

FIRST AMENDMENT LAW REVIEW

VOLUME 15

FALL 2016

BOARD OF EDITORS

Editor-in-Chief
CHIDIEBERE T. MADU

Executive Editor
JENICA D. HUGHES

Chief Article and Note Editor
SARA A. MATECUN

Chief Staff Editor
ELIZABETH A. KAPOPOULOS

Managing Editor
KIRSTIN E. GARDNER

Communications Editor
TAYLOR J. GLENN

Symposium Editors
RYAN M. ARNOLD
HANNAH A. COMBS

Article Editors
COURTNEY M. ACHEE
DANIEL B. HORWITZ
ELIZABETH M. HUTCHENS
TIFFANY F. YATES

Note Editors
NICOLE D. DAVIS
EDWARD R. HENNELLY
CHELSEA V. PARISH
JOSEPH M. SWINDLE

WRITING STAFF

TYLER D. ABBOUD
CHELSEA K. BARNES
NATALIO D. BUDASOFF
JOHN A. CASHION
ASHTON L. COOKE
JENNIFER M. DAVIS
JOHN A. FERRIS
HANNA S. FOX
ELAINE M. HILLGROVE
CATHERINE E. HIPPS
EMILY S. JESSUP
AMBER N. LEE
SAVERIO S. LONGOBARDO
MARTIN D. MALONEY

EMILY E. MANN
LAUREN N. MARGOLIES
JACK M. MIDDOUGH
ALLISON E. OLDERMAN
ELIZABETH M. PAILLIERE
GARRETT J. RIDER
KATHERINE L. RIPPEY
KATHERINE T. SPENCER
JESSICA L. STONE-ERDMAN
MATTHEW K. TAYLOR
LINDSIE D. TREGO
KIRSTIN S. VINAL
TRAVIS W. WHITE
JOSEPH M. WOBBLETON

FACULTY ADVISOR

DAVID S. ARDIA, *Assistant Professor of Law and Co-Director of the UNC Center for Media Law and Policy*

SYMPOSIUM ADVISOR

MARY-ROSE PAPANDREA, *Associate Dean for Academic Affairs and Professor of Law*

THE UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW

Administration

MARGARET SPELLINGS, B.A., Honorary Doctorate, *President of the University of North Carolina*
MARTIN H. BRINKLEY, A.B., J.D., *Dean*
MARY-ROSE PAPANDEA, B.A., J.D., *Associate Dean for Academic Affairs and Professor of Law*
JEFFREY MICHAEL HIRSCH, B.A., M.P.P., J.D., *Associate Dean for Strategy and Geneva Yeargan Rand Distinguished Professor of Law*
HOLNING S. LAU, B.A., J.D., *Associate Dean for Faculty Development, Reef C. Ivey, II Distinguished Professor of Law, and Faculty Director of the LL.M. Program*
JON PAUL MCCLANAHAN, B.A., J.D., *Associate Dean for Administration, Assistant Dean for Academic Excellence and Clinical Associate Professor of Law*
CRAIG T. SMITH, B.A., J.D., LL.M., *Assistant Dean for the Writing and Learning Resources Center and Clinical Professor of Law*
KELLY PODGER SMITH, B.A., J.D., *Associate Dean for Student Services*
AMY BAREFOOT, B.A., *Assistant Dean for Communications*
JENNIFER L. GOTSHALL CLARK, B.S., *Assistant Dean for Finance*
DOUGLAS B. EDMUNDS, B.A., M.S., *Assistant Dean for Information Technology and Adjunct Instructor*
LOUISE W. HARRIS, B.A., *Assistant Dean for Development*
JOHN B. KASPRZAK, B.A., M.A.T., J.D., *Assistant Dean for Student Development and Adjunct Associate Professor of Law*
BRIAN D. LEWIS, B.G.S., M.A., *Assistant Dean for Career Development*
BIANCA MACK, B.A., M.B.A., J.D., *Assistant Dean for Admissions*

Faculty

DAVID S. ARDIA, B.S., M.S., J.D., LL.M., *Assistant Professor Law and Co-Director of the Center for Media Law and Policy*
KEVIN BENNARDO, B.A., J.D., *Clinical Associate Professor of Law*
TAMAR R. BIRCKHEAD, B.A., J.D., *Professor of Law and Director of Clinical Programs*
KIMBERLY C. BISHOP, B.A., J.D., *Clinical Associate Professor of Law*
JOHN CHARLES BOGER, A.B., M.Div., J.D., *Wade Edwards Distinguished Professor of Law*
LISSA LAMKIN BROOME, B.S., J.D., *Wells Fargo Professor of Banking Law and Director of the Center for Banking and Finance*
ALFRED L. BROPHY, A.B., J.D., A.M., PH.D., *Judge John J. Parker Distinguished Professor of Law*
PATRICIA L. BRYAN, B.A., J.D., LL.M., *Henry P. Brandis Professor of Law*
ALEXA Z. CHEW, A.B., J.D., *Clinical Associate Professor of Law*
ANDREW CHIN, B.S., PH.D., J.D., *Associate Professor of Law*
JOHN MARTIN CONLEY, B.A., J.D., PH.D., *William Rand Kenan Jr. Professor of Law*
JOHN F. COYLE, B.A., M.Phil., J.D., *Associate Professor of Law*
MAXINE N. EICHNER, B.A., J.D., M.A., PH.D., *Graham Kenan Professor of Law*
KATE SABLOSKY ELENGOLD, B.A., J.D., *Clinical Associate Professor of Law*
LEWIS MOORE EVERETT, B.A., M.A., J.D., *Clinical Associate Professor of Law*
BARBARA A. FEDDERS, B.A., J.D., *Assistant Professor of Law*
VICTOR B. FLATT, B.A., J.D., *Thomas F. and Elizabeth Taft Distinguished Professor in Environmental Law and Director of the Center for Climate, Energy, Environment and Economics (CE²)*
DEBORAH R. GERHARDT, A.B., J.D., *Associate Professor of Law*
MICHAEL J. GERHARDT, B.A., M.S., J.D., *Samuel Ashe Distinguished Professor in Constitutional Law and Director of the Program for Law and Government*
RACHEL I. GURVICH, B.A., J.D., *Clinical Assistant Professor of Law*
THOMAS LEE HAZEN, B.A., J.D., *Cary C. Boshamer Distinguished Professor of Law*
ANDREW HESSICK, B.A., J.D., *Professor of Law*
CARISSA BYRNE HESSICK, B.A., J.D., *Anne Shea Ransdell and William Garland "Buck" Ransdell, Jr., Distinguished Professor of Law*
JEFFREY MICHAEL HIRSCH, B.A., M.P.P., J.D., *Associate Dean for Strategy and Geneva Yeargan Rand Distinguished Professor of Law*
DONALD THOMAS HORNSTEIN, B.A., J.D., *Aubrey L. Brooks Professor of Law*
MELISSA B. JACOBY, B.A., J.D., *Graham Kenan Professor of Law*
EISHA JAIN, B.A., J.D., *Assistant Professor of Law*
THOMAS A. KELLEY, III, A.B., J.D., *Paul B. Eaton Distinguished Professor of Law and Acting Director of Clinical Programs*
JOSEPH E. KENNEDY, B.A., J.D., *Professor of Law*
CATHERINE Y. KIM, B.A., J.D., *Associate Professor of Law*
JULIE L. KIMBROUGH, B.A., J.D., M.S.L.S., *Deputy Director of the Law Library and Clinical Assistant Professor of Law*
AARON S. KIRSCHENFELD, A.B., M.S.I.S., J.D., *Digital Initiatives Law Librarian and Clinical Assistant Professor of Law*
P. ANNE KLINFELTER, B.A., M.S.L.S., J.D., *Director of Law Library and Associate Professor of Law*
JOAN H. KRAUSE, B.A., J.D., *Dan K. Moore Distinguished Professor of Law; Professor of Social Medicine in the School of Medicine; Adjunct Professor in the Gillings School of Global Public Health*
HOLNING S. LAU, B.A., J.D., *Associate Dean for Faculty Development, Reef C. Ivey, II Distinguished Professor of Law, and Faculty Director of the LL.M. Program*
WILLIAM P. MARSHALL, B.A., J.D., *William Rand Kenan Jr Distinguished Professor of Law*
JON PAUL MCCLANAHAN, B.A., J.D., *Associate Dean for Administration, Assistant Dean for Academic Excellence and Clinical Associate Professor of Law*
JONAS J. MONAST, B.A., J.D., *C. Boyden Gray Distinguished Fellow, Assistant Professor of Law and Co-Director of the Center on Climate, Energy, Environment & Economics (CE²)*
ROBERT P. MOSTELLER, B.A., M.A., J.D., *J. Dickson Phillips Distinguished Professor of Law*
ERIC L. MULLER, A.B., J.D., *Dan K. Moore Distinguished Professor of Law in Jurisprudence and Ethics*
RICHARD E. MYERS, B.A., M.A., J.D., *Henry Brandis Distinguished Professor of Law*
GENE R. NICHOL, B.A., J.D., *Boyd Tinsley Distinguished Professor of Law*
DONNA L. NIXON, B.S., J.D., M.S.L.S., *Electronic Resources Librarian and Clinical Assistant Professor of Law*
WYATT B. ORSBON, B.A., J.D., LL.M., *Visiting Clinical Assistant Professor of Law*

JOHN V. ORTH, A.B., J.D., M.A., Ph.D., *William Rand Kenan Jr. Professor of Law*
 MARY-ROSE PAPANDREA, B.A., J.D., *Associate Dean for Academic Affairs and Professor of Law*
 BETH S. POSNER, A.B., M.A., J.D., *Clinical Assistant Professor of Law*
 GERALD J. POSTEMA, A.B., M.A., Ph.D., *Cary C. Boshamer Professor of Philosophy and Professor of Law*
 DANA A. REMUS, A.B., J.D., *Professor of Law*
 STACEY L. ROWLAND, B.A., M.I.S., M.S., J.D., *IT Services Librarian and Clinical Assistant Professor of Law*
 KATHRYN A. SABBETH, B.A., J.D. LL.M., *Associate Professor of Law*
 OSCAR J. SALINAS, B.A., J.D., M.A., *Clinical Associate Professor of Law*
 MARIA SAVASTA-KENNEDY, B.A., J.D., *Clinical Professor of Law and Director of the Externship Program*
 RICHARD S. SAVER, B.A., J.D., *Arch T. Allen Distinguished Professor of Law; Professor of Social Medicine in the School of Medicine; Adjunct Professor in the Gillings School of Global Public Health*
 NICK SEXTON, B.A., J.D., M.S., *Head of Access Services and Reference Librarian and Clinical Assistant Professor of Law*
 THEODORE M. SHAW, B.A., J.D., *Julius L. Chambers Distinguished Professor of Law and Director of the Center for Civil Rights*
 JAMES W. SHERWOOD, B.A., J.D., LL.M., M.S., *Reference/Foreign and International Law Librarian and Clinical Assistant Professor of Law*
 CRAIG T. SMITH, B.A., J.D., LL.M., *Assistant Dean for the Writing and Learning Resources Center and Clinical Professor of Law*
 LESLIE A. STREET, B.A., J.D., M.S., *Assistant Director for Public Services of the Law Library and Clinical Assistant Professor of Law*
 KATHLEEN DELANEY THOMAS, B.S., J.D., LL.M., *Assistant Professor of Law and Director of the UNC School of Law Tax Institute*
 SARA B. WARF, B.A., J.D., *Clinical Assistant Professor of Law*
 JUDITH WELCH WEGNER, B.A., J.D., *Burton Craige Professor of Law*
 W. MARK C. WEIDEMAIER, B.A., J.D., *Ralph M. Stockton, Jr. Distinguished Scholar and Associate Professor of Law*
 ARTHUR MARK WEISBURD, A.B., J.D., *Reef C. Ivey II Distinguished Professor of Law*
 DEBORAH M. WEISSMAN, B.A., J.D., *Reef C. Ivey II Distinguished Professor of Law*
 ERIKA WILSON, B.S., J.D., *Assistant Professor of Law*
 JANINE M. ZANIN, B.A., J.D., *Clinical Associate Professor of Law and Faculty Supervisor of Externship Programs*

