

Political Litigation and the Politics of Litigation

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In traditional accounts of Westminster separation of powers, courts occupy a neutral sphere outside of political discourse. The judiciary is the independent, neutral, non-political applier and interpreter of the sovereign will of Parliament. In this context litigation undertaken as part of a “political campaign” uncomfortably straddles the law–politics dichotomy and courts hearing such cases encroach on Parliament’s rightful role. This article argues that, in litigation, courts negotiate and define social norms, contrary to the traditional understanding of the role of the courts. Litigation is a political act when a litigant advances both a normative and descriptive account of social interaction that is resolved through the use of state power. This article draws on constructivist theory to examine how, in occupying these social roles, courts and parties transcend any law–politics dichotomy and demonstrate that the litigation process is firmly embedded in political discourse.

I INTRODUCTION

Traditional understandings of Westminster separation of powers define the three functions of government as the *Crown*, whose power is exercised by Cabinet and responsible Ministers, administering the Government; *Parliament*, the Sovereign and the ultimate authority for governmental action; and the *judiciary*, an independent, neutral, non-political body dispensing and applying the laws Parliament duly enacts.¹ Under this model, courts occupy a neutral sphere outside political discourse. The judiciary, as Professor Smillie notes, ascertains relevant facts and applies the relevant rule.²

* BA/LLB(Hons). The author would like to thank Associate Professor Treasa Dunworth of the University of Auckland’s Faculty of Law for her helpful suggestions and support.

1 See Richard Ekins “Judicial Supremacy and the Rule of Law” (2003) 119 LQR 127.

2 John Smillie “Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand” [1996] NZ Law Review 254 at 255.

... the law consists largely of posited precepts laid down in legislation or leading judicial precedents. These precepts or rules are of universal application and are couched in reasonably clear and specific terms. They take the form of generalized propositions that specify particular legal consequences to prescribed sets of facts: if facts A, B and C exist, then consequence X must follow. By this view, the role of the judge in our society is a limited one — the judge's basic job is to ascertain the relevant facts and apply the applicable rule.

This article begins by setting out the traditional conception of parliamentary supremacy and the judicial function. Parliamentary supremacy is predicated on Parliament being afforded exclusive occupation of the “political” sphere. In pursuit of *absolute* parliamentary sovereignty, the courts were forced to discard any “political” function and occupy a neutral sphere outside of political discourse. In this theoretical context litigation undertaken as part of “political campaigns” uncomfortably straddles the law–politics division that orthodox parliamentary sovereignty requires. This article argues that the use of litigation as a vehicle for political discourse does not straddle the law–politics division, but rather explicates the political nature of the judicial function, undermining this dichotomy.

Part III argues that litigation is a political performance. Litigation necessitates the resolution of a normative and descriptive claim about social interaction: a claim that invokes shared norms and argues they are not being met. The article sets out the social roles parties and courts occupy and argues that, in occupying these roles, litigants advance both a normative and descriptive account of social interaction and authoritatively resolve the difference between the “should” and “is” through the use of state power. In doing so, “litigation” is firmly embedded in political discourse.

Political campaign groups use litigation to further a desired political outcome and thereby participate in political discourse. Part IV demonstrates that such litigation by political campaign groups is neither anomalous nor a modern deviation from “traditional judicial practice”.

Part V seeks to elucidate how litigation is structurally wedded to political discourse. Part V draws on contemporary norm and constructivist analysis to identify how, in occupying these social roles, litigation transcends the purported law–politics dichotomy. The article will analyse litigation organisations such as the Child Poverty Action Group, the Fawcett Society, the Council of Trade Unions and ad hoc pressure groups introduced to deconstruct the structure of litigation.

II FORMALISM AND PARLIAMENTARY SOVEREIGNTY

Parliamentary sovereignty is the dominant characteristic of Westminster separation of powers. It holds:³

... Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

Two characteristics underpin parliamentary sovereignty: Parliament's omnipotence and its monopoly on political power. Common to both of these characteristics is absolutism. Parliament has unlimited powers and the sole right to determine any question arising in an unlimited sphere. As Joseph notes, "'Sovereignty' denotes an absolute quality (state of being) that imports *closure*; sovereignty doctrine knows only the absolutism of its own canons".⁴ This conception of parliamentary sovereignty owes much to the absolutist tradition of constitutional thought that dominated in Britain before 1688. For example, Jean Bodin's divine right was both a political and religious doctrine, forming the basis of political legitimacy for, most relevantly, Stuart monarchs. It asserts that a monarch is subject to no earthly authority, deriving their right to rule directly from the will of God. To be sovereign is to be unquestionable and the ultimate arbiter of any question.⁵ Sir Robert Filmer, writing in the 17th century:⁶

... claimed that God had granted kings absolute and arbitrary power. While they might consult advisers or even parliaments before making laws, it was not essential for them to do so. The authority of the king could not be challenged by the common law, the decisions of the two houses of parliament or the will of the people.

Both the absolutist monarchical and parliamentary sovereignty traditions advanced a constitutional system that was highly centralised and based on absolute rule rather than being characterised by competing powers with checks and balances. The 17th century debates concerned who was sovereign: the Crown or Parliament. What was not questioned was what "sovereignty" meant. While divine

3 AV Dicey *Lectures Introductory to the Study of the Law of the Constitution* (MacMillan and Co, London, 1885) at 36.

4 Philip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321 at 323.

5 See Julian H Franklin *Jean Bodin and the Rise of Absolutist Theory* (Cambridge University Press, Cambridge, 1973) at ch 3–4.

6 HT Dickinson "The Eighteenth-Century Debate on the Sovereignty of Parliament" (1976) 26 *Transactions of the Royal Historical Society* 189 at 191.

right was abandoned after the Glorious Revolution, these characteristics of illimitable and absolute power were imputed onto Parliament as “sovereign”. The parallels are most evident in Blackstone’s commentaries, quoted by AV Dicey:⁷

The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. ... It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations ... this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.

Koopmans concludes there is:⁸

... a kind of artful deceit in the course of constitutional evolution in England: by slowly transforming the King-as-ruler into the King-in-Parliament, it put the absolute and central powers of the King into the hands of Parliament

The absolutist nature of parliamentary sovereignty is also evident in its second characteristic: the monopoly on political power. “Parliamentary monopoly” requires all governmental and political power to reside in Parliament in order that it might be subject to legitimation and oversight by it. The unlimited nature of Parliament’s powers and the sole right to determine any question arising in that unlimited sphere means that Parliament is the sole arbiter of the political questions of appropriate social organisation and distribution of power.

Absolutism forms the basis of formalist understandings of Westminster constitutionalism. In pursuit of this normative vision of parliamentary sovereignty, the courts were forced to discard any “political” function and occupy a neutral sphere outside of political discourse. In order for parliamentary sovereignty to become constitutional reality, the courts’ role developed into one of “mere dispute resolution” and “law” was sharply divided from “politics”. Sovereignty “operat[ed] [as] a defensive shield around it[self] by rearranging any challenge to it in its own image”.⁹ Thus, parliamentary sovereignty created the orthodox conception of the judicial function: courts are to apply law deduced from Parliament, the

7 Dicey, above n 3, at 37.

8 Tim Koopmans *Courts and Political Institutions: A Comparative View* (Cambridge University Press, Cambridge, 2003) at 19.

9 Joseph, above n 4, at 323.

identifiable law-giver. This Austinian conception positions the court as forming a body that simply applies the law set by the sovereign Parliament. The judiciary is therefore considered the independent, neutral, non-political applier and interpreter of the sovereign will of Parliament.

Orthodox legal discourse silos “law” as the preserve of judges, distinct from “politics” which is contained within Parliament. Thus courts are defined as “independent and neutral, with a little bit of political ‘if’ and ‘but’ mixed in”.¹⁰ As Shapiro and Stone Sweet note, the traditional view sees judicial review as “nothing more than a technical exercise in conflict of law jurisdiction”.¹¹ This view is reflected in contemporary practice. Former Prime Minister the Rt Hon Helen Clark stated — in criticism of Elias CJ’s comments to a United Kingdom select committee — that the Chief Justice was “striding into the political arena” and warned that judges “must be seen to be above politics”.¹² Similarly, the Hon Dr Michael Cullen defended parliamentary sovereignty in a speech to Parliament celebrating its 150th year:¹³

Any perception the Courts are working to develop a common law jurisprudence which imposes new limits on the power of the Parliament ... would threaten the credibility of both institutions.

In the courts’ shift to “mere” dispute resolvers and their acceptance of the non-political myth required under the Westminster model, a formalist approach to adjudication necessarily developed. This method of adjudication best reflected the role the courts perceived themselves as playing in society. In this framework, the judge’s basic job is to ascertain the relevant facts and apply the applicable rule:¹⁴

By this view, the law consists largely of posited precepts laid down in legislation or leading judicial precedents. These precepts or rules are of universal application and are couched in reasonably clear and specific terms. They take the form of generalized propositions that specify particular legal consequences to prescribed sets of facts: if facts A, B and C exist, then consequence X must follow. By this view, the role of the judge in our society is a limited one — the judge’s basic job is to ascertain the relevant facts and apply the applicable rule.

