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OFFICIOUS INTERMEDDLING OR PROTECTED FIRST AMENDMENT ACTIVITY? THE CONSTITUTIONALITY OF PROHIBITORY CHAMPERTY LAW AFTER *CITIZENS UNITED*

Bradley C. Tobias*

> Only once was Judge Taylor ever seen at a dead standstill in open court, and the Cunninghams stopped him. Old Sarum, their stamping grounds, was populated by two families separate and apart in the beginning, but unfortunately bearing the same name. The Cunninghams married the Coninghams until the spelling of the names was academic "academic until a Cunningham disputed a Coningham over land titles and took to the law. During a controversy of this character, Jeems Cunningam testified that his mother spelled it Cunningham on deeds and things, but she was really a Coningham, she was an uncertain speller, a seldom reader, and was given to looking far away sometimes when she sat on the front gallery in the evening. After nine hours of listening to the eccentricities of Old Sarum's inhabitants, Judge Taylor threw the case out of court. When asked upon what grounds, Judge Taylor said, "Champertous connivance," and declared he hoped to God the litigants were satisfied by each having their public say. They were. That was all they had wanted in the first place.[1]

For many Americans, Harper Lee's timeless, Pulitzer Prize–winning classic, *To Kill A Mockingbird*, is required reading in elementary education, and the phrase "champertous connivance" frequents many accompanying vocabulary lists paired with the revered novel. The stoic, cigar-chewing Judge Taylor is portrayed as a fair, yet practical jurist who enlists Atticus as the defense attorney for Tom Robinson, a black man who is brought up on baseless charges of rape in Maycomb, Alabama, during the Jim-Crow era.[2] In the passage above, Judge Taylor allows feuding families to quibble in the public forum, understanding that their claims are likely frivolous and without merit.[3] Without objection from either the Cunninghams or the

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[1] HARPER LEE, TO KILL A MOCKINGBIRD 165 (1960).

[2] *See generally id.*

[3] *See id.* at 165.

Coninghams, Judge Taylor disposes of the case on a seemingly obscure ruling of champertous connivance.[4] In fact, given the brief summary of the case, the doctrine of champerty is likely wholly irrelevant to this small dispute between families over titles to land. However, this passage illustrates one of the overarching themes of this Note: the courtroom as a public forum for speech for both litigants and their supporters and the doctrine of champerty as a powerful claim-dispensing weapon and potential barrier quelling that speech.

In the United States, third-party litigation finance has quickly become a major global investment market over the past several decades.[5] While many legal scholars have correctly argued for more regulation in third-party litigation to protect against ethical and financial abuses, one of the biggest obstacles creating uncertainty today in the viability of large commercial litigation lenders is the number of antiquated champerty and maintenance statutes[6] that are still on the books in most states. Changing perceptions of litigation, influenced heavily by the Civil Rights movement during the middle of the century, were instrumental in defining litigation as a form of political expression and an avenue by which less politically powerful members of society may seek to enforce their rights.[7] Given the political nature of legal services, some courts and legal scholars have suggested that outside investment—either in individual lawsuits or in law firms—may be constitutionally protected.[8] The Supreme Court's careful distinction between litigation as political expression and litigation for pecuniary gain emanating from its decision in *NAACP v. Button*[9] has likely been blurred in later cases, culminating in the decision in *Citizens United v. Federal Election Commission*,[10] which resulted in a ruling that protected unlimited corporate and union independent expenditures in election campaigns.[11] Though *Citizens United* is a campaign finance case, many have argued, and this Note follows the same paradigmatic approach, that the broadly sweeping language employed by Justice Anthony Kennedy can be read to apply outside of the election law context—to arenas where political speech restrictions may run afoul of First Amendment limits. This Note will argue that state champerty and maintenance statutes, as they apply to prohibiting commercial third-party litigation lending activities, are unconstitutional

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4 *See id.*

5 *See* Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 455 (2012) [hereinafter Steinitz, *The Litigation Finance Contract*] ("Litigation funding—for-profit, nonrecourse funding of a litigation by a nonparty—is a new and rapidly developing industry. It has been described as one of the 'biggest and most influential trends in civil justice' today by RAND, the *New York Times*, and others.").

6 See *infra* Part II for expanded definitions of *champerty* and *maintenance*.

7 *See infra* Part III.

8 *See infra* Part IV.

9 371 U.S. 415 (1963).

10 558 U.S. 310 (2010).

11 *Id.* at 365.

under the First Amendment, as seen with the recent holding in *Citizens United*, coupled with changing attitudes towards the nature of litigation.

Part I of this Note delves into the current landscape of the litigation finance industry in the United States, examining the development of the industry and current legal and ethical dilemmas facing both litigants and lenders. Preparing for a First Amendment analysis, Part I pays close attention to the problems that could potentially serve as government interests in a strict scrutiny speech restriction analysis of categorical prohibitory champerty law. This Note examines the legal, ethical, and practical problems that come with the territory of third-party litigation finance agreements. Part II explains the development of First Amendment protection of litigation and attorney conduct in the United States, starting with *Button* in 1963 and tracing Supreme Court First Amendment jurisprudence through commercial speech, solicitation, and advertising. Part III discusses *Citizens United* and its effect on the commercial-speech doctrine and application to categorical champerty laws that would prohibit commercial litigation financing. In Part III, this Note concludes that general prohibitory champerty laws that have not been narrowly tailored to allow the government to curtail the legal and ethical problems that might be associated with litigation finance are unconstitutional. In applying a post–*Citizens United* First Amendment analysis, categorically prohibitory champerty laws are not constitutional. Finally, the Conclusion suggests ways to protect significant government interests in preventing legal and ethical problems without categorically prohibiting third-party litigation finance agreements and promoting a robust litigation finance industry which can foster bargaining power parity between plaintiffs and defendants and promote a more just legal system.

I. THE BACKGROUND AND DEVELOPMENT OF THE THIRD-PARTY LITIGATION FINANCE INDUSTRY

A. Development and Current Picture of Third-Party Litigation Finance in the United States

Commercial litigation finance is a growing industry in the United States with the potential to attract numerous investors funding plaintiffs claims seeking lucrative returns.[12] The concept of third-party commercial litigation finance is relatively simple: third-party investors advance a sum of money to plaintiffs in civil cases to fund all or some of their attorney's fees, and when a settlement or judgment is reached, the investors take a sizable percentage of the winnings.[13] Third-party

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[12] *See, e.g.*, Kevin M. LaCroix, *Litigation Funding: A U.S. Growth Industry?*, D&O DIARY (Apr. 10, 2012), http://www.dandodiary.com/2012/04/articles/securities-litigation/litigation-funding-a-u-s-growth-industry/.

[13] *See, e.g.*, Ashby Jones, *On the Burgeoning Industry of Lending for Litigation*, WALL ST. J. (Nov. 15, 2010, 9:35 AM), http://blogs.wsj.com/law/2010/11/15/on-the-burgeoning-industry-of-lending-for-litigation/.

litigation financing is a not-too-far distant cousin from the contingency-fee model, in which law firms and attorneys perform legal services conditionally free of charge to clients unless the case is successful, in such instance the client owes the attorneys a portion of the judgment or settlement winnings.[14] Third-party litigation finance, on a large scale and commercial level, has arisen as "the recent convergence of unfavorable economic conditions, the consequent desire for sound investment prospects, and the enormous resources presented by the litigation market have created the perfect opportunity for the entrepreneurial investor."[15] In its everyday practice, "funds advanced often come from a group of investors who provide cash to [third-party litigation funding companies] according to the terms of their underlying investment agreement."[16] The companies then solicit applicants with pending litigation claims and advance money to injured parties in cases that are deemed likely to result in a damages award large enough to repay the amount advanced and reap a profit for the lender and the investors.[17] When the invested parties lose, however, the third-party litigation lenders forfeit their entire investment because the loans they offer are nonrecourse: if the financed party loses its case, it is not obligated to pay anything back to the lender.[18] Adding to the attractiveness of third-party litigation financing for investors is the fact that returns from third-party litigation funding are uncorrelated to rises and falls in markets because cases will be resolved by the judicial system irrespective of what is happening to asset prices in the wider economy.[19]

The practice has grown so prevalent and lucrative over the past two decades that it has attracted some of the world's largest banks to position themselves into the business.[20] Large scale litigation finance is not native to the United States.[21] Third-party litigation funding first developed in Australia during the early 1990s and soon spread over to other common-law countries such as the United Kingdom and New

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[14] BLACK'S LAW DICTIONARY 338 (8th ed. 2004).

[15] Jasminka Kalajdzic et al., *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 127–28 (2013).

[16] Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 620 (2007).

[17] *Id.*

[18] Mariel Rodak, Comment, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503, 506–07 (2006).

[19] *See* Claire Madden, *Third-Party Commercial Litigation Funding—An Investor's View*, LAW. (Oct. 10, 2012), http://www.thelawyer.com/third-party-commercial-litigation-funding-an-investors-view/1014815.article (explaining that the potential for a market to develop around litigation investment is vast).

[20] Major banks including Citigroup, Credit Suisse, Deutsche Bank, and TD Bank have entered into the business of lawsuit lending. *See* Binyamin Appelbaum, *Putting Money on Lawsuits, Investors Share in the Payouts*, N.Y. TIMES, Nov. 15, 2010, at A20. Some of these banks finance the specialized lawsuit lender firms, discussed *infra*, while others lend directly to lawyers and plaintiffs. *Id.*

[21] *See* Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT'L & COMP. L. 343, 360 (2011).

