, see JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2006); on the automobile, see SARAH A. SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM (2019).

107. Of course, the *Model Rules* recognizes that the contemporary lawyer serves other roles too. *See* MODEL RULES OF PROF'L CONDUCT pmbl. 2–3 (2018) [hereinafter MODEL RULES].

108. Gordon, *supra* note 36, at 727.

109. MODEL RULES R. 1.2 cmt. 2.

110. MODEL RULES R. 1.2 cmt. 1.

111. MODEL RULES R. 1.1.

This relationship does not always obtain in cause lawyering, though. Particularly where cause lawyering happens on the model made famous by the NAACP, the conditions of legal work can look very different. In such situations, multiple lawyers in a single organization simultaneously represent a variety of clients across a number of interconnected and carefully chosen disputes in the hopes of moving the law in a particular direction. Such lawyers may turn down cases or clients not because their claims are not meritorious, but because they are unlikely to advance the law in the direction the cause lawyers hope.[112] Such lawyers may also refuse to make valid legal arguments on behalf of their clients for the same reason: not because the arguments would not advance their clients' position, but because those arguments happen not to be the arguments that the cause lawyers want to see reflected in the law.[113] In these cases, it can often seem as if the lawyer, and not the client, is the one in the driver's seat.

1. PROBLEM 1: CONFLICTS OF INTEREST

This raises at least two concrete ethical concerns. The first is related to conflicts of interest. From the idea that the lawyer should represent the client, it follows that the lawyer and the client should have interests that align. If the lawyer had an interest different from that of the client, they would be unable to act as the client's faithful agent. The lawyer might be tempted to pursue their own interest instead of the client's. Moreover, the client would have a hard time relying on them. If the client were not certain that the lawyer had no interest divergent from their own, they would (rightly) hesitate to trust their lawyer with their own affairs. This would undermine the candor and close relationship on which the prototypical model of legal representation depends. For a lawyer to be the kind of lawyer the ABA imagines, it must be clear to everyone that the lawyer can and will make the client's interests completely their own and that there will be no conflict between what the lawyer and the client want.

The Model Rules of Professional Conduct enshrines these principles explicitly. It opens by optimistically asserting that the lawyer's many commitments will tend to align:

> A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.[114]

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112. *See* Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447, 461 (2018).

113. On this idea of "playing for the rules," see Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

114. MODEL RULES pmbl. 8.

The Code recognizes, however, that this may not always be the case. It is possible that "the representation of one client will be directly adverse" to that of another, or that there may be "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person" or even "by a personal interest of the lawyer."[115] In such cases, the lawyer has a "concurrent conflict of interest" and should ordinarily withdraw from representation.[116] The duty to avoid a conflict of interest between the lawyer and their client is paramount.

In cause lawyering, however, the interests of the lawyer and the client can slip out of alignment. What the lawyers may judge to be best for the cause may not be what the client wants.

Derrick Bell foregrounded this concern in his now canonical article on "serv[ing] two masters."[117] Writing in 1976, Bell wondered at the NAACP's intransigent commitment to total desegregation in its school integration litigation. At the time he was writing, the school desegregation campaign had suffered a series of losses in court. In Bell's estimation, these "reverses" were, in part, a function of the NAACP's "rigidity."[118] Despite an "increasing number of defections within the Black community," the organization refused to consider any alternatives to "total desegregation" in its litigation strategy, including in particular compromises such as greater funding for Black schools.[119] As Bell saw it, the NAACP's lawyers were "making decisions, setting priorities, and undertaking responsibilities that should [have] be[en] determined by their clients and shaped by the community."[120] In trying to serve two masters—the cause and the client—the lawyers had begun to fail both.[121]

Scholars working in Bell's wake have identified such ethical dilemmas in several other public interest impact litigation scenarios.[122] Tomiko Brown-Nagin has reconstructed in arresting detail how the NAACP's commitment to desegregation brought its lawyers into conflict with the communities they sought to represent in Atlanta, whose members believed that they had more to gain from equalization than desegregation.[123] Sandra Levitsky has observed similar dynamics in the gay rights context, where legal advocacy organizations' significant resources enabled them demand "*unilateral* cooperation" from the client populations and movement

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115. MODEL RULES R. 1.7.

116. MODEL RULES R. 1.7. The *Model Rules* does make allowance for continued representation, even where there exists a concurrent conflict of interest, if certain conditions are met. *See* MODEL RULES R. 1.7(b)(1)-(4).

117. Derrick Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 472 (1976).

118. *Id.* at 482.

119. *Id.* at 488.

120. *Id.* at 512.

121. *Id.* at 472.

122. *See, e.g.*, Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 74-75 (2011).

123. *See generally* TOMIKO BROWN-NAGIN, COURAGE TO DISSENT (2011).

allies they hoped to serve, thus effectively setting their agenda.[124] And William Simon, writing about poverty law, famously claimed that "effective lawyers cannot avoid making judgments in terms of their own values and influencing their clients to adopt" them.[125] In all these cases, lawyers were violating Bell's precept, "that lawyers [should] 'lawyer' and not attempt to lead clients and class."[126] The historical record thus points us to a recurring tension between the cause lawyer and the causes—read, clients?—they champion.[127]

2. PROBLEM 2: POLICY LITIGATION

We can wonder how serious the first ethical dilemma really is. That cause lawyers need concrete clients at all is an artifact of standing doctrine. It is only to get into court—to comply with the Constitution's "cases and controversy" requirement[128]—that cause lawyers need to find an actually harmed individual.[129] The harm that individual suffers is real, but vindicating it is not the cause lawyer's only, or main goal. This is the "dark secret" of cause lawyering: public interest impact litigators care more about policy than plaintiffs.[130]

For this reason, the first ethical dilemma may not seem that important. If we all know that care for the client is secondary, then the putative legal ethics violation can seem minor. When the situation of the particular client is merely the occasion for a lawsuit, and not the real matter in controversy, the alleged ethical violation appears a technicality.[131]

This raises the second, deeper ethical concern about cause lawyering. It has to do with whether such cases should be allowed into court at all.

The polity has a stake in what matters make it to the bar. We do not need to elaborate a comprehensive theory of social change or the role of courts to say that the public interest is not served by inappropriate litigation. In a democratic

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124. Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 146 (Austin Sarat & Stuart Scheingold eds., 2006) (emphasis as in original).

125. William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1102 (1994).

126. Bell, *supra* note 117, at 512.

127. For a lawyer's account of this distance, and attempts to manage it, see Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443 (1996). This is not to claim that, in any of these examples, lawyers actively represented individual clients who disagreed with the lawyers' positions. Indeed, modern cause lawyering organizations have learned to shop for the right clients.

128. U.S. CONST. art. III, § 2 (limiting the "judicial Power" to "Cases" and "Controversies").

129. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 199 (2000) (holding that an organization may have standing to sue only if, among other things, a member of the organization has individual standing to sue); Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (holding that value preferences and ideology are not enough to confer standing).

130. Simon, *supra* note 125, at 1102-03.

131. This analysis helps us understand Susan Carle and Scott Cummings daring proposal "to count the long-term movement's interest as a legitimate goal to pursue." Carle & Cummings, *supra* note 112, at 466. They propose considering the cause itself as a client. Conflicts between specific clients and the cause could then be settled using existing practices, including disclaimers, waivers, and partial withdrawals. *See id*. at 466-68.

society, the people should have some say over how different issues get resolved, and whether courts constitute an appropriate forum for their resolution. The lawyer who contravenes that judgment—who takes advantage of a loophole to bring a case that should not ordinarily be brought—acts unethically.

Under a "representative or pluralist view[] of liberal democracy," the courts simply should not be used to pursue the kind of social change cause lawyers seek to bring about.[132] Catherine Albiston has insightfully reconstructed this theory of democracy as one according to which legitimate policy decisions are made through the aggregation of various competing interests.[133] Methods of aggregation may be varied, and include such different forms as voting and interest group negotiation.[134] But legitimate policy decision-making bodies are those founded on principles of pluralistic aggregation and representation. Courts, however, are not founded on such principles. They thus serve a fundamentally different role, resolving concrete disputes between particular parties. Accordingly, under such a conception of democracy, "the appropriate remedy for citizens' grievances against their government is through the electoral process rather than the courts," and "litigation as a means of systemic reform is seen as an illegitimate foray into the political system that should be channeled instead into electoral or interest group politics."[135]

It is not clear that American democracy is, in fact, founded exclusively on such a "classical liberal" theory.[136] But, as Albiston herself recognizes, the theory does "underlie the debate about public interest law organizations" today, and constitutes an "unspoken assumption[]" about the way our country should function.[137]

The limited role of courts such a theory imagines is reflected in multiple ways in American law and legal ethics. We see it in the old common law crime of barratry, which sanctioned stirring up "vexatious" cases.[138] We see it, too, in the constitutional grant of power to Congress to "constitute Tribunals inferior to the Supreme Court" and the attendant federal courts principle that Congress can regulate federal courts' jurisdiction.[139] Most fundamentally, we see it in the need for a concrete and discrete cause of action to bring a lawsuit, whether one positively enacted or implicitly discovered. Without some kind of prior, collectively-given permission to bring a case, the law will not allow a case to be brought. The people, acting through the state or their own history as embodied in the common law, get to decide who gets access to the courts.

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132. Catherine Albiston, *Democracy, Civil Society, and Public Interest Law*, 2018 WISC. L. REV. 187, 190.
133. *Id.* at 190-91.
134. *Id.* at 191.
135. *Id.*
136. *Id.*
137. *Id.* at 190.
138. *Barratry*, BLACK'S LAW DICTIONARY (10th ed. 2014).
139. U.S. CONST. art. I, § 8.

This makes cause lawyering even more ethically problematic. If the issues that cause lawyers take up are fundamentally political, and the remedies they seek involve changing entire policies, it is not obvious why they should be allowed into court in the first place. Ordinarily, such disputes should be given over to the political system and its representative institutions. It does not seem fair that cause lawyers should be allowed to opt out of that space of contestation. It also seems like a misuse of their power as lawyers, which gives them access to courts to resolve disagreements, not to make policy. On such an analysis, the ethical cause lawyer should have to join the lobbyist and pursue their claim amid the fray.

This conceptual analysis can help make sense of the hostility to cause lawyering in the history of American law and legal ethics. The Illinois Supreme Court's disapproval of the Brotherhood's legal representation scheme is understandable, in part, as a worry about the Brotherhood's lawyers' divided allegiances, pulled between their need to serve their client and their loyalty to the union—a classic conflict of interest. Meanwhile, the impulse that pushed a member of the ABA to file the complaint against the Liberty League is comprehensible, in part, as the shock that came from confronting an advertisement that called so blatantly for using the courts for a purpose for which they were not designed—a worry about policy litigation. And the very uselessness of Opinion 148 in guiding future ethics adjudication is less mysterious when we understand that it failed to articulate a principled rationale for departing from a traditional position of skepticism about the use of courts to achieve political change.

Although the history does not always speak in the language of "conflicts of interest" and "policy litigation," those normative worries both spring from and help us understand why cause lawyering did not have a stable place in the American legal tradition. From the perspective of legal ethics, it was basically improper.

II. THE REGIME OF *NAACP V. BUTTON*

Given public interest impact litigation's historical ethical dubiousness, it took a transformation in American law to secure its legitimacy. As a doctrinal matter, that change came with the groundbreaking United States Supreme Court decision in *NAACP v. Button*. There, the Court directly confronted the ethical problems cause lawyering might raise. Its decision unequivocally endorsed public interest impact litigation as an acceptable, ethical practice for American lawyers. Brennan, writing the majority opinion, explicitly sought to legitimate cause lawyering while guarding against the threats it might pose to traditional legal ethics. Rather than solving those ethical conundrums, however, his opinion perpetuated them.

A. BACKGROUND

Although public interest impact litigation grew in prominence in the aftermath of the *Brown* decision of 1954,[140] it would be several more years before legal

140. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

ethics caught up. The key case, *NAACP v. Button*, was not handed down until 1963, and was itself a direct product of the social forces *Brown* unleashed.

The case had its origin in a series of laws passed by the Virginia General Assembly in 1956. In response to the Warren court's desegregation decisions,[141] southern states sought new ways to entrench Jim Crow and oppose *Brown*'s mandate. Their campaign of "massive resistance" took many forms.[142] One of its more insidious manifestations was a mobilization against civil rights lawyers and, in particular, civil rights public interest impact litigators. Southern states enacted new laws "to expand the definitions of [lawyers'] ethical requirements to encompass the ordinary actions of the NAACP's lawyers."[143]

Virginia helped lead the way.[144] The Governor of Virginia scheduled a special session of the state legislature for August, 1956 with the explicit purpose of passing laws to resist integration.[145] His "Stanley Plan" largely focused on school funding.[146] But part of his project of resistance dealt with lawyers.[147] The state sought to use its traditional authority over the regulation of the legal profession to penalize cause lawyering on behalf of Black civil rights.[148] The new laws' aim, as reported in the press, was "to restrict the activities of pressure groups fostering racial litigation," hobbling the NAACP.[149] It was an anti-cause-lawyering weaponization of legal ethics.

The new ethics laws were immediately challenged in court. As relevant here, the Assembly had created five new chapters of the Virginia Code, which banned the kind of legal work in which the NAACP was engaged. The NAACP challenged all five chapters. After two trips through the federal court system and another through the Virginia state courts,[150] only one of those laws remained, so-called "Chapter 33," a law "forbidding solicitation of legal business by . . . an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or

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141. Including Brown v. Bd. of Educ., 347 U.S. 483 (1954), but also Brown v. Bd. of Educ. (Brown II), 349 U.S. 294 (1955).

142. *See generally* MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION (Clive Webb ed., 2005); Rutledge M. Dennis, *Massive Resistance*, *in* THE WILEY BLACKWELL ENCYCLOPEDIA OF RACE, ETHNICITY, AND NATIONALISM (2015).

143. TUSHNET, *supra* note 4, at 274.

144. *See* Walter F. Murphy, *The South Counterattacks: The Anti-NAACP Laws*, 12 W. POL. Q. 371, 374 (1959).

145. *See Virginia Awaits Session on Bias*, N.Y. TIMES, Aug. 26, 1956, at 74; *Virginia Gov. Plans Special Legislature Meet*, ATLANTA DAILY WORLD, Aug. 7, 1956, at 4.

146. *See* Robert E. Baker, *Legislators Get Stanley School Plan*, WASH. POST & TIMES HERALD, Aug. 28, 1956, at 1.

147. *See Proposed Virginia Assembly Legislation Aimed at Lawful Group*, NEW J. & GUIDE, Sep. 8, 1956, at 1; *Bills Aimed at NAACP Stir Va. Assembly Fight*, WASH. POST & TIMES HERALD, Sep. 11, 1956, at 28.

148. *See* Murphy, *supra* note 144, at 374; Dennis, *supra* note 142.