10 Martin Shapiro and Alec Stone Sweet *On Law, Politics, and Judicialization* (Oxford University Press, Oxford, 2002) at 4–5.

11 At 24.

12 Philip Joseph “The Higher Judiciary and the Constitution: A View from Below” in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis, Wellington, 2006) 213 at 220.

13 Michael Cullen “Parliamentary sovereignty and the Courts” [2004] NZLJ 243 at 243.

14 Smillie, above n 2, at 255.

Deviation from the formalist paradigm (“judicial creativity” or “activism”) is inconsistent with the orthodox conceptualisation of separation of powers because the court overreaches to perform functions which are the sole preserve of Parliament.

III LITIGATION AS THEATRE

In contrast to this traditional view, this article will argue that litigation has a dynamic and creative role in society. Litigation is a social performance that contests the content of values and norms and negotiates answers to social questions. Litigants create social meaning through litigation disputes. In this way disputes are not a negative process but a positive construction of appropriateness: a performance in a given social community.

There are two primary reasons for this. First, the plaintiff claims that the defendant has not met social expectations in a way that is harmful to them. Litigation is social: it defines a speaker, the claimant, asserting a particular conception of justice; a wrongdoer, allegedly failing to meet social expectations; an audience; and the relationship between them. This article will refer to this as the claimant–grievance–villain framework. Secondly, the claimant makes normative claims. A dispute entails advancing both a normative and descriptive account of social interaction: a “should” and an “is”. Hawkins describes this as “argumentative rationality” in which litigants “deliberate over their assumptions about the world, the values they share, how those assumptions and values should apply to their behavior, and whether particular behaviors actually conform with abstract standards”.¹⁵ In this sense, the socio-political structure of society is not a conceptually stable resource from which actors make informed decisions on what constitutes a breach of a standard of appropriateness by the villain. Rather “appropriateness” is continually defined and negotiated through disputes regarding the questions of what appropriate social organisation, distribution and allocation of power means. This article will draw on contemporary norm and constructivist analysis to identify how, in occupying these social roles and articulating a grievance, the claimant asserts an understanding of what *is* and what *ought* to be that transcends any law–politics dichotomy.

15 Darren Hawkins “Explaining Costly International Institutions: Persuasion and Enforceable Human Rights Norms” (2004) 48 *International Studies Quarterly* 779 at 783.

In *Ministry of Health v Atkinson*, the Ministry of Health excluded family members from payment for the provision of various disability support services to their children, including “home-based support services, individualised funding, contract board, and supported independent living”.¹⁶ Seven parents of affected children and two affected adult children complained under Part 1A of the Human Rights Act 1993.¹⁷ An act or omission breaches Part 1A if it is inconsistent with s 19 of the New Zealand Bill of Rights Act 1990¹⁸ which protects, inter alia, the right to be free from discrimination on various grounds, including family status. The Human Rights Review Tribunal and the High Court upheld the families’ claim that the policy was discriminatory and was not justified in terms of s 5 of the Bill of Rights Act.

The families articulated a grievance: their unfair rejection of income support and funding against a wrong-doer, the Government, for failing to meet social expectations. The case was not just a negative claim for income support but a positive claim for equality. The claimants sought to ascertain what justice required and redefine the gendered nature of “work” as care. In fact, Cliff Robinson, one of the applicants, described the decision as recognising his “life’s work”.¹⁹ When considered in this way, litigation mirrors the framework of political campaigns:²⁰

In modern campaigning you need to have a clear proposition, the problem, solution and the villain. And you often also need what we call ‘issue campaigns’ — something very specific that illustrates the wider problem.

Both litigation and campaigning involve a claimant articulating a grievance against a shared conception of justice, and a villain, either causing or failing to prevent the injustice. Litigating a claim individualises injustice and casts the defendant as a ready-made villain. As Yanacopulos argues:²¹

Campaigning requires a clear simple message and objective, and its purpose is to mobilize by using the media to put pressure on decision-makers, something that coalitions are particularly well

16 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [15].

17 At [1].

18 Human Rights Act 1993, s 20L(1).

19 Stacey Kirk and Danya Levy “Appeal court’s landmark disability decision” (14 May 2012) Stuff <www.stuff.co.nz>.

20 Interview with Oxfam International employee (Helen Yanacopulos, Washington DC, 8 July 1998) quoted in Helen Yanacopulos “The strategies that bind: NGO coalitions and their influence” (2005) 5 *Global Networks* 93 at 106.

21 Yanacopulos, above n 20, at 105.

placed to do. It is typically adversarial, requiring a villain or an injustice.

The claimant–grievance–villain framework explicates how a claim in litigation is a social and public claim about justice and is part of the ongoing political discourse around appropriate social organisation, distribution and allocation of power. This article seeks to prove two propositions in support of this conception of litigation. Part IV shows that litigation in these terms is not anomalous in the Common Law. Part V develops this framework further and explores two particular mechanisms linking litigation to political discourse. In the case studies examined, litigation is used as a vehicle for political discourse. It is used to pressure the other two branches of government, build political campaigns, seek media attention and persuade public opinion around a political campaign in a way analogous to a “political” issue-based campaign. Using constructivist theory, I argue that these case studies draw out the political nature of dispute resolution, rendering the courts’ political nature explicit.

IV POLITICAL LITIGATION IS NOT A MODERN DEVIATION FROM TRADITIONAL LEGAL PRINCIPLE

The separation of the courts from the political decision-making sphere under orthodox theory sees the contemporary involvement of courts in the political discourses of the United Kingdom and New Zealand as deviating from traditional legal principle. This Part argues that use of litigation by political campaign groups to achieve a desired political outcome is neither an anomalous feature of the Common Law, nor a modern phenomenon. The issues of suffrage, slavery, freedom of the press and appropriate moral codes were often negotiated through both Parliament and the courts during the 19th and early 20th centuries — the height of positivism and parliamentary supremacy. Taken together, the case studies considered in this Part demonstrate that political litigation is not an irregularity or deviation but a feature of the role of courts in society.

Abolitionism

The abolitionist movement used litigation extensively. A clear example is Granville Sharp’s legal work and, in particular, his

advocacy in the case of *Somerset v Stewart*.²² *Somerset* was prima facie a dispute between two individuals seeking a declaration of the law. James Somerset, the runaway slave of Charles Stewart, “sought a writ of habeas corpus to prevent Stewart from seizing and detaining him in England for shipment to Jamaica to be sold”.²³ Behind the individualist and private nature of the dispute, *Somerset* was political litigation conducted by a political campaign group and opposed by West Indian trading interests.²⁴ Sharp became involved in anti-slavery activism in 1767 when his attempts to free Jonathan Strong resulted in litigation.²⁵ After two years of research, Sharp, who had no legal training, published a pamphlet.²⁶

... in which [he] condemned slavery as a “gross infringement of the common and natural rights of mankind,” and as “plainly contrary [*sic*] to the laws and constitution of this kingdom” because no laws “countenance[d]” it and others, according to his interpretation, made it actionable.

From 1765, Sharp had looked for a test case to challenge inconsistencies in the Common Law.²⁷ At the time, United Kingdom Common Law held two conflicting views regarding slavery. According to a 1729 opinion by the Attorney-General and Solicitor-General, the Common Law recognised slavery. When the Attorney-General became Lord Chancellor he upheld this view in *Pearne v Lisle*, holding that a slave continued to be their master’s property whilst in the United Kingdom.²⁸ Similarly, Blackstone wrote an opinion for Sharp stating that attempting to effect an anti-slavery ruling in the King’s Bench would be “uphill work”.²⁹ In contrast, Lord Northington’s dictum in *Shanley v Harvey* indicated the Common Law did not acknowledge slavery.³⁰ In that case, Sharp attained habeas corpus for Thomas Lewis who was kidnapped and taken to a ship to be sold in Jamaica. Lord Mansfield, however, avoided determining the issue as it was unclear whether the jury had found there could be no slavery or that Lewis was not a slave,³¹ although he suggested directions that the law of slavery might take.

22 *Somerset v Stewart* (1772) Lofft 1, 98 ER 499 (KB).

23 William M Wiecek “*Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World” (1974) 42 U Chi L Rev 86 at 86.

24 At 102.

25 At 96.

26 Wiecek, above n 23, at 96.

27 Carol Harlow and Richard Rawlings *Pressure Through Law* (Routledge, Abingdon (UK), 1992) at 13.

28 *Pearne v Lisle* (1749) Amb 76, 27 ER 47 (Ch).

29 Harlow and Rawlings, above n 27, at 13.

30 *Shanley v Harvey* (1762) 2 Eden 125, 28 ER 844 (Ch).

31 Harlow and Rawlings, above n 27, at 13.

In *Somerset*, Sharp applied for habeas corpus on Somerset's behalf. In ordering Somerset's release Lord Mansfield stated:³²

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law.