Zealand.[22] It also developed in some European civil-law countries such as Germany, Switzerland, and Austria.[23] In the United Kingdom, the growth of litigation finance has come in two different stages.[24] In the first stage, "relatively small operations set up by former contingency fee lawyers who recognized the demand for such lending services and oftentimes engaged in predatory lending."[25] These lenders were primarily engaged in small claims, "often in personal injury cases."[26] The second stage, which is reflective of the modern setting of commercial litigation lending across the world and in the United States, is populated by institutional investors, including major banks and companies specializing in the practice.[27] Large specialized companies, such as Juridica Investments, Ltd., and Burford Capital, make litigation financing their sole practice[28] and have both become publicly traded companies on the London Stock Exchange's Alternative Investment Market (AIM).[29] These two lenders have expanded into the United States, investing in a broad range of lawsuits and funding a number of cases handled by major law firms, including Skadden Arps, Clifford Chance, Allen & Overy, and Hogan Lovells.[30] Between these two litigation investment behemoths—the largest two in the world in terms of capital—over five-hundred million dollars in case investment assets are managed.[31] Estimation of the amount of assets managed within the entire industry is difficult, but some industry participants have estimated that there is over one-billion dollars of funds currently managed for the sole purpose of financing litigation.[32] Given the current size and growth of the market for third-party investment in lawsuits, it is quite plausible that in the future a secondary market may arise from the trading of shares in litigation.[33] This

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[22] *Id.*

[23] *Id.*

[24] *See* Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1277 (2011) [hereinafter Steinitz, *Whose Claim Is This Anyway?*].

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1276–77.

[28] *See About Juridica*, JURIDICA INVESTMENTS LTD., http://www.juridicainvestments.com/about-juridica.aspx (last visited Apr. 15, 2014); *Who We Are*, BURFORD CAP., http://www.burfordcapital.com/who-we-are/ (last visited Apr. 15, 2014).

[29] *See* Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 572–73 (2010).

[30] *See* Ashby Jones, *Third-Party Litigation Funding Stepping up in U.K.*, WALL ST. J. (Mar. 20, 2008, 5:20 PM), http://blogs.wsj.com/law/2008/03/20/third-party-litigation-funding-stepping-up-in-UK/.

[31] *See About Juridica*, JURIDICA INVESTMENTS LTD., http://www.juridicainvestments.com/about-juridica.aspx (last visited Apr. 15, 2014); *Who We Are*, BURFORD CAP., http://www.burfordcapital.com/who-we-are/ (last visited Apr. 15, 2014).

[32] *See* Steinitz, *The Litigation Finance Contract*, *supra* note 5, at 459 n.1.

[33] *See* Steinitz, *Whose Claim Is This Anyway?*, *supra* note 24, at 1282 ("The last couple of years have also ushered in a secondary market in legal claims. Predominantly, this secondary market takes the form of litigation-funding firms going public—selling shares to the

Note is primarily focused on investigating the relationship of the champerty doctrine with these institutional investors rather than the smaller consumer-oriented lenders.

B. Contrasting Benefits of Third-Party Litigation Finance with Potential Ethical and Legal Problems

While this Note argues for the implication of striking down state champerty and maintenance laws barring the practice of third-party litigation, it is important to understand the context of the debate over the merits of the practice in order to frame third-party litigation as a form of speech. As will be discussed *infra*,[34] it is vital to point out the benefits that third-party litigation lenders advance to potential plaintiffs because these benefits will provide the primary fodder for advancing the idea that third-party litigation investments are protected by the First Amendment.[35] Conversely, the potential problems associated with third-party financing will serve later as government interests that might be asserted in a defense of categorical prohibitory champerty law under a First Amendment strict scrutiny analysis.

The benefits of third-party litigation financing are clear. In the classic David-versus-Goliath sense, potential plaintiffs, looking to take on large corporate defendants with vast amounts of capital, will be able to use large third-party litigation lenders as their slingshot to knock down their by-all-other-accounts heavily favored opponent.[36] In this sense, David-like plaintiffs can have greater access to justice. When plaintiffs have the financial resources to pursue their cases, they can gain valuable legal resources, such as access to more elaborate evidence and the best testifying experts.[37] For plaintiffs who find themselves unemployed or at the fringes of their credit limits, "unable to borrow from banks and other credit-based lending institutions," third-party litigation funding provides an essential option for financing litigation critical to enforcing plaintiffs' rights.[38] In theory, with more capital on its

public and listing on stock exchanges. But it is possible that in the foreseeable future we will also be witnessing the creation of a new form of securities—legal-claims-backed securities." (citation omitted)).

[34] *See infra* Part III.

[35] While this Note primarily investigates litigation funding for plaintiffs, it is also available for defendants. In the David-versus-Goliath paradigm discussed *infra*, David-like defendants are able to take on third-party finance to manage their legal footprint in an economically efficient manner.

[36] *See, e.g.*, Bruce L. Beron & Jason E. Kinsella, *David vs. Goliath Patent Cases: A Search for the Most Practical Mechanism of Third Party Litigation Financing for Small Plaintiffs*, 38 N. KY. L. REV. 605, 608 (2011) (suggesting alternatives "for small private entities and individuals seeking to assert their legal rights in enforcing high-tech patents they hold against larger entities").

[37] Appelbaum, *supra* note 20, at A20.

[38] Courtney R. Barksdale, Note, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707, 733–34 (2007).

side, an otherwise financially limited plaintiff can have a higher chance of a case being truly decided on the merits rather than by a substantial imbalance of resources between the two sides.[39] Additionally, during the course of a lawsuit, a wealthy defendant will no longer have the option of dragging out the suit with excessive motions in order "to force the plaintiff to accept an unfair settlement."[40]

One particular area of litigation—intellectual-property litigation—is an excellent vehicle to illustrate the benefits of third-party litigation financing using the David-versus-Goliath analogy.[41] The proverbial small-time garage inventor, although perhaps a dwindling romantic vision in modern industry, invents a brilliant widget for which he seeks patent protection. Three years later, after his patent has issued, he reads in a trade industry magazine that a major company now markets and sells a widget strikingly similar to the one which the small inventor's patent covers. Short on capital and vastly outmanned, the small inventor has few options to turn to if he wants to enforce his patent against the major company. With a large sum advanced from a major third-party litigation lender, the garage inventor may hire top market patent litigation counsel and instantaneously gain leverage over the major company. Indeed, there are numerous intellectual-property cases where third-party litigation provides an instrumental role in evening the stakes and creating equilibrium in bargaining power.[42]

While the benefits of third-party litigation finance are clear, the potential ethical and financial issues present problems for the practice. On a broad level, some have argued as a general principle that a justice system cannot truly be impartial when there are business entities betting on it.[43] The most prominent and fervent critic of the practice appears to be the U.S. Chamber of Commerce, which, in 2009, called for the prohibition of third-party litigation financing at all levels.[44] The critics counter the David-versus-Goliath analogy, arguing that David-like plaintiffs do not always

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[39] *See* Rodak, *supra* note 18, at 515 ("[L]itigation financing gives plaintiffs increased leverage and bargaining power against typically large, wealthy defendant corporations with seemingly unlimited resources and time.").

[40] Barksdale, *supra* note 38, at 734.

[41] *See, e.g.*, *#1 Classic Litigation Funding*, BURFORD CAP., http://www.burfordcapital.com/casestudies/classic-litigation-funding/ (last visited Apr. 15, 2014) (explaining classic funding scenarios in which claimants have valuable claims but lack funds to afford preferable counsel or to prosecute the case).

[42] *See, e.g.*, Leader Techs., Inc. v. Facebook, Inc., 719 F. Supp. 2d 373 (D. Del. 2010); Mondis Tech., Ltd. v. LG Elecs., Inc., No. 2:07-cv-565, 2011 WL 1714304 (E.D. Tex. May 4, 2011); *see also #1 Classic Litigation Funding*, *supra* note 41.

[43] *See, e.g.*, Lisa Rickard, *Why Are Hedge Funds Allowed to Invest in Litigation?*, ATLANTIC (July 3, 2012, 1:42 PM), http://www.theatlantic.com/national/archive/2012/07/why-are-hedge-funds-allowed-to-invest-in-litigation/259345/.

[44] *See* Nate Raymond, *More Attorneys Exploring Third-Party Litigation Funding*, N.Y. L.J. (June 4, 2010), *available at* http://litigationwealth.com/wp-content/uploads/2013/07/More-attorneys-explore-third-party-litigation-financing.pdf.

have meritorious cases and are not gaining access to greater "justice" with funding from third-party litigation lenders.[45] Instead, critics argue that third-party litigation funding only increases the overall litigation volume, and these cases include the gamut of frivolous claims.[46] With an excess of these non-meritorious cases in the judicial system, justice will not be effectively distributed.[47] These general critiques are without significant empirical evidence and ignore the economic realities facing third-party litigation lenders. The argument that plaintiffs accepting third-party litigation funding will be fueled to test non-meritorious cases in court ignores potential economic common sense restrictions that third-party litigation lenders are unlikely to ignore.[48] Third-party litigation lenders are averse to risky claims which do not have a high probability of success. Controlled by their fiduciary duties to their inventors, third-party litigation lenders will be inclined to filter out these meritless claims and pass on investing.

Another, more focused critique of the romantic vision of third-party ligation financiers empowering plaintiffs to take on Goliath-like defendants is that in many cases plaintiffs already hold the upper hand in bargaining power.[49] Again, using patent litigation as a vehicle to illustrate, "[t]he average patent infringement case costs about $2 million to litigate."[50] Plaintiffs alleging that large corporate defendants are infringing their patents at first glance seem to have quite the disadvantage. However, empirical evidence shows that, on average, defendants bear the vast majority of litigation costs due to the factors inherent in the nature of patent litigation. For instance, defendants have the burden of proving patent invalidity because the patent-in-suit is valid, defendants risk preliminary injunctions against their products, and defendants also risk treble damages and attorney's fees if their patents are found to infringe willfully.[51] With all of these factors at play, the David-like plaintiff suddenly has grown significantly in stature and the Goliath-like defendant, with weakened bargaining power, has more incentive to settle regardless of the merits. In patent litigation at least, particularly in the setting where companies engage in the act of patent trolling—buying portfolios of patents with the sole intention of litigating—third-party litigation, lenders have an opportunity to swoop in

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[45] John Beisner et al., *Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States*, U.S. CHAMBER INST. FOR LEGAL REFORM 4 (Oct. 2009).

[46] *Id.*

[47] In *To Kill A Mockingbird*, Judge Taylor may agree with this notion. Without "champertous connivance" to throw out the frivolous case of quibbling between the Cunninghams and the Coninghams, Judge Taylor's docket may have been delayed, and Atticus may not have been able to fight on behalf of Tom Robinson. *See* LEE, *supra* note 1, at 165.

