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THE WORST WAY OF SELECTING JUDGES—EXCEPT ALL THE OTHERS THAT HAVE BEEN TRIED

Michael R. Dimino, Sr.*

I. INTRODUCTION

We all know the defects of judicial elections. The public is too ignorant of the legal system, the candidates, and the law to make wise choices; consequently, judges are elected often because of their famous names, ethnicities, position on the ballot, party affiliation, and the like, rather than through an assessment of merit. Judicial candidates prostrate themselves before the majority, dependent on their votes; consequently, the ability of the judiciary to protect the rights of unpopular individuals and to maintain fidelity to precedent suffers. Candidates campaign by appealing to constituencies; consequently, judges once on the bench do not approach legal issues with entirely open minds. And judges approaching reelection look over their shoulders, cognizant of the political risk they run by performing their jobs honorably.

It sounds like a compelling case. Popular election is an awful way to select those charged with administering justice and personifying Law. I agree. And if you are not yet convinced, other essays in this volume and in innumerable other symposia will give you plenty of reasons to hate judicial elections.

Nevertheless, I write here in the defense of elections, or at least to urge caution in the face of the seeming torrent of criticism. Just as “you can’t beat something with nothing,” it is not enough to point to the flaws inhering in elections; those who would do away with them need to show that a different approach is superior.

This Essay critiques the arguments leveled at judicial elections. For each criticism--which I have discovered through a reasonably thorough review of cases and law review commentary--I assess the degree to which the criticism is

* Assistant Professor, Widener University School of Law (Harrisburg, Pennsylvania). J.D. Harvard Law School, 2001; B.A. State University of New York at Buffalo, 1998. The title paraphrases a portion of a speech Sir Winston Churchill made to the House of Commons on November 11, 1947: “Democracy is the worst form of Government except all those other forms that have been tried from time to time.” THE OXFORD DICTIONARY OF MODERN QUOTATIONS 216 (Elizabeth Knowles ed., 5th ed. 1999). Ben Barros, Jim Diehm, and Randy Lee provided helpful comments, for which I am grateful. I thank Kristen Coy for excellent research assistance and Dean Doug Ray and the Widener University School of Law for a research grant to prepare this essay. Finally, I thank the Northern Kentucky Law Review and Mike Nitardy for the invitation to participate in this discussion and the law review staff for their editorial suggestions.
valid, and also the degree to which other judicial-selection methods fall prey to the same criticism. I argue that the flaws of judicial elections, though often considerable, are shared in large part by alternative selection systems. Beyond, however, being simply equivalent in malignity to other selection methods, elections have—or, rather, may have, depending on the content of judicial-election campaigns—one advantage over other systems that instigated the nineteenth century move to judicial elections and ensures their popularity with the everyday citizenry: the opportunity they provide for a free people to choose those officials who exercise policy-making authority. Democracy may indeed be the worst method of choosing judges . . . except for all the other ones.1

II. THREATS TO JUDICIAL INDEPENDENCE

A. Independent from Whom?

Two motivations inspired the move to judicial elections.2 First, judges were seen by liberals of the mid-nineteenth century as too conservative, and it was thought that public involvement in the selection of judges would make the bench more liberal.3 The goal was accountability.4 Judges were making unpopular decisions, and the public wanted a voice in judicial selection to bring the judiciary back into line. Second, certain reformers thought judicial elections would raise the quality of the bench by making it independent of other parts of

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1 As Professor Schotland has put it, the reformers’ quest is finding the “method of selecting judges [that] is least unsatisfactory.” Roy A. Schotland, To the Endangered Species List, Add: Nonpartisan Judicial Elections, 39 WILAMETTE L. REV. 1397, 1398 (2003). See also Anthony Champagne & Judith Haydel, Introduction, in JUDICIAL REFORM IN THE STATES 15-16 (Anthony Champagne & Judith Haydel eds., 1993) (“The experience with the selection of judges in the states proves conclusively that there is no good way to select judges.”).


4 See, e.g., Dodd et al., supra note 2, at 358 (“By the time of the Presidency of Andrew Jackson . . . many states began to move towards an elected judiciary. The Hamiltonian desire for an independent judiciary, at the state level at least, was giving way to a concern that unelected judges . . . were not answerable to the electorate.”).
According to this theory, judges who were dependent on the legislature or the governor for their positions could not, it was thought, fulfill their duties properly, for they would be constantly worried about the ways other governmental officials would perceive their performance.

Elections were adopted, therefore, to change the philosophies of the courts and to make the judges more independent than they were under appointive systems--independent, that is, of other government officials. In essence, the states adopting judicial elections made a conscious choice to trade dependence on a governmental appointing authority for dependence on the people.

B. Independence in Non-Elective Systems

This history should give us pause before condemning judicial elections as negating the independence of the judiciary, and force us to ask ourselves what we mean by the phrase. In a system most protective of judicial independence, judges would be subservient only to the law. Protections of jurisdiction, tenure, and salary would be in place so judges could obey the law without fear of consequences. But this is unrealistic in at least two ways. First, there will always be some controls the people and their representatives can place on all aspects of government. Second, as discussed in the next subsection, faithfulness to a concept as indeterminate as “law” is not terribly constraining. With legal interpretations subject to endless debate among the most honorable jurists, and with the constant threat or presence of some judges who refuse to treat law as

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5 See Dimino, supra note 2, at 311.
6 See Hall, supra note 3, at 347, 350.
8 See Nelson, supra note 7, at 217.
10 See Frank H. Easterbrook, Ways of Criticizing the Court, 95 HARV. L. REV. 802, 828-29 (1982) (arguing that because the Supreme Court decides what arguments “are out-of-bounds,” no argument it makes is “out-of-bounds”).
constraining in the least, it is evident that a judge who need be responsive to only the law need be responsive to no one.

No state provides its judges with more independence than does the national government, with appointment followed by tenure for good behavior and salary protection. Yet even that system places substantial constraints on judicial independence. Jurisdiction is provided and withdrawn by statute, facilities and staff are provided (or not) by statute, and enforcement of court decisions rests to some degree on the executive. Furthermore, even though salary cannot be diminished by the political process, the possibility of increases, as well as the possibility of promotion, can motivate judges to shade their interpretations of law to be more politically palatable.

12 See, e.g., Roper v. Simmons, Docket No. 03-633, 2005 U.S. LEXIS 2200, at *24, *35 (Mar. 1, 2005) (holding that “our own independent judgment” is sufficient to shape the meaning of the Eighth Amendment and reject a “misguided” state statute “[f]rom a moral standpoint”); New Jersey Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1037-42 (N.J. 2002), cert. denied, 537 U.S. 1083 (2002) (construing a statute, N.J. STAT. ANN. §§ 19:13-19:20 (2004), which provided that a candidate who withdraws from an election “not later than the 51st day before the general election” shall be replaced by the choice of the state committee of the candidate’s party, to mean that the Democratic state committee was entitled to replace a scandal-mired candidate who withdrew thirty-six days prior to an election he was sure to lose) (emphasis added); Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398, 444-46 (1934) (holding that a state acted consistently with the Contract Clause, U.S. CONST. art. I, § 10, cl. 1, which prohibits states from “impairing the Obligation of Contracts” when it forbade mortgagees from foreclosing on land as per pre-existing contracts); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 395 (1857) (construing Article IV, § 3, cl. 2 of the Constitution, which gives Congress the power to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,” to give no power to prohibit slavery in territories acquired after 1787).

13 See U.S. CONST. art. III, § 1, cl. 2 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

14 See id. § 1, cl. 1 (permitting, but not requiring, Congress to establish inferior federal courts); id. § 2, cl. 2 (permitting Congress to make “Exceptions” and “Regulations” governing the Supreme Court’s appellate jurisdiction).


16 See David Adamany & Joel Grossman, Support for the Supreme Court as a National Policy Maker, 5 L. & Pol’y Q. 405, 406-09 (1983) (suggesting that the judiciary’s dependence on other political actors for the enforcement of its rulings creates an incentive for the courts to issue decisions in accord with public opinion).

17 See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 665 (1943) (Frankfurter, J., dissenting) (noting the pressure of “worldly ambition”); Roundtable Discussion, Is There a Threat to Judicial Independence in the United States Today?, 26 FORDHAM URB. L.J. 7, 26 (1998) (statement of Circuit Judge Guido Calabresi) (“If I were to identify the single greatest threat to judicial independence today, it would be the fact that judges want to move up.”); Peter D. Webster, Selection and Retention of Judges: Is There One “Best” Method?, 23 FLA. ST. U. L. REV. 1, 12 (1995) (arguing that appointed judges pander to the appointing authority in the hopes of attaining a more powerful judgement).
It is therefore apparent that independence of state courts from the other organs of government is unattainable under anything remotely reflecting American separation of powers, even altering the provisions respecting judicial appointment, salary, and removal. Moreover, even if protections are built into the state constitution, no constitutional protection can insulate judges from the desire to be respected—a motivation that can cause some judges to deviate from the law just as surely as can the availability of pecuniary gain.

Critics of judicial elections note with distress the potential for elected judges to decide cases so as to pander to the electorate. As Justice O’Connor opined, “[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.” The most colorful (and, as a result, the most famous) statement of this phenomenon was California Supreme Court Justice Otto Kaus’s quip that trying to ignore the political impact of decisions was like trying to ignore a crocodile in one’s bathtub.

It would appear indisputable, though distasteful to many observers, that elected judges do take public opinion into account. Nevertheless, there is no reason to criticize judicial elections for that fact while ignoring the effect of public opinion on appointed judges. Surely public opinion took a toll on federal District Judge Harold Baer, after he suppressed evidence in United States v. Bayless. Judge Baer concluded that the suspects in that case had not done anything to give the police reason to suspect a crime was occurring, reasoning that because “residents in this neighborhood [Washington Heights] tended to regard police officers as corrupt, abusive and violent,” the suspects’ flight from police was entirely reasonable. After widespread, vocal opposition to the ruling, including calls for his impeachment, Judge Baer reversed his ruling.


22 Id. at 242.

Judge Baer’s about-face may be notable because of the transparency of the political motivation, but by no means is it the only instance where public opinion influenced an appointed judge’s decision. Studies indicate, though inconclusively, that the appointed Justices on the Supreme Court, and in particular the swing Justices, are affected by public opinion, though they certainly have little financial reason to placate the public.  

Indeed, appointed judges’ departures from the law may be worse than elected judges’, not in the sense that such departures are more frequent, but because appointed judges may try to curry favor with a different audience.  

Whereas the incentive on elected judges is to rule consistently with the preferences of the median voter, appointed judges who bend the law in response to political pressure may disproportionately favor the desires of elites, whose opinions may be antagonistic to those of a majority of Americans.  

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But see Daniel R. Pinello, Impact of Judicial-Selection Method on State Supreme Court Policy: Innovation, Reaction, and Atrophy 130 (1995) (finding that appointed judges are not affected by public opinion, but elected judges are).  

Other scholars, however, are unconvinced that the relationship between public opinion and Court decisions is causally related.  

See Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 424-28 (2002). They posit that perhaps Supreme Court decisions are the result of the Justices’ attitudes which, in turn, are the result of the same factors that impact public opinion.  

25 See Paul Brace et al., Measuring the Preferences of State Supreme Court Judges, 62 J. POLS. 387, 397 (2000) (finding that appointed judges’ preferences tend to reflect elite opinion at the time of appointment, while elected judges’ preferences more closely match citizen ideology at the time of election).  

26 See Stephen L. Carter, The Confirmation Mess: Cleaning Up the Federal Appointments Process 90 (1994) (noting the Supreme Court’s defiance of public desires in Establishment Clause cases, and further noting that opinion is most strongly antagonistic to the Court’s approach among “the downtrodden”); Barnum, supra note 24, at 659 n.14 (noting that the Court has defied the will of the general public in school-prayer cases, but that the Court’s decisions may have accorded with the preferences of some elites); see also United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (arguing that the Court imposes the views of “society’s law-trained elite” on the rest of the country); Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (“When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s Members are drawn.”); Robert H. Bork, The Tempting of America: The Political Seduction of the Law 16-18, 130, 241-42 (1990); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 58-59 (1980).
In conclusion, while elected judges may show more of a tendency to tailor their decision to public decisions than do appointed judges, no system of judicial selection is immune from popular influence. In considering alternatives to election systems, reformers should bear in mind that public opinion always plays some role, and perhaps there is an advantage in the comparatively open way judicial elections attempt to make judges accountable.

C. Finding and Making the Law

The single-minded pursuit of judicial independence places excessive faith in the capacity of judges to follow the law. All judicial-selection reformers seek a system where the law prevails. But condemning judicial elections because they invite popular control over the meaning of law requires assuming that judges, left to their own devices, would follow the law better than would judges who are more tightly controlled. No explanation for that assumption has been offered or, perhaps, is possible. So long as there are legal controversies, the proper interpretation of law will be uncertain. Whether one side or another has the “correct” interpretation is unknowable, for we have yet to agree on the proper methodology for determining what constitutes a “correct” legal answer. Thus, because of the uncertainty of the law, insulating judges from influences elevates one vision of the law over another, but may not elevate law over the caprice of judges.

Modern defenders of judicial independence are forced to acknowledge the legal-realist critique that law is fluid and judicial decisions often turn on nonlegal factors, notably the attitudes of the judges themselves. But the law must be more than that, for unless law exists independently of the attitudes of judges, there is no reason to engineer a system of judicial selection to protect it. (No

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29 Dimino, supra note 28, at 816.
30 See generally Brian Leiter, Rethinking Legal Realism: Toward a Naturalized Jurisprudence, 76 TEX. L. REV. 267, 278 (1997) (stating that when a “judge responds to the underlying facts of the case . . . the judge has nonlegal reasons . . . for deciding the way she does”).
31 See generally, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUINAL MODEL REVISITED (2002) (discussing the policy-making ability of the Court and using the attitudinal model to explain and predict decisions).
32 See, e.g. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 665 (1943) (Frankfurter, J., dissenting) (“The Court has no reason for existence if it merely reflects the pressures of the day.”); see also James C. Foster, The Interplay of Legitimacy, Elections, and Crocodiles in the Bathtub: Making Sense of Politicization of Oregon’s Appellate Courts, 39 WILLAMETTE L. REV. 1313, 1317 (2003) (noting that the perception of judges as being above politics “has the singularly unfortunate
reason, that is, other than the political one that reformers prefer the decisions of independent judges to the views of the populace. However well that reason may explain the push for judicial independence,\textsuperscript{33} it is an argument not based on the primacy of law but on reformers’ subjective preference for one set of policy-makers over another.)\textsuperscript{34}

Moreover, proponents of a nearly completely independent judiciary must not only view the law as capable of being discovered, but they must view the judges as having a comparative advantage over the people in discovering the law. This may well be an accurate conception--after all, judges are generally a conscientious lot, concerned with faithfully carrying out their duties,\textsuperscript{35} and most judges believe themselves to be constrained to one degree or another by external law.\textsuperscript{36} Nevertheless, it was not the conception of law that our framers, whose juries had the power to find the law as well as the facts, appear to have held.\textsuperscript{37} And, fundamentally, if the law is more than what the judges say, then there is no reason why my opinions, or anyone else’s, are necessarily any less valid than those of the members of the Supreme Court.

Beyond the practical problems of defining the institutions from whom judges should be independent and in ascertaining the law that the judicial-selection method should protect, judicial-selection reformers face a conceptual problem in doing away with accountability. The problem is the ancient one of guarding the guardians--\textit{Quis custodiet ipsos custodies?} As one commentator stated the quandary, “[t]he trade-off for judicial independence is the risk that judges will pursue personal agendas that are in conflict with their judicial responsibilities.”\textsuperscript{38}

Two hundred eighteen years after the Philadelphia Convention, with the insights of centuries of political theory and the wisdom of the \textit{Federalist} familiar to all with the most elementary exposure to history or government, one truth of politics should be clear: An institution not checked will accumulate power and smother liberty.\textsuperscript{39} We know this to be true of the executive and the legislative consequence of making judicial independence wholly contingent upon a profound social misconception of the judicial role”).

\textsuperscript{33} Cf. Schotland, \textit{supra} note 1, at 1414 (noting that in North Carolina, “because the label ‘Republican’ is perceived as ‘tough on crime,’ the change to nonpartisanship [favored by Democrats] was ironically partisan”).

\textsuperscript{34} See Dimino, \textit{supra} note 28, at 811-12.


\textsuperscript{39} See generally \textit{THE FEDERALIST NO. 48, at 308} (James Madison) (Clinton Rossiter ed., 1961) (“It will not be denied that power is of an encroaching nature . . . .”); \textit{Id.} No. 51, at 321-22 (James
branches, but the maxim applies equally to the judiciary. Are we really comfortable giving judges the power to interpret the law, knowing that some decisions will be wrong, without adequate means to force judges to follow the law correctly? Does anyone doubt that without checks on judicial power, judges will feel freer to alter the law to their own ends?

Of course no one doubts that side effect, and nobody doubts that judicial decisions are correlated with judicial selection methods. Judges decide cases, particularly criminal cases, differently depending on the methods of accountability they face. And reformers fear that the influence of the people will move judicial decisions away from the law and toward mob rule. But for the cure to be better than the diseases caused by judicial elections, states must decide that it is better for judges to pursue their own ends than to have judges pursuing the people’s desires. Only reformers’ idealism and naïveté make the choice appear to be between systems where judges follow the mob and one where judges follow the law.

D. The People’s Law

Madison) (“[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition.


Knowing that judges make law, and knowing that judges selected under different electoral systems make law different ways, begs the $64,000 questions: Is it normatively good for the public to exert some influence on the content of law, and, if so, should that influence extend to the adjudication of individual cases?

Even the most tepid democrat would answer the first question affirmatively. We accept that public input into the legislative process is proper, and we view law as a manifestation of the public will. On the other hand, ideals of due process require that individual cases be judged by one or more “neutral” decision-makers. If the Rule of Law requires that like cases be treated alike, then public input would seem to be of little value (and considerable harm) in individual cases.

43 Of course it is not, at least if “public” is equated with “majority.” See, e.g., MANCUP OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 15, 123-24 (1965); Robert A. Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 6 J. PUB. L. 279, 294 (1957) (“[T]he process [of national policy-making] is neither minority rule nor majority rule but what might better be called minorities rule, where one aggregation of minorities achieves policies opposed by another aggregation.”); Nathaniel Persily, Toward a Functional Defense of Political Party Autonomy, 76 N.Y.U. L. REV. 750, 810 (2001) (“Democracy is more than a math problem. The number of people favoring a particular candidate or proposition is only one factor for which an electoral system needs to account.”).


[E]lected judges... always face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench. So if... it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then – quite simply – the practice of electing judges is itself a violation of due process... [But] the Due Process Clause of the Fourteenth Amendment... has coexisted with the election of judges ever since it was adopted.

Similarly, due process does not require that judges be “neutral” in the sense of being openminded to non-meritorious legal arguments. See id. at 775-77 (noting that due-process cases have used “impartiality” to refer to a lack of bias for or against a party before the court); Dimino, supra note 2, at 338-46 (arguing that the Due Process Clause does not require a judge to be open to arguments if he has come to a reasoned conclusion that those arguments are fallacious). Nevertheless, states may seek to protect judicial “neutrality” or “impartiality” beyond that which is constitutionally mandated. See White, 536 U.S. at 794 (Kennedy, J., concurring) (suggesting that states may adopt recusal standards more strict than required by the Due Process Clause).

The problem is that judges are both policy-makers and adjudicators; indeed, judges make policy through adjudication. Rules governing judicial accountability, therefore, suffer in a dilemma: either the public is locked-out of a policy-making process that often can be as important as legislative policy-making, or individual litigants need fear that their unpopular, but legally correct, positions will not receive a fair hearing. States, it seems to me, have good arguments on both horns of that dilemma. But it does the judicial-selection debate no good to point out elections’ threats to independence without also pointing out their reinforcement of democracy.

Critics of judicial elections and popular accountability of judges minimize the extent to which judges effectuate policy. Justice Ginsburg, for example, claims that “[e]ven when they develop common law or give concrete meaning to constitutional text, judges act only in the context of individual cases, the outcome of which cannot depend on the will of the public.” History, social science, and common, modern-day experience, however, demonstrate beyond peradventure that courts have used those “individual cases” to formulate policy affecting far more people than the parties to any one case. Anyone who has been the least bit attuned to the development of public policy over the last fifty years is well aware that massive changes in our nation’s approach to problems involving race, criminal justice, family relations and sexual intimacy, tort liability,
religion, education, and elections, just to name a few areas, have come about through the actions of courts. And some decisions have been explicit about the degree to which policy considerations shape the holdings.


58 See Lino A. Graglia, Revitalizing Democracy, 24 HARV. J.L. & PUB. POL’Y 165, 171 (2000) (“It would be incredible, if it were not true, that for the past four or five decades virtually every change in basic issues of domestic social policy has come not from state or federal legislatures but from the U.S. Supreme Court.”). Some scholars have suggested that courts are relatively powerless to effectuate social change. See Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 343 (1991); Donald L. Horowitz, THE COURTS AND SOCIAL POLICY 293-98 (1977); Dahl, supra note 43, at 293 (“By itself, the Court is almost powerless to affect the course of national policy.”). Other scholars have disputed the conclusion. See, e.g., David A. Schultz, Introduction, in JUDICIAL REFORM IN THE STATES LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE 3 (David A. Schultz ed., 1998); Michael McCann, How the Supreme Court Matters in American Politics: New Institutionalist Perspectives, in THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST PERSPECTIVES 63 (Howard Gillman & Cornell Clayton eds., 1999). Recently political scientist Lawrence Baum has suggested that perhaps the failures of courts to change social policy owe more to the limitations of government generally than to those of courts in particular. See Lawrence Baum, The Supreme Court in American Politics, 6 ANNUAL REV. POL. SCI. 161, 176 (2003). Whether or not courts have achieved all that they set out to do, however, it is indisputable that courts have been engaged in social policy-making for several decades if not for time immemorial.

Irrespective of whether these changes have been beneficial, they demonstrate that the judiciary has both the capacity and the will to be more than a passive interpreter of law.

For unaccountable judicial review to be legitimate, judges must invalidate the popular will only when the Constitution, a more enduring expression of the popular will, demands such invalidation. Thus, in Justice Ginsburg’s words, “the will of the public” as expressed in statute can be ignored if the more authoritative will of the public, as expressed in the Constitution, conflicts with the statute.

If, however, the judges do not apply the Constitution, but rather their own values, to strike down legislation, judicial review presents a particularly troubling form of the “countermajoritarian difficulty” about which Professor Bickel wrote more than forty years ago. In that circumstance, the public would seem entitled to ask why its will should be ignored when the alternative is often that judges give effect to their own preferences. Viewed in this way, demands for judicial accountability are the predictable, natural, and appropriate responses to judges who exceed (or are perceived to exceed) their authority. Fundamentally, there

This is not logic. It is practical politics.

See generally Benjamin N. Cardozo, The Nature of the Judicial Process 29, 103-05 (1921) (stating law is “an expression of customary morality which develops silently”).

See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-80 (1803); The Federalist No. 78, at 467-68 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Nor does [judicial review] by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both . . . .”)

I am at a loss to understand why Justice Ginsburg believes the common law should not reflect the will of the public. I had understood the common law to be an expression of that law commonly felt by the public and reflected in their customs. See Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 427-29 (William N. Eskridge Jr. & Philip P. Frickey eds., 1994) (tent. ed. 1958). That public understanding was mediated, to be sure, through judges, and public understanding may not have been sufficient to affect the law in the absence of customs reflecting that understanding, but judges were not supposed to develop the law to suit their own preferences in opposition to those of the people. See Andrew L. Kaufman, Cardozo 215 (1998), quoting Judge Cardozo:

Why can't you say that when I am doing my will, I am interpreting the common will, a process ever so much more respectable? I have always professed to be doing this, and now you tell me it was a sham, and maybe it was, though somehow or other there are times when I do feel that I am expressing thoughts and convictions not found in the books and yet not totally my own.

Arguably, as people’s attitudes and behaviors change, so should the common law. See Hart & Sacks, supra note 51, at 429.

Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16 (1962).

See Planned Parenthood v. Casey, 505 U.S. 833, 1001 (Scalia, J., dissenting) (“[T]he people should demonstrate, to protest that we do not implement their values instead of ours.”).

Id. See also Mark Silverstein, Judicious Choices: The New Politics of Supreme Court Confirmations 164-65 (1994); Lino A. Graglia, Judicial Review: Wrong in Principle, a Disaster
is a substantial cost--call it tyranny--to insulating anyone who fashions public policy from public accountability.65

The very dilemma between public interference with adjudications and oligarchical rule from on-high suggests a potential solution. If one can separate the courts that engage in policy-making from the courts that merely apply pre-existing law, then there should be minimal damage to democratic principles in lessening the public accountability of the latter.66 Perhaps trial courts should be categorized as policy-implementing, and state supreme courts as policy-making.67 Trial-court judges would be selected by appointment, while supreme court justices would be elected.68 Such a distinction between the powers of trial and appellate courts is at best a rough one, as I discuss below, but when crafting judicial-selection rules for a state-court system perhaps generalities are useful.

Under that analysis, the public could exercise influence through elections for the state supreme court justices, while the public’s influence would be considerably less effectual in the day-to-day adjudications that more starkly


66 I have previously argued that the policy-making power of trial courts argues for providing First Amendment protection to judges in trial-court elections wishing to discuss judicial philosophy. See Dimino, supra note 2, at 364. Justice Stevens, dissenting in Republican Party v. White, took the opposite view, arguing that “[e]ven if announcing one’s views in the context of a campaign for the State Supreme Court might be permissible, the same statements are surely less appropriate when one is running for an intermediate or trial court judgeship.” 536 U.S. 765, 799 (2002) (Stevens, J., dissenting). See also id. at 784 n.12 (majority opinion). Regardless of one’s opinion on the constitutional question, however, the relative differences in policy-making between trial and appellate courts may well influence one’s choice of the appropriate selection mechanisms.


68 No state currently uses a system like the one I suggest. A handful of states, including Florida, Indiana, New York, Oklahoma, South Dakota, and Tennessee, use different methods to select different types of judges. See The Council of State Governments, The Book of the States 209-11 (2002). There, however, the low-level, policy-implementing courts are more electorally accountable than the policy-making courts. Id.
present the unfortunate potential of a litigant being treated unfairly in court because of the unpopularity of his legal position. For the same reason, perhaps states should consider lengthening the terms of “policy-implementing” judges while maintaining or instituting relatively short ones for “policy-making” ones.

The appointments provisions for executive officials in the Constitution recognize a similar distinction. While principal officers must be nominated by the President and confirmed by the Senate, thus exposing the nominees in policy-making positions to scrutiny by members of Congress elected and responsible to the public, a different rule may obtain for policy-implementing officials. As the Constitution provides, “the Congress may by Law vest the Appointment of . . . inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” Behind this distinction seems the conclusion that democratic involvement is not always worth the effort and distraction occasioned by public debate, but that such debate is necessary when choosing the people who are to make fundamental decisions about governmental policy.

Unfortunately, of course, there is no clean distinction between the policy-making courts and policy-implementing courts, and there are two different reasons for the distinction’s imperfection. First, unchecked power corrupts, and a court that is insulated because it is perceived as not making policy may, for that very reason, be emboldened to take on more of a policy-making role. Second, all courts have discretion, all courts’ decisions in some way affect people who are not parties to any particular proceeding, and therefore all courts make policy.

69 See U.S. Const. art. II, § 2, cl. 2.
70 The Senate’s practice on nominations may indicate a similar lesson. While some Senate Democrats have filibustered and otherwise prevented the appointment of several of President George W. Bush’s nominees to the courts of appeals, those Senators have been considerably more deferential to the President’s choice of district judges. See T.R. Goldman, Renomination of Appeals Court Candidates Stirs Up Another Round of Political Posturing, PALM BEACH DAILY BUS. REV., Jan. 25, 2005, at 76. See infra Part III for a discussion of the impact of the Senate on the judicial selection process.
72 Madison’s notes report that the provision authorizing appointment outside of the senatorial-consent model was approved after Madison himself suggested that the provision “does not go far enough if it be necessary at all. Superior officers below Heads of Departments ought in some cases to have the appointment of the lesser offices.” James Madison, Notes of Debates in the Federal Convention of 1787, at 647 (W.W. Norton & Co. 1987) (1893).
73 The Supreme Court itself may be an example of this power-accretion trend. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 981 (1992) (Scalia, J., dissenting) (“[N]o government official is ‘tempted’ to place restraints upon his own freedom of action, which is why Lord Acton did not say ‘Power tends to purify.’ The Court’s temptation is in the quite opposite and more natural direction – towards systematically eliminating checks upon its own power; and it succumbs.”); Judge Laurence Silberman, Attacking Activism, Judge Names Names, LEGAL TIMES, June 22, 1992, at 14 (“It was quite frustrating to see those particular jurists come to accept and even relish the temptation of activism.”).
Trial courts, therefore, do not merely implement policy, but also make it. 75 “The local judge who invariably sends drunken drivers to jail, the judge . . . who throws the book only at youthful drug offenders, and the judge who . . . make[s] life miserable for errant spouses who fall behind in their child support and alimony payments--all are making policy.” 76

State supreme courts, though they exercise substantial policy-making discretion in crafting common-law rules and interpreting state statutes, are bound by United States Supreme Court precedent concerning federal law, and to that extent are policy-implementers. 77 Mid-level appellate courts are the toughest call, as they exercise more discretion than trial courts but less than state supreme courts. 78

If elections are to be retained, states that want to lessen public accountability for judges can adopt mechanisms to reduce public involvement. States may choose to hold elections at times other than the first Tuesday after the first Monday in November, thereby depressing turnout, or using a nonpartisan ballot or the Missouri Plan, both of which handicap the casual voter by making it more difficult to receive information about the persons desiring judicial office. 79 These reforms have one goal preeminently in mind: the reduction of popular control over the judiciary. 80

Policy-making courts are a poor fit with a nation accustomed to self-governance. And yet it seems unlikely either that courts will stop making policy or that the people will stop caring. Our long history of legislating from the bench--in both a conservative and a liberal direction--should be enough to demonstrate that courts do more than “lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter

80 See Dimino, supra note 28, at 813 (“The push for merit selection . . . rests . . . on the determination that public input is bad for the judicial system, and must be tolerated only as a political compromise.”).
squares with the former.\footnote{United States v. Butler, 297 U.S. 1, 62 (1936).} Instead, the courts use their own ideas of good policy to interpret the law, thereby making the judges’ policy views critical to citizens interested in shaping the laws governing society. Accordingly, it is hardly surprising that voters expect accountability from those who govern them—whether they wear business suits or judicial gowns.

III. IDEOLOGY AND INTEREST GROUPS IN JUDICIAL SELECTION

A. Ideology

Thus far I have considered the supposed threat to judicial independence of judges while on the bench, either due to an impending election, the desire for a positive public reputation, or the like.\footnote{See supra Part II.} Critics of elections have argued, however, that particularly in light of \textit{Republican Party v. White},\footnote{536 U.S. 765, 788 (2002) (invalidating Minnesota’s “announce clause,” which prohibited judicial candidates from “announcing their views on disputed legal or political issues”).} which invalidated some restrictions on judicial campaign speech, campaigns for judicial office pressure candidates to promise to rule in certain ways, such that even before a judge takes office he has compromised his impartiality.\footnote{See id. at 800 (Stevens, J., dissenting). Some candidates have responded to \textit{White} by taking advantage of the freedom it affords, while others maintain that it is improper for judges to take positions on issues, even if the freedom to do so is constitutionally protected. See, e.g., MacKenzie Carpenter, \textit{Should Justice Be Mute as Well as Blind?: Supreme Court Rivals Disagree on Speaking Out}, \textit{Pittsburgh Post-Gazette}, Oct. 20, 2003, at A1. The candidate who spoke out, Max Baer, won. \textit{Id.}}

Judges often approach cases with an inclination about the proper resolution.\footnote{See Memorandum of Mr. Justice Rehnquist, Laird v. Tatum, 409 U.S. 824, 833-35 (1972) (No. 71-288).} That inclination may have been gleaned from years of practice, from scholarly examination of a related question, or simply a philosophical feeling (whether that philosophy is political, judicial, social, or something else) that the case should be resolved one way or another. Such an inclination might influence the eventual decision more or less, depending on the type of case and the strength of the inclination. Nevertheless, it is undeniable that such intuitions exist and that the attitudes of the judges forecast their decisions on the bench.\footnote{See, e.g., SEGAL \& SPAETH, supra note 24, at 424-28.}
And if the average voter does not understand this confluence of legal realism and political science, one can be sure that Presidents and Senators do.\textsuperscript{87} Because I believe the public has a strong interest in staffing its courts with judges faithful to the public’s view of the proper jurisprudential philosophy, I view judicial discussion of philosophy--a candidate’s “honestly held views,” as \textit{White} stressed\textsuperscript{88}--as less of a problem than do critics of judicial elections.\textsuperscript{89} Whether problematic or not, however, the pre-commitment phenomenon is as prevalent in appointment processes as in elections, and is becoming ever more so as Americans (and their Senators) recognize the policy-making power that appellate judges carry.\textsuperscript{90}

Both the President in nominating judges and the Senate in providing “Advice and Consent”\textsuperscript{91} have long been keenly aware that the philosophies of judges determine, in large part, the policies that result from the courts.\textsuperscript{92} It is no surprise, then, that Presidents have nominated judges whose philosophies match their own, and that Senators look both to their constituents’ policy preferences\textsuperscript{93} and the Senators’ own preferences in deciding how to vote on nominees.\textsuperscript{94}

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\textsuperscript{87} See Barry Friedman, \textit{Mediated Popular Constitutionalism}, 101 Mich. L. Rev. 2596, 2609 (2003) (finding studies show the “popular influence” on the Supreme Court is because the President, who appoints [Justices], “appoint[s] people whose views are congenial”).
\textsuperscript{88} \textit{White}, 536 U.S. at 781 n.8.
\textsuperscript{89} See Dimino, \textit{supra} note 2, at 367-68.
\textsuperscript{90} See, \textit{e.g.}, \textit{John Anthony Maltese, The Selling of Supreme Court Nominees} 148 (1995) (“[C]rass politics has always permeated the Supreme Court appointment process. What is new (indeed, refreshing) in recent years is the degree to which participants now admit that they are engaging in politics.”); Roger E. Hartley & Lisa M. Holmes, \textit{The Increasing Senate Scrutiny of Lower Federal Court Nominees}, 117 Pol. Sci. Q. 259, 260-62 (2002).
\textsuperscript{91} U.S. Const. art II, § 2, cl. 2.
\textsuperscript{92} See Laurence H. Tribe, \textit{God Save This Honorable Court} 77-92 (1985). See generally Henry J. Abraham, Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton 18-28 (rev. ed. 1999); see generally Paul Simon, \textit{Advice & Consent: Clarence Thomas, Robert Bork and the Intriguing History of the Supreme Court’s Nomination Battles} (1992) (arguing that the Senate should take its “Advice and Consent” responsibilities seriously, and recommending that the Senate insure ideological diversity among Supreme Court nominees, inquire closely into the nominee’s substantive views, and use executive sessions when nominees face serious charges).
This trend is sure to continue, and indeed judicial nominees have become a perennial presidential campaign issue since 1968. In the 2004 campaign, for example, President Bush reiterated his pledge not to appoint “judicial activists,” while Senator Kerry promised not to appoint any Justice who would overturn Roe v. Wade or any other decision which had established a constitutional right. In past presidential campaigns, Presidents Reagan and Bush promised to name pro-life Justices, President Clinton promised Justices who would support a constitutional right to privacy, and President Nixon promised judges who would favor “peace forces” against society’s criminal elements, each with varying degrees of success. And the phenomenon is not limited to the federal system. Courts can become campaign issues in states with appointive and “merit selection” systems, too, as did the California Supreme Court. Concern with that court’s approach to the death penalty produced a governor who appointed opponents of capital punishment to the bench, followed by a governor who appointed judges supportive of it.

No more should be necessary, incidentally, to refute another criticism of judicial elections: that they undermine stare decisis. Of course they can, but so can an appointive system whenever the courts become issues in campaigns of “political” officials. Richard Nixon and Ronald Reagan campaigned on reversing trends that had become apparent in the appointive federal judiciary. And the Massachusetts Supreme Judicial Court’s decree forcing that state to issue marriage licenses to same-sex couples may have resulted in President Bush’s

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95 In a forthcoming book, Professor Richard Davis argues that Supreme Court nominations have become like elections in the extent to which the input of interest groups and the public is central. See Richard Davis, Electing Justice: Fixing the Supreme Court Nomination Process (forthcoming 2005). He argues that this democratization of the nominations process is irreversible. Id.

96 See id.


101 Abraham, supra note 92, at 317.


104 See id.

105 See Finley, supra note 18, at 57; Larkin, supra note 38, at 78-79; Phillips, supra note 18, at 144.

re-election.\textsuperscript{107} I do not see why elections are any more of a threat to stare decisis when the people are able to express their displeasure with judicial decisions by voting directly against the judges who created the offending policies.

Thus, candidates for offices that appoint judges often promise that their election will alter not only the policies of the branch for which they are running, but also those of the judiciary. For those pledges to mean anything,\textsuperscript{108} the appointing President or Governor\textsuperscript{109} and for that matter, leaders of the legislature,\textsuperscript{110} must have some reasonably reliable way of discovering potential nominees’ judicial philosophies or their likely approaches to specific cases.\textsuperscript{111}

And indeed the appointing officials do investigate potential judges.\textsuperscript{112} President Lincoln is reputed to have said, in considering whom to nominate to the Supreme Court, “We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore we must take a man whose opinions are known.”\textsuperscript{113} Presidents (particularly President Reagan) who sought to use the courts to achieve policy goals established elaborate vetting mechanisms to ensure that the eventual nominees would not disappoint the President.\textsuperscript{114} President Bush has continued this trend by seeking to nominate individuals with relatively conservative— the President would probably prefer “non-activist”— judicial philosophies.\textsuperscript{115}

Likewise, the Senate has shown no sign of relinquishing its role in providing advice and consent to the President, and the filibusters during President Bush’s first term attest to the fact that the Senate is very much concerned with the ideologies of the nominees.\textsuperscript{116} But not only does the Senate consider ideology important as a general matter, but Senators may require commitments of


\textsuperscript{108}I am not necessarily implying that the pledges do in fact mean anything. As White reminded us, “[C]ampaign promises are–by long democratic tradition–the least binding form of human commitment.” Republican Party v. White, 536 U.S. 765, 780 (2002).

\textsuperscript{109}See \textit{Charles H. Sheldon & Linda S. Maule, Choosing Justice: The Recruitment of State and Federal Judges} 106 (1997). “Governors tend to appoint persons who have, through their past political, legal or social actions reflected the values, policies and preferences held by Governors.” \textit{Id}.

\textsuperscript{110}See \textit{id.} at 89 (reporting that majority parties in legislatures that appoint judges “[i]nvariably” choose members of that party).


\textsuperscript{112}See \textit{George S. Boutwell, Reminiscences of Sixty Years in Public Affairs} 29 (1902).

\textsuperscript{113}Id. \textit{See also} Fein, supra note 111, at A16.


\textsuperscript{115}See, e.g., Chermensky, supra note 94, at 620-21.

\textsuperscript{116}Id. at 620.
nominees regarding certain issues before confirmation is granted.\textsuperscript{117} Thus, one’s views of \textit{Roe},\textsuperscript{118} \textit{Griswold},\textsuperscript{119} \textit{Brown},\textsuperscript{120} the Pledge of Allegiance,\textsuperscript{121} and countless other topics (some more controversial than others) may mean the difference between confirmation and rejection.\textsuperscript{122} And nominees, though they may decline to answer such questions as a prudential or political choice,\textsuperscript{123} may not rely on ethical canons as tying their hands and forcing them to demur.\textsuperscript{124} Nominees, like candidates, enjoy the constitutional right to discuss matters of judicial philosophy.\textsuperscript{125}

Appointing authorities consider nominees’ ideology in making judicial appointments.\textsuperscript{126} To be sure, the Senate’s exercise of advice and consent has been controversial, and the ideologically driven rejection of candidates qualified for the Court particularly so.\textsuperscript{127} But my point here is not to defend normatively the Senate in rejecting such nominees as John Parker,\textsuperscript{128} Clement Haynsworth,\textsuperscript{129} Judge Edith H. Jones, \textit{Symposium: The Ethics of Judicial Selection}, 43 \textit{Tex. L. Rev.} 1, 4-5 (2001).


\textsuperscript{120} \textit{Brown v. Bd. of Educ.}, 347 U.S. 483 (1954).

\textsuperscript{121} \textit{See Elk Grove Unified Sch. Dist. v. Newdow}, 124 S. Ct. 2301 (2004), rev’g 328 F.3d 466 (9th Cir. 2003).


\textsuperscript{123} In point of fact, nominees decline to answer questions only when providing an answer will decrease their chances for confirmation. \textit{See Carter, supra} note 26, at 59 (noting the types of questions answered and not answered by Justices Kennedy, Thomas, and Ginsburg).


\textsuperscript{126} Chemerinsky, \textit{supra} note 94, at 620-21.


\textsuperscript{128} \textit{See generally Abraham, supra} note 92, at 30-31, 149; J. Myron Jacobstein & Roy M. Mersky, \textit{The Rejected: Sketches of the 26 Men Nominated for the Supreme Court but Not Confirmed by the Senate} 113-22 (1993) (discussing the reasons the Senate would not confirm John Parker).

\textsuperscript{129} \textit{See Abraham, supra} note 92, at 10-11; Jacobstein & Mersky, \textit{supra} note 128, at 141-47; Massaro, \textit{supra} note 94, at 1-31, 78-104. \textit{See generally John P. Frank, Clement Haynsworth, the Senate and the Supreme Court} (1991) (discussing why the Senate rejected Clement Haynsworth’s confirmation).
and Robert Bork, but rather to make the positivist point that scrutiny of nominees, and the selection of nominees, on the basis of ideology is standard operating procedure in appointive systems. Recognition of this truth should mute criticism of elections as ideologically based.

The “merit selection” process was supposed to rid states of both candidate electioneering and the politics that is necessarily a part in any appointment process, but of course it has done neither. “Merit selection” systems call for the initial selection of a judge who then runs unopposed in a retention election. The procedures for making the initial selection vary by state, but typically involve executive appointment (with all the problems of politics associated therewith), or the use of a nominating commission, which typically chooses a few nominees and leaves to the executive the choice of which nominee to fill the vacancy. Any pretense that the nomination process rids judicial selection of politics evaporates when it is recognized that the members of the commission itself are appointed as part of a political process and they vote along ideological lines, seeking to install judges who favor their policy preferences. If such use of ideology is acceptable, there seems little reason to limit involvement to the elites who are appointed to commissions.

Whatever the form of judicial selection, ideology matters. The question is whose ideology should matter. Though one might think that the choice of the median voter in a judicial election would not be much different from the choice of a democratically elected executive ratified by a democratically elected legislature, Professor Pinello’s scholarship indicates that the selection method

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131 Smith, supra note 42, at 1485.
134 Daugherty, supra note 132, at 319; Link, supra note 132, at 137.
135 Daugherty, supra note 132, at 319; Link, supra note 132, at 137.
137 See Armitage, supra note 133, at 655-56; Olszewski, supra note 133, at 9 (“[I]n practice, the Missouri Plan replaced the usual open politics associated with general elections with the closed-door politics of bar associations and executive appointments, in which the general population has no voice.”); A.J. Barranco, Don’t Eliminate the Right to Elect Florida’s Trial Judges, Fl. Bar News, Aug. 15, 1999, at 4; see also Randolph A. Piedrahita, Deciding Who Will Be Judges, Advocate (Baton Rouge), Mar. 24, 2004, at 6-B (letter to the editor) (referring to the members of nominating commissions as “a bunch of unelected poobahs”); Webster, supra note 17, at 40 n.285.
does indeed alter the decisions of courts. The elections-appointments dispute is about these results. The ubiquitous fretting about elected judges appeasing a bloodthirsty public by deciding cases against criminal defendants is little more than a substantive disagreement between elite lawyers and law professors on one side, and the median voter on the other. Because it is impossible to determine who is “right” in the substantive dispute (or, more accurately, to convince anyone else that one’s substantive position is correct), there is little reason to privilege elite ideology over the rest of the public’s. Indeed, democracy would seem to argue for quite the opposite.

B. Interest Group Involvement

Many of the same points made with regard to the impact ideology has on judicial selection in both appointive and electoral systems also apply to the role played by interest-group support and opposition. Interest groups, many of which are formed precisely to advocate for a certain ideology, have become increasingly active in both state electoral and federal appointive systems of judicial selection. Chambers of Commerce push for pro-business judges.