149. *Virginia Widens Integration Ban*, N.Y. TIMES, Sep. 23, 1956, at 52; *see also* Robert E. Baker, *School Bills Go To Stanley; Session Ends*, WASH. POST & TIMES HERALD, Sep. 23, 1956, at B-14.

150. As recounted in TUSHNET, *supra* note 4, at 274-77.

liability."[151] Under this new statute, a lawyer who accepted a referral from an ideological non-profit had committed a crime, and could face disbarment.

Chapter 33 cut to the heart of the NAACP's model in Virginia.[152] The way the organization operated, non-lawyers in the NAACP would travel the state to uncover civil rights violations and identify suitable plaintiffs. Fact-situations that seemed as if they might make promising cases in line with the NAACP's goals were referred to NAACP-friendly or -affiliated lawyers, often attorneys working for the NAACP's own Legal Defense Fund or lawyers that the NAACP would itself pay. This was how the NAACP developed cases to challenge Virginia's illegally segregated facilities. Under the new Chapter 33, however, this conduct would now be criminal, and the lawyers involved could be sanctioned.

The dispute at the center of the *Button* case was about the legality of Chapter 33. Ultimately, the Supreme Court struck the statute down. In the Court's estimation, it "unduly inhibit[ed] protected freedoms of expression and association."[153] As a result of its trip through the state court system, the provision had been narrowed by the Virginia high court. But, even so narrowed, the United States Supreme Court believed that it cut too far into protected First Amendment activity. As interpreted by Virginia,

> a person who advises another that his legal rights have been infringed and refers him to a particular attorney or group of attorneys for assistance has committed a crime. . . . There thus inheres in the statute the gravest danger of smothering all discussion looking to the eventual institution of litigation[.][154]

The law, the Court majority concluded, was overbroad. This overbreadth outweighed whatever legitimate interest the state might have in regulating the legal profession. Whether there was a core practice which the state could sanction or not, Chapter 33 went too far. The fact that the law could be applied to ordinary discussions about potential litigation or to organizing by non-lawyers without a pecuniary interest in potential cases was a fatal flaw. The "mere" presence of Chapter 33 on the statute rolls "could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens."[155] In other words, to use more modern First Amendment language, Chapter 33 had an improper chilling effect.[156]

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151. NAACP v. Button, 371 U.S. 415, 423 (1963); *see also id*., at n.7 (quoting the text of the statute). Note that the law included a special carve out for legal aid to the impecunious. *See id.*

152. For a description of the contemporaneous operations of the NAACP in Virginia, *see id.* at 448-51 (Harlan, J., dissenting).

153. *Id.* at 437 (majority opinion).

154. *Id.* at 435.

155. *Id.* at 436.

156. On the history and use of the "chilling effect doctrine" in the First Amendment context, see Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1485-95 (2013).

B. *BUTTON* AND EGALITARIAN NEUTRALIST CAUSE LAWYERING

With *Button*, Justice Brennan, the majority opinion's author, began elaborating modern First Amendment doctrine. His opinion anticipated in several respects his groundbreaking argument in *N.Y. Times v. Sullivan*,[157] decided the next year, which would formally codify some of the speech-related principles *Button* first raised.

Button was also a watershed decision for legal ethics. In striking down Chapter 33, the Court confronted the two central ethical dilemmas of cause lawyering which we identified earlier: the problem of conflicts of interest, and the puzzle of policy litigation.[158] The Court held that these concerns were not sufficiently significant to ban cause lawyering.[159] As the Court saw things, it was a practice in which litigants had a First Amendment right to engage. Consequently, regulation in the name of legal ethics had to be careful to avoid trenching on fundamental freedoms. Brennan's majority opinion sought to create a space for cause lawyering and, simultaneously, avoid its potential ethical pitfalls.

At the heart of the Court's reasoning was what we could call an "egalitarian neutralist" conception of public interest impact litigation. *Button* was founded on a conviction that the First Amendment entitled all cause lawyers equally, without preference, to pursue their policy aims through the judiciary, as long as the lawyers involved were pursuing their work for the public interest. This vision was "egalitarian" in that all causes were equal in their right to appear before a court. And it was "neutral" in that it was predicated on the Court's impartiality towards all lawyers' acting on the basis of motivations other than pecuniary gain. As long as the attorneys bringing cases were motivated by their desire to see the public interest vindicated, the Court concluded, it was ethical to bring forward any interest the lawyers' might champion.

This egalitarian neutralism put a limit on the state's ability to regulate the legal profession and provided a positive ethical foundation for cause lawyering. Since lawyers acting in the public interest had to be allowed to pursue their causes in court, neither states nor bar associations could enforce ethical standards that might impede cause lawyers' access. Despite its historical novelty, and its tension with traditional legal ethics principles, cause lawyering was ethically sound as long as it staged a policy contest before judges between lawyers invested in their cause alone.

The Court articulated this new understanding of legal ethics in response to the State of Virginia's attempted defense of Chapter 33. Virginia framed its argument around its historic right to regulate the legal profession to ensure the ethical practice of law.[160] It thus built its brief around state bar ethics opinions, ethics codes,

157. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

158. *See supra* notes 107–139 and accompanying text.

159. *See* NAACP v. Button, 371 U.S. 415, 439-40 (1963).

160. *See* Brief for Respondents, NAACP v. Button, 371 U.S. 415 (1963) (No. 5).

and legal ethics court cases.[161] Brennan conceptualized his own, defensive ethical theory in answer to this attack. The two pieces of his vision—its egalitarianism, and its neutralism—were each elaborated as a response to one of the two different ethical dilemmas that cause lawyering was thought to raise—conflicts of interest, and policy litigation.

The *Button* Court's "neutralism" was a way of defanging conflicts of interest. Virginia's brief strongly suggested that the NAACP's group legal representation practices impermissibly divided lawyers' allegiances between their clients and the organization's national policies.[162] Virginia supported this argument by citing to several ethics opinions that reiterated the need for a direct and personal relationship between a lawyer and their client, and that explicitly forbade lay intermediaries in legal practice.[163]

The *Button* majority, however, was unconvinced. As it reasoned: "[t]here has been no showing of a serious danger here of professionally reprehensible conflicts of interest . . . partly because no monetary stakes are involved . . . [a]nd the aims and interest of the NAACP have not been shown to conflict with those of its members and nonmember Negro litigants[.]"[164]

The NAACP was a non-profit. It made no money from its litigation. There was, then, no temptation that its agents or the lawyers that it hired would pursue an outcome that their client did not desire for financial reasons. The NAACP's lawyers were motivated to take their cases and prosecute them by the same force as their clients: their ideology. And that ideology kept the NAACP close to its plaintiffs.

The "egalitarianism"—the second part of Brennan's *Button* regime—was a response to the second dilemma; the puzzle of policy litigation. Virginia made sure that the Supreme Court had to address this concern by repeatedly defending its enactment of Chapter 33 as flowing from its power to determine who could practice law and its traditional authority to sanction stirring up litigation.[165] Although Virginia's brief sometimes framed this argument as a question of "solicitation," the underlying claim was about the state's power to define the lawyer's role and the proper uses of its courts.[166] In Virginia's eyes, Chapter 33 was a kind of barratry statute: a law against "running and capping," or hiring intermediaries to help a lawyer generate cases.[167]

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161. *See id*. at 18-26.
162. *See id*. 18-19.
163. *See id*. at 19-21.
164. *Button*, 371 U.S. at 442-43.
165. *See* Brief for Respondents, *supra* note 161, at 21, 25.
166. *Id*. at 15–16.
167. *See id*. at 14; *see also* Brief for Petitioner, *supra* note 47, at 17–18. On the way suspicion of litigation led to the regulation of the legal profession under the rubric of barratry, and its close cousins champerty and maintenance, see Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 65–67 (1935).

Responding to Virginia's argument on this score gave occasion for some of the Court's most ringing prose. "[T]he vital fact" in *Button*, it explained, was "that here the entire arrangement" that the NAACP had designed "employs constitutionally privileged means of expression to secure constitutionally guaranteed civil rights."[168] As the majority saw it, the NAACP was not bringing just ordinary cases. Rather, it brought cases to vindicate fundamental constitutional protections. And it did this against the backdrop of a racially unjust system. As a result:

> [I]n the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.[169]

For the *Button* Court, cause lawyering of the kind the NAACP did was a way of participating in the American democratic project. Appearing in a courtroom was the equivalent of participating in public debate. The state could no more prevent the NAACP from bringing its cases than it could muzzle its public advocacy. If the cause lawyers wanted to go to court, they had a First Amendment right to do so.

Ultimately, this new conception of the role of courts in a democracy does much to explain the Court's holding. As the majority understood things, American democracy was predicated on groups expressing their opinions in public and competing for political power. "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association," the majority wrote, quoting earlier jurisprudence.[170] In our system of government, citizens regularly organize to find common ground and magnify their voices. But sometimes even an organized group cannot make itself felt in contests of election or debate. Then, "[g]roups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts."[171] There was, the opinion explained, nothing wrong with this. Parties that pursued politics through the courts were just like parties that pursued their aims through other democratic means. "[U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."[172]

Just as the Constitution protected parties that organized to participate in electoral or deliberative politics, it protected parties that pursued democratic participation through litigation. As the majority conceded,

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168. *Button*, 371 U.S. at 442.
169. *Id*. at 429.
170. Sweezy v. N.H., 354 U.S. 234, 250-51 (plurality opinion) (quoted in *Button*, 371 U.S. at 431).
171. *Button*, 371 U.S. at 429.
172. *Id*. at 430.

> The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.[173]

Litigation, here, was just a way of participating in democratic life. In the age of interest group pluralism, this was just another pluralist interest group making its distinctive contribution to the American public interest.[174] Cause lawyering of the NAACP's variety was political participation, pure and simple. It thus fell squarely under the protection of the First (and Fourteenth) Amendment(s).[175]

In finding a First Amendment right to engage in public interest impact litigation, the majority sought to refigure the state's interest in regulating the uses of its courts and, in particular, sanctioning lawyers who used the courts for purposes of which the state did not approve. As we saw, legal ethics authorities had long agreed that it was unethical to foment litigation or bring inappropriate suits. But the majority, adopting an argument from the NAACP's brief,[176] announced that this interest was dependent on the kind of litigation that was fomented, not the practice of stirring up litigation itself. "Resort to the courts to seek vindication of constitutional rights," the opinion explained, was "a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain."[177] In other words, it was alright to ban stirring up litigation for self-enrichment, and so appropriate to sanction as unethical lawyers who sought out clients to drum up suits to line their own pockets. But the state's interest in restricting litigation for ethical reasons ended there.

NAACP-style cause lawyering was not about making money. Its lawyers were up to something else. The organization was interested in rights. When the NAACP drummed up suits, it was democracy in action. As such, the state had no grounds to worry about self-enrichment or private gain. Virginia thus had no legitimate interest in halting the NAACP's cases on ethical grounds. Without an interest in regulating the suits themselves, the state had no right to sanction the NAACP's lawyers' conduct either.

Brennan's democratic argument swept large, however, as he himself recognized. This is what made it "egalitarian," as well as neutral. It took in not just the NAACP, but any group that shared its non-pecuniary motivations.

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173. *Id*. at 431.

174. On the interest group pluralist theory of democracy, and its popularity in the United States at midcentury, *see, e.g*., Andrew McFarland, *Interest Group Theory*, *in* THE OXFORD HANDBOOK OF AMERICAN POLITICAL PARTIES AND INTEREST GROUPS (L. Sandy Maisel, Jeffrey M. Berry & George C. Edwards, III eds., 2010).

175. *Button*, 371 U.S. at 430.

176. *See* Brief of Petitioner, *supra* note 47, at 17–26.

177. *Button*, 371 U.S. at 443.

This is not to say that the majority was insensitive to the specific situation of Black Americans. The need to pursue democratic engagement through litigation, it remarked, was characteristic of Black Americans in the Jim Crow South.[178]

Nevertheless, the Court denied that American racism might grant Black litigants a special claim on public interest impact litigation as a form of democratic practice. As the Court observed, it had also been necessary for "opponents of New Deal legislation during the 1930's" to pursue their political project through the courts.[179] And while advocates of "unpopular causes" might often find court appearances more effective than ordinary politics,[180] ethical cause lawyering was not for minority political programs alone. "Because our disposition is rested on the First Amendment," the majority opinion concluded, "we do not reach the considerations of race or racial discrimination."[181] "[T]hose who would arouse our society against" the NAACP's objectives would be just as welcome to pursue their case in court as the NAACP itself.[182] Brennan's democratic vision was egalitarian in the most formal way. Considerations of race and power were simply not a part of it.

We can see, then, how the *Button* decision sought to resolve the two ethical dilemmas we identified. According to the Court, cause lawyering of the kind practiced by the NAACP was a form of democratic participation. It was not only appropriate, but constitutionally necessary that such cause lawyers be able to pursue their cases in court, because sometimes courts would be the only actually available forums through which cause lawyers' clients might engage in democratic self-governance. By the same token, such lawyers could not be prevented from bringing litigation out of a fear of hypothetical conflicts of interest alone. With a suitable case, courts could be assured that no such conflicts would come to pass. In particular, as long as the cause lawyers and the clients shared the same cause, and the cause lawyers themselves were not in it for the money, no ethical dilemmas requiring state regulation in the name of upholding legal ethics would arise at all.

C. THE *BUTTON* REGIME: PROSPECTS AND PROBLEMS

1. *BUTTON'S* RECEPTION AND ELABORATION

Button's importance was recognized from the moment the decision was issued. At the time, the NAACP called it one of the Court's most important civil rights rulings.[183] It was covered in newspapers across the country and heralded as a big win for the civil rights organization.[184]

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178. *See id.* at 443–44.
179. *Id.* at 430.
180. *Id.* at 435.
181. *Id.* at 444.
182. *Button*, 371 U.S. at 444.
183. *See High Court Oks NAACP Work*, NEWSDAY, Jan. 15, 1963, at 4.
184. *See, e.g.*, *Court Strikes Down Virginia Law Trying to 'Curb' NAACP Activity*, WASH. POST & TIMES HERALD, at A2; *High Court Lifts Barrier for NAACP*, L.A. TIMES, Jan. 15, 1963, at 17.

The press mostly understood *Button's* significance in the context of the immediate political fight over massive resistance. As the *New York Times* proclaimed on its front page, with *Button*, the Supreme Court had "[n]ullified" a "[c]urb by Virginia on [the] N.A.A.C.P."[185] But even some popular newspapers recognized that *Button* had greater implications. The *Chicago Defender*, the great Black paper, observed that "[t]he Virginia statute" at issue in *Button*, had tried to "tighten[] the customary ethical provision that lawyers may not solicit business for themselves or have any other person or organization bring clients to them."[186] But, the article explained, although the Virginia law appeared to be an ethics regulation, it was in reality an attempt to "hamstr[i]ng efforts to bring legal action in school integration and civil rights cases," which was impermissible.[187] Some of the mainstream liberal white press made a similar point. The *Washington Post* astutely put the legal ethics question at the heart of its coverage, analyzing *Button* as a conflict between Virginia's asserted right to regulate the legal profession and the demands of the First Amendment.[188]

The legal community immediately grasped how monumental a change *Button* effected. The case received detailed write-ups in the *Harvard Law Review*, the *Columbia Law Review*, and the *Yale Law Journal*,[189] all of which stressed *Button*'s significance for legal ethics and observed the ways it broke new ground.[190] The law review commentators did not think the decision beyond criticism. In particular, they worried that Brennan's opinion did not draw clear lines, or that it swept too broadly.[191] Still, their tone was supportive, even celebratory.