Lord Mansfield reluctantly delivered judgment after he had deferred the decision for a year, ordering five separate hearings to resolve the dispute outside of court in an apparent attempt to avoid a decision.³³ After failing to convince Stewart to release Somerset and render the case moot, Lord Mansfield reportedly said "if the parties will have judgment, ... 'let justice be done though the heavens fall'".³⁴ The judgment was not a proclamation of the inconsistency of slavery with the Common Law. Rather:³⁵

Technically considered, the judgment in *Somerset* settled only two narrow points of English law: a master could not seize a slave and remove him from the realm against the slave's will [because coercion of that slave in England could not be based on American law] and a slave could secure a writ of habeas corpus to prevent that removal.

However, Lord Mansfield's quote resonated with abolitionist activists. Sharp, on behalf of Somerset, articulated a claim of injustice against a villain, Stewart. In response Lord Mansfield articulated a new conception of what justice required. His dictum, plangent and declaratory in tone, claimed slavery was "incapable of being introduced on any reasons, moral or political" and an "odious" derogation from natural law.³⁶ As Wiecek notes, "loose aphorisms about slaves being liberated once they set foot on English ground remained unchecked and hence potent".³⁷ Abolitionists adopted and promoted this expansive interpretation.

Advocates used the media to construct the meaning of *Somerset* after judgment. Despite its conservative finding, *Somerset* "fuelled abolitionist aspirations because, at least implicitly, it posited slavery as inconsistent with both natural and common law principles

32 *Somerset*, above n 22, at 19.

33 Wiecek, above n 23, at 102.

34 At 102.

35 Wiecek, above n 23, at 87.

36 *Somerset*, above n 22, at 19.

37 Wiecek, above n 23, at 110.

and thus undermined the presumption that slavery was legitimate”.³⁸ Both sides published legal arguments of their interpretation of the ratio in newspapers and pamphlets to affect public opinion.³⁹ For abolitionists, lifting Lord Mansfield’s expansive comments out of their legal context provided a powerful rhetorical position. As Hulsebosch notes, “that expansive interpretation was the value added that antislavery advocates contributed to the legal product that came to be known as *Somerset’s Case*”.⁴⁰ Wiecek notes that, whatever its technical reality, the case undermined the legitimacy and legal basis for slavery, denting slavery’s legal standing within British and American colonies.⁴¹

No other decision so well illustrates the ambiguities of slave case law as *Somerset*. No other English decision on slavery has been so often quoted and almost as often misunderstood; no comparable opinion has proliferated such a case law progeny with such protean interpretations. *Somerset* best illustrates a legal world where things are not what they seem, a world of deceptive appearances and unforeseen consequences.

Somerset therefore provided the basis for political literature, further test cases, and persuasive arguments linking abolitionism with the vindication of long-held Common Law rights. *Somerset*’s powerful impact was in no way proportionate to its relatively narrow conflict of laws ratio. Sharp distributed free copies of his pamphlet to attorneys and asked them to challenge as many cases as they could in the courts.⁴² Thomas Clarkson suggested every case was successful, although no particular case provided authority on “whether a slave bec[ame] free when brought into England”.⁴³ Six years later, Sharp gained a similar ruling to *Somerset* in the Scottish courts.⁴⁴

The abolitionist movement ultimately pursued a legislative solution, which came in a slow and piecemeal manner. However, litigation was an integral part of their broader campaign on slavery. It provided a forum to contest accepted norms and act in pursuit of a political good.

38 Cheryl I Harris “‘Too Pure an Air:’ *Somerset’s* Legacy From Anti-Slavery To Colorblindness” (2007) 13 Texas Wesleyan Law Review 439 at 442.

39 Wiecek, above n 23, at 103.

40 Daniel J Hulsebosch “*Somerset’s Case* at the Bar: Securing the ‘Pure Air’ of English Jurisdiction within the British Empire” (2007) 13 Texas Wesleyan Law Review 699 at 701.

41 Wiecek, above n 23, at 87.

42 At 100.

43 Thomas Clarkson *The History of the Rise, Progress and Accomplishment of the Abolition of the African Slave-Trade by the British Parliament 74–75* (1808) as cited in Wiecek, above n 23, at 100.

44 Harlow and Rawlings, above n 27, at 15.

General Warrant Cases

The “General Warrant Cases” involved another dispute that appeared to be between two private individuals, yet was part of a larger political campaign.⁴⁵ The General Warrant Cases were litigated by “John Wilkes, librarian and rebel Member of Parliament”⁴⁶ and the the Society for the Protection of the Bill of Rights. They sought to confine “the extent of the common law powers of arrest, search and seizure” where Ministers of the Crown “had issued warrants without specifying the individuals, premises or goods to be acted against”.⁴⁷

John Wilkes created, edited and wrote for an independent paper called the *North Briton*, a response to Prime Minister Lord Bute’s propaganda paper *Briton*.⁴⁸ The *North Briton*, alongside another newspaper, the *Monitor*, provided satirical commentary on social and political events, undermining the Government.⁴⁹ The General Warrant Cases were prompted by two separate attempts, by Lord Halifax and the King respectively, to arrest the authors of the *North Briton* and *Monitor* to prevent publication. In the first case, Lord Halifax handed chief messenger Carrington warrants for the arrest of the *Monitor*’s authors, Arthur Beardmore and John Entick, to halt publication while a peace treaty was being debated in Parliament.⁵⁰ The messengers broke into and ransacked Entick’s house, causing £2,000 worth of damage.⁵¹

The second case arose from the publication of the 45th edition of *North Briton*. Wilkes satirised a speech the King gave to Parliament, questioning his independence from his Ministers. The King, enraged, ordered the Attorney-General to arrest Wilkes under the treason exception to parliamentary privilege.⁵² Lord Halifax issued a general warrant naming the offences but not the offenders, empowering Carrington, Money, Watson and Blackmore to arrest and search anyone connected with the action.⁵³ As the case against Wilkes was weak, the Secretary planned to first arrest the printer and publisher, examine them, and seize evidence of Wilkes’s authorship.⁵⁴ Carrington’s messengers entered the premises of an alleged publisher

45 Harlow and Rawlings, above n 27, at 17. The text mentions the following examples: *Wilkes v Wood* (1763) Lofft 1, 98 ER 489 (KB); *Entick v Carrington* (1765) 2 Wils KB 275, 95 ER 807 (KB); and *Money v Leach* (1765) 3 Burr 1742, 97 ER 1075 (KB).

46 Harlow and Rawlings, above n 27, at 18.

47 At 17.

48 Arthur H Cash *John Wilkes: The Scandalous Father of Civil Liberty* (Yale University Press, New Haven (CT), 2006) at 68.

49 At 88.

50 At 88.

51 At 88.

52 At 99–101.

53 At 101.

54 At 102.

and bookseller of the *North Briton* at night, arresting any journeymen, printers and servants they found and seizing bundles of paper.⁵⁵ In all, 49 people were arrested when the messengers were looking for only three.⁵⁶

Wilkes was eventually arrested and imprisoned in the Tower of London. His property was confiscated or damaged.⁵⁷ Supporters applied for a writ of habeas corpus from the Court of the Common Pleas.⁵⁸ Wilkes used the opportunity to maximise publicity. In the courtroom, Wilkes proclaimed that he was fighting for liberty.⁵⁹

My lord, I am happy to appear before your lordship and this Court, where liberty is so sure of finding protection and support, and where the law (the principle and end of which is the preservation of liberty) is so perfectly understood. Liberty, my lord, hath been the governing principle of every action of my life ...

Wilkes's claim was that he needed protection against a villain who was acting with complete disregard to shared understandings of liberty. Pratt CJ found the warrants were valid but that there was no libel due to parliamentary privilege.⁶⁰ The result disappointed Wilkes as it allowed the practice of general warrants. This disappointment precipitated a civil liberties campaign run at first by John Wilkes and then the Bill of Rights Society. As a co-ordinated civil liberties campaign it was successful: the courts outlawed the use of general warrants, and, within one year, 14 printers were awarded damages.⁶¹ Wilkes's extensive publicity campaign ran apace with these cases. He printed copies of his speech at Court in newspapers and pamphlets. He also wrote periodicals, newspapers and letters and began to produce a book, *English Liberty*.⁶²

Over six years, at least 40 cases emanated from the general warrant issued against *North Briton*.⁶³ Wilkes initiated actions for false arrest against Constable Chisholme and three leading messengers — Money, Watson and Blackmore — and trespass actions against Secretaries of State Egremont, Halifax, Wood and Webb for illegal invasions of his privacy and damage to his property.⁶⁴ The barrister who represented Wilkes in the original hearing entered 25 lawsuits,

55 At 102.

56 At 105.

57 At 108–109.

58 At 111.

59 At 112–113.

60 At 116.

61 Harlow and Rawlings, above n 27, at 18.

62 Cash, above n 48, at 123.

63 At 133.

64 At 122.

acting for the journeymen against the messengers.⁶⁵ The publisher, Leach, brought a suit for false imprisonment and trespass against the same messengers.⁶⁶ These suits marked the first time working-class people sued the state.⁶⁷ The cases:⁶⁸

... were both crucially important for civil liberties and were understood at the time to represent a great victory, moral as well as political, over the government of the day. In every sense of the term, they were test cases.