139 See Pinello, supra note 24, at app. A, 141-44.
140 See, e.g., Smith, supra note 42, at 1504-05 (arguing for the elimination of judicial elections and the installation of “defense-oriented judges,” whom the author characterizes as “Bill of Rights-oriented, fairminded, open-minded, and open-hearted. These judges are not biased in favor of the accused; they merely afford the accused due process and dignity.”). Such analysis begs the operative question of the placement of the boundary between upholding the law and violating it, apparently assuming that judges who are not “defense-oriented” are “rubber-stamps for prosecutors,” apathetic or antagonistic to “protecting the rights of the accused” and willing to “defer[] to prosecutors at every step because they believe most defendants are in fact guilty.” Id. at 1485. One person’s “due process” and “fair-minded[ness]” is another’s “bias[.]” Id. at 1505.
141 See Dimino, supra note 28, at 816-17.
142 See, e.g., Bert Brandenburg, Keep the Courts Free and Fair: The Influence of Special Interests and Partisan Politics Threatens the Independence of Judges and the Rights of All Americans. But Groups Are Unifying to Counter the Trend, TRIAL, July 1, 2004, at 32. The hypocrisy apparent in the title of Brandenburg’s piece is unfortunately common in debates on this issue. See generally Carter, supra note 26, at 64-65 (noting that Senators Kennedy and Thurmond took different views of the propriety of inquiring into nominees’ philosophies depending on the party of the nominating President); Chemerinsky, supra note 94, at 620 (criticizing Republicans for “just plain hypocrisy” in opposing Clinton judicial nominees for excessive liberalism and then, once a Republican took the White House, claiming that the Senate should not consider ideology in evaluating nominees); Shepard, supra note 18, at 813 (noting the different positions Senator Kennedy has taken regarding the role of Senate confirmation depending on his agreement with the views of the nominee). Cf. Dimino, supra note 2, at 333 n.216 (criticizing Indiana Chief Justice Randall Shepard for writing an article arguing that due process prevented judicial candidates from taking positions on issues and then participating in a case where a judicial candidate was sanctioned for campaign speech); F. Andrew Hanssen, Is There a Politically Optimal Level of Judicial Independence?, 94 AM. ECON. REV. 712, 729 (2004) (“[A]s one might expect, such self-control [as provided by the check of independent courts] is rendered more attractive by the
Associations of Trial Lawyers urge the selection of judges favorable to tort victims.\textsuperscript{145} District Attorneys’ Associations and Associations of Criminal Defense Lawyers advocate for judges sympathetic to their causes.\textsuperscript{146} We should not be surprised. As the importance of judicially-crafted public policy has become clear, interest groups have exercised their influence to affect the selection of judges.\textsuperscript{147}

Critics of judicial elections decry the involvement of interest groups, saying that candidates should not be pressured to subscribe to interest groups’ agendas, and arguing that wealthy interest groups “can overwhelm campaign debate with [their] messages.”\textsuperscript{148} In the view of the critics, judges should keep open minds on legal questions, and that were judicial elections to become referenda on specific legal questions, the advantage of having a separate judicial branch would be undermined.\textsuperscript{149} This argument presents merely a nuanced version of the argument that ideology should be removed from elections altogether. Normatively speaking, to the extent one believes that an individual in a democracy should be entitled to affect the choice of a judge that makes policy, so should that person be entitled to associate with like-minded others in an effort to be more effective.\textsuperscript{150}

Even if one rejects the normative argument and concludes that interest group involvement in the judicial-selection process should be avoided, adopting an
appointive system is hardly likely to solve the problem.\textsuperscript{151} Interest groups have been active in the appointment process on the federal level for generations, even if one begins looking as recently as organized labor and civil rights organizations’ opposition to President Hoover’s nomination of Judge Parker to the Supreme Court,\textsuperscript{152} and they are becoming more involved. As Michael Gerhardt has written, “[t]hat the degree of participation by interest groups in the federal appointments process has risen enormously in the twentieth century is beyond question.”\textsuperscript{153}

What is more, the interest groups are successful in influencing the appointment process.\textsuperscript{154} Political-science studies indicate that interest-group activity affects senatorial votes on confirmation to a statistically significant extent.\textsuperscript{155} Professors Gregory Caldeira and John Wright, for example, have demonstrated that interest-group lobbying affects senatorial decisions on confirmation “above and beyond” the effects of ‘public opinion polls and constituency demographics,”\textsuperscript{156} even when controlling for the effects of other factors, such as campaign contributions, party and ideology.\textsuperscript{157} One may conclude that interest-group influence in the judicial-selection process is healthy or not, but the appointment process in no way avoids that influence.\textsuperscript{158} Interest groups are plentiful, active, and effective in both elective and appointive systems.\textsuperscript{159}

Nevertheless, there are two types of interest groups that present particular concerns in the debate between judicial elections and appointments: political parties and the organized bar.\textsuperscript{160} Both interest groups can aid the selection process.\textsuperscript{161} Parties provide voters with cues of judges’ philosophical outlooks

\textsuperscript{152} See ABRAHAM, supra note 92, at 30-31.
\textsuperscript{154} See ABRAHAM, supra note 92, at 30-31; Miller, supra note 151, at 473; Segal, supra note 153, at 105-06.
\textsuperscript{156} Caldeira & Wright, supra note 155, at 521.
\textsuperscript{157} See id. at 520.
\textsuperscript{158} See id. at 520-21.
\textsuperscript{159} See id.
\textsuperscript{160} Charles H. Sheldon, \textit{The Role of State Bar Associations in Judicial Selection}, 77 JUDICATURE 300, 300 (1994).
\textsuperscript{161} Id.
and enable voters to make intelligent choices without extensive research,\textsuperscript{162} while the organized bar can help evaluate the professional competence of prospective judges.\textsuperscript{163} Though both groups can play a role in judicial selection, whether states use appointments or elections, parties hold a greater influence under elective systems (particularly systems using partisan elections) and the organized bar’s influence is greatest when appointments are made by a non-partisan or bipartisan commission ostensibly trying to select meritorious potential judges.\textsuperscript{164}

As anthropologist Susan Philips has demonstrated by looking at the changes in Pima County (Tucson), Arizona, when the state altered its system of selecting trial judges from elections to appointments, participation in bar activities replaced political-party participation as the principal way of maximizing one’s chances to ascend to the bench.\textsuperscript{165}

Critics of elections may argue that this development is beneficial, and the input of a professional organization concerned with raising the quality of the judiciary is preferable to that of a political party concerned only with achieving policy results through the courts.\textsuperscript{166} But the distinction is not so clear, and supposedly “neutral,” “objective” professional organizations, including the American Bar Association,\textsuperscript{167} have become “special conduit[s] through which potentially partisan considerations can be camouflaged as ‘professional qualifications’ concerns.”\textsuperscript{168} It is for that reason that the second Bush Administration has decided not to have the ABA rate its judicial nominees prior to nomination.\textsuperscript{169}

Parties do not exercise the authority in appointments that they do in elections, but even in appointive systems their influence is hardly irrelevant.\textsuperscript{170} Appointments are made by politicians who belong, and owe their offices to,

\begin{itemize}
  \item See, e.g., \textsc{Philip DuBois, From Ballot to Bench: Judicial Elections and the Quest for Accountability} 245 (1980).
  \item See \textsc{Sheldon, supra note 160, at 300-01.}
  \item See \textit{id.}
  \item See \textsc{Philips, supra note 75, at 23-25; see also Richard A. Watson & Rondal G. Downing, The Politics of Bench and Bar} 258 (1969).
  \item See \textsc{Norman Viera \\& Leonard Gross, Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations} 116-37 (1998).
  \item See \textsc{Gerhardt, supra note 94, at 229-30. See also Laurence H. Silberman, The American Bar Association and Judicial Nominations}, 59 \textsc{Geo. Wash. L. Rev.} 1092, 1095 (1991). “[T]he banner of ‘insensitivity’ was often used to rebuff those nominees whose political views were identified with the conservative wing of the Republican party or with notions of judicial restraint.” \textit{Id.}
  \item See, e.g., \textsc{Elisabeth Frater, Revenge of the Bork Conservatives}, \textsc{Nat’l J.}, Mar. 31, 2001, at 970; Amy Goldstein, \textit{Bush Curtails ABA Role in Selecting U.S. Judges}, \textsc{Wash. Post}, Mar. 23, 2001, at A1. And it may also explain why Democrats have been eager to make use of the ABA’s judicial ratings. See \textsc{Jonathan Ringle, A Crucial Shift at the Judiciary Committee}, \textsc{Legal Times}, May 28, 2001, at 17 (reporting Democratic plans to reinstate the role of the ABA in rating nominees, after Republicans had disregarded the organization in response to its perceived liberal bias).
  \item See \textsc{Alfini \\& Gable, supra note 166, at 686-89.}
\end{itemize}
Accordingly, those politicians reward party faithful with judgeships, as has historically been the case in the federal system. President Carter, who pledged to select appellate judges on merit alone, selected more than ninety percent of his judges from his party, leading one scholar to quip, “Whatever Carter’s criteria for ‘merit’ were, they indicated that Democrats were far more deserving than Republicans.” And Carter was the only President who bothered to use a sham to obscure the partisanship.

It is obvious that in practice Presidents select judges from within their own parties, and it is at least arguable that such a practice is beneficial from a democratic point of view. If party influence is a defect of a judicial selection system, however, that defect is present in both appointive and elective systems. For the same reason that the public and interest groups have become involved in judicial selection, the parties have an interest in seeing sympathetic judges on the bench. Every political actor knows that judges will be making policy and passing on the validity of policies enacted by the other branches, and that as a result court-packing is an invaluable tool of policy-making. The importance of judgeships to parties has been recognized as central since at least the time President Adams filled the courts with the “midnight judges,” and parties have since taken plenty of opportunities to achieve policy results through the courts. At best, appointment systems do not eliminate the influence of interest groups, but rather change the identities of the groups that do the influencing. The special interests, therefore, provide no reason to dispense with elections.

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171 Id.
172 See Tribe, supra note 92, at 81-85 (discussing the Supreme Court nominations of, inter alia, Alexander Wolcott and Roscoe Conkling, both of whom owed their nominations to party loyalty rather than to legal acumen).
174 See generally Gottschall, supra note 173, at 173 (discussing the impact of Carter’s appointees on the judiciary).
175 Chemerinsky, supra note 94, at 624. See generally Schwartz, supra note 114, at 3-9 (discussing the way presidents make judicial appointments).
177 See id.
178 See Schwartz, supra note 114, at 3-9.
180 See Case, supra note 176, at 20-23.
IV. THE UNQUALIFIED

Closely related to the complaint that elections excessively empower parties and their bosses is the complaint that voters will select whomever the bosses put before them and, therefore, elections will fill courts with unfit judges. Like the other criticisms leveled at judicial elections, this one has a basis in truth. The public is likely to vote based on visceral reactions to decisions and unlikely to understand the role that a judge plays in upholding the law. Therefore a judge often becomes “politically vulnerable for being legally right” and the judges who succeed in the political game are often not the ones scholars and other elites most respect. Furthermore, ballot position, famous names, ethnicity and other factors are as likely as merit, intelligence, and other “objective” “qualifications” to influence a judge’s election, causing elites to lose further respect for the electoral process.

This critique is unfair in two respects. First, the appointments process often selects the unqualified. Second, voters have little choice but to focus on party...
affiliation (where available) and candidates’ demographic characteristics as indications of future judicial rulings where the candidates refuse to answer questions about judicial philosophy or are prohibited from doing so by rules of judicial conduct. In other words, elections might be more likely to reflect a public deliberation on judicial policy if judicial policy were allowed to play center stage in campaigns.

A. Appointments Not Based on Merit

Appointing authorities, be they Presidents, legislatures, or Governors, do not focus exclusively on merit in selecting individuals for judgeships. Presidents nominating Justices for the Supreme Court of the United States, the most prestigious judicial body in the nation, if not the world, have the ability to choose among the country’s entire legal community and could, if they wanted, select the most intelligent, most articulate, and most experienced of America’s legal scholars, judges, and practitioners. The fact that this does not happen—that Learned Hand spent fifty-two years on the district court and the court of appeals without a Supreme Court nomination, for example—indicates that factors other than merit influence the selection of Supreme Court Justices. And if the Supreme Court does not contain the most talented members of the legal profession, state courts and lower federal courts would seem even more likely to be filled with individuals whose distinguishing features may not include legal proficiency.

1. Demographics

These other distinguishing characteristics turn out to be virtually the same ones that voters care about when judicial candidates stand for election. Judicial candidates must be politically connected to get a place on the ballot, but so too must a would-be judge come to the attention of an appointing authority through his work on behalf of the appointer’s political party. Judicial candidates benefit from being able to “represent” a particular geographic region, in that

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188 See generally Finley, supra note 18, at 60 (stating one problem “is the general lack of public knowledge of and interest in judicial races”).
189 For a discussion of legislative appointment politics, see Long, supra note 2, at 766-72.
190 See Reddick, supra note 136, at 733-34.
191 See generally Chemerinsky, supra note 94, at 624; O’BRIEN, supra note 28, at 45-48 (discussing the factors other than merit that are taken into consideration during judicial selection).
favorite-son candidates may receive a home-town bounce at the polls, but so too do appointing officials look to geography in making appointments.\textsuperscript{193}

Most controversially, critics of judicial elections allege that members of certain ethnic groups or genders face a disadvantage in elections, because voters will prefer members of their own ethnicity and look more favorably on men than women.\textsuperscript{194} Once again, the implied distinction from appointive systems fails.\textsuperscript{195} Surely it is unquestionable that ethnicity, religion, and gender play a considerable role in appointing judges.\textsuperscript{196} President Eisenhower selected Catholic Democrat, William Brennan to appeal to those groups.\textsuperscript{197} President Johnson selected Thurgood Marshall because he believed naming a black man to the Court was “the right thing to do.”\textsuperscript{198} President Nixon tried to name a Southerner to the Court, succeeding finally with Justice Powell.\textsuperscript{199} President Reagan promised to name a woman to the Court (something Nixon had tried but failed to do)\textsuperscript{200} and did so with his nomination of Justice O’Connor.\textsuperscript{201}

\textsuperscript{193} See O’BRIEN, supra note 28, at 45-48. Though the importance of geography on the Supreme Court is decreasing, it is still quite relevant in appointments in lower courts. \textit{Id.} at 48. See also Groner, supra note 192, at 1 (reporting that Maryland’s Senators refused to approve the nomination of Claude Allen, a Virginian, to the Fourth Circuit because the seat to which Allen was nominated had traditionally been held by a Marylander).


\textsuperscript{195} See generally \textit{Barbara A. Perry, A “Representative” Court?: The Impact of Race, Religion, and Gender on Appointments} (1991) (providing an in depth discussion on how race, religion and gender effect judicial selection).


\textsuperscript{197} See, e.g., JOHN W. DEAN, \textit{The Rehnquist Choice: The Untold Story of the Nixon Appointment that Redefined the Supreme Court} 44-59 (2001); RICHARD REEVES, \textit{President Nixon: Alone in the White House} 160-61 (2001).


attracted to Justice Scalia in part because naming him would place the first Justice of Italian ancestry on the Court.²⁰² President George H.W. Bush filled Justice Marshall’s “black seat” with Justice Thomas.²⁰³ And President George W. Bush is widely rumored to be interested in naming the first Hispanic Justice to the Court.²⁰⁴ Though certain of these Justices were indisputably qualified for the Court, in each example merit was merely one concern among many, occasionally subordinate to the politics of demography.²⁰⁵

Against this background, it is curious indeed to object to elections on the ground that ethnicity and other demographic characteristics might make the difference to voters. Of course, one may object to the particular ethnic preferences of voters. That is, one may approve of giving a member of a minority group or a female a preference in the selection process, while disapproving of a preference for a white male.²⁰⁶ But that criticism accuses voters not of focusing on the wrong criteria, but of coming to the wrong conclusion. Both reasons for opposing elections are strongly elitist. But to the extent that a desire for ethnic diversity,²⁰⁷ rather than a desire for selections based

²⁰² See Entin, supra note 201, at 543.
²⁰⁵ See, e.g., Mack Tushnet, A Court Divided: The Rehnquist Court and the Future of Constitutional Law 52 (2005) (“[O’Connor] was appointed because she was a woman...[Y]ou have to go back some decades to find a Supreme Court nominee with as slender a record as O’Connor’s prior to her nomination...”).
²⁰⁶ See generally James J. Brudney, Recalibrating Federal Judicial Independence, 64 Ohio St. L.J. 149, 167 n.63 (2003) (reporting the desire of Presidents Clinton and G.H.W. Bush, the ABA, and Justice Brennan that the federal bench be diversified in terms of race and gender).
²⁰⁷ See Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study, 19 Fla. St. U. L. Rev. 591, 615-20 (1990); Symposium, supra note 186, at 351 (statement of Professor Schotland) (discussing the “happy event” that a black man named O’Riley won an election in a jurisdiction thought to favor persons of Irish extraction). I do not suggest that Mr. Riley’s election was in any way an unhappy event, only that Professor Schotland should be equally upset at the use of ethnicity by voters regardless of whether the person selected is of European or African ancestry and regardless of whether the voters’ use of race “succeeded” or not—in either event, “merit” was not the criterion leading to election.

The less-than-representative number of minority judges may be reflective of anti-minority prejudice by white voters, but it is also possible that political affiliation and the relatively low number of minority lawyers drive the relatively low number of minority judges. See League of
only on merit, fuels opposition to elections, that opposition looks more and more like an attempt to reshape the judicial-selection process so as to make the judiciary more liberal as opposed to an attempt to raise the competence of the bench non-ideologically.\textsuperscript{208} It is no wonder that voters overwhelmingly reject attempts to eliminate judicial elections.

2. It’s Whom You Know, Not What You Know\textsuperscript{209}

Elections have a distinct advantage over other selection systems in that voters are relatively free from the pressures of cronyism that affect judicial selection in appointive systems.\textsuperscript{210} Even where party nominees are selected through back-room politicking, and even where the nominees are the ones who know the right party officials, at least the voters are able to choose the more qualified of two different cronies.\textsuperscript{211}

When the appointment is made by an executive, however, the possibility of judgeships being rewards for long-time political support or personal friendship is manifest.\textsuperscript{212} Senatorial and presidential patronage have long been responsible for hundreds of appointments to lower federal courts,\textsuperscript{213} and President Truman made personal friendship the single most important criterion for appointment to the Supreme Court.\textsuperscript{214} More recently, President Johnson made a point to reward political and personal friends with judgeships, including nominating Abe Fortas as an Associate Justice\textsuperscript{215} and then as a replacement for Chief Justice Warren and

\begin{itemize}
  \item United Latin Am. Citizens Council v. Clements, 999 F.2d 831, 859 (5th Cir. 1993); Champagne & Check, supra note 18, at 928.\textsuperscript{208}
  \item See generally Dimino, supra note 28, at 819 (suggesting that “merit selection [may] represent[] a rigged process to ensure the continued policy influence of elites who cannot justify their decisions to the electorate”).\textsuperscript{208}
  \item Or, as Professor Yalof phrased it when referring to President Kennedy’s nomination of Byron White, “loyalty first, credentials second.” YALOF, supra note 114, at 71 (typesetting altered).\textsuperscript{209}
  \item See Franklin S. Spears, Selection of Appellate Judges, 40 BAYLOR L. REV. 501, 524-25 (1988).\textsuperscript{210}
  \item See id.\textsuperscript{210}
  \item See id. at 508; FRANCES HOWELL RUDKO, TRUMAN’S COURT: A STUDY IN JUDICIAL RESTRAINT 25 (1988).\textsuperscript{211}
  \item See, e.g., Laura E. Little, Loyalty, Gratitude, and the Federal Judiciary, 44 AM. U. L. REV. 699, 742-43 (1995); see, e.g., Sarah Wilson, Appellate Judicial Appointments During the Clinton Presidency: An Inside Perspective, 5 J. APP. PRAC. & PROCESS 29, 30, 43 (2003) (noting the involvement of party officials in the selection process and the nomination of Judge William Fletcher, who was a classmate of the President’s and co-chair of his California campaign).\textsuperscript{212}
  \item See RUDKO, supra note 212, at 25 (stating that “personal friendship and political considerations were probably predominant” in Truman’s appointments); YALOF, supra note 114, at 20-40 (describing Truman’s Supreme Court appointments and concluding that the appointment of Sherman Minton was “the product of simple, unadulterated cronyism”); Yoo, supra note 197, at 1441 (“We learn [from Yalof] that Truman’s main goal in Supreme Court appointments was cronyism.”).\textsuperscript{213}
  \item See YALOF, supra note 114, at 81-86; SILVERSTEIN, supra note 65, at 14-15.\textsuperscript{214}
\end{itemize}
Homer Thornberry--another Johnson crony--to take Fortas’s seat.\textsuperscript{216} The influence of cronyism is no less present in the states.\textsuperscript{217} As one commentator stated, even in states that select their judges by appointment “[p]olitics and cronyism remain the order of the day when it comes to selecting judges.”\textsuperscript{218}

Voters have neither the expertise nor the inclination to choose the most qualified jurists for their states’ courts. Instead, they rely on proxies including party affiliation and loyalty, ethnicity, and gender to indicate the candidates’ likely approaches to judging.\textsuperscript{219} Such reliance may be distasteful, but eliminating elections does not solve the problem, for appointing authorities use the same criteria.

\subsection*{B. Who Is to Blame for Public Ignorance?}

Few quarrel with the idea that voters know too little about the law and the legal system to make informed choices in judicial elections.\textsuperscript{220} Voter ignorance, however, has not stopped us from extending universal suffrage in legislative and executive races, where the public votes with the same visceral, half-informed opinions as determine their votes in judicial races.\textsuperscript{221} For political offices, we have accepted that risks of oligarchy outweigh the risks of democracy. Given the judicial capacity for, and history of, policy-making, it is unclear why democracy’s risks to the judiciary are much worse than their risks to other branches of government.\textsuperscript{222}

Moreover, the alternatives are to allow appointment by an executive, legislature, or nominating commission, each of which presents considerable problems.\textsuperscript{223} Though the nominating commission, one would hope, has the expertise to evaluate judicial competence, commissions are unrepresentative of the polity and may use their power to achieve certain policy aims rather than to raise the quality of the bench.\textsuperscript{224} Appointments by governors or legislatures are

\textsuperscript{216} \textit{See} YALOF, \textit{supra} note 114, at 90-94; CARTER, \textit{supra} note 26, at 75; SILVERSTEIN, \textit{supra} note 64, at 22. Since Fortas was not confirmed as Chief Justice, Thornberry had no position to fill. ABRAHAM, \textit{supra} note 92, at 219; YALOF, \textit{supra} note 114, at 94.
\textsuperscript{217} \textit{See} Spears, \textit{supra} note 210, at 524-25.
\textsuperscript{218} Smith, \textit{supra} note 42, at 1504.
\textsuperscript{221} \textit{See} id.
\textsuperscript{222} \textit{See} Dimino, \textit{supra} note 2, at 308-09 (discussing the independence of the Senate and the President).
\textsuperscript{223} \textit{See} Olszewski, \textit{supra} note 133, at 8-9.
\textsuperscript{224} \textit{See generally} id. (stating a preference for elections over merit selections).
even worse in that regard. Many elected public officials are lawyers (though typically a lower percentage of state legislators than federal legislators have law degrees), but their incentives are to use judicial appointments to attract votes and make policy, and as a result they may not focus on judicial competence. Thus, while appointing authorities could evaluate the competence of every appointed judge, in practice they decline to do so. And if elected officials can rely on outside groups’ assessments of judicial competence (like those provided by the ABA), it is unclear why voters would be unable to do the same.

To the extent that voters lack the information required to make wise choices, that ignorance stems from the muzzle placed on judicial candidates by the same elites who play heightened roles in non-elective selection processes. Until the Supreme Court’s 2002 decision in Republican Party v. White, states could forbid judicial candidates from making the least enlightening speech on judicial philosophy. As a result, there was virtually no information available for voters to discern differences between candidates, and yet that lack of information was used as a reason for denying the public the capacity to vote on judges. Since the White decision, some judicial candidates have been more upfront about their views and informing the public about the judicial system, but some states have resisted White and continue to restrict the ability of candidates to talk about the law in any substantive way. So long as information is restricted, elections will not be fully effective, but that is hardly the fault of the voters.

V. THE PROBLEM OF MONEY

225 See generally Long, supra note 2, at 766-72 (discussing legislative appointments and elections).

226 See United States Senate Committee on the Judiciary, Nominations in the 108th Congress (2003-05), at http://judiciary.senate.gov/nominations.cfm (last visited Feb. 10, 2005) (reporting that 105 nominees of President Bush have been confirmed to federal district courts, courts of appeals, or the Court of International Trade). I feel reasonably confident in speculating that not every Senator personally examined the records of each of those nominees over the last two years and that the Senators relied on surrogates to do research for them and devoted more time to examining nominees for noteworthy posts than for positions of lesser authority. This is an entirely natural and proper way to dedicate resources to investigating nominees and is equally so when voters do the same to evaluate candidates.

227 See Cornis-Pop, supra note 220, at 177-78.


229 See id. at 768.


 Unless campaigns are publicly funded, judges running for election must raise money from private sources, which often include interests that would practice before the judge, were he elected.\textsuperscript{232} In this way, elections raise a threat of bias,\textsuperscript{233} in that potential donors feel obligated to contribute to a judge’s campaign lest he remember their lack of generosity the next time the contributor appears before the judge.\textsuperscript{234} Even for those who do not believe that judges in fact consider relative contributions when deciding cases, critics claim that a system of private financing creates the \textit{appearance} that justice is for sale,\textsuperscript{235} and argue that elections should be scrapped to eliminate this appearance.\textsuperscript{236}

Unquestionably, campaign contributions create a serious risk of undermining public confidence in the impartiality of judicial decisions.\textsuperscript{237} Eliminating elections will reduce the dependence of would-be judges on direct donor-to-candidate contributions,\textsuperscript{238} but even under an appointive system, money matters. Interest-group lobbying, whose presence and success in appointive systems was discussed earlier,\textsuperscript{239} requires extensive resources. Interest groups need money to


\textsuperscript{236} See, e.g., Wildermann, supra note 234, at 772-73. Cf. Buckley v. Valeo, 424 U.S. 1, 66-67 (1976) (per curiam) (holding that limiting campaign contributions was constitutionally permissible in part because unlimited contributions created an appearance of legislative corruption).

\textsuperscript{237} See Rotunda, supra note 233, at 16.

\textsuperscript{238} Often the candidate’s campaign funds are not administered by the candidate himself, but a candidate who wants to know who the donors are can certainly take note of the persons in attendance at fund-raising dinners and the like. See MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(2) (providing that a judicial candidate should not personally solicit funds but may establish a committee to do so on his behalf).

\textsuperscript{239} See supra notes 144-81 and accompanying text.
pay their staffs, make information available to the media, coordinate with other interest groups, and energize their own members about the prospective judge. 240

This last activity provides a parallel between appointments and elections. Campaign contributions assist the candidate in broadcasting his message to potential voters, but raise the possibility that the candidate will become beholden to contributors. Interest groups spend money for the analogous purpose of inspiring everyday citizens to become motivated in support of, or in opposition to, a particular nominee. 241 In that way, money can be (and is) used to educate voters or spur their participation in the judicial selection process. The danger presented by money in the appointment process is also analogous to the dangers in elective systems: Nominees know interest-group support could mean the difference between confirmation and rejection and as a result there is a risk that the judge will be beholden to the groups and contributors who supported him in the confirmation process. 242

I do not mean to overstate the point. I do not fear that appointed judges are deciding cases so as to appease friendly interest groups. But neither am I very concerned that elected judges will decide cases to repay generous donors. The worry, to the extent there is one, stems from the requirement of reelection. 243 Judges about to face reelection may decide cases in certain ways to avoid upsetting potential donors. 244 But if an appointed judge were required to be reconfirmed, there is the same danger that the judge will decide cases so as not to upset interest groups or their contributors. 245 Thus, contributions can induce corruption in both appointive and elective systems, and may cause more of a problem in elective systems only because those systems require judges to undergo the selection process multiple times.

240 See DeGregorio & Rossotti, supra note 153, at 221-231 (detailing the activities of interest groups surrounding the Bork and Thomas nominations).
243 See Dimino, supra note 2, at 350-53.
244 See Wildermann, supra note 234, at 79-80; see also Shapiro, supra note 242, at 939-40.
245 See Shapiro, supra note 242, at 935, 939-40.
VI. CONCLUSION

One need not be enamored with judicial elections to conclude that they are no worse than the other available selection systems. I have argued two points which should at least cause readers to think twice before advocating the abandonment of an institution that has kept one branch of government accountable to the people of many states since the Jacksonian era. First, many of the same problems that critics see with judicial elections are present in appointive systems as well. Second, the democratic accountability that was a major impetus for instituting elections continues to present a powerful argument for their continuance.

I do not argue that each of the problems discussed in the body of this Essay are worse, or even as bad, in appointive systems as in electoral ones. Scholars and policy-makers may well conclude that the threats caused by privately financing judicial election campaigns are worse than are the threats caused by the interest group involvement and financing of “campaigns” for and against the confirmation of judicial nominees. Similarly, though one must concede that appointive systems occasionally select cronies and hacks, perhaps states will conclude that the risk of selecting unqualified judges is greater with elections than appointments (though empirical evidence as yet belies such a position).

It is imperative that we examine both the plusses and the minuses of alternative systems before condemning our current ones, and when we do we find that many of the same problems that animate reformers will persist under appointive systems. Additionally, appointments have the considerable disadvantage of creating an “independent” but unaccountable judiciary, whose policy judgments are insulated from popular change.

246 A recent working paper suggests that greater levels of judicial independence are correlated with greater levels of quality in the judiciary. See Daniel Berkowitz & Karen Clay, The Effect of Judicial Independence on Courts: Evidence from the American States (Aug. 2004) (on file with the Northern Kentucky Law Review). Unfortunately, the conclusions about judicial “quality” are based on surveys of elite opinion, which may indicate nothing more than that independent judges’ decisions correlate better with elite opinion than do elected judges. Regardless, states may believe that providing greater independence to judges may raise the quality of their courts, either by removing incentives to decide cases wrongly or by making a career on the bench more attractive for the best lawyers.

247 See, e.g., Harry P. Stumpf, American Judicial Politics 150 (2d ed. 1998) (“[W]hy researchers are able to find so little difference in the characteristics of judges selected irrespective of the mechanism used ... is that the mechanisms are not that different; in fact, at bottom, they are about the same.”); Henry R. Glick & Craig F. Emmert, Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges, 70 Judicature 228, 228-35 (1987). Nevertheless, judicial quality may be heightened by increasing judicial independence even if the objective indicia of judges’ competence show no difference across selection schemes. See Dimino, supra note 28, at 803 n.3 (“A stellar résumé does not necessarily indicate an excellent analytical mind or first-class judicial craftsmanship.”).
The debate on the proper balance between judicial accountability and independence is centuries-old and will not end with the contributions in this volume. Recent years have shown the dangers of both. We have seen an apathetic public unqualified to stand guard over the rule of law and those bound to uphold it. But we have also seen a judiciary that has treated the rule of law as an invitation to politico-judicial policy-making.\textsuperscript{248}

No system of judicial selection can guard against every danger. Any system of selecting fallible humans, by fallible humans, is bound to face some challenges. In the end, a healthy rule of law depends on both a judiciary and a public dedicated to preserving it\textsuperscript{249}. No system of judicial selection can guarantee both. If the public maintains the “spirit of moderation” about which Judge Hand wrote,\textsuperscript{250} then judicial elections present no problems. To continue paraphrasing, if the people lack that spirit, an appointive system will not be the salvation.\textsuperscript{251} And if the people abdicate their responsibility, blindly delegating legal authority to judges, the rule of law “will perish.”\textsuperscript{252}

We live in an imperfect world where government is “to be administered by men over men,”\textsuperscript{253} where human nature foreordains self-interested politics,\textsuperscript{254} and where we must choose to risk the tyranny of the majority or the tyranny of the judges.\textsuperscript{255} Each of us must decide which risk he fears less.

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Bd. of County Comm’rs v. Umbehr, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting) (“[T]he Court must be living in another world. Day by day, case by case, it is designing a Constitution for a country I do not recognize.”); United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“[T]his most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society’s law-trained elite) into our Basic Law.”).
\item See, e.g., Lee v. Weisman, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (“Our Nation’s protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.”). The “changeable philosophical predilections of” voters may provide no better protection for individual rights than do the predilections of Justices, but one or the other danger must be confronted.
\item Learned Hand, The Contribution of an Independent Judiciary to Civilization, in The Spirit of Liberty 155, 164 (Irving Dillard ed., 3d ed. 1960) (“[A] society so riven that the spirit of moderation is gone, no court can save . . . a society where that spirit flourishes, no court need save; [and] in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.”).
\item See id.
\item Id.
\item The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).
\item The Federalist No. 10, at 77 (Clinton Rossiter ed., 1961).
\item Cf. Hanssen, supra note 143 (analyzing the decision to grant courts independence as akin to a prisoners’ dilemma, where political actors will be willing to tie their hands with independent courts if the hands of their opponents are also tied).
\end{enumerate}
\end{footnotesize}
I. INTRODUCTION

The question of what candidates for judicial office are allowed to say while campaigning speaks directly to the notion of the proper role of judges in American society. At the heart of the debate is the struggle to balance the competing norms of judicial independence and democratic accountability within our legal system, which reflect the conflicting ideals of autonomous and responsive law. Can a society that places high priority on both of these goals find a way to reconcile their inherent tensions?

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A case decided by the United States Supreme Court that focused on the question of speech restrictions on judicial candidates provides an excellent vehicle through which to examine these issues. In Republican Party of Minnesota, et al. v. White, et al., the central question was the constitutionality of a judicial canon that prohibited judicial candidates from announcing their views on disputed legal or political issues.

This study focuses on the ways in which fundamental conflicts in our legal culture affect the arguments that are advanced by those who advocate and oppose limiting political debate in judicial campaigns by proscribing limits on candidates’ speech. By analyzing the briefs amicus curiae submitted in Republican Party of Minnesota v. White, I examine the inherent conflicts between judicial independence and democratic accountability and their relation to the principles of autonomous and responsive law. The increased prominence of state courts as judges are seen more and more as policymakers, and the rising costs of judicial campaigns provide the backdrop against which these dynamics are unfolding.

While many scholars and public figures advocate the strengths of one side or the other of the argument, I instead look at the nature of the debate in this case. As I shall explain further in this essay, I contend that judicial independence and democratic accountability are conflicting norms that cannot be wholly reconciled. Codes of conduct restricting judicial campaign speech attempt to resolve these tensions but reflect the contradictions embodied by these competing goals. For the key issue at stake is not simply what judicial candidates should be allowed to say, but rather the nature of the relationship between law and politics in our society.

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2 Id.
3 Id. at 768.
4 See infra Parts II.A., IV.A.-D.
5 Id.
6 See infra Parts II.A-B., IV.A.-D.
II. BACKGROUND LAW

A. Conflicts in American Legal Culture

The case of Republican Party of Minnesota v. White centers around the conflict over the proper role of judges in American society.\(^7\) Many of the complexities of this debate are captured by the typologies set forth by Phillipe Nonet and Philip Selznick.\(^8\) Their ordering scheme is built around three different types of law: repressive law, autonomous law, and responsive law.\(^9\) For the purposes of this discussion, I focus on the latter two. Our understanding of much of the uproar over the proper balance of judicial independence and democratic accountability is aided by the distinctions between the ideals of autonomous and responsive law.\(^10\)

In a legal system based on concepts of autonomous law, political influence is kept separate from the judicial process to ensure the independence of the judiciary.\(^11\) The rule of law is supreme, and judicial discretion is minimized.\(^12\) Judges are expected to play a role that is both legal and apolitical; their judicial independence is secured by their commitment not to impose their own values through their rulings.\(^13\) Judicial policymaking is not a feature of a system based on autonomous law. Rather, there is a distinct separation between judicial and legislative functions.\(^14\) In the words of Nonet and Selznick, in such a system:

Law is elevated "above" politics; that is, the positive law is held to embody standards that public consent, authenticated by tradition or by constitutional process, has removed from political controversy. The authority to interpret this legal heritage must therefore be kept insulated from the struggle for power and uncontaminated by political influence.\(^15\)

This insulation of legal institutions from political struggles serves to confer legitimacy upon both the legal and political bodies in society.\(^16\)

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\(^7\) White, 536 U.S. at 768.


\(^9\) Id.

\(^10\) See id. at 52-78.

\(^11\) Id.

\(^12\) Id.

\(^13\) Id.

\(^14\) Id.

\(^15\) Id.

\(^16\) Id.
In contrast, in a responsive law system, political activity is not kept separate from the judiciary. Instead of merely applying the letter of the law, judges look to the purpose of laws and the values that lie behind them. Thus, they are often involved in shaping public policy and the law takes on a much more flexible form, according to the contingencies of a given situation. Judicial discretion is greater, and the system is judged not on how faithfully positive law is applied, but rather on how well that law meets the needs of society. Of course, defining the needs of society can be a contentious process. Under responsive law, instrumentalism, not legal formalism, is the order of the day.

Both the ideals of autonomous and responsive law are embodied in the American legal system. We view ourselves as a nation that lives by the rule of law, not the rule of human beings. Much of the rhetoric surrounding our legal system revolves around the message “Equal Justice Under Law” engraved on the front on the United States Supreme Court building. We proudly assert that no person is above the law, and have created institutions such as public defender offices with the goal of leveling the playing field and providing fair legal treatment regardless of race or class. It is a fundamental assumption of our society that each person accused of a crime is entitled to her or his day in court.

While we hold to the idea of the legal system as providing fair and equal justice to all citizens, we also trumpet instances in which instrumentalism, not legal formalism, carries the day. In cases such as Brown v. Board of Education and Gideon v. Wainwright we see a legal system that is responsive to the spirit of the law as interpreted by the court, not merely the letter of the law as it is written. Many citizens believe that it is appropriate at times for courts to play a role in shaping public policy and that in doing so, courts should reflect the ideals and values of our society.

Our conceptions of judges and notions of the nature of our legal system are based on both autonomous and responsive law. Judges are granted the power to render judicial decisions, and are entrusted to administer the law fairly and evenhandedly. But many also concede that politics plays some role in judicial decision-making. In confirmation hearings of federal judicial appointees, Senators seek to gauge the ideology of the nominees. In states in which judges are elected, the political inclinations of the judges can play a significant role in

17 Id. at 82.  
18 Id.  
19 Id. at 95-103.  
24 Id.
judicial campaigns. Judges are both held up as being apart from the political process, and at the same time are recognized as being enmeshed in it.

In determining the methods of judicial selection, society is forced to make statements about the proper roles of judges. As certain judges are appointed, others elected, and still others selected and retained through a hybrid process of appointment and election, our methods of judicial selection send a mixed message about the nature of judges. We want judges to be neutral arbiters but we also want them to be accountable to a certain extent to the will of the public.

Though there is widespread recognition that political factors are blended into the judicial system, Terri Jennings Peretti is one of the few scholars that argue for an openly political judiciary.\(^\text{25}\) Focusing on the United States Supreme Court, she contends that the Court should take political concerns into account when making decisions.\(^\text{26}\) In her view, justices who vote according to their values are in fact being politically representative of the president who appointed them.\(^\text{27}\) The awareness of the larger political context serves as an effective check on the court, thus serving democratic ends.\(^\text{28}\) Instead of seeing the court as an institution that is apart and insulated from democratic processes, she argues that it is a legitimate and key part of our pluralist system of government.\(^\text{29}\)

What Peretti sees as a positive aspect of our government, Martin Shapiro views as an irreconcilable conflict.\(^\text{30}\) Declaring that “lawmaking and judicial independence are fundamentally incompatible,” he calls the tension between the two, as embodied in the debate over the extent to which a judiciary should be democratically accountable, irresolvable.\(^\text{31}\) Shapiro contends that our demands that those who make laws be accountable to the people and that those who resolve legal disputes apply the law independently, evenhandedly, and objectively, collide once we give lawmaking functions to judges.\(^\text{32}\)

In examining the question of judicial independence, it is important to keep in mind that there are several notions of the meaning of that term. In one sense, independence refers to a judge being free from outside influences that would impinge upon impartiality or the appearance of impartiality in deciding a given case.\(^\text{33}\) More broadly construed, judicial independence refers to a judge being

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\(^{25}\) See generally Terri Jennings Peretti, In Defense of a Political Court (1999) (arguing in favor of an openly political judiciary as a legitimate and key part of a democratic system of government).

\(^{26}\) Id. at 84.

\(^{27}\) Id.

\(^{28}\) Id.

\(^{29}\) Id.


\(^{31}\) Id.

\(^{32}\) Id. at 1238-39.

able to carry out her role without fear of retaliation from other branches of government or from the populace. Both interpretations can come into play in judicial elections.

B. Judicial Selection: The Road to Republican Party of Minnesota v. White

At the founding of the nation, concern about judicial independence was reflected in both the Declaration of Independence and the United States Constitution. In the list of complaints lodged against the King of England in the Declaration, the signers decried that King George III had, “made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.” To prevent such a scenario from recurring, the Constitution stipulated that federal judges would be selected through presidential nomination and confirmation by two-thirds of the Senate. Article III set forth that federal judges “shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.” By providing life tenure and guaranteed salaries during good behavior, the founders hoped to insulate federal judges from political pressures.

The original states initially followed the model of the federal government and chose judges by either gubernatorial nomination and confirmation by the legislature, or through election by the legislature. The populist movement, begun in the time of President Andrew Jackson, led to the introduction of judicial elections. These changes were conceived of as a way of bringing the will of the people to bear on the judiciary and as a method for rectifying an appointment process that some viewed as a spoils system often used to reward party loyalists. Beginning with Mississippi in 1832 and New York in 1846, many states changed over to an elected judiciary. From the admission of Iowa in

34 PHILIP DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 20-28 (1980).
35 THE DECLARATION OF INDEPENDENCE para. 10 (U.S. 1776).
36 U.S. CONST. art. II, § 2, cl. 2. See also U.S. CONST. art. III.
37 THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).
38 U.S. CONST. art. II, § 2, cl. 2.
40 PHILIP DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 3 (1980).
41 DUBOIS, supra note 40, at 3-6; ALAN G. TARR, JUDICIAL PROCESS AND JUDICIAL POLICYMAKING 61-64 (Wadsworth 2d ed. 1999).
42 Id.
43 Id.
1846 to that of Arizona in 1912, every new state to enter the Union established a
system of judicial elections.\textsuperscript{44}

These elections were initially conducted as partisan affairs. Party
conventions nominated judicial candidates, who campaigned alongside nominees
for other offices.\textsuperscript{45} Near the beginning of the 20th century, many states enacted
Progressive Era reforms and again shifted their methods of judicial selection.\textsuperscript{46}
In an attempt to remove the nominating process from the control of the parties,
some states opted for nonpartisan judicial elections.\textsuperscript{47} Others maintained
the partisan nature of judicial elections, but used direct primaries instead of party
conventions to elect candidates.\textsuperscript{48}

In the 1930s, the American Bar Association recommended a new method of
selecting state judges.\textsuperscript{49} Under this plan, a judicial nominating commission
would provide a list of qualified judicial candidates to the governor, who would
then choose from among the names on the list.\textsuperscript{50} The new judge would then
stand for periodic uncontested retention elections, in which the voters would
decide whether or not the judge should continue in office.\textsuperscript{51} This plan of merit
selection came to be known as the Missouri plan after that state became the first
to adopt it in 1940.\textsuperscript{52} Many other states soon followed suit, often choosing this
new plan and abandoning partisan elections.\textsuperscript{53}

This evolution has resulted in a dizzying variety of methods of judicial
selection across the country. While all states employ some combination of the
plans described above–partisan election, nonpartisan election, merit selection,
appointment by the governor, and election by the state legislature–many states
employ different modes of selection for various types of judges.\textsuperscript{54} Certain states
elect judges in partisan elections but reelect them via uncontested retention
elections.\textsuperscript{55} In two states, judicial nominating processes and campaigns are
partisan, but candidates appear on the ballot without party affiliation.\textsuperscript{56} Some
states fill judicial posts that become vacant in the midst of a judge’s term by

\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Dubois, supra note 40, at 3-6; Tarr, supra note 41, at 61-64.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Dubois, supra note 40, at 3-6; Tarr, supra note 41, at 61-64.
\textsuperscript{54} Tarr, supra note 41, at 57-61.
\textsuperscript{55} Illinois and Pennsylvania. 32 The Council of State Governments, The Book of States 135-
\textsuperscript{56} Michigan and Ohio. See Marvin Comisky & Philip C. Patterson, The Judiciary—
Selection, Compensation, Ethics, and Discipline 9 (1987).
means of appointment, though they otherwise choose judges via nonpartisan election. 57 Though there is tremendous diversity of methods of judicial selection both among and within states, judicial elections in some form are common in most parts of the country.

Methods of judicial selection follow general geographic patterns that could reflect a combination of common regional political values and the legacy of the method of judicial selection that was prevalent when each state entered the Union. 58 Appointment by the governor is common in the Northeast, partisan elections are prevalent in the South, nonpartisan elections are widely employed in northern states along the Canadian border, and merit selection is found in much of the rest of the Midwest and West. 59 While these generalizations capture neither the diversity of selection methods within regions and states, nor the evolution of selection methods of individual states, they help to provide a sense of geographic order.