The *Columbia Law Review* captured their shared spirit in hoping that *Button* augured a new, more democratic legal ethics. The doctrines that governed professional responsibility, it observed, had been in a bad way for a long time. "[R]eform [was] overdue."[192] In the previous years, "courts and bar associations [had been forced] to overlook or distinguish away . . . many

185. Anthony Lewis, *Curb by Virginia on N.A.A.C.P. Is Nullified by Supreme Court*, N.Y. TIMES, Jan. 15, 1963, at 1.

186. *High Court Bans Va. Law Which Hit NAACP Work*, CHICAGO DAILY DEFENDER, Jan. 15, 1963, at 3.

187. *Id.*

188. *See Court Strikes Down Virginia Law*, *supra* note 184, at A2.

189. *See The Supreme Court, 1962 Term*, 77 HARV. L. REV. 79 (1963); *Recent Developments*, *supra* note 65; *The South's Amended Barratry Laws: An Attempt to End Group Pressure Through the Courts*, 72 YALE L. J. 1613 (1963). The *Yale Law Journal* analysis was the most complete, running to thirty pages, and anticipating many of the concerns that have come to pass; the unattributed comment repays reading even today.

190. *See, e.g.*, *The Supreme Court, 1962 Term*, *supra* note 189, at 122–23.

191. In particular, the *Columbia Law Review* and *Harvard Law Review* commentaries were frustrated by the *Button* majority's lack of clear standards, and apparent embrace of balancing. *Compare Recent Developments*, *supra* note 65, at 1511–12, *with The Supreme Court, 1962 Term*, *supra* note 189, at 123. The *Yale Law Journal* comment, for its part, worried that the First Amendment argument swept too broadly and that the case should have been grounded on the right of access to courts. *See The South's Amended Barratry Laws*, *supra* note 189, at 1639–42.

192. *Recent Developments*, *supra* note 65, at 1511.

practices that they [had felt were] unobjectionable but that constitute[d] technical violations of the state regulations and the Canons of Professional Ethics."[193] This was bad for lawyers, and bad for the law. It was time to update legal ethics to make the profession's norms and regulations responsive to the needs and realities of modern legal practice. *Button*, while not perfect, was a necessary first step on the path towards a new legal ethics regime. It would be good if additional steps followed soon.

The Court was happy to oblige. Just as the *Columbia Law Review* hoped, it built out a new First Amendment framework for a cause-lawyer-friendly legal ethics, relying on the foundation *Button* established.[194] The Court lost no time, beginning the very next year with *Brotherhood of Railroad Trainmen v. Virginia ex. rel. Virginia State Bar*.[195] The case involved the same union lawyer-referral scheme that had been before the Illinois Supreme Court some six years before.[196] As we saw, the program had been challenged in courts across the country in the prior decades on legal ethics grounds, and had been regularly found a violation of basic legal ethics principles.[197] Virginia's high court had recently joined its sister states in decreeing the Brotherhood's plan improper, relying on some of the same legal ethics precepts we have already seen, including the ban on stirring up litigation and the prohibition against control of legal services by lay intermediaries.[198] But although the Virginia court had been in good company when it first ruled, it was now out of step with the times; its decision had come down before *Button*.

The Supreme Court granted the appeal from the Virginia high court's decision and promptly reversed.[199] *Button*, it now held, protected the Brotherhood's scheme. Whatever else *Button* stood for, it established that the state could not use its power to regulate the legal profession to prevent citizens from asserting their constitutional rights.[200] Here, railroad workers sought nothing more than to exercise their First Amendment freedom to associate, by coming together to consult with one another to determine how to best make use of their constitutional (and statutory) rights to go to court.[201] That the Brotherhood acted as an intermediary between them and their lawyers was irrelevant. Ultimately, the union was simply

193. *Id.*

194. *See generally* Yeazell, *supra* note 23, at 1988–91 (detailing the way *Button* transformed the ethics of legal practice, and so the legal profession in general and the Plaintiffs' bar in particular, "as the Supreme Court confronted [the] implications of *Button* over the next fifteen years").

195. Bhd. of R.R. Trainmen v. Va. *ex rel*. Va. State Bar, 377 U.S. 1 (1964).

196. *Compare id.* at 1–4, *with* In re *Bhd. of R.R. Trainmen*, 150 N.E.2d at 165.

197. *See supra* notes 96–104 and accompanying text; *see also* Comment, *Union's Attorney Solicitation Program Unethical*, *supra* note 105, at 394–95 n.2; *The South's Amended Barratry Laws*, *supra* note 189, at 1631 n.76 (collecting cases in which the Brotherhood's arrangement was found to violate legal ethics).

198. In re *Bhd. of R. R. Trainmen*, 377 U.S. at 6 n.10.

199. *See id.* at 8.

200. *See id.* at 6–7.

201. *Id.* at 7.

facilitating legitimate legal practice—something *Button* had held was constitutionally protected.

The Court suggested in dicta that the case might have come out differently had the Brotherhood's plan aimed to generate business for the lawyers that they recommended and organized.[202] *Button*, the Court remarked, left open a space for the state to regulate the legal profession to prevent improper self-enrichment.[203] But the Court saw no such aim in the Brotherhood's scheme. "What Virginia ha[d] sought to halt [wa]s not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice. It [wa]s not 'ambulance chasing.'"[204] That kind of base commercialism, the state might legitimately regulate. But the Brotherhood (like the NAACP) was doing something different. Their plan was not aimed at enriching lawyers, but at helping injured workers. The Brotherhood's plan was therefore protected by the First Amendment and did not raise any concerns about the improper practice of law. Consequently, Virginia had no interest in proscribing it.[205]

If *Brotherhood of Railroad Trainmen* was the first brick on *Button*'s foundation, *Ohralik* and *In re Primus* were the new structure's keystone.[206] The two cases, handed down as a pair on the same day in 1978, brought *Button's* legal ethics regime to its full elaboration.[207] *Brotherhood of Railroad Trainmen*, like *Button* itself, had seemed to turn on the difference between values- and profit-driven lawyering. But the Court had not canonized that distinction in a legal rule. With *Ohralik* and *In re Primus*, the Court finally did just that, creating a bright line according to which legal ethics principles applied differently based on the motivation of the lawyers concerned.

Both *Ohralik* and *In re Primus* presented scenarios of client solicitation. In the former, a lawyer in private practice approached a traffic accident victim in her hospital room, where she was recovering, to solicit her as a client on a contingent-fee basis.[208] In the latter, a lawyer affiliated with the ACLU, on retainer as a legal consultant by a community non-profit, sent a letter to a recently sterilized woman offering her free legal representation should she decide to sue her doctor.[209] In both cases, the local bar associations filed formal complaints against the lawyers, recommending that the attorneys be disciplined for violating

202. *See id.* at 6–7 (observing that, while "Virginia undoubtedly has broad powers to regulate the practice of law within its borders," it could not regulate in the instant case).

203. *See supra* notes 176–77 and accompanying text.

204. In re *Bhd. of R. R. Trainmen*, 377 U.S. at 6.

205. *See id.* at 8.

206. *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 29–30 (2000) (on the significance of and relationship between Ohralik and *In re* Primus).

207. *In re* Primus, 436 U.S. 412 (1978); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

208. *See Ohralik*, 436 U.S. at 449–50. The lawyer also approached the victim's friend—a passenger in her car who was also injured—at her home, uninvited, soon after her release from the hospital. *See id.* at 451.

209. *See* In re *Primus*, 436 U.S. at 414–17.

their professional ethics.[210] And in both cases the state supreme courts imposed sanctions stronger even than those initially recommended.[211]

The United States Supreme Court took both cases and distinguished them. It affirmed the disciplining of the contingent-fee-seeking lawyer in *Ohralik* and reversed the disciplining of the ACLU-affiliated lawyer in *In re Primus*.[212] The distinction between the cases and their outcomes hinged, in turn, on *Button*, on which both *Ohralik* and *In re Primus* explicitly relied. The hospital-room-visiting, contingency-fee-chasing lawyer in *Ohralik* was seeking to secure remunerative employment. Such conduct, the Court observed, citing *Button*, was "only marginally affected with First Amendment concerns [and fell] within the State's proper sphere of economic and professional regulation."[213] The ACLU lawyer from *In re Primus*, on the other hand, was not engaged in "in-person solicitation for pecuniary gain."[214] Instead, "her actions were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain."[215] They therefore counted as political activity and fit comfortably under the protection of the First and Fourteenth Amendments, according to *Button* and its progeny.[216] That the ACLU might earn an award of attorneys' fees from a successful suit on the would-be client's behalf was irrelevant. The mere possibility of a fee-award was not enough to sway the Court on the essential point: that the ACLU was "motivated . . . by its widely recognized goal of vindicating civil liberties," and not "by considerations of pecuniary gain."[217] This goal was decisive.

With these decisions, the Supreme Court brought *Button's* cause lawyering legal ethics regime to its full realization, and turned it into a straightforward, easy-to-apply test. Where lawyers were motivated by pursuit of private gain, the Court held, they were bound by longstanding, traditional rules of legal ethics, and subject to state regulation. But, where they were driven by their zeal for a cause, and not primarily by the desire for remuneration, their activities amounted to political speech and so were protected by the First Amendment. Under those circumstances, their conduct was beyond the reach of all but "narrowly drawn [ethics] rules."[218] The profit motive now became the key axis for distinguishing between impermissible "ambulance chasing," which the state bar associations

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210. *Compare Ohralik*, 436 U.S. at 452-53, *with* In re *Primus*, 436 U.S. at 417.

211. In *Ohralik*, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio recommended a public reprimand, but the Ohio Supreme Court decided to impose an indefinite suspension. 436 U.S. at 452–54. In In re *Primus*, South Carolina's version of the same Board recommended a private reprimand, which the South Carolina Supreme Court increased to a public reprimand *sua sponte*. 436 U.S. at 418–21.

212. *Compare Ohralik*, 436 U.S. at 454, *with* In re *Primus*, 436 U.S. at 421.

213. *Ohralik*, 436 U.S. at 459 (citing *Button*, 371 U.S. 415 at 439–443).

214. In re *Primus*, 436 U.S. at 422.

215. *Id*.

216. *See id*. at 426.

217. *See id*. at 430.

218. *Id*. at 438.

and courts could restrict, and permissible client solicitation by public interest impact litigators. Thanks to *Button*, cause lawyering would now have a secure place in legal practice as a way of engaging in democracy.

2. *BUTTON'S* INADEQUACIES

The *Button* regime's bright lines have proved unsatisfactory. Despite the majority opinion's direct engagement with legal ethics, it did not adequately resolve the cause lawyering concerns it identified. Brennan hoped that his opinion obviated worries about conflicts of interest and policy litigation. It didn't.

a. The Absence of a Fee Does Not Obviate Conflicts of Interest

Start with the first cause lawyering concern: conflicts of interest. Brennan hoped to address the anxiety that impact litigation created ethically problematic conflicts between lawyers and causes by asserting that, where there was no specific financial incentive for a lawyer to take a case, there would be a congruence of interests between a values-driven organization and the clients on whose behalf the organization brought suits.[219] Brennan implied that it was the presence of the fee that created the possibility of a conflict.[220] Remove the fee, and the ethical dilemma would go too.

But the *Button* majority's claim about the relationship between fees and ethical cause lawyering is unpersuasive and under-inclusive. Brennan's own colleagues argued as much. It is unpersuasive, since the absence of a fee does not guarantee a complete alignment of interests between a cause lawyer and their client. And it is under-inclusive, since the presence of a fee does not mean that a cause lawyer is likely to have a conflict of interest with their client that would prevent them from engaging in ethical cause lawyering.

Justice Harlan made the first point—that Brennan's no-fee theory was unpersuasive—in his *Button* dissent. Harlan argued that a general agreement on values between the NAACP and its clients did not guarantee that the NAACP's lawyers were genuinely advocating for their clients' wishes. "It is claimed," Harlan began his opinion, characterizing (and quoting from) Brennan's majority, "that the interests of petitioner [the NAACP] and its members are sufficiently identical to eliminate any 'serious danger' of 'professionally reprehensible conflicts of interest.'"[221] But "the totality of the separate interests of the members . . . may far exceed in scope and variety [the NAACP's] views of policy, as embodied in litigating strategy and tactics."[222] For example, the organization might favor an immediate, divisive, headfirst challenge to segregation in all circumstances, with the aim of dismantling a discriminatory educational system, even if so doing led

219. *See supra* note 164 and accompanying text.
220. *See Button*, 371 U.S. at 443.
221. *Id*. at 461 (Harlan, J., dissenting).
222. *Id*. at 462.

the state to shut down its entire school system in protest. Individual plaintiffs, however, even ones deeply committed to civil rights and desegregation, might prefer delay or compromise, in the interest of making sure that their children were able to receive some education, howsoever inadequate.

Of course, Harlan remarked, these parents could always fire the NAACP as their lawyer. But this did not resolve the ethical quandary. Up until that moment of firing, where the conflict between the NAACP and the client existed but was latent, could the "lawyer, retained and paid by [the NAACP] advise the parent with that undivided allegiance which is the hallmark of the attorney-client relation?"[223] Harlan's question was rhetorical; the answer, he believed, was clearly not. That the lawyers worked without receiving a fee was irrelevant. The possibility of a conflict was real nonetheless. Brennan's majority opinion was willfully naïve.

History proved Harlan's concern well-founded. The lack of alignment between the NAACP's integration-or-bust litigation strategy and the more varied desires of the families on whose behalf it sued has become the scholarly *locus classicus* for thinking about the conflicts of interest raised by public interest impact litigation.[224] As legal historian Brown-Nagin showed in her study of the civil rights movement in Atlanta, there could always be a gap between what the NAACP wanted and what Black litigants might want.[225] Pragmatic gradualists worked alongside radical reformers, formal egalitarians alongside politically savvy negotiators. Division existed between the NAACP and its clients and within the NAACP itself. The many different lawyers, organizers, politicians, and parents may well have shared the same overarching goal of Black liberation. But they had different understandings of what that goal required. That the NAACP's lawyers were not motivated primarily by remuneration did nothing to lessen these disagreements and the conflicts to which they led.[226] Harlan was right: the absence of a fee did not assure that a lawyer and their client would want the same thing.