[48] *See* Lyon, *supra* note 29, at 593.

[49] *See* Beisner et al., *supra* note 45, at 4 (calling into question who is a "Goliath-like defendant").

[50] Joanna Shepherd Bailey et al., *Third-Party Litigation Financing*, 8 J.L. ECON. & POL'Y 257, 264 (2011).

[51] *Id.*

and exploit the unequal bargaining positions between the litigation parties to make a profit on their investment.[52] Scholars have argued for regulation as a solution to this problem, hoping to articulate rules which can continue to leverage the bargaining power of these David-like plaintiffs, but simultaneously rein in abuses like the above-mentioned situation.[53]

A very serious problem associated with third-party litigation financing is the potential breach of ethical obligations by attorneys.[54] When an investor invests in a lawsuit, she will have a desire to protect her investment. At the outset, investors will expend significant efforts evaluating litigation investment opportunities.[55] Investors, however, are generally barred from learning attorney-client privileged information by the rules of professional responsibility.[56] Publicly traded third-party litigation lenders that engage in lending to plaintiffs have a fiduciary duty to their investors which conflicts with the duty of confidentiality that attorneys owe to their clients.[57] In an unregulated market of litigation financing, lenders will be able to control the course and direction of the lawsuit by threatening or executing the withdrawal of funding from clients at any stage of the litigation they wish. Ethics opinions issued in Arizona, Florida, New York, Ohio, South Carolina, Utah, and Virginia reflect the concerns that these states have regarding litigation financing. According to these opinions, litigation financing violates fee-splitting prohibitions, yet attorneys are permitted to provide litigation finance companies with information about a client's case when the client gives informed consent and may share information about litigation financing with the client when doing so is in the client's best interest.[58] One particular context where the ethical problems with third-party litigation may be hard to maneuver around is the class-action lawsuit.[59] While third-party litigation finance can be an extremely helpful tool to realize a significant class recovery which might otherwise fall flat, the contract fees, commissions, and other

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[52] *Id.*

[53] *States Need to Regulate Litigation Financing Industry: Professor*, INS. J. (Jan. 11, 2012), http://www.insurancejournal.com/news/national/2012/01/11/230719.htm (quoting Professor Maya Steinitz arguing that federal and state governments need to soon adopt laws that regulate this growing market).

[54] *See, e.g.*, Beisner et al., *supra* note 45, at 7–8.

[55] *See* Bailey et al., *supra* note 50, at 260 ("Third-party capital tries to identify good cases in which [to] make an investment—similar to a portfolio manager identifying a good stock, or a contingency fee lawyer deciding on which cases to invest his or her time.").

[56] *See* Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 669 (2005).

[57] *See* Beisner et al., *supra* note 45, at 8–9 (discussing concern over third-party financiers interfering with attorney-client relationships).

[58] *See* Rodak, *supra* note 18, at 509 (citing Eileen Libby, *Whose Lawsuit Is It?: Ethics Opinions Express Mixed Attitudes About Litigation Funding Arrangements*, A.B.A. J., May 2003, at 36 (providing an overview of how various state ethics committees have addressed litigation financing)).

[59] *See* Beisner et al., *supra* note 45, at 8–9.

payments made to the financier may drastically reduce the amount of recovery for the class.[60] Further adding to the potential for abuse in the class action context, it is practically impossible to consult with all members of the class before third-party litigation finance agreements may be reached.[61] Naturally, uninformed class members may have a host of concerns when the case is ultimately disposed.

Another problem arises when sensitive case information is communicated to third-party litigation finance companies for purposes of investment decision-making: the waiver of attorney-client privilege for discoverability purposes. The general rule in federal courts is that attorney-client privilege is waived upon disclosure of privileged material to a third party.[62] However, the "common interest doctrine" is the exception to that rule.[63] In order to avoid potential waivers, litigating parties should consider carefully which documents they want to disclose to potential investors—specifically, limiting disclosure to only documents which are already expected to be produced in litigation.[64] Most importantly, prior to disclosing any documents to a potential investor, litigating parties should already have executed confidentiality, common interest, and non-disclosure agreements for evidentiary purposes and confidentiality protection.[65] The scope and boundaries of attorney-client privilege varies across the circuits, and thus the ultimate issue of whether documents disclosed to investors are discoverable will depend upon the location in which the suit is ultimately filed.[66]

Along with the power of withdrawal of funding, lenders may also be able to influence whether the cases are forced into court or into settlement.[67] In one case in North Carolina from 2001, a defendant's law firm brought a tortuous interference with contract claim, alleging that litigation-funding companies had interfered by secretly lending $200,000 to his client.[68] With its advance, the law firm claimed it

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[60] Kevin M. LaCroix, *Has the "Litigation Funding Moment" Arrived?*, D&O DIARY (Feb. 4, 2013), http://www.dandodiary.com/2013/02/articles/securities-litigation/has-the-litigation-funding-moment-arrived/.

[61] *See id.*

[62] *See* Beisner et al., *supra* note 45, at 8.

[63] *See, e.g.*, Leader Techs., Inc. v. Facebook, Inc., 719 F. Supp. 2d 373, 376 (D. Del 2010) ("The common interest doctrine is an exception to the general rule that the attorney-client privilege is waived following disclosure of privileged materials to a third party." (citing Union Carbide Corp. v. Dow Chem. Co., 619 F. Supp. 1036, 1047 (D. Del. 1985))).

[64] Lisa M. Thomas, *Third-Party Litigation Funding: Are Communications with Investors Discoverable?*, BAKER BOTTS INTELL. PROP. REP. (Dec. 2012), http://www.bakerbotts.com/file_upload/IPReport201212-Third-PartyLitigationFunding.htm.

[65] *Id.*

[66] *Id.*

[67] *See* Lisa Rickard, *A Legal View from America*, HUFFINGTON POST (July 20, 2012, 12:00 AM), http://www.huffingtonpost.co.uk/lisa-rickard/a-legal-view-from-america_b_1685927.html.

[68] *See* McLaughlin, *supra* note 16, at 641 (citing Weaver, Bennett & Bland v. Speedy Bucks Inc., 162 F. Supp. 2d 448, 450 (W.D.N.C. 2001)).

would be impossible for it to settle its client's claim for less than $1,200,000 in order to repay the debt of $600,000 after the lender's collection of a fifty-percent contingency fee.[69] On the other side, the plaintiff's law firm filed a counterclaim alleging that the defendant had intentionally induced the plaintiff to refuse the settlement offer and refuse the law firm attorney's advice, thereby violating the terms of the plaintiff's law firm retainer agreement.[70] While in this case, attorneys did not break rules of professional responsibility by sharing confidential attorney-client privileged information with third-party litigation lenders, the client broke free from the reins of her attorney's advice by acting in the interest of herself vis-à-vis her return on a loan made by a third-party litigation lender.[71] This is an example of how a third-party litigation lender can potentially poison the attorney-client relationship.[72] This issue is one in which a state government may have a legitimate interest in preventing, and specialized litigation regulations, as discussed *infra*, can still prevent these transgressions without categorically prohibiting all third-party litigation finance agreements.[73]

II. BARRIERS TO THIRD-PARTY LITIGATION FINANCING

Two concepts that have existed in common law since medieval England and are derived from ancient Greek and Roman law—maintenance and champerty—are the two major legal barriers to the third-party litigation finance industry.[74] Maintenance is defined by *Merriam-Webster's Dictionary* as "an officious or unlawful intermeddling in a legal suit by assisting either party with means to carry it on."[75] Champerty is a particular type of maintenance, wherein the party providing maintenance seeks to profit from the suit: It involves "[a]n agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim."[76]

The U.S. Supreme Court offers its own succinct definition of the doctrines: "Put simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome."[77] Champerty may also be defined more pejoratively, as "an agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim

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69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*
73 *See infra* Conclusion.
74 *See* Ari Dobner, Note, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1543–44 (1996).
75 *Maintenance Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/maintenance (last visited Apr. 15, 2014).
76 BLACK'S LAW DICTIONARY 262 (9th ed. 2009).
77 Lyon, *supra* note 29, at 579 (citing *In re* Primus, 436 U.S. 412, 424–25 n.15 (1978)).

as consideration for receiving part of any judgment proceeds."[78] In medieval times, feudal lords subsidized their subjects' litigations for profit, "underwrit[ing] suits against their enemies as a form of private warfare to weaken their opponent's coffers."[79] Judge Blackstone, warning his counterparts of the evils of champerty, wrote that the offense was "perverting the process of law into an engine of oppression."[80] While champerty is more correctly categorized as a specific type of maintenance, courts have conflated these terms in modern practice.[81]

In the United States, thirty-three out of fifty states (and the District of Columbia) have champerty laws that prohibit a third party from taking a financial interest in a lawsuit.[82] Many states have already thrown out their champerty statutes or simply stopped enforcing them, following the lead of other countries relaxing their prohibitions on champerty.[83]

In addition, several American Bar Association (ABA) Model Rules may place restrictions on the flexibility of third-party litigation lenders and their ability to monitor effectively their investments and communicate with litigants.[84] This Note is less concerned with the Model Rules and the various states' adoption of the rules because those rules contain provisions allowing for alternative litigation finance when the client gives informed consent after receiving the full, candid disclosure of all the associated risks and benefits, whereas champerty statutes may act as total bars to third-party litigation finance. At least one scholar has already pointed out that ABA

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[78] BLACK'S LAW DICTIONARY 262 (9th ed. 2009).

[79] Lyon, *supra* note 29, at 581.

[80] Thallhimer v. Brinckerhoff, 3 Cow. 623, 644 (N.Y. 1824) (citing 4 BLACKSTONE, COMMENTARIES *135).

[81] L.S. Tellier, Annotation, *Assertion of Defense of Champerty in Action by Champertous Assignee*, 22 A.L.R.2d 1001–02 (1952).

[82] *See* Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 107 & n.190 (2011) (stating that sixteen states, not including the District of Columbia, permit champerty (maintenance for profit)).