Judicial elections for state appellate and general jurisdiction trial judges are now held in 39 states. 60 Figure 1 61 depicts the states that hold different types of elections:

57 See, e.g., California; see THE COUNCIL OF STATE GOVERNMENTS, supra note 55, at 135.
58 TARR, supra note 41, at 63.
59 Id.
60 See infra Figure 1.
61 Brief of Amicus Curiae of the Conference of Chief Justices at app. 1a, Republican Party of Minnesota v. Kelly, 534 U.S. 1054 (2001) (No. 01-521). Through the granting of the writ of certiorari by the United States Supreme Court and the filing of briefs amicus curiae, the case was named Republican Party of Minn. v. Kelly, as Verna Kelly was then-chair of the Minnesota Board of Judicial Standards. 534 U.S. 1054, 1054 (2001). The decision of the Supreme Court was named Republican Party of Minn. v. White, in light of Suzanne White’s assumption of Verna Kelly’s former position. 536 U.S. 765, 765 (2002). As such, documents reflect the name of the case at the time they were filed.
Figure 1:
States that Hold Judicial Elections for Appellate and General Jurisdiction Trial Judges, by Type of Election (States in italics have different kinds of elections for different types of judges)

<table>
<thead>
<tr>
<th>Partisan</th>
<th>Retention</th>
<th>Nonpartisan</th>
<th>No Such Elections</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Alaska</td>
<td>Arkansas</td>
<td>Connecticut</td>
</tr>
<tr>
<td>Idaho</td>
<td>Arizona</td>
<td>Arizona</td>
<td>Delaware</td>
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<tr>
<td>Illinois</td>
<td>California</td>
<td>California</td>
<td>Hawaii</td>
</tr>
<tr>
<td>Indiana</td>
<td>Colorado</td>
<td>Florida</td>
<td>Massachusetts</td>
</tr>
<tr>
<td>Kansas</td>
<td>Florida</td>
<td>Georgia</td>
<td>Maine</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Illinois</td>
<td>Idaho</td>
<td>New Hampshire</td>
</tr>
<tr>
<td>Michigan</td>
<td>Indiana</td>
<td>Indiana</td>
<td>New Jersey</td>
</tr>
<tr>
<td>Missouri</td>
<td>Iowa</td>
<td>Kentucky</td>
<td>Rhode Island</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Kansas</td>
<td>Maryland</td>
<td>South Carolina</td>
</tr>
<tr>
<td>New York</td>
<td>Maryland</td>
<td>Minnesota</td>
<td>Vermont</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Missouri</td>
<td>Mississippi</td>
<td>Virginia</td>
</tr>
<tr>
<td>Ohio</td>
<td>Nebraska</td>
<td>Montana</td>
<td></td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>New Mexico</td>
<td>Nevada</td>
<td></td>
</tr>
<tr>
<td>Tennessee</td>
<td>Oklahoma</td>
<td>North Carolina</td>
<td></td>
</tr>
<tr>
<td>Texas</td>
<td>Pennsylvania</td>
<td>North Dakota</td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td>South Dakota</td>
<td>Oklahoma</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Tennessee</td>
<td>Oregon</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Utah</td>
<td>South Dakota</td>
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<tr>
<td></td>
<td>Wyoming</td>
<td>Washington</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Wisconsin</td>
<td></td>
</tr>
</tbody>
</table>

While judicial elections have been part of the American political landscape for close to two centuries, their nature has been anything but static in recent years. The current debate about the proper role of speech restrictions in judicial campaigns has unfolded against the backdrop of judicial campaigns that have increasingly come to resemble contests for other elective offices. Elections for many judicial offices have evolved dramatically in recent years from being largely noncompetitive, unnoticed, and low cost to being highly contested, high profile, and very expensive.62

The role of judges as policymakers and the involvement of interest groups in judicial elections are often cited as lying behind this dramatic turnaround. Judicial elections in the past have been described as being “about as exciting as a game of checkers played by mail.”63 Generally, contests were decided more on

reputation and name recognition than on opinions of issues of public debate. Campaigns were not expensive affairs, candidates did not need to engage in extensive fundraising, and interest groups were largely uninvolved. Uncontested elections were the norm, and an incumbent who lost an election was a rare exception to the rule.

The judicial landscape has changed dramatically. As the American system of adversarial legalism has led to the increasingly frequent creation and implementation of policy in the courtroom, more interest groups have become involved in judicial campaigns. Issues decided by state courts, such as tort reform, environmental regulation, and the death penalty, have led lawyers, business groups, environmental organizations, political parties, issue-driven interest groups, and others to take sides in campaigns for or against judges perceived to be favorable or unfavorable toward their interests. Campaigns have become more expensive, as outside groups spend money to target judicial candidates of their choosing, who then often must raise funds to mount a public defense. These new types of campaigns have often been cited as being “nastier, noisier, and costlier” and have become increasingly more difficult to distinguish from elections for legislative or executive office.

III. STATEMENT OF FACTS AND HOLDING OF REPUBLICAN PARTY OF MINNESOTA V. WHITE

When a lawyer named Gregory Wersal ran for a seat on the Minnesota Supreme Court, he wanted to promote himself as a strict constructionist who was critical of state Supreme Court decisions on abortion, crime, and welfare. His attempts to make his views known prompted an ethics filing against him for violating the state’s judicial canon, leading him to drop out of the race because of

64 Champagne, supra note 63, at 669.
65 Id.
69 Id. at 670; Brief of Idaho Conservation League, Republican Party of Minn. v. Kelly, 534 U.S. 1054 (2001) (No. 01-521). The “nastier, noisier, and costlier” quotation was found both in the Champagne article and the Conference of Chief Justices brief and was attributed in the former article to Roy Schotland and in the latter brief to Richard Woodbury. Id.
70 536 U.S. 765 (2002).
concern that the charge would endanger his private law practice.\textsuperscript{72} He filed suit along with the Republican Party of Minnesota in federal court in February 1998, alleging that the Minnesota canon imposed unconstitutional restrictions on his rights of free speech as a candidate.\textsuperscript{73}

The canon that Wersal was accused of violating declares that a candidate for judicial office may not “announce his or her views on disputed legal or political issues” and is prohibited from attending and speaking at political gatherings or seeking the endorsement of a political party.\textsuperscript{74} Both a federal district court and the United States Court of Appeals for the Eighth Circuit ruled against Wersal and upheld these speech restrictions as constitutional.\textsuperscript{75} On December 3, 2001, the United States Supreme Court agreed to hear the case, focusing only on the issue of whether judicial candidates may announce their views on disputed legal and political issues.\textsuperscript{76} The Court chose not to review the other prohibitions ruled on in the opinion by the Eighth Circuit Court of Appeals.\textsuperscript{77} The case had national implications, as Minnesota based the “announce” clause in its judicial canon on the ABA Model Code of Conduct; of the 39 states holding judicial elections, many imposed similar restrictions on candidates’ speech.\textsuperscript{78} On June 27, 2002, the Court overturned the decision of the Eighth Circuit with a 5-4 decision, holding that the “announce” clause was an unconstitutional limitation on political speech.\textsuperscript{79}

\textsuperscript{72} \textit{White}, 536 U.S. at 769.

\textsuperscript{73} \textit{Id.} at 769-70.

\textsuperscript{74} \textit{See} \textit{MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2002); MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(c)-(d) (2002).}

\textsuperscript{75} \textit{See generally} Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967 (D. Minn. 1999) (holding that the state demonstrated a sufficient compelling interest in maintaining a judiciary free from pre-announced views and the influence of political fund-raising to deny plaintiffs the relief sought); Republican Party of Minn. v. Kelly, 247 F.3d 854 (8th Cir. 2001) (examining the canon under strict scrutiny and determining that the restrictions were narrowly tailored to serve a compelling state interest).

\textsuperscript{76} Republican Party of Minn. v. Kelly, 534 U.S. 1054, 1054 (2002).

\textsuperscript{77} \textit{Id.} (“Petition for writ of certiorari . . . granted limited to Question 1 presented by the petition.”).

\textsuperscript{78} Brief of Amicus Curiae The American Bar Association at 4, app. 1a, Republican Party of Minn. v. Kelly, 534 U.S. 1054 (2002) (No. 01-521).

\textsuperscript{79} Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).
IV. ANALYSIS

A. Conflicts in the Legal Culture Embodied: Amicus Briefs in Republican Party of Minnesota v. White

The potentially wide-ranging impact of the Court’s decision in Republican Party of Minnesota v. White led numerous groups to file briefs as amicus curiae on either side of the issue, and in one instance, on neither side of the issue. Figure 2 lists the groups who joined the case before the Supreme Court as friends of the court.

Figure 2:
Parties Filing Amicus Briefs in Republican Party of Minnesota v. White

<table>
<thead>
<tr>
<th>In Support of Petitioners</th>
<th>In Support of Respondent</th>
<th>In Support of Neither Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chamber of Commerce of the United States</td>
<td>Conference of Chief Justices</td>
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<td>Philip Krinkie and 18 Minnesota Legislators</td>
<td>Minnesota State Bar Association</td>
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<td>Public Citizen</td>
<td>Missouri Bar</td>
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<td>Republican National Committee</td>
<td>Natl. Assoc. of Criminal Defense Lawyers Pennsylvanians for Modern Courts</td>
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<td>Two State Supreme Court Justices</td>
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Just as the issue at the heart of this case results from conflicts within American legal culture between the desire for democratic accountability and judicial independence, the arguments made in amicus briefs in this case reflect the tensions between the ideals of responsive and autonomous law. These contrasting legal perspectives frame many of the arguments that the amici advance.

80 See generally Amicus Briefs, Republican Party of Minn. v. Kelly, 534 U.S. 1054 (2002) (No. 01-521) (supporting petitioners, respondent, or neither party).
81 See id.
82 See id.
B. **Responsive Law: In Support of Petitioners**

The amicus curiae briefs in support of the petitioners come from an eclectic group: two state supreme court justices, an interest group working to defend first amendment rights, a national business organization, a liberal public interest law firm, a conservative national political party, a group of state legislators, and an interest group advocating campaign finance reform. In outlining their positions, some of them incorporate the principles of the responsive law ideal as they argue in favor of an intermingling of law and politics. Others are less forthright about their normative declarations and appear to be more pragmatic and self-interested in their approach. The following analysis does not deal with every argument advanced by each amicus curiae; rather, it focuses on the ways in which those arguments do or do not reflect the ideals of responsive law.

The brief that appears to embrace the principles of responsive law the most wholeheartedly was filed by two sitting state supreme court justices: Associate Justice Clifford Taylor of the Michigan Supreme Court and Justice Richard B. Sanders of the Washington Supreme Court. Both justices have had personal experience with judicial elections, and Justice Sanders was involved in a legal challenge focusing on his political speech. Thus, they claim to have both professional and personal expertise in balancing the need for free speech with the concerns of the judiciary.

Contending that state courts are deeply involved not just in interpreting but in making the law, they assert that state courts have much more of a legislative nature than does the federal judiciary. They declare that holding state judicial elections:

> [R]ejects . . . . the notion of a fully independent judiciary and suggests that a certain degree of political responsiveness is not

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84 See, e.g., Brief Amicus Curiae of the American Center for Law and Justice at 4, *Kelly* (No. 01-521).

85 See, e.g., Brief of Amicus Curiae Chamber of Commerce of the United States at 2, *Kelly* (No. 01-521).

86 Brief of Amici Curiae State Supreme Court Justices at 1-2, *Kelly* (No. 01-521).

87 Id.

88 Id.

89 Id. at 3.
only permissible, but is an intrinsic and expected element of the elective judicial role.\textsuperscript{90}

Maintaining that announcing one’s views on legal issues does not amount to a commitment to decide cases in certain ways, they contend that a politically responsive elected judiciary leads to enhanced, not lessened, public confidence in the judicial system, and that the “announce” clause should be struck down as an unconstitutionally broad restriction on political speech.\textsuperscript{91}

The arguments articulated by Taylor and Sanders echo those of author Terri Jennings Peretti. By fully embracing the political responsiveness of the judiciary, they offer the most unambiguous responsive law arguments of any brief amicus curiae filed in this case.\textsuperscript{92} In doing so, they depart from the views held by other judges who filed amicus briefs in this case, who, as discussed below, filed in support of respondents and tend to embrace the ideals of autonomous law.\textsuperscript{93} In contrast, Taylor and Sanders are unabashed proponents of a responsive law model that incorporates judges into the political system.\textsuperscript{94}

The American Civil Liberties Union and the Minnesota Civil Liberties Union jointly filed a brief amicus curiae that argued in favor of the free speech rights of judicial candidates.\textsuperscript{95} Notably, they declare that they have no position on the normative question of whether judges should be elected as opposed to appointed.\textsuperscript{96} But given that many judges are elected, they argue in favor of candidates’ rights to share their positions with the electorate.\textsuperscript{97} They contend that speech restrictions do not produce judges without political views.\textsuperscript{98} Instead, the result is a judiciary chosen blindly that will likely not reflect the political will of the people.\textsuperscript{99} Declaring that general announcements of positions do not undermine judicial independence as long as candidates do not commit to a certain result for a particular case, they offer recusal in the event of apparent judicial partiality as the appropriate method for maintaining both free speech and an

\textsuperscript{90} Id. at 4.
\textsuperscript{91} Id.
\textsuperscript{92} Brief of Amici Curiae State Supreme Court Justices at 6-7, Kelly (No. 01-521) (arguing that because state judges play such an important role in the creation of the common law the public should have significant influence over the creation of their courts). See also PERETTI, supra note 25, at 84.
\textsuperscript{93} See infra Part IV.C.
\textsuperscript{94} Brief of Amici Curiae State Supreme Court Justices at 11-12, Kelly (No. 01-521).
\textsuperscript{95} See Brief Amici Curiae of The American Civil Liberties Union and the Minnesota Civil Liberties Union at 4-9, Kelly (No. 01-521).
\textsuperscript{96} Id. at 3.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 5.
\textsuperscript{99} Id.
independent judiciary.\textsuperscript{100} Instead of advocating a system in which politics and the judiciary are intertwined, they argue that since such a system in fact exists due to our systems of judicial elections, speech restrictions should be loosened to ensure a judiciary that accurately reflects the will of the people.\textsuperscript{101}

The Chamber of Commerce of the United States offers a similar mix of principle and pragmatism. They maintain that if judges are to be elected, voters need to have sufficient information to make an informed choice.\textsuperscript{102} They, too, argue that the “announce” clause is an unconstitutionally broad restriction on political speech, and contend that a better solution would be the recusal of individual judges who have made campaign statements that make them appear partial in a particular case.\textsuperscript{103} Defending their own self-interest, they argue that even if the Court finds the announce clause to be constitutional, the speech of interested parties in campaigns, such as the Chamber of Commerce, should not be restricted.\textsuperscript{104}

A different interpretation is offered in the brief submitted by the American Center for Law and Justice.\textsuperscript{105} They articulate the responsive law ideal that an elected judiciary should represent the political views of the people, and go on to argue that the “announce” clause is discriminatory because it gives incumbent judges an unfair advantage over challengers.\textsuperscript{106} Because sitting judges can make their views known through their judicial opinions, they are able to communicate their stances on issues to the public, while challengers who lack a similar pulpit are not able to do so.\textsuperscript{107} They advocate the free speech rights of both incumbents and challengers and argue that the “announce” clause is an unconstitutionally broad restriction of political speech.\textsuperscript{108} Their arguments incorporate elements of responsive law, but focus mostly on the actual unequal impact of the canon in question.\textsuperscript{109}

The Republican National Committee filed a brief amicus curiae in support of the Republican Party of Minnesota’s petition for a writ of certiorari.\textsuperscript{110} Much of

\begin{footnotes}
\item[100] Id. at 18.
\item[101] See Brief Amici Curiae of The American Civil Liberties Union and the Minnesota Civil Liberties Union at 5, \textit{Kelly} (No. 01-521).
\item[102] Brief of Amicus Curiae Chamber of Commerce of the United States at 4-5, 8, \textit{Kelly} (No. 01-521).
\item[103] Id. at 4-5.
\item[104] Id. at 2, 8-10.
\item[105] See generally Brief Amicus Curiae of the American Center for Law and Justice, \textit{Kelly} (No. 01-521) (advocating the free speech rights of both sitting judges as well as their challengers and arguing that the “announce” clause is unconstitutional).
\item[106] Id. at 5-7, 8-15.
\item[107] Id. at 8-15.
\item[108] Id. at 5.
\item[109] Id.
\item[110] Brief Amicus Curiae of the National Committee at 5, \textit{Kelly} (No. 01-521).
\end{footnotes}
their brief focused on the prohibition against judicial candidates speaking at political events, which was not taken up by the Court. On the issue of the “announce” clause, they note that, “The state of Minnesota can protect its judiciary from the appearance of undue influence by simply making judgeships appointed offices.” But having chosen an elected judiciary, they argue that the state cannot divorce the process from politics and cannot unconstitutionally limit the speech rights of the candidates. The Republican National Committee does not argue for a responsive law system; rather, given that an intermingling of politics and law already occurs, they advocate the free flow of information within that system.

Public Citizen advances an argument that recognizes the inherent difficulties of judicial elections:

Public Citizen is sympathetic to the criticism of judicial elections. Requiring judges to campaign for their posts—and in particular to seek and accept campaign contributions—while at the same time calling upon them to perform their judicial function impartially, creates a conflict that is difficult to reconcile.

They offer a different solution: remove the speech restrictions imposed by the “announce” clause, and instead impose campaign finance rules to control contributions to judicial candidates by lawyers and parties who do business in their court. Arguing that the “announce” clause is ineffective and discriminates against challengers, they use their brief as a vehicle for advocating their campaign finance reform agenda.

The briefs amicus curiae filed in support of the petitioners in Republican Party of Minnesota v. White embrace responsive law principles to varying degrees. Several stay neutral on the normative question of whether judges should be elected or appointed and argue that since they are in fact elected, their speech rights should not be restricted by the “announce” clause. Others directly or indirectly tout the virtues of judicial elections. While some wholeheartedly endorse a judiciary that reflects the political will of the people, others simply

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111 Id. at 16-17.
112 Id. at 17.
113 Id.
114 Id.
115 Brief of Amicus Curiae Public Citizen at 2, Kelly (No. 01-521).
116 Id. at 3.
117 Id. at 4-6, 8-10.
118 See, e.g., Brief Amici Curiae of The American Civil Liberties Union and the Minnesota Civil Liberties Union at 4-9, Kelly (No. 01-521).
119 See, e.g., Brief of Amici Curiae State Supreme Court Justices at 6, Kelly (No. 01-521).
maintain that voters should have sufficient information about candidates to make informed choices.\footnote{See, e.g., Brief Amici Curiae of The American Civil Liberties Union and the Minnesota Civil Liberties Union at 5, \textit{Kelly} (No. 01-521).} Only one brief argues that elections per se compromise the independence of the judiciary, while many amici contended that only promises about how a candidate would rule in a certain case impair the judiciary’s ability to be impartial.\footnote{Brief of Amicus Curiae Public Citizen at 2-3, \textit{Kelly} (No. 01-521). \textit{See, e.g.,} Brief Amici Curiae of The American Civil Liberties Union and the Minnesota Civil Liberties Union at 18, \textit{Kelly} (No. 01-521).} Threads reflecting the ideals of responsive law can be traced to varying degrees through all of these arguments.

C. Autonomous Law: In Support of Respondents

A relatively more homogenous group filed the briefs amicus curiae in support of the respondents.\footnote{See generally Briefs Amicus Curiae of Ad Hoc Committee of Former Justices and Friends Dedicated to an Independent Judiciary, American Bar Association, Attorney General of California et al., Brennan Center for Justice at NYU School of Law et al., Conference of Chief Justices, Minnesota Bar Association, Missouri Bar, National Association of Criminal Defense Lawyers, Pennsylvanians for Modern Courts, \textit{Kelly} (No. 01-521) (arguing principles of autonomous law and the importance of keeping law separate from politics to ensure judicial independence as well as the public confidence in its integrity).} Many of the supporters of the respondents are members of the legal establishment: the Conference of Chief Justices, the American Bar Association, a judicial center based at a law school, a state bar association, several state attorneys general, an ad hoc committee of former justices and friends, and an interest group advocating modern courts.\footnote{\textit{Id.}} In setting forth their arguments, all invoke the principles of autonomous law, declaring the importance of keeping law separate from politics to ensure the independence of the judiciary and public confidence in its integrity.\footnote{\textit{See id.; see also NONET & SELZNICK, supra} note 8, at 52-78. This section provides an explanation of the fundamentals of autonomous law.} The following section does not analyze all the arguments advanced by each amicus curiae; rather, it focuses on the ways in which those arguments reflect the ideals of autonomous law.

The Conference of Chief Justices is composed of Chief Justices from the Supreme Court or equivalent in each state, the District of Columbia, and several United States commonwealths and territories.\footnote{Brief Amicus Curiae of Conference of Chief Justices at 1, \textit{Kelly} (No. 01-521).} The filing of their brief was unanimously approved at the Conference’s January 2002 meeting, and thus can be said to represent the collective will of state chief justices.\footnote{\textit{Id.}} Emphasizing the
differences between judges and legislators, the Conference brief argues that the “announce” clause helps to balance First Amendment rights and the due process concern that each litigant will receive a fair trial, while maintaining the impartiality of the judiciary. They contend that there is a fundamental tension between judicial elections and judicial independence, and emphasize the importance of judicial candidates not making campaign promises about how they would rule on contentious legal and political issues. Doing so, they maintain, would compromise the integrity of the judiciary. Their arguments articulate clearly the principles of autonomous law.

The brief of the American Bar Association sounds similar themes. As the Minnesota canon in question was crafted using the ABA Model Code of Judicial Conduct, it is not surprising that the ABA views the canon as sound. Contending that the impartiality and independence of the judiciary warrant restricting candidate speech, they assert that public confidence in the judiciary would be undermined if judicial candidates were perceived as promising how they would rule in certain cases. They also argue that the due process rights of litigants are violated if even the appearance of impartiality is tarnished. “The ultimate result would be to undermine the public’s trust in the judiciary’s independence and threaten the rule of law.” This emphasis on the importance of the public’s trust to the rule of law is another expression of the ideals of autonomous law.

A bevy of legal organizations joined together to file a brief with the Brennan Center for Justice at the New York University School of Law. They discussed at length the distinctions between legislators and judges, arguing that at times, “when constitutional rights are at stake, judges represent a critical anti-majoritarian force that balances the political power of the majority,” and thus should not simply reflect the will of the majority. Citing the Federalist Papers and other sources, they maintain that the states may restrict certain speech in serving their compelling interest in maintaining the appearance of an impartial

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127 See id. at 2-3.
128 Id. at 27.
129 Id.
130 Brief of Amicus Curiae of the American Bar Association at 2, 6-9, Kelly (No. 01-521).
131 Id. at 12-14.
132 Id. at 14.
133 Id.
134 Brief Amici Curiae for Brennan Center for Justice at NYU School of Law et al., Kelly (No. 01-521). Also signing on were the American Judicature Society, Campaigns for People, Citizen Action/Illinois, Kansas Appleseed Center for Law and Justice, North Carolina Center for Voter Education, Protestants for the Common Good, The Reform Institute, and Wisconsin Citizen Action. Id.
135 Id. at 9-10.
They declare that these restrictions are all the more important given the increased role of money in judicial campaigns and the pressure on judicial candidates to make promises in the course of fundraising. Even the appearance of money being contributed in exchange for statements about certain political and legal issues taints the process immeasurably, they argue. Their emphasis on the dangers of even perceived partiality speaks to the autonomous law belief that the legitimacy of the judiciary is closely tied to its separation from politics.

The briefs filed by the Minnesota State Bar Association, Pennsylvanians for Modern Courts, and the Ad Hoc Committee of Former Justices and Friends Dedicated to an Independent Judiciary all make similar points. Each asserts that both the impartiality of the judiciary and the appearance of impartiality are critical. In their view, campaign statements made to win votes undermine public confidence in the independence and integrity of the judiciary. By declaring opinions on disputed political and legal issues, judicial candidates endanger the due process rights of litigants who have the right to a fair and impartial trial. As such, these statements endanger the legitimacy of the entire judicial system.

Throughout these arguments, the themes of autonomous law have been sounded clearly and unambiguously. Judges must be kept separate from politics, amici argue, to maintain judicial independence and impartiality and ensure the due process rights of litigants to a fair trial. They argue that the “announce” clause is a justified restriction on political speech because even the appearance of partiality is enough to undermine public confidence in the judicial system, which is critical to its legitimacy.

136 Id. at 11-12.
137 See id. at 15-22.
138 Id. at 16.
139 See Briefs Amicus Curiae of Ad Hoc Committee of Former Justices and Friends Dedicated to an Independent Judiciary, Minnesota Bar Association, Pennsylvanians for Modern Courts, Kelly (No. 01-521).
140 See, e.g., Brief of the Minnesota Bar Association at 4, Kelly (No. 01-521).
141 Id. at 5.
142 See, e.g., Brief Amicus Curiae of Ad Hoc Committee of Former Justices and Friends Dedicated to an Independent Judiciary at 5, 27-29, Kelly (No. 01-521).
143 Id. at 28-29.
D. Autonomous Law: In Support of Neither Side

Another argument that invokes the ideals of autonomous law was made by amici who chose not to file their brief in favor of either the petitioners or respondents. Two environmental interest groups, the Idaho Conservation League and the Louisiana Environmental Action Network, chose to take no position on the first amendment issues presented in Republican Party of Minnesota v. White. Instead, they argue that judicial elections themselves violate litigants’ due process rights to a fair trial. Citing the increasing politicization of state judicial elections, they declare that:

Political responsiveness is the antithesis of independence. In other words, in a fundamental sense, an independent and impartial elected court is an oxymoron, and efforts to limit speech and other political activity of judicial candidates cannot alter that conclusion.

They contend that the increased participation of interest groups in political campaigns has only served to exacerbate the problems posed by an elected judiciary. Their recommended solution is to replace judicial elections with a system of merit appointment, which, in their opinion, removes politics from the judicial process as much as possible and upholds the integrity and legitimacy of the judicial system. This argument is a strikingly clear articulation of the principles of autonomous law.

V. CONCLUSION

While the normative question of what judicial candidates should be allowed to say when campaigning for office is not easily decided, the influences of conflicting norms within American legal culture can be clearly seen in the arguments made by those on each side. The disconnect between judicial independence and democratic accountability mirrors the tensions between the

144 See Brief Amicus Curiae of The Idaho Conservation League and the Louisiana Environmental Action Network, Kelly (No. 01-521).
145 Id. at 2.
146 Id. at 3-4, 24-28.
147 Id. at 20.
148 Id. at 3, 7.
149 Id. at 3.
ideals of autonomous and responsive law because these conflicting norms cannot be wholly reconciled. Codes of conduct restricting judicial campaign speech are unable to resolve these tensions because of the inherent contradictions embodied by these competing goals.

The arguments advanced in amicus briefs that reflect the ideas of autonomous law appear more uniform than those that echo responsive law. Perhaps that is due to the deeply held notions of the role of judicial independence and impartiality in our legal system. Among the amici whose logic follows the reasoning of responsive law, only one goes so far as to admit that compromising judicial independence is a necessary result of judicial elections. Others may advocate a mingling of law and politics, but insist that this mixture would not damage judicial independence. Because the autonomous law ideal hinges the legitimacy of our judicial system on public faith in judicial independence and the rule of law, most of those who advocate a form of responsive law are reluctant to abandon the principles of autonomous law entirely.

Even among those who contend that speech restrictions on candidates should be looser, a distinction is drawn between judicial candidates and those running for legislative and executive office. In the arguments advanced in the amicus briefs, no party relinquished the idea that judges are inherently different from other candidates for office; the dispute was over the extent of that difference. No amicus asserted that judicial candidates should pledge to decide a certain case a particular way, as a candidate for president might promise to sign or veto a certain bill. Though judicial elections are in many ways an attempt to make judges democratically accountable, the notion that judges are somehow different than other political actors has endured.

Though the United States Supreme Court offered its guidance on how to navigate the course between democratic accountability and judicial independence, the tensions between these two competing norms are inherently irreconcilable. As our society places great value on both the ideals of autonomous and responsive law, imperfect methods of balancing these competing goals result, such as the Minnesota canon at question in Republican Party of Minnesota v. White.

150 Brief of Amici Curiae State Supreme Court Justices at 4, Kelly (No. 01-521).
151 See, e.g., Brief Amicus Curiae of the National Committee at 17, Kelly (No. 01-521).
152 See, e.g., Brief Amici Curiae of The American Civil Liberties Union and the Minnesota Civil Liberties Union at 4-9, Kelly (No. 01-521). The American Civil Liberties Union and the Minnesota Civil Liberties Union remain neutral on the question of whether judges should be elected or appointed, but argue that since they are in fact elected, their speech rights should not be restricted by the "announce" clause. Id.
153 See, e.g., Brief of Ad Hoc Committee of Former Justices and Friends Dedicated to an Independent Judiciary, at 12, Kelly (No. 01-521) (arguing that the judicial branch of the government is different because judges are bound to follow the principle of stare decisis to decide cases impartially without giving way to political pressure or partisanship).
This essay has analyzed the ways in which conflicting norms in American legal culture are manifested in the arguments made in favor of and in opposition to restrictions on judicial candidates’ speech. Further research should investigate whether and how restrictions on judicial candidates’ speech impact the decisions of voters when choosing judges. Additionally, an empirical study of whether the mode of judicial selection affects the types of judges that are chosen would shed light on another important dynamic in the debate on judicial independence and democratic accountability. As the debate on judicial selection has been ongoing since the early days of this country, it is unlikely to end soon. Further study can help to elucidate the complex relationship between law and politics and the competing norms of autonomous and responsive law in the United States.

154 See supra Part IV.A.-D.
FRYE V. KANSAS CITY MISSOURI POLICE DEPARTMENT: WHEN PUBLIC SAFETY ISSUES CLASH WITH THE FREEDOM OF SPEECH

by Brent E. Dye*

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V. CONCLUSION

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I. INTRODUCTION

It is a beautiful Saturday morning in late June, and after a hectic week at work, you decide to drive to the local park for a relaxing jog to clear your mind and to release some stress. As you approach the downtown area, you notice that the volume of traffic has marginally increased. Because it is a Saturday and people are typically out shopping and running errands, you are unconcerned and think nothing of the upsurge in traffic. Soon you approach one of the town’s busiest intersections and, from a distance, notice a group of citizens standing next to the road holding signs. Unable to depict the images on the signs, you continue to approach the intersection and maintain speed with the flow of traffic. Nearing the intersection, the images of the crowd’s signs slowly become cognizable. Suddenly, you realize that the signs portray images of mutilated fetuses.

At that instant, as a result of viewing the extremely graphic images, the driver of the car directly in front of you is overcome with shock and immediately slams on his brakes. Stunned and dazed at having just viewed the graphic signs, you react as quickly as your motor skills allow and swiftly press the break pedal. Although you were not tailgating, the sudden action of the car in front of you afforded virtually no time or room to stop, and your car crashes into the back of the preceding car. Before you have time to fully realize what just transpired, you are thrown forward as the driver behind you crashes into your rear bumper. Subsequently, because of the heavy traffic and delayed reactions of the following drivers, your initial accident causes a chain reaction that results in a ten-car pile up in which several motorists suffer injuries.\(^1\)

Incredibly and thankfully, this potentially dangerous scenario was avoided due to the prudence and quick judgment of the Kansas City Police Department.\(^2\) In the following case, several abortion protestors were arrested after they refused to remove graphic signs that were causing a traffic hazard and impairing the driving ability of passing motorists.\(^3\) Subsequently, the protestors brought suit, claiming that the First Amendment gave them the right to protest next to the road, and that the police officers curtailed this right.\(^4\) The First Amendment, however, is not an absolute right free from limitations.\(^5\) This scenario unfolded in *Frye v. Kansas City Missouri Police Dep’t*,\(^6\) where the police officers acted pursuant to their police powers and had a significant interest in maintaining

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1. This hypothetical situation is loosely based on what could have potentially occurred in the *Frye* case had the police not arrested a group of protestors for causing a traffic hazard. *Frye v. Kansas City Mo. Police Dep’t*, 375 F.3d 785, 788 (8th Cir. 2004).
2. *Id.* at 789.
3. *Id.* at 788.
4. *Id.*
6. 375 F.3d 785 (8th Cir. 2004).
public safety.\textsuperscript{7} As a result, the Eighth Circuit Court of Appeals determined that the police officers did not violate the protestors’ First Amendment rights, and awarded them qualified immunity.\textsuperscript{8}

This note examines the conflict that occurs when protestors’ right to freedom of speech clashes with the government’s interest in maintaining public safety. Part II discusses the judicial background and evolution of citizens’ right to freedom of speech as well as the concept of qualified immunity. Part III reviews the facts and procedural history, as well as the holding and rationale in \textit{Frye v. Kansas City Missouri Police Dep't}.\textsuperscript{9} Part IV analyzes the decision of the Eighth Circuit Court of Appeals regarding whether the police officers were justified in their actions and whether the Eighth Circuit adopted a heckler’s veto. Part V concludes with a summary of why the Eighth Circuit Court of Appeals was correct in its decision.

\section*{II. BACKGROUND LAW}

\subsection*{A. Qualified Immunity: An Official’s Privilege to Escape Liability for Violating a Citizen’s Constitutional Right}

The doctrine of qualified immunity is a privilege that exempts police officers and other public officials from facing suits brought under both common law\textsuperscript{10} and 42 U.S.C. § 1983,\textsuperscript{11} particularly when these officials infringe on citizens’ constitutional rights.\textsuperscript{12} The privilege of qualified immunity is more than a mere

\begin{quote}
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.
\end{quote}

\textsuperscript{7} \textit{Id.} at 791.
\textsuperscript{8} \textit{Id.} at 792.
\textsuperscript{9} \textit{Id.} at 785.
\textsuperscript{10} See, e.g., \textit{Wood v. Strickland}, 420 U.S. 308, 318 (1975) (ruling that the doctrine of qualified immunity applies to common law claims such as tort, as well as claims alleging a violation of a statutory right).
\textsuperscript{11} 42 U.S.C. § 1983 (2000) provides:

\begin{quote}
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.
\end{quote}

defense to liability; it serves as an exemption from litigation.\(^\text{13}\) Because qualified immunity is an affirmative defense that can exempt a public official from trial, an official positing such a defense must make the claim at the earliest possible stage of litigation, or waive the claim altogether.\(^\text{14}\) An official asserting a claim of qualified immunity must do so before the initial stages of the litigation process because the determination of qualified immunity is not a factual question for a jury, but rather a legal question for the court.\(^\text{15}\)

The purpose and theory behind qualified immunity is that it enables public officials to make split-second decisions based upon their own reasonable interpretation of the law without fearing harassing resultant litigation.\(^\text{16}\) Therefore, the underlying goal of qualified immunity is to “avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.”\(^\text{17}\) Furthermore, courts have ruled that public officials are provided a reasonable margin of error because officials should not always err on the side of caution when performing the functions of their jobs.\(^\text{18}\)

An official’s interpretation of the law and reaction to that interpretation must, however, be reasonable in light of the actual situation with which the official is confronted.\(^\text{19}\) Because the doctrine of qualified immunity protects an official who acts reasonably in his decisions, the doctrine serves as a governmental safeguard that preserves an official’s ability to protect and serve the public.\(^\text{20}\) It is therefore not strictly a benefit to public officials, but to society as a whole.\(^\text{21}\)

To determine whether a public official may assert the doctrine of qualified immunity as a defense, the court must first examine the following threshold question: whether, “taken in the light most favorable to the party asserting the violation,” the facts alleged under the circumstances show that the public

\(^{14}\) Id.
\(^{15}\) Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (determining that a qualified immunity claim is a legal question for a court to decide rather than a factual question for a jury).
\(^{16}\) Davis v. Scherer, 468 U.S. 183, 195 (1984) (explaining that it would be difficult for an official on duty to anticipate the legal consequences of his actions with respect to frivolous lawsuits when the official reasonably believes he is legally entitled to act).
\(^{17}\) Harlow, 457 U.S. at 818.
\(^{18}\) Davis, 468 U.S. at 196 (inferring that erring on the side of caution versus action may be detrimental depending on whether public safety is at issue).
\(^{19}\) See, e.g., Malley v. Briggs, 475 U.S. 335, 341 (finding that a question of objectivity is determined by whether a reasonable trained officer in the same circumstance would have acted in similar fashion).
\(^{20}\) Wyatt v. Cole, 504 U.S. 158, 167 (1992) (stating that the doctrine of qualified immunity benefits the public because it prevents the “inhibition of discretionary action” on the part of the public official).
\(^{21}\) Id.
official’s decision and conduct violated the citizen’s constitutional rights.\textsuperscript{23} If this threshold question is answered in the negative, there is no reason to make further inquiries concerning qualified immunity because no constitutional right was violated.\textsuperscript{24}

However, if this threshold question is answered in the affirmative, a court must next inquire whether the citizen’s constitutional right that the official allegedly violated was clearly established.\textsuperscript{25} There are two inquiries to be made here: whether the party claiming injury had a constitutional right violated, and whether that right was clearly established.\textsuperscript{26} These two questions, however, are related in the sense that the answer to the second question – whether the right was clearly established – is used to determine whether the party asserted a valid constitutional right in the first place.\textsuperscript{27}

The dispositive inquiry into whether a citizen’s right is clearly established is determinative as to whether it would be clear to a reasonable official that his interpretation of the law and conduct was unlawful in the actual situation that the official faced.\textsuperscript{28} Concerning whether an official’s actions were reasonable in light of the situation, the judgment is from that of another reasonable official on the scene, not from the perspective of an official five years later with twenty-twenty hindsight.\textsuperscript{29} In addition, the inquiry into whether an official’s actions were reasonable is made with respect to the facts and circumstances he actually faced, without taking into account the official’s underlying intent or motivation.\textsuperscript{30}

Although the test to determine whether a citizen’s allegedly violated right is clearly established hinges on reasonableness, it is important to note that subjective good faith and hunches alone are not sufficient in determining whether an official is exempt from facing litigation through the doctrine of qualified

\textsuperscript{23} Siegert v. Gilley, 500 U.S. 226, 232 (1991) (determining that the question of whether a citizen even experienced a violation of a constitutional right is the initial inquiry before the merits of reasonableness are even determined).

\textsuperscript{24} Saucier, 533 U.S. at 201 (stating that if no constitutional right has been violated, there is no reason to continue with the qualified immunity analysis).

\textsuperscript{25} Id.

\textsuperscript{26} Siegert, 500 U.S. at 232.

\textsuperscript{27} “[The decision] of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits.” \textit{Id}.

\textsuperscript{28} See, e.g., Wilson v. Layne, 526 U.S. 603, 614-15 (1999) (explaining that qualified immunity does not depend on whether the conduct was previously established as unlawful, but whether the unlawfulness was apparent and unreasonable to the public official).

\textsuperscript{29} Terry v. Ohio, 392 U.S. 1, 20 (1968) (restating premise that police officer’s conduct must be reasonable in scope, and reasonableness is determined by how an objective officer would have behaved in the same situation).

\textsuperscript{30} See \textit{Scott v. United States}, 436 U.S. 128, 138-40 (1978) (holding that in justifying an official’s act, the official must point to specific facts and circumstances that, taken in the aggregate, show that he or she acted reasonably without reference to a particular state of mind).
immunity.\textsuperscript{31} Therefore, if it is obvious from an objective standpoint that another official would have reacted in the same manner if faced with the same circumstances as the defendant, then the official may avail himself of the doctrine of qualified immunity to escape litigation.\textsuperscript{32}

B. \textit{A Citizen’s Right to Freedom of Speech in the Public Forum}

Today, citizens are freely entitled to express their personal views and beliefs in society’s public forums,\textsuperscript{33} but their expressions are subject to reasonable restrictions pertaining to time, place, and manner.\textsuperscript{34} However, this has not always been the case.\textsuperscript{35} In 1897, the Supreme Court upheld Justice Oliver Wendell Holmes’ statement\textsuperscript{36} that, “[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.”\textsuperscript{37} Forty-two years after the Supreme Court’s decision in \textit{Davis v. Commonwealth of Massachusetts},\textsuperscript{38} the Court changed direction and held that streets and other public forums have traditionally been areas of communication,\textsuperscript{39} and their protected use is part of the privileges and liberties afforded to citizens.\textsuperscript{40}

\textsuperscript{31} “If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers, and effects, only in the discretion of the police.” Beck v. Ohio, 379 U.S. 89, 97 (1964).

\textsuperscript{32} See, e.g., Malley v. Briggs, 475 U.S. 335, 341 (1986) (upholding state trooper’s claim of immunity where the court determined that reasonably competent officers would have reacted in the same way as the trooper).

\textsuperscript{33} “[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.” Harry Kalven, \textit{The Concept of the Public Forum: Cox v. Louisiana}, 1965 Sup. Ct. Rev. 1, 11-12.

\textsuperscript{34} See Grayned v. Rockford, 408 U.S. 104, 115 (1972) (holding that officials could reasonably restrict protestors’ use of a public forum with respect to time, place, and manner, especially when protestors were noisy and distracting students at a nearby school).

\textsuperscript{35} See Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895), aff’d, 167 U.S. 43 (1897) (stating that conviction of plaintiff was proper when he made a public address on public grounds without a permit).

\textsuperscript{36} \textit{Id.}

\textsuperscript{37} 167 U.S. 43, 48 (1897) (affirming Oliver Wendell Holmes’s decision).

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} Although the Supreme Court has recognized the existence of three categories of public forums, this casenote is not going to distinguish between the three types, because this was not an issue before the court. See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45-48 (1983) (differentiating and explaining the three categories of public forums).

\textsuperscript{40} “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly,
Although public forums such as streets and parks are protected channels for citizens to protest and express their ideas, these open avenues are not exempt from limitations and restrictions.\textsuperscript{41} For example, citizens are not free to assemble and demonstrate wherever they please.\textsuperscript{42} The government can regulate citizens’ freedom of speech in public forums if it has a significant interest at stake, such as keeping the streets clear and the public safe from danger.\textsuperscript{43} However, the government may not restrict a citizen’s freedom of speech based upon the message, ideas, subject matter, or content that the citizen is expressing.\textsuperscript{44} Thus, restriction of speech because of a significant government interest must be made upon content-neutral rather than content-based factors.\textsuperscript{45}

C. Content-Based Versus Content-Neutral Regulation: The Government’s Privilege to Restrict Citizens’ Freedom of Speech in a Public Forum

1. Besides Spoken Words, the First Amendment also Protects Conduct and Expression

Even though the First Amendment of the Federal Constitution only expressly guarantees freedom of speech,\textsuperscript{46} the Supreme Court has also extended this right to symbolic speech that contains a mixture of expression and speech.\textsuperscript{47} In determining whether conduct, such as displaying a sign, is protected by the First Amendment, the Supreme Court has required: (i) that the action manifest “an intent to convey a particularized message” and (ii) that “the likelihood [is] great that the message [will] be understood by those who view it.”\textsuperscript{48} Therefore, acts

\textsuperscript{41} Grayned v. Rockford, 408 U.S. 104, 115-16 (1972).
\textsuperscript{42} Id.
\textsuperscript{43} Cox v. Louisiana, 379 U.S. 536, 554-55 (1965) (reversing convictions of students that partook in a peaceful protest in a public forum, yet noting the limitations to a citizen’s right to protest). “Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement.” Id. (inferring that restrictions of speech must be made on content-neutral factors rather than content-based or they will be presumptively invalid).
\textsuperscript{44} Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 95 (1972).
\textsuperscript{45} Id. (inferring that restrictions of speech must be made on content-neutral factors rather than content-based or they will be presumptively invalid).
\textsuperscript{46} U.S. CONST. amend. I. “Congress shall make no law . . . abridging the freedom of speech . . . .”
\textsuperscript{47} Spence v. Washington, 418 U.S. 405, 409-10 (1974) (acknowledging that the First Amendment does not end its protection at the spoken or written word). Conduct may be “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.” Id. at 409.
\textsuperscript{48} Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting \textit{Spence}, 418 U.S. at 410-11) (holding that defendant’s burning of an American flag was protected under the First Amendment because it conveyed a “particularized message” and was “understood by those who viewed it”).
such as burning flags and displaying signs are afforded the same equal protection as that bestowed upon spoken words under the First Amendment.49

2. Distinguishing Between Content-Based and Content-Neutral Restrictions

The First Amendment of the United States Constitution guarantees the right of freedom of spoken speech, as well as expression and conduct, to all citizens.50 This right, however, is not absolute; the freedom of speech is subject to limitations and restrictions.51 Generally, a government or municipality may place restrictions on speech in a public forum as long as such restrictions are reasonable with respect to time, place, or manner.52 These restrictions, besides being reasonable with respect to time, place, or manner, must also be implemented without regard to the actual content of the speech.53 Any regulation based upon content is presumably invalid.54 The policy behind restricting speech based on content-neutral rather than content-based factors is to prevent the government from restricting speech on the basis that it does not agree with the message the speaker is portraying.55

The Court in Police Dep’t of Chicago v. Mosley stated that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.”56 Although this premise is generally true, there are, as with most rules of law, exceptions that permit the government to restrict speech based on content.57

49 Id.
50 U.S. CONST. amend. I.
53 Madison, Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm’n, 429 U.S. 167, 176 (1968) (stating that a speaker at a school board meeting may not be discriminated against based upon the speech content).
55 “Any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
56 408 U.S. 92, 95 (1972).
57 Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise constitutional problems.”).
Specifically, obscenity, \(^{58}\) defamation, \(^{59}\) fighting words, \(^{60}\) and other forms of vulgar language are generally not protected under the First Amendment; thus, the government can usually restrict the use of such language based on its content. \(^{61}\) Another exception that permits the government to regulate speech based on content is where the regulation is necessary to protect a compelling governmental interest. \(^{62}\) However, when the government regulates speech based upon its content in a traditional public forum, it is subject to the highest level of scrutiny applicable to such restrictions. \(^{63}\) Pursuant to this level of scrutiny, the government must demonstrate that the law or restriction is “narrowly tailored” to meet a substantial or compelling governmental interest. \(^{64}\)

Alternatively, government regulations with respect to time, place, and manner that are based on content-neutral factors impose a less direct burden on the freedom of speech. \(^{65}\) Therefore, courts use a less stringent level of scrutiny to balance the competing interests of the government versus that of the citizen. \(^{66}\) Today, to determine the reasonableness of a content-neutral regulation, most courts apply the traditional test set forth in \(O’Brien v. United States. \(^{67}\) In \(O’Brien\), the Court fashioned a test stating:

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[T]hese areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.
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\(^{58}\) See, e.g., Roth v. United States, 354 U.S. 476, 486 (1957) (holding that a federal statute restricting the advertising of obscenity was not unconstitutional with respect to the First Amendment).

\(^{59}\) See, e.g., Beauharnais v. Illinois, 343 U.S. 250, 304 (1952) (holding that libel and defamation is not provided protection under the First Amendment).

\(^{60}\) See, e.g., Chaplinsky, 315 U.S. at 572.


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[O]ur Nation’s Founders understood that obscenity, defamation, and fighting words are not among the areas of speech they included within the First Amendment's protection against governmental regulation. These areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.
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\(^{62}\) Boos v. Barry, 485 U.S. 312, 321 (1988) (stating that when the government regulates speech based on content, it must show that the “regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end”) (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983)).