Meanwhile, the converse proposition—that a lawyer who does take a fee necessarily runs the risk of a conflict of interest—seems equally mistaken. Just because a lawyer seeks to make money by accepting pay for representation does not mean that the lawyer will have a conflict with their client. Indeed, it is a basic commitment of legal ethics that the opposite is true. The payment of a fee is generally thought to ensure an alignment between a lawyer and their client.[227] A lawyer is presumed to serve the person paying their bills. For that reason, it is when a lawyer is being paid by a third-party, not the client, that we ordinarily worry most

223. *Id.*

224. *See* Bell, *supra* note 117, at 500; *see also supra* notes 117–127 and accompanying text.

225. *See* BROWN-NAGIN, *supra* note 123.

226. Indeed, the absence of a financial stake may well have made the conflicts worse, since ideological disagreement is not susceptible to compromise or settlement in the same way as a disagreement about a sum.

227. *Cf.* MODEL RULES R. 1.8(f) & cmt. 11 (1983).

about conflicts of interest.[228] The lawyer who takes a fee from a client to perform legal work is the prototypically responsible lawyer of the ethics codes.

We can go further. Sometimes, the lawyer who takes a fee from a client is engaged in just the kind of lawyering *Button* aimed to protect. For this reason, the *Button* rule, as elaborated by *Ohralik* and *In re Primus*, is not only confused but also under-inclusive.

This critique follows from arguments that Justice Thurgood Marshall made in his powerful concurrence in the judgments of *Ohralik* and *In re Primus*.[229] Marshall, who was still a lawyer for the NAACP when *Button* was decided, had joined Brennan on the Court by the time it considered those two cases.[230] Unsurprisingly, although Brennan did not write the majority opinions in *Ohralik* or *In re Primus*, he endorsed their reasoning: the cases brought to fruition the seeds his majority opinion in *Button* had planted nearly two decades before.

Marshall, however, had serious reservations. He worried about the Court's new rule, which distinguished so sharply between for-profit and non-profit lawyering. Under this new regime, as we saw, for-profit lawyers had to follow traditional ethics rules about client recruitment and conflicts of interest, while non-profit lawyers could be exempt. Marshall felt this bright-line test was improper and tended to reinforce traditional inequalities in the legal profession. As he observed in concurrence, the ethics rules around solicitation had "developed as rules of 'etiquette' and came to rest on the notion that a lawyer's reputation in his community would spread by word of mouth and bring business to the worthy lawyer."[231] In practice, this functioned to exclude new arrivals and legal outsiders. Speaking generally, such ethics rules "f[e]ll most heavily on those attorneys engaged in a single-practitioner or small-partnership form of practice—attorneys who typically earn less than their fellow practitioners in larger, corporate-oriented firms."[232] They were the ones who most needed to get their names out in the community to drum up new business.

With *Ohralik* and *In re Primus*, the Court effectively endorsed solicitation bans for for-profit attorneys. This was to set the rules against solo practitioners and small group lawyers. The established firms could count on their networks and reputation to generate business, and their reserves and credit lines to tide things over when business was scarce. But small firms and solo practitioners could not.

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228. *See, e.g.*, Paula M. Bagger, *Practice Points: When a Third Party Pays the Legal Fees*, ABA (May 21, 2019), https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2019/when-a-third-party-pays-legal-fees/ [https://perma.cc/9MEH-5RSA].

229. I am indebted for this insight to Nicole M. Brown, Note, *NAACP v. Button: The Troubling Intersection of the Civil Rights Movement and Public Interest Law*, 24 GEO. J. LEGAL ETHICS 479, 492–93 (2011), and Carle, *supra* note 4, at 305–07.

230. *See* Mark Tushnet, *Marshall, Thurgood*, *in* AM. NAT'L BIO. (1999), https://doi.org/10.1093/anb/9780198606697.article.1101170 [https://perma.cc/22N4-ANB6].

231. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 474 (1978) (Marshall, J., concurring in part and in the judgments).

232. *Id.* at 475.

They were dependent on immediate client revenue to keep their doors open and might not be well enough known to attract new business without seeking it out. Yet, despite their relative lack of prestige and wealth, these lawyers were a legitimate, even crucial part of the American legal ecosystem. At the time Marshall wrote, they were its dominant component: most lawyers were part of small firms or in practice for themselves.[233]

The Court's new legal ethics rule not only made it harder for small firms and solo practitioners to generate business, it also made it harder for them to engage in cause lawyering. The Court's distinction between profit-seeking and values-driven lawyering effectively redounded to the benefit of lawyers who could afford to forgo profit-seeking work. In other words, as Marshall understood the decisions in *Ohralik* and *In re Primus*, the Court seemed to be siding with the large institutional players against solo practitioners and smaller firms. Only if the latter could play by rules that had been designed to protect the former could they benefit from *Button*'s special dispensation from traditional rules of legal ethics.

Marshall did not work out the full implications of his argument, although later scholars have suggested where they might lead.[234] To make the protections of *Button* turn on whether a lawyer charges a fee for their services tends to cut small-time practitioners out of the space of cause lawyering without justification. We could imagine, for example, a small group practice constituted solely for the purpose of taking civil rights cases, perhaps hoping to benefit from civil rights laws' many fee-shifting provisions. Such an organization might well be just as good at litigating civil rights claims as an established, non-remunerative public interest impact litigation outfit. And yet, these practitioners might not be able to afford to forego a fee.

It is not evident, however, why their taking a fee—whether directly from a client or as a result of a fee-shifting provision—should automatically make their lawyering into something that is no longer about promoting civil rights. This hypothetical firm, like the NAACP, would be using the law to enforce the observance of civil rights laws, and so make policy change. But the Court's rule from *Ohralik* and *In re Primus* would penalize them, as compared to their richer or more prestigious competitors, who could afford to litigate the same cases without worrying about compensation. There is no principle, however, for treating the two groups differently. The ability to take work without compensation seems unrelated to the question of whether the work itself is values-driven and participates in a process of democratic governance.

The Court should have known this. It certainly had ample evidence before it, in *Button*, *Ohralik*, and *In re Primus*, that a fee was not a reliable indicator of an impermissible conflict of interest. The NAACP's lawyers received a per-diem for

233. *See id.* at 475 n.7.

234. *See* Brown, *supra* note 229.

their services in *Button*, and the ACLU lawyer might have taken advantage of fee-shifting provisions in *In re Primus* to win significant compensation.[235] Yet neither of these facts prevented the Court from finding that the kinds of practices that the NAACP and the ACLU engaged in deserved First Amendment protection. It is not evident, then, why a fee-for-service civil rights firm, for instance, or some other, similar profit-seeking venture should necessarily fall outside of *Button*'s reach.[236]

Button's conviction that non-remunerative cause lawyering would be ethically sound, because it would prevent conflicts of interest was, thus, doubly misplaced. The absence of a fee did not guarantee that there would be no conflicts of interest. And the presence of a fee did not necessarily mean there would be. Brennan's opinion had something of an *ipse dixit* quality to it: he resolved the conflicts of interest problems of cause lawyering simply by declaring them to be resolved.

b. *Button* Did Not Resolve the Ethical Problems of Policy Litigation

The *Button* majority's asserted resolution of the second ethical dilemma—policy litigation—was similarly flawed. The majority decreed a problem resolved by fiat. As we saw, Brennan used *Button* to adapt the interest-group pluralist model of democracy then in vogue and apply it to the courts.[237] His opinion stated that policy litigation would be an acceptable use for courts, particularly for some minority groups, for whom litigation might be the only practicable means of engaging in democratic politics at all.[238] He never defended the statement, though. He simply wrote it into law.

The democratic theory that the *Button* majority relied on was problematic, however, and did not actually succeed in dissolving the ethical problem of policy litigation. As a threshold matter, from the observation that *some* minority groups might be unable to assert themselves in ordinary electoral competition, and so might benefit from access to the courts to vindicate their rights, it does not follow that *all* minority groups are so situated, and that therefore the courts should be open, on an egalitarian footing, to all minority comers. In fact, as Bruce Ackerman has persuasively argued, some discrete minority groups might be better situated to participate in electoral politics, than a diffuse, passive majority.[239] Yet *Button* did not try to distinguish between those minority groups that could participate successfully in traditional forms of democratic engagement and those that could not. It simply granted them all access to the courts. If cause lawyering is supposed to be an alternative for those who have no other avenues to take part

235. *See* NAACP v. Button, 371 U.S. 415, 420 (1963); *In re Primus*, 436 U.S. at 418 n.8, 427–29.
236. *See* Brown, *supra* note 229, at 493–95.
237. *See supra* notes 168–72 and accompanying text.
238. *See supra* note 172.
239. *See* Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 715–717 (1985).

in the political life of the republic, the *Button* majority's egalitarianism hardly singled them out.

More profoundly, the *Button* majority did not try to explain why, as a general matter, it was legitimate for courts to hear cases designed to shift policy in the name of democracy, when the restrictions limiting courts to deciding concrete disagreements in specific cases could be understood to be democratically authorized as well. In other words, Brennan's argument from democracy failed on its own terms. Brennan's opinion claimed that democracy requires that cause lawyering cases be heard, regardless of whatever legal ethics restrictions a state might want to impose, because engaging in litigation is a way of participating in democratic life. But limitations on what courts are for can also be understood as the products of democratic life. Yet Brennan's opinion had no justification for its conviction that the need for courts to be available as democratic forums was more democratically legitimate than, and so entitled to precedence over, a democratically-enacted, legislative understanding that would limit courts to resolving specific cases and avoiding policy litigation.

This is not to say that such a justification is impossible to provide. John Hart Ely famously offered one, in his canonical book on judicial review.[240] As he explained in *Democracy and Distrust*, a court can, in the name of democracy, overrule or disregard apparently democratically-enacted laws where it has reason to believe that the majorities that enacted those laws were somehow anti-democratic, trying to use the laws to shut democracy itself down.[241] In that case, it was appropriate to let one kind of democratic legitimacy outrank another. Courts can and should act in a democracy-forcing way.

Strangely, the *Button* majority opinion did not cabin the ethical propriety of cause lawyering to such cases. Brennan's opinion's democratic theory was articulated without reference to the cause for which a cause lawyer might advocate.[242] This was central to its egalitarian neutralist vision. As the majority explained, those opposed to the NAACP's objectives were as welcome in court to engage in policy litigation as the NAACP itself.[243] In other words, since courts are simply additional sites for democratic contestation, all are welcome to advance their arguments there.

Such a broad rule transforms the role of the courts, taking them beyond Ely's limited democratic defense. Brennan hoped that, by being egalitarian, courts could operate as *alternative* forums for those unable to receive a fair hearing in traditional political spaces. But in practice, because of their very egalitarianism, courts could instead become merely *an additional* forum for those with the resources to press their arguments in multiple places. Rather than operating as a

240. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
241. *See id.* at 88-101.
242. *See Button*, 371 U.S. at 444–45.
243. *See id.* at 444.

privileged space for hearing the concerns of the marginalized, they had to be open to all, and so could become just another place for the wealthy and powerful to go for redress if they lost before a legislature, an administrative body, or the executive.

This outcome should have been predictable, on both theoretical and empirical grounds, at the time *Button* was decided. Theoretically, the *Button* majority's approach failed to grapple with the problem of who is able to bring a case into court and the law's general tendency to protect the status quo. Admittedly, the transformative jurisprudence of the Warren Court opened federal courts to new, less privileged plaintiffs, and showed that the law could be a tool for progressive social change. But, as Brennan and his brethren knew, this was not the historical orientation of the law or the courts. The Warren Court needed to make it easier for the poor and marginalized to get into court precisely because courts often served the rich and mainstream. Brennan should have known that a formally egalitarian theory of access would, ultimately, redound to those with resources.

The history of cause lawyering taught that very lesson. The *Button* majority cited to ABA Ethics Opinion 148, which had recognized the propriety of the Liberty League's anti-New Deal litigation, as authority for its decision.[244] But an opinion authorizing right-wing lawyers to attack a major piece of New Deal legislation is a strange foundation for a progressive legal project. And, as we saw in the Georgia usury case and as Susan Carle has documented more broadly, the ethical legitimacy of cause lawyering had been tied in the past to the respectability and standing of the lawyers who represented the cause.[245] In other words, public interest impact litigation had historically been an elite project. The Court should have been suspicious that it could, by formal equality, somehow make it into something else.

The history of cause lawyering since *Button* has born this out. Public interest impact litigation was, after it came to prominence, a powerful tool for progressive social change.[246] And indeed, well through the 1970s, it remained perceived as a tool for "constituencies whose interests were not adequately protected through the market for legal services."[247] But there was nothing in the law that prevented those with resources from using the tools of public interest impact litigation to push back against changes they hoped to resist in the name of maintaining the status quo or advancing conservative reaction. In response to the very success of public interest impact litigation at helping the marginalized, those with relative power countermobilized and developed their own cause lawyering firms to resist and roll back change.[248]

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244. *See id.* at 440 n.19.

245. *See supra* notes 61, 85–86 and accompanying text.

246. *See* Rachel F. Moran, *Three Ages of Modern American Lawyering and the Current Crisis in the Legal Profession and Legal Education*, 58 SANTA CLARA L. REV. 453, 485 (2018); *see also supra* notes 22-23 and accompanying text.

247. SOUTHWORTH, *supra* note 28, at 10.

Today, one would be hard pressed to say who public interest impact litigation serves more.[249] These days, lawyers recruit clients on behalf of both dominant and marginalized groups and litigate to change longstanding policy as well as reverse recently enacted laws and regulations.[250] Under Brennan's *Button* vision, the courts were supposed to be democratically legitimate sites of policy litigation, because they created a space for groups that could not assert themselves adequately in electoral competition. But they have become simply another place for the perpetuation of democratic contestation.

The *Button* regime, then, has proved inadequate. It promised an ethical resolution to the problem of conflicts of interest and the puzzle of policy litigation. But, on closer examination, it simply perpetuated both problems in a new form. This was because the egalitarian neutralism of the *Button* regime did not, in fact, address the barriers traditional principles of legal ethics posed to cause lawyering. It simply refigured them. It was hoped that, where lawyers were not motivated by financial incentives, there would be an alignment between their values and their clients' wishes, and so no conflict of interest concerns. And it was imagined that, by conceptualizing democracy as encompassing impact litigation, the democratic legitimacy of using courts to change policy could be assured. But, in practice, the absence of a fee did not guarantee that lawyers and their clients would share a single interest. And the puzzle of policy litigation persisted, since the democratic legitimacy of litigating did not obviously supersede the democratic right to regulate the uses of courts. In the world of the *Button* regime, the traditional cause lawyering dilemmas are still there, but masked behind *Button*'s assertions and First Amendment protections. The problems haunt us still.

III. BLACK'S FORGOTTEN DISSENT

When viewed historically, *Button's* failures are less surprising. The case was not supposed to come down the way that it did. Only a pair of unpredictable historical accidents led to the outcome we know. Recovering that history helps unsettle Brennan's *Button* framework. It also draws our attention to an alternative, never-published opinion by Justice Black, which informed Brennan's eventual majority, but from which he departed in substantial ways. In particular, in order to put his majority together, Brennan turned away from the race- and power-conscious reasoning Black relied on in his unpublished writing. In its place, Brennan partly adopted the thinking of Black's rival on the Court, Justice Frankfurter, who had articulated an egalitarian, neutralist understanding of legal ethics in his own unpublished opinion in the case.