As Harlow and Rawlings argue, the Wilkites were:⁶⁹

... a radical, anti-establishment pressure group in every modern sense of the term, if not an embryonic political party, fully conscious not only of the political effectiveness of successful legal action but of the publicity value of legal proceedings and able to exploit these consistently and to great effect.

The Suffragist Movement

Litigation provided a key campaign tactic for the United Kingdom suffragist movement after the failure of its parliamentary campaign.⁷⁰ To generate a test case, the Manchester Suffrage Society created a *lis*, registering women to vote under the Reform Act 1867 on the grounds that, under the Interpretation Act 1950, the term “man” in the 1867 Act included “woman”.⁷¹ Thousands of women registered to vote, some incurring a fine in doing so. If struck off the electoral roll, they appealed to the Court of Common Pleas. In *Chorlton v Lings*,⁷² a full bench of four under Bovill CJ held unanimously that “man” in the 1867 Act did not include “woman”, as women were not of legal capacity.⁷³

Unlike the General Warrants Cases and *Somerset*, the courts consistently ruled against the suffrage societies. Despite this, the courts’ involvement in the struggle for women’s suffrage only increased. Suffragists, continually blocked by parliamentary procedure and the courts, began to campaign using direct action. But these protests, too, were shut down by authorities — now using the

65 At 123.

66 At 123.

67 At 123.

68 Harlow and Rawlings, above n 27, at 18.

69 At 19.

70 At 23.

71 At 23.

72 *Chorlton v Lings* (1868) 4 LR CP 374 (Comm Pleas).

73 Harlow and Rawlings, above n 27, at 23.

criminal law.⁷⁴ Christabel Pankhurst argued the use of the criminal courts was a political campaign tactic by the Government to dent the movement's credibility and the "respectability" of its members by presenting them as petty criminals.⁷⁵ The suffragists, with little hope of acquittal, used their trials for publicity.⁷⁶ The criminal trial process became a platform for a political claim. The suffragists fully utilised the dock to "secure sympathy" and "demonstrate their own capabilities".⁷⁷ Christabel Pankhurst, arrested after failing to appear in court when summoned, argued from the dock that the judicial system was "corrupted for party ends" and the Crown was using court processes to "keep us in the police-court".⁷⁸ Similarly, Emmeline Pankhurst argued to the Court: "We are here not because we are law-breakers; we are here in our efforts to become law-makers."⁷⁹

In their "efforts to become law-makers", the suffragists used the litigation process extensively. Ultimately, reform came about through Parliament; but this article argues that litigation created essential political pressure on legislators without which reform would not have happened.

Prosecution Societies

The Society for the Suppression of Vice sought to shape Victorian culture according to the Society's moral and ethical framework. They used litigation in pursuit of this goal. Roberts identifies three phases to their campaign: the campaign for reformation "of community standards of behaviour and public order" in the early 19th century; the "radical unrest" of the mid-19th century where the Society launched several well-publicised prosecutions for blasphemy; and the "high Victorian years" when it acted primarily as a pressure group in support of the Obscene Publications Act 1857 and as a semi-official law enforcement agency against supposedly subversive literary figures.⁸⁰

Before the advent of the organised police force, individuals were responsible for apprehending and prosecuting criminals in a demanding and expensive process. In practice, this responsibility fell on victims. These shortcomings led to the advent of prosecution

74 At 24–25.

75 At 25.

76 At 25.

77 At 25.

78 At 25.

79 FW Pethick Lawrence "The Trial of the Suffragette Leaders" (1908) in Jane Marcus (ed) *Suffrage and the Pankhursts* (Routledge & Kegan Paul, London, 1987) 51 at 77.

80 MJD Roberts "Making Victorian morals? The society for the suppression of vice and its critics, 1802–1886" (1981) 21 *Historical Studies* 157 at 157.

societies which operated in much the same way as modern insurance. These societies typically employed a prosecutor to gather evidence, apprehend perpetrators and prosecute crimes committed against members, who paid an annual subscription.⁸¹

A small but socially and politically influential group of conservative and propertied members of Victorian society appropriated this model as part of their campaign to “control ‘offences against religion, morality, and public decency’”.⁸² Founded in 1802, the Society for the Suppression of Vice was a key part of Victorian social and political debate.⁸³ By 1804, the Society had obtained 1,200 members which included parliamentarians, clergy and peers, and generated an annual income of up to £1400 from 1803 to 1807.⁸⁴ The Society and its predecessors sponsored legislation and conducted test cases in areas of morality, focusing on prosecuting “vice” on behalf of its members.⁸⁵ It targeted vice using criminal prosecutions. The resulting convictions drove the criminal law in a direction that reflected the Society’s values.⁸⁶ Offending vices included: profanation of the Lord’s Day and profane swearing; publication of blasphemous, licentious and obscene books and prints; keeping disorderly public houses, brothels and gaming houses; procuring; and illegal lotteries.⁸⁷ As Harlow and Rawlings note:⁸⁸

The Vice Society proceeded methodically and according to a preferred pattern. Its first step was to publish an abstract of the laws against vice The Society then inspected a given area for breaches of law and warned potential violators of its intentions by issuing copies of the abstract The last resort was to prosecute the unrepentant — preferably in the King’s Bench, which was felt to have a greater deterrent value — and to publicise the convictions.

The Society was a political action group that tried to enforce moral beliefs through shaping and enforcing the Common Law. Alongside other conservative Christian societies, it deployed the law to promote political claims and this implicated the courts directly in navigating questions of expression and democracy. The clearest example of this is the Society’s prosecution of rationalist societies — in particular the

81 JM Beattie *Crime and the Courts in England 1600–1800* (Oxford University Press, Oxford, 1986) at 48–49.

82 Roberts, above n 80, at 159.

83 At 157.

84 At 161.

85 At 159, referring to the Proclamation Society which later merged with the Society for the Suppression of Vice.

86 See Roberts, above n 80, at 160.

87 At 160.

88 Harlow and Rawlings, above n 27, at 30–31.

publisher of Paine's *The Age of Reason*, who was sentenced to prison for two years after prosecution by the Vice Society.⁸⁹

The Myth of Formalism

The narrative of public interest litigation generally begins in the United States with *Brown v Board of Education of Topeka*⁹⁰ and the litigation strategy of the National Association for the Advancement of Coloured People (NAACP). In the 1960s the United States Supreme Court positioned itself at the heart of political discourse on civil rights issues in a suite of decisions. In other jurisdictions, the use of litigation to pressure the executive branch and promote political claims is often presented as a modern departure from traditional legal reasoning or "regarded as a vaguely American import".⁹¹ When Chris Grayling, the United Kingdom's Justice Secretary, announced changes to the United Kingdom's judicial review system, he said "[j]udicial review has developed since the 1970s as a way for individuals to challenge decisions by the State."⁹² Grayling further claimed "many [judicial review cases] are no longer just an opportunity for an individual to challenge an official decision, but are used by campaign groups as a legal delaying tactic for something they oppose".⁹³

Grayling clearly conceives of public interest litigation campaigns as modern phenomena. Similarly, Professor Smillie describes "a progressive shift away from a parliamentary democracy, in which Parliament is acknowledged as the supreme law-making authority".⁹⁴ Smillie suggests this is a deviation from the traditional and proper role of courts:⁹⁵

Instead of seeing themselves as being engaged with Parliament in some grand collaborative lawmaking enterprise, the Judges should return to the role they performed efficiently and well for centuries. They should see their primary responsibility as being to expound, apply, and preserve the inherited common law with its strong (albeit indirect and historic) democratic foundation in the

89 At 31–32.

90 *Brown v Board of Education of Topeka* 347 US 483 (1954).

91 Roger Smith "Experience in England and Wales: Test case strategies, public interest litigation, the Human Rights Act and legal NGOs" (May 2003) Essex University <www.essex.ac.uk> at 1.

92 Chris Grayling "The judicial review system is not a promotional tool for countless Left-wing campaigners" *Daily Mail* (online ed, London, 5 September 2013).

93 Grayling, above n 92.

94 John Smillie "Who Wants Juristocracy?" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis, Wellington, 2006) 235 at 235; and see also Jim Evans "Questioning the Dogmas of Realism" [2001] NZ Law Review 145 at 145: "in the last 20 years judicial practice in New Zealand has followed, with its own particular brand of local enthusiasm, a mistake that has been widely influential in most parts of the common law world".

95 At 242.

customary practices and common assumptions of the English people.

The argument assumes that the traditional role of the courts excluded political matters and was only concerned with adjudication in a strict formalist sense. Yet this Part has shown that courts have had a central position in political discourse throughout history. Hence, the courts' involvement with political discourse is not anomalous in Common Law tradition. Courts have negotiated issues of suffrage, slavery, freedom of the press and appropriate moral codes as extensively as Parliament in the 19th and early 20th centuries.