\(^{63}\) Perry, 460 U.S. at 45.

\(^{64}\) See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (stating that the narrowly tailored requirement is satisfied “so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation”) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

\(^{65}\) See Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 213-14 (1997) (stating content-neutral regulations are afforded an intermediate level of scrutiny because content-neutral restrictions prevent less of a risk that particular views or ideas will experience exclusion). The Court noted that the degree of scrutiny would more than likely reflect the severity of the impact on the restriction of speech. \(Id.\)

\(^{66}\) \(Id.\)

\(^{67}\) 391 U.S. 367, 377 (1968).
[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.\textsuperscript{68}

Although similar in rationale and basis, other courts apply a three-part test that elaborates on the test established in \textit{O'Brien}.\textsuperscript{69} Courts that apply this expanded test examine whether reasonable restrictions with respect to time, place, and manner “are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”\textsuperscript{70}

Regardless of which test courts use, both primarily focus on a two-step analysis.\textsuperscript{71} First, courts must determine whether the regulation is in fact suppressing speech based upon its content and message.\textsuperscript{72} If the regulated speech is a protected type of speech under the Constitution, then courts must examine whether the content-based restriction is necessary to serve a compelling interest that is also narrowly tailored.\textsuperscript{73} However, if the restriction is not an attempt to suppress the speech’s content, then courts must determine whether the incidental restriction on speech is outweighed by a significant governmental interest.\textsuperscript{74} Furthermore, this analysis also evaluates whether the regulations leave open an alternative channel for communicating the message.\textsuperscript{75}

\textsuperscript{68} Id.
\textsuperscript{69} See, e.g., United States v. Grace, 461 U.S. 171, 177 (1983) (citing test from Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983)).
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{73} See Grace, 461 U.S. at 177.
\textsuperscript{75} Id.
III. STATEMENT OF FACTS AND HOLDING OF FRYE V. KANSAS CITY
MISSOURI POLICE DEP’T

A. The Facts

On June 23, 2001, at 11:00 a.m., a group of demonstrators in Kansas City, Missouri assembled at a busy intersection to protest and dispense information about abortion. To maximize their message, the protestors positioned themselves approximately two to three feet from the actual roadway, safely between the sidewalk and curb. As part of their demonstration, the protestors displayed signs that contained color photographs of aborted fetuses. Although some protestors held smaller signs, the larger signs with the color photographs of the aborted fetuses measured three by five feet and were securely attached to the ground.

Shortly after the demonstration began, two police officers were dispatched to the intersection in response to several motorists’ complaints that the demonstration contained “offensive signs.” On the scene, the officers observed that the demonstrators were not in the roadway or even hanging their signs over the roadway; therefore, the officers merely told the demonstrators that they could continue with their demonstration as long as they did not create a traffic hazard. However, within five minutes of their departure, the officers returned to speak with a group of motorists who had pulled over to complain about the photographs.

This time, the officers determined that the poster-size photographs of the aborted fetuses were offending passing motorists and had created a hazard to public safety. Specifically, passing motorists complained that viewing the offensive photographs had adversely affected their ability to “safely and properly control their vehicles.” The officers, after consulting with the city’s attorney, provided the demonstrators with the option of either moving their demonstration away from the roadway or remaining in the same location while removing the photographs of the aborted fetuses away from the roadway. The demonstrators, however, refused both of these options and subsequently, five of them were

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76 Frye v. Kansas City Mo. Police Dep’t, 375 F.3d 785, 785 (8th Cir. 2004).
77 Id. at 788.
78 Id.
79 Id.
80 Id.
81 Id.
82 Id., 375 F.3d at 788.
83 Id.
84 Id.
85 Id.
86 Id.
arrested for violating the city’s loitering ordinance. The city’s ordinance made it, “unlawful for any person to . . . stand . . . either alone or in concert with others in a public place in such a manner so as to [o]bstruct any public street [or] public highway . . . by hindering or impeding the free and uninterrupted passage of vehicles, traffic, or pedestrians.”

In March 2002, eleven of the demonstrators brought suit against the Kansas City Police Department, claiming that the officers had violated their Federal Constitutional rights to freedom of speech, assembly and equal protection, as well as their right to be free from false arrest. As a defense, the named police officers filed a motion for summary judgment on the theory of qualified immunity.

The United States District Court for the Western District of Missouri granted the officers’ motion for summary judgment, holding that the police officers had not infringed upon the demonstrator’s First Amendment rights because they reasonably interpreted the city’s loitering ordinance and placed reasonable limitations with respect to where the demonstrators could display their graphic signs.

B. The Holding and Rationale

In Frye, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the district court and found summary judgment appropriate due to the absence of any genuine issue of material fact. The court began its analysis with the qualified immunity issue. First, the court determined that, viewed in the light most favorable to the allegedly injured parties, the demonstrators did in fact have a First Amendment right to express their views concerning abortion.

Next, the court examined whether the demonstrators’ right to express their views in the public forum was clearly established. To make this determination, the court asked “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” As to this inquiry, the court concluded that the demonstrator’s right was not clearly established. Specifically, the court concluded that the police officers did not impose

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87 Id.
88 Frye, 375 F.3d at 788 (citing Kansas City, Mo., Code of Ordinances, § 50-161(a) (1995)).
89 Id. at 789. The demonstrators also brought a state law tort claim. Id.
90 Id.
91 Id.
92 Id. at 792.
93 Id. at 789.
94 Frye, 375 F.3d at 789.
95 Id.
96 Id. (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).
97 Id. at 792.
restrictions based upon the content of the demonstrators’ message. The court determined that the officers did not hinder the demonstrators from expressing their message; rather, the officers merely placed reasonable restrictions upon where the demonstrators could locate their large signs of the aborted fetuses. The court concluded that the ordinance was narrowly tailored to serve a significant government interest, and left open adequate alternative avenues of communication.

The significant interest that the government was protecting involved the state’s police powers to protect the health and safety of its citizens. Therefore, the court held that the district court did not err in granting the police officer’s motion for summary judgment.

IV. ANALYSIS

The decision in Frye, which found the defendant police officers not liable for violating the protestors’ First Amendment rights, was the correct decision. The officers were exempt from litigation because they were protected by the shield of qualified immunity. Although the Eighth Circuit Court of Appeals’ refusal to side with the protestors may be justified in the eyes of the law, the decision inadvertently adopted a “Heckler Veto” at the expense of every citizen’s First Amendment rights.

A. The Eighth Circuit Correctly Determined That the Police Officers Were Entitled to Qualified Immunity

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98 Id. at 790.
99 Id.
100 Frye, 375 F.3d at 790.
101 Id. at 791.
102 Id. at 792.
103 See Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982) (stating that if there are no genuine issues as to material fact, qualified immunity should be granted so as to prevent officials from facing suit); see also Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). The Mitchell Court expanded upon the idea that qualified immunity is more than a mere defense – if granted, it exempts public officials from facing suit. Id.
104 Frye, 375 F.3d at 792 (Beam, J., dissenting). See Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) (“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.”).
The Eighth Circuit began its initial analysis, as with all qualified immunity appeals, by examining whether, when viewed in the light most favorable to the protestors, the facts alleged showed that the officers’ actions violated at least one of the protestors’ constitutional rights.\textsuperscript{105} The basic function of this initial inquiry is to ensure that the plaintiffs asserted a constitutional right.\textsuperscript{106} The Eighth Circuit answered this question in the affirmative, because the First Amendment permits protestors to peacefully assemble in a public forum and lawfully express their views on abortion.\textsuperscript{107} As a result of the Eighth Circuit’s finding that the police officers allegedly violated the protestors’ Constitutional rights, the court next inquired into whether the Constitutional right violated was clearly established.\textsuperscript{108}

Unlike the initial question, which is undertaken in a broad and general manner, this second inquiry is examined with respect to the specific facts and circumstances surrounding the case.\textsuperscript{109} Therefore, the Eighth Circuit, to determine whether the protestors’ right was clearly established, asked “[w]hether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”\textsuperscript{110} Ultimately, the Eighth Circuit answered this question in the negative and determined that the officers acted reasonably, therefore allowing them to hide behind qualified immunity to escape litigation.\textsuperscript{111}

B. The Eighth Circuit Correctly Determined That the Protestors’ First Amendment Rights Were Not Clearly Established

In determining that the protestors’ right was not clearly established, the Eighth Circuit grounded its decision on the basis that the police officers’ restrictions as to where the protestors could locate their large poster-sized signs were based on content-neutral factors.\textsuperscript{112} To determine this, the Eighth Circuit

\textsuperscript{105} Frye, 375 F.3d at 789. See Paul v. Davis, 424 U.S. 693, 699 (1991) (determining that “not every legally cognizable injury which may have been inflicted by a state official” results in a violation of a Constitutional right).

\textsuperscript{106} Paul, 424 U.S. at 699.

\textsuperscript{107} See, e.g., Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973) (asserting that First Amendment protections include the right to associate and organize with others for the common advancement of shared beliefs and ideas).

\textsuperscript{108} See Wilson v. Layne, 526 U.S. 603, 615 (1999) (“[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.”).

\textsuperscript{109} See Anderson v. Creighton, 483 U.S. 635, 641 (1987) (stating that this inquiry must be made as to the specific facts and circumstances surrounding the incident and not in broad general propositions taken in the abstract).

\textsuperscript{110} Frye, 375 F.3d at 789 (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).

\textsuperscript{111} Id. at 792. The Eighth Circuit held that the officers imposed reasonable restrictions on the placement of protestors’ signs and concluded that the officers’ actions were based on content-neutral factors. Id.

\textsuperscript{112} Id. at 790.
applied the test from *Ward v. Rock Against Racism*, which states: “[t]he principal inquiry in determining content neutrality, in speech cases generally, and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”

Thus, the police officers’ purpose for placing the restriction on the protestors was the controlling consideration in determining whether their actions were motivated by content-neutral or content-based factors.

Upon arriving on the scene, the police officers determined that the protestors’ large signs, which depicted mutilated fetuses, were causing a traffic hazard and quickly decided that the signs needed to be restricted. By means of restriction, the officers presented the protestors with the option of either moving their protest away from the busy highway, or staying but removing the large signs. When the protestors refused, they were promptly arrested pursuant to the exercise of the state’s police powers because their protest was impeding both the flow of traffic and safety of the citizens. Although the protestors were exercising their First Amendment right, which “includes the right to attempt to persuade others to change their views,” the Supreme Court stated that a citizen’s right to freedom of speech is not absolute and may be subject to reasonable restrictions.

Therefore, as the Eighth Circuit correctly determined, even if the protestors’ anti-abortion message was highly offensive to passing motorists, the content of their message was protected under the First Amendment. However, as the Supreme Court established in *Erznoznik*:

> “[i]t may not be the content of the speech as much, as the deliberate verbal or visual assault that justifies proscription.”

In its opinion, the Eighth Circuit ultimately determined that the police officers’ restrictions were reasonable and that reasonable restrictions

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113 491 U.S. 781, 791 (1989) (holding that reasonable restrictions on noise levels were constitutional because the restrictions were established to protect surrounding residents and not because of the music’s message or purpose).

114 *Frye*, 375 F.3d at 790. To determine if the restrictions on the noise level were content-based or neutral, the Supreme Court examined the purpose behind the restriction. *Id.* at 790.

115 *Id.* at 788. *See also* Habiger v. Fargo, 80 F.3d 289, 296 (8th Cir. 1996), *cert. denied*, 519 U.S. 1011 (1996) (holding that “an officer on duty in the field is entitled to make a reasonable interpretation of the law he is obligated to enforce”).

116 *See Frye*, 375 F.3d at 785.

117 United States v. Morrison, 529 U.S. 598, 617-19 (2000) (noting that the framers of the United States Constitution created a federal government of limited power but reserved a generalized police power to the several states).

118 *Frye*, 375 F.3d at 790 (quoting Hill v. Colorado, 530 U.S. 703, 716 (2000)).


120 *Frye*, 375 F.3d at 789.

121 *Id.* at 790 (alteration in original) (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 210-11 (1975)).

122 *Erznoznik*, 422 U.S. at 211. The proscription that the court is referring to is in cases where speakers are seeking to force public confrontation with messages that have potentially offensive aspects. *Id.*

123 *Frye*, 375 F.3d at 790.
“are justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.”

1. The Eighth Circuit Correctly Pointed to a Significant Interest the Police Officers Protected in Determining That the Officers’ Regulations Were Content-Neutral

Although the Eighth Circuit properly determined that the police officers, in regulating where the protestors’ could display their graphic signs, based their restrictions on a significant government interest, this interest may have been caused by the hecklers. The police officers were justified in placing restrictions on the protestors because they were exercising their police powers to serve a significant government interest. In general, the significant government interest that the officers were protecting was the safety and well-being of the protestors, passing motorists, and other pedestrians. Specifically, the Eighth Circuit correctly and justifiably determined that the government had a significant interest in “requiring drivers to devote great attention to driving conditions and [to] the road signs.”

Even though the plaintiffs in Frye conceded that the officers were permitted to exercise their police powers and that “the protection afforded to offensive messages does not always embrace offensive speech” that a captive audience cannot avoid,” they attempted to argue “the fact that [their] allegedly offensive speech may have affected the driving skills of motorists [was] simply irrelevant.”

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125 Frye, 375 F.3d at 792 (Beam, J., dissenting) (stating that a First Amendment violation occurs when citizens may decide what speech offends them).
126 Id. at 791 (inferring that preventing motorists from crashing into other vehicles and even pedestrians is well within the exercise of a state’s police powers to maintain safety).
127 Id. at 792. The Eighth Circuit held that the protestors were obstructing the free flow of traffic and were causing a hazard because the motorists were diverting their eyes from the road and concentrating on the graphic signs. Id.
128 Id. (quoting Foti v. Menlo Park, 146 F.3d 629, 641 (9th Cir. 1998)). See Heffron v. Int’l Soc’y for Krishna Consciousness, Inc., 452 U.S. 640, 651 (1981) (noting that the city’s interest in maintaining the orderly movement of motorists and pedestrians is a substantial government interest because it involves the safety of its citizens); Hillsboro County v. Automated Med. Lab., Inc., 471 U.S. 707, 719 (1985) (stating that states traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons) (quoting Medtronic, Inc. v. Lohr, 418 U.S. 475, 475 (1996)).
129 Hill v. Colorado, 530 U.S. 703, 716 (2000) (pointing out that the government is permitted to regulate reasonably offensive speech if the audience cannot escape or avoid the contents of the particular message).
130 Frye, 375 F.3d at 791 (alteration in original) (quoting Appellant’s Brief at 25-26, Frye v. Kansas City Mo. Police Dep’t, 375 F.3d 785 (8th Cir. 2004) (No. 03-2134)). The protestors tried to advance the point that the police officers acted prematurely in exercising their police powers. Frye,
To advance this argument, the protestors relied on *Cohen v. California*. The protestors’ reliance on *Cohen* was misguided because the facts of *Cohen* were clearly distinguishable in that the motorists in *Frye* were, in essence, a captive audience. In *Cohen*, the Court found that the audience members were not captive because they could have avoided the obscene language by merely turning away. However, the Eighth Circuit correctly inferred that the motorists in *Frye*, by virtue of the heavy traffic, could not simply and safely avoid the signs by averting their eyes.

The Eighth Circuit refused to follow *Cohen* because the interest in avoiding unwanted speech that offends the listener widely varies in different settings. This was the proper ruling because the protestors had positioned themselves with their signs mere feet from the busy intersection, and it was impossible for the motorists to avoid the offensive communication. It could be argued that the protestors caused the motorists to be classified as captive because it was the protestors’ signs that created the traffic hazard. By placing the large signs directly in the line of sight of the motorists, the protestors forced the motorists to view the contents of the sign. In turn, the motorists’ uncontrollable adverse reactions to the signs also created traffic. Therefore, the motorists were held

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375 F.3d at 791. Specifically, the protestors relied on *Cohen v. California*, 403 U.S. 15, 19-20 (1971). *Frye*, 375 F.3d at 791. The Court in *Cohen* determined that words likely to cause violent reaction were not sufficient to uphold the conviction of the plaintiff who wore a jacket bearing the obscene words. *Id.*

*Id.*, 403 U.S. at 21.

*Id.*. See also *Avis Rent A Car Sys., Inc. v. Aguilar*, 529 U.S. 1138, 1141 (2000) (Thomas, J., dissenting from denial of certiorari) (stating that speech may be more restricted with a captive audience because the audience cannot avoid the offensive or objectionable speech).

*Id.*, 403 U.S. at 21. Specifically, the defendant, in an effort to protest the Vietnam War, wore a jacket that said “Fuck the Draft.” *Id.* The *Cohen* Court observed that there was no evidence that suggested the offended people were powerless to avert their attention from the defendant’s message. *Id.*

*Id.*, 375 F.3d at 791.

*Id.* (quoting *Hill v. Colorado*, 530 U.S. 703, 716 (2000)). The Court in *Hill* noted that the power to avoid a message that may be offensive to a person is not as important when “strolling through Central Park than when in the confines of one’s own home, or when persons are powerless to avoid it.” *Id.* See also *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 772-73 (2000) (“The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.”).

*Id.*, 375 F.3d at 788. The Eighth Circuit, in essence, inferred that the motorists were captive because they could not avoid the signs. *Id.* In fact, all the motorists that stopped and complained said that the graphic photos had impaired their driving and ability to “safely and properly control their vehicles.” *Id.* One officer on the scene testified that cars were nearly running over each other. *Id.*

*Id.* at 791. The police officers observed that the presence of the large graphic signs created a traffic hazard by impairing motorists’ driving abilities. *Id.*

*Id.* See *Lehman v. Shaker Heights*, 418 U.S. 298, 302 (1974) (reasoning that signs directly in a motorist’s vision thrust the contents of the message upon the viewer and the motorist, in essence, becomes captive).

*Id.*, 375 F.3d at 791.
captive when (1) they were forced to view the signs and (2) they were further forced to view the material because their cars were stuck in traffic, as a direct result of the protestors’ signs.\footnote{Id. See also Pub. Util. Comm’n v. Pollack, 343 U.S. 451, 468 (1952) (stating that an audience is captive out of necessity or lack of alternatives, not choice). In Pollack, the captive audience was passengers forced to ride a streetcar because of the lack of public transportation. Id.}

Although the Eighth Circuit properly determined that the police officers regulated the protestors’ speech in accordance with a significant governmental interest, the police officers may have acted in response to the protestors and, in essence, adopted a heckler’s veto.\footnote{See Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992) (holding that a restriction on speech by the government because of fear the public order will be disturbed was not content-neutral because it was based on the public’s reaction to the speech).} The Supreme Court in \textit{Terminiello} stated that the First Amendment permits citizens to express their views through controversial speech because this type of speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”\footnote{Frye, 375 F.3d at 793-94 (Beam, J., dissenting) (quoting \textit{Terminiello v. Chicago}, 337 U.S. 1, 4 (1949) (determining that freedom of speech, although not absolute, is protected against censorship or punishment even if speech is provocative, challenging, and strikes at prejudices at set ideas)).}

Furthermore, speech may not be curtailed simply because viewers do not agree with the particular message in the speech or because the message offends them.\footnote{See, e.g., \textit{Hustler Magazine v. Falwell}, 485 U.S. 46, 54-55 (1988).} Thus, the Supreme Court has clearly established that controversial public expressions are afforded protection under the First Amendment and cannot be prohibited merely because some audience members find the speech offensive, controversial, or shocking.\footnote{See, e.g., \textit{Bachellar v. Maryland}, 397 U.S. 564, 567 (1970) (noting that the expression of ideas and views in public should not be prohibited because some of the audience members are offended by the particular message of the speech).}

Although the Eighth Circuit noted that the police officers’ regulations were not based on the content of the protestors’ message, but rather were implemented for safety purposes, “[a] listener’s [adverse] reaction to speech [does not represent] a content-neutral basis for regulation.”\footnote{Frye, 375 F.3d at 793. See also \textit{Renton v. Playtime Theatres, Inc.}, 475 U.S. 41, 41 (1986) (determining that content-neutral restrictions “are justified without reference to the content of the speech,” but content-based restrictions are not) (quoting \textit{Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.}, 425 U.S. 748, 771 (1976)).} “While the government can enact content-neutral restrictions based on the secondary effects the speech creates, an effect from speech is not secondary if it arises specifically from listener’s reactions to the speech.”\footnote{Frye, 375 F.3d at 793 (Beam, J., dissenting) (citing \textit{Lewis v. Wilson}, 253 F.3d 1077, 1081-82 (8th Cir. 2001)).} However, as a result of the Eighth Circuit permitting the police officers to place “content-neutral” restrictions based upon
the secondary effects that the protestors’ speech created, the court ignored its own precedent. In Frye, the motorists’ reactions to the graphic signs did not constitute a secondary effect, in that the effect specifically arose from the motorists’ reaction to the protestors.

The fact that an accident had yet to occur as a result of the protestors is no defense – the government may regulate speech pursuant to public safety, as long as there is a reasonable basis for justifying those regulations. Prior to its decision in Frye, the Eighth Circuit held that without evidence that an individual’s message intentionally seeks to provoke a violent reaction, the mere possibility of violence is an insufficient constitutional basis to regulate an individual’s message. In Lewis, the Eighth Circuit went on to state, “[t]he only reason why [this] expressive conduct would be especially correlated with violence is that it conveys a particularly odious message; because the ‘chain of causation’ thus necessarily ‘run[s] through the persuasive effect of the expressive component’ of the conduct.” The Eighth Circuit, however, correctly distinguished Frye because the protestors’ demonstration had already started to produce adverse effects on the motorists, and increased the chance that an accident would occur.

2. The Eighth Circuit Correctly Determined That the Police Officers’ Restrictions Were Based on Content-Neutral Factors Because the Restrictions Left Open Alternative Channels of Communication

Besides qualifying as upholding a significant governmental interest, in order for a restriction on speech to be deemed content-neutral, the reasonable restriction must also leave open adequate alternative channels of communication. See Erie v. Pap’s A.M., 529 U.S. 277, 326 (2000) (defining and stating that secondary effects are caused by speech as opposed to being merely associated with it).

Frye, 375 F.3d at 793 (Beam, J., dissenting).

Id. at 797. One of the officers testified that he observed motorists pulling over, not because the signs impaired their view, but because they found the message offensive; therefore, the traffic hazard was created as a result of the motorists’ reactions. Id. In Judge Beam’s dissent, he noted that restrictions were only placed on signs the motorists “described as offensive and disgusting,” therefore creating a “heckler’s veto.”

ACORN v. St. Louise County, 930 F.2d 591, 596 (8th Cir. 1991) (upholding an ordinance that prohibited in-the-road solicitations even though an accident had yet to occur; this restriction was reasonably related to the significant interest of keeping the public safe).

Lewis v. Wilson, 253 F.3d 1077, 1081 (8th Cir. 2001), cert. denied, 535 U.S. 986 (2002) (stating that a “public official with even marginal creative ability could frequently invent a ‘public policy’ basis for rejecting a plate containing a message with which he or she disagrees”). The license plate in question contained the message “ARYAN-1.”

Id. In this quote, the Eighth Circuit rejected the defendant’s argument on the basis that it could regulate speech because of potential adverse responses to a particular message.

Frye, 375 F.3d at 791 (alteration in original) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 394 n.7 (1992)).
communication.\textsuperscript{154} Although reserving such a channel is a factor in determining whether restrictions on speech are content-neutral, the Supreme Court has in some instances expressed some reserve about whether it is a determinative factor.\textsuperscript{155} Specifically, forty-five years ago, the Supreme Court was cautious in applying the reasonable alternative channels of communication test with respect to a state’s police powers, stating: “[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”\textsuperscript{156}

Concerning more recent times, the Supreme Court has determined that “[w]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means . . . .”\textsuperscript{157} Thus, based upon this line of reasoning and precedent, the Eighth Circuit determined that the officers had left open an alternative channel of communication.\textsuperscript{158} By instructing the protestors either to remove the graphic signs or to move away from the highway, the officers did not forbid the abortion protestors from expressing their message.\textsuperscript{159} This was a correct determination because the Supreme Court has rejected the idea that “people who wish to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.”\textsuperscript{160}

Moreover, the protestors could have remained on the sidewalk near the road, displaying posters that did not contain the controversial images, yet still effectively communicated their message.\textsuperscript{161} Another alternative the Eighth

\textsuperscript{154} See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983).

\textsuperscript{155} See Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 809 (1996) (“The availability of alternative channels of communication may be relevant when we are assessing content-neutral time, place, and manner restrictions, but the fact that speech can occur elsewhere cannot justify a content-based restriction . . . .”).

\textsuperscript{156} See Schneider v. New Jersey (Town of Irvington), 308 U.S. 147, 163 (1939) (disagreeing with an argument that a city ordinance that restricted handbills was constitutional simply “because [the ordinance’s] operation [was] limited to streets and alleys and [left people] free to distribute printed matter in other public places”). The court went on to add that streets and sidewalks are “natural and proper” places to distribute information pertaining to one’s views, and that the “public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.” Id.

\textsuperscript{157} Hill v. Colorado, 530 U.S. 703, 704 (2000) (commenting that the city’s ordinance requiring protestors to stay at least eight feet away from a person near a health care facility was constitutional). “The 8-foot zone should not have any adverse impact on the readers’ ability to read demonstrators’ signs. That distance can make it more difficult for a speaker to be heard, but there is no limit on the number of speakers or the noise level.” Id.

\textsuperscript{158} Frye, 375 F.3d at 790.

\textsuperscript{159} Id.

\textsuperscript{160} Id. (quoting Adderley v. Florida, 385 U.S. 39, 47-48 (1966)). Adderley furthered the premise that “[t]he United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.” Adderley, 385 U.S. at 48.

\textsuperscript{161} Frye, 375 F.3d at 790. The officers presented the protestors with this option before arresting them; however, the protestors advanced that they had the right to express their anti-abortion message any way they pleased. Id.
Circuit did not discuss was one where the protestors could have stood on the sidewalk and peacefully handed out leaflets. This option would not have adversely affected the motorists’ ability to properly retain control of their vehicles because they would be oblivious to the message. The protestors also had the option of continuing their use of the graphic signs, but moving them away from the road.

When faced with similar situations where public officials are accused of curtailing protestors’ right to freedom of speech, courts should follow the approach taken by the Eighth Circuit. Specifically, where freedom of speech clashes with public safety, courts should examine and evaluate whether the government had a significant interest in restricting the speech, whether the restrictions were reasonable based upon the circumstances, and whether alternative avenues of communication were available. This analysis is appropriate because, to reiterate the Supreme Court, although the First Amendment protects a citizen’s right to freedom of speech, it does not permit that citizen to express his or her views and beliefs in any manner that is dangerous to public safety or welfare, especially if a reasonable alternative channel of communication is available.

V. CONCLUSION

In Frye, the Eighth Circuit Court of Appeals correctly held that because the police officers had a significant interest in upholding public safety, they did not violate the protestors’ First Amendment rights when the officers placed reasonable restrictions as to where the protestors could display their highly graphic and offensive signs. Furthermore, the Eighth Circuit correctly applied the doctrine of qualified immunity to shield the officers from litigation as a result of the proper exercise of their police powers.

Pertaining solely to the freedom of speech issue, the Eighth Circuit’s ruling was correct because although the First Amendment allows protestors to express

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162 See Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 357 (1997) (determining that peacefully passing out leaflets that express certain beliefs and views is a bona fide alternative where an ordinance effectively creates a buffer-zone).
163 Frye, 375 F.3d at 790. This option, although arguably not as effective, would have been acceptable because it would not have posed a safety hazard. Id.
164 Id. at 785.
165 Id. at 790.
166 Schenck, 519 U.S. at 375.
167 Frye, 375 F.3d at 785.
their views and beliefs in the public forum, this right is not absolute and free from restrictions.\textsuperscript{169} The Eighth Circuit determined that the freedom of speech is not immune from restrictions, especially where the content of the message jeopardizes the health, welfare, and safety of passing motorists.\textsuperscript{170} In \textit{Frye}, the court determined that the protestors’ graphic signs impaired the ability of the passing motorists to safely control their vehicles and could have potentially resulted in a dangerous accident.\textsuperscript{171} Therefore, the court correctly held that the officers were justified because they had a significant interest in maintaining public safety by ensuring the flow of traffic was unimpeded.\textsuperscript{172}

The court also properly determined that the officers placed reasonable restrictions as to where the protestors could display their signs. Before arresting the protestors, the officers gave them an opportunity to remove the signs of the aborted fetuses or to move away from the road.\textsuperscript{173} Besides being a reasonable restriction as to location, this was also a reasonable alternative for the protestors to communicate their message.

This case, besides demonstrating a proper approach to resolving First Amendment concerns connected with issues of public safety, also properly applied the doctrine of qualified immunity. Specifically, the doctrine of qualified immunity permits public officials to make reasonable split-second decisions without fearing litigation.\textsuperscript{174} If qualified immunity did not exist, some officials would be hesitant to act out of fear they might face harassing litigation.\textsuperscript{175} Thus, because the doctrine of qualified immunity protects an official who acts reasonably in his decisions, the doctrine serves as a governmental safeguard that preserves an official’s ability to protect and serve the public, and is therefore not strictly a benefit to public officials, but to society as a whole.\textsuperscript{176}

If \textit{Frye} has taught us anything, it is that protestors do not have the right to express their views whenever and however they please. Furthermore, the decision has taught us that the government’s interest in maintaining public safety is greater than citizens’ right to freedom of speech when the method of communicating that speech is dangerous to society.\textsuperscript{177} If there is a clash between safety interests and the right to freedom of speech, however, any restriction of the speech must be narrowly tailored and provide for alternative channels of communication.\textsuperscript{178}

\textsuperscript{169} \textit{See}, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).
\textsuperscript{170} \textit{Frye}, 375 F.3d at 790.
\textsuperscript{171} \textit{Id}.
\textsuperscript{172} \textit{Id}.
\textsuperscript{173} \textit{Id} at 789.
\textsuperscript{175} \textit{Id}.
\textsuperscript{176} \textit{See}, e.g., Wyatt v. Cole, 504 U.S. 158, 158 (1992) (stating that the doctrine of qualified immunity benefits the public because it “prevents the inhibition of discretionary action” on the part of the public official).
\textsuperscript{177} \textit{Frye}, 375 F.3d at 785.
DISCIPLINARY COUNSEL V. GARDNER: DRAWING THE LINE BETWEEN ZEALOUS ADVOCACY AND UNETHICAL BEHAVIOR

by Chris Markus*

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1 The MODEL CODE OF PROF’L RESPONSIBILITY DR 8-102(B) (1981) provides “[a] lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.”
I. INTRODUCTION

Imagine you are an Ohio lawyer representing a client who has been convicted of driving in violation of a court order that had suspended his license. While you have no plans of contesting the fact that your client was in violation of the order, you are nevertheless confident that you will prevail in court because you believe the officer who issued the citation to your client mistakenly charged him with violation of a statute unrelated to the violation of the court order, a crime of which your client is not guilty. After losing the case at the trial level, you appeal. The Ohio Court of Appeals affirms the conviction, reasoning that your client was given “reasonable inquiry” to know exactly what statute he was being charged with violating. Frustrated, you submit a motion to the appellate court seeking reconsideration or certification of the case to the Ohio Supreme Court. Your motion, however, goes beyond asking the court to reconsider its decision; besides accusing the court of being biased and corrupt, the document lambastes the three-judge panel that decided the case. At one point your motion declares that “honesty and truth [are] damned” in the panel’s decision regarding your client. Your motion goes well beyond fair criticism of the court’s decision, asking such loaded questions as: “Why does this panel only apply the law as a hammer to crush citizens and not as a shield to protect their basic rights?” and “Is having a prosecutorial bent [so] hard to let go of that truth must be cast aside to achieve a particular result?”

There is little question that such statements will not aid your client; in fact, these types of statements can only have a detrimental effect on your client’s case. Beyond that, these types of statements may also have consequences on your career as a lawyer and may serve as a basis for professional discipline.

This note examines the standards employed by courts in determining whether a lawyer’s criticism of a judge should be the basis for disciplinary action. Section II examines the two approaches used by courts in determining whether a
lawyer’s criticism is protected by the First Amendment.\textsuperscript{8} Section II also examines the speech protections of the free speech clause of the Ohio Constitution.\textsuperscript{9} Section III includes the specific facts and holding of \textit{Disciplinary Counsel vs. Gardner}.\textsuperscript{10} Section IV provides an analysis of the court’s opinion and explains why the court’s holding is well-supported by existing case law. Section V concludes the note.

II. BACKGROUND LAW

A. The Role of Professional Standards and Ethical Precepts in Limiting an Attorney’s Freedom of Speech Under the First Amendment

While the American Bar Association Model Code of Professional Responsibility (“the Code”), as adopted by the Supreme Court of Ohio,\textsuperscript{11} recognizes the right of lawyers to publicly criticize judges,\textsuperscript{12} the Code urges that the lawyer is to “be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms . . . .”\textsuperscript{13} The Supreme Court of Ohio has also charged lawyers with the duty to complain about judicial officers when necessary,\textsuperscript{14} but cautioned that such a duty is secondary to the lawyer’s obligation to “maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance.”\textsuperscript{15}

\textsuperscript{8} U.S. CONST. amend. I (providing that “Congress shall make no law . . . abridging the freedom of speech . . . .”).
\textsuperscript{9} OHIO CONST. art. I, § 11. This section provides in relevant part: “Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.” \textit{Id}.
\textsuperscript{11} See, e.g., \textit{id.} at 428-33; \textit{see also} Toledo Bar Ass’n v. Kolby, 259 N.E.2d 111, 113-14 (Ohio 1970) (referring to the Code as the proper measure of conduct for an attorney).
\textsuperscript{12} MODEL CODE OF PROF’L RESPONSIBILITY EC 8-6 (1981). Canon 8 not only recognizes the right of lawyers to criticize judges, but also states that lawyers have “a special responsibility” in assisting the selection of qualified judges. \textit{Id}. Additionally, Canon 8 charges lawyers with a “duty” to prevent “political considerations from outweighing judicial fitness in the selection of judges” and states that lawyers “should protest earnestly against the appointment or election” of judges who are not capable of sitting on the bench. \textit{Id}.
\textsuperscript{13} \textit{Id}.
\textsuperscript{14} \textit{In re} Thatcher, 89 N.E. 39, 87 (Ohio 1909).
\textsuperscript{15} \textit{Id}. 
The Code prohibits lawyers from “knowingly mak[ing] false accusations against a judge”\(^{16}\) and from “[e]ngaging in undignified or discourteous conduct which is degrading to a tribunal.”\(^{17}\) At least three rationales have been advanced for limiting the extent and means by which a lawyer may criticize a judge: (1) maintenance of public confidence in the legal system;\(^\text{18}\) (2) the fact that judges are not entirely free to defend themselves against false accusations;\(^\text{19}\) and (3) such limitations are necessary for the administration of justice.\(^\text{20}\) These limitations coexist and arguably conflict with the free speech guarantee of the First Amendment.\(^\text{21}\) However, the argument that the free speech guarantee of the First Amendment offers lawyers an absolute protection in criticizing courts or judges has been rejected by many courts,\(^\text{22}\) including the United States Supreme Court.\(^\text{23}\)

In restricting the extent to which a lawyer may criticize a judge, pursuant to the ethical obligations of being a member of the profession, some courts have applied “an objective standard to determine whether a lawyer’s statement about a judicial officer is made with knowledge or reckless disregard of its falsity.”\(^\text{24}\) The objective approach focuses on how the “reasonable attorney” would act “in the same or similar circumstances” and assesses “whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made.”\(^\text{25}\) The language “knowledge” or “reckless

\(^{16}\) **MODEL CODE OF PROF’L RESPONSIBILITY DR 8-102(B) (1981).** See also **MODEL RULES OF PROF’L CONDUCT R. 8.2(a)** (prohibiting lawyers from “mak[ing] a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge”).

\(^{17}\) **MODEL CODE OF PROF’L RESPONSIBILITY DR 7-106(C)(6) (1981).** See also **MODEL RULES OF PROF’L CONDUCT R. 3.5(d)** (prohibiting lawyers from “[engag[ing] in conduct intended to disrupt a tribunal”).

\(^{18}\) **See** Kentucky State Bar Ass’n v. Lewis, 282 S.W.2d 321, 326 (Ky. 1955) (stating that lawyers worthy of respect should recognize the importance of public confidence in the courts as well as the duty to expose a dishonest judge).

\(^{19}\) **See Thatcher**, 89 N.E. at 87 (“Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the bar against unjust criticism and clamor.”).

\(^{20}\) **See In re Sawyer**, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring) (observing that in order to accomplish justice, lawyers may have to submit to ethical limitations on speech that might be considered protected speech in other circumstances).

\(^{21}\) U.S. Const. amend. I (providing that “Congress shall make no law . . . abridging the freedom of speech . . . ”).


\(^{23}\) **See Sawyer**, 360 U.S. at 646-47 (Stewart, J., concurring) (“Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.”).


\(^{25}\) **See** Standing Comm. on Discipline, U.S. Dist. Court, Cent. Dist. of Calif. v. Yagman, 55 F.3d 1430, 1437 (9th Cir. 1995) (quoting United States Dist. Court, E. Dist. of Wash. v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993)).
disregard" used in the objective approach is reminiscent of the *New York Times Co. v. Sullivan* actual malice standard. However, courts applying the objective standard reject the notion that a disciplinary authority must also show subjective knowledge of falsity or reckless disregard as to the falsity of statements made that criticize a judge on the part of the lawyer making those statements. In *Standing Comm. on Discipline, U.S. Dist. Court, Cent. Dist. of California v. Yagman*, the United States Court of Appeals for the Ninth Circuit distinguished between the interests of defamation law and the law of professional ethics as they apply to attorney disciplinary proceedings. In applying the objective standard, the *Yagman* court observed that the goal of defamation law is to provide a remedy for what is “an essentially private wrong,” while the goal of disciplining attorneys for making unethical criticisms of judges is “to preserve public confidence in the fairness and impartiality of our system of justice.”

The rationale behind the *Yagman* court’s application of the objective standard was twofold: on the one hand, the court recognized the importance of encouraging legitimate and factual criticism of the legal system; on the other hand, that interest must be tempered by “the public’s interest in preserving confidence in the judicial system.”

An alternative approach employed by some courts in determining whether a lawyer’s criticism of a judge is protected speech is to apply a subjective, “actual malice” standard that mirrors the *Sullivan* test as applied in defamation cases involving public officials. Under the subjective approach, before a lawyer can be censured for his criticism of a judge, the following must first be shown by the disciplinary authority: (1) the lawyer’s statement was “a false statement of fact (or a statement of opinion that necessarily implies an undisclosed false assertion of fact)”; and (2) the lawyer making the statement did so “with actual malice—that is, with knowledge that it was false or with reckless disregard as to its

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26 *Yagman*, 55 F.3d at 1437 (referring to *Standing Comm. on Discipline v. Yagman*, 856 F. Supp. 1384, 1389-90 (C.D. Cal. 1994)).
27 See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (applying an “actual malice” standard to a defamation case, requiring plaintiff to show that defendant’s statements were made “with knowledge that [they were] false or with reckless disregard of whether [they were] false or not”).
28 See *Yagman*, 55 F.3d at 1437.
29 Id.
30 Id.
31 Id.
32 Id. at 1438.
33 Id.
34 See *Yagman*, 55 F.3d at 1438.
35 See *In re Green*, 11 P.3d 1078, 1085 (Colo. 2000).
36 See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-92 (holding that newspaper publisher who printed editorial criticizing a city commissioner in his official capacities was protected by the First Amendment as no “actual malice” on part of publisher was found).
37 *Green*, 11 P.3d at 1085.
38 Id.
truth.” This subjective approach requires, by a showing of “clear and convincing” evidence, that the speaker made statements with “subjective awareness of probable falsity or actual intent to [speak] falsely.” In In re Green, the Supreme Court of Colorado supported an application of the subjective standard in an attorney discipline case by noting that the “principal purpose” of the First Amendment is to “safeguard[] [the] public discussion of governmental affairs.”

The Green court founded its reasoning on the idea that because a lawyer’s criticism of a judge is similar to criticism of other public officials, it is appropriate to apply the same, subjective standard in both cases. The court also noted that lawyers are part of a “class of people in the best position to comment on the functioning of the judicial system[,]” and that interest about judges was particularly important in Colorado because the judges in that state are elected officials.

Whether the objective or subjective standard is applied, it is clear that a lawyer cannot hide behind the First Amendment to avoid being disciplined for making criticisms of judges that are clearly false and unethical. When a court finds that a lawyer has made a false and unethical criticism of a judge, the penalties that follow have included admonishment, reprimand, suspension, and disbarment.

39 Id.
41 See Green, 11 P.3d at 1085.
42 Id.
43 Id.
44 Id.
45 U.S. Const. amend. I states “Congress shall make no law . . . abridging the freedom of speech . . . .
46 See In re Sawyer, 360 U.S. 622, 646 (1959) (Stewart, J., concurring); see also Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (advancing the proposition that lies made “knowingly and deliberately” and directed at public officials are not a protected form of speech). See generally Theard v. United States, 354 U.S. 278, 278 (1957) (quoting In re Rouss, 116 N.E. 782, 783 (N.Y. 1917) (“Membership in the bar is a privilege burdened with conditions.”).
47 See In re Frerichs, 238 N.W.2d 764, 768-70 (Iowa 1976) (warning lawyer for being disrespectful toward the court by indicating that court had decided case in a deceitful manner, but no further disciplinary action was taken).
48 See Wilburn v. Reitman, 91 P.2d 865, 866-67 (Ariz. 1939) (reprimanding lawyer for stating in a brief that opposing counsel was able to win case by hypnotizing judge and putting him in a state “resembling normal sleep”).
49 See Ramirez v. State Bar, 619 P.2d 399, 406 (Cal. 1980) (suspending lawyer from practice for a one year period (however, the one year suspension was stayed on the condition that the attorney actually be suspended for 30 days and pass the Professional Responsibility Exam administered by the California Committee of Bar Examiners)).
B. *The Independent and Separate Protection of Opinions Afforded by the Ohio Constitution Vis-à-Vis the Federal Constitution*

In *Milkovich v. Lorain Journal Co.*, the United States Supreme Court held that special First Amendment protection for opinions is not warranted, and thus the Court declined to create a new category of First Amendment protection for speech characterized as “opinion.” However, the Ohio Supreme Court held that the Ohio Constitution protects some false statements of opinion under Article I, Section 11 (hereinafter “the free speech clause”). This protection has been described as “a separate and independent guarantee ancillary to freedom of expression . . . .” An example of a criticism that may be characterized as an opinion would be a lawyer referring to a judge’s ruling as “incoherent.” Such a statement can never definitively be proved false, and therefore is distinguishable from a false statement of fact. A false statement of fact, such as saying the judge was “drunk on the bench,” implies a statement of fact that may or may not be proven. Under the free speech clause of the Ohio Constitution, a statement of opinion is protected, while the latter statement of fact is not.

In determining whether a statement is an opinion (and thus protected under the Ohio Constitution) or a fact (which may or may not warrant protection), Ohio courts apply a “totality of the circumstances” test. The totality of the circumstances test was first adopted by the Ohio Supreme Court in *Scott v. News-Herald* and was reaffirmed in *Vail v. The Plain Dealer Publ’g Co.* The

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51 *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990). The Court stated that the necessary “breathing space” needed for free expression is already provided for by existing First Amendment decisions and that creating an artificial dichotomy between ‘opinion’ and ‘fact’ was not necessary. *Id.*


53 *Ohio Const.* art. I, § 11 (providing in relevant part: “Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.”).

54 *Gardner*, 793 N.E.2d at 430.


56 *Id.*

57 See *Ohio Const.* art. I, § 11.

58 *Green*, 11 P.3d at 1084. See *Vail v. The Plain Dealer Publ’g Co.*, 649 N.E.2d 182, 185 (Ohio 1995) (recognizing the unique protection of opinions provided by the Ohio Constitution).

59 *Green*, 11 P.3d at 1084.

60 *Id.*


62 *Vail*, 649 N.E.2d at 185. The Vail court recognized that the U.S. Supreme Court had rejected the idea of affording opinions special First Amendment protection in *Milkovich*, but went on to conclude that the totality of the circumstances test, which provides protection for opinions under Article I, Section 11 of the Ohio Constitution adopted in *Scott*, is “the law in this state.” *Id.*
totality of the circumstances test requires consideration of four factors in determining whether a statement is fact or opinion. The court must consider: (1) the specific language used; (2) whether the statement can be verified; (3) the meaning of the statement within the general context in which it was made; and (4) the broader context in which the statement appeared.

The totality of the circumstances test is not a “bright-line test.” It “can only be used as a compass to show general direction and [is] not a map to set rigid boundaries.” No one factor of the test is determinative, and courts applying the test have varied the weight put on any one of the factors, in light of the circumstances. If, after considering the four factors, a court finds that an ordinary listener would accept the statement as opinion and not fact, that statement is protected under the free speech clause of the Ohio Constitution, even if the statement may not enjoy protection under the federal First Amendment.

III. STATEMENT OF FACTS AND HOLDING FOR OFFICE OF DISCIPLINARY COUNSEL V. GARDNER

A. The Facts

Attorney Mark J. Gardner disagreed with the decision issued by the Court of Appeals for the Eighth District of Ohio regarding one of his clients. In a move not uncommon, Gardner filed a motion with the court seeking reconsideration, or in the alternative, certification of the case to the Ohio Supreme Court. However, the motion Gardner filed with the court was not a typical one—in it he accused the Eighth District panel of judges of being corrupt, and questioned whether an oath taken by the judges to uphold the law meant anything to the panel. The motion also stated that the panel of judges did not give “a damn

63 Scott, 496 N.E.2d at 706.
64 Id. (citing Ollman v. Evans, 750 F.2d 970, 979 (D.C. 1984)). See also Vail, 649 N.E.2d at 185.
65 Vail, 649 N.E.2d at 185.
66 Scott, 496 N.E.2d at 706.
67 See Vail, 649 N.E.2d at 185.
68 Id.
69 See id. at 186-87 (Douglas, J., concurring) (“Once a determination is made that specific speech is ‘opinion,’ the inquiry is at an end. It is constitutionally protected.”).
71 793 N.E.2d at 426-28.
72 Gardner, 793 N.E.2d at 426.
73 Id. at 427.
74 Id.
about how wrong, disingenuous, and biased its opinion is,” and accused the panel of “only apply[ing] the law as a hammer to crush citizens and not as a shield to protect their basic rights.”