There is irony in this reversal. Black's opinion, which Brennan abandoned, would have come out in favor of the NAACP, while Frankfurter's opinion,

248. *See id*. at 12, 32.
249. *Accord id*. at 35–37.
250. *See supra* notes 27–28.

which Brennan embraced, ruled against them. Thus, by following aspects of Frankfurter's reasoning, Brennan performed a kind of legal jiu-jitsu, turning an argument designed to stop the NAACP into one that enabled it. It won Brennan his majority, but at some cost to legal ethics doctrine.

A. THE SAGA OF *BUTTON*

Brennan was never supposed to write the majority opinion in *Button*. When the case came to the United States Supreme Court in 1961 as *NAACP v. Gray*, the Justices decided it the other way.[251] By a vote of 5–4, the Court resolved to affirm the judgment of the Supreme Court of Appeals of Virginia and uphold the constitutionality of Chapter 33.[252] The majority concluded straightforwardly that the NAACP was acting improperly and was in violation of traditional principles of legal ethics. Brennan was in the minority.[253]

At that time, Brennan and the other three dissenters saw the case as chiefly about race. As is clear from the Supreme Court's conference notes, Brennan, Chief Justice Warren and Justices Black and Douglas generally agreed that the question presented in *Gray* was about racial equality. As Warren explained, Virginia was pulling a sleight of hand by trying to characterize Chapter 33 as a traditional barratry statute.[254] He believed that professional regulations like prohibitions on barratry "originally were aimed at the commercialization of litigation."[255] But Chapter 33 targeted lawyers who did *not* have a pecuniary interest in the underlying suit. Virginia, then, was turning the whole concept of barratry on its head, trying to regulate non-commercial conduct in the name of commercialism. Cleary Chapter 33's real aim did not concern the regulation of the legal profession at all. "The purpose of the statute is obviously to circumvent *Brown*."[256] This was not allowed.

Black hammered Warren's point home. Chapter 33, he observed, was part "of a group of laws designed as a package to thwart . . . desegregation[.]"[257] It sought, plainly, to destroy the NAACP. That organization, and more generally the support of "those who are trying to enforce constitutional rights by contributing their time [and] money" was "necessary if these Negro rights are to be enforced."[258] Cause lawyering of the kind Virginia sought to stop was essential for protecting the rights of Black Americans. If the Court was committed to racial equality, it had to strike Chapter 33 down.

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251. *See* List 3, Sheet 1, Brennan Papers, Case File, Box 1/60, October Term 1961, Administrative File, Conference Lists.

252. *See* Vote Sheet, Brennan Papers, Case File, Box 1/60, October Term 1961, Administrative File, Docket Book.

253. *See id.*

254. *See* THE SUPREME COURT IN CONFERENCE 317 (Del Dickson ed., 2001).

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

A majority of the Justices, however, refused to look behind the law the way Black and Warren did. Chapter 33, they believed, should be taken at face value. In conference, Frankfurter put the point most baldly: "There is nothing in the record to show that this statute is aimed at Negroes as such!!!!!!," he apparently exclaimed.[259] Justices Clark and Whittaker echoed his sentiment. "We should be color blind on this law," Whittaker said.[260] Clark concurred: "To strike [it] down, we would have to discriminate in favor of Negroes."[261]

Frankfurter and the rest of the *Gray* majority did not understand themselves as unsympathetic to the plight of Black Americans or the NAACP. But the five Justices who would have affirmed the Virginia court and upheld Chapter 33 believed that the best way to advance the rights of Black Americans was to adopt a neutral posture with respect to Black litigants. Frankfurter again made the argument most forcefully. As he explained: "I can't imagine a worse disservice [to the cause of civil rights] than to continue being guardians of the Negroes."[262] True enough, he conceded, Black Americans had previously been locked out of opportunities for equal social and political participation, which justified the Court's intervention in cases like *Brown*.[263] But now things were different. "Colored people are . . . people of substance. Colored people now have responsible positions."[264] Once upon a time people of color had no alternative to court process to vindicate their rights. But now that they had established themselves in the community, they had the ability to advocate through ordinary political channels.

"The NAACP," Frankfurter went on, claimed that it had to "assume[] state functions since Virginia, it says, is not protecting their interests."[265] But Frankfurter was doubtful this was true. Black voters were a significant voting bloc, with real relative power; they could make Virginia pay attention to their needs, if they wanted to. The Supreme Court therefore needed to back off. It should no longer take on a special role as protector of Black civil rights. The Court had, in prior years, intervened in the system of universal justice in the name of Black litigants. Now, it needed to return to impartiality, to shore up the impersonal rule of law.

Frankfurter's apparent blindness to the realities of Black life in America is shocking to modern readers. But his view carried. He held his majority long enough to draft a comprehensive opinion upholding Virginia's law. He formatted

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259. DICKSON, *supra* note 254, at 317. This sentence—including the exclamation points—comes from Brennan's conference notes. *See* Conference Notes, Brennan Papers, Case File, Box 1/76, October Term 1962, Administrative File, Docket Book.

260. DICKSON, *supra* note 254, at 318.

261. *Id*.

262. *Id*. at 317.

263. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

264. DICKSON, *supra* note 254, at 317–18.

265. *Id*. at 318.

it in official style and circulated it on January 10, 1962.[266] It was, by all appearances, ready to be released.

And then: the shock of historical contingency. Justice Charles Whittaker, a member of Frankfurter's majority, had been struggling under the strain of his vote in *Baker v. Carr*.[267] Facing a nervous breakdown, he resigned from the Court before the decision in *Gray* could be announced.[268] The case was now 4–4. Unexpectedly, Frankfurter, aged 79, suffered a stroke and had to step down from the Court as well.[269] A 5–4 case against the NAACP was suddenly a 4–3 case for it. But with two seats vacant, a full court could throw the decision either way. The initial *Gray* majority gone, the case was set for reargument. By the time it was heard again, at the start of the October 1962 term as *NAACP v. Button*, two new Justices appointed by President Kennedy—Byron White and Arthur Goldberg—had already taken their seats.[270]

During that summer of uncertainty and the fall before the case was reargued, Brennan sensed an opportunity. He knew that the two new Justices would cast the decisive votes, and he suspected he could bring them around to support the NAACP. Over the summer, he put together a sixty-three-page memorandum that surveyed the history of the litigation and framed the case in a way meant to sway White and Goldberg.[271] Before the case was reargued—before, even, the Term had opened—he circulated it to the two of them, hoping to influence their votes.[272]

Brennan's ploy worked. At conference, after the case had been reargued, White and Goldberg voted with Brennan to reverse.[273] Their comments echoed Brennan's own and touched on the themes of his summer memorandum.[274] As Brennan drafted what was now a majority opinion—Black, Warren, and Douglas had not changed their previous votes in favor of the NAACP—he made sure to

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266. *See* Felix Frankfurter, Frankfurter Draft Opinion, NAACP v. Gray 2 (Jan. 10, 1962) (unpublished manuscript) (on file with the Library of Congress) [hereinafter Frankfurter Opinion].

267. *See* Baker v. Carr, 369 U.S. 186 (1962).

268. *See More Perfect: The Political Thicket,* WNYC (June 10, 2016), http://www.wnyc.org/story/the-political-thicket/ [https://perma.cc/86YL-N9FJ].

269. *See* TUSHNET, *supra* note 4, at 279.

270. *See id.*

271. This is according to Brennan's law clerks, Richard Posner and Robert O'Neil, in their recapitulation of Brennan's opinions for the term. *See* Opinions of William J. Brennan Jr., October Term 1962, William J. Brennan Papers, Library of Congress, Box II/6 ("Justice Brennan, mindful that the views of the two newly appointed Justices, White and Goldberg, would be decisive, circulated before the opening of the Term a lengthy memorandum of fact and law to those Justices, the memorandum having been prepared during the summer.") (on file with the Library of Congress) [hereinafter Button Case History].

272. The long memorandum was dated October 5, 1962. *See* Memorandum of Mr. Justice Brennan, Oct. 5, 1962, William J. Brennan Papers, Library of Congress, Box 1/79, Folder 3 (on file with the Library of Congress) [hereinafter Gray Memo]; *see also* William J. Brennan to Arthur Goldberg, Oct. 5, 1962, William J. Brennan Papers, Library of Congress, Box 1/79, Folder 3 (on file at the Library of Congress).

273. *See* Vote Sheet for NAACP v. Gray, October Term 1962, William J. Brennan Papers, Library of Congress, Box 1/76 (on file with the Library of Congress).

274. *See* DICKSON, *supra* note 254, at 319–20.

keep White and Goldberg on board. He sent them a revision of his draft opinion before sending it to anyone else.[275] And he cultivated them, going out of his way to tell them how much their input mattered to him, and informing them that he was incorporating their suggestions before taking advice from the other Justices: "The numerous other changes" in his draft opinion, Brennan wrote to White while in the midst of revisions, "reflect other suggestions of yours, as well as some from [Goldberg]. I don't intend to circulate [the opinion again]," he assured him, "until I've had your reaction to the revision."[276]

The *Button* opinion Brennan eventually issued reflected this careful politicking.[277] It effected a complete reframing of the case. In order to keep his majority together, Brennan was compelled to write new sections and even introduce tensions.[278] It is no surprise, in hindsight, that the *Button* framework is creaky. It was, in fact, cobbled together.

B. FRANKFURTER AND BLACK

The initial framing of the *Button* case, when it was still called *Gray*, was very different. The lines were drawn, as they often were, between Frankfurter and Black. Although they could be quite friendly, and shared a mutual respect, their opposition was overdetermined.[279] Frankfurter, the former Harvard professor, thought Black uncultivated and in need of tutoring.[280] Black, for his part, was with many on the Court in finding Frankfurter pedantic, even maddening.[281] The effete Northern intellectual

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275. *See* William J. Brennan to Byron White, Nov. 20, 1962, William J. Brennan Papers, Library of Congress, Box 1/79, Folder 3 (on file with the Library of Congress); *see also* Letter to Arthur Goldberg, Nov. 20, 1962, William J. Brennan Papers, Library of Congress, Box 1/79, Folder 3 (on file with the Library of Congress).

276. *Id.*

277. The blow-by-blow drama is recounted in arresting detail—including Brennan's maneuvering in the face of Justice White's initial "ominous[] silen[ce]"—in the October Term 1962 case history that Brennan's law clerk produced. *See* Button Case History, *supra* note 271, at xi-xii.

278. *See id.* at xii; *see also infra* note 336 and accompanying text.

279. *See, e.g.*, JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER, AND CIVIL LIBERTIES IN MODERN AMERICA 10 (1989).

280. *See, e.g.*, NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 149 (2010).

281. *See, e.g.*, ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 287 (2d ed. 1997) (demonstrating how the other Justices' dislike of Frankfurter's lecturing style is now the stuff of historical lore); *see also* Law Clerk Memoranda, Oct. 12, 1961, William O. Douglas Papers, Library of Congress, Box 1259 (indicating how much Frankfurter was disliked, via a memorandum Douglas commissioned from one of his law clerks, asking him to identify all the pedantic, "law review"-style articles Frankfurter had written between 1951 and 1961, presumably to use as ammunition) (on file with the Library of Congress).

and charming Southern politician were obvious foils, with different styles and judicial philosophies.[282]

But it would be a mistake to interpret their disagreement here through the lens of biography. Frankfurter had been a founding and influential member of the ACLU,[283] the other great public interest impact litigation shop of its day alongside the NAACP.[284] Black, meanwhile, had once notoriously been a member of the Ku Klux Klan,[285] and the Alabama Democratic Party, out of which Black emerged, pushed "massive resistance."[286] On the basis of simplistic biographical analysis, it might have been expected for Black to come out in favor of a law hobbling the NAACP, and for Frankfurter to come to the defense of cause lawyering. But their votes were just the opposite. Black thought Chapter 33 an obviously unconstitutional attack on Black Americans' rights. Frankfurter believed it a defensible exercise of the state's traditional power to regulate the legal profession.

1. FRANKFURTER'S *GRAY* MAJORITY

At root, their difference centered on the legal salience of race and power, and the role of the Supreme Court in fighting discrimination. For Black, the key fact in the case was that the NAACP was trying to vindicate the rights of a racial minority that had been the target of systematic oppression. With Chapter 33, Virginia intended to shut the NAACP down, thus attacking Black civil rights. Frankfurter, however, was not prepared to acknowledge this was true. He refused to admit to the rest of the Court that Virginia's aim in passing the law had anything to do with white supremacy. Even if the facts were as Black presented them, Frankfurter maintained it made no difference to how his colleagues should analyze the case. The approach he recommended is familiar to us already: Frankfurter believed the Court should be egalitarian and neutral.

This was reflected in his proposed majority opinion. Its neutrality came first. Frankfurter acknowledged that, from the Plaintiffs' perspective, the case had a definite slant:

> In oral argument, counsel for the petitioner strove to establish a federal interest by adopting as the nub of his argument the contention that if the ordinary rules

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282. *See* WALLACE MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 8 (1961); *see also* MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING 15–17 (1984); *see also* SIMON, *supra* note 279, at 9–10.

283. *See* LIVA BAKER, FELIX FRANKFURTER 108 (1969); *see also* Lori A. Ringhand, *Aliens on the Bench: Lessons in Identity, Race and Politics from the First "Modern" Supreme Court Confirmation Hearing to Today*, 2010 MICH. ST. L. REV. 795, 810.

284. *See Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 YALE L.J. 574, 575 (1949).

285. NEWMAN, *supra* note 281, at 91–92.

286. On Massive Resistance in Alabama, see generally Matthew L. Downs, *Massive Resistance*, ENCYCLOPEDIA ALA., http://www.encyclopediaofalabama.org/article/h-3618 [https://perma.cc/JHY6-DKZA.] (last visited Nov. 18, 2020).

> restricting the conduct of litigation were not relaxed to permit the N.A.A.C.P. to promote challenges to school segregation in Virginia, the way would be left open for the official agencies of the Commonwealth to flout and evade this Court's *Brown* mandate with impunity.[287]

The heart of the NAACP's argument was that it played a special role in the legal system. It was the organization protecting Black civil rights. Without a special dispensation that would explicitly allow them to keep bringing their cases, Black civil rights would go undefended, and the state would ignore the Warren Court's desegregation orders. In other words, the Plaintiffs invited the Court to take a position, and to recognize that the NAACP was on the side of promoting the rule of law.