[83] New Jersey has never allowed champerty as a defense. *See* Weller v. Jersey City H. & P. St. Ry. Co., 57 A. 730, 732 (N.J. Ch. 1904) ("[T]he law of maintenance and champerty has never prevailed in this state . . . ."). In 1997, the Massachusetts Supreme Judicial Court held that the Commonwealth would no longer void agreements as champertous. Saldini v. Righellis, 687 N.E.2d 1224, 1226–27 (Mass. 1997). Florida has significantly modified and South Carolina has abolished champerty as a permissible defense. *See* Kraft v. Mason, 668 So. 2d 679, 682–83 (Fla. Dist. Ct. App. 1996) (requiring unwanted or unnecessary intermeddling as an element of champerty); Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 277 (S.C. 2000).

[84] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2013) [hereinafter MODEL RULE 1.7] (defining "conflict of interest" as including representation "materially limited" by attorney's responsibilities to a third-party or the lawyer's own interests); MODEL RULE 1.8(f)(1)–(3) (stating that an attorney must not accept compensation for representation from a third party without gaining informed consent of client and only if it will not interfere with attorney's independent professional judgment).

Model Rule 5.4, which provides that "[a] lawyer or law firm shall not share legal fees with a nonlawyer" and "shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law,"[85] may be unconstitutional under *Citizens United*.[86]

A. Champerty Law in the United States

Scholars have argued, and many courts have agreed, that laws prohibiting champerty are rooted in outdated, antiquated visions of the litigation system and have no applicability to the modern courts.[87] Traditional champerty common law from medieval England "has eroded to near obsolescence,"[88] but many states still retain laws reflecting the general public policy goals of prohibiting profiteering and litigation speculation.[89] These policies codified by states "have not [been] updated . . . in the commercial context in many years, [and] in some cases even a century or more."[90] In this Part, champerty laws will be characterized and analyzed for their potential chilling effect on third-party litigation lenders making investments towards funding litigation. In some cases, courts have completely rejected champerty laws and instead have substituted fairness considerations to review deals between third-party litigation lenders and clients.[91]

B. Defining Champerty Law in New York

Third-party litigation finance companies seek out claims across the United States, invoking both state and substantive law. In claims arising out of finance agreements between investors and litigants, state courts will typically apply the law

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[85] MODEL RULE 5.4(a), (b).

[86] *See* Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 17 (2012) (stating that Model Rule 5.4 and others may not be able to "withstand a First Amendment challenge" post–*Citizens United*).

[87] *See, e.g.*, *Osprey, Inc.*, 532 S.E.2d at 277; Lyon, *supra* note 29, at 576 ("[C]ommon law doctrines of maintenance and champerty are inconsistent with our contemporary view of litigation.").

[88] Dobner, *supra* note 74, at 1529; *see also* Sebok, *supra* note 82, at 121–22 (discussing how centuries of jurisprudence have resulted in a less than uniform view of champerty and maintenance which existed in early England).

[89] Dobner, *supra* note 74, at 1529 (quoting 14 AM. JUR. 2D *Champerty & Maintenance* § 1 (1964) ("In none of the states are the doctrines or laws of champerty and maintenance preserved in their original rigor. In many states they are declared to be obsolete and to have no existence at all.")).

[90] Bailey et al., *supra* note 50, at 262.

[91] *See, e.g.*, Bashor v. Northland Ins. Co., 480 P.2d 864, 867 (Colo. App. 1970) (rejecting the idea of "intermeddling maintenance" and focusing instead on how much control the litigation funder had over the litigation).

of the state in which the agreement is to be performed, or in the alternative, the law of the state which has the most significant ties to the litigating and lending parties.[92] As most of the publicly traded third-party litigation finance companies are located in and around New York,[93] New York champerty law is highly relevant to the discussion. New York Judiciary Law Section 489(1) states in part that "no corporation or association . . . shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of . . . any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon."[94] New York courts have not yet made a clear statement of whether this statute prohibits third-party litigation lenders from investing in cases for profit. The U.S. Court of Appeals for the Second Circuit interpreted Section 489 in the way that it predicted the New York Court of Appeals would, but it was careful to note in *Elliott Associates, L.P. v. Banco de la Nacion*[95] that New York courts "have consistently interpreted [Section 489] as proscribing something narrower than merely maintaining a suit in return for a financial interest in the outcome."[96] While the Second Circuit's ruling was helpful to trace the origins of New York champerty law and the rationale behind prohibition on champerty, the facts of the *Elliott Associates* case necessarily limited the holding to situations in which a debt instrument was acquired by a third party with the primary purpose of enforcing it, and the litigation stemming from the enforcement of the instrument did not violate Section 489.[97]

In 2010, the New York Court of Appeals came even closer to expounding upon the applicability of Section 489 when it decided *Merrill Lynch Mortgage v. Love Funding Corp.*,[98] but it only held that a corporation or association that takes an assignment of a claim does *not* violate New York Judiciary Law Section 489(1) if its purpose is to collect damages, by means of a lawsuit, for losses on a debt instrument in which it holds a preexisting proprietary interest.[99] While this ruling assured participants in the secondary distressed debt and bankruptcy claims market that rely heavily on the notion that their procured assignments of distressed claims include

[92] Lauren Deysher Gojkovich, Note, *Leveraging Litigation: How Shareholders Can Use Litigation Leverage to Double-Down on Their Investment in High-Stakes Securities Litigation*, 16 STAN. J.L. BUS. & FIN. 100, 115 (2010).

[93] *See* Raymond, *supra* note 44.

[94] N.Y. JUD. LAW § 489 (McKinney 2004).

[95] Elliott Assocs. v. Banco de la Nacion, 194 F.3d 363 (2d Cir. 1999).

[96] *Id.* at 372 (internal quotation marks omitted).

[97] *See id.* ("[T]he New York Court of Appeals . . . would rule that the acquisition of a debt with intent to bring suit against the debtor is not a violation of the statute where, as here, the primary purpose [is to collect the debt].").

[98] Trust for the Certificate Holders of Merrill Lynch Mortg. Investors, Inc. v. Love Funding Corp., 918 N.E.2d 889 (N.Y. 2009).

[99] *Id.* at 894, 895. For a detailed summary of the facts and accompanying analysis of this case, see Lazar Emanuel, *Litigation Funding and the Law of Champerty*, NYPRR, July 2010, at 1–2, 4–5.

their right to enforce the underlying obligation by bringing suit, the decision did not explicitly mention the legality of third-party litigation finance agreements which may run afoul of Section 489.[100] Indications in the language of the decision, although ambiguous, give rise to an inference that the New York Court of Appeals is likely to support a third-party litigation finance agreement involving a financing party in the business of funding lawsuits, assuming that the lender is truly in the business of litigation funding, with its express purpose being to make a profit rather than to bring lawsuits into the court.[101]

Third-party litigation lenders still have unanswered questions in New York's champerty jurisprudence, including, "[i]s litigation funding by a source which is not a party to litigation legal?"[102] In the face of this looming question, Section 489's uncertain prohibitions on champerty still pose a threat to the booming litigation finance industry, much of which is housed in New York. Therefore, in light of the categorical prohibitory language of Section 489, which may prohibit third-party litigation finance agreements without narrow tailoring to protect the legitimate government concerns with litigation financing agreements, New York champerty law is still subject to First Amendment analysis, as will be discussed *infra*.[103]

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[100] *See* Emanuel, *supra* note 99, at 5 (discussing lingering questions following the ruling).

[101] Indeed, an earlier opinion in the case of *Echeverria v. Estate of Linder*, No. 018666/2002, 2005 WL 1083704 (N.Y. Sup. Mar. 2, 2005), helps to affirm this inference:

> Under New York law these assignments are allowed as long as the primary purpose and intent of the assignment was for some reason other than bringing suit on that assignment. . . . [U]nder New York law the primary purpose and intent of taking the assignment would be to profit, and not to bring suit, which would prevent this action from being Champerty. Resting on the language of Judiciary Law 489, and the purpose and intent requirement, the Court is comfortable finding that the instant agreement is not champerty.

Id. at *7.

[102] *See* Emanuel, *supra* note 99, at 7. Emanuel lists six additional more focused questions that the New York Court will need to resolve:

> 1.) Is litigation funding that provides a return to the source of funding in excess of the legal usury rate lawful and/or proper? 2.) Is usury an element in champerty? 3.) Recognizing that some plaintiffs (e.g., plaintiffs with claims for personal injury or for malpractice) may not have the funds to recover on their claims, shall we authorize litigation funding only in specified causes of action? 4.) In the funding of litigation, is there a difference between loans to litigants with a specified interest rate and the purchase of a contingent interest in the recovery or settlement of the litigation? 5.) If the source of the litigation funding purchases a contingent interest, is that interest limited to a specified portion of the lawyer's contingent fee, or can it extend to a specified portion of the client's recovery? 6.) What is the proper relationship between the lawyer for a litigant and a potential source of litigation funding?

Id.

[103] *See infra* Part III.

C. Defining Champerty Law in Ohio: Rancman v. Interim Settlement Funding Corp. *and Legislative Action*

Ohio, through legislative action, has updated its law, effectively abrogating the Ohio Supreme Court, to reflect a modern and matured understanding of the champerty doctrine.[104] In *Rancman v. Interim Settlement Corp.*,[105] the Supreme Court of Ohio interpreted the continued validity of champerty in the state.[106] The plaintiff in *Rancman* received a $7,000 advance on any future settlement of a claim pending against her insurance company for injuries sustained in a car accident.[107] The funding agreement provided for a graduated rate of return based on the length of time until her suit was resolved: $19,600 if the case closed within one year of the loan, $24,800 if the resolution happened between twelve and eighteen months, and so on.[108] After she settled her suit for $100,000 in under twelve months, Rancman sought rescission of the advance agreement on the grounds that it was a usurious loan, or one offered at an illegally high interest rate.[109] The defendant, Interim Settlement Funding Corporation, countered that the agreement constituted an investment, not a loan, and therefore was not subject to statutory limitations on interest rates under usury law.[110] Lower trial- and appellate-level Ohio courts found that the contract was void under Ohio usury law because the potential profit on the money advances exceeded the legally permissible interest rate.[111] However, the Ohio Supreme Court ruled that "[i]t [was] unnecessary for the resolution of [the] case to determine the threshold level of risk necessary for a contingent advance to be treated as an investment rather than a loan" because the relevant inquiry was whether the advances were void as champerty.[112]

The court delved into the history and policy of maintenance and champerty law in Ohio, stating, "The doctrines of champerty and maintenance were developed at common law to prevent officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation which would disturb the peace of society,

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104 *See* OHIO REV. CODE ANN. § 1349.55 (West 2008) (allowing "non-recourse civil litigation advance[s]," provided there is compliance with certain requirements).