A panel of the Ohio Board of Commissioners on Grievances and Discipline made findings of fact on the matter and, along with the parties’ stipulation, found that Gardner had violated Disciplinary Rule 7-106(C)(6) of the Model Code of Professional Responsibility. In addition, the panel found, by “clear and convincing evidence,” that Gardner had violated DR 8-102(B) of the Code. At the panel’s hearing, Gardner admitted that his conduct was not appropriate or professional, but maintained his assertion that the court had “skewed and ignored the facts, disregarded honesty and truth, and violated their oaths to decide cases fairly and impartially.”

In report of the panel’s findings to the board, the panel recommended a sanction for Gardner that the parties had suggested—a public reprimand. However, the board rejected the panel’s recommendation and instead recommended that Gardner be suspended for six months, with the six-month suspension stayed on the condition that he commit no further violations of the disciplinary rules. The board based its recommendation on Gardner’s “outrageous behavior toward a tribunal.”

Gardner challenged both the board’s finding that he violated DR 8-102(B) and also the board’s recommendation of a six-month suspension. Gardner challenged the panel’s finding on two grounds: (1) the accusations made in the motion are federally protected free speech because they are opinions that are immune from disciplinary measures, similar to the treatment of opinions in defamation cases; and (2) even if his accusations are capable of being proved false, the panel failed to prove as much.

75 Id.
76 Id.
77 The MODEL CODE OF PROF’L RESPONSIBILITY DR 7-106(C)(6) reads: “In appearing in his professional capacity before a tribunal, a lawyer shall not: Engage in undignified or discourteous conduct which is degrading to a tribunal.”
78 Gardner, 793 N.E.2d at 428.
79 The MODEL CODE OF PROF’L RESPONSIBILITY DR 8-102(B) reads: “A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.”
80 Gardner, 793 N.E.2d at 428.
81 Id.
82 Id.
83 Id.
84 Id.
85 Id.
86 Gardner, 793 N.E.2d at 428.
87 Id.
88 Id.
B. The Decision of the Ohio Supreme Court

The Ohio Supreme Court held that neither the First Amendment nor the free speech clause of the Ohio Constitution protected Gardner’s accusations made in the motion he submitted to the Court of Appeals for the Eighth District of Ohio. In addition, the court held that Gardner had violated DR 8-102(B).

The court in Gardner utilized a three-tiered approach in analyzing whether Gardner’s statements were a form of protected speech and whether Gardner had violated DR 8-102(B). First, the court examined whether Gardner’s statements were protected by the First Amendment and concluded that neither false accusations of criminal conduct nor factually baseless opinions that a judge is corrupt warrant First Amendment protection. Second, the court considered whether Gardner’s statements were the type of opinions protected by the free speech clause of the Ohio Constitution. The court concluded that, in the context of a motion submitted to the court, Gardner’s statements were not opinions, but rather the statements were “factual assertions.”

The final strand of the court’s analysis in Gardner involved the determination of whether Gardner’s statements violated DR 8-102(B). In determining that Gardner had violated DR 8-102(B), the court noted that Gardner made no inquiry as to whether the court of appeals was biased or corrupt and that he ignored his law partner’s advice to refrain from making the statements. According to the court, the fact that Gardner did not make such an inquiry and that he ignored his partner’s advice evidenced a “reckless disregard for truth.”

In the court’s First Amendment analysis, “fair administration of justice” was cited as a valid justification for restricting a lawyer’s speech. Additionally, the court held that “attorneys may not invoke the federal constitutional right of free speech to immunize themselves from even-handed discipline for proven unethical conduct.” The court also pointed out that, unlike the free speech clause of the Ohio Constitution, the First Amendment

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89 Id. at 429.
90 Id. at 430.
91 Id. at 433.
92 Gardner, 793 N.E.2d at 428-33.
93 Id. at 428.
94 Id. at 429.
95 OHIO CONST. art. I, § 11.
96 Gardner, 793 N.E.2d at 429.
97 Id. at 430.
98 Id. at 431.
99 Id. at 432.
100 Id.
101 Id. at 429.
102 Gardner, 793 N.E.2d at 429.
103 Id. (quoting In re Sawyer, 360 U.S. 622, 646 (1959)).
104 OHIO CONST. art. I, § 11.
does not protect opinions that have no basis in fact. Thus, even though Gardner claimed that his statements warranted First Amendment protection as opinions that were unverifiable, the court rejected this argument because the First Amendment provides no special protection for opinions.

Noting that this was an issue of first impression, the court stated that the free speech clause of the Ohio Constitution does not necessarily prohibit the imposition of discipline on a lawyer for criticizing a judge. The court applied the totality of the circumstances test to determine that Gardner’s statements were not protected as opinions. The test calls for an inquiry into the “specificity, verifiability, general context, and social context of the words used” to determine whether the average person would believe the words to be an opinion or a statement of fact. The court reasoned that accusations of criminal or ethical misconduct (e.g. Gardner’s accusations that the court was corrupt and biased) have a well-defined meaning, can be proved or disproved, and that the average reader would not consider documents filed in court to be opinions. Based on this rationale, the court determined that Gardner’s charges were not opinions of the type protected by the free speech clause.

Finally, the court also held that Gardner made his accusations knowing that they were false, as required for a violation of DR 8-102(B). Before the court determined that Gardner made the statements knowing that they were false, the court considered whether to apply an objective or subjective approach to determine whether Gardner possessed the requisite knowledge for a violation of DR 8-102(B). Gardner urged the court to apply the subjective “actual malice” test which would have required the disciplinary counsel to show that Gardner himself knew the statements were false or possessed a reckless disregard as to their truth at the time they were made. The court, however, declined to require the disciplinary counsel to show Gardner’s state of mind at the time the statements were made, and applied an objective approach that assessed Gardner’s statements from the point of view of a “reasonable attorney.”

The court framed the question of knowledge in an objective way: what would a reasonable attorney do in similar circumstances?; would a reasonable attorney believe that there was a “factual basis . . . considering their nature and the context

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105 Gardner, 793 N.E.2d at 429.
106 Id.
107 Id.
108 Id. at 430.
109 Id.
110 Id.
111 Gardner, 793 N.E.2d at 430.
112 Id.
113 Id. at 433.
114 Id. at 431.
115 Id.
116 Id.
in which they were made.” In rejecting the subjective approach, the court observed that adoption of such an approach would insulate statements that were reckless or irresponsible if the speaker did not “entertain serious doubts as to their truth.”

The court went on to cite the state’s interests in the protection of the public, the administration of justice, and in the legal profession as valid reasons for applying the objective approach. The court also noted that a lawyer’s statements would still be protected if they turned out to be mistaken, so long as they retain a reasonable factual basis.

The court concluded by observing that Gardner had made no inquiry into the court’s integrity and no investigation into the court’s impropriety before making his accusations and, as such, his statements were indicative of a “reckless disregard for the truth.”

After arriving at the conclusion that Gardner’s statements were unprotected violations of DR 7-106(C) and DR 8-102(B), the court decided that the lawyer deserved a more severe suspension than the stayed six-month suspension recommended by the Ohio Board of Commissioners on Grievances and Discipline, and suspended Gardner from practicing law in Ohio for six months.

Justice Lundberg Stratton filed a separate opinion concurring in part and dissenting in part from the majority. The concurrence agreed with the bulk of the majority’s decision, but disagreed with the majority’s characterization of an “opinion.” The majority held that the free speech clause of the Ohio Constitution protects some false statements of opinion, a view that Justice Stratton felt “unnecessarily blurs the line between a mere opinion . . . and a false statement of fact.” Thus, Justice Stratton agreed with the majority’s First Amendment analysis and its decision that Gardner had violated DR 8-102(B), but concluded that the free speech clause of the Ohio Constitution does protect opinions, and that protection should not extend to false statements of opinion.

Justice Pfeifer’s dissent stated that Gardner did deserve a public reprimand, but not the six-month suspension handed down by the majority. In support of his suggestion of a lesser punishment, Justice Pfeifer pointed out that “a motion for reconsideration in an appellate court, while a public document, would receive about as much scrutiny from the public if it were written on the wind.” Additionally, the dissent noted that the “vigorous advocacy” that is a necessary

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117 Gardner, 793 N.E.2d at 431.
118 Id. (quoting In re Holtzman, 577 N.E.2d 30, 34 (N.Y. 1991)).
119 Id. at 432.
120 Id.
121 Id.
122 Id. at 433.
123 Gardner, 793 N.E.2d at 433.
124 Id.
125 Id.
126 Id. at 433.
127 Id. at 434.
128 Id.
element of our legal system will sometimes lead to “spirited interplay between lawyers and judges” and cautioned against a decision that would dampen that spirit.\textsuperscript{129}

IV. ANALYSIS

A. Gardner's Statements Were Not Protected Under the First Amendment

The United States Supreme Court held in \textit{N.Y. Times Co. v. Sullivan} that in order for criticism of a public official to be defamatory it must be shown that the critical statement was made with “actual malice.”\textsuperscript{130} The Court defined actual malice as “knowledge that [the statement] was false or with reckless disregard of whether it was false or not.”\textsuperscript{131} Subsequent cases have placed judges in the category of public officials\textsuperscript{132} identified in \textit{Sullivan}, thus subjecting criticisms of judges to the actual malice standard for defamation, libel and slander cases.\textsuperscript{133} Thus, it can be concluded that false statements criticizing judges made with actual malice may subject a speaker to defamation liability whether he or she is a lawyer or a non-lawyer.\textsuperscript{134}

Although the U.S. Supreme Court has not definitively and specifically addressed “the restraint on free speech inherent in disciplining a lawyer for comments criticizing a judge[,]”\textsuperscript{135} the Court has recognized the validity of restraints on a lawyer’s speech in other circumstances.\textsuperscript{136} In \textit{Sheppard v. Maxwell},\textsuperscript{137} the Court concluded that a defendant in a murder case had not

\textsuperscript{129} \textit{Gardner}, 793 N.E.2d at 434 (quoting Disciplinary Counsel v. Grime, 614 N.E.2d 740, 742 (Ohio 1993) (Pfeifer, J., dissenting)).
\textsuperscript{131} \textit{Id}.
\textsuperscript{132} \textit{See} Dostert v. Washington Post Co., 531 F. Supp. 165, 166 (N.D. W. Va. 1982) (characterizing a West Virginia Twenty-Third Judicial Circuit judge as a public official for purposes of a libel and slander suit). \textit{Accord} Driscoll v. Block, 210 N.E.2d 899, 911 (Ohio Ct. App. 1965) (holding that a municipal judge failed to show actual malice on part of newspaper accused of libel and thus was not permitted to recover damages).
\textsuperscript{133} \textit{See Dostert}, 531 F. Supp. at 166.
\textsuperscript{134} \textit{Sullivan}, 376 U.S. at 279-80.
\textsuperscript{135} \textit{In re Green}, 11 P.3d 1078, 1083 (Colo. 2000).
\textsuperscript{136} \textit{See} Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (“Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.”); \textit{see also} Gentile v. State Bar of Nevada, 501 U.S. 1030, 1074-81 (1991) (holding that Nevada Bar rule limiting lawyer’s speech relating to adjudicative proceeding was void for vagueness, but a rule that limited a lawyer’s speech relating to an adjudicative proceeding when speech would create a “substantial likelihood of material prejudice” was constitutionally permissible). \textit{Id} at 1075.
\textsuperscript{137} \textit{Sheppard}, 384 U.S. at 333.
received a fair trial\textsuperscript{138} because the trial court judge had not taken adequate steps to prevent the trial from taking on a “carnival atmosphere” due to an overwhelming media presence.\textsuperscript{139} The Court suggested that one measure the trial judge could have taken to alleviate the detrimental effect of the media would have been to “proscribe[] extrajudicial statements by any lawyer[,]”\textsuperscript{140} and that this sort of restriction is “within the court’s power . . . .”\textsuperscript{141} In \textit{Sheppard}, the Court’s rationale for suggesting such limitations was clear—criminal defendants are entitled to the right to a fair trial, and restrictions on a lawyer’s speech to guarantee this right may be necessary.\textsuperscript{142}

Another U.S. Supreme Court case that upheld restrictions on a lawyer’s speech can be found in \textit{Ohralik v. Ohio State Bar Ass’n}.\textsuperscript{143} In \textit{Ohralik}, the Court held that ethical rules which prohibit lawyers from in-person solicitation of employment for financial gain did not run afoul of the free speech protections of the First Amendment.\textsuperscript{144} In deciding \textit{Ohralik}, the Court concluded that Ohio’s interests in protecting the public from the potential evils of in-person solicitation (which included “overreaching, overcharging, underrepresentation, and misrepresentation”), as well as the state’s “special responsibility for maintaining standards among members of the licensed professions[,]”\textsuperscript{145} outweighed a lawyer’s First Amendment rights related to in-person solicitation.\textsuperscript{146} Additionally, the Court supported its decision by recognizing the state’s “great” interest in regulating lawyers as necessary for the administration of justice.\textsuperscript{147}

Finally, Justice Stewart’s concurrence in \textit{In re Sawyer} advances the proposition that limitation of a lawyer’s speech may be necessary for the accomplishment of justice, and that ethical rules of the legal profession may validly limit what “might [otherwise] be constitutionally protected speech.”\textsuperscript{148}

At first glance, the facts of \textit{In re Sawyer} seem to be similar to those of \textit{Gardner}.	extsuperscript{150} Both cases involve lawyers who were accused of violating ethical rules after allegedly making comments that impugned actions of judges.\textsuperscript{151} But,

\textsuperscript{138} \textit{Id.} at 363.
\textsuperscript{139} \textit{Id.} at 358.
\textsuperscript{140} \textit{Id.} at 361.
\textsuperscript{141} \textit{Id.}.
\textsuperscript{142} \textit{Id.} at 358.
\textsuperscript{144} \textit{Id.} at 467.
\textsuperscript{145} \textit{Id.} at 461.
\textsuperscript{146} \textit{Id.} at 460 (citing \textit{Williamson} v. \textit{Lee Optical Co.}, 348 U.S. 483, 486 (1955); \textit{Semler} v. \textit{Oregon State Bd. of Dental Examiners}, 294 U.S. 608, 612 (1935)).
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.} (citing \textit{Goldfarb} v. \textit{Virginia State Bar}, 421 U.S. 773, 792 (1975)).
\textsuperscript{149} \textit{See In re Sawyer}, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring).
\textsuperscript{151} \textit{See id.} at 426; \textit{see also Sawyer}, 360 U.S. at 623.
while the lawyer’s statements in Sawyer were indeed critical, they were critical of the law, and arguably of the government, but not of the judge who heard the case. In its analysis of the facts, Justice Brennan’s opinion “start[ed] with the proposition that lawyers are free to criticize the state of the law.” The opinion drew a distinction between criticism of the law and attacks on “the integrity or the competence of the judges.” Justice Brennan went on to assert that, even if the lawyer had said the trial judge was “wrong on his law,” this is permissible, as “appellate courts and law reviews say that of judges daily . . . .” However, although not expressly stated, Justice Brennan did seem to suggest that there is a line which a lawyer’s criticism may not cross by placing a statement such as “[the judge was] wrong on his law” in a separate category from statements that label a judge as “corrupt or venal or stupid or incompetent.” The Court in Sawyer held there was no basis for disciplining the lawyer in that case, who had criticized the law, because her statements did not impugn the trial judge.

Although the Supreme Court has not definitively and specifically addressed “the restraint on free speech inherent in disciplining a lawyer for comments criticizing a judge[,]” taken together, Sheppard, Ohralik, and In re Sawyer provide some general guidelines as to the extent that a lawyer’s speech may be restricted. First, a lawyer’s free speech rights must succumb to a defendant’s right to a fair trial. Second, the state’s interest in protection of the public and the state’s responsibility for licensing lawyers may outweigh a lawyer’s First Amendment rights. Finally, a lawyer is free to “criticize the state of the law.”

In Gardner, the Ohio Supreme Court, though not in an express manner, followed these guidelines. The court began its First Amendment analysis by stating that it is “unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed.” This assertion is supported by the proposition in Sheppard that a judge may control both the courtroom and the premises of the

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152 See Sawyer, 360 U.S. at 629-30 (complaining attorney stated that “[t]here’s no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the government can’t make a case.” Additionally, the lawyer said that in a Smith Act case “[the government] just makes up the rules as they go along.”).
153 Id. at 631.
154 Id. at 632.
155 Id. at 635.
156 Id.
157 Id. at 636.
158 In re Green, 11 P.3d 1078, 1083 (Colo. 2000).
159 See Sheppard, 384 U.S. at 362-63.
161 Sawyer, 360 U.S. at 631.
While the reason for curtailing the lawyer’s speech in Sheppard was different from the reason the lawyer’s speech in Gardner was punished, the ultimate goal of the restrictions in both cases was the same: to prevent the “obstruct[ion] [of] or prejudice the administration of justice.”

The second major proposition set forth in the Ohio Supreme Court’s First Amendment analysis in Gardner was that “lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be.”

This concept is analogous to the observation in Ohralik that the state’s “special responsibility for maintaining standards among members of the licensed professions[,]” in conjunction with the state’s interest in protecting the public, justified curtailment of a lawyer’s speech. Again, while the cases involved different facts, both decisions shared a common goal: to prevent the “obstruct[ion] [of] or prejudice the administration of justice.”

The final guideline given by the Supreme Court relevant to the Gardner decision is that a lawyer is free to “criticize the state of the law.” The decision of the Ohio Supreme Court conforms to this principle. Gardner was not punished because his statements criticized the law or even the Eighth District’s application of the law, but rather because he made accusations that the three-judge panel was corrupt and biased. Thus, Gardner can easily be distinguished from In re Sawyer in that Gardner involved a lawyer who personally attacked judges, whereas In re Sawyer involved a lawyer’s attack on the law applied by a judge.

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163 See Sheppard, 384 U.S. at 358.
164 See id. at 363 (holding that restrictions on lawyers and other staff of the court were warranted in order to guarantee the fairness of a trial).
165 See Gardner, 793 N.E.2d at 433 (suspending lawyer for making “[un]founded attacks against the integrity of the judiciary”) (citing Disciplinary Counsel v. West, 706 N.E.2d 760, 761 (1999); Columbus Bar Ass’n v. Hartwell, 520 N.E.2d 226, 227 (1988)).
166 See id. at 428 (citing Gentile v. Nevada State Bar, 501 U.S. 1030, 1075 (1991)); see also Sheppard, 384 U.S. at 363 (concluding that “[n]either prosecutors, [nor] counsel for defense . . . should be permitted to frustrate [the court’s] function”).
167 Gardner, 793 N.E.2d at 428 (quoting Gentile, 501 U.S. at 1071)).
169 Gardner, 793 N.E.2d at 428 (citing Gentile, 501 U.S. at 1075). See also Ohralik, 436 U.S. at 460 (“The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice . . . .”) (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975)).
171 See Gardner, 793 N.E.2d at 429 (holding that the First Amendment does not protect a lawyer who opines that a judge is corrupt).
172 See id. at 427 (reprinting portions of Gardner’s motion which stated that the panel did not give “a damn about how wrong, disingenuous, and biased its opinion is.”) Gardner’s memo also questioned how the panel “justifi[ed] its own corruption of the law and truth.” Id.
173 See supra note 171.
174 Sawyer, 360 U.S. at 629 (quoting lawyer as saying “[t]here’s no such thing as a fair trial in a Smith Act case”).
Thus, the *Gardner* decision was constitutionally sound because its result is indicative of common threads running through similar cases: proper and fair administration of justice,\(^{175}\) and the fact that the penalty imposed on the lawyer came as a result of his accusations of bias and corruption,\(^{176}\) not his criticism of the state of the law.\(^ {177}\)

Although not mentioned by the Ohio Supreme Court in its First Amendment analysis,\(^ {178}\) it is also interesting to note that even if the *Gardner* decision had not in any way allowed for a curtailment of Gardner’s speech, the accusations made by Gardner may have been made with the actual malice required by *New York Times Co. v. Sullivan* in defamation cases involving public figures.\(^ {179}\) In order to be made with actual malice, a statement must be made “with knowledge that it was false or with reckless disregard of whether it was false or not.”\(^ {180}\) Although there is no clear indication in *Gardner* that the lawyer knew his accusations were false, the facts reveal that the accusations may have been made with a reckless disregard for their falsity.\(^ {181}\) The lawyer in *Gardner* failed to make any inquiry into whether the Eighth District panel was, in fact, corrupt or biased.\(^ {182}\) Additionally, Gardner’s law partner advised him not to make the accusations, but Gardner disregarded this warning.\(^ {183}\) According to the decision, these facts “demonstrate[] a reckless disregard for the truth.”\(^ {184}\) Additionally, the dissent notes that “the disturbing thing about this case . . . is that the comments here were not made off-the-cuff in a moment of anger. They were written down, edited, and presumably checked for spelling.”\(^ {185}\) These facts seem to indicate that Gardner had the time to reconsider his accusations (or even make an inquiry into their validity), but he obviously failed to do so.\(^ {186}\)

In summary, the *Gardner* decision was proper because it was consistent with U.S. Supreme Court decisions on related issues\(^ {187}\) and Gardner’s accusations may have demonstrated actual malice, which is beyond the protection

\(^{175}\) *See supra* notes 165, 168 and accompanying text.

\(^{176}\) *See supra* notes 165, 172 and accompanying text.

\(^{177}\) *See Gardner*, 793 N.E.2d at 425.


\(^{180}\) *Sullivan*, 376 U.S. at 279-80.

\(^{181}\) *See Gardner*, 793 N.E.2d at 432 (pointing out that Gardner made no inquiry into the court’s integrity before making his accusations and ignored his partner’s cautions against making the objectionable statements).

\(^{182}\) *Id*.

\(^{183}\) *Id*.

\(^{184}\) *Id*.

\(^{185}\) *Id* at 434.

\(^{186}\) *Id*.

\(^{187}\) *See supra* notes 164, 166 and accompanying text.
afforded by the First Amendment when a public figure (in this case a judge) is involved.  

B. Gardner’s Statements Were Not Opinions of the Sort Protected by the Free Speech Clause of the Ohio Constitution

Although the U.S. Constitution’s First Amendment and the Ohio Constitution’s free speech clause serve similar purposes (the protection of certain types of speech) and are couched in similar terms, the free speech clause of the Ohio Constitution has been held to offer broader protection of speech than that of the First Amendment. The free speech clause has been held to protect speech which is categorized as opinion, although the First Amendment offers no such protection.

At the outset of its free speech clause analysis, the Gardner court recognized that because opinions were protected under Ohio law, a statement that may be prohibited by DR 8-102(B) may, at the same time, be protected by the free speech clause. Thus, as the court noted, “[t]he tension between [the free speech clause] and DR 8-102(B) lies at the heart of this case.” However, the court was not forced to directly address this “tension” because it determined that Gardner’s statements could not be classified as the type of opinion protected by the free speech clause.

188 See supra notes 27, 171 and accompanying text.
189 See supra note 53 and accompanying text.
190 See supra note 171 and accompanying text.
191 See supra note 171 and accompanying text.
192 See supra note 171 and accompanying text.
193 Id.
194 See Vail v. The Plain Dealer Publ’g Co., 649 N.E.2d 182, 185 (Ohio 1995) (“The Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press.”).
195 Id.
196 See Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990) (declining to extend First Amendment protection to speech characterized as an opinion because the necessary “breathing space” for free expression already offered by the First Amendment was adequate and that creating “an artificial dichotomy between ‘opinion’ and fact” was not necessary).
197 See MODEL CODE OF PROF’L RESPONSIBILITY DR 8-102(B) (1981) (prohibiting lawyers from “knowingly mak[ing] false accusations against a judge or other adjudicatory officer”).
199 Id.
200 Id. at 430.
In arriving at its determination that Gardner’s statements were not protected by the free speech clause, the court applied the totality of the circumstances test. The totality of the circumstances test calls for the analysis of four factors in order to determine whether a statement is an opinion: (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; (4) and the broader context in which the statement appeared.

In considering the specific language used, the court’s “preliminary concern” should be on “the common meaning of the allegedly defamatory statement.” The main statements at issue in Gardner were the accusations of bias and corruption. The court concluded that because such accusations involved charges of activity that were criminal or unethical, the statements “had [a] well-defined meaning.”

In determining whether a statement is verifiable, the test that must be answered in the negative in order to show that a statement is one of opinion is “where the ‘statement lacks a plausible method of verification, a reasonable [listener] will not believe that the statement has specific factual content.’” In Scott v. News-Herald, the Ohio Supreme Court stated that allegations of perjury were statements that could be verified. In Scott, the court arrived at the conclusion of verifiability because it could determine whether perjury occurred by examining the transcripts and witnesses present at the hearing where the perjury was alleged to have occurred. Similarly, the accusations of bias and corruption at issue in Gardner could be proved or disproved by examining the court record and judges’ conduct at the time the corruption and bias allegedly occurred. Thus, the court concluded that Gardner’s statements were verifiable (and thus leaned toward being factual).

The court’s analysis of the third and fourth prongs of the test seemed to mesh the concepts of “general context” and “broader context” and examined Gardner’s

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201 Id. (citing McKimm v. Ohio Elections Comm’n, 729 N.E.2d 364, 364 (Ohio 2000)). The totality of the circumstances test used to determine whether speech can be categorized as an opinion was first applied in Ohio in Scott v. News-Herald, 496 N.E.2d 699, 706 (1986). The validity of the test was reaffirmed in Vail v. The Plain Dealer Pub’g Co., 649 N.E.2d 182, 185 (1995).
202 Vail, 649 N.E.2d at 185 (citing Scott, 496 N.E.2d at 706). Accord Gardner, 793 N.E.2d at 430 (phrasing the totality of the circumstances test in more abbreviated language than that used in Vail: “[t]he test . . . is an objective one based on . . . the specificity, verifiability, general context, and social context of the words used” (citing McKimm, 729 N.E.2d at 364).
203 Scott, 496 N.E.2d at 706.
204 Gardner, 793 N.E.2d at 430.
205 Id.
206 Scott, 496 N.E.2d at 707 (citing Ollman v. Evans, 750 F.2d 970, 979 (1984)).
207 Id.
208 Id.
209 Id.
210 See Gardner, 793 N.E.2d at 430 (stating that criminal allegations are “capable of being proved or disproved”).
211 Id.
statements generally in the context of a motion submitted to a court. The Gardner court reasoned that statements made in documents submitted to a court would probably not be considered expressions of opinion by an “average reader.” An example of a context where an “average reader” might consider statements to be opinions is the sports section of a newspaper. The Scott court described the sports page as “a traditional haven for cajoling, invective, and hyperbole[.]” and doubted that a reader would assign the same weight to statements made on a sports page to statements made “under the byline ‘Law Correspondent’ on page one of the newspaper.” The statements made by the lawyer in Gardner are more similar to those that may be found under the byline of “Law Correspondent” and, as the Scott court insinuated, are less likely to be considered an opinion than those found on a sports page. Thus, the court correctly concluded that Gardner’s statements could “reasonably [be] understood to be factual assertions of the appellate court’s corruption and prosecutorial bias.”

Since Gardner’s statements, when subjected to the totality of the circumstances test, are indicative of factual assertions rather than opinions, the Ohio Supreme Court properly concluded that the accusations were not “‘rhetorical hyperbole’ or ‘imaginative expression’ for which he might escape sanction.”

C. Gardner Violated DR 8-102(B) When He Submitted a Motion Containing Accusations of Biasness and Corruption to the Ohio Court of Appeals for the Eighth District

Since the lower court’s record revealed no indications that Gardner’s accusations of bias and corruption were true, the major issue the Ohio Supreme Court had to resolve in determining whether Gardner violated DR 8-102(B) was whether the accusations were made knowingly by Gardner. Other courts that

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212 See id.
213 Id.
214 See Scott, 496 N.E.2d at 708 (protecting article accusing public school superintendent of perjury under the Ohio Constitution).
215 Id.
216 See Gardner, 793 N.E.2d at 430 (“[A]ttorneys who practice [in a courtroom] ‘possess, and are perceived by the public as possessing, special knowledge of the workings of the judicial branch of government.’”) (quoting State ex rel. Oklahoma Bar Ass’n v. Porter, 766 P.2d 958, 969 (Okla. 1988)).
217 Id.
218 Id. (citing In re Complaint Against Judge Harper, 673 N.E.2d 1253, 1267 (1996); Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990)).
219 The MODEL CODE OF PROF’L RESPONSIBILITY DR 8-102(B) (1981) provides “[a] lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.”
220 See id. (requiring false accusations to be made knowingly).
addressed whether a lawyer’s accusations were made knowingly have applied two different standards in determining whether the requisite knowledge was present to support such a violation.\textsuperscript{221} A majority of courts have applied an objective standard to determine whether a lawyer’s accusations were made knowingly.\textsuperscript{222} The majority approach frames the question of knowledge in terms of whether a reasonable lawyer would believe a reasonable factual basis existed for making the statements.\textsuperscript{223} The minority approach requires actual malice on the part of the lawyer making the accusations.\textsuperscript{224} Thus, under the minority approach, to sustain a violation of DR 8-102(B), the disciplinary counsel must show that the lawyer making the accusations either (1) knew the accusations were false, or (2) exhibited a reckless disregard as to their truth.\textsuperscript{225}

The Gardner court chose to apply the majority approach. The court criticized the actual malice approach because it “would immunize all accusations, however reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts as to their truth.”\textsuperscript{226}

The court went on to hold that a reasonable lawyer would not have believed a reasonable factual basis for accusations of bias and corruption existed in Gardner’s scenario.\textsuperscript{227} In reaching this conclusion, the court noted that Gardner made no inquiry into his accusations before submitting them in the motion and that he disregarded his partner’s advice not to make the statements.\textsuperscript{228} Because Gardner failed to take these steps, and because the ethical rules require lawyers to “be certain” that accusations have merit, the court correctly found that Gardner violated DR 8-102(B).\textsuperscript{229}

\textbf{V. CONCLUSION}

A lawyer’s unfounded and unfair criticism of a judge or judges presiding over a pending case threatens both the fair administration of justice and the public’s confidence in our legal system.\textsuperscript{230} When coupled with the broad speech protection offered by the Ohio Constitution’s free speech clause,\textsuperscript{231} the objective,
“reasonable attorney,” approach employed by the Ohio Supreme Court in analyzing whether a lawyer’s speech violates ethical standards, protects the interests in the fair administration of justice and the public’s confidence in the legal system. Additionally, the lawyer is given enough breathing room to continue to zealously advocate for her client. The Ohio Supreme Court’s decision in *Gardner* indicates that there are substantial public interests that outweigh a lawyer’s interests in making unwarranted criticisms of judges.

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232 *Gardner*, 793 N.E.2d at 431.
I. INTRODUCTION

You just cast your vote to choose your Congressional representative. Your vote will become one of many that will decide who is chosen as the next representative, or will it? Did your vote really count? Was your vote diluted because of political gerrymandering in your Congressional district?

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Congressional electoral districts\(^2\) are drawn by the State legislative representatives.\(^3\) These electoral districts are apportioned based upon the population of the entire United States.\(^4\) One representative is chosen from each Congressional district.\(^5\) These Congressional districts may artificially favor one political party,\(^6\) generally the representative’s party that dominated the creation of electoral district lines. This “favoring” is done by creating districts that are composed of enough persons belonging to that representatives party to give the party a safe advantage, while simultaneously creating a few districts where the opposing party has an overwhelming majority.\(^7\) For example, let’s say if there were a majority of Republican representatives drawing the districting lines, then the Republican representatives would draw the electoral lines in such a fashion to create a safe Republican advantage in most districts, while packing the Democratic voters into a few districts where they would have an overwhelming majority.\(^8\) This is achieved by shifting lines here and there until the desired results are achieved.

Shifting the electoral lines in such a fashion dilutes the Democratic votes. These crafty line drawing techniques are called political gerrymandering. Political gerrymandering is the result of intentional governmental discrimination based upon a voter’s political affiliation.

The outraged citizen may think political gerrymandering is not fair, it is not right, it is down right unconstitutional. Your remedy for this invasion upon a most sacred right, your right to vote,\(^9\) would be to petition the courts to have the State legislators draw the lines so that your vote fully counts. But think again; the Supreme Court recently declined to determine a political gerrymandering

\(^2\) 4 WEST’S ENCYCLOPEDIA AM. L. 116 (1998) (indicating that a congressional district is a geographical subdivision of the state that elects a representative to Congress).

\(^3\) U.S. CONST. art. I, § 4, cl. 1 provides in pertinent part: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . .”

\(^4\) U.S. CONST. art. I, § 2, cl. 3 provides in pertinent part: “Representatives . . . shall be apportioned among the several States . . . according to their respective numbers.”

\(^5\) 1 WEST’S ENCYCLOPEDIA AM. L. 223 (1998) (stating that districting is the establishment of precise geographical boundaries of each constituency).

\(^6\) Vieth, 124 S. Ct. at 1774 (noting that there is a long history of political gerrymandering in American legislation).

\(^7\) Daniel H. Lowenstein & Jonathan Steinberg, The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?, 33 UCLA L. REV. 1, 7-8 (1985) (noting that the basic technique of maximizing party gains given a fixed percentage of the total vote consists of creating as many districts as possible of the two types: one, districts where the party has an advantage that will likely create a win; and two, districts in which the opposing party has an overwhelming majority).

\(^8\) Id.

\(^9\) Williams v. Rhodes, 393 U.S. 23, 31 (1968) (“[W]e have said with to the right to vote: ‘No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights . . . are illusory if the right to vote is undermined.’”) (citing Wesberry v. Sanders, 376 U.S. 1, 17 (1963)).
claim in *Vieth v. Jubelirer*.\(^{10}\) In *Vieth*, the Court concluded that there was no judicial standard to determine the alleged injury.\(^{11}\) Thus, the Court held that the claim, which was brought under the Equal Protection Clause, was nonjusticiable, thereby making the courts powerless to remedy this political gerrymandering claim.\(^{12}\)

This case note argues that a political gerrymandering claim would be justiciable, if the claim was brought under the First Amendment. This argument is set forth in five sections. The first section is a brief introduction to the subject matter. The second section sets forth the background facts and the standard of review when determining a plaintiff’s claim for governmental violation of First Amendment guarantees. The third section is the statement of facts and holding of *Vieth v. Jubelirer*. The fourth section is the analysis of the *Vieth* holding. The final section concludes that a political gerrymandering claim is justiciable if it is brought under the First Amendment because the First Amendment sets forth a judicial standard of review, strict scrutiny. Strict scrutiny is the standard to use because political gerrymandering is, in essence, governmental discrimination based upon political affiliation.

II. BACKGROUND LAW

A. *What is Political Gerrymandering?*

Political gerrymandering is the act of districting or creating electoral lines for the sake of partisan advantage.\(^{13}\) The word “gerrymandering” is derivative from an amalgam of the names of Massachusetts Governor Elbridge Gerry and a salamander, an amphibian.\(^{14}\) The outline of an election district that Governor Elbridge Gerry created was thought to have resembled a salamander; hence the name “gerrymandering.”\(^{15}\)

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\(^{10}\) *Vieth*, 124 S. Ct. at 1792.
\(^{11}\) *Id.* at 1778.
\(^{12}\) *Id.* at 1792.
\(^{13}\) *Id.* at 1775. See also *BLACK’S LAW DICTIONARY* 696 (7th ed. 1999) (“The practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.”).
\(^{14}\) *Vieth*, 124 S. Ct. at 1775 (citing *WEBSTER’S NEW INTERNATIONAL DICTIONARY* 1051 (2d ed. 1945)).
\(^{15}\) *Id.*
B. What is Nonjusticiability?

Actions that are not properly determinable by the courts are deemed nonjusticiable. In *Vieth v. Jubelirer*, the United States Supreme Court defined “nonjusticiable” as when “the judicial department has no business entertaining the claim of unlawfulness—because the question . . . involves no judicially enforceable rights.” In this case, the plurality’s opinion turned on the inability of the courts to pronounce a judicially discernable standard upon which to determine the alleged injury; without this standard, the Court held that the matter was nonjusticiable.

C. The Appropriate Standard of Review When Determining a Plaintiff’s Claim of Governmental Violation of First Amendment Guarantees

The Supreme Court has consistently held that significant impairments to First Amendment rights must survive strict scrutiny in order to be constitutional. The Court has applied the same standard of review, strict scrutiny, when reviewing regulations that impose burdens on political parties’ rights that the First Amendment protects, such as the freedom of association. The “First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content,” opined the Court in *Police Dep’t of Chicago v. Mosley*. In *Buckley v. Valeo*, the Court determined that First Amendment rights may be curtailed only by an interest of vital importance, and the burden of proving the existence of vitality rests upon the government. Similarly, the Court in *EU v. San Francisco County Democratic Central Committee* decided if the challenged law burdens First

16 BLACK’S LAW DICTIONARY 1078 (7th ed. 1999) (defining “nonjusticiable” as “[n]ot proper for judicial determination”).
17 *Vieth*, 124 S. Ct. at 1776.
18 Id. at 1777.
19 U.S. CONST. amend. I.
20 See EU v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222 (1989) (“If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest.”); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (“It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny.”); *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) (deciding that statutes that affect First Amendment interests must be narrowly tailored to their legitimate objectives).
23 424 U.S. 1, 1 (1976).
24 Id. at 25.
Amendment\textsuperscript{25} and Fourteenth Amendment\textsuperscript{26} rights, then it can survive constitutional scrutiny only if the State shows that the law advances a compelling State interest.\textsuperscript{27} Thus, a claim that is brought under the protection of the First Amendment in opposition to governmental action which threatens First Amendment guarantees is granted the highest level of review, strict scrutiny, requiring the State to advance a compelling State interest in order for the State’s action to survive constitutional scrutiny.\textsuperscript{28}

III. STATEMENT OF FACTS AND HOLDING OF \textit{VIETH v. JUBELIRER}

A. The Facts

Based upon the 2000 census, Pennsylvania’s entitlement to Representatives in Congress decreased by two, from twenty-one to nineteen.\textsuperscript{29} Accordingly, Pennsylvania’s General Assembly took up the task of creating a new districting map.\textsuperscript{30} After “[p]rominent national figures in the Republican Party pressured the General Assembly to adopt a partisan redistricting plan as a punitive measure against Democrats for having enacted pro-Democratic redistricting plans elsewhere,” the Republican members of the State House and Senate teamed up and created a pro-Republican plan.\textsuperscript{31} The General Assembly passed this plan on January 3, 2002; thereafter, the Governor signed it into law.\textsuperscript{32}

In response, registered Democratic voters in Pennsylvania brought suit in the United States District Court for the Middle District of Pennsylvania, seeking to enjoin the implementation of the Act under 42 U.S.C. § 1983.\textsuperscript{33} The complaint

\textsuperscript{25} U.S. CONST. amend. I.
\textsuperscript{26} U.S. CONST. amend. XIV.
\textsuperscript{28} See EU, 489 U.S. at 222 (“If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest.”); Elrod v. Burns, 427 U.S. 347, 362 (1976) (“It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny.”); Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 101 (1972) (deciding that statutes that affect First Amendment interests must be narrowly tailored to their legitimate objectives)).
\textsuperscript{29} Vieth v. Jubelirer, 124 S. Ct. 1769, 1773 (2004).
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id. 42 U.S.C. § 1983 (2000) provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party
alleged that the legislation created “malapportioned districts, in violation of the one-person, one-vote requirement of Article I, § 2 of the United States Constitution.” The complaint also alleged that the districting constituted a political gerrymander, in violation of Article I and the Equal Protection Clause, noting that the districts were “‘meandering and irregular’ and that they ‘ignor[ed] all traditional redistricting criteria . . . solely for the sake of partisan advantage.’”

A three-judge panel, hereinafter the District Court, was convened pursuant to 28 U.S.C. § 2884. The District Court granted, in part, the Defendant’s motion to dismiss in regard to the gerrymandering claim, and granted the motion to dismiss all claims against the Commonwealth, but on the apportionment claim, the court ruled in favor of the Plaintiffs. The District Court then retained jurisdiction over the case pending the court’s review and subsequent approval of the court ordered remedial redistricting plan. The Governor signed the remedial plan into law on April 18, 2002. Plaintiffs moved again to impose remedial districts, arguing that the District Court should not consider the plan a proper remedial scheme because it was malapportioned and constituted an unconstitutional political gerrymander, like its predecessor.

The District Court denied this motion, concluding that the new districts were not malapportioned. The District Court rejected the political gerrymandering claim. The Plaintiffs appealed the dismissal of the political gerrymandering claim, and thereafter the United States Supreme Court granted certiorari.

injured in an action at law, suit in equity, or other proper proceeding for redress

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34 Vieth, 124 S. Ct. at 1773.
35 U.S. CONST. art. I, § 2, cl. 3 provides in part: [“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .”].
36 U.S. CONST. amend. XIV, § 1.
37 Vieth, 124 S. Ct. at 1773 (citing Juris. Statement 136a, ¶ 22, 135a, ¶ 20).
38 28 U.S.C. § 2284(a) (2000) provides in pertinent part: “A district court of three judges shall be convened when . . . an action is filed challenging the constitutionality of the apportionment congressional districts of any statewide legislative body.”
39 The original complaint in Vieth v. Jubelirer named the State of Pennsylvania as a Defendant to the action. Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 532 (M.D. Pa. 2002). In that action, the State of Pennsylvania moved for dismissal pursuant to the protection of the Eleventh Amendment. Id. at 539. The court below granted Pennsylvania’s motion and dismissed the action for lack of subject matter jurisdiction. Id.
40 Vieth, 124 S. Ct. at 1774.
41 Id.
42 Id.
43 Id.
44 Id.
45 Id.
46 Id.
47 Vieth, 124 S. Ct. at 1774.
B. The Majority Opinion

The Chief Justice, Justice O’Connor, and Justice Thomas joined the majority opinion by Justice Scalia.\footnote{Id. at 1773.} Justice Kennedy concurred in judgment while Justice Stevens dissented, Justice Souter dissented, in which Justice Ginsberg joined, and Justice Breyer dissented.\footnote{Id. at 1772.}

Justice Scalia began the majority opinion with a brief summary of the long history of political gerrymanders in American legislation, noting that in the Eighteenth century several counties conspired to minimize the political power of Philadelphia by refusing to allow it to merge or expand into surrounding jurisdictions and by denying it additional representatives.\footnote{Id. at 1774.} The Court noted that the Framers provided a remedy for such practice in the Constitution, which granted states the power to draw districts; it permitted Congress to “make or alter”\footnote{U.S. CONST. art. I, § 4, cl. 1 provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing [sic] Senators.”} those districts at their discretion.\footnote{Vieth, 124 S. Ct. at 1775 (quoting U.S. CONST. art. I, § 4).} Pursuant to these powers, in order to regulate elections and to restrain the practice of political gerrymandering, Congress created the Apportionment Act of 1842.\footnote{Id. (citing Apportionment Act of 1842, ch. 47, 5 St at. 49 (1842) (determining that the House of Representatives shall be composed of members elected “agreeably” to a ratio of one Representative for every 70,680 in each state and that the number to which each “[s]tate shall be entitled under this apportionment shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which the State may be entitled”).}

Following the history of political gerrymandering, the Court turned its opinion to discussion of nonjusticiability. The Court noted that in \textit{Davis v. Bandemer},\footnote{478 U.S. 109, 109 (1986).} it had held that the Equal Protection Clause\footnote{U.S. CONST. amend. XIV, § 1.} granted judges the power and duty to control political gerrymandering.\footnote{Vieth, 124 S. Ct. at 1776.} However, the Court observed that sometimes “the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.”\footnote{Id.} These types of claims are “nonjusticiable” or are “political questions.”\footnote{Id.}

In \textit{Davis v. Bandemer}, the Court noted that it was not persuaded that there were “no judicially discernible and manageable standards by which political
gerrymander cases are to be decided[,]” however, in that case, the Court could not discern what the judicially discernable standard was to be.59 After the eighteen years of judicial effort to discern the appropriate standard that followed the Davis v. Bandemer opinion, the lower courts still had no judicially discernible and manageable standards for adjudicating political gerrymandering claims.60 Thus, the Court concluded that political gerrymandering claims were nonjusticiable and that Davis v. Bandemer had been wrongly decided.61

In the Davis v. Bandemer opinion, the Court concluded that a political gerrymandering claim could succeed only where plaintiffs showed “both intentional discrimination against an identifiable political group and actual discriminatory effect on that group.”62 The Court noted that the intent prong of this test was more easily shown than the effect prong because when the line drawing was done by the legislature, it was intentional; however, the effect prong was harder to prove.63 In Veith, the Court reasoned that courts were not justified in imposing a judicially enforceable constitutional obligation that the legislators must “not to apply too much partisanship in districting.”64 In further rationale of this decision, the Court noted that one’s political affiliation is not “immutable;” it may shift, and not all voters follow the party line.65 Furthermore, the Court reasoned that a party which offers an utterly incompetent candidate will lose even if it has a registration stronghold.66 Based on the aforementioned rationales, the Court concluded that it was “impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy.”67 Thus, the claim was nonjusticiable.68

The Court then proceeded to rebut the concurring and dissenting opinions. The Court first rejected Justice Stevens’ concurring opinion.69 The Court rebutted Justice Stevens’ reliance on the First Amendment to elevate the standard of review to strict scrutiny in this equal protection claim.70 The Court opined that to “say the suppression of political speech (a claimed First Amendment violation) triggers strict scrutiny is not to say that failure to give political groups equal representation (a claimed equal protection violation) triggers strict scrutiny.”71 The Court then noted that only an equal protection claim was before

59 Id. at 1777 (citing Davis v. Bandemer, 478 U.S. 109, 127 (1986)).
60 Id. at 1778.
61 Id.
62 Vieth, 124 S. Ct. at 1778 (citing Davis, 478 U.S. at 127).
63 Id. at 1778-79.
64 Id. at 1781.
65 Id. at 1782.
66 Id.
67 Id.
68 Vieth, 124 S. Ct. at 1792.
69 Id. at 1786.
70 Id.
71 Id.
it in this case. The Court opined that if a First Amendment claim was sustained, this would render unlawful all consideration of political affiliation in districting, just as the First Amendment rendered unlawful all consideration of political affiliation in hiring for non-policy-level government jobs.