Adjunct Faculty

E. KENT AUBERRY, A.B., J.D., *Adjunct Professor of Law*
 MICHAEL W. BALLANCE, B.A., J.D., *Adjunct Professor of Law*
 CARMEN BANNON, B.S., J.D., *Adjunct Associate Professor of Law*
 JENNIFER LEAH BILLS, B.A., J.D., *Adjunct Professor of Law*
 SETH A. BLUM, B.A., M.A., J.D., *Adjunct Professor of Law*
 ELIZABETH BRASWELL, B.A., J.D., *Adjunct Professor of Law*
 ERIC J. BRIGNAC, B.A., J.D., *Adjunct Professor of Law*
 JONATHAN E. BROUN, B.Ph., J.D., *Adjunct Professor of Law*
 SUZANNE BUCKLEY, B.A., J.D., *Adjunct Associate Professor of Law*
 CAROL LYNN CALDER, B.A., J.D., *Adjunct Professor of Law*
 MARY BETH CHOPAS, B.A., J.D., Ph.D., *Adjunct Professor of Law*
 JOANNA CAREY CLEVELAND, B.A., J.D., M.P.A., *Adjunct Professor of Law*
 FELICE M. CORPENING, B.A., J.D., *Adjunct Professor of Law*
 KAREN DAVIDSON, B.A., M.A., J.D., *Adjunct Professor of Law*
 THE HONORABLE M. PATRICIA DEVINE, B.A., J.D., *Adjunct Professor of Law*
 JINA DHILLON, B.A., M.P.H., J.D., *Adjunct Assistant Professor of Law*
 DORI J. DIXON, B.A., J.D., *Adjunct Associate Professor of Law*
 MARK E. DOROSIN, B.A., M.A., J.D., *Managing Attorney for the UNC Center for Civil Rights and Adjunct Professor of Law*
 PATRYK DRESCHER, B.S., M.A., J.D., *Adjunct Professor of Law*
 DOUGLAS B. EDMUNDS, B.A., M.S., *Assistant Dean for Information Technology and Adjunct Instructor*
 SHERRY HONEYCUTT EVERETT, B.A., M.A., J.D., *Adjunct Associate Professor of Law*
 JAMES C. FULLER, B.A., J.D., *Adjunct Professor of Law*
 BETH YOUNT GRIMES, B.A., J.D., *Adjunct Professor of Law*
 MIKAEL R. GROSS, B.S., M.S., J.D., *Adjunct Associate Professor of Law*
 ELIZABETH M. HADDIX, B.A., J.D., *Staff Attorney for the UNC Center for Civil Rights and Adjunct Professor of Law*
 R. HARPER HECKMAN, B.A., J.D., *Adjunct Professor of Law*
 ELIZABETH HOPKINS THOMAS, B.A., J.D., *Adjunct Assistant Professor of Law*
 MALCOLM HUNTER, B.A., J.D., *Adjunct Professor of Law*
 SAMUEL S. JACKSON, A.B., J.D., *Adjunct Professor of Law*
 ROBERT O. JENKINS, B.A., M.P.A., J.D., *Adjunct Professor of Law*
 SALLY C. JOHNSON, B.S., M.D., *Adjunct Professor of Law*
 VALERIE A. JOHNSON, B.A., J.D., *Adjunct Professor of Law*
 JOHN B. KASPRZAK, B.A., M.A.T., J.D., *Assistant Dean for Student Development and Adjunct Associate Professor of Law*
 SEBASTIAN KIELMANOVICH, J.D., J.D., *Adjunct Associate Professor of Law*
 MARK J. KLEINSCHMIDT, B.A., J.D., *Adjunct Professor of Law*
 CHRISTOPHER KUKLA, B.A., J.D., *Adjunct Professor of Law*
 MARIA M. LYNCH, B.A., J.D., *Adjunct Professor of Law*
 RINA LYUBKIN, B.S., B.S., J.D., *Adjunct Clinical Professor of Law*
 JAMES M. MARKHAM, B.A., J.D., *Adjunct Associate Professor of Law*
 JESSICA MARSDEN, B.A., J.D., *Adjunct Assistant Professor of Law*
 C. STEVEN MASON, B.A., J.D., *Adjunct Professor of Law*
 AMILY K. MCCOOL, B.A., M.S.W., J.D., *Adjunct Associate Professor of Law*
 WILLIAM S. MILLS, A.B., J.D., *Adjunct Professor of Law*
 CHRISTINE C. MUMMA, B.S., J.D., *Adjunct Professor of Law*
 SYLVIA K. NOVINSKY, B.S., J.D., *Adjunct Professor of Law*
 THE HONORABLE ROBERT F. ORR, A.B., J.D., *Adjunct Professor of Law*
 BARBARA OSBORNE, B.A., M.A., M.ED., J.D., *Adjunct Associate Professor of Law*
 DAVID W. OWENS, B.A., M.R.P., J.D., *Adjunct Professor of Law*
 HEATHER PAYNE, B.CHE., J.D., *Assistant Director for the Center for Climate, Energy, Environment, and Economics (CE³) and Adjunct Assistant Professor of Law*

TODD S. ROESSLER, B.S., M.S., J.D., *Adjunct Professor of Law*
ELLIOT M. SILVERSTEIN, B.S., J.D., Ph.D., *Adjunct Professor of Law*
THOMAS M. STERN, B.A., J.D., *Adjunct Professor of Law*
DEVON WHITE, B.A., M.A., J.D., *Adjunct Professor of Law*
GORDON WIDENHOUSE, A.B., M.A., J.D., *Adjunct Professor of Law*
MELVIN F. WRIGHT JR., B.A., J.D., *Adjunct Professor of Law*

Faculty Emeriti

KENNETH S. BROUN, B.S., J.D., *Henry Brandis Professor of Law Emeritus*
CAROLINE NICHOLSON BROWN, B.A., M.A., J.D., *Professor of Law Emeritus*
MICHAEL L. CORRADO, B.A., B.S., A.M., Ph.D., J.D., *Arch T. Allen Distinguished Professor of Law Emeritus*
CHARLES EDWARD DAYE, B.A., J.D., *Henry Brandis Professor of Law Emeritus*
LAURA N. GASAWAY, B.A., M.L.S., J.D., *Paul B. Eaton Distinguished Professor of Law Emeritus*
S. ELIZABETH GIBSON, B.A., J.D., *Burton Craige Professor of Law Emeritus*
PAUL HARDIN, B.A., J.D., *Professor of Law Emeritus*
PAUL G. HASKELL, A.B., LL.B., *William Rand Kenan, Jr. Professor of Law Emeritus*
JOSEPH JOHN KALO, B.A., J.D., *Graham Kenan Professor of Law Emeritus*
RONALD CHARLES LINK, A.B., M.A., J.D., *Dan K. Moore Distinguished Professor of Law Emeritus*
ARNOLD H. LOEWY, B.S., J.D., LL.M., *Graham Kenan Professor of Law Emeritus*
RUTH ANN MCKINNEY, B.A., M.Ed., J.D., *Clinical Professor of Law Emeritus*
ALICE A. RATLIFF, B.A., M.A., J.D., *Clinical Professor of Law Emeritus*
RICHARD A. ROSEN, B.A., J.D., *Professor of Law Emeritus*
WILLIAM J. TURNIER, B.S., M.A., J.D., *Willie Person Mangum Professor of Law Emeritus*

The *First Amendment Law Review* is published three times a year by the First Amendment Law Review.

The views expressed in signed contributions to the *Review* do not necessarily reflect the opinions of the Board of Editors.

Subscriptions: We have stopped printing issues and therefore stopped accepting subscriptions. The contact information for the *Review* is listed below:

First Amendment Law Review
The University of North Carolina School of Law
100 Ridge Road, CB# 3380
3002 Van Hecke-Wettach Hall
Chapel Hill, North Carolina 27599-3380
(919) 843-6683
falr@unc.edu

Manuscripts: The *Review* invites the submission of unsolicited manuscripts. Manuscripts cannot be returned unless accompanied by a self-addressed, postage-paid envelope. Correspondence and manuscripts should be directed to the Editor in Chief.

Copyright: Copyright © 2017 by the North Carolina Law Review Association. Except as otherwise provided, permission is hereby granted for copies of each article to be made for classroom use, provided that: (1) all copies are distributed at or below cost, (2) the author and the *First Amendment Law Review* are identified, (3) proper notice of copyright is affixed to each copy, and (4) the *First Amendment Law Review* is notified of the use.

Publication Information: The *Review* is exclusively online and available through Hein Online, LexisNexis, and Westlaw. The text and citations in Volume 15 conform generally to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds, 20th ed. 2015).

Cite as: FIRST AMEND. L. REV.

www.falrunc.wordpress.com

The Board of Editors would like to thank the following individuals and organizations for their support of the *First Amendment Law Review*:

Dean Martin H. Brinkley

Professor David S. Ardia

Dean Mary-Rose Papandrea

Professor William P. Marshall

Assistant Dean John B. Kasprzak

Student Services Coordinator Elizabeth Dorsey Bachenheimer

University of North Carolina Center for
Media Law & Policy

Graduate and Professional Student Federation of the University
of North Carolina at Chapel Hill

Student Bar Association

Student Congress of the University of North Carolina at Chapel
Hill

North Carolina Law Review

North Carolina Banking Institute

North Carolina Journal of International Law and Commercial
Regulation

North Carolina Journal of Law and Technology

and the many alumni of First Amendment Law Review and
UNC School of Law who helped build and continue to support
this publication.

FIRST AMENDMENT LAW REVIEW

VOLUME 15

FALL 2016

ARTICLES

*TINKER REMORSE: ON THREATS, BOOBIES,
BULLYING, AND PARODIES.....Mark Strasser* 1

MEDICAL FUTILITY AND RELIGIOUS FREE
EXERCISE.....*Teneille Ruth Brown* 43

OPEN-CARRY: OPEN-CONVERSATION OR OPEN-
THREAT?.....*Daniel Horwitz* 96

A FIRST AMENDMENT ANALYSIS OF VOTING
RIGHTS OF THE MENTALLY INCAPACITATED:
WHY ARE YOU CALLING ME AN IDIOT, WHY
CAN'T I VOTE?.....*Tiffany Yates* 121

TINKER REMORSE: ON THREATS, BOOBIES, BULLYING, AND PARODIES

Mark Strasser*

INTRODUCTION

Over 45 years ago, the United States Supreme Court recognized that students have free speech rights in school.¹ In a few cases since then, the Court has modified the jurisprudence in ways that do not make it clearer but, instead, more obscure and more difficult to apply.² The circuit courts have tried to take account of the Court's changing views and have come up with very different and sometimes incompatible ways to apply the doctrine.³ Until the United States Supreme Court offers a coherent analysis of the existing jurisprudence that offers guidance on several issues on which there is a split, lower courts will continue to offer increasingly incompatible interpretations of the jurisprudence—they will issue decisions that are increasingly at odds with each other and which, considered together, will increasingly undermine good public policy and the perception that the law treats individuals fairly and consistently.

Part I provides an account of the Court's jurisprudence regarding student speech rights, highlighting ways in which the doctrine has become increasingly obscure. Part II examines attempts made by the circuit courts to make sense of the doctrine, explaining some of the surprising implications of these interpretations. The piece concludes that the current jurisprudence, as articulated by the Court, allows the exceptions to swallow the rule in many cases, which results in inconsistent holdings across the circuits and an incomprehensible doctrine.

I. STUDENT FREE SPEECH JURISPRUDENCE

The Court first recognized student expression rights in the context of a silent protest of the Vietnam War.⁴ While the Court

* Trustees Professor of Law, Capital University Law School, Columbus, Ohio.

¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

² *See Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

³ *See infra* notes 206–336 and accompanying text.

⁴ *Tinker*, 393 U.S. at 503.

laid out some of the parameters of the doctrine, those parameters nonetheless needed fleshing out. Regrettably, the subsequent jurisprudence obscures rather than clarifies the existing doctrine, leaving the existing parameters in doubt and offering less rather than more guidance about how to handle the increasingly varied and confusing cases that the lower courts must decide.

A. *Tinker*

Many commentators argue that *Tinker v. Des Moines Independent Community School District* represents the high point of First Amendment freedom for students,⁵ although some suggest that the opinion is not so readily characterized that way.⁶ The case involved two high school students and one junior high school student⁷ who were suspended because they wore black

⁵ Christine Metteer Lorillard, *When Children's Rights "Collide": Free Speech vs. the Right to Be Let Alone in the Context of Off-Campus "Cyber-Bullying"*, 81 MISS. L.J. 189, 195 (2011) (noting that *Tinker* "has been extolled as the 'zenith of children's rights'"); Patrick E. McDonough, *Where Good Intentions Go Bad: Redrafting the Massachusetts Cyberbullying Statute to Protect Student Speech*, 46 SUFFOLK U. L. REV. 627, 635 (2013) ("*Tinker* represents the high-water mark for the Court's protection of students' constitutional rights under the First Amendment."); Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 636 (2002) (describing "*Tinker* as the touchstone case supporting public school students' First Amendment rights."); Abby Marie Mollen, *In Defense of the "Hazardous Freedom" of Controversial Student Speech*, 102 NW. U. L. REV. 1501, 1506 (2008) ("The high water point for students' First Amendment rights came in the first case directly on the question that the Supreme Court decided."); Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1030 (2008) (discussing "the robust vision of student speech rights it embraced in *Tinker v. Des Moines Independent School District*").

⁶ Matthew I. Schiffhauer, *Uncertainty at the "Outer Boundaries" of the First Amendment: Extending the Arm of School Authority Beyond the Schoolhouse Gate into Cyberspace*, 24 ST. JOHN'S J. C.R. & ECON. DEV. 731, 758 (2010) ("*Tinker* strikes the appropriate balance between school authority and students' First Amendment rights in Internet student speech cases."); Matthew Sheffield, *Stop with the Exceptions: A Narrow Interpretation of Tinker for All Student Speech Claims*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 175, 179 (2011) ("The Court's majority opinion in *Tinker* seems almost schizophrenic, as it shifts from a narrow holding based on the facts of the case, to making broad proclamations about First Amendment rights.").

⁷ *Tinker*, 393 U.S. at 504 ("Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.").

armbands to school protesting the Vietnam War.⁸ The Court made clear that the expression at issue implicated First Amendment guarantees.⁹ Wearing an armband “was closely akin to ‘pure speech’ which . . . is entitled to comprehensive protection under the First Amendment.”¹⁰ Further, the Court rejected that this form of speech disrupted the educational process in this particular case.¹¹

Tinker is widely quoted for the recognition that students have First Amendment rights.¹² “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹³ That said, however, the Court also recognized the need for school authorities to maintain control in the educational setting.¹⁴ “[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”¹⁵ The question before the Court was how to reconcile the competing interests

⁸ *Id.* (“On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands.”).

⁹ *See id.* at 505 (“[T]he wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment.”) (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

¹⁰ *Id.* at 505–06 (citing *Cox v. Louisiana*, 379 U.S. 536, 555 (1965)).

¹¹ *Id.* at 505 (“[T]he wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it.”).

¹² *See, e.g.*, Eleanor M. Bradley, *Adjusting the Law to Reflect Reality: Arguing for A New Standard for Student Internet Speech*, 86 TEMP. L. REV. 881, 886–87 (2014); Sean Radomski, *We Helped Start the Fire: A College Sporting Event Incitement Standard*, 14 VA. SPORTS & ENT. L. J. 278, 290 (2015); Christine Snyder, *Reversing the Tide: Restoring First Amendment Ideals in America's Schools Through Legislative Protections for Journalism Students and Advisors*, 2014 BYU EDUC. & L.J. 71, 73 (2014); Kelly-Ann Weimar, *A Picture Is Worth A Thousand Words: Tattoos and Tattooing Under the First Amendment*, 7 ARIZ. SUMMIT L. REV. 719, 751 (2014).

¹³ *Tinker*, 393 U.S. at 506.

¹⁴ William Bush, *What You Sign Up for: Public University Restrictions on "Professional" Student Speech After Tatro v. University of Minnesota*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 547, 554 (2014) (“While *Tinker* laid a strong baseline for student free speech in public schools, the Court emphasized that students' free speech rights are cabined by the legitimate interests of schools.”).

¹⁵ *Tinker*, 393 U.S. at 507 (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)).

when they appeared to conflict,¹⁶ although the Court implied that the conflict was more apparent than real. “There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone.”¹⁷ Instead, the school officials punished these students for “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners.”¹⁸

The school officials did not know how the other students would react to the wearing of armbands and were arguably taking prudent prophylactic action by suspending the protesting students.¹⁹ However, the Supreme Court made clear that the “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”²⁰

When suggesting that the fear of disturbance did not alone justify abridging expression guarantees, the Court did not make clear what would justify such an abridgement. The Court noted that “[a]ny departure from absolute regimentation may cause trouble[] [and] [a]ny variation from the majority's opinion may inspire fear,”²¹ implying that one must expect that dissenting views will cause discomfort.²² The Court explained that “[a]ny word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance,”²³ and that “our Constitution says we must take this risk.”²⁴

Risk of what? Is speech protected only if there is no reaction to it? The Court was unwilling to go so far. Instead, in

¹⁶ See *id.* (“Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.”).