105 789 N.E.2d 217 (Ohio 2003).

106 *Id.* at 218.

107 *Id.* at 218–19.

108 *Id.*

109 *Id.* at 219. The common-law concept of usury factors heavily into the validity of a third-party litigation financing agreement. For an analysis of the impact of usury laws on the litigation finance industry, see John P. Barylick & Jenna Wims Hashway, *Litigation Financing: Preying on Plaintiffs*, 59 R.I. B.J. 5, 37–39 (2011) (describing how litigation finance companies intentionally draft contracts so as to avoid state usury laws).

110 *Rancman*, 789 N.E.2d at 219.

111 *Id.*

112 *Id.*

lead to corrupt practices, and prevent the remedial process of the law."[113] Ultimately, the Ohio Supreme Court held that champerty and maintenance were still enforceable under Ohio law and thus the transactions at issue were null and void because they violated the Ohio champerty law.[114] Specifically, the court held that "a contract making the repayment of funds advanced to a party in a pending case contingent upon the outcome of that case is void as [champertous]."[115] The court reasoned that the act "constitute[d] champerty because it gives a [third party] an impermissible interest in a suit, [it] impedes the settlement of the underlying case, and it promotes speculation in lawsuits."[116] The *Rancman* court was concerned with the "champertor's earning a *handsome profit* by speculating in a lawsuit and by potentially manipulating a party to the suit."[117] Many scholars criticized the *Rancman* court's narrow view of third-party litigation finance.[118] Most troubling with the *Rancman* decision was the paternalistic view that the court took in protecting litigants, a view which directly conflicts with earlier Supreme Court jurisprudence regarding state restrictions on the delivery of speech.[119]

Five years later, the Ohio legislature overturned *Rancman* and the State's champerty laws and set out a statute defining the limits and bounds of third-party litigation financing, or under the statute, "non-recourse civil litigation advance[s]."[120] Ohio's statute provides a lightly regulated, yet admirable model for controlling the potential dangers of third-party litigation finance without infringing upon First Amendment rights.[121] The statute sets out requirements for the finance contract, defines parties who may be involved in this transaction, and sets forth attorney responsibilities that comply with the Ohio Rules of Professional Conduct.[122] The statute does not address the "handsome profit" that the third-party litigation funder may reap; however, it does prohibit "third-party [litigation] lenders from making any legal decisions regarding the underlying civil action."[123]

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[113] *Id.* at 219–20 (quoting 14 C.J.S. *Champerty and Maintenance* § 3 (1991) (internal quotation marks omitted)).

[114] *Id.* at 220–21.

[115] *Id.* at 221.

[116] *Id.*

[117] *Id.* (emphasis added) (citation omitted).

[118] *See, e.g.*, Stephen Gillers, *Waiting for Good Dough: Litigation Funding Comes to Law*, 43 AKRON L. REV. 677, 678 (2010) (characterizing the decision as "myopic, hostile, and superficial"); Sebok, *supra* note 82, at 112 ("[T]he argument for limiting profit maintenance based on the claim that any ex ante increase in the settlement value of a case always converts the investment into a form of intermeddling profit maintenance is wrong.").

[119] *See infra* Part III.B.

[120] OHIO REV. CODE ANN. § 1349.55 (West 2013).

[121] *See id.* (requiring, among other things, the fee advancement contract disclose the total dollar amount to be repaid by the consumer, and that the consumer have the option to cancel withing a few days of fund disbursement).

[122] *See id.*

[123] Lyon, *supra* note 29, at 586–87.

D. States that Prohibit Champerty

As of 2011, sixteen states expressly *permit* champerty, leaving thirty-five which may not.[124] Generally, states that outlaw champerty by statute do so in several different forms, and all of the states that prohibit champerty do so in broad terms.[125] The primary objective of states prohibiting champerty is to prohibit "intermeddling profit maintenance," which, as Professor Anthony Sebok has described, "can take many forms."[126] He argues that intermeddling profit maintenance is limited, and requires "that the investigator has bought the right to make certain decisions about the litigation [taking away the right] from the party bringing the suit along with a share of the contingent outcome."[127]

A survey of prohibitory champerty law in the states begins with Virginia. In Virginia, "barratry" is a criminal offense punishable by a fine not more than $10,000; however, barratry is vaguely defined by statute as "the offense of stirring up litigation," where "'stirring up litigation' means instigating or attempting to instigate a person or persons to institute a [lawsuit]."[128] Unlike other state statutes, such as Florida's, which takes into account whether a third party holds too much control over a lawsuit by defining intermeddling as "offering unnecessary and unwanted advice or services; meddlesome, esp[ecially] in a highhanded or overbearing way,"[129] the Virginia statute prohibits *any* conduct by a third party in a lawsuit insofar as that

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124 *See* Sebok, *supra* note 82, at 107 & n.190 (citing the sixteen states with their respective corresponding cases and statutes). In this Part, I am specifically referring to states that ban maintenance for profit or maintenance in which a third party can collect on a percentage of winnings in a lawsuit.

125 *See id.*

126 *Id.* at 98–120.

127 *See id.* at 109.

128 VA. CODE ANN. § 18.2-451, 452 (West 1975). As a direct response to the *Button* decision, the Virginia legislature included a provision in the statute that does not prohibit champerty when the instigating of a lawsuit is "justified." *See supra* note 9 and accompanying text. Per Section (e), "justified" may include when

> the instigator is acting on behalf of a duly constituted legal aid society approved by the Virginia State Bar which offers advice or assistance in all kinds of legal matters to all members of the public who come to it for advice or assistance and are unable because of poverty to pay legal fees.

§ 18.2-451(e).

129 Sebok, *supra* note 82, at 109 (citing Kraft v. Mason, 668 So. 2d 679, 682 (Fla. Dist. Ct. App. 1996)); *see also* FLA. STAT. ANN. § 877.01(i) (West 2012) ("Whoever gives, promises, offers or conspires to give, promise, or offer, to anyone any bribe, money, goods, presents, reward, or any valuable thing whatsoever with the intent and purpose of stirring up strife and litigation; or with intent and purpose of assisting, seeking out, influencing, or advising the accused, sick, injured, uninformed, or others to bring suit or seek professional legal services or advice, shall be guilty of a misdemeanor . . . .").

party is not already excluded by the provisions outlining the definition of champerty.[130] Indeed, Virginia law does carve out a small exception which may explicitly provide a way for a third-party litigation finance company to finagle around the barratry statute in very limited circumstances:

> Only those causes of action for damage to real or personal property, whether such damage be direct or indirect, and causes of action ex contractu are assignable. The provisions of this section shall not prohibit any injured party or his estate from making a voluntary assignment of the proceeds or anticipated proceeds of any court award or settlement as security for new value given in consideration of such voluntary assignment.[131]

The relatively limited exception of "damage to real or personal property" and "causes of action ex contractu" would not account for a variety of claims which third-party litigation funders might choose to finance, such as business tort claims, defamation claims, claims of invasion of privacy and so on.[132]

Other states, such as Alabama, ban champerty from the attorney's perspective.[133] Alabama's statute bans a variety of attorney conduct that is aimed at attorneys who solicit funding from third parties for their clients with the purpose of advancing their claims and procuring profit for themselves.[134] These statutes, which are aimed at limiting attorneys from engaging in champertous agreements, directly channel the Supreme Court's jurisprudence regarding attorney solicitation for pecuniary gain, discussed *infra*.[135] But the champertous conduct prohibited by these statutes would effectively prohibit attorneys from soliciting finance agreements from third-party litigation financiers for their clients.

The defense of champerty has also existed at common law and continues to exist even without reference to statutory provisions. Several states have reaffirmed the

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[130] VA. CODE ANN. § 18.2-451 (West 1975).

[131] VA. CODE ANN. § 8.01-26 (West 1991).

[132] *See, e.g.*, VA. CODE ANN. § 34-28.1 (West 2003) (stating that unless permitted by Section 8.01-26, awards and settlements in personal injury cases are exempt from creditors); Cmty. Hosp. of Roanoke Valley, Inc. v. Musser (*In re Musser*), 24 B.R. 913, 922 (Bankr. W.D. Va. 1982) (stating "that the prohibition against assignments of causes of action for personal injury does not [prevent] a hospital from obtaining equitable assignment" for medical bills).

[133] ALA. CODE § 34-3-24 (2014).

[134] *Id.* ("Any attorney-at-law, either before or after action brought, who gives, offers or promises to give a valuable consideration to another person as an inducement to placing in the hands of such attorney or in the hands of any partnership of attorneys, or in the hands of any other attorney, a demand of any kind for the purpose of bringing an action or making claim against another person, corporation or partnership . . . shall be guilty of a misdemeanor . . . .").

[135] *See infra* notes 150–65 and accompanying text; *see also infra* text accompanying note 184.

defense of champerty at common law.[136] These states, including Pennsylvania and Minnesota, have refused to abandon the doctrine even in the wake of other states abolishing champerty.[137] Indeed, they appear to be the dwindling minority, and their state's courts rely on each other's upholding of the doctrine as their primary rationale for continuing the doctrine.[138]

Some states may be less concerned with issues of control but more with the U.S. Chamber of Commerce theory that champerty may bring more frivolous lawsuits that would not have otherwise existed.[139] For example, wary of this problem, Colorado has developed a sweeping definition of intermeddling that potentially envelops a large number of litigation finance contracts into the territory of illegality. The Eighth Circuit summarized a series of Colorado opinions to stand for the proposition that "intermeddling" meant encouraging or causing another to bring a suit "which otherwise he would not have brought."[140] This broad definition, which comes from a case in 1902, has never been overruled and has not been updated to comport with more modern views of the litigation system and mature applications of champerty doctrine.