Next, the Court refuted Justice Souter’s dissenting opinion. Justice Souter’s dissent proposed a new standard to determine political gerrymandering that relied on a five-part test. The Court noted that his test is “doomed” because no test is successful unless the tester knows what he is “testing for.” The Court supported this rationale by noting that incumbency protection has been an acceptable districting principle, and that “some intent to gain political advantage is inescapable whenever political bodies devise a district plan and that some effect results from the intent.” Thus, the issue becomes how much is too much? Justice Souter attempted to solve “how much is too much” by qualifying “too much” as when “partisan competition has reached an extremity of unfairness.” The Court stated that this “flabby goal” deprived the test of all determinacy and that “adding the modifier” did not solve the problem.

Similarly, the Court refuted Justice Breyer’s dissent by noting that it provided “no real guidance.” Justice Breyer’s dissent set forth several circumstances that laid out indicia of abuse. The Court determined that each “scenario suffers from at least one of the problems we have previously identified, most notably the difficulties of assessing partisan strength statewide and of ascertaining whether an entire statewide plan is motivated by political or neutral justifications.” Thus, the Court concluded that it did not know “precisely what Justice Breyer is testing for, or precisely what fails the test.”

The Court also refuted Justice Kennedy’s concurring opinion. The Court reasoned that Justice Kennedy acknowledged that there is “an absence of rules to limit and confine judicial intervention,” and that the case should be dismissed; however, he adduced that the Court should not determine all claims to be nonjusticiable because a standard “may” be discovered. The Court stated that

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72 Id.
73 Id. (citing Elrod v. Burns, 427 U.S. 347, 349, 373 (1976) (holding that plaintiffs, noncivil service employees, had stated a valid claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments by alleging they were fired or threatened with dismissal for the sole reason that they were not affiliated with or sponsored by the political party of the current sheriff)).
74 Vieth, 124 S. Ct. at 1787.
75 Id.
76 Id. at 1788.
77 Id.
78 Id. at 1789.
79 Id.
80 Vieth, 124 S. Ct. at 1789.
81 Id.
82 Id.
83 Id.
84 Id. at 1790.
this argument fails because it is “logically impossible” to affirm the holding below without finding that the unconstitutional districting standard applied or that some other standard that should have been applied was not met or to find that the claim was nonjusticiable. The Court noted that it must either enunciate the standard that courts should use or else affirm the claim because it is beyond the Court’s competence to decide.

The Court concluded that neither Article I, § 2, nor the Equal Protection Clause, nor Article I, § 4, provided a judicially enforceable limit on the political considerations that the States and Congress must take when they district. The Court then overturned Davis v. Bandemer because “[e]ighteen years of essentially pointless litigation have persuaded us that Bandemer is incapable of principled application.” The Court declined to adjudicate the political gerrymandering claim set forth in Vieth.

C. Justice Kennedy’s Concurring Opinion

Justice Kennedy’s concurrence began by noting that a decision that ordered the correction of all election district lines drawn for partisan reasons would “commit federal and state courts to unprecedented intervention in the American political process.” However, Justice Kennedy was quick to note that he “would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the constitution in some redistricting cases.” Justice Kennedy posited that an opinion which determined that a gerrymander violated the law must rest on a conclusion that the classifications were applied in an “invidious manner or in a way unrelated to any legitimate legislative objective.” Justice Kennedy further stated that the Court

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85 Id.
86 Vieth, 124 S. Ct. at 1791.
87 U.S. Const. art. I, § 2, cl. 3 provides in pertinent part: “Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . . .”
88 U.S. Const. amend. XIV, § 2 provides in pertinent part: “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state . . . .”
89 U.S. Const. art. I, § 4, cl. 1 provides in pertinent part: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.”
90 Vieth, 124 S. Ct. at 1792.
91 Id.
92 Id.
93 Id. at 1792-93 (Kennedy, J., concurring).
94 Id. at 1793.
95 Id.
lacked a model of fair and effective representation, which made the analysis of political gerrymandering difficult to pursue.\textsuperscript{96}

Justice Kennedy then noted that while the briefs and appellant’s argument relied on the Equal Protection Clause\textsuperscript{97} as the source of their substantive rights, the complaint in this case also alleged a violation of First Amendment\textsuperscript{98} rights.\textsuperscript{99} Justice Kennedy then opined that the First Amendment\textsuperscript{100} may be a “more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering.”\textsuperscript{101} This is because the First Amendment has an interest of not “burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.”\textsuperscript{102}

Justice Kennedy stated that a First Amendment claim would give the complaint elevated scrutiny by stating that “[u]nder general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest.”\textsuperscript{103} He then quoted from California Democratic Party v. Jones,\textsuperscript{104} stating “‘[r]epresentative democracy in any populous unit of government is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.’”\textsuperscript{105} Drawing from precedent, Justice Kennedy concluded that

First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views . . . that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters representational rights.\textsuperscript{106}

Justice Kennedy criticized the plurality opinion which implied that “under the First Amendment any and all consideration of political interest in an apportionment would be invalid” by stating that this misrepresented the First Amendment analysis.\textsuperscript{107} He stated that the First Amendment\textsuperscript{108} “inquiry is not

\textsuperscript{96}Vieth, 124 S. Ct. at 1793 (Kennedy, J., concurring).
\textsuperscript{97}U.S. CONST. amend. XIV, § 1.
\textsuperscript{98}U.S. CONST. amend. I.
\textsuperscript{99}Vieth, 124 S. Ct. at 1797 (Kennedy, J., concurring) (noting Am. Compl. ¶ 48; Juris. Statement 145a).
\textsuperscript{100}U.S. CONST. amend. I.
\textsuperscript{101}Vieth, 124 S. Ct. at 1797 (Kennedy, J., concurring).
\textsuperscript{102}Id. at 1797 (citing Elrod v. Burns, 427 U.S. 347, 386 (1976)).
\textsuperscript{103}Id. (citing Elrod, 427 U.S. at 362).
\textsuperscript{104}530 U.S. 567, 567 (2000).
\textsuperscript{105}Id.
\textsuperscript{106}Id.
\textsuperscript{107}Id.
whether political classifications were used” but instead “whether political classifications were used to burden a group’s representational rights.” 109 If the Court found that a State “did impose burdens and restrictions on groups or person by reason of their views, [then] there would likely be a First Amendment violation, unless the State shows some compelling interest.” 110

The “First Amendment may offer a sounder and more prudential basis for intervention than does the Equal Protection Clause,” stated Justice Kennedy in reference to cases of allegations of gerrymandering which allegedly have the purpose and effect of imposing burdens on a disfavored party. 111 This is because the equal protection analysis “puts its emphasis on the permissibility of an enactment’s classifications” while the First Amendment analysis focuses on “whether the legislation burdens the representational rights of the complaining party’s voters for reasons of ideology, beliefs, or political association.” 112

Justice Kennedy concluded that “failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper.” 113 Therefore, he joined the judgment of the plurality. 114

D. Justice Stevens’ Dissenting Opinion

Justice Stevens’ dissent began by noting that, although their reasons differ, there were five Justices that are convinced that the plurality’s opinion is wrong. 115 Justice Stevens stated that the “plurality opinion would exempt governing officials from that duty in the context of legislative redistricting and would give license . . . to partisan gerrymanders that are devoid of any rational justification.” 116 Justice Stevens concluded that the plaintiffs had met their burden of proving that political gerrymandering had occurred, and that at least District 6 had violated equal protection principles. 117

Justice Stevens’ dissent noted that there are well-settled principles to determine whether or not political gerrymandering had occurred, such as the district’s shape. Justice Stevens pointed to Justice Powell’s dissent in *Bandemer* 118 that set forth a three-part test to determine if political gerrymandering had occurred. 119 The three parts include examining (1)
configurations of the districts, (2) the observance of political subdivision lines, and (3) the observance of other criteria that have independent relevance to the fairness of redistricting. Justice Stevens noted that the Court has integrated portions of all three parts of Justice Powell’s standard in its recent racial gerrymandering jurisprudence. Based upon this precedent, Justice Stevens concluded that question of justiciability was well settled.

Commenting on the plurality’s opinion, Justice Stevens stated that the Court’s distinction of racial gerrymandering claims was perplexing. He further noted that the First Amendment protects “political belief and association” and that the Court has “squarely rejected” the notion that a purpose to discriminate on the basis of politics is not subject to strict scrutiny. Justice Stevens noted that discriminatory governmental decisions that burden fundamental First Amendment interests are subject to strict scrutiny. He stated that unless party affiliation is an appropriate requirement for the positions, then “government officials may not base a decision to hire, promote, transfer, recall, discharge, or retaliate against an employee, or to terminate a contract, on the individual’s partisan affiliation or speech.” Thus, Justice Stevens concluded, “it follows that political affiliation is not an appropriate standard for excluding voters from a congressional district.”

E. Justice Souter’s Dissenting Opinion

Justice Ginsberg joined Justice Souter’s dissent. Justice Souter began his dissent by noting that for forty years the Court had recognized that “voting districts must produce divisions with equal populations: one person/one vote.” Justice Souter recognized that drawing a district line one way and not another always carried some consequence for political parties; however, he opined that if

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120 Id.
121 Id. at 1802.
122 Id. at 1803.
123 Id.
124 Id. (citing Elrod v. Burns, 427 U.S. 347, 356 (1976)).
125 Vieth, 124 S. Ct. at 1803 (Stevens, J., dissenting) (citing Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 94-95 (1972) (deciding that statutes that affect First Amendment interests must be narrowly tailored to their legitimate objectives)).
127 Id. at 1803 (Stevens, J., dissenting).
128 Id. at 1815 (Souter, J., dissenting).
129 Id. (citing Reynolds v. Sims, 377 U.S. 533, 568 (1964)).
the “unfairness” was “sufficiently demonstrable,” then the guarantees of equal protection condemned the actions as a denial of substantial equality.\textsuperscript{130}

Justice Souter argued that because the Court had created the problem of a lack of judicially identifiable standards used to determine when political line drawing goes too far and constitutes political gerrymandering, it was the Court’s responsibility to make a “fresh start.”\textsuperscript{131} Justice Souter proposed the adoption of a political gerrymandering test that is analogous to the \textit{McDonnell Douglas Corp. v. Green}\textsuperscript{132} summary judgment standard.\textsuperscript{133} This political gerrymandering test, based on the summary judgment standard, would call for the plaintiff to satisfy the elements of a prima facie cause of action, and then the State may rebut the plaintiff’s claim and/or offer an affirmative justification for its districting lines.\textsuperscript{134}

The prima facie case Justice Souter suggested was based upon satisfaction of a five part test.\textsuperscript{135} The first element was for the plaintiff to identify a cohesive political group to which he/she belonged.\textsuperscript{136} The second element required the plaintiff to show that the district of his/her residency paid “little or no heed” to the “traditional districting principles” of contiguity, compactness, respect for political subdivision, and conformity with geographic features like rivers and mountains.\textsuperscript{137} The third element is that the plaintiff must establish a correlation between the district’s deviations from traditional principles and the distribution of the population of his/her political group.\textsuperscript{138} The fourth element was that the plaintiff must present the court with a hypothetical district that included his/her residence in which the proportion of the plaintiff’s group was either lower (in a packing claim) or higher (in a cracking claim) and that also “deviated less from the traditional districting principles than the actual district.”\textsuperscript{139} The fifth element was that the plaintiff would have to show that the defendant acted intentionally to manipulate the scope of the district in order to pack or crack the plaintiff’s political group.\textsuperscript{140}

Justice Souter concluded that he would grant leave for the plaintiff to amend its complaint based on the five elements above and would remand the case for further proceedings consistent with the test.\textsuperscript{141}

\textbf{F. Justice Breyer’s Dissenting Opinion}

\textsuperscript{130} Id.
\textsuperscript{131} Id. at 1816.
\textsuperscript{132} 411 U.S. 792, 792 (1973).
\textsuperscript{133} \textit{Vieth}, 124 S. Ct. at 1817 (Souter, J., dissenting).
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 1818.
\textsuperscript{139} \textit{Vieth}, 124 S. Ct. at 1818-19 (Souter, J., dissenting).
\textsuperscript{140} Id. (citing \textit{Washington v. Davis}, 426 U.S. 229, 240 (1976)).
\textsuperscript{141} Id. at 1822.
Justice Breyer began his dissenting opinion by stating that the use of purely political consideration in drawing district lines is not a “necessary evil” that the Constitution must tolerate.\textsuperscript{142} He noted that when political gerrymandering fails to advance “any plausible democratic objective while simultaneously threatening serious democratic harm” then the courts may identify an equal protection violation and provide a remedy.\textsuperscript{143} Justice Breyer reasoned that the constitution should insist that legislation better reflect different political views held by different groups of voters.\textsuperscript{144} 

Justice Breyer conceded that traditionally based district boundaries were not “politics free” and that district boundaries represent a series of compromises which include an “uneasy truce,” sanctioned by tradition that gives political advantage to one party.\textsuperscript{145} However, he noted that the use of purely political boundary drawing could be a serious and remediable abuse when the unjustified use of political factors entrenched a minority political group in power.\textsuperscript{146} 

Justice Breyer noted that legislation itself has implemented some remedies for the problems of political gerrymandering, but courts may not always rely on the legislation to correct the problems.\textsuperscript{147} Justice Breyer stated that the bottom line is that the “courts should be able to identify the presence of one important gerrymandering evil, the unjustified entrenching in power of a political party that the voters have rejected.”\textsuperscript{148} Justice Breyer concluded that he would let the plaintiff proceed because he noted that there was a strong likelihood that the plaintiff would be able to assert circumstances consistent with those that he set forth.\textsuperscript{149}

IV. Analysis

The nonjusticiable political gerrymandering claim in Vieth was based on the Equal Protection Clause.\textsuperscript{150} Based on the claim before the Court, the outcome of Vieth\textsuperscript{151} was correct. However, just because the equal protection claim failed, it

\begin{itemize}
  \item \textsuperscript{142} Id. (Breyer, J., dissenting).
  \item \textsuperscript{143} Id.
  \item \textsuperscript{144} Id. at 1823.
  \item \textsuperscript{145} Vieth, 124 S. Ct. at 1824.
  \item \textsuperscript{146} Id. at 1825.
  \item \textsuperscript{147} Id. at 1826.
  \item \textsuperscript{148} Id. at 1827.
  \item \textsuperscript{149} Id. at 1829.
  \item \textsuperscript{150} Id. at 1792.
  \item \textsuperscript{151} Vieth, 124 S. Ct. at 1769.
\end{itemize}
does not necessarily follow that a claim under the First Amendment\textsuperscript{152} would similarly fail.\textsuperscript{153} A claim of political gerrymandering brought under the equal protection clause required a showing of discriminatory intent and discriminatory effect.\textsuperscript{154} Under the First Amendment, however, a claim that advances any showing of governmental discrimination based on political affiliation towards political participation in the electoral process, in association with a political party and in the expression of political views, would be subject to the highest level of review, strict scrutiny.\textsuperscript{155} In essence, political gerrymandering is governmental discrimination based on political affiliation. Therefore, strict scrutiny is advanced as the appropriate judicial standard of review.\textsuperscript{156} Because strict scrutiny is advanced as the appropriate judicial standard of review, the First Amendment would provide a viable alternative for a claim of political gerrymandering.

In order for the government to constitutionally prevail against a First Amendment claim subject to the highest level of review, strict scrutiny, it must advance a compelling state interest, which is achieved in the least restrictive manner.\textsuperscript{157} In a political gerrymandering claim brought under the First Amendment,\textsuperscript{158} this would mean that the government would have to advance that

\textsuperscript{152} U.S. CONST. amend. I.
\textsuperscript{153} Vieth, 124 S. Ct. at 1786. “To say that suppression of political speech (a claimed First Amendment violation) triggers strict scrutiny is not to say that failure to give political groups equal representation (a claimed equal protection violation) triggers strict scrutiny.” Id.
\textsuperscript{154} Id. at 1778.
\textsuperscript{155} Id. at 1798 (stating that the Equal Protection Clause “puts its emphasis on the permissibility of an enactment’s classifications,” while “the First Amendment analysis focuses on whether the legislation burdens the representational rights of the complaining party’s voters for reasons of ideology, beliefs, or political association”). \textit{See also} EU v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222 (1989) (“If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest.”); Elrod v. Burns, 427 U.S. 347, 362 (1976) (“It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny.”); Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 101 (1972) (deciding that statutes that affect First Amendment interest must be narrowly tailored to their legitimate objectives).
\textsuperscript{156} See Mosley, 408 U.S. at 101 (deciding that statutes that affect First Amendment interest must be narrowly tailored to their legitimate objectives); Rutan v. Republican Party of Ill., 497 U.S. 62, 100-01 (1990) (deciding that governmental discrimination based upon political affiliation is subject to strict scrutiny); Branti v. Finkel, 445 U.S. 507, 516 (1980) (deciding that discriminatory governmental employment dismissals based on political affiliation are subject to strict scrutiny).
\textsuperscript{157} See Mosley, 408 U.S. at 101 (deciding that statutes that affect First Amendment interests must be narrowly tailored to their legitimate objectives); Rutan, 497 U.S. at 100-01 (deciding that governmental discrimination based upon political affiliation is subject to strict scrutiny); EU, 489 U.S. at 222 (determining that “[i]f the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest”); Branti, 445 U.S. at 516 (deciding that discriminatory governmental employment dismissals based on political affiliation are subject to strict scrutiny); Elrod, 427 U.S. at 362 (“It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny.”).
\textsuperscript{158} U.S. CONST. amend. I.
creating political districts based upon political affiliation advances a compelling state interest, in the least restrictive manner. Because creating political districts to advance a party’s interest would not likely be viewed as a compelling state interest that is accomplished in the least restrictive matter, it is not likely that a political gerrymandering claim brought under the First Amendment would be considered constitutional.

A. Political Gerrymandering Infringes Upon First Amendment Rights

Redistricting plans that discriminate on the basis of political affiliation infringe upon the First Amendment rights of freedom of speech and political association. Justice Kennedy’s concurring opinion correctly stated that political gerrymandering involves the “First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party or their expression of political views.” Justice Kennedy also noted that “First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their [political] views.” Similarly, Justice Stevens’ dissenting opinion noted that “political belief and association constitute the core of those activities protected by the First Amendment . . . .” Even the plurality opinion in Vieth noted that “only an equal protection claim is before us . . . a First Amendment claim, if it were sustained, would render unlawful all consideration of political affiliation in districting, just as it renders unlawful all consideration of political affiliation in hiring for non-policy-level government jobs.” Thus, political gerrymandering infringes upon political association and speech, which are rights protected by the First Amendment.

159 Id.
160 Id.
161 Vieth v. Jubelirer, 124 S. Ct. 1769, 1797 (2004) (Kennedy, J., concurring) (“After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party or their expression of political views.”)
162 Id. at 1779. See also L. Paige Whitaker, Convinced by the Record; Showing an Appearance of Corruption: The Supreme Court Upholds the Groundbreaking McCain-Feingold Campaign Finance Law, 51 FED. L. 26, 27 (2004) (noting that in analyzing First Amendment claims, the courts generally look to see if the challenged action implicates speech or associational freedoms).
163 Vieth, 124 S. Ct. at 1797 (citing California Democratic Party v. Jones, 530 U.S. 567, 574 (2000) (“Representative democracy in any populous unit of government is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.”))
164 Id. at 1803 (Stevens, J., dissenting) (citing Elrod v. Burns, 427 U.S. 347, 356 (1976)).
165 Vieth, 124 S. Ct. at 1786.
166 U.S. CONST. amend. I states in part: “Congress shall create no law . . . abridging the freedom of speech . . . or the right of the people to peacefully assemble.”
The Court has long recognized that the First Amendment protects political speech and participation. In *Elrod v. Burns*, the Court noted that “political belief and association are the core of the activities protected by the First Amendment.” Similarly, in *California Democratic Party v. Jones*, the Court determined that the “First Amendment protects the ‘freedom to join together in furtherance of common political beliefs.’” In *EU v. San Francisco County Democratic Central Committee*, the Court determined that “it is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments.” Likewise, in *Perry v. Sindermann*, the Court noted that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.” Thus, the First Amendment historically has protected freedoms of political speech and association.

The First Amendment guarantees of freedoms of speech and association protect against discriminatory governmental action based upon political affiliation. In *Rutan v. Republican Party of Illinois*, the Court determined that job related promotions, transfers, and recalls that were based on political affiliation were an impermissible infringement on First Amendment rights. Similarly, the Court in *Branti v. Finkel* decided that the First Amendment protected against discriminatory governmental employment dismissals based on political affiliation. Likewise, governmental action based on discriminatory political affiliation was not tolerated in *O’Hare Truck Service, Inc. v. City of Northlake* or in *Elrod v. Burns*. Thus, a strong precedent of First Amendment protection does not allow governmental discriminatory action based upon political affiliation.

Political gerrymandering is essentially governmental discrimination based upon political affiliation. Political gerrymandering is the drawing of discriminatory political electoral districts based upon the political affiliation of

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167 *Id.*

168 *Id.*

169 *Id.* at 356.

169 *Id.* at 356.


173 *Id.* at 597.


175 *Id.* at 72.


177 *Id.* at 516.

178 *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 725-26 (1996) (deciding that the government may not discriminate based upon political affiliation of independent contractors).

179 *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (determining that government action that inhibits belief and association by conditioning public employment on political affiliation is invalid).
the citizens. This governmental discrimination is an infringement upon First Amendment guarantees of free speech, association and freedom from governmental discrimination based upon political affiliation.

B. The First Amendment and Strict Scrutiny

Historically, discriminatory governmental decisions that are based upon political affiliation have been subjected to the highest level of review, strict scrutiny. The First Amendment’s broad protection stems from its text: “Congress shall create no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . .” This constitutional mandate limits the government’s ability to restrict speech and associational freedoms.

In Police Dep’t of Chicago v. Mosley, the Court opined that the “First Amendment means that the government has no power to restrict the expression because of its message, its ideas, its subject matter or its content.” Similarly, the Court in Perry v. Sindermann noted that “if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited,” and this “would allow the government to ‘produce a result which [it] could not command directly.’” Thus, a claim under the First Amendment would be subject to strict scrutiny.

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180 Vieth v. Jubelirer, 124 S. Ct. 1769, 1775 (2004) (noting that political gerrymandering is the act of districting or creating electoral lines for the sake of partisan advantage). See also BLACK’S LAW DICTIONARY 696 (7th ed. 1999) (“The practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.”).

181 See O’Hare Truck Serv., Inc., 518 U.S. at 725-26 (deciding that the government may not discriminate based upon political affiliation of independent contractors); EU v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222 (1989) (“If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest.”); Elrod, 427 U.S. at 347, 362, 373 (deciding that a significant impairment of First Amendment rights, governmental discrimination based on political affiliation, must survive exacting scrutiny); Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 101 (1972) (deciding that statutes that affect First Amendment interest must be narrowly tailored to their legitimate objectives).

182 U.S. CONST. amend. I.

183 Id. See also Whitaker, supra note 162, at 26-27 (noting that the exacting strict scrutiny under the First Amendment requires striking down a regulation unless it is narrowly tailored to serve a compelling state interest).

184 Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 92 (1972).

185 Id. at 94-95 (striking down a city ordinance that prohibited picketing near a school).


187 Id. at 597 (citing Speiser v. Randall, 357 U.S. 513, 526 (1958)).
In order to survive strict scrutiny, the government must advance a compelling state interest that is achieved in the least restrictive manner. Therefore, in response to a claim of political gerrymandering, the government would have to advance a compelling state interest in drawing the discriminatory legislative lines and also show that the line drawing was narrowly tailored to serve that compelling state interest. If the State could not support that discriminatory line drawing advances a compelling State interest, then the legislation must fail the constitutional review.

C. Discriminatory Political Districting Will Not Survive Strict Scrutiny

Creating political districts in order to advance a political party’s interest would likely fail a strict scrutiny constitutional level of review because political gerrymandering does not advance a compelling state interest in the least restrictive manner. In previous opinions, the Supreme Court has held that the First Amendment does not tolerate discrimination based upon political affiliation. The court in *Elrod v. Burns* determined that political patronage dismissals were unconstitutional under the First and Fourteenth Amendments. Similarly, in *EU v. San Francisco County Democratic Central Committee*, the Court determined that a state statute barring political parties from endorsing and opposing candidates was unconstitutional because it burdened free speech and infringed upon freedom of association, both of which are protected by the First Amendment. In *Branti v. Finkel*, the Court determined that assistant public defenders could not be discharged based on the political beliefs because of the protection of the First and Fourteenth Amendments. Furthermore, unless

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188 See *EU v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (“If the challenged law burdens the rights [First and Fourteenth] of the political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling states interest.”) (citing Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986); Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979); Elrod v. Burns, 427 U.S. 347, 348 (1976) (deciding if political patronage appointments are to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of belief and association in achieving that end); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (determining that First Amendment rights may be curtailed only by interest of vital importance, the burden of proving the existence of which rests upon the government); American Party of Texas v. White, 415 U.S. 767, 780-81 (1974); Williams v. Rhodes, 393 U.S. 23, 31 (1968).

189 See Whitaker, *supra* note 162, at 26-27 (noting that the exacting strict scrutiny under the First Amendment requires striking down a regulation unless it is narrowly tailored to serve a compelling stated interest).

190 U.S. CONST. amend. I.

191 Id.

192 Id. at amend. XIV.

193 *Elrod*, 427 U.S. at 373.


party affiliation has been noted as an appropriate requirement for a government position, then the decision not to hire, promote, transfer, recall, and retaliate against an employee or to terminate a contract may not be based on an individual’s partisan affiliation or speech.\textsuperscript{196} Thus, political affiliation is not an appropriate criterion for governmental decision making.

Because political affiliation is not an appropriate criterion for governmental decision making, excluding voters from a Congressional district based upon their political affiliation (i.e., political gerrymandering) would similarly be an inappropriate criterion. Therefore, political gerrymandering would likely be determined unconstitutional under the First Amendment\textsuperscript{197} because political gerrymandering discriminates based upon political affiliation.

D. Political Gerrymandering is Justiciable Under the First Amendment

The problems of nonjusticiability in Vieth v. Jubelirer, which were based upon a lack of a judicially discernible standard of review,\textsuperscript{198} are resolved in a claim of political gerrymandering under the First Amendment because strict scrutiny is advanced as the appropriate standard of review. In application of this standard of review to similar cases which have alleged political discrimination based upon political affiliation, the Court has held that political affiliation is not an appropriate criterion for governmental decision making.\textsuperscript{199} Likewise, the First Amendment\textsuperscript{200} requires that there be no intentional governmental discrimination based on political affiliation in district line drawing. If political discrimination is not tolerated, then the problems of determining “how much” political gerrymandering is constitutionally allowed or how to redress the injury caused by political gerrymandering, the issues that plagued the Court in Vieth, are resolved. Political gerrymandering should not be tolerated at all under the First Amendment. This resolution of a judicial standard of review, strict scrutiny, and the corresponding redressability, no tolerance, would allow a claim of political


\textsuperscript{197} U.S. CONST. amend. I.

\textsuperscript{198} Vieth, 124 S. Ct. at 1792 (deciding that the inability of the courts to pronounce a judicially discernable standard upon which to determine the alleged injury made the matter nonjusticiable).

\textsuperscript{199} O’Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 726 (1996) (deciding that the government may not discriminate based upon political affiliation of independent contractors); Branti, 445 U.S. at 516 (deciding that the First Amendment protected against discriminatory governmental employment dismissals based on political affiliation); Elrod v. Burns, 427 U.S. 347, 357 (1976) (deciding that government action that inhibits belief and association by conditioning public employment on political affiliation is invalid).

\textsuperscript{200} U.S. CONST. amend. I.
gerrymandering to be justiciable if brought under a violation of the First Amendment.  

Some may argue that even though the First Amendment sets forth a standard of review while also redressing the injury that is caused by political gerrymandering, the subject is still nonjusticiable because of the long standing tradition of political control over the legislative line. The argument is premised on the political question doctrine, believing that political gerrymandering considerations are better left to the legislative branch. This argument is flawed because Congressional power may include power over the electoral process, but this power is not without limits. Congressional power is restricted by First Amendment concerns. Congress does have the power to create the districting lines; Congress does not have the power to do so unconstitutionally.

Because Congress’s ability to create legislative districts is bound by constitutional restraint, Congress’ actions must be within the constitutional limits. If Congressional action exceeds constitutional limits, then the Court may review that Congressional action. Ultimately, questions of constitutional interpretation are the responsibility of the Court. Because the Court has a duty to interpret the Constitution, the Court should review Congressional actions.

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201 Id.  
203 Id. at 75 (noting that congressional redistricting should be an object of political struggle).  
204 See, e.g., EU v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222 (1989) (determining that a state’s power to regulate the time, place, and manner of elections does not extinguish the state’s responsibility to observe the rights of the state’s citizens) (citing Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986)). See also Bryan R. Whittaker, A Legislative Strategy Conditioned on Corruption: Regulating Campaign Finance After McConnell, 79 IND. L.J. 1063, 1066 (2004) (stating that Congressional power to regulate elections is not limitless, the power is restricted on the basis of First Amendment concerns).  
205 See, e.g., Rutan v. Republican Party of Ill., 497 U.S. 62, 77-78 (1976) (“What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.”) (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972); Williams v. Rhodes, 393 U.S. 23, 29 (1968) (noting that the Constitution grants Congress the power to pass laws regulating the selection of president electors, but Congress may not violate other provisions of the Constitution when exercising these powers)).  
207 See, e.g., Elrod v. Burns, 427 U.S. 347, 352 (1976) (concluding that questions of discriminatory discharge based upon political affiliation were determinable by the Court).  
208 U.S. CONST. art. III, § 2, cl. 1 states in pertinent part: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . .”  
209 See Elrod, 427 U.S. at 352 (determining that questions of constitutional interpretations are ultimately the responsibility of the Court) (citing Powell v. McCormack, 395 U.S. 486, 506 (1969)).
that allegedly violate the Constitution. Now that the Court is armed with a judici ally discernable standard of review, strict scrutiny, and the ability to redress the injury, forbidding any intentional governmental discrimination based upon political affiliation, then political gerrymandering would be justiciable under the First Amendment.

V. CONCLUSION

Political gerrymandering would be justiciable when brought under the First Amendment.\(^\text{210}\) A claim of political gerrymandering may be brought under the First Amendment\(^\text{211}\) because political gerrymandering infringes upon the rights that are guaranteed by the First Amendment.\(^\text{212}\) Under the First Amendment,\(^\text{213}\) any showing of governmental discrimination based on political affiliation towards political participation in the electoral process, in association with a political party and in the expression of political views, will be subject to the highest level of review, strict scrutiny.\(^\text{214}\) In order for the government to constitutionally prevail under a strict scrutiny level of review, the government must advance a compelling state interest for its action or legislation, which is achieved in the least restrictive manner.\(^\text{215}\) Thus, in a political gerrymandering

\(^{210}\) U.S. CONST. amend. I.

\(^{211}\) Id.


\(^{213}\) U.S. CONST. amend. I.

\(^{214}\) See EU v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222 (1989) ("If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest."); Elrod, 427 U.S. at 362 ("It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny.").

\(^{215}\) See Rutan v. Republican Party of Ill., 497 U.S. 62, 74 (1990) (concluding that governmental discrimination based upon political affiliation was subject to strict scrutiny); EU, 489 U.S. at 222 ("If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest."); Branti v. Finkel, 445 U.S. 507, 516 (1980) (deciding that discriminatory governmental employment dismissals based on political affiliation were subject to strict scrutiny); Elrod, 427 U.S. at 362 ("It is firmly established that a significant impairment of First Amendment rights must survive exacting
claim, the government would have to advance that creating political districts based upon political affiliation advances a compelling state interest in the least restrictive manner. Because creating political districts to advance a party’s interest would not likely be viewed as a compelling state interest that is accomplished in the least restrictive matter, it is not likely that a political gerrymandering claim brought under the First Amendment would be considered to be constitutional. Therefore, a claim of political gerrymandering would be justiciable when brought under the First Amendment because it provides a standard of judicial review, strict scrutiny, and a corresponding remedy, which would forbid governmental action that denies the freedom of political association, freedom of political speech and governmental discrimination based upon political affiliation.

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216 U.S. CONST. amend. I.
217 Id.
CHAOS IN THE MARKETPLACE: WHEN SUBSEQUENT PUNISHMENT LEADS TO PRIOR RESTRAINT: WILL CINCINNATI EVER GET IT RIGHT?

by Mardee Sherman*

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I. INTRODUCTION

As a general rule, freedom of speech must take precedence over any other state interests, even if that speech is disruptive.¹ In the words of Supreme Court Justice Hugo Black, “[t]he right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they

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¹ “As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.” Boos v. Barry, 485 U.S. 312, 322 (1988).
believed essential if vigorous enlightenment was ever to triumph over slothful ignorance."²

Fresh from the battle with England over their own rights, the Framers of the Constitution realized that unconventional and unpopular ideas were those needing protection the most—fashionable speakers relaying a socially correct message are rarely harangued for their speech, nor prohibited from repeating their message. Undoubtedly, there are some speakers who need all the constitutional protection they can muster.

Nathaniel Livingston is such a speaker. He has been called everything from a “perennial protester”³ to “a fingernail on a chalkboard in Cincinnati’s comfort zone.”⁴ To city council members and to the magistrate who heard his case, he is uncivil and disruptive.⁵ To his fellow members of the Coalition for a Just Cincinnati, “society is made better by the likes of [him] and other protesters.”⁶ To the press, he provides fodder for local articles.⁷ He is probably the last person the average Cincinnatian wants to hear on a daily basis. Accordingly, he is someone most likely to warrant protection under the First Amendment.

The City of Cincinnati obviously thinks otherwise. This note examines the city’s attempt to diminish the frequent disruptions inflicted on the City Council by Mr. Livingston and others, and its passage of a motion allowing for the removal and temporary suspension of future speech by anyone causing a disturbance at these meetings.

Part II details the history and background of the Bill of Rights, along with the evolution of the First Amendment as it pertains to protected speech. Part III lays out the history of the citizens’ forum portion of Cincinnati City Council meetings, and the reasons leading to the amended Rules of Council. Part IV analyzes the amended Cincinnati Rules of Council against case law holdings on restrictions on speech, and attempts to show that these rules are prior restraints of protected speech, and therefore unconstitutional.

² Martin v. City of Struthers, Ohio, 319 U.S. 141, 143 (1943) (overruling a city ordinance that made it unlawful for anyone distributing handbills and circulars to “ring the door bell, sound the door knocker, or otherwise summon [the residents] to the door for the purpose of receiving such [literature]” because it was a violation of freedom of speech).
⁴ Peter Bronson, Maybe He Protests Too Much, THE CINCINNATI ENQUIRER, December 11, 2002, at 1C.
⁷ In the Best of Cincinnati issue of 2003, City Beat called Nathaniel Livingston the best “[o]ne-man publicity firm. Within the course of a given day you’ll see or hear him everywhere—local talk radio, local television news, local newspapers and local fax machines, etc. He might be the hardest working man in the self-promotion business.” CITY BEAT, 2003, available at http://www.best-of-cincinnati.com/years/bestof2003/publiclitystaff.html.
II. BACKGROUND LAW

Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?8

Freedom of speech has long been considered “the matrix, the indispensable condition, of nearly every other form of freedom.”9 In addition, thanks to the Fourteenth Amendment,10 that indispensable right is incorporated to the states.11 Freedom of speech is far from being an absolute right, however.12 Although the First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech,”13 courts have long interpreted this language to warrant the need for certain restrictions.14 All things considered, however, the prior restraint of speech invites greater protection from the courts than the subsequent consequences of that same speech.15

8 John Milton, Areopagitica, in THE STUDENT’S MILTON 751 (F. Patterson ed. 1933) (1654). This piece, which was titled “A Speech for the Liberty of Unlicensed Printing to the Parliament of England,” was written in response to attempts in England to “license” religious and political writings. Id. Milton stated that “[t]ruth is strong . . . [and] needs no policies, nor stratagems, nor licensings to make her victorious.” Id. It is considered the inspiration and forerunner to the famous “marketplace” theory set forth by United States Supreme Court Justice Oliver Wendell Holmes, Jr. See infra Part II.B; see also Holly Coates Keehn, Terroristic Religious Speech: Giving the Devil the Benefit of the First Amendment Free Exercise and Free Speech Clauses, 28 SETON HALL L. REV. 1230, 1252 n.166 (1998).
10 U.S. CONST. amend. XIV.
11 See Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that freedom of speech is a fundamental right protected by the due process clause of the Fourteenth Amendment). Most states also have their own bill of rights enclosed in state constitutions. See, e.g., OHIO CONST. art. I, § 11. “Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.” Id.
13 U.S. CONST. amend. I states that “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.”
14 See, e.g., Rosenfeld v. New Jersey, 408 U.S. 901, 901-02 (1972) (allowing that the right of free speech has never been held to be absolute at all times and under all circumstances).
15 BE&K Constr. Co. v. N.L.R.B., 536 U.S. 516, 530 (2002) (holding that liability could not be imposed on an employer for filing losing retaliatory lawsuits against labor unions as long as the employer could show there was some objective basis to the suit).
This section will delve into the history of the Bill of Rights in the United States; the First Amendment, particularly how it applies to prior restraint of protected speech; and the limitations of such speech.

A. *The Bill of Rights*

Freedom of speech officially began with the Bill of Rights’ inclusion into the United States Constitution in 1791. This Bill of Rights was considered an afterthought, and was only added when several states refused to ratify the Constitution unless they were provided some guarantees of civil liberties. James Madison, urged on by Thomas Jefferson, helped draft twelve amendments, which were sent to the states for ratification. Of those twelve, ten emerged victorious and in the language we know today.

The Bill of Rights had a long history before ratification, however. One of the reasons the states were so anxious to secure its passage was because they feared a return of the unjust methods that the English monarchy used to control the colonies prior to the Revolution. Many of the English laws dealt with warrantless searches and unreasonable taxation. Moreover, the colonies flourished with Christians attempting to restrict other religious viewpoints. Puritans who fled to this country to escape religious persecution made no pretense of being tolerant of anyone else with different beliefs.

In addition, a good many colonies attempted to suppress dissent by passing scores of anti-sedition laws that stamped out criticism of the ruling body. Such criticism, even if truthful, was considered a criminal act. In fact, attacks based on truth were more liable for criminal prosecution, as an “accurate criticism was

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18 In a letter to James Madison in 1987, Thomas Jefferson wrote, “I will now tell you what I do not like. First, the omission of a bill of rights . . . . Let me add, that a bill of rights is what the people are entitled to against every government on earth . . . and what no just government should refuse, or rest on inference.” *Id.* at 17.
19 The twelve amendments submitted for ratification included one that obligated state governments to provide many of the same rights included in the federal bill of rights. *Amar, supra* note 16, at 22. James Madison described it as the “most valuable amendment in the whole list.” *Id.* Unfortunately, his proposal, although passed by the House of Representatives, died in the Senate. *Id.* The concept did not emerge again until the *Gitlow* case in 1925. *Id.*
21 *Id.* at 19.
24 *Id.*
25 *Id.*
26 *Id.*
more likely to foment discontent and perhaps even insurrection."\textsuperscript{27} This was because the concept behind the First Amendment’s freedom of speech clause at the time of its ratification was limited to the notion of prior restraint, and did not face the disputes about subsequent punishment that abound today.\textsuperscript{28}

This conception of prior restraint related back to the old English law of licensure, where all printers and their presses were licensed, and nothing was allowed to be published without prior approval from the state.\textsuperscript{29} Because the doctrine of prior restraint “includes, and prevents, injunctions of speech, . . . [it was] thought to be crucial to securing liberty of expression.”\textsuperscript{30} The licensing laws eventually expired in 1694, but the fear lingered on.\textsuperscript{31} Seventy-five years after the law ended, William Blackstone wrote that “[t]he liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.”\textsuperscript{32}

One of the last incidents before the Revolutionary War involved a printer named John Peter Zenger, who made the mistake of publishing a series of critical attacks on the reigning governor of New York at that time.\textsuperscript{33} Zenger, who was charged with seditious libel, retained Alexander Hamilton as his defense lawyer.\textsuperscript{34} Hamilton, by convincingly arguing to the jury that truth was and should be a defense, managed to get an acquittal despite the fact that the trial judge had been handpicked by the lampooned governor.\textsuperscript{35} Zenger’s case was the exception, however—most sedition cases did not have such successful conclusions.\textsuperscript{36}

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\textsuperscript{27} Rodney A. Smolla, 1 Smolla & Nimmer on Freedom of Speech § 1:4 (3d ed. 1997).
\textsuperscript{28} Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 713 (1931).
\textsuperscript{29} Id.
\textsuperscript{31} Near, 283 U.S. at 734-35 (citing Joseph Story, Story on the Constitution § 1891 (5th ed. 1991)).
\textsuperscript{32} 4 William Blackstone, Commentaries *151 (emphasis added).
\textsuperscript{33} Smolla, supra note 27, at § 1:4.
\textsuperscript{34} Id. n.2. The actual charge against Zenger read:

\texttt{Being a seditious person; and a frequent printer and publisher of false news and seditious libels, both wickedly and maliciously devising the administration of His Excellency William Cosby, Captain General and Governor in Chief, to traduce, scandalize, and vilify both His Excellency the Governor and the ministers and officers of the king, and to bring them into suspicion and the ill opinion of the subjects of the king residing within the Province.}

\texttt{Id.}\textsuperscript{\textsuperscript{35}}

\textsuperscript{35} Id. Ironically, one article Zenger was prosecuted for dealt with the governor’s tactics that sought to “evade the right to jury trial in civil cases.” Amar, supra note 16, at 85.
\textsuperscript{36} Smolla, supra note 27, at § 1:4. The Sedition Act held that:
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Once the Bill of Rights was ratified, it appeared the states’ worries were over. Nevertheless, only a few short years later, the Alien and Sedition Acts of 1798 were passed in an attempt to thwart the Jeffersonian Republicans. In one fell swoop, Congress not only managed to reinvent prior restraint, but also to throw in subsequent punishment to boot. A few publishers prosecuted under the acts made an attempt to utilize the virgin First Amendment to argue their case, but overall, the amendment lay quietly dormant for over one hundred years, notwithstanding a rash of restraint upon sedition that lasted throughout the Civil War.

B. The First Amendment

[T]f any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government . . . then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

TEDFORD & HERBECK, supra note 17, at 29.
TEDFORD & HERBECK, supra note 17, at 25.

Interestingly, another Livingston protested the Act vehemently before Congress. Senator Edward Livingston, Speech before Congress (June 21, 1798). During the Congressional debates on the Alien and Sedition Act, Senator Edward Livingston hailed forth with this accusation:

If we are ready to violate the Constitution, will the people submit to our unauthorized acts? Sir, they ought not to submit; they would deserve the chains that these measures are forging for them. . . . Do not let us be told that we are to excite a fervor against a foreign aggression to establish a tyranny at home; that like the arch traitor we cry “Hail Columbia” at the moment we are betraying her to destruction; that we sing “Happy Land,” when we are plunging it in ruin and disgrace; and that we are absurd enough to call ourselves free and enlightened while we advocate principles that would have disgraced the age of Gothic barbarity.

Id.

JAMES MORTON SMITH, FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 94 (1956). Due to the origin of the Sedition Act, which was designed to eradicate the Republicans, it was set to conveniently “expire on March 3, 1801, the last day of President Adam’s term of office.” Id.


AMAR, supra note 16, at 24. Notwithstanding, the Sedition Act, in terms of its constitutionality, never received its day in court. Id. Almost two hundred years later, Justice Brennan noted that, “Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history . . . . [There has been] a broad consensus that the Act, because of the restraint it imposed upon criticism of [the] government . . . was inconsistent with the First Amendment.” Sullivan, 376 U.S. at 276.

TEDFORD & HERBECK, supra note 17, at 32.
Beginning with *Schenck v. United States*, in 1919, the freedom of speech clause in the First Amendment first began to pull itself out of its deep slumber with the advent of the Espionage Act of 1917. Congress, worried about criticism of the government’s wartime efforts, passed the law in an effort to stifle dissent in the military. The measure was quickly challenged in court when an officer of the Socialist party was charged with violating the Espionage Act by circulating leaflets urging resistance to the draft.

Although Schenck’s conviction was affirmed, the idea of protected speech rose anew from the ashes, as well as the accompanying limitations. Justice Oliver Wendell Holmes, Jr. set forth the idea that the First Amendment was not absolute, and in fact may be restricted at times for the public good. By utilizing the “clear-and-present danger” test, he made it clear that the necessities of war sometimes create a need for curtailing speech.