¹⁷ *Id.* at 508.

¹⁸ *Id.*

¹⁹ *Id.* (“The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands.”).

²⁰ *Id.*

²¹ *Id.*

²² See Elizabeth M. Jaffe & Robert J. D'Agostino, *Bullying in Public Schools: The Intersection Between the Student's Free Speech Rights and the School's Duty to Protect*, 62 *MERCER L. REV.* 407, 423 (2011) (“*Tinker* requires more than an apprehension of disturbance or a desire to avoid discomfort associated with an unfavorable viewpoint.”).

²³ *Tinker*, 393 U.S. at 508.

²⁴ *Id.*

order for the state to be justified in punishing students for their protected speech, the state had “to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”²⁵ Where there was “no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.”²⁶ Not only was there no finding of such interference below,²⁷ the Court’s “independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.”²⁸ Instead, the Court inferred that the school authorities’ action was “based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation’s part in the conflagration in Vietnam.”²⁹ The school authorities actions were even more suspect because they “did not purport to prohibit the wearing of all symbols of political or controversial significance.”³⁰ For example, “students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism.”³¹

The *Tinker* Court rejected that school authorities “possess absolute authority over their students.”³² Instead, “[s]tudents in school as well as out of school are ‘persons’ under our Constitution . . . [who] possess[] . . . fundamental rights which

²⁵ *Id.* at 509.

²⁶ *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). See also Allison E. Hayes, *From Armbands to Douchebags: How Doninger v. Niehoff Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*, 43 AKRON L. REV. 247, 252 (2010) (“*Tinker* sets a very high standard: a student’s speech must ‘materially and substantially interfere’ with the school’s administrative order to be prohibited.”).

²⁷ *Tinker*, 393 U.S. at 509 (“In the present case, the District Court made no such finding.”).

²⁸ *Id.*

²⁹ *Id.* at 510.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 511.

the State must respect.”³³ Further, “personal intercommunication among the students . . . [itself is] an important part of the educational process.”³⁴ This means that “[w]hen he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, . . . [the student] may express his opinions, even on controversial subjects like the conflict in Vietnam.”³⁵ That does not mean that students are free to prevent the school from performing its basic functions. The student may speak as long as she “does so without ‘materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.”³⁶ That said, however,

conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.³⁷

When discussing student behavior inside and outside of class, the Court did not make clear whether the *Tinker* analysis should also be applied to off-campus conduct after school hours or was instead limited to conduct that was under the auspices of the school. Regrettably, the Court never clarified in the subsequent case law the conditions under which a school could reach off-campus behavior not under school auspices.³⁸

The *Tinker* Court interpreted the Constitution to provide substantial protection for student speech. Neither probable nor actual harm will justify the punishment of student speech unless that harm is substantial.³⁹ In the case before the Court, “no disturbances or disorders on the school premises in fact occurred”⁴⁰ and, further, the record did not contain “any facts

³³ *Id.*

³⁴ *Id.* at 512.

³⁵ *Id.* at 512–13.

³⁶ *Id.* at 513 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

³⁷ *Id.* (citing *Blackwell v. Issaquena Cty. Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966)).

³⁸ See *infra* notes 53–206 and accompanying text (discussing other Supreme Court school expression cases).

³⁹ See Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CALIF. L. REV. 1269, 1338 (1991) (“*Tinker* . . . requires a showing of either a material or substantial disruption of the school’s work or harm to students.”).

⁴⁰ *Tinker*, 393 U.S. at 514.

which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.”⁴¹ Precisely because of the lack of such evidence, the *Tinker* Court saw no need to specify what would count as a sufficient disturbance to justify punishment; however, Justice Black in his dissent noted some of the disturbances contained in the record that together failed to meet the Court’s implicit standard.⁴² For example, the “armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone.”⁴³ Further, one mathematics teacher testified that “his lesson period [was] practically ‘wrecked’ chiefly by disputes with Mary Beth Tinker, who wore her armband for her ‘demonstration.’”⁴⁴ Thus, the Court implied that stimulating discussion in classrooms that veered from the planned content for the day would not alone suffice to establish that students had substantially disrupted school activities.⁴⁵

The majority opinion was open to at least two interpretations: (1) the loss of one mathematics class failed to qualify as a substantial disruption⁴⁶ or (2) while the loss of a class could constitute a substantial disruption, in this case the teacher himself decided to change the focus of the lesson that day to turn

⁴¹ *Id.* See also Kristi L. Bowman, *Public School Students’ Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 201–02 (2007) (“The test for which *Tinker* is well-known and oft-cited is that student speech may be restricted if . . . such interference is reasonably anticipated by school officials.”).

⁴² See *infra* notes 44–45 and accompanying text.

⁴³ *Tinker*, 393 U.S. at 517 (Black, J., dissenting).

⁴⁴ *Id.*

⁴⁵ See *Tinker*, 393 U.S. at 514. Surprisingly, some have not appreciated this aspect of *Tinker*. See Douglas E. Abrams, *Recognizing the Public Schools’ Authority to Discipline Students’ Off-Campus Cyberbullying of Classmates*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 181, 207–08 (2011) (“Lower courts have found material and substantial disruption where student speech disturbs or distracts classroom teaching or lesson plans. Indeed, proof of such disturbance or distraction would almost certainly have won for the school district in *Tinker* itself.”); Reesa Miles, *Defamation Is More Than Just A Tort: A New Constitutional Standard for Internet Student Speech*, 2013 BYU EDUC. & L. J. 357, 361–62 (2013) (“While the armbands may have caused discussion outside the classroom, they did not interfere with the classroom itself.”); Emily Gold Waldman, *Returning to Hazelwood’s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 69 (2008) (“Although the armbands had caused ‘discussion outside of the classrooms,’ they had [not] disrupted class work.”).

⁴⁶ Cf. Lisa C. Connolly, *Anti-Gay Bullying in Schools-Are Anti-Bullying Statutes the Solution?*, 87 N.Y.U. L. REV. 248, 269 (2012) (“*Tinker* appears to set a stringent bar for a finding of substantial disruption.”).

the wearing of an armband into a teachable moment.⁴⁷ If indeed the teacher himself decided that the armband presented an opportunity to digress in a way that would benefit the students, then the change in the curriculum that day should not be attributed to the student but instead to the teacher who (perhaps wisely) decided to take advantage of an opportunity to discuss important events.⁴⁸ Allowing a teacher to react to a student's passive expression and thereby convert it into punishable expression would permit the teacher to employ a heckler's veto.⁴⁹ School personnel should not be permitted to exercise such a veto if students have robust speech rights.⁵⁰ That said, however, it might be necessary to prohibit certain expression where, for example, there is ample reason to believe that permitting students to wear certain clothing would result in fights, injuries, or deaths.⁵¹

⁴⁷ Cf. Susannah Barton Tobin, *Divining Hazelwood: The Need for A Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 264 (2004) ("To the extent that controversial speech interferes with those objectives, teachers and administrators should take the opportunity to engage students in dialogue and consider each controversy a 'teachable moment.'").

⁴⁸ Alexander Wohl, *Oiling the Schoolhouse Gate: After Forty Years of Tinkering with Teachers' First Amendment Rights, Time for A New Beginning*, 58 AM. U. L. REV. 1285, 1286–87 (2009) (discussing how *Tinker* provided a great example of a teachable moment for several different reasons).

⁴⁹ Kristi L. Bowman, *The Civil Rights Roots of Tinker's Disruption Tests*, 58 AM. U. L. REV. 1129, 1145 (2009) ("[T]he decision in *Tinker* led to a series of difficult and problematic questions including . . . the role of the so-called heckler's veto in assessing the level of actual or anticipated disruption."); John E. Taylor, *Tinker and Viewpoint Discrimination*, 77 UMKC L. REV. 569, 579 (2009) ("[F]orty years of applying *Tinker* have not made clear the degree to which *Tinker* allows schools to engage in a heckler's veto."); R. George Wright, *Tinker and Student Free Speech Rights: A Functional Alternative*, 41 IND. L. REV. 105, 112–13 (2008) (discussing "credible threats of altercations and disorder under the alternative *Tinker* 'disruption' prong"); R. George Wright, *Post-Tinker*, 10 STAN. J. C.R. & C.L. 1, 2 n.11 (2014) ("Whether *Tinker*, in contrast, allows for a 'heckler's veto' by opponents of the actual or proposed speech . . . is worthy of reflection.").

⁵⁰ Cf. *Tinker*, 393 U.S. at 510 (discussing the *Tinker* Court's refusal to permit school authorities to censor some but not other controversial speech); see *supra* notes 36–38, and accompanying text.

⁵¹ See Alison M. Barbarosh, *Undressing the First Amendment in Public Schools: Do Uniform Dress Codes Violate Students' First Amendment Rights?*, 28 LOY. L.A. L. REV. 1415, 1418–19 (1995) ("One popular approach taken across the country has been the adoption of dress codes that prohibit students from wearing gang-related apparel at school."). *But cf.* *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 766 (9th Cir. 2014), *cert. denied sub nom. Dariano ex rel. M.D. v. Morgan Hill Unified Sch. Dist.*, 135 S. Ct. 1700 (2015) (O'Scannlain, J., dissenting) ("It is this bedrock principle—known as the heckler's veto doctrine—that the panel overlooks, condoning the suppression of free speech by some students because *other students* might have reacted violently.").

B. Exceptions to Tinker

*Bethel School District No. 403 v. Fraser*⁵² provides a counterweight to *Tinker*.⁵³ At issue was “whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.”⁵⁴ Matthew Fraser gave a nomination speech at a student assembly where he “referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.”⁵⁵

Discussing student reactions to the speech, a school counselor explained that “[s]ome students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent’s speech[, while still] [o]ther students appeared to be bewildered and embarrassed by the speech.”⁵⁶ The day after the speech, the Assistant Principal summoned Fraser to her office,⁵⁷ telling him that the school considered the speech a violation of school policy.⁵⁸ The school policy Fraser violated read as follows: “Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.”⁵⁹ His speech was determined to be obscene, at least for purposes of that policy.⁶⁰ He was eventually suspended for two days.⁶¹

Fraser challenged the punishment in federal court.⁶² The district court held that the school had violated Fraser’s First

⁵² 478 U.S. 675 (1986).

⁵³ Jeremy Jorgensen, *Student Rights Up in Smoke: The Supreme Court’s Clouded Judgment in Morse v. Frederick*, 25 *TOURO L. REV.* 739, 747 (2009) (“Reversing the lower courts, the Supreme Court abandoned *Tinker*’s substantial disruption test and held that censoring the student’s sexually insinuating speech did not contravene the First Amendment.”); Joseph A. Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 *DRAKE L. REV.* 97, 100 (2010) (“*Fraser* is an exception to *Tinker* because it did not overrule *Tinker* and allows a school to regulate student speech, even absent a substantial disruption.”).

⁵⁴ *Fraser*, 478 U.S. at 677.

⁵⁵ *Id.* at 677–78.

⁵⁶ *Id.* at 678.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 679 (“The examiner determined that the speech fell within the ordinary meaning of ‘obscene,’ as used in the disruptive-conduct rule . . .”).

⁶¹ *Id.*

⁶² *Id.* (“Respondent, by his father as guardian ad litem, then brought this action in the United States District Court for the Western District of Washington.”).

Amendment rights,⁶³ a decision affirmed by the Ninth Circuit.⁶⁴ The United States Supreme Court granted certiorari and reversed.⁶⁵

While acknowledging *Tinker's* holding that students retain First Amendment rights,⁶⁶ the *Fraser* Court noted the “marked distinction between the political ‘message’ of the armbands in *Tinker* and the sexual content of respondent's speech.”⁶⁷ The Court explained that “[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.”⁶⁸ After all, students must learn to keep their audience in mind.⁶⁹ “Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.”⁷⁰

After acknowledging the right of adults to express political views in offensive terms,⁷¹ the *Fraser* Court explained that children do not have that same robust First Amendment right in school.⁷² Permitting the kind of speech employed by *Fraser* might have undermined the ability of the school to impart civic virtue. “The schools . . . may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school

⁶³ *Id.* (“The District Court held that the school's sanctions violated respondent's right to freedom of speech under the First Amendment to the United States Constitution . . .”).

⁶⁴ *Id.* (“The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court . . .”).

⁶⁵ *Id.* at 680.

⁶⁶ *Fraser*, 478 U.S. at 680 (“This Court acknowledged in *Tinker v. Des Moines Independent Community School Dist.* . . . that students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

⁶⁷ *Id.*

⁶⁸ *Id.* at 681.

⁶⁹ Cf. Paul J. Beard II & Robert Luther III, *A Superintendent's Guide to Student Free Speech in California Public Schools*, 12 U.C. DAVIS J. JUV. L. & POL'Y 381, 396 (2008) (“First Amendment protection over student speech would turn in large part, not on the message as objectively read or heard, but on the reactions of the message's readers or hearers.”).

⁷⁰ *Fraser*, 478 U.S. at 681.

⁷¹ *Id.* at 682 (“A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens.”) (citing *Cohen v. California*, 403 U.S. 15 (1971)).

⁷² *Id.* (“It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.”).

that tolerates lewd, indecent, or offensive speech.”⁷³

When discussing why the school’s action passed constitutional muster, the Court focused on “the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.”⁷⁴ The Court also discussed its recognition of “an interest in protecting minors from exposure to vulgar and offensive spoken language.”⁷⁵ The Court concluded that “[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school’s basic educational mission.”⁷⁶

While the *Fraser* opinion was clear that the speech was not protected, the opinion was less clear about why that was so.⁷⁷ Perhaps it was because the speech caused some disturbance at the school⁷⁸ or perhaps because the Court believed the speech to be outside of First Amendment protection.⁷⁹ Insofar as schools may punish any speech that might be thought to undermine their mission,⁸⁰ the schools would have been granted a robust power to limit speech.⁸¹

⁷³ *Id.* at 683.

⁷⁴ *Id.* at 684 (alteration in original).