III. INVESTING IN LITIGATION: FREE SPEECH?

A. Marching Toward Litigation as Protected Free Speech

Before *Citizens United*, the Supreme Court began its protection of political speech by entities in the early 1960s against the backdrop of the Civil Rights movement. In 1963, the Court decided *NAACP v. Button*,[141] which found that the activity of the NAACP's lawyers—solicitation of clients to bring civil discrimination lawsuits—was protected by the First Amendment.[142] The decision struck down several Virginia statutes on champerty, barratry, and maintenance as unconstitutional in that they chilled First Amendment interests of asserting political speech.[143] Those statutes went as far as making it a crime for a lawyer merely to tell another individual that their rights have been violated or refer that person to an attorney or

136 *See, e.g.*, Lingel v. Olbin, 8 P.3d 1163, 1173 (Ariz. Ct. App. 2000); Johnson v. Wright, 682 N.W.2d 671, 680 (Minn. Ct. App. 2004); Frank v. TeWinkle, 45 A.3d 434, 439 (Pa. Super. Ct. 2012), *appeal denied*, 56 A.3d 398 (Pa. 2012).

137 *See, e.g.*, *Johnson*, 682 N.W.2d at 679–80.

138 *See, e.g.*, *id.* at 680 ("As an error correcting court, we do not presume to abandon the champerty doctrine simply because a few states have chosen to do so.").

139 *See* Sebok, *supra* note 82, at 113.

140 *Id.* at 113–14 (citing Casserleigh v. Wood, 119 F. 308, 312 (8th Cir. 1902)).

141 371 U.S. 415 (1963).

142 *Id.* at 428–29, 432, 437.

143 *Id.* at 437.

group of attorneys.[144] In his opinion, Justice Brennan delivered these words, carefully defining litigation that was to be protected by the First Amendment:

> Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain. Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition among Virginia lawyers; the problem is rather one of an apparent dearth of lawyers who are willing to undertake such litigation.[145]

Here, there was careful effort by the Court to distinguish lawsuits brought purely for profit and private gain from lawsuits brought to seek "vindication of constitutional rights."[146] In explaining why the efforts by the NAACP lawyers to act in the face of Virginia statutes criminalizing the solicitation of prospective litigants, Justice Brennan emphasized that the NAACP lawyers must have derived personal satisfaction in participation in litigation because the lawyers "would hardly be inclined to participate at the risk of financial sacrifice."[147] This line of reasoning promoting First Amendment protection to litigation as political expression extended to a number of cases several years later dealing with attorneys advertising to and solicitation of potential clients for legal representation.[148] Professor Sebok has argued that this decision prevents states from limiting the power of laypersons to engage in "selfless maintenance" designed to protect constitutionally protected rights through litigation.[149]

Fifteen years later, the Court continued to emphasize the distinction between lawsuits for pecuniary gain and lawsuits for political expression when it decided two cases in the same day: *In re Primus* and *Ohralik v. Ohio State Bar Association*. In the former case, a South Carolina attorney associated with the American Civil Liberties Union (ACLU), who had solicited for legal representation women who were sterilized as part of the State's law that conditioned some welfare assistance on sterilization, was reprimanded by the South Carolina Bar Association for violating bar rules prohibiting attorneys from soliciting business.[150] Despite the potential for the ACLU to benefit financially in the event of a successful litigation, the Supreme Court overturned the disciplinary decision, holding that the action of the

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[144] *Id.* at 434.
[145] *Id.* at 443 (footnote omitted).
[146] *Id.*
[147] *Id.* at 444.
[148] *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); *In re* Primus, 436 U.S. 412 (1978).
[149] Sebok, *supra* note 82, at 101.
[150] *In re Primus*, 436 U.S. at 415–19.

attorney constituted pursuing litigation as a vehicle for effective political expression and association, an action protected by the First Amendment.[151] In *Ohralik*, an attorney was disciplined by the Ohio State Bar Association for his personal solicitation of accident victims for the purpose of representing them on a contingent-fee basis.[152] Unlike in *Primus*, the Court found that the State could constitutionally discipline a lawyer for soliciting clients for pecuniary gain because the First Amendment only marginally concerned the attorney's conduct, and the State did not lose its right to regulate commercial activity deemed harmful to the public even if speech is a component of that activity.[153]

Once again in *Ohralik*, the Supreme Court was careful to distinguish litigation as a form of political expression from litigation solely for private pecuniary gain.[154] However, as will be discussed *infra*, the decision in *Ohralik* further elaborated on the protection of commercial speech under the First Amendment.[155] Additionally, the Court was careful to focus its concern on a state bar association's right to impose sanctions on an attorney whose in-person solicitation for pecuniary gain created a great threat to the protected interests of litigants.[156] This interest, the Court emphasized, was to protect potential litigants from being unduly pressured by attorneys into making speedy and uninformed legal decisions.[157]

In re Primus and *Ohralik* both emphasized that a *lawyer* is not be protected under the First Amendment for soliciting and promoting litigation for his own pecuniary gain.[158] While both cases involved attorneys soliciting clients for representation with the potential for pecuniary gain, the key difference between the two was that the attorney in *Primus* worked for an organization that regularly engaged in litigation as a form of political expression: the ACLU.[159] Because the attorney received a salary not directly from the ACLU, but rather from an externally associated nonprofit organization associated with the ACLU,[160] the Court did not deem this to be sufficient to categorize the litigation outside of the realm of political speech.[161]

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[151] *Id.* at 439.
[152] *Ohralik*, 436 U.S. at 449–53.
[153] *Id.* at 459.
[154] *See id.* at 464 ("The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert. In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.").
[155] *See infra* Part III.B.
[156] *See* Lyon, *supra* note 29, at 589 (discussing *Ohralik*, 436 U.S. at 457).
[157] *Id.*
[158] *See Ohralik*, 436 U.S. at 457–59, 462–68; *In re* Primus, 436 U.S. 412, 433, 434 (1978).
[159] *In re Primus*, 436 U.S. at 414–15.
[160] *Id.*
[161] *Id.* at 428–29.

The Court explicitly rejected an argument that "the ACLU's policy of requesting an award of counsel fees [took the] case outside of the protection of *Button*."[162] Despite the fact that the ACLU could seek pecuniary gain from having its individual attorneys solicit clients, the Court embraced the ACLU's overall inclination toward litigation for its political purposes.[163]

Most important for later application in an analysis of the constitutionality of champerty law, the *Primus* Court rejected South Carolina's defense grounded in its interest to prevent "the 'stirring up' of frivolous or vexatious litigation and minimizing commercialization of the legal profession."[164] Using the same reasoning from *Button*, the "Court declined to accept the proffered analogy to the common-law offenses of maintenance, champerty, and barratry, where the record would not support a finding that the litigant was solicited for a malicious purpose or 'for private gain, serving no public interest . . . .'"[165] As will be argued *infra*,[166] champerty statutes which categorically prohibit third-party litigation financiers from investing in litigants for the purpose of litigation must be defended on their ability to prevent litigants from being solicited for private gain, and this defense is likely no longer constitutionally valid after *Citizens United*.

B. Champerty Prohibition as Commercial Speech Regulation

Can absolutely prohibitory champerty laws fall into the categorization of commercial speech restricting regulation? Perhaps. In 1976, two years before the *Ohralik* decision, the Supreme Court first recognized that some commercial speech was protected under the First Amendment.[167] In *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*,[168] consumers of prescription drugs brought suit against the Virginia State Board of Pharmacy and its individual members, challenging the validity of a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs.[169] The "commercial speech" at issue was categorized as advertising, which can be distinguished from the in-person solicitation at issue in *Button*, *Primus*, and *Ohralik*. Writing for the Court, Justice Blackmun held that "commercial speech" was not wholly outside the protection of

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162 *Id.* at 429.

163 *See id.* at 429–31 (noting that the mere ability of the ACLU to seek an award of counsel fees is insufficient to move the organization's action outside the realm of the First Amendment protection).

164 *Id.* at 436–37.

165 *Id.* at 437 (quoting NAACP v. Button, 371 U.S. 415, 440 (1963)).

166 *See infra* Part IV.

167 Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 56 (1999).

168 425 U.S. 748 (1976).

169 *Id.* at 749–50.

the First and Fourteenth Amendments.[170] The Court noted that price information was very important to the consumers, and it intimated that the First Amendment protected the "right to 'receive information'" in addition to the right to speak.[171] Here, the Court emphasized the difference between the rights of the speaker and the rights of the listener.[172] Given the free speech interests at stake, the Court said that the state regulation must support a *substantial* interest.[173] However, the Court was ruling against statutes constraining advertising by commercial entities, rather than the in-person solicitation of clients, as was taking place in *Button*, *Primus*, and *Ohralik*. Elaborating on the definition and protection of commercial speech two years later in *Ohralik*, Justice Brennan stated:

> We have not discarded the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech *a limited measure of protection*, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.[174]

Since *Virginia Pharmacy Board* and *Ohralik*, the Supreme Court has heard more than two dozen commercial-speech cases and has yet to create a clear-cut definition of what amounts to commercial speech, thus leaving courts and scholars mystified as to what expression receives commercial speech's "limited measure of protection."[175] However after *Virginia Pharmacy Board*, the door was opened for constitutional challenges to state and local rules that restricted general business advertising and solicitation.[176]

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[170] *Id.* at 762.

[171] *Id.* at 757 (citing Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972)).

[172] *See id.*

[173] *See id.* at 766–70 (assessing the state's interest in the advertising ban).

[174] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978) (emphasis added) (citation omitted).

[175] Stern, *supra* note 167, at 56 (footnote omitted).

[176] *See* David McGowan, *Lawspeech*, 21 J. PROF. LAW. 1, 9 (2012) ("[W]hen the Court extended constitutional protection to commercial speech in the *Virginia Pharmacy Board* case these [solicitation] restrictions became vulnerable to constitutional challenge.").