Two years later, Justice Holmes attempted to narrow his earlier clear-and-present danger test when he dissented in *Abrams v. United States*. He brought forth the notion that the government may only punish speech that “produces or is intended to produce a clear and imminent danger.” However, his most persuasive efforts towards the evolution of free speech came at the tail end of his dissent. Here, Holmes urged that “the ultimate good . . . is reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”

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43 249 U.S. 47 (1919).
44 *Tedford & Herbeck, supra* note 17, at 46.
45 *Id.*
46 *Id.* at 48.
48 *Id.* at 52.
49 *Id.* Justice Holmes stated that:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

*Id.* (emphasis added).
50 250 U.S. 616, 627 (1919).
51 *Id.* Justice Holmes also argued that the intent behind the overt act is what matters, and there was no such intent here. *Id.* All this case consisted of was the “surreptitious publishing of a silly leaflet by an unknown man.” See *id.* at 628.
52 *Id.* at 630.
53 *Id.*
This “marketplace of ideas” theory advanced the concept that all ideas, whether popular or not, should be given an equal chance to be heard.\textsuperscript{54} Expanding on that, the notion that freedom of speech is necessary for citizenry to make informed decisions was advanced in Justice Louis Brandeis’ concurrence in a later decision in 1927.\textsuperscript{55} He argued that the Framers of the Constitution believed that the

\begin{quote}
[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.\textsuperscript{56}
\end{quote}


Another theory involves the idea that freedom of speech has value on a more personal and individual level. In Procunier v. Martinez, Justice Thurgood Marshall allowed that “[t]he First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression . . . . To suppress expression is to reject the basic human desire for recognition and affront the individual’s worth and dignity.” 416 U.S. 396, 427 (1974).

One First Amendment philosophy conceived by law professor Steven H. Shiffrin is perhaps most closely aligned with the issue here. Steven H. Shiffrin, The First Amendment, Democracy, and Romance 5 (1990). His dissent theory embodies the precept that free speech is meant to protect those non-conformists and “romantics” whose words shatter the status quo of society. Id. Shiffrin argues, “The First Amendment’s purpose and function in the American polity is not merely to protect negative liberty, but also affirmatively to sponsor the individualism, the rebelliousness, the anti-authoritarianism, the spirit of nonconformity within us all.” Id. In fact, if the First Amendment is to have any kind of an “organizing symbol,” Shiffrin states that it should be “the image of the dissenter.” Id. In Shiffrin’s opinion, dissidents such as Nathaniel Livingston are valuable to society, in that the general populace lacks the impulse to shake up the complacent and powerful “elite,” and therefore dissent—even “worthless dissent”—is needed to combat injustice. Steven H. Shiffrin, Dissent, Injustice, and the Meaning of America 92-93 (1999).

\textsuperscript{55} Whitney v. California, 274 U.S. 327, 371 (1927).

\textsuperscript{56} Id. at 375.
C. Limitations of Freedom

Although the idea that society benefits from an open exchange of ideas has moved its way to the present, the “umbrella of constitutional protection” has sorted through speech over time, and focused on a few narrowly defined categories. Thus, that protection may be limited or prohibited all together, depending on the type of speech or conduct. For example, the Supreme Court has ruled that obscenity and child pornography deserve no protection from the First Amendment, and other areas, such as commercial speech, defamation, and public broadcasting, may receive only limited protection.

1. Content-Based versus Content-Neutral

Speech enjoying even the most extensive First Amendment protection may be segregated by its content. A law striking down speech may be content-based “if its application depends on either the subject matter or the viewpoint expressed.” Content-neutral laws, on the other hand, merely regulate the time, place, or manner of expression. By way of example, a law prohibiting individuals picketing for abortion rights on a public street would be content-based; a law prohibiting all picketers between the hours of 4-6 p.m. on a public street would be content-neutral.

How such laws are analyzed depends on the determination of that content. Content-neutral laws are evaluated using a form of intermediate scrutiny first

57 See Virginia v. Hicks, 539 U.S. 113, 119 (2003) (holding that society is deprived of an “uninhibited marketplace of ideas” when individuals choose to abstain from protected speech due to the burden of litigation).
60 See, e.g., Miller v. California, 413 U.S. 15, 24 (1973) (holding that obscenity is only protected if “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value”).
65 See Erwin Chemerinsky, Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court’s Application, 74 S. Cal. L. Rev. 49, 49 (2000).
66 Id. at 51.
utilized in *United States v. O'Brien*. There, the Court held that “a government regulation is sufficiently justified if it . . . furthers an important or substantial governmental interest; if [it] is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” In addition, the law must leave open ample means of expression.

Content-based laws, on the other hand, must be evaluated under a more rigid strict scrutiny basis, and are considered presumptively unconstitutional. This means that the government has the burden of showing that the law is narrowly tailored to serve a compelling state interest and is the least restrictive means to further that interest. There are always exceptions, of course. Some content-neutral laws may be neutral on their face, but content or viewpoint-based in their application. A content-neutral law may be invalid because it suppresses too much speech, or fails to “leave open ample alternative channels for communication.”

2. The Public Forum

Laws that regulate speech in a public forum, such as a city council meeting, demand a stricter standard of review than laws regulating speech in a non-public forum. The Supreme Court has gone further than this, and recognized three different categories of forums – traditional, nonpublic, and designated forums.

Traditional forums are those areas that have long been devoted to assembly and debate, such as public streets and parks that have “immemorially been held in trust for the use of the public, and . . . for purposes of assembly,

70 United States v. O’Brien, 391 U.S. 367, 377 (1968). “If the governmental purpose in enacting the ordinance is unrelated to such suppression, the ordinance need only satisfy the ‘less stringent’ intermediate O’Brien standard.” City of Erie v. Pap’s A.M., 529 U.S. 277, 278 (2000).
72 *Id*.
73 “If the governmental interest is related to the expression’s content, . . . the ordinance falls outside O’Brien and must be justified under the more demanding, strict scrutiny standard.” *City of Erie*, 529 U.S. at 278. See, e.g., Boos v. Barry, 485 U.S. 312, 321 (1988) (stating that laws established on “content-based restrictions on political speech in a public forum . . . must be subjected to the most exacting scrutiny”).
75 *Id*.
77 See, e.g., City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) (holding unconstitutional a city ordinance prohibiting residents from displaying signs other than generic identification or “for sale” signs).
78 *Id.* at 56.
communicating thoughts between citizens, and discussing public questions."\(^{81}\) Understandably, this category is considered the most desirable of the three, since it offers the most protection.\(^{82}\) Content-based speech in a traditional forum must satisfy the strict scrutiny test.\(^{83}\) However, content-neutral regulation of speech in traditional public forums is governed by the more relaxed time, place, or manner test.\(^{84}\)

The second category is the nonpublic forum, which is the term used to describe public property not typically designed or used as a forum for public communication.\(^{85}\) Restrictions on speech may occur in a nonpublic forum as long as they are reasonable, and not merely an attempt to suppress the speaker’s view.\(^{86}\) The government may reserve nonpublic property for its intended purpose, so long as the regulation of speech is reasonable and not an effort to suppress a particular viewpoint.\(^{87}\) Examples of nonpublic forums include such venues as airport terminals\(^{88}\) and mailboxes.\(^{89}\)

The last category of the public forum is the designated forum,\(^{90}\) which is the forum addressed by this article. The designated forum consists of public property chosen by the state as a place for expressive activity.\(^{91}\) A state is not duty-bound to create such a forum, nor is it required to retain indefinitely the open character of the facility; but as long as it does so, it must apply the same standards used in the traditional forum, namely the reasonable time, place and manner regulations.\(^{92}\) Moreover, as in the traditional forum, any content-based restrictions must be narrowly drawn to justify a compelling state interest, thus satisfying strict scrutiny.\(^{93}\)

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\(^{81}\) Id.

\(^{82}\) Id.

\(^{83}\) Id.

\(^{84}\) Id.

\(^{85}\) Id. at 46 ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.").

\(^{86}\) Perry, 460 U.S. at 46.

\(^{87}\) Id.

\(^{88}\) Int’l Soc’y for Krishna Consciousness v. Lee, 505 U.S. 672, 682 (1992) (holding that airports were not traditional public forums because their traditional purpose was not to promote the free exchange of ideas but to facilitate air travel).

\(^{89}\) United States Postal Serv. v. Council of Greenburgh Civic Ass’ns, 453 U.S. 114, 129 (1981) (stating that a letterbox is primarily a receptacle for the delivery and receipt of mail, not a public forum).

\(^{90}\) Also known as a “limited” public forum. See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995). The Supreme Court broke the category down even further by allowing that a designated forum may have a limited or an unlimited character. Int’l Soc’y for Krishna Consciousness, 505 U.S. at 678. This determines whether the property has been opened for expressive activity by part or all of the public. Id.

\(^{91}\) Perry, 460 U.S. at 46.

\(^{92}\) Id.

\(^{93}\) Id.
3. Overbreadth and Vagueness

The overbreadth doctrine, an applied challenge, constitutes yet another doctrine affecting protected speech. This principle considers whether a law that punishes a “substantial amount of protected free speech, judged in relation to the statute’s plainly legitimate sweep,” suffices to invalidate all enforcement of that law, “until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.”

The doctrine is provided so that the threat of enforcement of an overbroad law may not deter or “chill” constitutionally protected speech. The court, however, must apply a balancing test so that the chilling effect of an overbroad law does not justify prohibiting all enforcement of that law, particularly one that “reflects legitimate state interests in maintaining . . . controls over harmful, constitutionally unprotected conduct.”

The vagueness doctrine, somewhat related to overbreadth, holds that a law is facially invalid if persons of “common intelligence must necessarily guess as at its meaning.” When an ordinance is vague, “not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normal standard, but rather in the sense that no standard of conduct is specified at all,” a higher decree of clarity is demanded when the law is aimed directly at activity protected by the Constitution.

4. Prior Restraint

All categories aside, however, the granddaddy of speech protected by the First Amendment is prior restraint—that speech which has been prevented before it ever occurs. The constitutional umbrella is at its widest point when it comes to protecting prior restraints against protected speech:

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96 Id. at 119.
97 Coates v. Cincinnati, 402 U.S. 611, 614 (1971) (holding that a Cincinnati, Ohio ordinance making it a criminal offense for “three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by” was too vague to be upheld) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).
98 Id. at 614-15.
99 Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 559 (1976). “[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights . . . . If it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.” Id.
The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.100

In dissent from the denial of certiorari to the Supreme Court of California, Justice Thomas, in *Avis Rent-a-Car Sys., Inc. v. Aguilar*,101 stated that prior restraints entail “the strictest scrutiny known to our First Amendment jurisprudence.”102

Prior restraint, although considered the historical foundation upon which free speech lies, is not absolute,103 although it certainly comes closest. Several dissenters in *New York Times Co. v. United States*104 intimated that under some circumstances, prior restraint of publication would be constitutional if disclosure of that protected speech would result in some kind of immediate or direct harm to the United States or its people.105 In addition, as discussed earlier, a restraint that is content-neutral may be allowed as long as it regulates the “time, place, and manner” of expression.106

III. STATEMENT OF FACTS

On April 14, 2004, a motion was adopted by the City of Cincinnati City Council.107 The motion requested that the City of Cincinnati Rules of Council §2.6(g) and §2.7(h) be amended to allow for the suspension of individuals

100 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975) (holding that the denial of use of municipal facilities for a production of the musical “Hair” amounted to a prior restraint in that there were no procedural safeguards necessary to preclude the dangers of government censorship).
102 *Id.* at 1142.
105 *Id.* at 754-57.
106 See, e.g., Hill v. Colorado, 530 U.S. 703, 719 (2000) (holding that a law prohibiting anyone from approaching individuals located within 100 feet of health care facility entrances in order to protest, educate or pass out leaflets imposed content-neutral time, place, and manner restrictions narrowly tailored to serve a significant government interest and left open ample alternative channels of communication).
107 City of Cincinnati Motion at 1, Doc. No. 200408241 (April 7, 2004).
accused of disrupting council meetings. The final version of the rule stated the following:

The chair may order the removal of any person causing a disturbance of a citizens’ forum or failing to comply with any lawful decision or order by the chair for the duration of the citizens’ forum or such lesser period as the chair may determine. Upon the issuance of a warning by the chair, any subsequent violation of this rule or any other form of disruptive behavior will result in the individual’s immediate suspension of being recognized by any chair at any council or committee meeting for a period of 60 days. The clerk of council shall be responsible for notifying suspended individuals of the duration of their suspension.

Cincinnati City Council provides for a “citizens’ forum” directly before regular meetings. The citizen’s forum constitutes a designated public forum during which interested parties, after submitting their name beforehand on a speaker’s card, may publicly address City Council for two minutes. The citizens’ forum lasts for not more than thirty minutes. If a speaker who submitted a speaker’s card is unable to speak due to time restraints, the speaker is given priority to speak at the next citizens’ forum.

Cincinnati provides the same type of forum for committee meetings, with the exception that the forum is considered part of the committee meeting, and the time limit for speakers is extended to three minutes. There are some restrictions on speaking in both forums. Rule §2.6(f) and §2.7(g) state that “[t]he use of obscene or profane language, personal attacks, slander, defamation, physical violence or the threat thereof, which the chair determines is intended as a disruption, shall constitute a disturbance of the citizens’ forum.”

Any disruption, as determined by the chair, may result in the removal of the speaker, and his or her immediate suspension from speaking before any council and/or committee meeting for sixty days. The statement accompanying the motion stated the rationale behind the motion—namely, the frequent interference

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108 Id.
109 CITY OF CINCINNATI, RULES OF COUNCIL § 2.6(g) (2004).
110 Id. § 2.6
111 Id.
112 Id.
113 Id.
114 Id. § 2.7.
115 CITY OF CINCINNATI, RULES OF COUNCIL §§ 2.6, 2.7 (2004).
116 Id. §§ 2.6, 2.7.
117 Id.
of council meetings by a small number of city residents who were allegedly causing other members of the public to avoid the open forum.\footnote{City of Cincinnati Motion at 1, Doc. No. 200408241 (April 7, 2004). The statement also includes a quote from the Ohio Attorney General’s 2004 Sunshine Laws Update holding that “[a] person is guaranteed the right to attend a public meeting, not the right to be heard at that meeting,” (quoting 2004 Att’y Gen. Sunshine Laws Update 88 (citing Forman v. Blaser, 1988 Ohio App. LEXIS 3405, at *8 (Ohio Ct. App. Aug. 8, 1988)) (holding that Ohio law guarantees . . . the right to observe, but not necessarily the right to be heard)).}

Thirty-five years ago, the only designated forum for Cincinnati residents to appear was before a committee meeting.\footnote{Doug Trapp, Un-Civil Rights, CITY BEAT, October 10, 2000, v.6, issue 46, available at http://www.citybeat.com/2000-10-05/news.shtml.} In 1971, the rules were changed to allow members of the public two minutes to speak about “any issue at the meeting’s end, or earlier if council is voting on the issue.”\footnote{Id. Several years ago, the city changed the rule to allow individuals to speak at the beginning of the meeting, rather than the end. Kevin Osborne, Council Approves Meeting Changes, The CINCINNATI POST, January 17, 2002, at A5.} Since that time, and especially since various organizations in Cincinnati founded the Cincinnati boycott,\footnote{In April of 2001, the shooting of an unarmed African-American man by Cincinnati police sparked several days of rioting and looting throughout the city. Howard Wilkinson, Angry Protesters, Police Clash; Leaders Make Plea for Peace, THE CINCINNATI ENQUIRER, April 11, 2001, at 1A. The Cincinnati boycott began several months later by local activists and religious leaders due to “what they consider the city’s lack of progress on racial issues since the April riots.” Kevin Aldridge, Groups Weigh Call for Boycott of City, THE CINCINNATI ENQUIRER, July 10, 2001, at 1B.} “hecklers and name-calling” from some of the more vocal citizens caused City Council to seek an avenue ending the strife and disruption that continuously occurred at council meetings.\footnote{Gregory Korte, Protests Test Council’s Patience, THE CINCINNATI ENQUIRER, April 8, 2004, at 1C.}

According to a local newspaper article, Councilman Pat DeWine proposed the current rule change to eliminate those disrupters who “say the most outrageous thing[s] . . . get thrown out and [are] back here the next day.”\footnote{Id.} That same day the rule was adopted, two local activists were expelled from the council meeting for using racial slurs and insults during the citizens’ forum segment of the meeting.\footnote{Id.}

One of them, Nathaniel Livingston, was evicted and later arrested when Mayor Charlie Luken saw him holding a sign that read, “Cranley says he doesn’t want any nigger neighbors.”\footnote{Id. The sign references City Council member John Cranley. Id. The protesters, most of them African-American, have complained in the past about a new city policy that has the effect of allowing Cincinnati police to use a racial slur three times before being fired. Stephanie Dunlap, That Word, CITY BEAT, April 14, 2004, available at http://www.citybeat.com/2004-04-14/news.shtml. Nicknamed the “three-slurs-and-you’re-out” policy, protesters argue that police have used the term “nigger” while on duty, and the city has refused to allow disciplinary measures.} In the past, Livingston and others had been
forcibly removed from Council chambers for uttering phrases such as “Nigganati” and “Fuck the police.” He and his fellow protesters also began addressing Mayor Charlie Luken as “Mayor Nigger Charlie.”

After the motion was adopted by council, Livingston filed a complaint against the city in the United States District Court for the Southern District of Ohio Western Division. The complaint sought temporary and permanent injunctive and declaratory relief to prohibit the city from enforcing the ban on “constitutionally protected speech” at city council meetings. At the time of this writing the lawsuit is still ongoing, although a Report and Recommendation was issued by Magistrate Hogan recommending denial of the plaintiff’s request for a temporary restraining order.

IV. ANALYSIS

While no court has of yet decided the constitutionality of the amended City of Cincinnati Rules of Council, the issue is important enough to be addressed at this point in time. The City of Cincinnati, although understandably wishing to prevent the disruption and heckling that frequently occurs at council meetings, fails to take into account or chooses to ignore the First Amendment concerns involved. By implementing a series of rules that are facially invalid, the city has infringed on the First Amendment rights of Nathaniel Livingston and all other citizens. I will attempt to show that Cincinnati Rules of Council §2.6(g) and §2.7(h) are prior restraints against constitutionally protected speech in a designated public forum.

Id. The city says the rule is necessary to make a firing withstand arbitration. Id. See also Kimball Perry, Judge, Activist Spar Over Racial Slur Rule, THE CINCINNATI POST, April 23, 2004, at 1A.

Gregory Flannery, Everything You Say Will Be Used Against You, CITY BEAT, Sept. 6, 2001, v.7, issue 42, available at http://www.citybeat.com/2001-09-06/porkopolis.shtml. The term “Nigganati” has been used by some as a derogatory version of the word “Cincinnati,” similar to the use of “Censornati” in reference to the city’s censorship issues. Id.

Osborne, supra note 124, at 1B.


Id. at 2. Livingston also sought relief from an injunction prohibiting him from holding a “Fuck the Police” rally at Fountain Square in Cincinnati, which has been held to be a “traditional public forum.” Id.

Livingston v. Fangman, No. 1:04CV263 (S.D. Ohio April 23, 2004) (denying temporary restraining order). The report and recommendation issued by Magistrate Hogan barely addressed the prior restraint issue, and instead focused on lecturing the Plaintiff on his behavior and choice of vocabulary. Id. Magistrate Hogan wrote, “Why would anyone believe that behaving in an uncivil and obnoxious manner in the name of free speech would prompt a public body toward one’s point of view or effectively advocate for one’s cause?” Id.
A. When Protection Leads to Suppression

It was an injunction against a newspaper that initiated the modern-day notion that a prior restraint will almost always violate the First Amendment.\(^{131}\) In 1931, the United States Supreme Court, in what was to become a landmark case, overruled a state law that attempted to prevent the publication of a controversial newspaper published by Jay M. Near.\(^{132}\) At the time of the decision, few people were concerned with the outcome—the newspaper in question was considered a scandal rag, and not worth much protection, much the same way people feel about Nate Livingston.\(^{133}\)

*Near v. Minnesota* dealt with a situation not unlike that which is happening in Cincinnati, in that both governments were attempting to protect their citizens from socially unacceptable communicators.\(^{134}\) Jay Near, owner and co-publisher of the *Saturday Press*, circulated a series of “malicious, scandalous and defamatory” articles that linked public officials to gambling syndicates, and declared that “Jew Gangsters” ran the city.\(^{135}\) Calling the *Saturday Press* a nuisance, the State of Minnesota applied an existing state law to shut down its publication.\(^{136}\) Once the case made its way to court, the state argued that the statute was a valid exercise of its police power, since it sought to shut down a paper that was “detrimental to public morals and to the general welfare, . . . disturb[ed] the peace of the community, and provok[ed] assaults and the commission of crime.”\(^{137}\)

The Court, however, disputed the state’s line of reasoning, stating of the press that “it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits.”\(^{138}\) Furthermore, the Minnesota statute’s objective was not to punish speech, but rather to suppress it beforehand.\(^{139}\) The Court believed that using governmental power to suppress speech in order to “protect the

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\(^{131}\) SMOLLA, supra note 27, at §15.3.


\(^{133}\) State *ex rel.* Olson v. Guilford, 174 Minn. 457, 459 (Minn. 1928), rev’d sub nom. Near v. State of Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (comparing the paper to “houses of prostitution” and “noxious weeds”). Ironically, owner Jay Near was indifferent to the constitutional issue. *Near*, 283 U.S. at 705. It took the early efforts of a young organization called the American Civil Liberties Union, and later, the publisher of the Chicago Tribune, to take the case to the United States Supreme Court. FRED W. FRIENDLY, MINNESOTA RAG: CORRUPTION, YELLOW JOURNALISM, AND THE CASE THAT SAVED FREEDOM OF THE PRESS 77-78 (Univ. Minn. Press 2003) (1981).

\(^{134}\) *Near*, 283 U.S. at 703.

\(^{135}\) FRIENDLY, supra note 133, at 61.

\(^{136}\) *Near*, 283 U.S. at 703.

\(^{137}\) Id. at 709.

\(^{138}\) Id. at 718.

\(^{139}\) Id. at 711.
community” was an unconstitutional form of censorship that could not be allowed.\textsuperscript{140}

Additionally, the state’s argument stating a need for protection from defamatory articles did not fly.\textsuperscript{141} Forcing a publisher to prove his writings before publication would be heading down the road to complete censorship,\textsuperscript{142} and civil libel remedies were available for those who were actually defamed.\textsuperscript{143} Accordingly, just as the Near Court years ago refused to buy into the claim that Minnesota needed to protect its citizens from the scandalous writings of the \textit{Saturday Review},\textsuperscript{144} so today should the court disallow Cincinnati’s attempts to “protect” its citizens from the disruptive words of Nathaniel Livingston.

B. Speech in the Public Forum

Notwithstanding prior restraint, one of the first issues to be addressed is whether the relevant portion of the city council meeting is a public forum. This type of designation looks at the location of the speech, rather than the content, at least initially.\textsuperscript{145} As noted earlier, a designated public forum consists of public property specifically selected by the state for expressive activity.\textsuperscript{146} Since many First Amendment issues, most notably the level of review, hinge on the question of whether the venue is a nonpublic, traditional or designated public forum, the issue is a crucial one.\textsuperscript{147} When deciding whether a public forum has been created, there must be a clear governmental intent.\textsuperscript{148} To that end, the actions of a government entity in opening its meetings to public discourse speak for themselves.\textsuperscript{149}

\textsuperscript{140} Id. at 721.
\textsuperscript{141} Id. at 720.
\textsuperscript{142} Near, 283 U.S. at 721.
\textsuperscript{143} Id. at 709.
\textsuperscript{145} Daniel A. Farber & John E. Nowak, \textit{The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication}, 70 VA. L. REV. 1219, 1220 (1984) (allowing that “[p]ublic forum analysis might well be called the ‘geographical’ approach to first amendment law, because results often hinge almost entirely on the speaker’s location”).
\textsuperscript{146} Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983).
\textsuperscript{148} Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985) (holding that “[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse”).
\textsuperscript{149} City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm’n, 429 U.S. 167, 174-75 (1976) (stating that “[w]hen a governmental entity allows a public question and answer period or a period of public participation, it creates a public forum where persons have First Amendment Rights”). \textit{See also} Pesek v. City of Brunswick, 794 F. Supp. 768, 782 (N.D. Ohio 1992) (holding that when a city council meeting was held open to the public and where citizens
In looking at Cincinnati’s intent, we need only look to the language of the Rule, which states, “For a period of not more than 30 minutes immediately prior to the start of each regular meeting of council, there will be a citizens’ forum where persons will be granted the privilege of the floor.”

The language states specifically that the city is designating a period of time to Cincinnati citizens for the purpose of speaking to council.

Therefore, because the city has designated this portion of the meeting as a public forum, any regulation of speech by the city at the citizens’ forum is subject to the strictest level of scrutiny. Moreover, since the City Council effectively bars future speech on the basis of past conduct, the basic principles of free speech allow that the City’s restrictions should be classified as a prior restraint against protected speech.

Once the city opened up its council meetings to allow for direct citizen involvement, it could not then turn around and prohibit those same persons from speaking because of what they have said in the past, or because of what the City believed they would say in the future. The doctrine of prior restraint precludes a government from denying the use of a public forum in advance of the expressive activity. Given its serious, even chilling nature, prior restraint establishes a more intense review than any other constitutional issue, and assumes a presumption against the constitutionality of the City’s action.

C. Content Discrimination

The doctrine of prior restraint does not automatically overrule all restraints against speech. As noted earlier, certain categories of speech have been given
little or no protection by the courts. These include obscenity, child pornography, commercial speech, defamation, and public broadcasting. Each of these categories has its own rules—for example, pornography is analyzed under the *Miller* three-part test. In order for something to be categorized as obscene, the trier of fact must look at a trio of factors dealing with community standards, the depiction of sexual conduct, and whether the work lacks certain values.

If the speech does not pass the test, and therefore does not fit into the lesser-protected category, it defaults back to its protected status, and the focus shifts to government regulation. For a government to enforce restrictions against speech based on content, it must show that those restrictions are necessary to serve a compelling state interest and are narrowly drawn to achieve that end. This content analysis goes hand-in-hand with its status as a public forum—in other words, you have one restriction based on content, and one based on location.

At this point, the regulation must be analyzed to determine whether the restriction is content-based or content-neutral. Even the most protected speech may be subject to restrictions of the “time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” A city like Cincinnati may place limits on the subject of the speech, or may be justified in reserving the citizens’ forum to certain groups, as long as the law is applied indiscriminately. As the Supreme Court noted, it would be ludicrous to allow

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158 *See supra* note 59.
159 *See supra* notes 60-64.
161 *Id.* In *New York v. Ferber*, 458 U.S. 747, 763 (1982), the Supreme Court closed the umbrella over pornographic speech even further when it classified “child pornography as a category of material outside the protection of the First Amendment.”
162 KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1192 (15th ed. 2004).
163 *Id.* Content-based discrimination can sometimes be divided even further into viewpoint discrimination, which can be considered a “subset” of content discrimination. Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 38 n.42 (Winter 2003). An example of viewpoint discrimination would be a law that prohibited all discussion of abortion in public; whether it was pro-choice, anti-abortion, or even scientific. *Id.* The Supreme Court addressed viewpoint discrimination in *R.A.V. v. City of St. Paul*, when they held that a cross-burning statute was facially invalid because “it prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresse[d],” 505 U.S. 377, 381 (1992). Whether an African-American directing the word “nigger” to a Caucasian would have the same racial connotations as when addressed from white to black leads to an entirely different scenario and a different law review article.
164 *Supra* note 144.
166 *Id.*
an individual to stage a meeting in the middle of Times Square during rush hour merely for the purpose of promoting free speech.\textsuperscript{168}

Therefore, in a limited public forum, the City has the right to allow only city residents to appear before council.\textsuperscript{169} Cincinnati is also within its rights to limit the content of the speech to matters pertaining to city issues. Because this particular forum was created for a specific, albeit limited purpose, which was to allow residents of Cincinnati to place their grievances before council, the City has an interest in limiting the forum to discussions from its own citizens that pertain to issues involving the City. As long as the “manner of expression is basically [compatible] with the normal activity of a particular place at a particular time,”\textsuperscript{170} the City will remain on solid Constitutional ground.

The City may go even farther, and state that its obligations include protecting its citizens from the profanity and obscene language used by Mr. Livingston and others. Cincinnati may feel that it has a responsibility to see that residents and children on school field trips are not intimidated or confused by outrageous speech.\textsuperscript{171} Shock value alone, however, cannot give rise to a disintegration of protected speech.\textsuperscript{172} Granting “veto power” to a public forum audience where a government attempts to preempt speech likely to annoy or offend listeners in the public square leads to an unconstitutional censorship.\textsuperscript{173}

Witness the Court’s decision in \textit{Cohen v. California}, when it held that:

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\item \textsuperscript{168} Cox v. Louisiana, 379 U.S. 536, 554-555 (1965) (invalidating the breach of peace conviction of a group of student protesters near a courthouse).
\item \textsuperscript{169} \textit{See}, e.g., Good News Club v. Milford Cent. Sch., 533 U.S. 98, 98-99 (2001) (stating that “[a] state establishing a limited public forum is not required to and does not allow persons to engage in every type of speech. It may be justified in reserving its forum for certain groups or the discussion of certain topics”).
\item \textsuperscript{170} City of Lakewood v. Plain Dealer Publ’g Co., 486 U.S. 750, 763 (1988).
\item \textsuperscript{171} Kevin Osborne, \textit{Council May Ban Slurs, Insults}, \textit{THE CINCINNATI POST}, April 8, 2004, at 1A.
\item \textsuperscript{172} \textit{See}, e.g., Lewis v. City of New Orleans, 408 U.S. 913, 913 (1972) (mem.); Rosenfeld v. New Jersey, 408 U.S. 901, 901 (1972) (mem.); Gooding v. Wilson, 405 U.S. 518, 525-27 (1972). The \textit{Rosenfeld} case involved a man who was arrested for repeatedly using the term “m[other] f[lucking]” at a school board meeting containing a large number of adults and around 40 children. 408 U.S. at 901. A similar situation arose in the earlier \textit{Gooding} case, when a man was arrested for using abusive language, such as “White son of a bitch, I'll kill you.” 405 U.S. at 520. The \textit{Gooding} Court felt this did not constitute the “fighting words” exception to protected speech—a narrow category of words that are offensive, but also “have a direct tendency to cause acts of violence.” \textit{Id.} at 527. Rather, Justice Brennan said that the law made it a “breach of peace merely to speak words offensive to some who hear them, and so sweeps too broadly.” \textit{Id}.  
\end{itemize}
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The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.\textsuperscript{174}

The \textit{Polaris} court noted the difference between content-based and the content-neutral “time, place, and manner” restriction.\textsuperscript{175} It found that a city ordinance regulating sound from an amphitheatre at certain times of the day that left “entirely untouched the substance of what performers [chose] to say” did not raise a “fear of censorship [or] thought control” and was therefore content-neutral.\textsuperscript{176} Conversely, an injunction against a newspaper, where the injunction operated to “suppress on the basis of [the content of] previous publications,” did raise censorship concerns, and required a stricter scrutiny.\textsuperscript{177}

Cincinnati, as noted earlier, has a valid argument in that failing to arrest the rants of fanatical dissenters may lead to a breakdown in the governmental process, which defeats the purpose of the meetings and wastes the time of residents and public officials alike. The problem arises, however, when a government places excessive limits on speech in a limited forum.\textsuperscript{178} Moreover, the City’s application of the law as it stands is far from consistent—it applies only to those who “caus[e] a disturbance of a citizens’ forum or [fail] to comply with any lawful decision or order by the chair . . . .”\textsuperscript{179}

The City’s restriction targets only those individuals who “disturb” the meeting in the subjective view of the meeting chair. These types of exceptions that attempt to “distinguish the good speakers from the bad” run the risk of being labeled discriminatory, and therefore content-based.\textsuperscript{180} Even assuming, arguendo, that the law is found to be content-neutral, the City still does not meet the demands set forth by the Supreme Court.\textsuperscript{181} Although the City may be able to show that it has a substantial, or even a compelling interest in protecting the

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\item [\textsuperscript{174}] 403 U.S. at 21.
\item [\textsuperscript{175}] Polaris Amphitheater Concerts, Inc. v. City of Westerville, 267 F.3d 503, 508 (6th Cir. 2001).
\item [\textsuperscript{176}] \textit{Id}.
\item [\textsuperscript{177}] \textit{Id.} (quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-19 (1971)).
\item [\textsuperscript{178}] See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).
\item [\textsuperscript{179}] \textit{City of Cincinnati, Rules of Council} § 2.6(g) (2004). A disturbance is defined as “obscene or profane language, personal attacks, slander, defamation, physical violence or the threat thereof.” \textit{Id.} § 2.6(f).
\item [\textsuperscript{180}] Sullivan, \textit{supra} note 173, at 211.
\item [\textsuperscript{181}] Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983).
\end{itemize}
rights of other audience members, the law as it stands is not sufficiently tailored to further that objective.\textsuperscript{182}

Although a regulation of the time, place or manner of protected speech need not employ the “least restrictive or least intrusive means,”\textsuperscript{183} the relevant Cincinnati Rules of Council fail to effectively provide for both the speakers’ and the audiences’ freedom of speech rights. By employing a broad regulation that sweeps up all speech—both peaceful and disruptive—the City could be said to be using the \textit{most} restrictive means possible.

Even in jurisdictions that allow injunctions prohibiting certain unprotected speech, such as defamation, those restrictions must be narrowly drawn.\textsuperscript{184} For example, the United States Court of Appeals for the Sixth Circuit directed the lower court to issue a permanent injunction, but held that the restriction could only prohibit the recurrence of statements already found to be defamatory.\textsuperscript{185}

If the restrictions are shown to be content-based—as I believe these are—they must be held to the strictest requirements.\textsuperscript{186} In other words, an injunction against further speech “issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order.”\textsuperscript{187}

This regulation that suspends all future speech prevents Mr. Livingston from expressing his views at a City Council meeting, whether they be polite, disruptive, or even erudite. The City assumes that Mr. Livingston’s remarks would continue to form the same disruptive vein that resulted in his eviction from council—however, because the City has denied Mr. Livingston his First Amendment right to speech, it will never know what Mr. Livingston would have said during those sixty days.

\textsuperscript{182} See NAACP v. Button, 371 U.S. 415, 438 (1963) (“Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”).


\textsuperscript{184} Petition for Writ of Certiorari at 14, Tory v. Cochran, --- S.Ct. --- (Mem), 2004 WL 914965 (U.S. Sep 28, 2004) (No. 03-1488). This case involves another “perennial protestor.” Id. Ulysses Tory is the former client of well-known attorney Johnnie Cochran, who, dissatisfied with the way Mr. Cochran handled his civil rights claim in the 1980’s, began picketing Mr. Cochran’s office and other public spaces Mr. Cochran was likely to frequent over ten years ago. Id. The lawsuit made its way to the California Court of Appeals, which affirmed the trial court’s decision to issue a permanent injunction against Ulysses Tory from forever uttering \textit{any} statements, defamatory or not, about Johnnie Cochran in a public forum. Id. When the California Supreme Court refused to hear an appeal, Erwin Chemerinsky, Tory’s attorney, petitioned for certiorari to the United States Supreme Court, which was granted on September 28, 2004. Tory v. Cochran, 125 S.Ct. 26 (2004).

\textsuperscript{185} Id. (citing Lothschuetz v. Carpenter, 898 F.2d 1200, 1206 (6th Cir. 1990)). Admittedly, there is a split of the circuits over the constitutionality of prior restraints in defamation cases, which the Supreme Court is obviously attempting to resolve by granting certiori to the \textit{Tory} case. \textit{Id.}

\textsuperscript{186} Perry, 460 U.S. at 45.

\textsuperscript{187} Carroll v. President and Comm’rs of Princess Anne, 393 U.S. 175, 183-84 (1968).
D. Government Discretion and the Vagueness Doctrine

What is more, the city vests unrestrained discretion in one person and one person only—the chairperson of the meeting. It allows for the expulsion and subsequent suspension of speech, merely by having a single government official determine that the individual has been guilty of a disruption. Hypothetically, imagine that an individual attends a City Council meeting, and starts speaking loudly and excitedly about the very large sum of money she or he is planning on donating to the city. Chances are a disruption of the meeting would occur. Odds are, however, that the charitable giver would not be evicted from the council meeting; nor would the giver be suspended from speaking at future meetings.

This example perhaps stretches the boundaries of imagination, yet it illustrates my point that the restrictions in place are hugely subjective and subject to abuse. In Forsyth County v. Nationalist Movement, the Supreme Court held that a county ordinance allowing an official to vary parade and assembly permit fees based on the type of activity expected was invalid. The fact that the amount of the fee corresponded to the content of the speech without adequate procedural safeguards was held to be unconstitutional.

What the Forsythe Court found especially unpalatable was that there were “no articulated standards either in the ordinance or in the county’s established practice.” Although noting that the county administrator had applied “content-neutral criteria” when assessing the fee, the Court found that the threat of abuse is what made the difference. The unconstitutionality “rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so.”

In the Cincinnati rules, as in Forsythe, there are no administrative guidelines or judicial review available to the chairperson. The definition of “obscene or profane language, personal attacks, slander, or defamation” is based upon the subjective standards of whomever happens to be in charge of the meeting that day. “A content-neutral regulation that [places] unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.” By failing to place appropriate limits on the discretion

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188 CITY OF CINCINNATI, RULES OF COUNCIL § 2.6 (2004).
190 Id.
191 Id.
192 Id. at 133.
193 Id.
194 Id.
195 CITY OF CINCINNATI, RULES OF COUNCIL § 2.6(g) (2004).
196 Polaris Amphitheater Concerts, Inc. v. City of Westerville, 267 F.3d 503, 509 (6th Cir. 2001) (citing City of Lakewood v. Plain Dealer Publ’g Co., 486 U.S. 750, 757 (1988)).
of the chair in administering the law, the results are no different “than if the law had brazenly set out to discriminate on the basis of content.”

Because there are no “bright-line” standards for one official to follow, the rule becomes violative of the vagueness doctrine. The vagueness doctrine is designed to strike down laws that are so imprecise and ambiguous that they could provide some sort of retaliatory or discriminatory application of the law by local officials against particular groups or individuals. Moreover, when applied to the regulation of speech, the law requires a higher level of specificity.

In Coates v. Cincinnati, the Court found “a vague statute ‘an obvious invitation to discriminatory enforcement against those whose association together is annoying because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens.’” Again, in Thornhill v. Alabama, a vague statute was overruled because it provided “a means of ‘harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.’”

E. Narrowly Tailored Restrictions

Some may argue that a mere sixty days of suspension, as stated in the Rules of Council, constitutes only a temporary loss, and as such, justifies the need for the prohibition. The Supreme Court, however, has stated that the demise of First Amendment freedoms for even “minimal periods of time, unquestionably constitutes irreparable injury.” Obviously, Cincinnati has a compelling interest in keeping its council meetings free from overly disruptive activity. Nevertheless, Cincinnati not only fails to leave open ample alternative channels of communication, it effectively shuts down the only channel available to the citizens of Cincinnati.

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197 Id.
198 See, e.g., Kolender v. Lawson, 461 U.S. 352, 358 (1983) (holding that an important aspect of the vagueness doctrine is “the requirement that a legislature establish minimal guidelines to govern law enforcement”).
200 See Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982) (affirming that “[i]f the . . . law interferes with the right of free speech or of association, a more stringent vagueness test should apply”).
202 Id. (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)).
204 See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983) (holding that the law must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication).
There are other steps the City Council could take to curtail disruptions, the most obvious being the eviction and/or citation of anyone who willfully disturbs the citizens’ forum portion of a meeting. It is certainly understandable that the city wants to avoid the necessity of constantly ejecting, or even arresting, the same group of people over and over. Subsequent punishment, however, as tedious as it seems, is less restrictive than a complete ban of speech, and hence would be more narrowly tailored than the suspension. The Supreme Court has intimated that it would find “no difficulty in sustaining subsequent criminal convictions . . . on facts that would not justify the intervention of equity and the imposition of prior restraint.”205

V. CONCLUSION

The debate over free speech has waged for centuries—from Justice Black arguing for an absolutism policy to Justice Frankfurter advocating that governmental interests should offset an individual’s right to freedom of expression.206 Even today, the Supreme Court justices go back and forth over whether to apply a balancing test or use a “categorical” approach when it comes to analyzing free speech cases.207 As a general rule, however, courts agree that the suppression of lawful speech may not be used as a means to suppress unlawful speech.

In the future, Cincinnati might want to take the words of one of its own officials to heart, and pay more attention to the Constitutional rights of its citizens. “We have, as a city, a pretty poor record when it comes to the First Amendment,” one city council member said. “You could probably write a book filled with cases of ‘City of Cincinnati v. Someone’ with all the First Amendment cases we’ve screwed up.”209

Cincinnati’s heart may be in the right place in trying to spare its quieter citizens the force of Nathaniel Livingston’s irreverent diatribes, but time and again, judges have held that any possible harm to the public in allowing some unprotected speech to go unpunished is outweighed by the prospect that the protected speech of others might be silenced forever.210

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205 Mayton, supra note 200, at 246 (quoting New York Times Co. v. United States, 403 U.S. 713, 737 (1971) (White, J., concurring)).
207 Id. at 59-60.
210 Ashcroft, 535 U.S. at 255 (citing Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)).
You make men love their government and their country by giving them the kind of government and the kind of country that inspire respect and love; a country that is free and unafraid, that lets the discontented talk in order to learn the causes of their discontent and end those causes, that refuses to impel men to spy on their neighbors, that protects its citizens vigorously from harmful acts while it leaves the remedies for objectionable ideas to counter-argument and time.211

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“If we don’t believe in free expression for people we despise, we don’t believe in it at all.”212

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211 ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 565 (7th ed. 1967).
212 John Pilger, Dissident Voices, Still Live, THE GUARDIAN (LONDON), November 23, 1992, at 10 (quoting Noam Chomsky, Interview by John Pilger with Noam Chomsky, Battersea Town Hall, London, Eng. (n.d.)). The author of the article noted that when Mr. Chomsky was heckled by a neo-fascist throughout his speech, what struck him was the “vigour with which [Noam Chomsky] defended the [heckler’s] right to have his say.” Id. at 11.
I. INTRODUCTION

Hypothetically, you are a high school senior who has just been awarded a state scholarship for postsecondary education. The scholarship is part of a state program aimed at facilitating college attendance by providing educational assistance to low-income students who rank among the top 10% of his or her class. You may use this award at any accredited institution in your state, public or private, and for any education-related expense.

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2 This hypothetical is loosely based on Locke, 124 S. Ct. at 1307.
Imagine that you are in your first term at the state accredited college of your choice. Upon enrollment, you declare a double major in business and theology. Subsequently, you are informed that this state program exclusively prohibits theology majors from receiving scholarship funds. In order to receive your scholarship, you must now certify, in writing, that you are not pursuing a theology major. You are forced to choose between majoring in theology or receiving the state scholarship. Ultimately, you choose to major in theology. Under these circumstances, the following questions are presented: Can your state exclude the use of state funds to pursue a theology degree from an otherwise inclusive scholarship program? Does the United States Constitution protect your right to free exercise of religion in this situation?

The hypothetical above is derived from *Locke v. Davey*. In this case, a student pursuing a theology degree sued state officials in a 42 U.S.C. § 1983 action, alleging that Washington’s prohibition of state scholarship funds for theology majors violated the student’s free exercise of religion.3

This casenote answers the aforementioned questions while exploring the scope and future of the First Amendment’s Free Exercise Clause in light of the United States Supreme Court’s recent decision in *Locke v. Davey*.4 In this case, the Court held that Washington’s exclusion of theology majors from the otherwise inclusive scholarship program did not violate the Free Exercise Clause.5

This casenote argues that the holding in *Locke v. Davey*6 was improper. The proper holding would have been to follow precedent by concluding that Washington’s exclusion of the use of state funds to pursue a theology degree from the state’s otherwise inclusive scholarship program violated the Free Exercise Clause, and thus was unconstitutional.7 Part II explains the legal background of *Locke v. Davey*. Part III provides the facts of *Locke v. Davey*. This section also discusses the majority and dissenting opinions of this case. Part IV provides arguments against the validity of the *Locke* holding, including: (1) the Court applied the incorrect standard of review by departing from the Court’s previous holdings in *Lukumi*8 and *Smith*;9 (2) the Court significantly departs from federal precedent; (3) the *Locke* Court modifies strict scrutiny review; and (4) the *Locke* holding risks judicial and legislative misinterpretation. Part V states the preferred holding of *Locke*. Part VI concludes this article.

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3 *Id.*
4 *Id.* at 1309-15.
5 *Id.* at 1309.
6 *Id.*
7 *Contra Locke*, 124 S. Ct. at 1309.
8 *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546-47 (1993) (determining that a law that is not neutral or not of general application which burdens religious practice must undergo the most rigorous of scrutiny, strict scrutiny).
9 *Employment Div. v. Smith*, 494 U.S. 872, 874-90 (1990) (holding that if a state law is applicable and neutral, then strict scrutiny is not required).
II. BACKGROUND LAW

To fully understand the effect of the Supreme Court’s decision in Locke v. Davey, a basic understanding of the Free Exercise Clause of the First Amendment, the surrounding principles, and the relevant case law is necessary.