⁷⁵ *Id.*

⁷⁶ *Fraser*, 478 U.S. at 685. See also Sarah Tope Reise, “Just Say No” to Pro-Drug and Alcohol Student Speech: The Constitutionality of School Prohibitions of Student Speech Promoting Drug and Alcohol Use, 57 EMORY L.J. 1259, 1267 (2008) (“[T]he Court held that the First Amendment does not protect a student’s use of vulgar, offensive, lewd, or obscene language in school.”).

⁷⁷ Jonathan Pyle, *Speech in Public Schools: Different Context or Different Rights?*, 4 U. PA. J. CONST. L. 586, 596–97 (2002) (“[T]he Court decided *Bethel School District v. Fraser*, upholding a high school’s suspension of a student for giving a speech laden with sexual innuendo at an official high school assembly. Separating the dicta from the holding of this opinion is difficult.”) (footnote omitted).

⁷⁸ *But see Fraser*, 478 U.S. at 690 (Marshall, J., dissenting) (“I dissent from the Court’s decision, however, because in my view the School District failed to demonstrate that respondent’s remarks were indeed disruptive.”).

⁷⁹ *But see id.* at 688 (Brennan, J., concurring in the judgment) (“[D]espite the Court’s characterizations, the language respondent used is far removed from the very narrow class of ‘obscene’ speech which the Court has held is not protected by the First Amendment.”) (citing *Ginsberg v. New York*, 390 U.S. 629, 635 (1968); *Roth v. United States*, 354 U.S. 476, 485 (1957)).

⁸⁰ See Maureen Sullivan, *Democratic Values in a Digitized World: Regulating Internet Speech in Schools to Further the Educational Mission*, 96 MARQ. L. REV. 689, 728 (2012) (“In order to uphold its educational mission, a school needs to be able to use its discretion to limit speech that is damaging to that objective.”).

⁸¹ See Adam K. Nalley, *Did Student Speech Get Thrown Out with the Banner? Reading “Bong Hits 4 Jesus” Narrowly to Uphold Important Constitutional Protections for Students*,

The Court noted that Fraser's language had been found obscene for purposes of the school policy,⁸² and that obscenity falls outside of First Amendment protection.⁸³ But, as Justice Brennan pointed out in his concurring opinion, the language used by Fraser did not count as obscenity for First Amendment purposes,⁸⁴ which made it somewhat difficult to tell exactly what the Court was saying or implying.

There is yet another difficulty posed in the opinion. The school policy noted that language that materially and substantially interfered with the educational process was prohibited, including the use of obscene language.⁸⁵ But that means that someone using inappropriate language would meet the material and substantial disruption standard, even if no one batted an eyelash or modified a lesson plan one iota in response to that language.⁸⁶ However, in *Fraser*, a teacher testified that she had modified her lesson plan the day after the speech,⁸⁷ despite losing only a portion of the class.⁸⁸ This meant that more class time was lost as a result of the armband in *Tinker* than the speech

46 HOUS. L. REV. 615, 637 (2009) ("The educational mission argument has the potential to dangerously limit student speech in many . . . areas.") (footnote omitted); see also Jordan Blair Woods, *Morse v. Frederick's New Perspective on Schools' Basic Educational Missions and the Implications for Gay-Straight Alliance First Amendment Jurisprudence*, 18 COLUM. J. GENDER & L. 281, 299 (2008) ("[A]fter *Tinker*, the Supreme Court increasingly granted schools authority to limit student expression that violated their self-defined basic educational missions.").

⁸² See *Fraser*, 478 U.S. at 679.

⁸³ *Roth v. United States*, 354 U.S. 476, 492 (1957) ("[O]bscenity is not expression protected by the First Amendment.") (footnote omitted).

⁸⁴ See *Fraser*, 478 U.S. at 688 (Brennan, J., concurring).

⁸⁵ See *id.* at 678 (majority opinion).

⁸⁶ See *id.* at 693 (Stevens, J., dissenting) ("Based on the findings of fact made by the District Court, the Court of Appeals concluded that the evidence did not show 'that the speech had a materially disruptive effect on the educational process.'" (citing *Fraser v. Bethel Sch. Dist.*, 755 F.2d 1356, 1361 (9th Cir. 1985), *rev'd*, 478 U.S. 675 (1986)). See also Clay Calvert, *Mixed Messages, Muddled Meanings, Drunk Dicks, and Boobies Bracelets: Sexually Suggestive Student Speech and the Need to Overrule or Radically Refashion Fraser*, 90 DENV. U. L. REV. 131, 134 (2012) ("Under *Fraser*, a message determined to possess a sexual connotation can be permissibly punished despite the absence of any evidence suggesting it will have even the slightest disruptive effect among the student body."); Kevin W. Saunders, *Hate Speech in the Schools: A Potential Change in Direction*, 64 ME. L. REV. 165, 173 (2011) ("Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*." (quoting *Morse v. Frederick*, 551 U.S. 393, 404–05 (2007))).

⁸⁷ *Fraser*, 478 U.S. at 678 ("One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class.").

⁸⁸ *Id.*

in *Fraser*.⁸⁹

Fraser might be read to carve out an exception for indecent speech, especially when directed at minors.⁹⁰ But the *Fraser* Court emphasized the offensiveness of the speech at issue,⁹¹ and offensive speech need not be lewd.⁹² By stating that “lewd, indecent or offensive speech” may be punished,⁹³ the Court suggested that schools were not limited with respect to the kinds of offensive speech that could be discouraged.⁹⁴

That point was illustrated in a much different case. At issue in *Hazelwood School District v. Kuhlmeier*⁹⁵ was “the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school’s journalism curriculum.”⁹⁶ The student newspaper was published roughly every three weeks⁹⁷ and the practice was to submit the proofs ahead of time to the principal for his approval.⁹⁸ One issue was submitted three days prior to the expected publication date.⁹⁹ Regrettably, the principal had some concerns about two of the articles that were to appear.¹⁰⁰ One article concerned student

⁸⁹ See *Tinker*, 393 U.S. at 517 (Black, J., dissenting).

⁹⁰ Justice Mary Muehlen Maring, “*Children Should Be Seen and Not Heard*”: *Do Children Shed Their Right to Free Speech at the Schoolhouse Gate?*, 74 N.D. L. REV. 679, 685 (1998) (explaining that “*Fraser*’s speech was vulgar and lewd, as opposed to disruptive, and directed at a young audience”). Cf. Melinda Cupps Dickler, *The Morse Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 368 (2007) (“The *Fraser* Court’s use of that language . . . had been limited by *Fraser*’s context to student speech that was vulgar or lewd.”); Jacob Tabor, *Students’ First Amendment Rights in the Age of the Internet: Off-Campus Cyberspeech and School Regulation*, 50 B.C. L. REV. 561, 566 (2009) (“At its narrowest, it [*Fraser*] holds that in a student assembly, a school may punish lewd and vulgar speech.”).

⁹¹ See Justin T. Peterson, *School Authority v. Students’ First Amendment Rights: Is Subjectivity Strangling the Free Mind at Its Source?*, 3 MICH. ST. L. REV. 931, 936 (2005) (“According to the Court, the school serves an appropriate function of public education by prohibiting lewd, vulgar, or offensive speech.”) (citing *Fraser*, 478 U.S. at 683).

⁹² See *Fraser*, 478 U.S. at 683–84 (“We have also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language.”).

⁹³ *Id.* at 683 (“The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”).

⁹⁴ Cf. Tabor, *supra* note 91, at 566 (“At its broadest, it [*Fraser*] holds that schools may punish speech that would undermine the school’s educational mission as determined by the school board.”).

⁹⁵ 484 U.S. 260 (1988).

⁹⁶ *Id.* at 262.

⁹⁷ *Id.*

⁹⁸ *Id.* at 263.

⁹⁹ *Id.* (“On May 10, Emerson delivered the proofs of the May 13 edition to Reynolds . . .”).

¹⁰⁰ *Id.*

pregnancy and he feared that the identity of the students might be ascertained, use of pseudonyms notwithstanding.¹⁰¹ He also feared that the discussion of sexual activity and birth control might not be suitable for some of the younger students.¹⁰² The other article was problematic because it contained a student's view of her parents' divorce and the parents had not been given an opportunity to respond.¹⁰³ In addition, he (wrongly) believed that the student was named in the article.¹⁰⁴

The principal saw few options. The necessary changes could not be made before the scheduled print run¹⁰⁵ and a significant delay in publication would mean that the newspaper would not be published prior to graduation.¹⁰⁶ He decided that the newspaper should be published as scheduled but without the two articles requiring revision.¹⁰⁷

Students later challenged the principal's actions, claiming that he had violated their First Amendment rights.¹⁰⁸ The district court concluded that the principal's concern about the pregnant girls' loss of anonymity and the accompanying invasion of privacy "was 'legitimate and reasonable,'"¹⁰⁹ and that he was justified in "shield[ing] younger students from exposure to unsuitable material."¹¹⁰ The district court further held that the article about the divorce was justifiably deleted because there was no evidence that the parents had been consulted.¹¹¹ The

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* ("Reynolds believed that the student's parents should have been given an opportunity to respond to these remarks or to consent to their publication.").

¹⁰⁴ *Id.* ("He was unaware that Emerson had deleted the student's name from the final version of the article.").

¹⁰⁵ *Id.* ("Reynolds believed that there was no time to make the necessary changes in the stories before the scheduled press run . . .").

¹⁰⁶ *Id.* at 264 ("[T]he newspaper would not appear before the end of the school year if printing were delayed to any significant extent.").

¹⁰⁷ *Id.* ("[H]e directed Emerson to withhold from publication the two pages containing the stories on pregnancy and divorce.").

¹⁰⁸ *Id.* at 262 ("Respondents are three former Hazelwood East students who were staff members of Spectrum, the school newspaper. They contend that school officials violated their First Amendment rights . . .").

¹⁰⁹ *Id.* at 264.

¹¹⁰ *Id.* at 265.

¹¹¹ *Id.* ("Because the article did not indicate that the student's parents had been offered an opportunity to respond to her allegation . . . there was cause for 'serious doubt that the article complied with the rules of fairness which are standard in the field of journalism . . .").

Eighth Circuit reversed,¹¹² reasoning that the newspaper could not be censored absent evidence of (1) material or substantial interference of school work or discipline¹¹³ or (2) interference with the rights of others.¹¹⁴ Because there was no evidence that the material would have been disruptive and because the articles would not have exposed the school to tort liability, the Eighth Circuit held that the students' First Amendment rights had been violated.¹¹⁵

The United States Supreme Court reversed.¹¹⁶ The *Kuhlmeier* Court began its analysis by noting that *Tinker* precludes students from being punished for expressing their personal opinions at school “unless school authorities have reason to believe that such expression will ‘substantially interfere with the work of the school or impinge upon the rights of other students.’”¹¹⁷ The Court then cited *Fraser* for the proposition that “[a] school need not tolerate student speech that is inconsistent with its ‘basic educational mission.’”¹¹⁸ But the *Tinker* and *Fraser* rules are very different, and reading *Fraser* to permit schools to punish speech that is inconsistent with their basic educational mission, even if not employing lewd or indecent speech, accords schools great deference.¹¹⁹

To make matters more confusing, the Court distinguished between (1) the degree to which the First Amendment limits an “educators' ability to silence a student's personal expression that happens to occur on the school premises,”¹²⁰ and (2) the degree to which the First Amendment limits “educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the

¹¹² *Id.* (“The Court of Appeals for the Eighth Circuit reversed.”) (citing *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368 (1986)).

¹¹³ *Id.*

¹¹⁴ *Id.* at 265.

¹¹⁵ *Id.* at 265–66.

¹¹⁶ *Id.*

¹¹⁷ *Id.* (citing *Tinker*, 393 U.S. at 509).

¹¹⁸ *Id.* (citing *Fraser*, 478 U.S. at 685).

¹¹⁹ See Sean R. Nuttall, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1303 (2008) (reading *Fraser* to accord “schools . . . complete discretion to prohibit lewd, vulgar, or offensive speech”); R. George Wright, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS L. REV. 679, 710–11 (2009) (“*Fraser* has sometimes been interpreted broadly to encompass any speech deemed inconsistent with the school's ‘basic educational mission.’”).

¹²⁰ *Kuhlmeier*, 484 U.S. at 271.

public might reasonably perceive to bear the imprimatur of the school.”¹²¹ The Court reasoned:

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.¹²²

For example, “a school may in its capacity as publisher of a school newspaper or producer of a school play ‘disassociate itself’ . . . from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.”¹²³ But if what was at issue in *Kuhlmeier* (control over material that might reasonably be attributed to the school) was qualitatively different from what was at issue in *Tinker* (political speech) or *Fraser* (lewd speech), then the broad reading of the *Fraser* test was dictum and possibly misleading to include.

The *Kuhlmeier* Court believed that *Tinker* did not control what was before it. “[T]he standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”¹²⁴ That latter standard involved a different test: “[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”¹²⁵ Yet, if indeed *Tinker* is simply the wrong test, then it is not clear why *Tinker* and *Fraser* were mentioned or how they helped the analysis beyond making clear that neither provided the relevant test¹²⁶—neither of those decisions provided support

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* (citing *Fraser*, 478 U.S. at 685).

¹²⁴ *Id.* at 272–73.

¹²⁵ *Id.* at 273.

¹²⁶ Shannon M. Raley, *Tweaking Tinker: Redefining an Outdated Standard for the Internet Era*, 59 CLEV. ST. L. REV. 773, 780 (2011) (“Although the *Kuhlmeier* Court began its

for the new standard for school-sponsored expression.¹²⁷

The Court only added to the confusion when deciding *Morse v. Frederick*.¹²⁸ At issue was whether a student could be punished for refusing to take down a banner at a school-sponsored event.¹²⁹ The Olympic Torch Relay was taking place in Juneau, Alaska by a school while class was in session,¹³⁰ and the principal allowed the staff and students to participate in the relay “as an approved social event or class trip.”¹³¹ Basically, student participation involved “leav[ing] class to observe the relay from either side of the street.”¹³²

Frederick and his friends were observing the relay across the street from the school.¹³³ As the torchbearers and camera crew went by, Frederick and his friends “unfurled a 14-foot banner bearing the phrase: ‘BONG HiTS 4 JESUS.’”¹³⁴ The principal crossed the street and demanded that the banner be taken down.¹³⁵ All but Frederick complied.¹³⁶ The principal confiscated the banner and suspended him for 10 days,¹³⁷ justifying the discipline by saying that the banner advocated illegal drug use.¹³⁸

analysis in a similar manner as both *Tinker* and *Fraser*, it distinguished itself from both cases and ultimately created a new standard under which student speech may be regulated.”); Tabor, *supra* note 91, at 568 (“Having quoted extensively from *Tinker* and from *Fraser*, the [Kuhlmeier] Court chose not to apply either.”).

