1-1-1989

SLAPP Suits: A Slap at the First Amendment

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I. Introduction

I have been involved in first amendment law for about twenty years. Today, however, is the first time I bring my interest in our fundamental constitutionally protected political freedoms to the arena of environmental and ecological legal concerns. There are several possible reasons for my being laggard in recognizing the important and exciting developing interplay between constitutional and environmental law. Perhaps the simplest and the most truthful reason for my becoming involved is that, sooner or later, my colleague and friend Nicholas Robinson dragoons or enlists each of us into his causes — and my time has finally arrived. If so, I thank him, for, in preparing for this symposium, I have become aware of a nationwide pernicious and unacceptable threat to the basic right of Americans to peacefully and lawfully engage in a wide range of social, political, and communal activities. This threat is aimed at many individuals and groups influencing public policy, public decision-making, and the development of law and is the subject of this symposium: the SLAPP suit.

Strategic Lawsuits Against Public Participation, or SLAPP suits, as they are commonly called, are a growing nationwide phenomenon[1] which imperil the protection afforded

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* This address was presented during "Strategic Lawsuits Against Public Participation (SLAPPs) - Protecting Property or Intimidating Citizens," the Fall Colloquium of the Pace University School of Law's Center for Environmental Legal Studies, co-sponsored by the Environmental Law Committee of the Westchester County Bar Association, White Plains, New York, October 14, 1989.

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1. *See* Canan & Pring, *Studying Strategic Lawsuits Against Public Participa-*

by the petition clause of the first amendment to the United States Constitution.[2] These suits also implicate fundamental freedom guarantees of the various state constitutions.[3] My focus today, however, will be largely on the first amendment.

II. The Constitutional Framework: The Petition Clause

The words of our marvelous first amendment ought to be before us as we explore the constitutional ramifications of SLAPP suits: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[4] There, in remarkably few words, are encapsulated the most seminal rights of a free people to assemble and to petition the government. What do these words, penned towards the end of the eighteenth century, mean as we experience the closing decade of the twentieth?

We must start our examination by recognizing the inextricable symbiosis of constitutional rights, public controversy and debate, and litigation. We must remember that all three

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tion: Mixing Quantitative and Qualitative Approaches, 22 LAW & SOC'Y REV. 385 (1988). *See also* Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23 (1990); Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3 (1990).

2. U.S. CONST. amend. I. The basic political, as opposed to religious, freedoms protected by the first amendment concern free speech, free press, the right to assemble peacefully, and the right to petition. Historically, the right to assemble has been viewed both as a protection antecedent to the petition clause as well as being a subordinate right to the petition clause. I suggest that the petition clause right, generally underdeveloped in American constitutional law, has a strong doctrinal potential independent of associated first amendment rights and that this is especially so with regard to analyzing and resolving the SLAPP suit issue.

3. Each state constitution provides specific protection for the rights covered by the language of the federal Constitution's first amendment. In some instances the language is identical, in others the wording varies from the federal provision. What is significant is not the textual language of the states' constitutional provisions but the possibility of judicial interpretations of textual language to address the problem of SLAPP suits. *See infra* 56. The author, who teaches a seminar in state constitutional law, is exploring approaches to resolving the issues raised in this conference through creative development of state constitutions.

4. U.S. CONST. amend. I.

factors come under one central, and to me, indisputable heading — politics. The Constitution is politics. Public debate and controversy are part of politics. Litigation is a form of political activity. The suggestion is made, usually by the harmlessly naive, that litigation and politics, or perhaps law and politics, are forces each divorced from the other. My guide, still valid after the passage of scores of years, is de Tocqueville: "Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate."[5]

Virtually every major issue of contemporary political, and indeed, often even social life, has taken on a jurisprudential and juridical dimension, frequently at the center stage apex of constitutional law. In the United States, issues such as abortion, prayer in the schools, legislative apportionment, sexual behavior, the death penalty, and a host of pressing political issues are often resolved, albeit not always well or permanently, through the courts. Environmental law, land use and development law, and historic preservation law, interests shared by many attending here today, have been largely advanced through litigation. It should be no surprise that those who believe their interests are threatened by community and citizen activism in these volatile areas of public debate and controversy would also resort to litigation. Too many of these suits, the SLAPP suits which bring us together today, represent flagrant misuse of the judicial process. Indeed, the misuse rises in many instances to the studied and cynical manipulation of the judicial process to intimidate, harass, and prevent the exercise of first amendment rights.