The fiction of an apolitical court as part of a normative commitment to orthodox Westminster constitutionalism has endured because legal discourse has stripped these cases of their context and therefore their politics.⁹⁶ As Gearey, Morrison and Jago note:⁹⁷

Cases are not dry 'law', decided under the sway of some mechanical jurisprudence; they are more. They are collections of stories, narratives where human characters make appeals to the law ... ask for rights, assert that others owe them duties and seek remedies for supposed breaches of those duties.

The normative commitment to formalism means that, for cases to be considered authoritative, they must be removed from the context and characters that gave rise to them. First, their origin is overlooked and ignored because:⁹⁸

... cases need to be sanitised if they are to stand as precedents for future generations of lawyers and if the popular fiction of law as apolitical is to be maintained. To know too much about the actors might lessen the authority of the decision.

Secondly, lawyers read and use cases for a specific purpose, extracting the insights relevant to the development of the Common Law.⁹⁹ These processes not only drive cases through the judicial and legal system but over time they remove context. The General Warrant Cases demonstrate this point. The cases were highly political. Yet Wade and Forsyth only mention *Entick v Carrington* as authority for the principle that the court can limit prerogative power.¹⁰⁰ Moreover,

96 Harlow and Rawlings, above n 27, at 290.

97 Adam Gearey, Wayne Morrison and Robert Jago *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions* (Routledge, New York, 2009) at 48.

98 At 60.

99 Adam Gearey, Wayne Morrison and Robert Jago *The Politics of the Common Law* (Routledge, New York, 2009) at 48.

100 William Wade and Christopher Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 289.

Joseph's leading text states "[t]he celebrated decision in *Entick v Carrington* established that neither state necessity nor prescriptive usage could excuse a trespass by the State".¹⁰¹ In elucidating what subsequent lawyers or academics deem important — the ratio decidendi — *Entick* is divorced from its context and sanitised of the politics underpinning it. Where the facts are mentioned, the Bill of Rights Society and the other warrant cases are not mentioned. Instead, the case is described as between private individuals and not the civil liberties campaign it was.

Legal rationality and the normative commitment to formalism required by parliamentary sovereignty has obscured the extent of political cases throughout the Common Law. Further, it has propagated the idea that contemporary litigation campaigns are new and potentially dangerous phenomena. In sum, litigation of a distinctly political nature is not a deviation, but rather *part of* the role courts have always played in the Westminster constitution.

V LITIGATION AND POLITICAL DISCOURSE

Part III set out how litigation necessitates the resolution of a normative and descriptive claim about social interaction: to invoke shared norms through a claimant–grievance–villain framework and argue they are not being met. Part V seeks to elucidate how litigation is structurally wedded to political discourse. This article discusses two primary mechanisms by which litigation influences political discourse. First, the media is a conduit for the promulgation of the “descriptive–normative” claim. Secondly, the courts and legal concepts make political claims more or less persuasive. In the case studies examined, litigation and “law” is deployed to advance normative political claims and puts courts at the heart of political issues, explicating the political function of courts. Litigation is a vehicle for political discourse. It adds persuasive value to pressure decision-makers and shapes public opinion.

Litigation and the Media

The media provides a conduit for promulgating the “descriptive–normative” claim litigation entails. Publicity is a powerful objective and is nearly always present in campaigns and litigation. Litigation

101 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 30 (footnotes omitted).

provides publicity that claims would otherwise not receive.¹⁰² A prominent American suffragist, Francis Minor, explained women's suffrage litigation as essential to gain public attention and provide mounting public pressure: "Every newspaper in the land would tell the story [of the case and] the question would be thoroughly discussed by thousands, who now give it no thought."¹⁰³

Public relations research suggests media interest increases if the story is "newsworthy" and represents "news values".¹⁰⁴ This includes amplitude (how big the event is); its relevance to the audience; whether it is unexpected or rare; whether it involves elite people or states; whether the audience can relate to the story; whether it is negative or involves conflict; and how the news item coheres with other news.¹⁰⁵ These values are cumulative — the more newsworthy the story, the more likely it is to be published. The villain–grievance–claimant structure of litigation provides a frame for political claims to be newsworthy. Litigation involving conflict between an aggrieved individual or group and an actor cast as the villain (often the state or people in authority) can affect the individual in a profound and highly personalised way or involve many people. The "relationship between litigation and the media is symbiotic and the publicity generated by important or controversial cases has a ripple effect".¹⁰⁶

The National Council for Civil Liberties (NCCL) has long seen the value in using media to achieve law reform or to enforce civil rights. Its 1938 annual report notes a media campaign as one of its achievements because it pressured police to pay reparations to a young woman beaten by officers.¹⁰⁷ Media considerations play an integral part of the criteria for whether the NCCL will take a case. The criteria includes whether the NCCL believe a particular area of law requires judicial scrutiny; whether abuse needs to be highlighted; and whether the case can fit into a broader campaign being undertaken by the NCCL or one of its allies.¹⁰⁸ For example, the introduction and use by British police of plastic bullets was tied in with a European campaign.¹⁰⁹ Similarly, the ability to generate media interest and to build both brand value and pressure on decision-makers justified the

102 See Anna-Maria Marshall "Social Movement Strategies and the Participatory Potential of Litigation" in Austin Sarat and Stuart A Scheingold (eds) *Cause Lawyers and Social Movements* (Stanford University Press, California, 2006) 164 at 172.

103 Harlow and Rawlings, above n 27, at 4.

104 Averill Gordon *Public Relations* (Oxford University Press, Oxford, 2011) at 89.

105 At 89.

106 Harlow and Rawlings, above n 27, at 294.

107 Barbara Cohen and Marie Staunton "In Pursuit of a Legal Strategy: The National Council for Civil Liberties" in Jeremy Cooper and Rajeev Dhavan (eds) *Public Interest Law* (Basil Blackwell, Oxford, 1986) 286 at 294.

108 At 296.

109 At 298–299.

United Kingdom Child Poverty Action Group's (UK CPAG) "test case strategy".¹¹⁰ Roger Smith from the UK CPAG notes media interest in one case led to a wave of secondary cases by people who were similarly affected and resulted in the overhaul of the departmental practices administering the scheme.¹¹¹

1 Council of Trade Unions

The New Zealand Council of Trade Unions (CTU) has used the structure of litigation to individualise and solidify abstract and structural problems within the villain–grievance–claimant structure. In 2013 the CTU began a campaign highlighting the allegedly poor health and safety conditions in New Zealand's forestry sector. The campaign began with a social media video and billboard campaign asking "What Killed Ken Callow?"¹¹² The forestry industry in New Zealand has the highest number of fatalities in any workplace in New Zealand and six times the number of accident compensation applications.¹¹³ There were 31 fatalities in forestry accidents between July 2007 and August 2013.¹¹⁴ That is four times the total number of forestry workers killed in Canada over the same period with 24,500 more workers in the Canadian industry than in the New Zealand industry.¹¹⁵

The CTU undertook a number of activities as part of the campaign to pressure the Government into introducing a more rigorous health and safety regime for the forestry sector and inquire into the sector's current health and safety practice.¹¹⁶ While the Minister of Labour, the Hon Simon Bridges MP, refused to undertake a government inquiry, he established a new health and safety agency, WorkSafe New Zealand, which approved a new code of practice and supported an "industry-led" inquiry into forestry health and safety.¹¹⁷

The CTU has since been granted leave to file a private prosecution against the employers (M&A Cross) of a Tokoroa forestry worker killed in a forestry incident.¹¹⁸ Under health and safety legislation WorkSafe New Zealand has the first right to prosecute for

110 Smith, above n 91, at 4.

111 Roger Smith "How Good are Test Cases?" in Jeremy Cooper and Rajeev Dhavan (eds) *Public Interest Law* (Basil Blackwell, Oxford, 1986) 271 at 274.

112 New Zealand Council of Trade Unions — Te Kauae Kaimahi "What Killed Ken Callow?" CTU <www.union.org.nz>.

113 Radio New Zealand "Forestry worker had little experience" (12 May 2014) <www.radionz.co.nz>.

114 Radio New Zealand, above n 113.

115 Radio New Zealand, above n 113.

116 Vaimoana Tapaleao "Safer forests family's aim" *New Zealand Herald* (online ed, Auckland, 4 April 2013).

117 Simon Bridges "Govt stepping up on forestry safety" (3 December 2013) Beehive <www.beehive.govt.nz>.

118 Alison King "Forestry death: Extension granted to prosecute firm" (10 May 2014) Rotorua Daily Post <www.nzherald.co.nz>.

workplace deaths and once legal action commences no one else can prosecute. However, WorkSafe New Zealand decided in February that it would not prosecute.¹¹⁹

Wide media attention accompanied the CTU's decision to launch a private prosecution over the death of Charles Finlay on a forestry site. The CTU's president, Helen Kelly, wrote an op-ed on a prominent blog-site titled "If it were someone you loved", arguing:¹²⁰

It is unclear why Worksafe has not taken this prosecution but my view is that the attitude has been that regardless of the inadequacy of the safety systems on the site (no lighting, long hours, no one stopped when they were unsure where Charles was on this dark site) the modus operandi of the regulator is to blame the worker. The reports into these deaths are full of excuses for what are fundamentally safety systems that will never keep these workers safe.