¹²⁷ *Kuhlmeier*, 484 U.S. at 281 (Brennan, J., dissenting) (“The Court does not, for it cannot, purport to discern from our precedents the distinction it creates.”). Some commentators fail to note the disconnect between *Fraser* and *Kuhlmeier*. See, e.g., Scott A. Moss, *The Overhyped Path from Tinker to Morse: How the Student Speech Cases Show the Limits of Supreme Court Decisions-for the Law and for the Litigants*, 63 FLA. L. REV. 1407, 1427 (2011) (“The *Kuhlmeier* Court interpreted *Fraser* as allowing control of speech in ‘school-sponsored publications, theatrical productions, and other expressive activities that . . . might reasonably [be] perceive[d] to bear the [school] imprimatur.’”) (citations omitted).

¹²⁸ 551 U.S. 393 (2007).

¹²⁹ *Id.* at 396 (“[T]he principal directed the students to take down the banner. One student—among those who had brought the banner to the event—refused to do so. The principal confiscated the banner and later suspended the student.”).

¹³⁰ *Id.* at 397 (“On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a street in front of Juneau–Douglas High School (JDHS) while school was in session.”).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 398.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See *id.*

The *Morse* Court began its analysis by explaining why this case qualified as a student expression case: the event occurred during normal school hours¹³⁹ and was sanctioned by the principal as an approved social event or class trip,¹⁴⁰ which made it subject to school regulations.¹⁴¹ Teachers and administrators were interspersed among the students and were supervising them,¹⁴² and both cheerleaders and the high school band were performing that day.¹⁴³

After having established that this was student speech, the Court analyzed the content of the expression, which admittedly was “cryptic.”¹⁴⁴ Nonetheless, the Court believed it reasonable to interpret the statement as advocating illegal drug use,¹⁴⁵ and the Court held that “[a] principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.”¹⁴⁶

In support of that holding, the Court reviewed the existing jurisprudence, reading *Tinker* as holding that “student expression may not be suppressed unless school officials reasonably conclude that it will ‘materially and substantially disrupt the work and discipline of the school.’”¹⁴⁷ The Court treated armband wearing as “political speech,”¹⁴⁸ and did not discuss whether wearing the armband in December 1965¹⁴⁹ might be viewed as communicating support for those who illegally undermined or interfered with the military draft.¹⁵⁰ However, the

¹³⁹ *Id.* at 400 (“The event occurred during normal school hours.”).

¹⁴⁰ *Id.* (“It was sanctioned by Principal Morse ‘as an approved social event or class trip’ . . .”).

¹⁴¹ *See id.* 400–01 (“[T]he school district’s rules expressly provide that pupils in ‘approved social events and class trips are subject to district rules for student conduct.’”) (citations omitted).

¹⁴² *Id.* at 401 (“Teachers and administrators were interspersed among the students and charged with supervising them.”).

¹⁴³ *Id.* (“The high school band and cheerleaders performed.”).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (“Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.”).

¹⁴⁶ *See id.* at 403.

¹⁴⁷ *Id.* (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

¹⁴⁸ *Id.*

¹⁴⁹ *See Tinker*, 393 U.S. at 504.

¹⁵⁰ *Cf.* Josh Saunders, *Ramsey Clark’s Prosecution Complex How Did Lyndon Johnson’s Attorney General Come to Defend Dictators, War Criminals, and Terrorists?*, *LEGAL AFFAIRS*, Dec. 2003 at 42, 44 (“[I]n 1968, Clark oversaw the prosecution of the pediatrician Dr. Benjamin Spock, Yale chaplain William Sloane Coffin Jr., and three

Morse Court did not treat Frederick's speech as political, at least in part, because he himself claimed that the message was meaningless and was just a ploy to get on TV.¹⁵¹ At the same time, the Court was unwilling to credit Frederick's own interpretation of his statement when characterizing it as in favor of illegal drug use.¹⁵² But if the message was reasonably interpreted by the Court to be promoting illegal drug use, then the message was also reasonably interpreted to be commenting on a social issue by virtue of its being an endorsement of marijuana use.

According to the Court's own interpretation of *Tinker*, Frederick's speech was protected unless (1) it was viewed as "materially and substantially interfer[ing] with the work and discipline of the school,"¹⁵³ or (2) the doctrine had been changed subsequent to *Tinker*.¹⁵⁴ To justify that the doctrine had changed, the Court offered an exposition of *Fraser*.¹⁵⁵

The Court admitted that "[t]he mode of analysis employed in *Fraser* is not entirely clear."¹⁵⁶ While the *Fraser* Court had focused upon the "offensively lewd and indecent speech" at issue,¹⁵⁷ it had also included language suggesting that "school boards have the authority to determine 'what manner of speech in the classroom or in school assembly is inappropriate.'"¹⁵⁸ One interpretation of *Fraser* is that it simply provided an exception to *Tinker*—as a general matter, student

other men accused of conspiring to undermine the Selective Service laws."). The draft did not end until several years later. See Alex Dixon, *July Marks 40th Anniversary of All-Volunteer Army*, U.S. ARMY (July 2, 2013), https://www.army.mil/article/106813/July_marks_40th_anniversary_of_all_volunteer_Army ("By July 1, 1973—now 40 years ago—the draft had been eliminated.").

¹⁵¹ See *Morse*, 551 U.S. at 401 ("Frederick himself claimed 'that the words were just nonsense meant to attract television cameras.'") (citing *Frederick v. Morse*, 439 F.3d 1114, 1117–18 (9th Cir. 2006), *rev'd and remanded*, 551 U.S. 393 (2007), and *vacated*, 499 F.3d 926 (9th Cir. 2007)). See also *id.* at 403 ("But not even Frederick argues that the banner conveys any sort of political or religious message.").

¹⁵² See *id.* at 402 ("The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear. The best Frederick can come up with is that the banner is 'meaningless and funny.'") (quoting *Frederick*, 439 F.3d at 1116).

¹⁵³ *Id.* at 403 (citing *Tinker*, 393 U.S. at 513).

¹⁵⁴ See *infra* notes 158–68 and accompanying text.

¹⁵⁵ See *Morse*, 551 U.S. at 404–05.

¹⁵⁶ *Id.* at 404.

¹⁵⁷ *Id.* (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986)).

¹⁵⁸ *Id.* (quoting *Fraser*, 478 U.S. at 683).

speech is protected unless (1) materially and substantially disrupting school¹⁵⁹ or (2) the speech is itself “offensively lewd and indecent.”¹⁶⁰ But that interpretation would suggest that Frederick’s speech was protected, absent a showing of disruption. Yet, there are other possible interpretations of *Fraser*, for example, that school can prohibit lewd, indecent, or offensive speech.¹⁶¹ The latter interpretation would permit Frederick’s speech to be punished, assuming that it might reasonably be found offensive.¹⁶²

The Court explained that it “need not resolve this debate [about the best interpretation of *Fraser*] to decide this case”¹⁶³ but then eschewed the interpretation establishing that the *Tinker* material disruption requirement applies unless the speech is lewd or offensive.¹⁶⁴ The Court reasoned that it was “enough to distill from *Fraser* two basic principles:”¹⁶⁵ (1) “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,”¹⁶⁶ and (2) that “the mode of analysis set forth in *Tinker* is not absolute.”¹⁶⁷

Here, the Court was simply wrong to believe that the two distilled principles were enough to establish that Frederick’s speech could be punished. *Tinker* itself suggests that the constitutional rights of students in schools are not coextensive with the rights of adults in other settings.¹⁶⁸ Under *Tinker*, students could have been punished for wearing armbands if doing so was disruptive, whereas an adult’s wearing an armband in the public square would not be similarly treated.¹⁶⁹ That

¹⁵⁹ *Id.* at 403 (citing *Tinker*, 393 U.S. at 513).

¹⁶⁰ *Id.* at 404 (citing *Fraser*, 478 U.S. at 685).

¹⁶¹ *Fraser*, 478 U.S. at 683.

¹⁶² *See Cf. Morse*, 551 U.S. at 401 (“The message on Frederick’s banner is . . . no doubt offensive to some . . .”).

¹⁶³ *Id.* at 404.

¹⁶⁴ *See infra* note 172 and accompanying text.

¹⁶⁵ *Morse*, 551 U.S. at 404.

¹⁶⁶ *Id.* at 404–05 (citing *Fraser*, 478 U.S. at 682).

¹⁶⁷ *Id.* at 405 (citing *Tinker*, 393 U.S. at 514).

¹⁶⁸ *See Tinker*, 393 U.S. at 514 (holding that restricting student speech would be appropriate upon “a showing that the students’ activities would materially and substantially disrupt the work and discipline of the school.”).

¹⁶⁹ *Cf. Parks v. Finan*, 385 F.3d 694, 700 (6th Cir. 2004) (striking down “permitting scheme [as applied] to individuals like Parks, who may be speaking, wearing signs, and/or leafletting, [because the scheme] unconstitutionally burdens free expression in violation of the First Amendment.”).

student speech rights are not coextensive with those of adults does not establish that Frederick's speech was subject to punishment. Further, if *Fraser* was recognizing an exception to the *Tinker* analysis for lewd or indecent speech, then the *Fraser* exception would not have been triggered in *Morse* and the Court would have held the speech protected absent a showing of disruption.

Basically, the *Morse* Court did resolve that *Fraser* should not be read as a limited exception to *Tinker*.¹⁷⁰ What remained unresolved was just how broadly the current exception should be read—does that exception only include lewd speech and speech promoting illegal drug use,¹⁷¹ or is the exception broader than that? The Court also pointed to *Kuhlmeier*, noting that it confirmed both that “schools may regulate some speech ‘even though the government could not censor similar speech outside the school,’”¹⁷² and that “the rule of *Tinker* is not the only basis for restricting student speech.”¹⁷³ While the Court admitted that “*Kuhlmeier* does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur,”¹⁷⁴ the Court implied that both *Fraser* and *Kuhlmeier* left open how broadly the exception to *Tinker* should be read rather than representing limited exceptions involving perceived state endorsement or the use of sexually indecent language.¹⁷⁵

In his concurring opinion, Justice Thomas made clear his view that *Tinker* was simply wrongly decided,¹⁷⁶ which allegedly was why the Court had felt the need to “set the standard aside on an ad hoc basis.”¹⁷⁷ He read *Fraser* as announcing an

¹⁷⁰ See *Morse*, 551 U.S. at 405 (“Whatever approach *Fraser* employed, it certainly did not conduct the ‘substantial disruption’ analysis prescribed by *Tinker*.”).

¹⁷¹ See *id.* at 407 (“[T]hese cases also recognize that deterring drug use by schoolchildren is an ‘important—indeed, perhaps compelling’ interest.”) (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

¹⁷² *Id.* at 405–06 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)).

¹⁷³ *Id.* at 406.

¹⁷⁴ *Id.* at 405.

¹⁷⁵ *Id.* at 405–06 (“[L]ike *Fraser*, [*Kuhlmeier*] confirms that the rule of *Tinker* is not the only basis for restricting student speech.”).

¹⁷⁶ *Id.* at 410 (Thomas, J., concurring) (“I write separately to state my view that the standard set forth in *Tinker* . . . is without basis in the Constitution.”).

¹⁷⁷ *Id.* at 417 (Thomas, J., concurring).

exception,¹⁷⁸ *Kuhlmeier* as announcing a different exception,¹⁷⁹ and *Morse* as announcing yet another exception.¹⁸⁰ But he noted that the Court has failed to “offer an explanation of when [*Tinker*] operates and when it does not.”¹⁸¹ In contrast, Justice Alito implied that *Tinker* governs¹⁸² unless certain limited exceptions are triggered: (1) the speech is reasonably interpreted to be advocating illegal drug use,¹⁸³ (2) the speech is lewd or vulgar,¹⁸⁴ or (3) the speech “is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ.”¹⁸⁵

At the very least, the Court has left open many questions. Should advocacy of illegal conduct not involving drugs be subjected to a more protective standard?¹⁸⁶ What constitutes a substantial disruption? Under what conditions, if any, will student speech undermining a school's mission be subject to punishment?

Justice Alito in his concurrence joined the opinion “on the understanding that . . . it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as ‘the wisdom of the war on drugs or of legalizing marijuana for medicinal use.’”¹⁸⁷ Yet, it is difficult to know what to make of this caveat if only because an individual might at the same time advocate illegal drug use and make a comment about

¹⁷⁸ *Id.* at 418 (Thomas, J., concurring) (“Signaling at least a partial break with *Tinker*, *Fraser* left the regulation of indecent student speech to local schools.”).

¹⁷⁹ *Id.* at 418 (Thomas, J., concurring) (“[I]n *Hazelwood School Dist. v. Kuhlmeier* . . . the Court made an exception to *Tinker* for school-sponsored activities.”).

¹⁸⁰ *Id.* (Thomas, J., concurring) (“Today, the Court creates another exception.”).

¹⁸¹ *Id.* (Thomas, J., concurring).

¹⁸² *Id.* at 422 (Alito, J., concurring) (“I do not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court.”).

¹⁸³ *Id.* (Alito J., concurring) (“[T]he decision in the present case allows the restriction of speech advocating illegal drug use.”).

¹⁸⁴ *Id.* (Alito J., concurring) (citing *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986)).

¹⁸⁵ *Id.* at 423 (Alito, J., concurring) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

¹⁸⁶ *See id.* at 436 (Stevens, J., dissenting) (“[P]unishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid.”) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969)).

¹⁸⁷ *Id.* at 422 (Alito, J., concurring).

a current social issue.¹⁸⁸ Indeed, insofar as one wishes to impute content to “BONG HiTS 4 JESUS”¹⁸⁹ rather than simply call it nonsensical,¹⁹⁰ one would presumably ascribe to the speaker a positive attitude towards the use of marijuana, which would be a comment on a social issue.¹⁹¹ If the reason that Frederick’s speech could be punished was that drug use can be detrimental,¹⁹² then the same exception might swallow political commentary on guns in schools, since gun “use presents a grave and in many ways unique threat to the physical safety of students.”¹⁹³ The difficulty that Justice Alito allegedly wishes to avoid, namely, that the “‘educational mission’ argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed,”¹⁹⁴ seems to infect his analysis. Many issues of current concern might be said to involve unique dangers or be inflammatory,¹⁹⁵ which would justify their being subject to punishment. Arguably, there are unique dangers implicated when casting aspersions upon groups based upon race, religion, nationality, immigration status, or sexual orientation or identity. Discussions about political questions can be very divisive, resulting in hurt feelings or lashing out. In short, the unique danger exception may be so broad as to swallow the rule.