The petition clause of the first amendment, historically relatively dormant, offers a basis for defining new and much needed protection against invidious SLAPP suits.[6] Before an-

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5. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 30 (H. Reeve trans. 1961).

6. The greatest number of first amendment political freedom cases have been decided under the premises of free speech protection. A large body of free press cases has also developed. The Supreme Court has seemed to view, incorrectly in my opinion, an inherent sameness and fungibility in the free speech clause and petition clause. This approach creates problems in the SLAPP suit situation where free speech principles, as currently developed under that clause, may be both too remote and too underinclusive to address the issue.

alyzing the application of the petition clause and some remedies which may emanate from its sweeping protection, a cautionary note is needed. Not all suits brought by large corporations, developers, and others against citizens, either individually or against the organizations to which they belong, are necessarily properly denominated as SLAPP suits. Developers have rights. Corporations have rights. These rights can be and often are violated. Their constitutional and other legally protected rights are in no way inferior to the rights of those whose causes and commitments we empathize with and support. Our challenge, as lawyers, law professors, and citizens concerned about the SLAPP suit epidemic is to devise remedies which do not themselves imperil the constitutional and legal rights of others. To appeal to the courts for a remedy is, we must not forget, a most elemental demonstration of the right to petition.

To determine the scope of protection afforded by the petition clause, we must first analyze its words in a contemporary context. We should immediately part company from those who would interpret the reach of the petition clause in the light of its framers' experiences or those who would limit its application to late eighteenth century models of petitioning. The first amendment's framers were familiar with a fairly small and in many ways a selectively-enfranchised society in which issues and grievances were resolved locally and directly. In parts of the early republic the town meeting was common; everywhere those who were considered worth listening to had the ears of those elected. Modern concepts of community activism were not foreseen.

The framers may have intended simply that government was not to prevent people from making known to officials their complaints and desires nor were they to be sanctioned for so doing. Lawyers and litigation were both, paradoxically, fundamentally suspect and heavily employed in the early republic. The use, however, of the law was generally reserved for the resolution of private disputes. Litigation as an intended and strategic vehicle of social change, or, as in the SLAPP suits, a device to prevent public activism, was largely unknown, although de Tocqueville's famous statement was both

shrewd observation and acute forecasting of an emerging phenomenon.[7]

I will not engage in a lengthy discussion of the original intent underlying the petition clause except to suggest that, whatever the experiences of the framers, they understood that wrongful, that is politically, morally, and legally wrongful, barriers to access to government by citizens was anathema. True, the fundamental protections of the Bill of Rights were intended to be limited in application to the federal government, but today most of those protections have been incorporated through the fourteenth amendment to the states, which assuredly includes, in its entirety, the first amendment.

I wonder, what would the framers think if they knew not just of the SLAPP suits brought by developers but of a SLAPP suit litigated in New York State, in which a local government sued its own citizens for peaceably and lawfully organizing and lobbying against a government scheme to launch a bond float?[8]

III. SLAPP Suits and the Chilling Effect Doctrine

A modern reassessment of the petition clause requires that we first recognize the central reality underlying suits which are not brought in good faith either to vindicate the violation of legal rights or to seek appropriate judicial relief for harm unlawfully done. Expressed in constitutional law concepts, the key term describing what is really happening is "chilling effect." By discussing the SLAPP suits in terms of their intended goal — paralyzing intimidation — the chilling effect doctrine allows us to expose and comprehend the enormity of the constitutional violations.

First amendment case law, as opposed to the amendment itself, does not have a long history, and the history of the chil-

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7. This is not to suggest that the *result* of private litigation did not cause or influence change, locally or nationally. Many cases caused profound reverberations. Generally, however, their effect can be divorced from the intent which brought the underlying controversy before a court.