Similarly, the widow of Charles Finlay applauded the CTU's role in bringing this prosecution and described her disappointment at WorkSafe's decision not to prosecute:¹²¹

If they weren't going to be prosecuting anybody or doing anything about it then, ultimately, in my head, Charles was going to be singled out as the one that was in the wrong I felt sick. I couldn't stomach that. They didn't say as much, but I knew if they couldn't find any fault in the industry, and of course we know there's so much fault in the industry, that it was going to come down to Charles — that threw me more than anything.

Grant Nicholson argues this case was "part of a political push by the CTU saying that they want to hold all employers more accountable and particularly that they want to lift standards across the forestry sector".¹²² The CTU's press release accompanying the announcement stated:¹²³

So many of the problems in the forestry industry would be assisted though regulation by the government. But still Simon Bridges refuses to act to make New Zealand[s] most dangerous industry safer. The Government is failing these workers.

119 King, above n 118.

120 Helen Kelly "If it were someone you loved" (9 May 2014) *The Standard* <<http://thestandard.org.nz>>.

121 Matt Bowen "Widow: I applaud CTU probe" (23 April 2014) *Stuff* <www.stuff.co.nz>.

122 Guyon Espiner "Lawyer comments on CTU forestry prosecution" (Podcast, 12 May 2014) *Radio New Zealand* <www.radionz.co.nz>.

123 New Zealand Council of Trade Unions "CTU to take private prosecution over forestry death" (9 May 2014) *Scoop* <www.scoop.co.nz>.

Thus the CTU entered litigation in the hope of shaping political discourse. Litigation provided ripe publicity opportunities. These media campaigns are designed to win favourable public opinion, to build the brand of the campaigners and to shame or tarnish those who they are challenging so that they reconsider their position. In the CTU and the *Collier* case (discussed below) in particular, litigation provides a unique forum to pressure politicians to act on an issue. The litigation enables a policy to be personalised through grievance, to reveal the human cost, to allocate blame and to propose alternatives. Litigation, therefore, has identifiable effects in shaping political discourse and building the persuasiveness of political claims. In this way, the CTU has used the villain–grievance–claimant structure to achieve an emotional connection around an obscure political claim.

2 *Undertaking Futile Litigation for Media: R v Central Birmingham Health Authority ex parte Collier*

The fact that litigation may be undertaken without an expectation of success demonstrates its social nature. Litigants bring lawsuits with the knowledge that losing may be inevitable, but the publicity value — the articulation of the is–ought difference inherent in litigation — could be worth the expense.

Levitsky’s study of the Chicago Lesbian, Gay, Bisexual and Transgender (LGBT) movement demonstrates the value of litigation outside of winning the case. This study concluded that activist interviewees across the LGBT movement saw the publicity associated with the litigation as valuable rather than the litigation itself.¹²⁴ Susan Curry, former Executive Director of AIDS Legal Council of Chicago stated:¹²⁵

[I]t’s the publicizing of litigation or litigating in tandem with public relations ... [that] can be a powerful social reform tool. Obviously, if you just litigate quietly and get the best outcome for your client or clients, that’s great. But that’s not going to have any of the impact you’d desire for the greater class without any kind of spin [People] have to read the *Chicago Tribune*, see it on the news, and it has to be in their face for them to get used to it, to learn.

R v Central Birmingham Health Authority ex parte Collier provides an example where a campaign group brought a case in the knowledge

124 Sandra R Levitsky “To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements” in Austin Sarat and Stuart A Scheingold (eds) *Cause Lawyers and Social Movements* (Stanford University Press, California, 2006) 145 at 151.

125 At 151.

that losing may be inevitable, but the publicity value could be worth it.¹²⁶ *Collier* was newsworthy and a Birmingham group called “Young at Heart” exploited this fact to pressure the Government. In *Collier*, the claimants consisted of a group of parents whose young children were affected by the postponement of crucial cardiovascular operations due to National Health Service staff shortages. *Collier* had been at the top of the urgent list for a bypass operation before it was postponed three times in three months.¹²⁷ The parents applied for the Court to order surgery, claiming the lack of intensive care beds postponed the surgeries the child “desperately needed” and that the child would probably die without it.¹²⁸

Young at Heart had already unsuccessfully applied to the court over another child in need of a cardiovascular operation against the same NHS district. They knew there was little prospect of success. However, in the first case the media attention was so great that Prime Minister Thatcher intervened, promising Parliament that the operation would occur soon, and organised the medical procedure. Young at Heart therefore decided to continue litigating whenever an opportunity presented itself, not because they thought they had a chance of winning but because litigation was “a way to get things done”.¹²⁹

Persuasiveness and the Courts

The litigation process plays an integral role in the process of political persuasion within campaigns. Persuasive messages attempt to “change actor preferences and to challenge current or create new collective meaning”.¹³⁰ Indeed, “persuasion is considered the centrally important mechanism for constructing and reconstructing social facts”.¹³¹

According to Finnemore, “[n]ormative claims become powerful and prevail by being persuasive”.¹³² Contestable claims of a political nature become accepted by being persuasive. Social psychology literature suggests persuasion and influence happen through distinct, recognisable mechanisms, including linking and activation.¹³³

This section will use social psychology to examine how litigation can make normative claims persuasive and become accepted

126 *R v Central Birmingham Health Authority ex parte Collier* (EWCA, 6 January 1988).

127 At 1.

128 At 1.

129 Harlow and Rawlings, above n 27, at 171.

130 Rodger A Payne “Persuasion, Frames and Norm Construction” (2001) 7 EJIR 37 at 38.

131 At 38.

132 Martha Finnemore *National Interests in International Society* (Cornell University Press, Ithaca (NY), 1996) at 141.

133 Maria Rost Rublee “Taking Stock of the Nuclear Nonproliferation Regime: Using Social Psychology to Understand Regime Effectiveness” (2008) 10 International Studies Review 420 at 421 and 426.

within political discourse. In this sense, campaigns deploy litigation and “legality” to alter the prevailing political discourse and build persuasive value.

1 Linking

“Linking” involves agents connecting a normative claim to well-established values, practices and communal identity.¹³⁴ In evaluating how to respond to a norm, actors consider how it fits in with their current value system. Hence, linking adds persuasive value. Litigation provides a forum for linking a new political claim to established practice. Indeed, NGOs may link to the values courts represent, such as “justice” and “authority”, or strong legal terms, such as “rights”, to bolster the persuasiveness of the message, gain media traction and pressure law-makers. Litigation builds authority behind their brand and claim, provides a cause for supporters to rally behind and *links* to the social concept of “courts” to increase the effectiveness of their lobbying campaigns.

(a) Framing

The extent of coherency between new normative ideas and established existing normative ideas defines the persuasiveness of political claims. New claims are more likely to be accepted if they are associated with pre-existing ideas.¹³⁵ This series of links and active values “frames” the political claim at the heart of the deployment of litigation. As Hawkins describes:¹³⁶

Ideas and arguments are persuasive when they fit well or resonate with widespread preexisting understandings, a condition that applies to both rhetorical action and learning Persuasion is a fundamentally social and cognitive process that takes place within broader sets of understandings that facilitate communication and social action.

A frame is the “basic building block” used to construct social meaning and broadly resonant norms.¹³⁷ A frame is a persuasive device used to “fix meanings, organize experience, alert others that their interests and possibly their identities are at stake, and propose solutions to ongoing problems”.¹³⁸ They provide the basis by which people identify,

134 Rost Rublee, above n 133, at 426.

135 Payne, above n 130, at 43.

136 Hawkins, above n 15, at 784.

137 At 39.

138 Michael Barnett “Culture, Strategy and Foreign Policy Change: Israel’s Road to Oslo” (1999) 5 EJIR 5 at 25.

understand and interpret new information and allow “advocates to create or explain broader social meanings”.¹³⁹ They also ensure that new claims cohere with already accepted ideas and practices within a broader socio-political setting.¹⁴⁰ If the links are accepted as part of political discourse the political claim gains a weight that shapes political discourse. In subsequent debate, the links to values, institutions or rights used by campaigners constitute the “frame” by which any political claim is assessed.

(b) Linking to Values

Linking enables the campaign to connect its claim to values such as “justice”, “the rule of law” and underlying New Zealand identity. Political campaigning occurs in light “of certain conceptions of a possible shared future, a future in which certain possibilities beckon us forward and others repel us”.¹⁴¹ One such shared view is that we live in a society governed by the rule of law which administers “justice” through the institution of the courts. Indeed, the Supreme Court Act 2003 describes New Zealand’s continuing commitment to the “rule of law”.¹⁴²

Dispute resolution is an integral part of developing a political community and negotiating what concepts such as “justice” and “equality” mean in any given society. Part of this dynamic is the law’s ability to speak to and be linked to people’s conception of “the good”. As Judith Butler, citing Drucilla Cornell, says: “the law posits an ideality ... that it can never realize, and ... this failure is constitutive of existing law”.¹⁴³ The law “exists both in the ‘as yet’ failure to realize the Good and in the commitment to its realisation”.¹⁴⁴ This tension between “as yet” and the existing law forms the space in which political questions and disputes arise. The negotiation of “as yet” and choosing, by adjudicating disputes, the next codification of “law” is an ongoing and political feature of law. The law is radically social; it exists beyond the text of the judgment or statute. It:¹⁴⁵

139 Payne, above n 130, at 43.

140 At 43.

141 Alasdair MacIntyre *After Virtue: A Study in Moral Theory* (3rd ed, University of Notre Dame Press, Notre Dame (IN), 2007) at 215.