A. Religion Clauses of the First Amendment

Within the Constitution of the United States of America, the Religion Clauses of the First Amendment provide that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”10 Through the Establishment Clause, the Framers intended to protect citizens from state sponsored establishment of religion.11 Equally important is the Free Exercise Clause. Through the Free Exercise Clause, the Framers sought to safeguard the citizen’s right to freedom of worship.12 These clauses, while frequently in tension,13 are to be read in concert, with neither clause subordinate to the other;14 government activity may not exceed the boundaries of either clause.15 However, precisely how the clauses should be read “in concert” has been the subject of frequent debate and continues to generate uncertainty.16

B. Guarantees of the Free Exercise Clause

The Free Exercise Clause of the First Amendment provides that “Congress shall make no law . . . prohibiting the free exercise of religion.”17 The crux of the

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10 U.S. CONST. amend. I.
12 Id.
14 Walz v. Tax Comm’n, 397 U.S. 664, 672 (1970) (noting that the government must “chart a course that preserved the autonomy and freedom of religious bodies, while avoiding the semblance of established religion. This is a ‘tight rope’ and one that we have successfully traversed.”).
16 Montoya, supra note 11, at 1171.
17 U.S. CONST. amend. I. The First Amendment provides: “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 people to peacefully assemble, and to petition the Government for a redress of grievances.” Id. The Free Exercise Clause applies to the states through the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV; Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
Free Exercise Clause is that it constitutionally guarantees freedom of religion and its practice without government interference. Accordingly, the clause “embraces two concepts, -- freedom to believe and freedom to act.” Even though the government does not have the power to regulate religious beliefs, the government may validly prohibit or burden a religious practice if the regulation or statute satisfies the appropriate standard of review. Unfortunately, in *Locke v. Davey*, the Supreme Court disputed not only the appropriate standard of review, but also the breadth and application of this fundamental right, the freedom of religion, without judicial consensus.

C. Modern Free Exercise Clause Jurisprudence

Over the last fifty years, the Supreme Court’s reading of the Free Exercise Clause has periodically alternated between a broad and a narrow interpretation which, in turn, has resulted in an inconsistent application of the appropriate standard of review and the subsequent free exercise enforcement. The following is a brief overview of the Court’s decisions regarding the Free Exercise Clause to demonstrate the history of the debate and also to shed light on its current status.

18 Compare Ferguson v. C.I.R., 921 F.2d 588, 589 (5th Cir. 1991) (holding that all sincere religious beliefs are protected by the Free Exercise Clause), and Follet v. Town of McCormick, 321 U.S. 573, 577 (1944) (holding that both orthodox and unorthodox religious practices are protected under the First Amendment), with Yoder, 406 U.S. at 216 (holding that philosophical and personal beliefs, rather than religious, are not protected under the First Amendment).


20 *Cantwell*, 310 U.S. at 303.

21 See Sherbert v. Verner, 374 U.S. 398, 402 (1963) (holding that government cannot directly regulate “religious beliefs as such”) (citing *Cantwell*, 310 U.S. at 303; Reynolds v. United States, 98 U.S. 145, 166 (1878)). Accord Braunfield v. Brown, 366 U.S. 599, 603 (1961) (stating that “[t]he freedom to hold religious beliefs and opinions is absolute”); see also *McDaniel*, 435 U.S at 626 (1978) (standing for the proposition that the state cannot require government officials to announce their belief in God).

22 *Lukumi*, 508 U.S. at 531.


25 Id. at 451-64.
In the 1960s, beginning with *Sherbert v. Verner*, the Free Exercise Clause entered an era of broad interpretation. In *Sherbert*, the Court held that South Carolina could not deny unemployment benefits to a Seventh-day Adventist who refused to work on Saturdays because it would violate her religious practices. The Court held that when the application of a law substantially burdens a religious practice, the state would be required to demonstrate a compelling state interest behind the law to justify such a burden. Applying a strict scrutiny standard of review, the Court found that South Carolina had no compelling state interest to justify substantially burdening appellant’s religious principles.

The Court also applied strict scrutiny in *Wisconsin v. Yoder*. In this case, the Court held unconstitutional a Wisconsin law requiring school attendance until age seventeen, as applied to the Old Order Amish. The Court determined that Wisconsin’s law unduly burdened the free exercise of religion within the Amish community. Moreover, the Court decided that Wisconsin’s interest in education was not sufficiently compelling to override the protection of Amish religious practices under the Free Exercise Clause.

In summary, the *Sherbert* and *Yoder* cases stood for the proposition that a state action or law which substantially burdened an individual’s right to the free exercise of religion, even if facially neutral, had to be justified by a compelling state interest.

However, in the cases that follow the *Yoder* decision, the Court has adopted a much narrower interpretation of the Free Exercise Clause, which the Court has since applied. This trend began with the Court’s decision in *Employment Division v. Smith*. In this case, the Court held that strict scrutiny was no longer...

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26 See generally *Sherbert*, 374 U.S. at 404 (invalidating a South Carolina state statute imposing a substantial burden on a Seventh-day Adventist’s religious practice by disqualifying her from unemployment benefits for not being available to work on Saturdays). The Court held that the imposition of the choice between religious principles and government benefits burdens the free exercise of religion. *Id.*

27 Beschle, *supra* note 24, at 463.

28 *Sherbert*, 374 U.S. at 399-400.

29 *Id.* at 406-09 (applying strict scrutiny).

30 *Id.*


32 *Id.*

33 *Id.* at 221-29 (holding that Wisconsin’s interest in education was not of a sufficient magnitude to justify the compelled exposure of the Amish community to formal education which would be destructive to their fundamental religious principles).

34 See *Sherbert*, 374 U.S. at 406-09; *Yoder*, 406 U.S. at 211-14.


36 See generally *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (upholding the denial of Oregon unemployment benefits to Native Americans who ingested peyote, during religious ceremonies, in violation of a criminal law prohibiting its use). Instead of strict scrutiny, the Court applied a rational basis review since the law was generally applicable and neutral. *Id.* at 874-90. The Court held that Oregon satisfied the rational basis review because the state had a legitimate interest in regulating peyote. *Id.* at 890.
required where a state action or law was generally applicable and neutral, even if the law had the incidental effect of burdening a religious practice. The Court further held that strict scrutiny would only be applicable when a Free Exercise claim was juxtaposed with some independent constitutional claim. In Smith, the respondents, members of the Native American Church, lost their employment after ingesting peyote during a religious ceremony. Subsequently, the state of Oregon denied them unemployment benefits because they had violated a statutory criminal law prohibiting the abuse of controlled substances. The Court held that strict scrutiny was not required because the state criminal law was generally applicable and neutral. Applying rational basis review instead of strict scrutiny, the Court held that the Oregon law satisfied this lower standard of review, rational basis, because Oregon had a legitimate state interest in regulating peyote.

Subsequently, the Court in Church of Lukumi Babalu Aye, Inc. v. City of Hialeah supplemented Smith and held that where government acts facially lack neutrality or general applicability, the acts must pass strict scrutiny. In Lukumi, the Court held that a city’s attempted prohibition of animal sacrifices in sacred rituals lacked general applicability and neutrality towards the Santeria religion. In turn, the Court applied strict scrutiny, holding that the city did not have a compelling state interest for such religious discrimination; thus, the act was deemed unconstitutional.

Accordingly, with regard to principles of Free Exercise Clause review, controlling Free Exercise Clause jurisprudence has distinguished between laws that are generally applicable or neutral, and laws that are not. The laws that

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37 Id. at 878-79.
38 Id. at 881.
39 Id. at 874-90.
40 Id. at 874.
41 Id.
42 See generally Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531-32 (1993) (holding that a Florida city ordinance which facially discriminated against a religious practice by prohibiting the use of animal sacrifices in religious rituals had to survive strict scrutiny). Applying strict scrutiny, the Court invalidated the ordinance because it was not justified by a compelling state interest. Id. at 546-47.
43 Id.
44 Id.
45 Id.
46 Id.
47 Id. at 531-32.
48 Id.
49 Id.
50 Id.
51 Id. at 531-32.
are generally applicable and neutral are given rational basis review, whereas the laws that are not applicable and neutral are subject to strict scrutiny. The rationale for these two diverging lines of review has been to protect the individual’s right to the free exercise of religion from government hostility “which is masked, as well as overt.”

III. STATEMENT OF FACTS AND HOLDING OF LOCKE V. DAVEY

A. Facts and Procedural History

The facts surrounding Locke v. Davey are as follows: The state of Washington established the Promise Scholarship program to provide eligible students, who had proven themselves to be academically successful, with postsecondary educational assistance. The purpose of the program was “to facilitate college attendance by low to middle income students from Washington who ranked among the top 10% of their high school class.” Eligibility was based on academics, enrollment requirements, and income. A qualified student was permitted to attend any accredited school located in Washington, public or private, and the student was allowed to spend the scholarship funds on any education-related expense. However, the Promise Scholarship, in accordance with the Washington Constitution, could not be used to pursue a degree in theology. While the term “degree in theology” was not defined by the Washington legislature, both parties had conceded that the term connotes those

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52 Id. at 533-34 (stating that law lacks neutrality if “it refers to a religious practice without a secular meaning discernable from the language and context”).
53 See supra note 23 and accompanying text.
55 Lukumi, 508 U.S. at 531 (mandating strict scrutiny for law that is not generally applicable and lacks neutrality).
56 Id. at 534.
59 Locke, 124 S. Ct. at 1310.
60 Id.
61 Wash. Const. art. I, § 11 stating in pertinent part: “No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.”
62 Locke, 124 S. Ct. at 1310. See also Wash. Rev. Code § 28B.10.814 (1997) (“No aid shall be awarded to any student who is pursuing a degree in theology.”).
academic pursuits that are “devotional in nature or designed to induce religious faith.”

In 1999, Respondent, Joshua Davey, was awarded a Promise Scholarship for the 1999-2000 academic year. Davey chose to attend Northwest College, a private Christian school affiliated with the Assemblies of God that was approved under the Promise Scholarship program. Upon enrollment, Davey declared a double major in business management/administration and pastoral ministries. In the beginning of the 1999-2001 academic year, Davey was informed by Northwest’s director of financial aid that he was ineligible for the scholarship due to his declared major in pastoral ministries. The director informed him that, in order to receive the scholarship funds, Davey would have to certify in writing that he was not pursing a theology degree at Northwest. Davey refused to certify such a statement and, in turn, did not receive the scholarship funds.

Consequently, Davey filed suit in the United States District Court for the Western District of Washington seeking damages and a preliminary injunction to enjoin Washington officials from refusing him the scholarship. Davey argued that the State’s denial of his scholarship violated the First Amendment’s Free Exercise Clause. The district court granted summary judgment in favor of Washington, rejecting Davey’s constitutional claims. Subsequently, the United States Court of Appeals for the Ninth Circuit reversed the decision, holding that the Washington statute was unconstitutional.

63 *Locke*, 124 S. Ct. at 1310 (citing Petitioner’s Brief at 6, *Locke* (No. 02-1315); Respondent’s Brief at 8, *Locke* (No. 02-1315)).
64 Id.
65 Id.
66 At Northwest College, students usually declare a major upon enrollment. Respondent’s Brief at 5, *Locke* (No. 02-1315).
67 *Locke*, 124 S. Ct. at 1310.
68 Id. at 1311.
69 Id.
70 Id.
71 Id.
72 Id. Davey also alleged violations of the Establishment and the Free Speech Clauses, among others. Id. Davey’s brief argued that “Washington disqualifies from the Promise Scholarship those who declare a major in theology.” Respondent’s Brief at 6-7, *Locke* (No. 02-1315). Two Promise Scholars can take “the very same course load,” but the student who declares a major in theology is disqualified while the other is not. *Id.*
73 *Locke*, 124 S. Ct. at 1311. The district court had concluded that “because the Washington Constitution prohibits the funding of religious instruction, both by its express terms and as interpreted by the state’s highest court” the state is entitled to judgment as a matter of law. Davey v. Locke, No. C00-61R, 2000 U.S. Dist. LEXIS 22273, at *9 (W.D. Wash. Oct. 5, 2000).
74 Davey v. Locke, 299 F.3d 748, 750 (9th Cir. 2002). The Ninth Circuit Court ruled that since the Washington program facially discriminated against religion, the program’s exclusion of theology majors must survive strict scrutiny, as required under *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546-47 (1993) (invalidating a city ordinance that imposed criminal sanctions on certain types of animal slaughter which was aimed at suppressing the Santeria religion). *Davey*, 299 F.3d at 750. This Court had held that the Washington program was
B. The Supreme Court Decision: Majority Opinion

Chief Justice Rehnquist delivered the majority opinion. The majority reversed the decision of the Ninth Circuit, holding that Washington’s exclusion of theology majors from the otherwise inclusive scholarship program did not violate the Free Exercise Clause. The Court supported this holding with the following three rationales. First, Rehnquist found that this case involved the “play in the joints” between the Establishment and the Free Exercise Clauses. This means that the case involved a state action that was permitted by the Establishment Clause, but was not required by the Free Exercise Clause. Thus, under the Establishment Clause, Washington could permit students to apply Promise Scholarship funds toward theology degrees; however, the Free Exercise Clause did not require the State to permit this application.

Second, Rehnquist rejected Davey’s reliance on Church of Lukumi Babalu Aye, Inc. v. Hialeah by refusing to accept Davey’s contention that the program was presumptively unconstitutional because it facially discriminated against religion. The Court distinguished Locke from Lukumi on the basis that, in Lukumi, the state demonstrated hostility towards the Santeria religion. In contrast, Rehnquist reasoned that the Promise Scholarship program’s disfavor of religion was much milder than that which the Court had held unconstitutional in Lukumi and prior cases. Rather, the only limitation of the Promise Scholarship program was not narrowly tailored to achieve a compelling state interest.

unconstitutional because the program was not narrowly tailored to achieve a compelling state interest.  

75  Locke, 124 S. Ct. at 1311.  
76  Id. at 1309-15.  
77  Id. at 1309.  
78  Id. at 1311. The Court noted that the Establishment Clause and the Free Exercise Clause are frequently in tension.  Id. (citing Norwood v. Harrison, 413 U.S. 455, 469 (1973)). Yet the Court determined that there is room for a play in the joints.  Id. (quoting Walz v. Tax Comm’n, 397 U.S. 664 (1970)). This means that some state actions are permitted by the Establishment Clause, but are not required by the Free Exercise Clause.  Id.  
79  Id.  
80  Id.  
82  Locke, 124 S. Ct. at 1312.  
83  Id.  
84  Id. The Court noted that the Washington law does not require one to choose between his or her religious beliefs and receiving a government benefit.  Id. at 1313 (citing Hobbie v. Unemployment Appeals Comm’n of Fla., 480 U.S. 136, 137-39 (1987) (striking down law that required a choice between choosing one’s religious belief and receiving a public benefit); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 709 (1981) (holding that the appellant could not be denied unemployment benefits because he refused to perform work that produced war machinery which was against his religious beliefs); McDaniel v. Paty, 435 U.S. 618, 618-19 (1978) (striking down a law which precluded ministers from participating in state politics); Sherbert v. Verner, 374
was that students may not both receive a Promise Scholarship and pursue a major in theology. Accordingly, the Court refused to follow Lukumi absent a finding that the Promise Scholarship program showed animus toward religion. Because Lukumi was found inapposite, the Washington program did not have to survive strict scrutiny and was not presumptively unconstitutional.

Third, Rehnquist concluded that Washington had a substantial state interest in not funding the pursuit of theology degrees, and that the exclusion placed only a minor burden on students.

C. The Supreme Court Decision: Dissenting Opinions

Two dissenting opinions were delivered in Locke v. Davey. Justice Scalia delivered the primary dissent, which was joined by Justice Thomas. Justice Scalia posited three main objections to the Court’s holding. First, Scalia disagreed with majority’s interpretation of precedent and contended that the Court was required, under Lukumi, to apply strict scrutiny to Washington’s scholarship program because, in his view, it facially discriminated against religion.

Second, Scalia asserted that the Washington program denied Davey equal protection under the law when it offered a generally public benefit but “carved out a solitary course of study for exclusion: theology.” Scalia asserted that:

When a State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.

U.S. 398, 399-404 (1963) (invalidating a South Carolina state statute imposing a substantial burden on a Seventh-day Adventist’s religious practice by disqualifying her from unemployment benefits for not being available to work on Saturdays).

85 Locke, 124 S. Ct. at 1312-13.
86 Id. at 1312.
87 Id. at 1315.
88 Id. at 1312.
89 Id. at 1315-21 (Scalia, J., dissenting).
90 Id. at 1315-20 (Scalia, J., dissenting).
91 Locke, 124 S. Ct. at 1316 (Scalia, J., dissenting).
92 Id. (citing Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 16 (1947) (stating that a state may not exclude religious groups “because of their faith, or lack of it, from receiving the benefits of public welfare legislation”)).
93 Id. (Scalia, J., dissenting).
Third, Scalia contended that the Promise Scholarship program violated the Free Exercise Clause because it discriminated solely on the basis of religious beliefs. Scalia contended that Washington’s program only favored those who adhere to “a tepid, civic version of faith.”

Justice Thomas joined Scalia’s dissent and also submitted a separate dissent. In his dissent, Justice Thomas asserted that the term “theology,” while undefined by the State of Washington, has a much broader connotation than recognized by the majority. He stated, “the study of theology does not necessarily implicate religious devotion or faith,” but could also include study “from a secular perspective as well as from a religious one.” In short, Justice Thomas asserted his interpretation that the majority’s decision was erroneous in his view because neither party had contested the validity of the assumption that the state denied the scholarship to only students who pursued a theology degree in devotional theology. Because it was assumed that the state denied the scholarship only to students who pursued a degree in devotional theology, he joined in Justice Scalia’s dissent.

V. ANALYSIS

A. Locke Applied the Incorrect Standard of Review

The first problem with the Locke holding is that its rejection of the strict scrutiny standard of review and the subsequent application of the rational basis review is directly contradicted by precedent established by the United States Supreme Court in Lukumi and Smith. The precedents established by Lukumi and Smith will be discussed in turn.

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94 Id. at 1315-20 (Scalia, J., dissenting).
95 Id. at 1320 (Scalia, J., dissenting).
96 Id. (Thomas, J., dissenting).
97 Locke, 124 S. Ct. at 1320 (Thomas, J., dissenting).
98 Id. at 1321 (Thomas, J., dissenting).
99 Id.
100 Id.
101 Compare Locke, 124 S. Ct. at 1311-15 (applying rational basis review to a law lacking facial neutrality and general applicability even though the statute singled out those pursuing a degree in theology), with Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531 (1993) (mandating strict scrutiny review for a law lacking facial neutrality and general applicability), and Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (applying rational basis review for a generally applicable and neutral law that burdens religious beliefs).
102 See supra note 101 and accompanying text.
103 Id.
1. Standard of Review Applied in Locke\textsuperscript{104} Contradicts Lukumi\textsuperscript{105}

In Lukumi,\textsuperscript{106} the Court determined that “[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates conduct because it is undertaken for religious reasons.”\textsuperscript{107} With these protections in mind, the Court held that laws that facially lack neutrality\textsuperscript{108} or general applicability\textsuperscript{109} must satisfy strict scrutiny.\textsuperscript{110} Accordingly, a law lacking these requirements must be narrowly tailored to achieve a compelling state interest.\textsuperscript{111} The Court further held that neutrality and general applicability are interrelated requirements, and thus failure to satisfy one is a likely indicator that the other has not been satisfied.\textsuperscript{112}

Despite the principles employed in Lukumi,\textsuperscript{113} the Court in Locke\textsuperscript{114} declined to apply strict scrutiny to a law that discriminated against religious beliefs but is not generally applicable and neutral.\textsuperscript{115} The Court reasoned that strict scrutiny was not warranted because the Promise Scholarship program’s disfavor of religion was much “milder” than that which the Court had held unconstitutional in Lukumi and other prior cases because the Promise Scholarship placed only a mild burden on Davey.\textsuperscript{116} In effect, the Court confined Lukumi\textsuperscript{117} to cases evincing hostility or animus.\textsuperscript{118}

\textsuperscript{104} Locke, 124 S. Ct. at 1311-15 (determining that the statute was constitutional under a rational basis review).
\textsuperscript{105} Lukumi, 508 U.S. at 531 (mandating that strict scrutiny must be applied to laws lacking facial neutrality or general applicability).
\textsuperscript{106} Id. at 546 (holding that a Florida city ordinance which facially discriminated against a religious practice by prohibiting the use of animal sacrifices in religious rituals was required to pass strict scrutiny). Applying strict scrutiny, the Lukumi Court invalidated the ordinance because it was not justified by a compelling state interest. Id. at 546-47.
\textsuperscript{107} Id. at 532.
\textsuperscript{108} Id. at 533-34 (stating that a law lacks neutrality “if the object of the law is to infringe upon or restrict practices because of their religious motivation”). The Lukumi Court held that “the object of the law” is determined by examining the law on its face. Id. at 533. The law is found to lack facial neutrality if “it refers to a religious practice without a secular meaning discernable from the language or context.” Id.
\textsuperscript{109} Id. at 543. The principle behind the general applicability requirement is that the “government . . . cannot in a selective manner impose burdens only on conduct motivated by religious belief.” Id.
\textsuperscript{110} Id. at 531.
\textsuperscript{111} Lukumi, 508 U.S. at 531.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 531-43.
\textsuperscript{114} Locke v. Davey, 124 S. Ct. 1307, 1312-13 (2004).
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 1312-13 (citing Hobbie v. Unemployment Appeals Comm’n of Fla., 480 U.S. 136, 137-39 (1987) (striking down law that required a choice between choosing one’s religious belief and receiving a public benefit); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 709 (1981) (holding that the appellant could not be denied unemployment benefits because he refused to perform work that produced war machinery which was against his religious beliefs); McDaniel v. Paty, 435 U.S. 618, 618-19 (1978) (striking down a law which precluded ministers from participating in state politics); Sherbert v. Verner, 374 U.S. 398, 399-404 (1963) (invalidating
The Court’s refusal in Locke to apply strict scrutiny contradicts Lukumi\textsuperscript{119} for two reasons. First, the Washington Promise Scholarship lacks facial neutrality by expressly targeting and penalizing those declaring an intent to pursue a theology degree.\textsuperscript{120} The program specifically states that “[n]o aid shall be awarded to any student who is pursuing a degree in theology.”\textsuperscript{121} Based on this text, the object of the program is to directly discriminate against all religions and also is to regulate education based on religious motivations.\textsuperscript{122} Moreover, the Court made no attempt to defend the program’s neutrality.\textsuperscript{123} The Court instead contended, albeit meritlessly, that the program harbored no hostility.\textsuperscript{124} However, the lack of hostility or even the good intentions of the program are irrelevant “if the law it enacts in fact singles out a religious practice for special burdens.”\textsuperscript{125}

Second, the scholarship program lacked general applicability\textsuperscript{126} by creating a generally available public benefit\textsuperscript{127} and explicitly excluding those pursuing theology degrees from the scholarship’s otherwise inclusive program.\textsuperscript{128} Those pursuing theology degrees are specifically singled out for disfavorable treatment, while no other field of study was excluded from this program.\textsuperscript{129} In short, the program selectively imposed a burden on conduct motivated by religious belief\textsuperscript{130} by inflicting a financial burden on those that chose to be theology majors.\textsuperscript{131}

a South Carolina state statute imposing a substantial burden on a Seventh-day Adventist’s religious practice by disqualifying her from unemployment benefits for not being available to work on Saturdays). However, the Court failed to cite authority that directly supports the proposition that “a state may deny a scholarship to a recipient solely on the basis of religion, or that a statute may, on its face, discriminate against religion.” See Montoya, supra note 11, at 1172.

\textsuperscript{117}See supra note 105 and accompanying text.

\textsuperscript{118}Locke, 124 S. Ct. 1315 n.8 (finding that Washington’s Constitutional history and text evinced no hostility).

\textsuperscript{119}See supra note 105 and accompanying text.

\textsuperscript{120}Respondent’s Brief at 9-14, Locke v. Davey, 124 S. Ct. 1307 (2004) (No. 02-1315). See also Locke, 124 S. Ct. at 1316 (Scalia, J., dissenting). The parties stipulate that it means “a degree that is devotional in nature or designed to induce religious faith.” Id. at 1320 (Thomas, J., dissenting) (citing Petitioner’s Brief at 6, Locke (No. 02-1315); Respondent’s Brief at 8, Locke (No. 02-1315)).

\textsuperscript{121}WASH. REV. CODE § 28B.10.814 (1997).

\textsuperscript{122}Locke, 124 S. Ct. at 1310. See supra note 108 and accompanying text.

\textsuperscript{123}Locke, 124 S. Ct at 1312.

\textsuperscript{124}Id. at 1315.

\textsuperscript{125}Respondent’s Brief at 10, Locke (No. 02-1315) (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 559 (1993) (Scalia, J., concurring)).

\textsuperscript{126}Locke, 124 S. Ct. at 1315-20 (Scalia, J., dissenting).

\textsuperscript{127}Id. at 1316.

\textsuperscript{128}Id. See also WASH. REV. CODE § 28B.10.814 (1997) (“No aid shall be awarded to any student who is pursuing a degree in theology.”).

\textsuperscript{129}Locke, 124 S. Ct. at 1316 (Scalia, J., dissenting).

\textsuperscript{130}Lukumi, 508 U.S. at 545. See also Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (stating that government may not “impose special disabilities on the basis of religious views or
Because the scholarship program burdens only theology majors, the program is neither neutral nor generally applicable. Thus, the *Locke* Court should have applied strict scrutiny instead of the rational basis standard of review.\(^{132}\) As such, *Locke*’s application of rational basis scrutiny is squarely at odds with *Lukumi*.\(^{133}\)

Furthermore, the Court’s holding is improper because the scholarship program fails strict scrutiny review for the following two reasons.\(^{134}\) First, Washington does not have a compelling state interest.\(^{135}\) The *Locke* Court found that Washington had substantial state interests in antiestablishment and in protecting the taxpayer’s conscience.\(^{136}\) This casenote argues that the noted interests are not sufficiently compelling. The reason for this premise is that the Court provides no evidence of how a neutral scholarship program would jeopardize Washington’s antiestablishment interests.\(^{137}\) Additionally, the state’s interest in protecting the taxpayer’s conscience is undermined by the fact that students who have not declared their major or have declared a major in a subject other than theology can enroll in unlimited theology classes and still receive the Promise Scholarship.\(^{138}\) As such, the taxpayers’ tax dollars will nonetheless be allocated to “support” religious education.\(^{139}\) “Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.”\(^{140}\)

The second reason that the program fails strict scrutiny is because the exclusion of theology majors is not narrowly tailored.\(^{141}\) While Washington’s Constitution prohibits the allocation of state funds “to any religious worship, exercise or instruction,”\(^{142}\) it does not require that programs must discriminate on the basis of religion.\(^{143}\) There are less restrictive alternatives that would not facially discriminate against religion.\(^{144}\) For example, the program could be

\(^{131}\) *Locke*, 124 S. Ct. at 1319 (Scalia, J., dissenting).

\(^{132}\) Id. at 1316 (Scalia, J., dissenting).

\(^{133}\) Id. at 1311-15.

\(^{134}\) Respondent’s Brief at 14, *Locke* (No. 02-1315) (citing *Lukumi*, 508 U.S. at 546).
confined to selected fields of study or to public institutions with set curriculums.\footnote{Id. at 1311-15.}

2. Standard of Review Applied in Locke\footnote{Id. at 1311-15.} Contradicts Smith\footnote{Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (upholding a denial of Oregon unemployment benefits to Native Americans who ingested peyote during religious ceremonies in violation of a criminal law prohibiting its use). Instead of strict scrutiny, the Court applied a rational basis review since the law was generally applicable and neutral. \textit{Id.} at 888-90. The Court held that Oregon satisfied the rational basis review because the state had a legitimate interest in regulating peyote. \textit{Id.} at 890.}

In \textit{Smith}, the Court held that when determining whether a law is constitutional under the Free Exercise Clause, laws that are generally applicable and neutral need not be justified by a compelling state interest, even if the law incidentally burdens a particular religious practice.\footnote{Id. at 879 (stating that this proposition is supported by precedent that has consistently “held that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law prescribes (or proscribes) conduct that his religion prescribes (or proscribes)’” (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982)). \textit{See also} United States v. Amer, 110 F.3d 873, 879 (2d Cir. 1997), \textit{cert. denied}, 118 S. Ct. 258 (1997) (holding that a neutral law of general applicability does not violate the Free Exercise Clause simply because it has an incidental burden on religious practice) (citing \textit{Smith}, 494 U.S. at 878-90). \textit{See} Gillette v. Unites States, 401 U.S. 437, 439, 461 (1971) (sustaining military Select Service System against the claim that it violated the free exercise of religion of persons who were opposed to a particular war on religious grounds). \textit{See} Lee, 455 U.S. at 263 n.3 (invalidating a claim by an Amish employer who sought exemption from payment of Social Security taxes, on behalf of himself and his employees, on the basis that the Amish community prohibited participation in governmental assistance programs). \textit{See} Braunfield v. Brown, 366 U.S. 599, 607-09 (1961) (upholding Sunday closing laws against a claim that the laws violate the free exercise of religion of those whose religions instructed them to refrain from work on other days).}

Accordingly, if the requirements of neutrality and general applicability are satisfied, then rational basis scrutiny is applied instead of strict scrutiny.\footnote{Smith, 494 U.S. at 879-82.} In explicitly creating an exception to this rule, the Court determined that strict scrutiny should only be applied to a neutral, generally applicable law where a Free Exercise claim is brought in conjunction with other constitutional protections, such as the freedom of speech or of the press.\footnote{Id. at 881. \textit{See}, \textit{e.g.}, Cantwell v. Connecticut, 310 U.S. 296, 302-07 (1940) (invalidating a licensing system for charitable solicitations under which the administrator had discretion to deny a license because he deemed the solicitor to be nonreligious, because the statute violated the freedom of press and the freedom of religion). This rule is known as the “hybrid rights” doctrine in which a claimant may establish a Free Exercise Clause violation, even in the case of a neutral and generally applicable law, by demonstrating that the challenged law infringes both the right of free exercise and a separate constitutional right. \textit{See}, \textit{e.g.}, First Covenant Church of Seattle v. City of Seattle, 120 Wash. 2d 203 (Wash. 1992).}
However, in contrast to the Court’s holding in Smith, the Court in Locke applied a rational basis review to Washington’s Promise Scholarship program. In doing so, the Locke Court held that Washington had a substantial state interest in “not funding the pursuit of devotional degrees . . . and the exclusion of such funding places a relatively minor burden on Promise Scholars.” From this, the Court concluded that the scholarship program satisfied rational basis scrutiny. Thus, Washington’s refusal to fund theology majors did not violate the Free Exercise Clause.

Locke’s application of rational basis scrutiny contradicts Smith in two ways. First, Locke, unlike Smith, applied the rational basis scrutiny to a government action which is neither neutral nor generally applicable, without defending its neutrality or general applicability. Moreover, the Locke Court provided no precedent in support of its application of rational basis review. Second, even if the Court had found the program to be both neutral and generally applicable, although it is neither, the Court dismissed the exception to Smith, without considering its applicability. The Locke Court made no mention of Smith’s exception, even though Davey’s Free Exercise claim was juxtaposed with claims alleging violations of the Establishment Clause, the Free Speech Clause, the Equal Protection Clause, and the Fourteenth Amendment.

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151 Locke v. Davey, 124 S. Ct. 1307, 1315 (2004). Though the Locke Court does not explicitly rely on Smith, the Court incorporated the rational basis review which was introduced by Smith into Free Exercise Clause jurisprudence. Id.
152 Id. at 1309.
153 Id. at 1312. Specifically, the Court held that Washington had a substantial state interest in protecting its antiestablishment interests. Id.
154 Id.
155 Id. at 1312-15. The majority merely stated that the scholarship program’s disfavor is milder than in Lukumi. Id. at 1312. Notably, the majority makes no mention of Smith. Id. at 1307-15.
156 See supra notes 147 and 150 and accompanying text.
158 Locke, 124 S. Ct. at 1312-15.
159 Id.
160 See supra notes 147 and 150 and accompanying text.
161 Locke, 124 S. Ct. at 1311.
B. Locke Significantly Departs from Federal Precedent\(^{162}\)

The second problem with the *Locke* holding is that it significantly departs from precedent established by the Supreme Court.\(^{163}\) Specifically, the holding of *Locke* contradicts such precedent by improperly “sustaining a public benefits program that facially discriminates against religion.”\(^{164}\)

The Court in *Locke* held that strict scrutiny was not applicable to Davey’s case because the program was, in part, distinguishable from decisions that compelled individuals to choose between their religious beliefs and receiving a government benefit.\(^{165}\)

However, the *Locke* reasoning is misplaced because the government may not “impose special disabilities on the basis of religious views or religious status.”\(^{166}\) In addition, Supreme Court precedent dictates that government regulations that compel individuals to choose between their religious beliefs and receiving a government benefit must be justified by a compelling state interest.\(^{167}\) For example, in *Hobbie v. Unemployment Appeals Commission of Florida*, an employee was denied Florida unemployment benefits after being discharged from her employment when she refused to work certain hours because of sincerely followed religious practices.\(^{168}\) Applying strict scrutiny, the Court held that the refusal to award unemployment compensation violated the Free Exercise Clause.

\(^{162}\) *Compare Locke*, 124 S. Ct. at 1312, with *Hobbie* v. Unemployment Appeals Comm’n of Fla., 480 U.S. 136, 144-46 (1987) (invalidating a Florida statute imposing a substantial burden on employee’s religious practices by disqualifying her from unemployment benefits for not being able to work certain hours), and *Thomas* v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 709, 720 (1981) (invalidating an Indiana statute for unduly burdening employee’s religious practices by disqualifying him from unemployment benefits because his religious beliefs forbade participation in the production of armaments), and *Sherbert* v. Verner, 374 U.S. 398, 399, 404, 409 (1963) (invalidating a South Carolina state statute imposing a substantial burden on a Seventh-day Adventist’s religious practice by disqualifying her from unemployment benefits for not being available to work on Saturdays).

\(^{163}\) See supra note 162 and accompanying text.

\(^{164}\) *Locke*, 124 S. Ct. at 1316 (Scalia, J., dissenting).

\(^{165}\) *Id.* (citing *Hobbie*, 480 U.S. at 141-43; *Thomas*, 450 U.S. at 716; *Sherbert*, 374 U.S. at 402-03)). The *Locke* Court provides no support for distinguishing the case-at-hand from these cases. *Locke*, 124 S. Ct. at 1313. The Court merely states that they are distinguishable because in this case the Washington statute does not require students to choose between their religious beliefs and receiving government benefits. *Id.* at 1312-13. The Court held that Washington “has merely chosen not to fund a distinct category of instruction.” *Id.* at 1313.

\(^{166}\) *Id.* at 1312.


\(^{168}\) *Hobbie*, 480 U.S. at 137-39 (applying strict scrutiny to strike down a law that requires one to choose between their religious beliefs and a government benefit).

\(^{169}\) *Id.* at 138.
because the state forced the employee to choose between her religious beliefs and forfeiting a government benefit.\textsuperscript{170}

Contrary to the Court’s position in \textit{Locke}, Davey’s case is analogous to the aforementioned precedent.\textsuperscript{171} Like \textit{Hobbie},\textsuperscript{172} the Washington Promise Scholarship program creates a generally available public benefit (a state scholarship program) conditioned on attendance at an accredited school, income, and academic performance.\textsuperscript{173} The Promise Scholarship program then excludes theology majors from its otherwise inclusive program.\textsuperscript{174} No other field of study is excluded from this program.\textsuperscript{175} Therefore, Washington requires individuals to choose between their religious beliefs and practices and receiving a government benefit.\textsuperscript{176}

In summary, Davey’s case is analogous to Supreme Court precedent which dictates that government regulations that compel individuals to choose between their religious beliefs and receiving a government benefit must be justified by a compelling state interest.\textsuperscript{177} Thus, the majority improperly dismissed precedent, such as \textit{Hobbie},\textsuperscript{178} without supplying an appropriate analysis or rationale.\textsuperscript{179} By

\textsuperscript{170} Id. at 140-46. In addition, the \textit{Hobbie} Court quoted:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.


\textsuperscript{171} See supra note 162 and accompanying text.

\textsuperscript{172} \textit{Hobbie}, 480 U.S. at 141-46 (deciding that the state may not force an employee to choose between following his or her religion and forfeiting benefits or abandoning religion to accept work) (citing Serbert v. Verner, 274 U.S. 398, 404 (1963)).


\textsuperscript{174} \textit{Id. See also WASH. REV. CODE} § 28B.10.814 (1997) (stating that “[N]o aid shall be awarded to any student who is pursuing a degree in theology.”).

\textsuperscript{175} \textit{Locke}, 124 S. Ct. at 1316 (Scalia, J., dissenting).

\textsuperscript{176} Id. Justice Scalia stated that:

When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individual solely on the basis of religion, it violates the Free Exercise Clause no less than had it imposed a special tax.

\textit{Id. See also} Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 16 (1947) (stating that a state “cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude . . . the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.”).

\textsuperscript{177} See supra note 162 and accompanying text.

\textsuperscript{178} Id.

\textsuperscript{179} \textit{Locke}, 124 S. Ct. at 1312. See supra note 165 and accompanying text.
dismissing such precedent and deviating from its holdings, the Court in *Locke* dismissed the value of federal precedent and, in doing so, completely undermined *stare decisis* and the law-making authority of the Court. The *Locke* Court’s distinction of Davey’s case from the aforementioned precedent is misplaced. Instead, the Court should have at least considered such Supreme Court decisions because of their precedential value, and because the Court has seriously considered such precedent in previous Free Exercise Clause decisions.

C. *Locke* Modifies Strict Scrutiny Review

The third problem with the *Locke* decision is that the holding, in effect, modifies the requirements necessary for the application of strict scrutiny review in Free Exercise Clause jurisprudence. In essence, *Locke* limited strict scrutiny review, as outlined in *Lukumi*, to cases of animus, and attached additional prerequisites to strict scrutiny review.

Prior to *Locke*, the Court held in *Lukumi* that strict scrutiny was required in instances where government regulations facially lack neutrality or general applicability. The strict scrutiny standard of review was applied only upon the demonstration of two prerequisites: (1) lack of facial neutrality, and (2) lack of general applicability. Upon such a showing, the claimant would then be entitled to a presumption of unconstitutionality, thus shifting the burden of proof to the government to establish that the regulation was narrowly tailored to achieve a compelling state interest.

Notwithstanding *Lukumi*, *Locke* has limited strict scrutiny review by confining the *Lukumi* holding to cases involving animus or hostility. The

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180 *Locke*, 124 S. Ct. at 1312.
181 Id. at 1312-13.
185 Id.
186 *Lukumi*, 508 U.S. at 546.
188 *Lukumi*, 508 U.S. at 533.
189 See generally id. at 546-47 (holding that a Florida city ordinance which facially discriminated against a religious practice by prohibiting the use of animal sacrifices in religious rituals had to pass strict scrutiny review). Applying strict scrutiny review, the Court invalidated the ordinance because it was not justified by a compelling state interest. Id. at 547.
190 Id. at 533. See supra note 108 and accompanying text.
191 *Lukumi*, 508 U.S. at 542-43. See supra note 109 and accompanying text.
192 *Lukumi*, 508 U.S. at 546-47.
193 Id. at 533.
Court reasoned that strict scrutiny was not appropriate because Washington’s disfavor of religion was of a much milder kind than in *Lukumi*. The Court further reasoned that strict scrutiny was not required because the program did not impose criminal or civil sanctions on any religious practice, deny ministers the right to participate in political affairs, or compel students to choose between their religious beliefs and a government benefit.

It follows that, in addition to animus, in order to qualify for strict scrutiny review, *Locke* now requires “both a law that is not neutral or generally applicable and either (1) imposes criminal or civil penalties on a religious practice, (2) excludes ministers from political participation, or (3) forces the citizen to choose between her religious conviction and the receipt of a government benefit.”

D. *Locke*\textsuperscript{201} Risks Judicial and Legislative Misinterpretation

The fourth problem with the holding in *Locke* is that the holding is susceptible to judicial and legislative misinterpretation, which may result in unjust deprivations of free exercise of religion.\textsuperscript{202} While the *Locke* holding is confined to religious instruction, the logic behind the opinion may be readily extended in many directions.\textsuperscript{203} At issue in this case was a state scholarship worth less than $3000, “but if the surviving principle of this case is that a state law may discriminate against religion on its face, and explicitly exclude religion from various funding schemes, then the reach of this decision may indeed be profound.”\textsuperscript{204}

\textsuperscript{194} *Id.*

\textsuperscript{195} Beerworth, *supra* note 183, at 383 (defining animus as “those rare instances in which a legislature inflicts intentional and particularized harm on a religious minority”).

\textsuperscript{196} *Lukumi*, 508 U.S. at 355. The *Locke* majority distinguished the facts in *Locke* from *Lukumi*, where a Florida city ordinance was aimed at suppressing animal sacrifices of the Santeria religion. *Locke* v. Davey, 124 S. Ct. 1307, 1312 (2004).

\textsuperscript{197} *Locke*, 124 S. Ct. at 1312.

\textsuperscript{198} *Id.* (citing McDaniel v. Paty, 435 U.S. 618 (1978)).


\textsuperscript{200} *Locke*, 124 S. Ct. at 1312. See also *Beerworth*, supra note 183, at 382 (citing *Locke*, 124 S. Ct. at 1312).

\textsuperscript{201} *Locke*, 124 S. Ct. at 1315-20 (Scalia, J., dissenting).

\textsuperscript{202} *Id.*

\textsuperscript{203} *Id.* at 1320 (Scalia, J., dissenting) (asking “What next? Will we deny priests and nuns their prescription drug benefits on the ground that taxpayers’ freedom of conscience forbids medicating the clergy at public expense?”). *Id.*

\textsuperscript{204} Montoya, *supra* note 11, at 1176-77.
Notably, the focus of the Court’s decision was the exclusion of theology majors from the Washington Promise Scholarship program by prohibiting the allocation of state funds to support any religious instruction, not just ministerial instruction in particular. In turn, states could interpret the Court’s validation of the program as authorization for the states to exclude religious education from other contexts, such as vouchers.

In his dissent, Justice Scalia warned that “when the public’s freedom on conscience is invoked to justify denial of equal treatment, benevolent motives shade into indifference and ultimately into repression.” The resultant risk of the Locke holding is that it is open to misinterpretation that would allow repressive lawmaking and accompanying unjust infringements on the free exercise of religion.

V. PREFERRED HOLDING

The preceding analysis of the Locke holding evinces the preferred holding of this note. The preferred holding would have been to follow precedent by holding that Washington’s exclusion of the use of state funds to pursue a theology degree from the state’s otherwise inclusive scholarship program violates the Free Exercise Clause. The benefits of this holding are numerous. First, the preferred holding is intuitively necessary because the applicable strict standard of

205 See Locke, 124 S. Ct. at 1320-21 (2004) (Thomas, J., dissenting) (stating that while WASH. REV. CODE § 28B.10.814 (1997) does not define “degree in theology,” the parties stipulate that it means “a degree that is ‘devotional in nature or designed to induce religious faith’”). Justice Thomas wrote a separate dissent to voice his concerns about the statute not defining “theology.” Id. According to Thomas, the study of “theology” has secular and religious perspectives and is not limited to devotional studies. Id. at 1321 (citing Petitioner’s Brief at 6, Locke (No. 02-1315); Respondent’s Brief at 8, Locke (No. 02-1315)).

206 Montoya, supra note 11, at 1177. See also WASH. CONST. art. I, § 11 (“[N]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.”).


208 Locke, 124 S. Ct. at 1320 (Scalia, J., dissenting).

209 Id.

210 Contra id. at 1315.
review under Free Exercise Clause jurisprudence dictates such a holding.\textsuperscript{211} Second, the preferred holding is consistent with federal precedent which dictates that government regulations that compel individuals to choose between their religious beliefs and receiving a government benefit must be justified by a compelling state interest.\textsuperscript{212} Third, the preferred holding would maintain the test of strict scrutiny under \textit{Lukumi}.\textsuperscript{213} Such a preferred holding is a bright-line rule that would establish judicial uniformity in Free Exercise cases. Fourth, the preferred holding would prevent the risk of judicial and legislative misinterpretation that could lead to unjust deprivations of free exercise.\textsuperscript{214}

\textbf{VI. CONCLUSION}

Imagine again that you have chosen to pursue a major in theology despite your state’s prohibition of theology majors from receiving state scholarship funds. As stated in this note, the Court held in \textit{Locke v. Davey} that your state can and may legitimately exclude the use of state funds to pursue a theology degree from an otherwise inclusive scholarship program without violating your right to free exercise of religion.\textsuperscript{215} As such, the United States Constitution affords no protection to this right under such circumstances.

Of greater interest is \textit{Locke v. Davey}’s effect on the scope and future of the Free Exercise Clause. Notwithstanding years of Free Exercise Clause jurisprudence, it is clear that the \textit{Locke} Court consciously disregarded the confines of strict scrutiny and federal precedent. Consequently, the Court adopted an even narrower interpretation of the Free Exercise Clause, further limiting the right to free exercise of religion in scope and breadth. However, after \textit{Locke}, three aspects of the future of the Free Exercise Clause are uncertain. First, it is unclear how courts will tackle \textit{Locke}’s modification of strict scrutiny in the future. Second, it is unpredictable how courts and state legislatures will construe this decision given its high susceptibility to misinterpretation. Finally, and of greatest concern, is to what extent the Court will dare to narrow the Free Exercise Clause and at whose expense before strict scrutiny is restored out of necessity. Naturally, we must ask “\textit{[w]hat next? Will we deny priests and nuns their prescription drug benefits on the ground that taxpayers’ freedom of conscience forbids medicating the clergy at public expense?}”\textsuperscript{216}

\begin{itemize}
\item \textsuperscript{211} See \textit{supra} notes 105 and 106 and accompanying text.
\item \textsuperscript{212} See \textit{supra} note 162 and accompanying text.
\item \textsuperscript{213} See \textit{supra} notes 105 and 106 and accompanying text.
\item \textsuperscript{214} \textit{Locke}, 124 S. Ct. at 1315-20 (Scalia, J., dissenting).
\item \textsuperscript{215} Id. at 1309.
\item \textsuperscript{216} Id. at 1320 (Scalia, J., dissenting).
\end{itemize}