8. Schultz v. Washington County, 157 A.D.2d 948, 550 N.Y.S.2d 446 (3d Dep't 1990).

ling effect doctrine is shorter yet. The chilling effect doctrine springs from the flood of first amendment litigation during the period of time which I hope was the late Cold War (before the Russians traded Red Stars for Golden Arches). During the late 1940s and the 1950s, the federal government sought ways to restrict the rights and freedoms of Americans tainted, rightly or wrongly, with accusations of disloyalty. While individual and identified persons could be criminally and otherwise sanctioned, the government sought to inconvenience and disable large numbers of potential and actual supporters of nations, causes, and organizations whose values were deemed inimical to American values.

Although often acquiescing in and sustaining the imposition of sanctions against individuals tried and convicted of various subversive offenses, the Supreme Court increasingly signaled that it would protect the full range of first amendment rights.[9] Recognizing that direct prohibition of many undesired activities would result in Supreme Court invalidation, the government devised schemes which on their face involved dissuasion rather than prohibition.

One such scheme was considered by the Supreme Court in *Lamont v. Postmaster General*,[10] a major chilling effect case. The government had decided that persons to whom unsealed mail was sent from overseas, which was denominated by the Post Office Department as being communist propaganda, would get their mail after receiving a notice and affirmatively requesting that the mail be delivered.[11] The government, perhaps uncharacteristically tongue in cheek, claimed it was helping many Americans avoid receiving what the post office officials clearly viewed as a species of junk mail or worse. The Supreme Court, in striking down the procedure, found that what government could not do by prohibition, it could not achieve by unconstitutional intimidation.[12] In a de-

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9. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951).

10. Lamont v. Postmaster General, 381 U.S. 301 (1965).

11. *Id.* at 302.

12. *Id.* at 306-07.

cision decidedly reflective of the realist school of constitutional adjudication, the High Court recognized that to put any price, let alone an unknown price, on the exercise of a first amendment right, in this instance the right to receive certain mail, was to effectively chill the citizen in the exercise of her rights and to prevent the free flow of ideas.

Would such intimidation effectively chill all citizens from exercising their rights? No, the Court has often answered. In any situation there are those who for one reason or another cannot and will not be chilled. The protection of first amendment rights requires that the rights of the most timid, the most afraid, the least activist-type person must be identified and secured.

The chilling effect doctrine has been restated and reapplied in many cases[13] but its bedrock principle has never changed: the protection constitutionally afforded any one person participating in the political process must protect all, and the recognition that most citizens are unwilling or unable to pay a price, actual or potential, for the exercise of their rights must be factored into the formulation of first amendment law. That concept applies to all branches of the first amendment political freedom clauses, including most certainly the petition clause.[14]

In my view, the chilling effect doctrine can and must be applied in SLAPP suit litigation, and that doctrine provides

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13. *See, e.g.*, Sheet Metal Workers' Int'l Ass'n v. Lynn, 488 U.S. 347 (1989) (the Court found the removal of an elected official had a pronounced chilling effect on both the fired official's exercise of his own free speech rights as well as on the members who had voted for him).

14. Perhaps almost as much as the first amendment plaintiffs of the Cold War era, contemporary citizen activists, or at least many of them, are ill-equipped economically, socially, and often politically to withstand SLAPP suits. This is especially true if the litigation is protracted and the alleged violations are many in number and severe in their claimed harm. Many activists do not necessarily reflect views shared by many or most of their neighbors and, often, local government may for a variety of reasons be more sympathetic to SLAPP suit plaintiffs than to defendants. Obviously the decision to be an activist, or to participate in decision-influencing or shaping activities cannot be made with the certainty that no backlash, counter-attack or personally upsetting events will occur. The point is that based on relative interests and responsibilities, the average community activist is chilling-effect-susceptible, a factor proven by the comments of a number of speakers at this symposium.

the basis for fashioning remedies. Its applicability is fairly complicated, however, because the context of SLAPP suits differs markedly from the types of lawsuits in which the doctrine was first hammered out.