¹⁸⁸ See *id.* at 426 (Breyer, J., concurring) (“But speech advocating change in drug laws might also be perceived of as promoting the disregard of existing drug laws.”).

¹⁸⁹ *Id.* at 397.

¹⁹⁰ See *id.* at 401. Cf. *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 766 (5th Cir. 2007) (“This appeal presents the question of whether student speech that threatens a Columbine-style attack on a school is protected by the First Amendment. Today we follow the lead of the United States Supreme Court in *Morse v. Frederick*, 551 U.S. 393 (2007), and hold that it is not because such speech poses a direct threat to the physical safety of the school population.”).

¹⁹¹ See *supra* text accompanying note 155.

¹⁹² *Morse*, 551 U.S. at 425 (Alito, J., concurring) (“[D]rug use presents a grave and in many ways unique threat to the physical safety of students.”).

¹⁹³ *Id.* (Alito, J., concurring). Cf. Melanie E. Migliaccio, *Don't Say "Gun": Is Censorship of Student "Gun" Speech in Public Schools A Permissible Incultation of Shared Community Values or an Unconstitutional Establishment of Orthodoxy?*, 8 LIBERTY U.L. REV. 751, 777 (2014) (“Political speech, like Jared's encouraging others to ‘Protect Your [Second Amendment] Right’ and Michael's support of the military, would appear to be protected under *Tinker*, but the First Amendment protection depends on how courts choose to define the issue.”).

¹⁹⁴ *Morse*, 551 U.S. at 423 (Alito, J., concurring).

¹⁹⁵ See Arielle A. Dagen-Sunsdahl, *Navigating Through Hills & Dales: Can Employers Abide by the NLRA While Maintaining Civil Work Environments?*, 31 ABA J. LAB. & EMP. L. 363, 380 (2016) (discussing “topics that may be considered objectionable or inflammatory, such as politics and religion”).

Justice Alito agreed that “public schools may ban speech advocating illegal drug use.”¹⁹⁶ However, he deemed “such regulation as standing at the far reaches of what the First Amendment permits,”¹⁹⁷ and he concurred based on “the understanding that the opinion does not endorse any further extension.”¹⁹⁸ Yet, the questions at hand included whether the First Amendment permits banning such speech and, if so, whether the First Amendment also permits banning other speech, e.g., about other dangerous or illegal activities.

Justice Alito was unwilling to read *Morse* as “endors[ing] the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school’s ‘educational mission.’”¹⁹⁹ But *Morse* is adding an additional exception to those already recognized in *Fraser* and *Kuhlmeier*, so the more pressing concern is whether *Fraser* recognized an educational mission exception and how broadly *Kuhlmeier*’s school endorsement test can be read.

Justice Alito argued that the “‘educational mission’ . . . argument can easily be manipulated in dangerous ways” and that he “would reject it before such abuse occurs.”²⁰⁰ Some commentators believe that he was thereby offering an important limitation on *Fraser*.²⁰¹ But whether this was a significant limitation on *Fraser* depends a great deal upon what he would consider an abuse. It seems plausible to believe that he has particular kinds of expression in mind that he would not want to be limited, such as the expression of student views that

¹⁹⁶ *Morse*, 551 U.S. at 425 (Alito, J., concurring).

¹⁹⁷ *Id.* (Alito, J., concurring).

¹⁹⁸ *Id.* (Alito, J., concurring).

¹⁹⁹ *Id.* at 423 (Alito, J., concurring).

²⁰⁰ *Id.* (Alito, J., concurring).

²⁰¹ Nuttall, *supra* note 122, at 1310 (“Justice Alito’s concurrence may take this overly lenient justification off the table.”); Jeremiah Galus, *Bong Hits 4 Jesus: Student Speech and the “Educational Mission” Argument After Morse v. Frederick*, 71 U. PITT. L. REV. 143, 144 (2009) (“Justice Alito’s concurring opinion rejects the propriety of extending *Fraser* and *Kuhlmeier*’s exceptions to *Tinker* to include student speech contrary to the school’s educational mission.”).

denigrate²⁰² sexual minorities²⁰³—Justice Alito likely wants to prevent certain religious viewpoints from being subject to punishment.²⁰⁴ But it is of course true that the sincere representation of religious beliefs can make some students feel unwelcome and impair their ability to learn.²⁰⁵ Justice Alito’s fears that standards might easily be manipulated is well-illustrated by the Court’s own interpretation of “BONG HiTS 4 JESUS.” Assuming that the expression is not simply nonsense, the difficulty posed for the Court is in its apparent willingness to accept that the expression may reasonably be interpreted as support for illegal drug use but *not* as general support for marijuana use and *not* that drug use may help one feel closer to (one’s) God. These latter interpretations would have made the sign protected as comments on social, political, or religious matters. In short, the Court has announced a standard under *Tinker* but has created possibly large exceptions under *Fraser*, *Kuhlmeier*, and *Morse* without offering any useful way to cabin those exceptions.

II. THE CIRCUITS TRY TO FOLLOW THE COURT’S LEAD

The Court has made clear that student speech rights are not absolute, so school and courts can be confident that punishing students for their speech in some circumstances is constitutionally permissible.²⁰⁶ Regrettably, the Court has spelled out the contours of the exceptions so poorly that it is difficult to

²⁰² Francisco M. Negrón, Jr., *A Foot in the Door? The Unwitting Move Towards A "New" Student Welfare Standard in Student Speech After Morse v. Frederick*, 58 AM. U. L. REV. 1221, 1235 (2009) (“Surely derogatory speech targeting members of minority groups, identified by race, ethnicity, religion or sexual orientation not only interferes with that mission, but can also be said to infringe on the rights of students to learn in an environment free of harassment.”).

²⁰³ Cf. Emily Gold Waldman, *A Post-Morse Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 488 (2008) (“[T]here was much in the majority opinion and Justice Alito’s concurrence to please religious advocacy groups.”).

²⁰⁴ Cf. *Christian Legal Soc’y Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 723–24 (2010) (Alito, J., dissenting) (“[W]hen Hastings refused to register CLS, it claimed that the CLS bylaws *impermissibly discriminated on the basis of religion and sexual orientation*. As interpreted by Hastings and applied to CLS, *both of these grounds constituted viewpoint discrimination*.”) (emphasis added).

²⁰⁵ *Id.* at 688 (majority opinion).

²⁰⁶ See, e.g., *Morse v. Frederick*, 551 U.S. 393, 403–04 (2007).

know what is permissibly punished and what is not. The circuits have been trying to fill in the gaps, which unsurprisingly has resulted in differing and incompatible doctrines.

A. Threatening Speech

*Bell v. Itawamba County School Board*²⁰⁷ illustrates the difficulties in applying the substantial disruption rule. Taylor Bell posted a rap recording on the internet, which contained threatening language against two high school coaches.²⁰⁸ The Fifth Circuit framed the question as whether the *Tinker* substantial disruption exception might be triggered by “off-campus speech directed intentionally at the school community and reasonably understood by school officials to be threatening, harassing, and intimidating to a teacher.”²⁰⁹ The Fifth Circuit affirmed the constitutionality of the discipline imposed, reasoning that the *Tinker* substantial disruption standard had been met.²¹⁰

First, Bell’s expression was reasonably thought threatening—he said that he was going to hit a particular individual with a pistol or put a pistol down that individual’s throat.²¹¹ While Bell may have had no intention of committing any violent behavior,²¹² one of the targeted individuals testified that he felt threatened.²¹³

True threats are not protected by the First Amendment,²¹⁴ and the person making a threat need not intend to carry it out in order to be found to have made a threat.²¹⁵ The Fifth Circuit held that the speech was threatening, which alone sufficed to establish

²⁰⁷ 799 F.3d 379 (5th Cir. 2015), *cert. denied sub nom.* *Bell v. Itawamba Cty. Sch. Bd.*, 136 S. Ct. 1166 (2016).

²⁰⁸ *Id.* at 383 (“Taylor Bell, a student at Itawamba Agricultural High School in Itawamba County, Mississippi, posted a rap recording containing threatening language against two high school teachers/coaches on the Internet.”).

²⁰⁹ *Id.*

²¹⁰ *See id.* (citing *Tinker*, 393 U.S. at 514).

²¹¹ *See id.* at 384.

²¹² *Id.* at 386. (“[H]e did not think the coaches would hear the recording and did not intend it to be a threat.”)

²¹³ *Id.* at 388 (“Coach W. testified he: interpreted the statements in the rap recording literally, after hearing it on a student’s smartphone at school; was ‘scared.’”).

²¹⁴ *See Virginia v. Black*, 538 U.S. 343, 359 (2003) (“[T]he First Amendment also permits a State to ban a ‘true threat.’”) (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)).

²¹⁵ *Id.* at 359–60 (“The speaker need not actually intend to carry out the threat.”).

that the First Amendment did not protect it.²¹⁶ However, the Fifth Circuit refused to base its decision on Bell's having made a true threat,²¹⁷ instead applying *Tinker* to "speech which originated, and was disseminated, off-campus, without the use of school resources."²¹⁸

The desire to reach such speech is understandable. The court explained that the existence of "the Internet, cellphones, smartphones, and digital social media"²¹⁹ and the "sweeping adoption [of technology] by students present new and evolving challenges for school administrators, confounding previously delineated boundaries of permissible regulations."²²⁰ Because of these new technologies, "[s]tudents now have the ability to disseminate instantaneously and communicate widely from any location via the Internet"²²¹ and, further, "[t]hese communications, which may reference events occurring, or to occur, at school, or be about members of the school community, can likewise be accessed anywhere, by anyone, at any time."²²²

An additional and important consideration "is the recent rise in incidents of violence against school communities."²²³ School authorities must "take seriously any statements by students resembling threats of violence"²²⁴ to avoid "[t]his now-tragically common violence."²²⁵ There is a "paramount need for school officials to be able to react quickly and efficiently to protect students and faculty from threats, intimidation, and harassment intentionally directed at the school community."²²⁶ The importance of protecting schools cannot be gainsaid.

²¹⁶ *Bell*, 799 F.3d at 400 (noting that the "high-school student . . . direct[ed] speech at the school community which threaten[ed], harass[ed], and intimidate[d] teachers").

²¹⁷ *Id.* at 400 ("In considering Bell's First Amendment claim, and our having affirmed summary judgment for the school board under *Tinker*, it is unnecessary to decide whether Bell's speech also constitutes a 'true threat.'").

²¹⁸ *Id.* at 393.

²¹⁹ *Id.* at 392.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 393.

²²⁴ *Id.* (citing *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 771 (5th Cir. 2007)).

²²⁵ *Id.*

²²⁶ *Id.* See also *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1064 (9th Cir. 2013) ("With the advent of the Internet and in the wake of school shootings at Columbine, Santee, Newtown and many others, school administrators face the daunting task of evaluating potential threats of violence and keeping their students safe without impinging on their constitutional rights.").

The surprising aspect of the *Bell* reasoning was not its emphasis on the importance of protecting students and school personnel but the circuit's limitation on the speech that could be punished. The court explained that a school cannot reach threats unless the speaker intends that his speech reach the school community.²²⁷ Thus, a student who makes credible threats against school personnel cannot be punished by the school unless he intentionally caused those threats to reach students or school personnel.²²⁸ But given the rise in actual violence and the lives that have been lost in school massacres, it is surprising that credible threats that come to light as a result of the (potential) perpetrator's negligence are nonetheless immune from school punishment.

Tinker suggests that students have First Amendment rights even after they have walked through the schoolhouse gate.²²⁹ But true threats are not protected whether made in or outside of school and whether made by minors or adults,²³⁰ so it is not as if *Tinker* would protect such statements unless substantially disruptive.²³¹ While a separate issue is whether schools should be able to reach speech made off-campus as a matter of policy, the First Amendment does not impose those limitations when true threats are involved.²³²

The issue of intent was not problematic in *Bell*, because he wanted the school community to become aware of his rap to increase awareness of what he believed was wrongdoing by the coaches.²³³ Because that was his intent, the court was not

²²⁷ See *Bell*, 799 F.3d at 395.

²²⁸ Even a slightly more forgiving standard does not seem appropriate in this context. See, e.g., Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 132 (2007) (“[T]he *Tinker* standard of material and substantial disruption should only be applied to off-campus Internet speech when the student knowingly or recklessly distributes the speech on-campus.”).

²²⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

²³⁰ See *Virginia v. Black*, 538 U.S. 343, 359 (2003); see *supra* text accompanying note 217.

²³¹ Cf. Laura Prieston, *Parents, Students, and the Pledge of Allegiance: Why Courts Must Protect the Marketplace of Student Ideas*, 52 B.C. L. REV. 375, 381 (2011) (“Although *Tinker* was protective of students' First Amendment rights, the Court has since made clear that student speech rights are not ‘coextensive with the rights of adults in other settings.’”) (citing *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986)).

²³² See *Black*, 538 U.S. at 359 (“[T]he First Amendment also permits a State to ban a ‘true threat.’”) (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)).

²³³ *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 396 (5th Cir. 2015).

precluded from examining whether the speech had or was likely to cause a disruption.²³⁴ Unsurprisingly, the circuit court found that “the school board reasonably could have forecast a substantial disruption at school, based on the threatening, intimidating, and harassing language in Bell’s rap recording.”²³⁵ Further, there was evidence that school had been disrupted—both coaches who were the subjects of the video claimed that they had changed how they worked as a result of it.²³⁶ (A separate question was whether the coaches should have modified how they acted at school.²³⁷)

Similarly, in *Wynar v. Douglas County School District*,²³⁸ the Ninth Circuit held that a student’s off-campus, threatening message could be punished.²³⁹ In that case, a student at Douglas High School sent from his home “a string of increasingly violent and threatening instant messages . . . to his friends bragging about his weapons, threatening to shoot specific classmates, intimating that he would ‘take out’ other people at a school shooting on a specific date.”²⁴⁰ The Ninth Circuit explained that the “messages presented a real risk of significant disruption to school activities and interfered with the rights of other students.”²⁴¹ The “school authorities . . . temporarily expelled Landon based in large part on these instant messages.”²⁴²

The Ninth Circuit was reluctant to attempt “to divine and impose a global standard for a myriad of circumstances involving

He admitted during the disciplinary-committee hearing that one of the purposes for producing the recording was to “increase awareness of the [alleged misconduct]” and that, by posting the rap recording on Facebook and YouTube, he knew people were “gonna listen to it, somebody’s gonna listen to it,” remarking that “students all have Facebook.”