The *Virginia Pharmacy Board* decision effectively established a different level of scrutiny for content-neutral regulations as opposed to content-based regulations. A content-based regulation of protected speech is presumptively unconstitutional.[177] To save such a statute, the government must show that the regulation is narrowly drawn and necessary (narrowly tailored) to achieve a compelling government interest.[178] Application of this standard will almost invariably lead to invalidating the law in question. However, in *Virginia Pharmacy Board*, the Court ruled that content-neutral restrictions will not be found unconstitutional "provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information."[179]

Four years after the *Virginia Pharmacy Board* decision, in *Central Hudson Gas & Electric v. Public Service Commission*,[180] the Court created a four-part test to determine if commercial speech laws were unconstitutional in the face of the First Amendment.[181] The four-part test inquires as to whether 1) the regulated speech is lawful and not misleading; 2) the government's interest in restricting the speech is substantial; 3) the regulation directly advances the government's interest; and 4) the regulation is not more extensive than necessary to serve that interest.[182] *Central Hudson* also explicitly noted that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[183] While the first three elements may be satisfied by statutes prohibiting third-party litigation under the veil of champerty, the *Central Hudson* test as applied may clash with champerty statutes and their lack of narrow tailoring.[184] The *Central Hudson* test, however, allows for the government to defend a speech regulation without asserting a *compelling* interest, which is required under the traditional test that is applied to content-based speech restrictions.[185]

In elaborating on the protection of commercial speech, the *Ohralik* decision helped to clarify commercial speech as it applied to in-person solicitation. *Ohralik*

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177 *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) (citing Leathers v. Medlock, 499 U.S. 439, 447 (1991)).

178 *Id.* at 118 (citing Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)).

179 425 U.S. 748, 771 (1996).

180 447 U.S. 557 (1980).

181 *Id.* at 561–66.

182 *Id.* at 566.

183 *Id.* at 563 (citation omitted).

184 *See id.* at 565 ("The regulatory technique may extend only as far as the interests it serves. The State cannot regulate speech that poses no danger to the asserted state interest, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well." (citations omitted)).

185 *See id.* at 566 (noting that the government must only offer a *substantial* interest when limiting commercial speech).

generally held that states may regulate in-person solicitation more stringently than simple advertising.[186] While the categorical prohibition of taking an interest in a lawsuit for profit is arguably not an advertising restriction, the rationale behind applying the *Central Hudson* test to champerty laws still may apply. Because champerty laws prohibit a third party from engaging in taking a pecuniary interest in a lawsuit, by extension, they must ban the third party from solicitation of litigants to finance. Champerty statutes, depending on how they are constructed, may be content-based. As stated earlier, Alabama's champerty statute is written specifically to ban conduct by attorneys.[187] As attorneys' speech—for example, soliciting funding from third parties for their clients with the purpose of advancing their claims and procuring profit for themselves—is prohibited, testing this law may fall within the purview of the content-based First Amendment strict scrutiny test. General prohibitory champerty statutes, those which categorically ban all third parties from taking an interest in a lawsuit, may be more likely to fall within the less rigorous commercial speech test, because the prohibition of one specific type of activity by any party, regardless of its entity status, is more like a content-neutral restriction. However, the question of the distinction between commercial speech and non-commercial speech becomes obfuscated when the party's identity as a commercial entity is immaterial, as it was in *Citizens United*.

C. Is Litigation Protected by the First Amendment?

To cabin investment in litigation by corporations within the Supreme Court's *Citizens United* opinion protecting corporate political expenditures, litigation must be effectively construed as analogous to the same type of political speech the Court is looking to protect. To protect the right to litigate under the First Amendment, the question must be framed as a matter of access to the courts. Before a third-party litigation financier is introduced, the First Amendment has to protect the base speech—actually bringing a claim to court. The Supreme Court has ruled that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances."[188] As such, this right,

> "cannot be impaired, either directly . . . or indirectly, by threatening or harassing an [individual] in retaliation for filing lawsuits . . . ." The [courts] . . . make it clear that state officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to

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186 Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 454–55 (1978).
187 *See* ALA. CODE § 34-3-24 (2014); *supra* notes 133–34 and accompanying text.
188 Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741 (1983).

> seek judicial relief or to intimidate or chill his exercise of that right in the future.[189]

If the right of access to the courts is the framework for claiming First Amendment protection, the First Amendment by no means allows for carte blanche freedom of speech once access to the courts has been granted. As David McGowan accurately asserted in his 2012 *Professional Lawyer* article, litigation is generally "freely regulated with very little free speech protection."[190] In civil cases, where a plaintiff is looking to assert or enforce some legal right which he in good faith believes has been violated, resort to the courts to resolve the dispute is undeniably political. But even in the most undeniably political cases, however, litigation is certainly not subject to full free speech protection.[191] Inasmuch as the *Button*, *In re Primus*, and *Ohralik* line of cases demands that litigation is protected by the First Amendment because it attempts to assert a legal right, litigation is still subject to the restrictions generated by state and federal judicial rules that constrain speech to meet systemic needs.[192] However, at the heart of what litigation really concerns may be a form of petitioning protected by the First Amendment.[193]

But, as Jason Lyon has pointed out, "the underlying rationale of [*Button*, *In re Primus*, and *Ohralik*] was about protecting litigants from 'vexatious conduct,' whether it be attorney manipulation or 'the oppressive, malicious, or avaricious use of the legal process.'"[194] The third-party litigation financier is not petitioning the government to hear its claim and in all likelihood has little to no political alignment of interests with its fundee-litigant. The large, publicly traded third-party litigation funder, such as Burford or Juridica, is operating to make returns for its investors and has not *sponsored* nor *endorsed* the merits of its fundee's claim. Rather, it has made a calculated decision that its fundee's claim has an investment-worthy chance of succeeding. Nonetheless, the third-party litigation finance company has made a decision to *associate* with the fundee-litigant whose rights to litigate are undeniably protected.

Furthermore, it is at least arguable that increasing access to federal and state courts resulting from liberalized pleading standards coupled with ballooning litigation costs arising from complex pretrial discovery may support the notion that

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[189] Glenview Constr., Inc. v. Bucci, 165 F. Supp. 2d 545, 552 (S.D.N.Y. 2001) (quoting Harrison v. Springdale Water & Sewer Comm'n, 780 F.2d 1422, 1428 (8th Cir. 1986)).

[190] McGowan, *supra* note 176, at 12.

[191] *See id.* (discussing *Seattle Times Co. v. Rinehart*, 467 U.S. 20 (1984), where the Court held that the First Amendment does not provide a right to information in litigation).

[192] *See id.* at 1–2 ("The need for courts to manage litigation and thus to restrict expression that threatens to interfere with such management is seen to justify orders that would be plainly unconstitutional in different settings.").

[193] *See id.* at 13–14 (discussing various forms of litigation as petitioning under the First Amendment).

[194] Lyon, *supra* note 29, at 589 (footnotes omitted); *see also* McGowan, *supra* note 176, at 11 (discussing *Button*, *Ohralik*, and *In re Primus*).

third-party litigation funding is actually a public service.[195] Particularly in the David-versus-Goliath model,[196] where the plaintiff may have valid civil claims against a larger company, a third-party litigation finance company may be the only viable option for a plaintiff to proceed in protecting his or her own legal rights. In this framework, there is no doubt that the denial of access to justice to potential plaintiffs because they do not have the same bargaining power as Goliath-like defendants in litigation equates these access-providers—third-party litigation funders—as public service providers. When the protected First Amendment right, "the right of access to the courts,"[197] hinges upon the capital provided by third-party litigation finance, then the access to the capital must be protected as well.

IV. *CITIZENS UNITED* BLURS THE BORDERS OF COMMERCIAL SPEECH

In 2010, the Supreme Court handed down a decision in *Citizens United v. Federal Election Commission*,[198] in which Justice Anthony Kennedy wrote an opinion that some have argued completely rewrote the rules on campaign-finance law in the United States.[199] While the facts of *Citizens United* were very different in nature from third-party litigation finance, the tenets and reasoning of the opinion included language that broadly applied First Amendment protection to corporations. The Court applied strict scrutiny on political speech grounds to strike down the 2002 Bipartisan Campaign Reform Act provision that restricted independent political expenditures by corporations and unions.[200] In his five to four majority opinion, Justice Kennedy wrote the "[g]overnment may not suppress political speech on the

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195 Lyon, *supra* note 29, at 589.

196 *Id.* at 599 (citing Beisner et al., *supra* note 45, at 4).

197 Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741 (1983).

198 130 S. Ct. 876 (2010).

199 *See, e.g.*, Harold Anthony Lloyd, *A Right but Wrong Place: Righting and Rewriting* Citizens United, 56 S.D. L. REV. 219, 220–21 (2011) (discussing the effects of *Citizens United*); Robert Sprague & Mary Ellen Wells, *The Supreme Court as Prometheus: Breathing Life into the Corporate Supercitizen*, 49 AM. BUS. L.J. 507, 507 (2012) (discussing the dramatic change in view of corporations from the traditional views in *Citizens United*). Indeed, *Citizens United* was and continues to be a highly controversial decision which many have criticized. This Note deviates from the controversy and does not endorse the often-criticized tenets of the Court's reasoning. Perhaps Justice Stevens said it best in his dissent, taunting: "Under the majority's view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech." *Citizens United*, 130 S. Ct. at 948 (Stevens, J., dissenting) (citation omitted).

200 130 S. Ct. at 887, 898–99, 913, 917 (majority opinion). Section 203 of the Bipartisan Campaign Reform Act of 2002 prohibited corporations and unions from spending their general treasury funds on "electioneering communications" or for speech that expressly advocates the election or defeat of a candidate. *Id.* at 887.

basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of for-profit corporations."[201]

Several scholars have already suggested that the ruling in *Citizens United* sets up a foundation for the assertion that there is a First Amendment protected interest in commercial activity as it is intrinsically bound with free speech and free association.[202] The reasoning in the suggestion follows by first eviscerating the distinction between political speech and commercial speech.[203] Continuing the progeny of *Button*, the Court remarked that "political speech must prevail against laws that would suppress it by design or inadvertence."[204] By "design" or by "inadvertence"—here there can be no doubt that under the antiquated rationale which champerty law first arose, the chilling consequences to third-party litigation finance companies are certainly unintended. Kennedy was careful to state, "[w]e find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion."[205] In the absence of a distinction which favors independent speakers over corporate and commercial speakers, the line of reasoning in *Button*, *Ohralik*, and *In re Primus* which prohibits taking an interest in litigation for pecuniary gain becomes immaterial. A corporate entity making efforts to invest in, or even help to bring a claim in court, is no different than an individual making the same efforts, and the Government may not impose restrictions that suppress either.[206]

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[201] *Id.* at 913.