Virtually all important chilling effect cases featured a citizen, or an organization of citizens, contesting federal, state, or municipal government action which, it was claimed, impermissibly abridged first amendment rights by direct or amorphous chilling of the activities of those persons or groups. By contrast, SLAPP suits are brought by private parties against private parties and, more than occasionally, against government officials such as town and planning board officers and the bodies on which they serve. The plaintiffs' causes of action, however, understandably do not raise and identify the underlying political concerns and motives of the plaintiffs. Thus, they reflect alleged grievances phrased in the familiar pleading language of common law and statutory causes of action such as libel and slander, interference with contractual relationship, interference with economic advantage, infliction of mental distress, prima facie tort, invasion of privacy, and other torts well known to courts and counsel.[15] While the complaints in the original chilling effect cases often proclaimed and always reflected their underlying political context, SLAPP suit complaints appear as just one more lawsuit in a litigious society in which people seek damages from each other and, perhaps, eq-

15. Perhaps the key factor delineating SLAPP suits from actions that are easily termed frivolous, with the consequences attendant upon such a finding, is that the SLAPP actions effectively masquerade as facially valid lawsuits. A true frivolous action often alleges either totally untenable theories of law or ridiculous factual claims, or both. That is why the frivolous action can often be disposed of through either demurrer or summary judgment. All of the causes of action listed in the main text, with the possible exception of prima facie tort, are important reflections of the historical development of the recognition of, and protection of, private rights, the violation of which properly calls for a judicial remedy. Prima facie tort, at least in New York, is judicially a poorly-defined cause of action often invoked by plaintiffs and rarely sustained by trial and appellate courts. Additionally, SLAPP suit plaintiffs sometimes allege, as against both defendants who are public officials and private-party defendants, the commission of constitutional torts. The end result is that a well-pleaded SLAPP complaint, reflecting technical skill rather than objective reality, is, at least in the preliminary stages of litigation, well-protected against allegations that the suit is frivolous.

uitable relief to prevent ongoing and future harm.

The problem, of course, is that the heightened protection that is applied when first amendment rights are threatened requires first and foremost that the first amendment nature of the case be recognized. A true SLAPP suit is like a British Q-ship of the First World War: to all appearances on the outside it seemed an ordinary, even commonplace, vessel, but in reality it masqueraded a powerful armament and agenda. The Q-ship sank U-boats which were deceived by its false appearance; the SLAPP suit sinks community activists because judges often do not, or cannot, identify the true colors under which the SLAPP suit sails the seas of litigation.

The federal government apparently achieved some significant degree of chilling effect at the same time that its political agenda underlying its various programs and regulations was proclaimed. Now imagine the extent of the chill as citizens become enmeshed in litigation which forces them to answer complaints which allege injurious conduct on their part which, if founded in reality, would clearly merit major recovery for the plaintiffs.

The chill sought and often attained by SLAPP suit plaintiffs falls into two levels. In the first, immediate paralysis at best or distraction at least, is sought so that the SLAPP suit defendants cannot effectively continue to engage in their petition clause-related activities. Forcing them to incur big bills for litigation, to say nothing about the trauma of being sued, often achieves the desired result. On the second level, long-term demoralization may be seen, characterized in many instances by cessation of community involvement. Organizations may lose members or may become effectively dysfunctional or both. They may even disband. Such a result benefits not only the SLAPP suit plaintiff but others who at a later date might have had to interact with and respond to the SLAPP suit-defeated group.

IV. Defendants' Protections

To bring the SLAPP suit phenomenon under control, it is essential to recognize that the protection offered by the first

amendment against a SLAPP suit is both potentially great and presently limited. While hardly the most judicially explored aspect of the first amendment, the petition clause cases provide valid and relevant doctrines which can rationally and effectively be applied to contesting identified SLAPP suits. Indeed, these petition clause cases provide the protectionist platform on which to construct substantive and procedural remedies to lessen, if not eliminate, SLAPP suit-caused harm. Application of the chilling effect doctrine is a case in point.