²³⁴ *Id.* at 397 (“Having held *Tinker* applies in this instance, the next question is whether Bell’s recording either caused an actual disruption or reasonably could be forecast to cause one.”).

²³⁵ *Id.* at 400.

²³⁶ *Id.* at 388 (“Both coaches identified in the rap recording testified that it adversely affected their work at the school.”).

²³⁷ *See id.* at 387 (“At the 10 March hearing for the requested injunction, Bell presented four affidavits from students at his school concerning alleged misconduct by the coaches.”).

²³⁸ 728 F.3d 1062 (9th Cir. 2013).

²³⁹ *Id.* at 1062.

²⁴⁰ *Id.* at 1064–65.

²⁴¹ *Id.* at 1065.

²⁴² *Id.*

off-campus speech.”²⁴³ The court noted that a “student’s profanity-laced parody of a principal is hardly the same as a threat of a school shooting,”²⁴⁴ and reasoned that “the subject and addressees of Landon’s messages [make it] . . . hard to imagine how their nexus to the school could have been more direct.”²⁴⁵ Further, precisely because specific individuals were being threatened with violence, “it should have been reasonably foreseeable to Landon that his messages would reach campus.”²⁴⁶ Here, too, the student claimed to have been joking.²⁴⁷ Others were not so sure. For example, one student’s father refused to allow that student to attend school on any day that the threatening student was also in attendance.²⁴⁸

Rather than impose the Third Circuit requirement that the threatening speech be intended to reach individuals at the school, the Ninth Circuit merely required that it be foreseeable that such information would be communicated.²⁴⁹ Given that school attacks occupy such a prominent place in the public mind, it would be foreseeable that school personnel would be alerted were an individual to make threats, so the Ninth Circuit standard would be rather easily met.

The Eighth Circuit analyzed a school threat case in *D.J.M. ex rel. D.M. v. Hannibal Public School District No. 60*,²⁵⁰ which involved a student who sent threatening messages from his computer to other students at home.²⁵¹ He was suspended for several months,²⁵² and his parents alleged *inter alia* a First

²⁴³ *Id.* at 1069.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 1071 (“We need not discredit Landon’s insistence that he was joking . . .”).

²⁴⁸ *Id.* (“One female student who was mentioned in Landon’s MySpace messages reported that she was afraid of Landon and that her father would not let her return to school if Landon was there.”).

²⁴⁹ *See generally id.*

²⁵⁰ 647 F.3d 754 (8th Cir. 2011).

²⁵¹ *Id.* at 757 (“After school D.J.M. would type messages into his home computer’s instant messaging program and then send them in real time to a friend’s home computer. His friends would then type messages back.”).

²⁵² *Id.* at 759 (“On October 31, one week after D.J.M. had been placed in juvenile detention, Powell and assistant principal Ryan Sharkey decided to suspend him for ten days. Then on November 3, Superintendent Janes extended the suspension for the rest of the school year . . .”).

Amendment violation.²⁵³ The district court “held that D.J.M.’s speech had been an unprotected true threat and alternatively that the District could properly discipline him for his speech because of its disruptive impact on the school environment.”²⁵⁴

The Eighth Circuit discussed both the approach involving true threats and the approach involving the *Tinker* substantial disruption prong.²⁵⁵ Notwithstanding D.J.M.’s claim that he had been joking²⁵⁶ and that he had intended no harm,²⁵⁷ the Eighth Circuit upheld the reasonableness of the District’s classifying his speech as a true threat.²⁵⁸ The Eighth Circuit also upheld that alternative finding that the speech could be punished under the *Tinker* substantial disruption prong.²⁵⁹

Even if D.J.M. had meant no harm, it was quite reasonable to take his threats seriously, which meant that there was sufficient basis for a true threat finding.²⁶⁰ Further, the school authorities took additional safety measures in response,²⁶¹ so it was reasonable to believe that there had been substantial disruption. Nonetheless, it would be helpful for the disruption standard to be more fully developed. The difficulty will not be in figuring out the necessary amount of actual or reasonably anticipated disruption to meet the standard in this kind of case, i.e., where a true threat has been made, because that expression is not protected anyway.²⁶² Rather, it will be necessary to figure

²⁵³ *Id.* (“D.J.M.’s parents subsequently brought this action in Missouri circuit court, alleging that his suspension had violated his First Amendment right to free speech . . .”).

²⁵⁴ *Id.* at 760.

²⁵⁵ *Id.* at 761 (“[T]he courts of appeal have taken differing approaches in resolving them. One line of cases centers on the concept of ‘true threats’ derived from *Watts v. United States* The other line focuses on the substantial disruption issue identified in *Tinker*.”) (citation omitted).

²⁵⁶ *Id.* at 762 (“He asserts that his instant messages were made in jest . . .”).

²⁵⁷ *Id.* at 760 (“He asserts that he had not intended to make any true threats and that his messages were not serious expressions of intent to harm.”).

²⁵⁸ *Id.* at 764 (“[H]ere the District was given enough information that it reasonably feared D.J.M. had access to a handgun and was thinking about shooting specific classmates at the high school.”).

²⁵⁹ *Id.* at 766 (“Here, it was reasonably foreseeable that D.J.M.’s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment.”).

²⁶⁰ *See id.* at 762 (noting that since D.J.M. “intentionally communicated his threats to . . . a third party . . . they were “true threats.”).

²⁶¹ *Id.* at 766.

²⁶² *Id.* at 764.

out the quantum of disruption required for other kinds of cases where the expression itself would normally be protected by the First Amendment.

B. Bullying

An increasing concern in schools is to prevent bullying, and one issue involves the extent to which schools can reach off-campus bullying.²⁶³ *Kowalski v. Berkeley County Schools*²⁶⁴ involved a student who had created a “MySpace.com webpage called ‘S.A.S.H.’ . . . [‘Students Against Sluts Herpes’], . . . which was largely dedicated to ridiculing a fellow student.”²⁶⁵ The webpage creator was suspended,²⁶⁶ which also meant that she was “prevented from crowning the next ‘Queen of Charm’ in that year’s Charm Review, having been elected ‘Queen’ herself the previous year.”²⁶⁷ Kara Kowalski was found to have violated the school’s harassment policy.²⁶⁸

Kowalski sued, alleging violation of state and federal guarantees.²⁶⁹ One of her claims was that the school could not reach her out-of-school speech.²⁷⁰ The Fourth Circuit characterized the relevant question as “whether Kowalski’s activity fell within the outer boundaries of the high school’s

²⁶³ See Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765, 814 (2015) (“The nagging question is what schools may do about off campus bullying that stops short of threats of violence, but where the potential for severe emotional distress among teenagers deserves considerable public concern.”).

²⁶⁴ 652 F.3d 565 (4th Cir. 2011).

²⁶⁵ *Id.* at 567.

²⁶⁶ *Id.* at 569 (“For punishment, they suspended Kowalski from school for 10 days and issued her a 90-day ‘social suspension,’ which prevented her from attending school events in which she was not a direct participant.”).

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 568–69 (“School administrators concluded that Kowalski had created a ‘hate website,’ in violation of the school policy against ‘harassment, bullying, and intimidation.’”).

²⁶⁹ *Id.* at 570.

[Kowalski alleged] free speech violations under the First Amendment, due process violations under the Fifth Amendment (which Kowalski has acknowledged should have been under the Fourteenth Amendment), cruel and unusual punishment under the Eighth Amendment, and equal protection violations under the Fourteenth Amendment. The complaint also alleged violations of corresponding provisions of the West Virginia Constitution and a state law claim for intentional or negligent infliction of emotional distress.

²⁷⁰ *Id.* at 570–71 (“She argues that because this case involved ‘off-campus, non-school related speech,’ school administrators had no power to discipline her.”).

legitimate interest in maintaining order in the school and protecting the well-being and educational rights of its students.”²⁷¹

The *Kowalski* court recognized that student “rights are not coextensive with those of adults,”²⁷² and that “school administrators have some latitude in regulating student speech to further educational objectives.”²⁷³ The court further noted some of the dangers of bullying—“student-on-student bullying is a ‘major concern’ in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide.”²⁷⁴ The court was confident that this was the kind of conduct that met the *Tinker* standard.²⁷⁵ Indeed, the court might also have emphasized *Tinker’s* discussion of conduct that “colli[des] with the rights of other students to be secure and to be let alone.”²⁷⁶ The *Kowalski* court cited this passage,²⁷⁷ but focused on the disturbance aspect²⁷⁸ rather than on the right to be left in peace.

When justifying the school’s reaching this conduct, the *Kowalski* court admitted that the creation of the offensive webpage occurred at Kowalski’s home—“Kowalski indeed pushed her computer’s keys in her home.”²⁷⁹ However, the Fourth Circuit noted that it was reasonable to believe that the effects would be broader than that—“she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment.”²⁸⁰ While the connection to

²⁷¹ *Id.* at 571.

²⁷² *Id.* (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

²⁷³ *Id.*

²⁷⁴ *Id.* at 572 (citing *Warning Signs*, STOPBULLYING.GOV, <https://www.stopbullying.gov/at-risk/warning-signs/index.html>) (last visited Nov. 18, 2016)).

²⁷⁵ *Id.* (“We are confident that Kowalski’s speech caused the interference and disruption described in *Tinker* as being immune from First Amendment protection.”).

²⁷⁶ See *Tinker*, 393 U.S. at 508 (according to *Tinker*, such rights hinder the work of schools or other students).

²⁷⁷ See *Kowalski*, 652 F.3d at 574.

²⁷⁸ See *id.* at 573–74 (noting that Kowalski’s posts caused school disturbance because they targeted another student, regardless of the fact that the posts were made outside school grounds).

²⁷⁹ *Id.* at 573.

²⁸⁰ *Id.*

the school would have been stronger “had Kowalski created the ‘S.A.S.H.’ group during school hours, using a school-provided computer and Internet connection,”²⁸¹ the court reasoned that the District “was authorized by *Tinker* to discipline Kowalski, regardless of where her speech originated, because the speech was materially and substantially disruptive in that it ‘interfer[ed] . . . with the schools’ work [and] colli[ded] with the rights of other students to be secure and to be let alone.”²⁸²

The court rightly noted that “such harassment and bullying is inappropriate and hurtful and that it must be taken seriously by school administrators in order to preserve an appropriate pedagogical environment.”²⁸³ Yet, it was not at all clear that Kowalski’s speech had First Amendment protection in any event. “The webpage contained comments accusing Shay N. of having herpes and being a ‘slut,’ as well as photographs reinforcing those defamatory accusations.”²⁸⁴ Neither adults nor students are immunized by the First Amendment for their defamatory expression, and the *Tinker* substantial disruption test would not need to be met in order to punish speech which itself was unprotected.²⁸⁵

C. Other Expression

One difficulty posed for the jurisprudence is in how to prevent a weak substantial disruption exception from swallowing whatever protections *Tinker* is supposed to provide.²⁸⁶ Consider *Doninger v. Niehoff*²⁸⁷ in which a student urged other students at her high school to contact school officials to complain about the

²⁸¹ *Id.*

²⁸² *Id.* at 573–74 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

²⁸³ *Kowalski*, 652 F.3d at 577.

²⁸⁴ *Id.* at 573.

²⁸⁵ *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (explaining the substantial disruption test and its application for regulating First Amendment Protected speech that may substantially disrupt school activities, order, or premises. The court held unconstitutional a suspension issued to students wearing non-disruptive arm bands expressing disapproval of the Vietnam War).

²⁸⁶ *Cf. Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 693 (1986) (Stevens, J., dissenting); *see supra* text accompanying note 87 (noting how the school policy at issue in *Fraser* defined obscene language as substantially disruptive, regardless of the speech’s actual or probable effects).

²⁸⁷ 527 F.3d 41 (2d Cir. 2008).

rescheduling or cancellation of a school event.²⁸⁸ Avery Doninger posted the following on a publicly accessible website unaffiliated with her school:²⁸⁹

[J]amfest is cancelled due to douchebags in central office. here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. we have so much support and we really appreciate [sic] it. however, she got pissed off and decided to just cancel the whole thing all together. andddd [sic] so basically we aren't going to have it at all, but in the slightest chance we do it is going to be after the talent show on may 18th. andd [sic] ..here is the letter we sent out to parents.²⁹⁰

As the Second Circuit pointed out, the posting contained language that some might find offensive.²⁹¹ The court was satisfied that if Avery's speech had occurred on campus, it would be subject to punishment under *Fraser*.²⁹² But the court then distanced itself from applying *Fraser*, because "[i]t is not clear . . . that *Fraser* applies to off-campus speech."²⁹³ Instead, the court upheld the school's punishment—prohibiting Avery from being Senior Class Secretary—based on *Tinker's* substantial disruption exception.²⁹⁴

²⁸⁸ *Id.* at 43.

²⁸⁹ *Id.* at 45 ("Avery posted a message on her publicly accessible blog, which was hosted by livejournal.com, a website unaffiliated with LMHS.").

²⁹⁰ *Id.*

²⁹¹ *Id.* at 49 ("We need not conclusively determine *Fraser's* scope, however, to be satisfied that Avery's posting—in which she called school administrators 'douchebags' and encouraged others to contact Schwartz 'to piss her off more'—contained the sort of language that properly may be prohibited in schools.") (citing *Fraser*, 478 U.S. at 675).

²⁹² *Id.* ("Avery's language, had it occurred in the classroom, would have fallen within *Fraser* and its recognition that nothing in the First Amendment prohibits school authorities from discouraging inappropriate language in the school environment.").

²⁹³ *Id.* See also *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011) ("*Fraser's* 'lewdness' standard cannot be extended to justify a school's punishment of J.S. for use of profane language outside the school, during non-school hours.").

²⁹⁴ *Doninger*, 527 F.3d at 50 ("[T]he *Tinker* standard has been adequately established here."); see also *id.* at 53 ("We decide only that based on the existing record, Avery's post created a foreseeable risk of substantial disruption to the work and discipline of the school and that Doninger has thus failed to show clearly that Avery's First Amendment rights were violated when she was disqualified from running for Senior Class Secretary.").