142 Section 3(2).

143 Judith Butler “Deconstruction and the Possibility of Justice: Comments on Bernasconi, Cornell, Miller, Weber” (1990) 11 *Cardozo L Rev* 1715 at 1716.

144 Austin Sarat and Stuart A Scheingold “What Cause Lawyers Do For, and To, Social Movements: An Introduction” in Austin Sarat and Stuart A Scheingold (eds) *Cause Lawyers and Social Movements* (Stanford University Press, California, 2006) 1 at 9.

145 Anne Norton “Transubstantiation: The Dialectic of Constitutional Authority” (1988) 55 *U Chi L Rev* 458 at 469.

... speaks to the people and their posterity of their identity and aspirations. It claims to speak to them not as an artifact of the past, but as the present Law.

Litigation campaigns exploit this tension between the “as yet” and existing law. The New Zealand Child Poverty Action Group (CPAG) justified its use of litigation by stating in a media release that:¹⁴⁶

The point of the case is to reassert the fundamental New Zealand ethos of equality of treatment. The needs of children don't change when a parent's circumstances change. [Quoting CPAG's economics spokesperson, Associate Professor Susan St John:] “Until we give all low income children the same rights to state assistance we will make little progress in tackling the worst of child poverty in New Zealand ... Maori and Pasifika children are affected disproportionately”.

Similarly, in *Ministry of Health v Atkinson* the claim occurred in the space between the normative right to be free from discrimination and the existing law which barred family members from being paid carers. The litigation campaign linked this right with concepts of love and family in a way that built a conception of the good within the law. For instance, news articles on the *Atkinson* decision included carers telling personal stories of struggle and love: “[i]t means my life's work has been recognised. That's the most important thing”.¹⁴⁷ The case, therefore, presented a highly political view of New Zealand social values in a way that linked justice, rights and ideas of family to build a positive vision of the law.

(c) Institutional Linking

Campaigns can connect their claim to “the courts” as a symbol of justice, power and authority. Campaigns use this authority to increase their claim's weight in political discourse and broaden the appeal of their message. Courts within Westminster democracies act as the body that emphatically states the law and provides a political claim with authority that increases its weight within political discourse. Saskia Righarts and Mark Henaghan conducted a study on the public's perception of the New Zealand court system and over 65 per cent of respondents “agreed” or “strongly agreed” they would get “a fair hearing in the New Zealand court system”.¹⁴⁸ This contrasts with the

146 Child Poverty Action Group “CPAG heads back to court” (26 May 2013) <www.cpag.org.nz>.

147 Kirk and Levy, above n 19.

148 Saskia Righarts and Mark Henaghan “Public Perceptions of the New Zealand Court System: An Empirical Approach to Law Reform” (2010) 12 Otago LR 329 at 332–337.

public's low regard for Parliament, described in the report *Restoring Public Confidence in Parliament*.¹⁴⁹

Campaigns can therefore leverage off the public's trust in the courts to add persuasive value to their campaign. After the *Atkinson* decision, one of the plaintiffs, Mr Robinson, "called on the Ministry and the Government to drop their legal battle", on grounds that "five of the best legal minds in the country ... have carefully considered the case and thrown it out".¹⁵⁰ The claimants deployed the courts' authority to justify their political claim and ensure it is influential in the political discourse. The Court's declaratory role in *Atkinson* enabled the claimants to leverage their claim to increase pressure on the Government.

By linking a political claim with the courts, the actor builds credibility and authority behind the claim. The drive to associate claims with courts is evident in the Fawcett Society litigation. In 2010, the United Kingdom Conservative–Liberal Democrat coalition Government announced its first budget. It contained widespread cuts to social service provision as part of the Government's response to the global financial crisis. The Fawcett Society launched a legal challenge on the emergency budget under the right contained in the Gender Equality Duty, which allows interested parties to request judicial review of decisions made by public authorities that have not given regard to gender equality.¹⁵¹

The Fawcett Society provided to the Court and media a robust report, demonstrating in detail the cumulative effects of reducing public spending:¹⁵²

Taken individually, the elements that make up the current austerity package will make life more difficult for many women across the UK; added together they spell a tipping point for women's equality.

The report demonstrated that, as part of the austerity programme, around twice as many women would lose their jobs in the public sector than men and around half a million women faced redundancy.¹⁵³ A further 72 per cent of people who would receive a wage cut in real terms would be women.¹⁵⁴ Finally, public sector cuts, service cuts and cuts to voluntary organisations would have

149 Committee of Former Speakers of the House of Representatives "Restoring Public Confidence in Parliament" (May 1998) McKinley Douglas <www.mdl.co.nz>.

150 Kirk and Levy, above n 19.

151 Sex Discrimination Act 1975, s 76A; and *R (on application of the Fawcett Society) v Chancellor of the Exchequer* [2010] EWHC 3522 (Admin).

152 Fawcett Society "The Impact of Austerity on Women" (March 2012) <www.fawcettsociety.org.uk> at 3.

153 At 6.

154 At 11.

disproportionate effects. The Fawcett Society calculated that £5.7 billion of the £8.1 billion in savings the budget raised came from women.¹⁵⁵

The Court ultimately declined the application for review and the case did not go to a substantive hearing. Ouseley J dismissed the application as “not arguable, or ... academic”.¹⁵⁶ The Government’s lawyers conceded that it had not carried out equality assessments as required by the legislation before setting the budget in some areas, including the public sector pay freeze and benefit cuts. They admitted this was “regrettable”.¹⁵⁷

Speaking after the hearing, the Fawcett Society’s chief executive Ceri Goddard said:¹⁵⁸

While we are disappointed not to have been granted a judicial review of the Budget, we are pleased the government has heard that budgetary decisions are not above equality law — and that a court of law agreed with us that the government’s economic processes need to be looked at again.

When lodging the application the Fawcett Society justified the application by stating that “[t]he blatant unfairness and the sheer scale of the impact this Budget could have on women have left [it] little choice but to resort to the courts for action.”¹⁵⁹ Further, it expressed the view that “in times of economic crisis it becomes more not less important to consider women’s basic rights, and observe the laws put there to safeguard them”.¹⁶⁰ The Fawcett Society linked its political claim to the courts as a symbol of justice, independence and authority.

(d) Linking to Rights

Litigation in this context involves the re-articulation of an ostensibly political claim in terms of rights and duties. In contemporary New Zealand society, such litigation often invokes human rights under the Human Rights Act 1993 or the New Zealand Bill of Rights Act 1990. The re-articulation of a grievance as “rights and duties” is an integral part of the campaign process. Indeed, McCann describes two processes of “rights consciousness raising”, or legal activism, building

155 BBC News Service “Legal challenge to Osborne Budget is refused” (6 December 2010) BBC News <www.bbc.co.uk>.

156 *R (on application of the Fawcett Society) v Chancellor of the Exchequer*, above n 151, at [22]; and Lucy Phillips “Fawcett Society loses Budget discrimination challenge” (7 December 2010) Public Finance <www.publicfinance.co.uk>.

157 Phillips, above n 156.

158 Phillips, above n 156.

159 BBC News Service “Fawcett Society in legal challenge to ‘unfair’ Budget (1 August 2010) <www.bbc.com>.

160 BBC News Service, above n 155.

on the notion of deploying the cultural resonance of legality.¹⁶¹ The first of these processes involves formulating a legal grievance surrounding a political claim. Sarat and Scheingold build on McCann's work to note that rights claims in this context are "intrinsic to the construction of a cause rooted in grievance and validated by discursive association with constitutional and legal rights".¹⁶²

Paul Rishworth discusses the prominent and authoritative role that rights discourse has in contemporary Western societies.¹⁶³ He describes the idea of human rights as "the new secular ethical code for public and private realms" constructed around the metaphor of "judgment and redemption".¹⁶⁴ According to this metaphor, respect for rights is the crux of what being "civilised" means and rights abusers are the new "savage".¹⁶⁵ Furthermore, to borrow Cass Sunstein's phrase, linking rights to part of an "incompletely theorized" rights agreement builds the resonance of a political claim.¹⁶⁶ Rights are to be respected and democratic societies do ordinarily respect them. Eleanor Roosevelt identified this communicative element of rights as she drafted the United Nations Universal Declaration of Human Rights. She stated that a "curious grapevine" would carry the "message" of human rights to those oppressed by totalitarian and authoritarian regimes.¹⁶⁷ The rights claim, therefore, provides a shortcut to the normative power of rights in contemporary political discourse to elevate the particular claim to an important position within the discourse.