An important area to examine in SLAPP suit attacks is the motivation underlying the defendants' actions. While few SLAPP suits are ever intended to go as far as trial, much less verdict, SLAPP suit complaints and the publicity which they generate often reflect the plaintiffs' accusations of bad intent, bad faith, and bad motivations by the defendants even when such factors are not necessarily elements of the causes of action brought. If the courts can be helped to see that underlying first amendment freedoms, particularly the petition clause, are implicated in the actions, the *Noerr-Pennington*[16] doctrine can be brought into play. In *Noerr-Pennington*, the Supreme Court, analyzing and applying the petition clause, correctly recognized that the protection of the freedom to petition, in its widest sense, required that actions rather than motivations determine the legality of a challenged act.

If a court recognizes that as a matter of law, defendants in a lawsuit are engaged in a constitutionally protected activity, it does not nor should it, lead automatically to their being exculpated from liability. *Noerr-Pennington*, however, would result in a finding that once a protected activity is involved, liability depends solely on the illegality of the acts themselves, and the aims and motivations underlying the challenged acts are of no legal consequence. Stated in other words, *Noerr-Pennington*, when invoked, takes much of the wind out of a plaintiff's sails because he is then forced to do just what most SLAPP suit plaintiffs cannot do — prove the illegality or tortious nature of his opponent's behavior without relying on the

16. Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

bolstering quality of bad motive attacks.

It would seem that *Noerr-Pennington* can provide much of the protection SLAPP suit defendants need. But if you have been keeping your eye on the SLAPP ball, you will remember one important reality — virtually always, the SLAPP plaintiff has no desire to allow the litigation to proceed to the point where *Noerr-Pennington*, or any other speech and petition-protectionist doctrine can be applied. Where plaintiffs with legitimate causes of action chafe at long court calendars and delays, the SLAPP suit plaintiff plays by different rules. In the world of *in terrorem* litigation, the operative rule is — keep the other guy out in the field as long as you can, long enough to intimidate him, but don't let him get to bat.

So we have a problem. We have the potentially broad, but insufficiently developed, unavailable umbrella protection of *Noerr-Pennington* without the opportunity of having it applied often in SLAPP suits.

Actually, the problem is even more invidious since too often the threat, rather than the institution of litigation achieves the desired result of intimidation and surrender.

I would like to raise for comment and further discussion some solutions to protect petition clause freedoms in cases that never will, indeed never should go to trial. As a preliminary comment, please accept the following. First, protection for SLAPP suit victims cannot be at the expense of the rights of anyone seeking redress in the courts for judicially cognizable harms. Whatever your feelings are about the relative merits of typical SLAPP suit adversaries, and I know feelings run high among this group today, constitutional rights can never truly be strengthened for one group by weakening the rights of another. Second, there is no, and there can be no, "magic bullet" cure for SLAPP suits. A host of responses, judicial, legislative, and citizen, will take the terror out of many of these actions. Perhaps these responses will make SLAPP suits less profitable to pursue, but achieving goals — good or bad — through actual or threatened litigation, is as American as apple pie and is likely to remain so.

At the doctrinal level, do not look to the United States Supreme Court for a judicial response to the SLAPP suit

right now. Existing constitutional doctrine favors SLAPP suit defendants, and for many reasons SLAPP suits are less likely to come before the Court than other first amendment issues. In any event, I freely admit to a fear of pressing this Court with SLAPP suit issues. I simply do not trust what I perceive as the current majority bloc on the bench. I would prefer to live with the doctrine we now have and try to have it applied more expeditiously and correctly, rather than risk reversals or new limitations on petition clause concepts.

I do suggest, however, that whenever and wherever feasible, SLAPP suit issues be taken before the highest courts of the states for adjudication based on protections afforded by state constitutions. State constitutional law is one of the most exciting areas of law in the United States and the use of the states' highest laws to shape and protect individual freedoms beyond the level afforded by the federal Constitution provides real opportunities. There is as much opportunity for such doctrinal development in SLAPP suits as in any other issue. Since many SLAPP suits raise issues on which, at the state level, interlocutory appeals may be taken, a body of state petition clause-protected law may emerge where a corollary development under federal law would be difficult if not impossible to achieve.

Note also that our states' high courts are actively involved in environmental, land use, and historic preservation issues. State appellate courts may well be able to make the connection between SLAPP suits and the true public participation issues in which they are enmeshed more quickly and effectively than their federal counterparts.