Frankfurter rejected the NAACP's invitation. As an empirical matter, he claimed to be unsure whether Virginia was trying to subvert *Brown*. After all, he saw no specific evidence in the record to show the state's discriminatory motive. In fact, he remarked in his opinion, Virginia's high court had some language in its writing that suggested it was trying to follow *Brown*.[288]

More fundamentally, Frankfurter did not believe that the NAACP had a special claim on enforcing the law or Black civil rights in particular. Cause lawyers in general, he suggested, did not have a privileged right to speak on behalf of the causes they represented. As he wrote in his opinion, "the totality of individual members [of the NAACP's] separate interests, even in the field of race relations where the N.A.A.C.P. works, may far exceed in scope and variety that body's views of policy, as carried out in litigating strategy and tactics."[289] Individuals associated with the NAACP might have a very different understanding of their rights from the Association itself. They could certainly disagree about how to enforce them. The NAACP, then, was just another group trying to litigate, not a group with a privileged claim to speak for Black Americans.

To the extent that the interests of the NAACP and its clients diverged, Frankfurter believed that the common law made clear whose should be favored: the clients'. Clients were principals. Lawyers and outside organizations were their agents, or nothing at all. If the promise of an NAACP-supplied lawyer encouraged clients to do something they otherwise would not have done, that would be the lawyer's interest triumphing where it should not. If the NAACP encouraged the bringing of a case that a client might not have wanted, that would be incitement to litigation. Neither was appropriate. Frankfurter's opinion piled citation on citation to show that both, at common law, had been long proscribed. The crimes of barratry and maintenance sought to prevent just this kind of behavior.[290]

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287. Frankfurter Opinion, *supra* note 266, at 31.
288. *See id.*
289. *Id.* at 28.
290. *See, e.g.*, *id.* at 14–15.

So understood, the case was easy. With its law, Virginia sought to do what the common law had long done. Chapter 33 would guard against "practices" that might undermine "the relation of personal confidence and responsibility demanded" by the lawyer-client relationship and the canons of the profession.[291] This, the state could clearly do. "Chapter 33 . . . comes with title-deeds accredited by the history not only of Virginia but of the entire Anglo-American community."[292]

The NAACP, meanwhile, was just the kind of organization that a state might reasonably worry would engage in legal representation in a problematic way. It was a corporate body, with its own views on policy and its own interests in litigating, which might depart both from what its clients wanted and from what the state thought might be the appropriate use of its courts. If Virginia wanted to curb the NAACP for those reasons, on those counts, it was welcome to do so.

Crucially, for Frankfurter, nothing more was at stake in the case than the principles embodied in Virginia's law. Since the law actualized sound common law objectives, it was presumptively fine. And as long as it did not discriminate between lawyers, it raised no additional worries. Chapter 33 was not facially discriminatory. There was, then, no reason it should not be applied to the NAACP alongside other cause lawyering organizations. The state's interest in what Chancellor Kent called the "principle common to the laws of all well governed countries, that no encouragement should be given to litigation, by the introduction of parties to enforce those rights which others are not disposed to enforce" was expansive.[293] It certainly "may reasonably extend beyond mere profitable 'ambulance-chasing.'"[294] No fundamental rights were abridged.

What the case presented, then, was a simple conflict between what the state wanted permissibly to do, and what the NAACP would prefer it not do. The NAACP thought that Virginia's law would prevent it from vindicating fundamental constitutional rights. But Frankfurter disagreed. "When the Commonwealth, for sound and sufficient reasons of its own, insists nonetheless that resort to the courts be a secondary device, chosen deliberately by a person believing himself aggrieved by official conduct he has failed to alter, it trenches on no superior federal interest."[295] Virginia had the power to decide who got into its courts, and why. If it wanted to keep them free from a certain kind of public interest litigation, so be it.

Here, we can see the egalitarianism that underlay Frankfurter's reasoning. Federal law, he believed, had nothing to say about how Virginia chose to use its courts. If the state wanted to make resort to courts "secondary," and keep out all

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291. *Id.* at 21.
292. *Id.*
293. *Id.* at 16–17.
294. *Id.* at 24.
295. *Id.* at 31.

cause lawyering, it could certainly do so. Since it treated all causes equally, the state's decision did not raise a federal constitutional concern.

That the state's decision used a general law to keep the NAACP out of court incidentally, along the way, was of no moment. The Supreme Court needed to be impartial as to the litigants that came before it. In particular, Frankfurter firmly believed that the Court should not take account of the particular situation of Black litigants and the NAACP, and that it should be "color blind" with respect to race. "[I]t will not advance the cause of constitutional equality for Negroes for the Court to be taking short cuts, to discriminate as partisans in favor of Negroes or even to appear to do so," he wrote to Justice Black, complaining about what he thought was the Court's special solicitude on behalf of Black litigants.[296] He was irritated, he wrote to Alexander Bickel, his former law clerk, that President Kennedy's executive branch had become a "mere adjunct of the NAACP."[297] Mark Tushnet, the pioneering legal historian who first unearthed the reversals in the saga of *Button*, thinks that, by 1962, Frankfurter was annoyed with the Court's race jurisprudence in general.[298] For Frankfurter, the NAACP had received special consideration before the Court long enough.

The Court, then, needed to scrutinize Virginia's law through an egalitarian, neutral prism. Considering the NAACP neutrally, as a litigant with no privileged claim on advancing justice, its grievance was simply that the law would keep it from pursuing its cases. But Chapter 33 prevented all cause lawyers equally from pursuing their cases. Because the law treated all litigants equally and drew on the state's historic powers to regulate the legal profession, there was nothing improper in its actions, and no reason for the Supreme Court to strike it down.

2. BLACK'S *GRAY* DISSENT

Black could not have disagreed more. He thought that Frankfurter's egalitarian neutralism was willful blindness. "Virginia's so-called 'barratry law,'" he began his *Gray* dissent, "could more accurately be labeled 'An Act to make it difficult and dangerous for the National Association for the Advancement of Colored People and Virginia lawyers to assert the constitutional rights of Virginia Negroes in state and federal courts.'"[299] The law, he observed, was born as part of the state's campaign to resist *Brown*.[300] It was explicitly aimed at making it harder for Blacks to assert their civil rights. To treat the law as about regulating the legal profession at all was daft. It was to give credence to the state's pretext.

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296. TUSHNET, *supra* note 4, at 277 n.1.

297. *Id.*

298. *See id.*

299. Black Draft Opinion, NAACP v. Gray, at 1, October Term 1961, Hugo L. Black Papers, Library of Congress, Box 365, Folder 2 (on file with the Library of Congress) [hereinafter Black Opinion].

300. *See id.* at 4.

As a legal matter, Black's reading of the statute decided the case for him. It had a discriminatory purpose. As he put it in his opinion, "I believe [Chapter 33] to be a plain, open, obvious and invidious discrimination against the Association for the sole reason that it seeks to protect the constitutional rights of Negroes."[301] By the Court's reasoning in *Yick Wo v. Hopkins*,[302] it had to be unconstitutional.[303] It was a violation of the Fourteenth Amendment's Equal Protection Clause.

Black, however, did not rest his opinion on discrimination alone. He invoked the First Amendment infirmities with the law,[304] and argued with Frankfurter's application of balancing.[305] But his underlying argument was about the role of courts and legal ethics in promoting justice. Unlike Frankfurter, Black thought the Court needed to take account of the concrete situation of the litigants that came before it, and, in particular, assess their relative power. Such a power-conscious analysis, he believed, was licensed—even endorsed—by the history of legal ethics. According to Black, the Anglo-American common law tradition did not issue in an egalitarian neutralist analysis that legitimated Chapter 33. Rather, it embodied a race- and power-conscious sensibility, according to which courts and lawyers should seek to do substantial justice.

Like Frankfurter, Black dug into the history of legal ethics to ground his argument. He agreed with Frankfurter, that there was a deep tradition of statutes like barratry meant to regulate the legal profession.[306] But he disagreed with Frankfurter on a fundamental level about these laws' purpose.[307] For Frankfurter, barratry-type statutes sought to maintain the "high professional standards" of the practice of law, "as well as . . . foster[] social stability" by discouraging litigation.[308] Black had a different view.

> The aim of . . . laws [like barratry and maintenance, regulating the conduct of lawyers,] was . . . not to to [sic] discourage the bringing of meritorious lawsuits, but to stamp out, if possible, the practices . . . through which rich and powerful men were using the law as an instrument of oppression against their enemies and as a means of supplementing their income at the expense of the poor and the weak.[309]

The origins of barratry, according to Black's research, lay in powerful men's abuse of the legal process, to subject their vassals and attendants to baseless suits as a way of aggrandizing their power.[310] Barratry was the law's reaction to this

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301. *Id*. at 6.
302. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
303. Black Opinion, *supra* note 298, at 7.
304. *See id*. at 7–9.
305. *See id*. at 9–10.
306. *See id*. at 13.
307. *See id*. at 12–13.
308. Frankfurter Opinion, *supra* note 266, at 13.
309. Black Opinion, *supra* note 298, at 14.
310. *See id*. at 13–14; s*ee also* Radin, *supra* note 167, at 65–66.

misconduct. It was not about social stability, then, or making sure that lawyers acted properly. It was a way of ensuring that the law did not become a tool for injustice.

This was a radical distinction. Frankfurter's view of the history of legal ethics was conservative, in a traditional sense. Laws regulating lawyers were there to preserve social order, whether in the profession or society at large. Black's view was progressive, even welfarist: lawyers should promote justice, and the laws regulating them sought to curb the abuse of the law for unjust ends. An egalitarian, neutralist approach misunderstood the law's history. The historic ground for professional regulation had a purpose and aim: guaranteeing that the vulnerable would be protected by lawyers and the law.

Viewed in light of such a tradition, Chapter 33 was not a barratry statute like any other. The laws southern states passed to regulate the legal profession had not aimed to promote justice. They did not try to protect the vulnerable. They did just the opposite, turning the law into a tool of oppression. Black railed against them.

> Far from having a substantial basis in history, therefore, I think this Virginia law stands absolutely without precedent in either English or American law as the first instance in which a government has imposed severe penalties, under the label of 'barratry,' upon an oppressed group for doing nothing more than banding together to bring meritorious lawsuits to force the stronger groups in society to obey the law and respect the rights of the weak.[311]

Laws regulating lawyers were meant to protect the weak from being preyed on through the law. But this Virginia law penalized lawyers who sought to help the poor protect themselves. It was not in line with the appropriate regulation of legal conduct at all.

Consequently, Chapter 33 could not qualify as a legitimate act of professional regulation. It undermined the tradition it claimed to advance. If anything, it was the NAACP that participated correctly in the spirit of legal ethics. Where Virginia sought to use law to prevent Black Americans from enjoying their rights, the NAACP sought to use law to affirm them. As Black explained, the Association aimed "to supply advice, counsel, aid, encouragement and moral support to a large group of citizens, who, since slavery was abolished and the Fourteenth Amendment adopted, have been entitled to the equal protection of the laws of every State"—and this in the face of the "many who wished to deny them this equal protection."[312]

Given the relative situation of the parties, then, the NAACP's conduct was clearly ethical. As Black explained, "individual Negroes frequently have not been able to assert their legal rights without actual economic, social, and sometimes even physical danger to themselves. Under these circumstances the

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311. Black Opinion, *supra* note 298, at 15.

312. *Id*. at 19.

Association has filled a great need among these weaker groups."[313] Without the NAACP, Black Americans might not be able to assert their rights. These were the very vulnerable persons barratry and maintenance laws should protect. What they needed, though, was not protection from unscrupulous lawyers, but rather access to the kind of lawyering that the NAACP was offering.

C. FROM BLACK TO BRENNAN

Black's argument did not carry. As we have already seen, a majority of the Court rejected his race- and power-conscious analysis. Frankfurter's opinion won a majority. Only Whittaker's resignation and Frankfurter's health kept the case from being disposed of against the NAACP on egalitarian, neutralist grounds.

When White and Goldberg had taken their seats, Brennan saw a chance to alter the *Gray* outcome. As his law clerks put it, Brennan was "mindful that the views of the two newly appointed Justices . . . would be decisive."[314] If Brennan could bring them around, he would be able to flip Frankfurter's majority.

Right away, Brennan distanced himself from Black's opinion and the race-based analysis that had united the *Gray* dissenters at conference. Black's anti-subordination, race- and power-approach had already been tried, but failed to achieve a majority. By the summer, if not before, Brennan "was convinced that a majority of the Court would not assent to the invalidation of a state statute merely on the basis of the discriminatory *motives* avowed by certain legislators."[315] An equal protection argument, he believed, would not deliver the votes.

Instead, cannily coopting Frankfurter's thinking, Brennan proposed to ground his position in race-neutral principles.[316] He made his case in a long memorandum that he circulated to White and Goldberg on October 5, 1962.[317] The memo began with a careful review of the facts and the principal opinions below. It then canvassed Frankfurter and Black's earlier arguments. The most significant section of Brennan's memorandum, however, came at the end, as he elaborated four different theories for striking down Virginia's law.[318] And the bulk of that section focused on two interrelated arguments about access to courts and freedom of speech.

Brennan's first ground for invalidating the statute was rooted in principles of federal supremacy. "Plaintiffs in public school litigation," he observed, "are

313. *Id.* at 19–20.

314. Button Case History, *supra* note 271, at x.

315. *Id.* at xi.

316. *See id.* ("[A] reversal could perhaps be grounded in First Amendment principles of overbreadth and protected associational activities, and need not rely upon inferences of discriminatory intent.").

317. *See* William J. Brennan to Byron White, November 20, 1962, William J. Brennan Papers, Library of Congress, Box 1/79, Folder 3 (on file with the Library of Congress); William J. Brennan to Arthur Goldberg, November 20, 1962, William J. Brennan Papers, Library of Congress, Box 1/79, Folder 3 (on file with the Library of Congress).

318. Gray Memo, *supra* note 272, at 56–64,

persons whose constitutional rights have assertedly been infringed."[319] No state could "forbid such person to seek a judicial remedy; that would be to nullify their federal rights."[320] And yet, Chapter 33 effectively sought to do indirectly what the state was constitutionally prohibited from doing directly: preventing plaintiffs from seeking a judicial remedy to vindicate their federal constitutional rights. Even Frankfurter, in *Lane v. Wilson*, had said this was not acceptable.[321] Because school desegregation litigation was "inherently more difficult of successful prosecution than other kinds of litigation, despite its substantive merit," Virginia's new laws effectively "singled it out for special hostile treatment."[322] This, however, was nothing else than for the state to "discriminate against federal rights," which was clearly not allowed.[323] Basic principles of federalism made Virginia's law unconstitutional.

Brennan's second argument, based on the First Amendment, was just as powerful—and just as race blind. By the time *Button* reached the Court, Brennan had already been developing the doctrines that would become overbreadth and the "chilling effect" for some time.[324] Here, he saw a chance to apply and refine them.