[202] Lyon, *supra* note 29, at 589; *see also* Knake, *supra* note 86, at 33–37 (discussing *Citizens United*'s effect on prior decisions related to free speech and economic competition); Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT'L L. 159, 166 (2011) (discussing First Amendment protection for lawsuit funding).

[203] *See, e.g.*, Tamara R. Piety, Commentary, Citizens United *and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16, 16, 19 (2010), http://www.michiganlawreview.org/assets/fi/109/piety.pdf (suggesting that if corporations are entitled to full First Amendment protection of political speech then it follows that corporations will also receive full protection for their "core expressive activity," which is defined as commercial speech). The implications of Piety's reasoning supports the conclusion that the distinction between political speech and commercial speech will cease to exist.

[204] 130 S. Ct. at 882.

[205] *Id.* at 899.

[206] Justice Kennedy emphasized this point, writing "[c]orporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *Id.* at 900 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978)); *see also* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1133–35 (10th Cir. 2013), *cert. granted*, 133 S. Ct. 641 (2013) (applying *Citizens United* to hold that a for-profit company's free-exercise rights existed by extension of its right to freely associate, finding "no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression").

Although *Button* overturned state laws which banned political speech on the major line of reasoning that the NAACP was a civil rights entity fighting for the civil rights of African Americans, the distinction between speakers advocating for civil rights and speakers advocating other causes may be blurred by *Citizens United*. Professor David McGowan has pointed out that the distinction is already blurred between the clearly political civil-rights cases and others:

> The distinction between civil rights litigation and other cases is elusive. Private benefits may be a small fraction of social benefits in both overtly political cases and in seemingly ordinary private disputes. A tenant seeking to avoid paying back rent might try to persuade a court to adopt an implied warranty of habitability, for example. If adopted, the warranty might provide a defense for the tenant and alter housing practices in an entire state. And overtly political challenges are sometimes brought in the name of persons with at least a small stake in the result of the case.[207]

Further lending credence to McGowan's argument that the line between civil-rights litigation and any other type of litigation is blurred, Kennedy also hammered home that where a question exists about the speech protection that is warranted, the First Amendment requires that the Court "give the benefit of any doubt to protecting rather than stifling speech."[208] Prohibitive champerty laws functionally operate to suppress content that may be infused into the courts and inherently political (and First Amendment protected) legal process because only claims sanctioned by litigants' own self-acquired capital may find their way into the sphere.[209]

Champerty statutes such as Virginia's or Florida's, which fail to carve out an exception for lenders who advance funds to plaintiffs to initiate and continue litigation, place a restriction on corporate commercial speech and the entity's ability to associate freely with whomever it chooses.[210] A strict scrutiny analysis under the First Amendment as applied to these state champerty statutes might first examine the statute under the content-based speech test. Champerty statutes which prohibit a third party from taking an interest in litigation are content-based restrictions because they prohibit exercise of potential political speech based solely on the forum in which that speech is delivered. Content-based speech restrictions, as the Supreme

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[207] McGowan, *supra* note 176, at 11.

[208] 130 S. Ct. at 891 (citing FEC v. Wisc. Right to Life, Inc., 551 U.S. 449, 469 (2007)).

[209] *See* Knake, *supra* note 86, at 36 (arguing that "[i]n the limited context of legal service delivery . . . it is difficult to see how the Court can maintain this artificial distinction between political versus commercial speech").

[210] *See supra* notes 129–30 and accompanying text.

Court has held, are presumptively unconstitutional unless they are "narrowly tailored to serve a compelling state interest."[211] Prior to *Citizens United*, the argument that categorically prohibitory champerty statutes are narrowly tailored to serve the government's interests may have stood the test because the Government could feasibly argue that it was trying protect the legal system from corporate influence. In defending champerty statutes, the government would be predisposed to cite to a number of state interests which reflect the legal and ethical concerns surrounding third-party litigation.[212] But no longer does it appear that the government will be able to argue that champerty-prohibitive statutes protect the legal system from undue corporate influence.[213] Third-party litigation finance companies such as Burford and Juridica will be able to argue that they have the same access rights to the courts as do the NAACPs of the world. As quoted from *Citizens United*:

> [T]hat "state law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets" . . . does not suffice . . . to allow laws prohibiting speech. "It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights."[214]

Justice Scalia's concurring opinion supports the idea that the Supreme Court may be inclined to expand First Amendment protection to corporate speech.[215] Justice Scalia explained that freedom of speech includes "the freedom to speak in association with other individuals, including association in the corporate form."[216] In this way, as Professor Knake has suggested, *Citizens United* should expand "to for-profit corporations *Button*'s protections for the association of nonprofit corporations and lawyers to deliver legal advice and advocacy."[217]

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[211] *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 198 (1992) (plurality opinion); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655 (1990); Boos v. Barry, 485 U.S. 312, 334 (1988) (plurality opinion); Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 573 (1987); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985); United States v. Grace, 461 U.S. 171, 177 (1983); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[212] *See supra* Part I.B.

[213] *See Citizens United*, 130 S. Ct. at 884 ("[T]his Court now concludes that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").

[214] *Id.* at 905 (quoting *Austin*, 494 U.S. at 658–59 (Scalia, J., dissenting)).

[215] *See* Knake, *supra* note 86, at 35 (stating that various freedoms apply to the corporate form).

[216] *Citizens United*, 130 S. Ct. at 925 (Scalia, J., concurring, joined by Alito, J., and joined in part by Thomas, J.).

[217] Knake, *supra* note 86, at 35.

CONCLUSION: THIRD-PARTY LITIGATION FINANCE REGULATION THAT DOESN'T INFRINGE ON FIRST AMENDMENT JURISPRUDENCE

Champerty laws that prohibit taking an interest in a lawsuit which categorically bans all parties from taking an interest for profit are not narrowly tailored to protect the government's interests. As Jason Lyon has written, the doctrine of champerty is obsolete and "appear[s] to run counter to our public policy goals . . . no longer provid[ing] a valid justification for prohibiting third-party litigation funding."[218] Indeed, many states have already begun phasing out the doctrines of champerty.[219] In the wake of *Citizens United*, free speech and the freedom to associate with whomever one pleases despite one's status as a corporate entity should act as the leading argument to strike down any prohibitory champerty law which will prevent the existence of litigation finance contracts.

This Note is certainly not advocating for the absence of any regulation of the third-party litigation finance industry. Indeed, there are serious problems with allowing an entity with a fiduciary duty to its investors to have too much control over a lawsuit to which it is not a litigant-party.[220] As states like Ohio have already done, strong regulations should be promulgated. Third-party litigation financiers having excessive control over a litigating party's course of action in a lawsuit is extremely problematic, and regulations which promote solutions to this problem are strongly encouraged. These regulations should ensure that the conflicts between attorneys' professional and ethical obligations and third-party litigation finance corporations' fiduciary duties to their investors are addressed.

To preserve the interests of the plaintiff over the third-party lender, regulations should be implemented which preserve attorney-client privilege and leave the legal decisionmaking to the attorneys with the informed consent of their clients. Third-party litigation finance agreements that include conditions that the financier be apprised of developments in the case, even when those developments might be privileged or involve disclosure of work product, are not inherently perverse to the attorney-client privilege as long as those disclosures are kept confidential.[221] Some investors demand a say in choice of counsel, the right to participate in strategic decisions, or the power to veto settlement offers.[222] In order to avoid these potential problems—where the third-party lenders overreach, have excessive control over the lawsuit, and dictate strategy and decisionmaking to counsel—new regulations should

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[218] Lyon, *supra* note 29, at 589–90.

[219] *See supra* Part II.C.

[220] *See supra* Part I.B.

[221] *But see* Robert C. Weber, *IBM GC Says: Beware of Lenders Offering to Finance Your Lawsuit*, FORBES (Feb. 12, 2013, 7:55 AM), http://www.forbes.com/sites/danielfisher/2013/02/12/ibm-gc-says-beware-of-lenders-offering-to-finance-your-lawsuit/.

[222] *See id.* (describing conditions routinely included in third-party financing contracts requiring "the financier [to] be apprized of developments in the case").

ensure that third-party loans be made directly to litigants rather than to their attorneys. This will help "to avoid the potential conflict of interest between the attorney's duty of loyalty to clients and the financial obligation to lenders."[223]

The problem of an increase in frivolous lawsuits is not exacerbated by the absence of champerty prohibition.[224] Indeed, systemic procedural rules already exist[225] which are designed to prevent the frivolous claim from entering court, and the frivolity-increase argument assumes that third-party litigation financiers will not have any filtering mechanisms of their own. But third-party litigation finance corporations will ultimately seek out only those claims which have the highest likelihood of success, and the spectrum of those cases will be far removed from the spectrum of even the least frivolous of the suspect claims. Advocating for the abolition of prohibitory champerty law is not analogous with a wild west scenario where lenders run rampant; indeed many safeguards deemed constitutionally acceptable—such as usury laws, the prohibition of lawyer fee-sharing with non-lawyers, or a lawyer's duty to exercise independent professional judgment—can help rein in the evils that may still exist in robust market for third-party litigation funding.[226]

While Judge Taylor may need to find a new obscure doctrine to rely on to dismiss the feuding families in his courtroom, the modern legal system has no place for prohibitory champerty laws. First Amendment jurisprudence and the Supreme Court's ambivalence towards the identity of speakers confirms that categorically prohibitive champerty is unconstitutional.

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[223] Lyon, *supra* note 29, at 609.

[224] *See* Sebok, *supra* note 82, at 104–05 (discussing whether the doctrine would have an effect).

[225] *See, e.g.*, FED. R. CIV. P. 11(b) (requiring that an attorney perform a due diligence investigation concerning the factual basis for any claim or defense). Analogous state procedural rules exist which perform the same frivolous-claim filtering function as Rule 11.

[226] *See* Steinitz, *The Litigation Finance Contract*, *supra* note 5, at 487.