Either by court rule or by statute, the expeditious handling of cases where first amendment rights, or their state constitution equivalent are identified, is the single most important defendants' remedy to limit the harm of SLAPP suits. A process must develop whereby a defendant in a SLAPP suit can move for expedited calendaring of the case by alleging the constitutional nature of the activities deemed injurious in the seemingly ordinary tort case. Certainly, this cannot be *ex parte* and the plaintiff must be afforded an opportunity to respond. The issue of the constitutional implications must, of

course, be a question of law for the court. Upon finding that a constitutionally protected right was involved, a proper and practical procedure would mandate moving the case ahead of all cases except for criminal cases receiving preference because of the "speedy trial" mandate. Such a process would scuttle most real SLAPP suits because the last thing the plaintiff wants is an expedited trial. Costs to the defendant, who is almost always financially less secure than the plaintiff, would be lessened and one of the real burdens, and intimidating factors, of SLAPP suits will have been lessened.

A plaintiff with a genuine and well-founded cause of action will not be dealt with unfairly under the process I have just described, since such a party would presumably be happy to have an early chance at proving his case. Such a plaintiff would also benefit from increased pressure on the defendant to settle, if, after securing an expedited proceeding, the defendant determined or was forced to recognize that she was really at fault legally.

Countersuits are believed by some students of SLAPP suits to be a viable means of, as some have put it, "SLAPPing back." While I recognize that some SLAPP suit defendants have received high verdicts in counterclaims, although many of these verdicts appear to be on appeal now, I do not believe that countersuits, or "SLAPP-Backs," are a good route to try to control the SLAPP suit phenomenon. For one thing, knowing that a suit is a SLAPP suit and proving that it was maliciously initiated are two different things. Merely prevailing does not provide the SLAPP suit defendant with a firm and colorable basis for a countersuit, especially when as is so often the case, the victim prevails because the suit is not prosecuted or is withdrawn rather than won at trial by the defendant.

Countersuits also involve people in time-consuming, uncertain, and both financially and emotionally draining litigation. In the case of community groups, such litigation can occupy members' time to the detriment of pursuing the purposes which caused them to unite in the first place. While in individual cases, countersuits may be advisable, in general they are no panacea for the problem.

Sanctions, whether imposed on counsel, parties, or both,

are major subjects of discussion today. Indeed, sanctions have been imposed in SLAPP suits. This, however, is at best a peripheral approach which has little effect on the main problem. Currently, sanction awards are limited by statute in most jurisdictions and the SLAPP suit plaintiffs can easily pay these amounts, including sanctions imposed on their attorneys, as part of the cost of doing business. In any event, few SLAPP suits are so facially out-of-line that the attorney is in serious danger of being sanctioned for bringing the action.

I do believe that attorney's fees, a frightening prospect for most SLAPP suit victims, should be paid by the plaintiff when a suit is found to lack merit and is also found to threaten first amendment or state equivalent protections. This would run counter to the prevailing American Rule[17] that each party pays for her own lawyer, but there are many exceptions and a statutory exception for petition clause implicated litigation may cause some SLAPP suit plaintiffs to think twice about vigorously pursuing bad claims.

V. Concluding Remarks

Exploration of responses to SLAPP suits is really just beginning and today's symposium allows for a fruitful exchange of ideas. I do suggest that the most important starting point for all those concerned with SLAPP suits is the understanding that the activities threatened by these suits are meant to be, and must be, protected as fundamentally guaranteed constitutional rights which are central to our conception of freedom. The broad language of the first amendment was intended, as was much of the Constitution, to establish bedrock precepts relevant to all ages. As the framers understood the importance of public participation in the context of the issues they debated, so must we recognize that community planning, environmental protection, land use, and historic preservation are some of our late twentieth century concerns which demand the highest degree of first amendment and state constitutional protection. The petition clause gives us rights which cannot be

17. O. DOBBS, THE LAW OF REMEDIES § 3.8, at 194 (1973).

usurped by the arrogant and improper employment of the very laws created to assure a free and civil society. All of us must be involved not only in pressing the issues we care about in our communities but in never ceasing to demand the full measure of constitutional protection and freedom we deserve.