There were two obvious problems with Chapter 33 from a First Amendment perspective. First, it seemed to encompass protected speech. It was overly broad. The statue would reach, for example, a non-lawyer member of the NAACP who recommended that a potential client pursue a claim against the state with the help of an NAACP lawyer. But such a staff member would be doing nothing more than "advocating lawful means of vindicating federal rights. Such advocacy would seem to be constitutionally privileged."[325]

Second, and just as problematically, the full reach of the law was not clear. Chapter 33 was both sweeping and vague. This posed a doubled problem. It was "an invitation to the State to single out and harass unpopular forms of advocacy."[326] But even without state action, it had a negative and indefensible effect. Just by having the law on the books, the state was discouraging allowed speech. Would-be speakers, noting the law, would self-censor out of fear and uncertainty. As Brennan put it, the statute's ambiguous reach "serves to deter privileged advocacy at the borderline of the statute's coverage."[327] This "chilling effect" was not "a matter of conjecture";[328] it had already led the NAACP to worry about what it

319. *Id.* at 57.
320. *Id.*
321. *See id.*
322. *Id.* at 58.
323. *See id.* at 58–59.
324. *See* Button Case History, *supra* note 271, at xi (noting Brennan's longstanding interest in "so-called 'indirect' restraints on freedom protected by the First Amendment" and listing cases).
325. Gray Memo, *supra* note 272, at 60.
326. *Id.*
327. *Id.*
328. *Id.* at 59.

would say and how it might say it. Chapter 33, then, was a clear unconstitutional violation of the First Amendment's free speech protections.

Brennan's First Amendment arguments, like the federalism argument that preceded it, were race- and power-neutral, and deeply egalitarian. In no sense did either argument turn on the special situation of Black Americans, the role of the NAACP, or Virginia's campaign of massive resistance. Brennan's federalism argument concerned federal rights in general, not those of the weak, or the marginalized. His First Amendment arguments were similarly universal. Brennan's focus was on basic notions of constitutional government and the role of courts. This was an egalitarian, neutralist approach to the law.

Brennan was not blind to the insight of Black's race- and power-conscious critique, though. He castigated Frankfurter's initial draft opinion, as Black had done, for its ignorance of the realities of race and power in America,[329] and devoted a whole section of his memorandum to the "practical effect of chapter 33 upon access to the courts by negro plaintiffs," which analyzed in detail how the Virginia law would prevent Black Americans from vindicating their rights.[330] He agreed with Black that Virginia's laws were part of the state's campaign of massive resistance to avoid integration,[331] and he also agreed that the NAACP's activities were not the kind reached by the state's interest in regulating the legal profession.[332]

But these considerations did not enter into his preferred analysis. He recognized that there were Equal Protection arguments against Chapter 33, grounded in the racial discrimination the law implicitly furthered.[333] His abbreviated treatment, however, made it clear that he did not think these arguments were the strongest. To strike Chapter 33 down, Brennan jettisoned Black's sensitivity for Frankfurter's formal universalism.

The move was a success. When the Justices met on October 12, 1962, to discuss the case after reargument, White and Goldberg echoed some of the very First Amendment arguments Brennan had foregrounded in his memorandum.[334] White even built his eventual concurrence in the case on a First Amendment-adjacent argument that paralleled Brennan's analysis of the exercise of rights.[335]

The process of drafting a formal opinion seems only to have strengthened Brennan's commitment to race- and power-neutral reasoning. In the course of

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329. *See id.* at 21 ("The opinions of the Virginia Supreme Court of Appeals and of MR. JUSTICE FRANKFURTER in the instant case seem not to consider the important respects in which litigation seeking to end segregation in the public schools differs from litigation generally.").

330. *See id.* at Part III, especially 33–44.

331. *See id.* at 4–9, 24–33.

332. *See id.* at 44–56.

333. *See id.* at 62–63.

334. *See* DICKSON, *supra* note 254, at 320.

335. *See* NAACP v. Button, 371 U.S. 415, 447 (1963) (White, J., concurring in part and dissenting in part) (observing that Chapter 33 was unconstitutional because it effectively "prevent[s] the exercise of constitutional rights" by "forbid[ing]" among other things "advising the employment of particular attorneys").

writing, Brennan sent his opinion to Black for comments.[336] Black, in turn, made extensive edits, mostly related to the nature of the NAACP's involvement in the litigation it financed and Virginia's interest (or lack thereof) in regulating their conduct.[337]

Brennan adopted many of these changes, which introduced some apparent race-sensitivity into the writing. But the move was hollow. For one, it was likely strategic. At the time, Brennan felt that he needed to retain Black's vote, as White "had remained ominously silent" since Brennan had circulated his first draft opinion.[338] Brennan added a new section in response to Black's comments and incorporated some of Black's strong language, but he did not change the fundamental reasoning of the opinion at all.[339] More significantly, Brennan kept his distance from Black on the crucial question of race-consciousness. His opinion remained studiously impartial about who could exercise rights to NAACP-style cause lawyering.

Indeed, soon after, Brennan doubled down on race-blindness. We see this most clearly in the final changes he made to his opinion, just before publication, in response to Harlan's proposed dissent.

Harlan strongly disagreed with Brennan's approach. He had sided with Virginia since the case had been initially argued as *Gray* in 1961. In conference, he had consistently supported the Frankfurter line. Chapter 33, he maintained, was a simple exercise of the state's power to regulate the legal profession. The NAACP was not entitled to any special exemption.[340] Harlan's dissent suggested that the Court was giving the NAACP special consideration because of its actions "in the context of the racial problem."[341]

His published words were cutting. "No member of this Court would disagree that the validity of state action claimed to infringe [constitutional rights] is to be judged by the same basic constitutional standards whether or not racial problems are involved," he wrote in his dissent's opening.[342] "No worse setback could befall the great principles established by *Brown* . . . than to give fair-minded persons reason to think otherwise."[343] Harlan's draft had been even more aggressive.[344] His implication was clear: the Court was letting race factor inappropriately into its calculations.

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336. *See* William J. Brennan to Hugo Black, November 20, 1962, Hugo L. Black Papers, Library of Congress, Box 365, Folder 1 (on file with the Library of Congress).

337. *See* Brennan Opinion with Black's Edits, October Term 1962, Hugo L. Black Papers, Library of Congress, Box 374 (on file with the Library of Congress).

338. Button Case History, *supra* note 271, at xii.

339. This presented some difficulties.

> It might be confessed that the addition of Justice Black's suggestions in the majority opinion may have caused a certain tension to be visible in the opinion, since the overbreadth rationale remained—as if to suggest that there might be a legal difference had the state chosen to exercise its power narrowly. *Id*.

340. *See* DICKSON, *supra* note 254, at 318–19.

341. NAACP v. Button, 371 U.S. 415, 451 (1963) (Harlan, J., dissenting).

342. *Id*.

343. *Id*. at 448.

344. *See* Harlan draft dissent, January 1963, Byron White Papers, Library of Congress, Box 1/10, Folder 2 (on file with the Library of Congress). It opened by saying that color-blind evaluation "should go without

After reading Harlan's draft dissent, Brennan decided to be more explicit about his egalitarianism and impartiality. "After my protest, John Harlan tells me that he has revised the opening of his dissent in *Button*," Brennan wrote to Goldberg, sometime after Harlan circulated his draft.[345] Harlan's alleged revisions, he suspected, would be inadequate to address his concerns. "[T]here is probably still a strongly suggested accusation that the Court is giving special status to Negro litigants denied to others. I therefore propose to add the attached at the end of the opinion. In any event I'm inclined to think it's a good thing to say."[346]

The additional section Brennan had enclosed became the last paragraph of the majority opinion.[347] There, Brennan countered Harlan by asserting directly that race had nothing to do with the case. All were welcome to pursue NAACP-style cause lawyering. As he put it:

> That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. . . . For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.[348]

What the NAACP was up to was allowed because of the structure of American constitutional law. It was a way of engaging in democratic government. It did not matter that the organization was asserting the rights of an oppressed minority. Harlan was wrong. So, for that matter, was Black. The First Amendment right to ideological lawyering was open to all.

Thus did Brennan creatively reinterpret Frankfurter's egalitarian neutralism. For Frankfurter, the Court needed to be neutral, treating the NAACP as just one litigant among others. And it needed to be egalitarian, upholding Chapter 33 so long as it treated all litigants equally. Brennan kept Frankfurter's values but gave them a different valence. The Court should be egalitarian and neutral, treating all litigants who came before it equally. And as long as those litigants were committed to the vindication of their rights, the First Amendment should allow them their

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saying" but that the court was here giving the impression to "fair minded persons, however mistakenly" that it was "judging state action in this field by different constitutional yardsticks." White, in his marginalia, called this "a low blow." *Id.* at 2.

345. William Brennan to Arthur Goldberg, January 9, 1963, William J. Brennan Papers, Library of Congress, Box 1/79, Folder 1 (on file with the Library of Congress). Brennan wrote a similar note, on the same day, to Justice Douglas, and presumably to the other Justices as well. William Brennan to William O. Douglas, January 9, 1963, William J. Brennan Papers, Library of Congress, Box 1/79, Folder 2 (on file with the Library of Congress).

346. *Id.*

347. *Compare* Typescript attached to Letter to Douglas, William J. Brennan Papers, Library of Congress, Box 1/79, Folder 2 (on file with the Library of Congress).

348. NAACP v. Button, 371 U.S. 415, 444–45 (1963).

day in Court. It was a brilliant move of legal jiu-jitsu. But it left Black's race- and power-conscious approach lost in the twist.

IV. THE BLACK ALTERNATIVE

Brennan's opinion achieved the majority in support of the NAACP that Black's had not. To that extent, it was more successful. But, as was shown in Part II, it has proved unsatisfactory with respect to two central legal ethics problems at the heart of cause lawyering: conflicts of interest and policy litigation. Black's unpublished dissent in *Gray* addresses those two anxieties more effectively. It better handles conflicts of interest by replacing the bright-line formalism of Brennan's fee-based reasoning with a pragmatic assessment of the relationship between cause lawyers and the causes they represent. And it better manages the puzzle of policy litigation by replacing a generalized First Amendment right to litigate in the name of democratic participation with a particularized assessment of relative power, allowing policy litigation only where other avenues of democratic engagement have been closed off. In both cases, Black's approach calls on courts to consider the ethical questions raised by cause lawyering head on, rather than decree them resolved by judicial fiat. This, ultimately, creates a more defensible foundation for the legal ethics of public interest impact litigation.

A. PROLEGOMENON: COUNTERFACTUAL HISTORY

Black's unpublished opinion represents a historical road not taken. Although his writing failed to attract sufficient votes when the case was argued as *Gray*, there are reasons to believe his equal protection argument might have carried a majority of the Court after reargument.

Black's initial *Gray* dissent likely had the support of four Justices. Mark Tushnet observed that the opinion only received Chief Justice Warren's vote.[349] But in the *Gray* conference, Brennan had signaled his agreement with "the Chief Justice and with Hugo."[350] Justice Douglas, too, stated that he agreed with the Chief Justice,[351] and even penned his own short draft opinion, which observed bluntly that "discrimination appear[ed] on the face" of the Virginia law, as it "reflect[ed] a legislative purpose to penalize the NAACP because [it] promotes desegregation."[352] Black's *Gray* opinion's rationale thus may have enjoyed the support of four Justices.

After the case was reargued, there may well have been five Justices willing to rule on Black's equal protection grounds. At the *Button* conference, Black, Warren, and Douglas all reiterated their conviction that Chapter 33 violated equal

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349. *See* TUSHNET, *supra* note 4, at 279.

350. DICKSON, *supra* note 254, at 318.

351. *See id.*

352. Douglas Draft Dissent, at 2, 1, William O. Douglas Papers, Library of Congress, Box 1287, Folder 5d (on file with the Library of Congress).

protection,[353] and Douglas stood by his opinion from *Gray*, emphasizing the law's discriminatory purpose.[354] Brennan, for his part, mentioned several arguments, including that "[e]qual protection is in the act on its face."[355] And while White was equivocal, Goldberg was not: "I think, moreover, that equal protection was violated," he observed.[356] "There is a substantial equal protection point here and I could reverse on that."[357]

Counterfactual history is always uncertain. But it is at least arguable that, after White and Goldberg replaced Whittaker and Frankfurter, the Court had five votes for a Black-style equal protection holding. Brennan sought to win *both* new Justices' votes. But in the end White wrote separately anyway, "concur[ring] in the judgment of the Court, but not in all of its opinion."[358] Brennan was left with five—the same five that might have gone for Black's opinion.

The Black alternative, then, is no mere historical artifact. It represents a position the Court might well have taken. Turning to it recovers a position that was plausibly available.

B. RACE- AND POWER-CONSCIOUS REASONING

The single most significant conceptual shift in the move from Black's dissent to Brennan's majority was the turn away from a concern with the situation of the petitioner. That situation, for Black, was central. He noted time and again in his writing that the NAACP existed to help "members of a disadvantaged group" assert their rights.[359] The kind of litigation it engaged in, he remarked, pitted a "weaker group[]" against "the whole State of Virginia, its Attorney General, its prosecuting officers and its executive agencies."[360] At the heart of the case was a dramatic power imbalance.

For Black, this power imbalance between the NAACP and its constituents, on the one hand, and the broader society, on the other, was a judicially relevant fact, which helped motivate the Court's decision. True, Black saw courts generally as "havens of refuge"[361] and mentioned with approval the possibility that "every citizen" might "have the help of a cooperative group like [the NAACP] in establishing and protecting his constitutional rights."[362] But even at his most universalist,

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353. *See* DICKSON, *supra* note 254, at 318–19.

354. *See* NAACP v. Button, 371 U.S. 415, 445 (1963) (Douglas J., concurring). Note that he did so over the objection of his law clerk, who thought it was in some tension with the logic of Brennan's majority opinion. *See* Memorandum from JGC, Law Clerk, to William O. Douglas, Jan. 2, 1963, William O. Douglas Papers, Library of Congress, Box 1287, Folder 5d (on file with the Library of Congress).

355. DICKSON, *supra* note 254, at 319.

356. *Id*. at 320.

357. *Id*.

358. *Button*, 371 U.S. at 447 (White, J., concurring in part and dissenting in part).

359. Black Opinion, *supra* note 298, at 20.

360. *Id*. at 19, 21.

361. *Id*. at 24 (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940)) (internal quotation marks omitted).

362. *Id*. at 20.

Black remained attuned to the relative power of the litigants who sought the protection of the law. The court system should be a haven to everyone, but it should be especially hospitable to "those who might otherwise suffer because helpless, weak, out-numbered, or because they are non-conforming victims of prejudice and public excitement."[363] No citizen should be deprived of the opportunity to vindicate their constitutional rights, but the NAACP played a special role in protecting the rights of a "disadvantaged group" that Virginia sought to further marginalize.[364] To put the point simply: it mattered to Black that the NAACP was litigating to help Black people assert their rights in the South.

This attunement to specific power relations offers a firmer foundation for addressing the two central legal ethics puzzles connected with cause lawyering this Article has considered: the challenge of conflicts of interest, and the legitimacy of policy litigation.