A commitment to adhere to human rights "grows its own legs" and becomes functionally autonomous through litigation. The role of consistency is important. Successful linking is most likely to occur where the new normative claim coheres with settled practice. Underpinning this is a desire for agents to be consistent in their social actions and attitudes.

Cialdini argues that this tendency is supported by the value placed on personal consistency in society.¹⁶⁸ By being consistent with previous decisions we simplify daily life because, psychologically, we

161 Michael McCann "Law and Social Movements" in Austin Sarat (ed) *The Blackwell Companion to Law and Society* (Blackwell Publishing, London, 2004) 506 at 511.

162 Sarat and Scheingold, above n 144, at 10–11.

163 Paul Rishworth "Human Rights and the Reconstruction of the Moral High Ground" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis, Wellington, 2006) 115 at 115.

164 At 118.

165 At 121.

166 See generally, Cass R Sunstein *Designing Democracy: What Constitutions Do* (Oxford University Press, Oxford, 2001) at 50.

167 William Korey "Human Rights NGOs: The Power of Persuasion" (1999) 13 *Ethics and International Affairs* 151 at 151.

168 Rost Rublee, above n 133, at 427.

no longer need to process all the relevant information: commitments “grow their own legs” as people create other reasons to support the justifications for commitments already made.¹⁶⁹

Cialdini’s thesis is supported through the internalisation of reiterated prior performance and behavioural practices as commitments “become functionally autonomous from the interests that may have once inspired them”.¹⁷⁰ In this way the invocation of rights in litigation is a speech act, both asserting negative grievance and a positive construction of appropriateness in the form of the content of the right “in a free and democratic society”. By linking to rights claims in an authoritative court, the claim becomes one of continuity with our prior commitments: to respect human rights, to uphold the rule of law and to have a free and open democratic society that values people. The particulars of the case give content to what is an inherently vague normative standard. It is thus through linking that NGOs provide the meaning and scope of rights and courts adjudicate on that proposed meaning and scope.

Most rights-based litigation links the authoritative concept of “rights” with a political claim in this way. For example, CPAG challenged the Government’s “In Work Tax Credit”, which was part of the Working for Families income assistance package, under s 19 of the New Zealand Bill of Rights Act 1990.¹⁷¹ The credit fulfilled the legislative objective of “mak[ing] work pay” by providing a \$60 per week tax credit to families provided they were not on a benefit.¹⁷² Children of beneficiaries were therefore excluded from the benefits of the tax credit. CPAG argued that this policy discriminated against children of beneficiaries on the grounds of their parents’ employment status.¹⁷³

CPAG filed a complaint with the Human Rights Commissioner alleging that the credit discriminated against individuals on the grounds of “employment status”. The Human Rights Review Tribunal noted “the lack of any consideration of discrimination on the ground of employment status in the Attorney-General’s report [was] ‘surprising’ and ‘unfortunate’”.¹⁷⁴ The High Court similarly commented:¹⁷⁵

169 Robert Cialdini *Influence: Science and Practice* (4th ed, Allyn and Bacon, Boston, 2001), as cited in Rost Rublee, above n 133, at 427.

170 Philip Tetlock and James Goldgeier “Psychology and International Relations Theory” (2001) 4 Annual Review of Political Science 67 at 67 as cited in Rost Rublee, above n 133, at 427.

171 *Child Poverty Action Group Inc v Attorney-General* (2011) 9 HRNZ 687 (HC) at [1].

172 At [15], [35]–[38] and [41].

173 *Child Poverty Action Group Inc v Attorney-General*, above n 171, at [101].

174 At [25], citing the Tribunal’s decision at [76]–[79].

175 *Child Poverty Action Group Inc v Attorney-General*, above n 171, at [25].

We are ... troubled by the absence of any analysis of the potential discrimination, particularly in light of the commitments made by signing international instruments such as the International Covenant of Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (UNCROC) which address such matters.

Consistency with international human rights commitments was deployed to give the political claim greater weight within political discourse.

2 Activation

The second component of persuasiveness is activation of the frame within the political discourse. At any given time, New Zealand's political discourse consists of many claims, issues and actors:¹⁷⁶

In fact, there may be multiple, and even incompatible, norms vying for attention in many situations, and our actions may depend to a large extent on the type of norm that is triggered by the context ...

Litigation activates a particular normative claim within the political discourse. Activation means "being made focal" or "having been highlighted".¹⁷⁷ Cialdini and Trost's studies showed that people are more likely to adhere to a norm that has been emphasised.¹⁷⁸ The Fawcett Society litigation activated latent norms in British political discourse. Several possible frames dominated the budget: the global financial crisis, government debt, spending control and the debate between "austerity" and "growth" policies. However, the Fawcett Society's litigation successfully activated the gender equity norms and made the budget's disproportionate effect of women an issue.

Although the Fawcett Society's judicial review did not overturn the budget, it was quite clear that the Fawcett Society's objectives were met. The Fawcett Society used "legality" and the Court's authority to activate gender equity norms and increase their weight in political discourse: "the Fawcett challenge fuelled an intense media debate on the inequality of the budget and the comprehensive spending review ... on equality grounds".¹⁷⁹ Indeed, a BBC headline read "Fawcett Society in legal challenge to 'unfair' Budget: the

176 Robert Cialdini and MR Trost "Social Influence: Social Norms, Conformity, and Compliance" in DT Gilbert and ST Fiske (eds) *The Handbook of Social Psychology* (4th ed, McGraw Hill, New York, 1998) vol 2, 151 at 152 as cited in Rost Rublee, above n 133, at 426.

177 Rost Rublee, above n 133, at 426.

178 Cialdini and Trost, above n 176, at 161 as cited in Rost Rublee, above n 133, at 426.

179 Hazel Conley "Using equality to challenge austerity: new actors, old problems" (2012) 26 *Work, Employment and Society* 349 at 350.

government is facing a legal challenge to its Budget from a leading women's rights group which claims it could be unlawful".¹⁸⁰ It went on to record the Fawcett Society's concern that the Government had "failed to fully assess whether its savings proposals would increase inequality between men and women" as "£5.8bn of £8bn savings outlined in the Budget would come from women" which the Society described as "blatantly unfair".¹⁸¹ The opposition's Women's Affairs spokesperson quickly backed the Fawcett Society's legal challenge stating that "at best ministers seem blind to women's lives; at worst, it's an ideological drive to turn back the feminist clock".¹⁸² The Government later admitted it did "not hold an Equality Impact Assessment for the June 2010 budget"¹⁸³ and the media scrutinised the financial detail of the budget noting that women were disproportionately affected by nearly all of the cuts.¹⁸⁴

This litigation, despite its low prospect of success, activated gender equity as an issue in a context where concern with government debt was preminent. The Fawcett Society used litigation and the "is-ought" claim to influence political discourse in a way that successfully put an issue on the political agenda and demanded a response.

VI CONCLUSION

Within traditional Westminster constitutionalism dispute resolution is considered to be separate from *political* decision-making. Parliamentary supremacy is predicated on Parliament being afforded exclusive occupation of the "political" sphere. For consistency with this principle, courts discarded any political function and sought to occupy a neutral sphere outside of political discourse. This article has deconstructed this law-politics division by arguing that the use of litigation as a vehicle for political discourse exposes the political nature of the judicial function.

Litigation involves the resolution of a normative and descriptive claim about social interaction. Litigants invoke shared norms and argue they are not being met. Part III argued that litigation entails a public claim within a claimant-grievance-villain framework. In this framework each party to litigation performs a social role that

180 BBC News "Fawcett Society in legal challenge to 'unfair' Budget" (1 August 2010) <www.bbc.co.uk>.

181 BBC News, above n 180.

182 BBC News, above n 180.

183 Beatrix Campbell "The Fawcett Society takes the cuts to court" *The Guardian* (online ed, London, 22 October 2010).

184 Campbell, above n 183.

necessitates advancing both a normative and descriptive account of social interaction and authoritatively resolves the difference between the “should” and “is” through the use of state power.

Through this performance, litigation is not merely a process of identifying and applying rules. What constitutes a breach of a standard is continually defined and negotiated through disputes in a social and therefore political way. Despite the clear demarcation orthodox Westminster constitutionalism requires, the normative claims inherent in litigation resonate throughout political discourses and contribute significantly to determining appropriate social behaviour and the scope of rights and duties within society. Litigation is an ongoing process of negotiating political decisions in Westminster democracies.

Litigation has identifiable influences and effects on political discourses and actors. Part V demonstrated that litigation is a vehicle for political discourse to pressure decision-makers and persuade public opinion. Litigation and “law” is deployed to advance normative political claims in a way that puts courts at the heart of political issues and renders explicit the political function of courts. Judges are political participants, exercising influence in constructing and influencing political discourses. Accordingly, the “traditional vision of an apolitical, non-policy making, law-discovering court” should be replaced by “that of a court embedded in the political process and making political decisions”.¹⁸⁵

185 Martin Shapiro and Alec Stone Sweet *On Law, Politics, and Judicialization* (Oxford University Press, Oxford, 2002) at 24.