1. CONFLICTS OF INTEREST IN LAWYER-CLIENT RELATIONSHIPS

With respect to conflicts of interest, Black's sensitivity to position allows a court to address directly the question of whether a cause lawyer actually and adequately represents the cause on whose behalf that lawyer appears. The bright-line formalism of the *Button* regime, as we saw, relies on a proxy for alignment of interest: whether a lawyer takes a fee or not. Black, on the other hand, looked directly at whether interests aligned. He dove into the history of the NAACP and the specifics of its relationship with its members to assess whether it actually sought to vindicate the Black civil rights its members demanded.[365]

This judicial scrutiny of the relationship between cause lawyers and their causes offers a better guarantee that the cause lawyer is not tolerating impermissible conflicts of interest. It is only because Black was convinced that the NAACP really did represent the interests of a marginalized community that he believed it deserved special consideration as a privileged protector of constitutional rights. It was not because the NAACP's lawyers took a reduced fee that they were good lawyers for their clients, although Black did take note of their financial sacrifice.[366] Rather, it was because the NAACP's lawyers actually "filled a great need among these weaker groups" by bringing lawsuits "to assert rights of Negro citizens."[367]

Black's approach calls on courts to look into the actual, concrete relationship between cause lawyers and their clients. This in turn gives courts an opportunity to determine that cause lawyers' clients have a genuine need for the legal services

363. *Id*. at 24 (quoting *Chambers*, 309 U.S. at 241) (internal quotation marks omitted).
364. *Id*. at 20.
365. *See id*. at 19–20.
366. *See id*. at 20.
367. *Id*.

cause lawyers provide. Where courts conclude they do, the interests they represent will be of necessity real interests.

Of course, this does not address all the problems with conflicts of interest that might surface. The clients in question may still be selected by the lawyers. And the lawyers may still, as a result of the priorities of the organizations they work for, sway what their clients do. These are problems with the current *Button* regime too.

The difference in the two approaches lies in the meaning of the options that the organization and the client agree to pursue. If cause lawyering is only allowed to vindicate the interests of those who, according to a relative analysis of their situation by the courts, find themselves in positions of genuine need that a lawyer is actually meeting, we can rest easy knowing that the interests vindicated are genuinely in need of protection. It puts the client's interest back at the heart of the case.

2. CABINING POLICY LITIGATION BASED ON RELATIVE POWER

Black's approach similarly offers a better resolution to the puzzle of policy litigation. As we saw, the *Button* regime currently allows any plaintiff to pursue policy change through the courts instead of the ordinary political process, which raises significant democratic concerns.

Black's dissent suggests a different approach: deeming policy litigation ethical where plaintiffs, for structural reasons, cannot effectively assert themselves through the ordinary democratic process. Black's opinion notes at several points the difficulties that forced the NAACP into a course of litigation, including Virginia's campaign of massive resistance and a generalized opposition to respecting Black civil rights.[368] As Blacks in America had been denied meaningful opportunity to engage in traditional democratic politics and had been opposed by "stronger groups in society" that refused "to obey the law and respect the rights of the weak,"[369] they turned to the courts as the last best alternative for the peaceful resolution of their concerns.[370] "Grievances deeply affecting the emotions of a large numbers of people," Black noted at the end of his opinion, can "disturb the good order and tranquility of the state itself . . . where government fails to provide a fair method for [their] hearing and settlement."[371] In such a situation, as was the case for Blacks in Virginia, the courts have to be open, lest the government invite violent unrest. Where the choice is revolution or litigation, the courts are, and must be, ethically available.

Although Black did not cite to *Carolene Products*,[372] his analysis echoes the Court's suggested approach there. Famously, in footnote 4 of that case, Justice Harlan Fiske Stone observed that the Court should review the constitutionality of

368. *See id.* at 16–18.
369. *Id.* at 15.
370. *See id.* at 23–24.
371. *Id.* at 23.
372. United States v. Carolene Products Co., 304 U.S. 144 (1938).

laws based, in part, on their relationship to the democratic process. In particular, laws that were infected with prejudice and tended to "seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities" should be scrutinized with special care.[373] The Court should be democracy-forcing, and so especially suspicious of laws that emerged from or exacerbated democratic pathologies.

Black's approach to policy litigation actualizes this democracy-forcing sensibility. Where a group or cause can assert itself through traditional democratic politics, the Court need not be particularly solicitous of its concerns. But where it suffers from the pathologies of democracy, the Court should relax its ordinary strictness. It is judicially relevant that a particular group or cause has been kept out of the ordinary means of making policy. Where its grievances are legitimate, and no other outlet is available for it but unrest, the Court should note this fact and make sure that the country's tribunals are open.

This approach has justice on its side. It would ensure that those who are genuinely weaker are able to pursue cause lawyering in court. This makes sense. Those who are dominant will have no trouble ensuring that their arguments get a fair hearing in public and in legislatures. It is the weak, not the strong, who need the special, enforced equality of the courtroom, with its principle-based arguments and decisions. Only where a group is marginalized, and so unable to effectively pursue its interest through ordinary politics, should—and would—it be able to prosecute ideological litigation instead.

At the same time, this approach raises none of the democratic concerns of Brennan's universalist, egalitarian regime. Recall the democratic theory problem with Brennan's approach: that it uses one democratic value to overbear another without explanation. Here, access to the courts in the name of democracy is restricted only to those situations where the cause has been kept from getting a fair democratic hearing. Democracy trumps anti-democratic behavior, not another democratic norm. The same long-established arguments that support democracy-enhancing forms of judicial review apply here, then. In bringing such policy litigation into court, lawyers and judges are not subverting democracy, but helping it realize its potential, by creating a political space for a group that would otherwise be without one.

C. BLACK'S APPROACH IN (IMAGINED) PRACTICE

Although Black's opinion has not previously received significant scholarly attention, some of its contributions have been anticipated by contemporary approaches to legal ethics. In particular, read against the backdrop of recent scholarship, Black's unpublished writing provides a historical foundation for the

373. *Id.* at 152 n.4.

"context-dependent" school of professional regulation, which offers an alternative to *Button*'s cause lawyering ethics regime.

The importance of making professional regulation dependent on context was famously championed by David Wilkins in a series of articles in the *Harvard Law Review* nearly thirty years ago. "[T]he traditional model [of legal ethics]," Wilkins observed, relies on "general, universal rules," which tend to overlook the limitations and specificities of particular lawyers' situations.[374] As we have already seen, the Model Rules of Professional Conduct prescribes a single code for the unified bar. And while the rules it imposes do recognize that a lawyer may play different roles, with different responsibilities, those responsibilities are role-dependent, not context-dependent. The Model Rules treat all litigators the same, refusing to differentiate between, say, a plaintiff's side solo-practitioner personal injury lawyer and the large firm insurance defense lawyer against whom they might square off.[375] As a result, at best, the rules provide lawyers with inadequate guidance, tend to be underenforced, and encourage lawyers to game the system.[376] At worst, they become simply "irrelevant to the actual process of lawyer decision making."[377]

In place of blanket prescriptions, or ad-hoc case-by-case reasoning, Wilkins proposed "middle-level rules," that take particular contextual factors into consideration.[378] In his initial proposal, Wilkins suggested context-dependent ethical rules should consider five broad categories of factors: the lawyer's task, subject matter, and party status, as well as lawyer and client characteristics.[379] What was ethically appropriate for a lawyer to do might be different depending on how these factors weighed in any given situation.

In a friendly amendment to Wilkins' argument, Susan Carle has persuasively argued that one factor is especially significant in assessing a lawyer's ethical responsibilities: relative power. "[I]n situations involving obvious and substantial power imbalances among the interests affected by [a lawyer's] representation," she writes, "the relative power of the client or interests being represented" is "one important factor" that both empirically does and normatively should inform how we understand ethical conduct.[380] For example, many lawyers and legal ethicists believe that a criminal defense lawyer representing a poor client both may and should advance arguments that a large firm defense attorney providing a letter to

374. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 515 (1990); *see also* David B. Wilkins, *Who Should Regulate Lawyers*?, 105 HARV. L. REV. 799, 814–19 (1992).

375. *See* Wilkins, *Legal Realism for Lawyers*, *supra* note 373, at 515–16 n.208.

376. *See id.* at 499–504.

377. *Id.* at 516.

378. *Id.* at 517.

379. *Id.*

380. Susan D. Carle, *Power as a Factor in Lawyers' Ethical Deliberations*, 35 HOFSTRA L. REV. 115, 118 (2006).

a corporate client accused of wrongdoing should not.[381] The key difference, Carle suggests, is the relative power of the interests involved.

Black would agree. A central concern of his unpublished dissent, as we saw, was the relative power of the various litigants. For Black, it mattered that the NAACP represented minority, marginalized interests without other vectors for vindicating their rights against the powerful forces of state authority. These contextual factors would matter for Carle and Wilkins too. To that extent, Black's dissent provides a historical anticipation of their context-dependent approach. Had things turned out a little differently, the context-dependent legal ethics school might well have had a foundation in the *U.S. Reports*.

This could have made a difference in assessing the ethics of some recent, high-profile cause lawyering cases. Consider, for example, *Fisher v. University of Texas*.[382] That suit, like many of the recent anti-affirmative-action cases, was masterminded by Edward Blum, who sought to recruit a suitable plaintiff through a comprehensive advertising campaign.[383] Indeed, Blum has deployed traditional impact litigation tactics repeatedly in an explicit effort to dismantle affirmative action.[384]

It is hard, here, to identify any interest that cannot be adequately asserted through the political system. In *Fisher*, the case was brought on behalf of a dominant racial group, that had a history of exercising its power at the expense of others; it cannot be plausibly argued that the cause served by Blum's program lacks the ability to make itself heard through traditional, non-judicial democratic channels.

Moreover, there seems to be at least some space between the actual, judicially cognizable interests of the lead plaintiff in *Fisher* and the ideological interests of Blum. As a student rejected from school for an allegedly improper reason, the lead plaintiff's cognizable interest would seem to end at her admission, and perhaps be mooted by her education. The law is very clear that an ideological injury is simply not cognizable at law for individual plaintiffs.[385] Whether the lead plaintiff's injury was sufficient as an ethical matter to sustain a case against affirmative action writ large, then, is at least questionable.

For these reasons, it seems likely that a race- and power-conscious analysis would have found the *Fisher* representation ethically problematic. The case raises both policy-litigation and conflict-of-interest concerns. And it lacks even the potential power imbalance that should cause a court to throw open its doors

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381. *See id.* at 118 n.11.

382. Fisher v. Univ. of Tex. at Austin (Fisher I), 570 U.S. 297 (2013); Fisher v. Univ. of Tex. at Austin (Fisher II), 136 S. Ct. 2198 (2016).

383. *See More Perfect: The Imperfect Plaintiffs*, WNYC (June 28, 2016), https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/imperfect-plaintiff [https://perma.cc/WW9M-B6C9] (Last visited Dec. 5, 2020).

384. *See id.*

385. *See* Sierra Club v. Morton, 405 U.S. 727, 739–40 (1972).

anyway. Rather than a democracy-enhancing use of the courts to remedy a democratic-pathology, *Fisher* seems like a democratic loser's attempt to get another bite at the apple.

Hobby Lobby, another recent example of cause-driven litigation, presents a closer case.[386] The suit was developed in close collaboration with the Becket Fund for Religious Liberty, a public interest impact litigation firm with a declared mission to use the tools of NAACP-style lawyering on behalf of religious minorities.[387] According to the Court, *Hobby Lobby* involved plaintiffs with sincere, devout Christian beliefs.[388]

It seems difficult to argue, as a general matter, that such litigants have been the subject of a history of discrimination or significant power imbalance. To that extent, the situation of the plaintiffs in *Hobby Lobby* is generally not comparable to that of Black (or, say, LGBTQ) Americans. Nevertheless, it is arguable that, in some contexts, religious Christians might be a disempowered minority without the ability to assert their view through other channels. A court, after a careful consideration of relative power, could well come to the conclusion that the plaintiffs in *Hobby Lobby* were indeed in a situation of tremendous power imbalance vis-à-vis the Department of Health and Human Services when it came to asserting their sincerely held religious beliefs. And given some of the unusual features of Hobby Lobby itself, including in particular its avowed religious commitment, it is plausible that an ideological organization like the Becket Fund would have interests in harmony with Hobby Lobby's own. The representation might well have been ethical under a Black-inspired regime.

CONCLUSION

Adopting Black's race- and power-based approach to legal ethics could have real consequences for the kinds of representations in which lawyers are ethically allowed to participate. As a threshold matter, it would bring cause lawyering initiatives of all kinds under scrutiny. For any given would-be public interest impact litigation program, it would force a close look at the relationship between lawyers and their clients. And it would also push courts to analyze whether the causes championed and groups represented were so excluded from the democratic process that they needed to work through the judiciary to pursue their aims. This would be one way of actualizing the context-dependent school of legal ethics advanced by scholars like Carle and Wilkins.

This approach, we have seen, turns away from the egalitarian, neutral cause lawyering regime of the present. Under current law, any ideological organization can ethically recruit a plaintiff to advance any cause, whether or not such a

386. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

387. *See About Us*, THE BECKET FUND, http://hobbylobbycase.com/about-the-becket-fund/ [https://perma.cc/LX6S-JXNZ] (Nov. 16, 2020).

388. *Hobby Lobby*, 573 U.S. at 683.

litigant could successfully pursue their agenda through the ordinary political process. This egalitarian neutralism is a product of Brennan's opinion in *Button*, which instituted a race- and power-neutral regime for cause lawyering. Ironically, this egalitarian neutralism initially surfaced in Frankfurter's opinion arguing *against* the conclusion Brennan reached. Brennan's reframing may have made tactical sense as he sought to retain the votes of two newly appointed Justices. But it came at the cost of Black's race- and power-consciousness.

This Article has argued that, despite Brennan's success, from the perspective of legal ethics, something was lost. Black's framework would have forced courts to look carefully at the particular situation of the plaintiffs who sought to pursue cause lawyering. It would have required them to assess whether plaintiffs' interests were genuinely served by their cause lawyers. And it would have pushed courts to consider whether plaintiffs needed access to the courts because they were unlikely to receive an appropriate hearing through the ordinary political process.

This is not to say that Black's approach would not have raised its own problems. Empowering courts to assess the relative position of litigants transfers power from lawyers to judges. The *Button* regime, for all its defects, produced a bright line rule. Black's opinion would have substituted standards and imprecise balancing.

On the legal ethics questions at the center of this Article, however, Black's approach offers an improvement. It would have addressed two serious, longstanding concerns with the ethics of cause lawyering. It tackled the worry that cause lawyering leads to impermissible conflicts of interest, by ensuring a close alignment between lawyers and their clients. And it guaranteed that policy litigation was actually democracy-reinforcing, rather than democracy-subverting, by defending it on *Carolene Products*-type grounds.

Black understood that, properly circumscribed, cause lawyering plays an important role in realizing democratic rights. This Article has argued that we could learn much by going back to Black to recover the power-conscious professional responsibility he championed. It offers a way to keep cause lawyering ethically in service of our democracy today.