Basically, many students complained to the administration.²⁹⁵ Further, the way that Avery induced students to complain—by calling the administration “douchebags” and suggesting that it would be a good idea to “piss [them] off more”²⁹⁶—itself contributed to the problem because employing such terms was “hardly conducive to cooperative conflict resolution.”²⁹⁷

Certainly, it was annoying and disruptive to have the phone ringing off the hook. Nonetheless, if causing a school to be inundated with calls meets the substantial disruption test, then a whole host of messages posted online might meet that standard, e.g., one accurately suggesting that the time or location of a school event had changed. Perhaps the individual would not have had all of the information so interested individuals would call the school to find out more. Or, even if all of the information had been supplied, many individuals might still call to confirm. Other kinds of postings that would cause the school to be inundated with calls are not difficult to imagine, e.g., that ambulances, fire trucks, or police cars had been summoned to the school. But the truthful posting of such information would not seem appropriately punished, even if resulting in the phone lines being tied up for an extended period.

The Second Circuit was likely trying to cabin the reach of its analysis by noting that Doninger’s language might be found offensive and that her choice of words might have exacerbated the problem.²⁹⁸ But it is not clear how these factors affected whether the relevant quantum of actual or anticipated disruption had been reached. An accurate and politely worded message might yield the same number of calls and might be equally disruptive, which suggests at the very least that the substantial disruption exception requires some fine-tuning.

Some posted messages, while not threatening,

²⁹⁵ *Id.* at 51 (“Schwartz and Niehoff had received a deluge of calls and emails, causing both to miss or be late to school-related activities.”) (citing *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 206 (D. Conn. 2007), *aff’d*, 527 F.3d 41 (2d Cir. 2008)).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ See *supra* notes 272–73 and accompanying text.

nonetheless disrupted school functioning in various ways.²⁹⁹ The Third Circuit addressed the proper application of *Tinker* when vulgar expression was used in an online posting.³⁰⁰ *J.S. ex rel. Snyder v. Blue Mountain School District*³⁰¹ concerned the suspension of a middle school student who had “create[ed] on a weekend and on her home computer, a MySpace profile (the “profile”) making fun of her middle school principal, James McGonigle.”³⁰² The profile “contained adult language and sexually explicit content[,]”³⁰³ including “profanity and shameful personal attacks aimed at the principal and his family.”³⁰⁴ However, the characterization was “so outrageous that no one took its content seriously[,]”³⁰⁵ and J.S. testified that she thought the profile “‘comical’ insofar as it was so ‘outrageous.’”³⁰⁶

The court noted that the “District’s computers block access to MySpace, so no Blue Mountain student was ever able to view the profile from school[,]”³⁰⁷ although the court did not discuss whether students could access MySpace from their smartphones while at school. Further, students did discuss the profile at school,³⁰⁸ and one of the teachers reported that the profile caused a disruption in his class.³⁰⁹

The Third Circuit assumed for purposes of the opinion that *Tinker* applied.³¹⁰ However, the court explained that “[t]here is no dispute that J.S.’s speech did not cause a substantial

²⁹⁹ See, e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 922–23 (3d Cir. 2011) (discussing how a fake social media profile created by a student about her principal led to students “discussing the profile in class” over a span of several days and prevented a school guidance counselor from performing various job functions, as her presence was needed in the meeting with the offending student).

³⁰⁰ See, e.g., *id.* at 931–33 (holding that neither *Tinker*, nor any of its exceptions, apply to off-campus speech, regardless of how “lewd, vulgar, and offensive” it is) (internal quotation mark omitted).

³⁰¹ 650 F.3d 915 (3d Cir. 2011).

³⁰² *Id.* at 920.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 921.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 922 (“McGonigle was approached by two teachers who informed him that students were discussing the profile in class.”).

³⁰⁹ *Id.* (“Randy Nunemacher, a Middle School math teacher, experienced a disruption in his class when six or seven students were talking and discussing the profile; Nunemacher had to tell the students to stop talking three times, and raised his voice on the third occasion.”).

³¹⁰ *Id.* at 926 (“[W]e will assume, without deciding, that *Tinker* applies to J.S.’s speech in this case.”).

disruption in the school.”³¹¹ Further, the Third Circuit concluded that “[t]he facts in this case do not support the conclusion that a forecast of substantial disruption was reasonable.”³¹² After all, “J.S. did not even intend for the speech to reach the school—in fact, she took specific steps to make the profile ‘private’ so that only her friends could access it.”³¹³ Of course, her friends went to the school, but “[t]he fact that her friends happen to be Blue Mountain Middle School students is not surprising, and does not mean that J.S.’s speech targeted the school.”³¹⁴ Yet, because her school friends had access to the webpage, it was foreseeable that other students and the principal would be made aware of its existence. Precisely because J.S. was focusing on the principal of the school, it was foreseeable that he would react once he became apprised of the website’s existence. Indeed, the duties of school personnel were temporarily modified as a result of the webpage coming to light.³¹⁵ Nonetheless, the Third Circuit reasoned, “McGonigle’s response to the profile *exacerbated* rather than contained the disruption in the school,”³¹⁶ which means that the reactions of a person subject to the attack could not in this case be attributed to the website creator as the basis for suggesting that she had caused a substantial disruption.

The district court had characterized the profile as “an attack on the school’s principal . . . [which] makes him out to be a pedophile and sex addict.”³¹⁷ Suppose that the principal’s conduct had changed thereafter, e.g., if he had refused to deal with students personally because he had feared that he would wrongly be inferred to be making sexual advances to those students. One can infer that the Third Circuit would attribute

³¹¹ *Id.* at 928.

³¹² *Id.*

³¹³ *Id.* at 930.

³¹⁴ *Id.* at 930–31.

³¹⁵ *Id.* at 923 (“Frain canceled a small number of student counseling appointments to supervise student testing on the morning that McGonigle met with J.S., K.L., and their parents. Counselor Guers was originally scheduled to supervise the student testing, but was asked by McGonigle to sit in on the meetings, so Frain filled in for Guers.”).

³¹⁶ *Id.* at 931.

³¹⁷ *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07CV585, 2008 WL 4279517, at *6 (M.D. Pa. Sept. 11, 2008), *aff’d on other grounds*, 593 F.3d 286 (3d Cir. 2010), *reh’g en banc granted, opinion vacated* (Apr. 9, 2010), *on reh’g en banc*, 650 F.3d 915 (3d Cir. 2011), *and aff’d in part, rev’d in part*, 650 F.3d 915 (3d Cir. 2011).

that change in behavior to the principal rather than J.S., although other circuits would likely say that this change would go to establishing that there had been a substantial disruption. For example, the *Bell* court had noted that the coaches accused online of inappropriate relations with female students had modified how they dealt with students in response to the accusation, and those modifications contributed to the finding of a substantial disruption.³¹⁸

Just as the federal courts are not in agreement about which school disruptions are attributable to students for purposes of meeting the *Tinker* disruption exception, courts cannot agree about which expressions are vulgar under *Fraser*. Consider *B.H. ex rel. Hawk v. Easton Area School District*,³¹⁹ which involved “two middle-school students [who] purchased bracelets bearing the slogan ‘I ♥ boobies! (KEEP A BREAST)’ as part of a nationally recognized breast-cancer-awareness campaign.”³²⁰ The students wore the bracelets to school.³²¹ Some of the teachers objected, e.g., because wearing the bracelets might be thought to “trivialize[] breast cancer,”³²² while others worried that wearing the bracelets might encourage inappropriate behavior.³²³ That said, there were no reports of inappropriate behavior that could be attributed to the bracelets.³²⁴

The students wore their bracelets on Breast Cancer Awareness Day³²⁵ and refused to remove them when a security guard directed them to do so.³²⁶ Hearing that exchange, another

³¹⁸ See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 388 (5th Cir. 2015); see also *supra* text accompanying note 239.

³¹⁹ 725 F.3d 293 (3d Cir. 2013).

³²⁰ *Id.* at 297–98.

³²¹ *Id.* at 299 (“B.H., K.M., and three other students wore the ‘I ♥ boobies! (KEEP A BREAST)’ bracelets at Easton Area Middle School during the 2010[-]2011 school year.”).

³²² *Id.*

³²³ *Id.* (“Others feared that the bracelets might lead to offensive comments or invite inappropriate touching.”).

³²⁴ *Id.* (“[T]here were no reports that the bracelets had caused any in-school disruptions or inappropriate comments.”).

³²⁵ *Id.* at 300 (“The following day, B.H. and K.M. each wore their ‘I ♥ boobies! (KEEP A BREAST)’ bracelets to observe the Middle School’s Breast Cancer Awareness Day.”).

³²⁶ *Id.* (“[B]oth girls were instructed by a school security guard to remove their bracelets. Both girls refused.”).

student stood up and refused to remove her bracelet.³²⁷ The girls were again asked to remove the bracelets later.³²⁸ Those refusing to do so were punished.³²⁹ At least one question is whether the bracelets should be considered vulgar and thus subject to the *Fraser* exception.³³⁰

The *B.H.* court characterized *Fraser* as holding that “lewd, vulgar, indecent, and plainly offensive student speech is categorically unprotected in school, even if it falls short of obscenity and would have been protected outside school.”³³¹ According to the court, this meant that “schools may also categorically restrict ambiguous speech that a reasonable observer could interpret as lewd, vulgar, profane, or offensive.”³³² However, “[a] school’s leeway to categorically restrict ambiguously lewd speech . . . ends when that speech could also plausibly be interpreted as expressing a view on a political or social issue.”³³³

The Third Circuit interpreted Justice Alito’s *Morse* concurrence as protecting “political or social speech reasonably interpreted to advocate illegal drug use,”³³⁴ although the court did not discuss why “BONG HiTS 4 JESUS” could not be reasonably construed as commenting about a social issue by expressing support for possibly illegal drug use.³³⁵ In dissent, Judge Hardiman argued that the majority’s “limitation on the ability of schools to regulate student speech that could reasonably be deemed lewd, vulgar, plainly offensive, or constituting sexual innuendo finds no support in *Fraser* or its

³²⁷ *Id.* (“Hearing this encounter, another girl, R.T., stood up and similarly refused to take off her bracelet.”).

³²⁸ *Id.* (“Braxmeier spoke to all three girls, and R.T. agreed to remove her bracelet. B.H. and K.M. stood firm, however, citing their rights to freedom of speech.”).

³²⁹ *Id.* (“The Middle School administrators . . . punished B.H. and K.M. by giving each of them one and a half days of in-school suspension and by forbidding them from attending the Winter Ball.”).

³³⁰ *Id.* at 302 (“The School District defends the bracelet ban as an exercise of its authority to restrict lewd, vulgar, profane, or plainly offensive student speech under *Fraser*.”).

³³¹ *Id.* at 305 (citing *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 213 (3d Cir. 2001)).

³³² *Id.* at 308.

³³³ *Id.* at 309.

³³⁴ *Id.* at 313.

³³⁵ *But see id.* at 339–40 (Greenaway, J., dissenting) (“[W]hen would a student using a term that is admittedly ambiguous not be able to assert that the use of the offending word, term, or phrase is speech that is commenting on a political or social issue?”).

progeny.”³³⁶ He suggested that it was “objectively reasonable to interpret the bracelets, in the middle school context, as inappropriate sexual innuendo and double entendre.”³³⁷ Regrettably, the Court has provided no helpful guidance about which speech can be classified as vulgar or about whether allegedly vulgar speech is immunized if commenting on a social issue, although it bears repeating that the *Fraser* speech was in the context of endorsing someone for a school office,³³⁸ so it seems unlikely that comments on political or social issues are immunized as a general matter.

CONCLUSION

Student speech rights are constitutionally protected, subject to certain exceptions. But the Court’s description and application of these exceptions has been so loose that in many cases they can simply swallow up whatever protections exist. Further, the Court has been utterly unhelpful with respect to how or when to differentiate among the kinds of speech that pose genuine dangers to students and school personnel versus sophomoric speech that, while inappropriate, poses no dangers to anyone. Difficult issues involving the *Tinker* disruption exception, e.g., when to attribute to the speaker the foreseeable reactions to the speech, are simply left to the circuits to decide.

Advances in technological capability coupled with an increase in school violence have made the Court’s guidance in this area all the more essential. Regrettably, the Court has instead offered contradictory comments resulting in circuit splits on matters that might literally involve life and death. The Court must at its earliest opportunity offer some helpful guidance on how to reconcile important free speech concerns with school functioning and safety so that the circuits do not continue to diverge on how to handle these matters of paramount

³³⁶ *Id.* at 325 (Hardiman, J., dissenting).

³³⁷ *Id.* at 335 (Hardiman, J., dissenting). *See also* J.A. v. Fort Wayne Cmty. Sch., 2013 WL 4479229, at *1 (N.D. Ind. Aug. 20, 2013) (agreeing that “a bracelet bearing the slogan ‘I ♥ boobies (Keep a Breast)’ might reasonably be thought lewd and vulgar).

³³⁸ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 677–78 (1986); *see supra* text accompanying note 56.

importance.

MEDICAL FUTILITY AND RELIGIOUS FREE EXERCISE

Teneille Ruth Brown *

INTRODUCTION

A tragic scenario has become all too common in hospitals across the United States. Dying patients pray for medical miracles when their physicians think that continuing treatment would render no meaningful benefit. This situation is unfortunately referred to as “medical futility.” A fraught term, “medical futility” covers any request for treatment that is considered inappropriate because it “merely preserves permanent unconsciousness or cannot end dependence on intensive medical care”¹ In these cases, physicians, who are less likely than their patients to rely on God as a means of coping with major illness, are at an impasse.² Their patients request everything be done so that they can have more time for God to intervene, but in the physician’s professional experience, *everything* will probably do *nothing*. What is the physician to do?

The conundrum is a modern one: medical technologies such as breathing machines and dialysis units can support human bodies almost indefinitely when many of our organs fail. But is there any limit on this technological imperative? Every state and the U.S. Constitution recognize that a patient has the legal right to *refuse* unwanted treatment, even if it is life-sustaining.³ However, there is no corresponding constitutional

*Professor of Law at the University of Utah, S.J. Quinney College of Law and Adjunct Professor of Internal Medicine at the University of Utah. This article is based in part on an empirical project I conducted and published as part of the 2015 Petrie-Flom Conference on Law, Religion and Health Care at Harvard Law School. A related article explores health care providers’ views of medical futility and religion. See Teneille Brown, *Accommodating Miracles*, in LAW, RELIGION, AND HEALTH IN THE UNITED STATES (Holly Fernandez Lynch, I. Glenn Cohen, & Elizabeth Sepper, eds., Cambridge University Press 2017). This research was also made possible in part through generous support from the Albert and Elaine Borchard Fund for Faculty Excellence.

¹ Lawrence J. Schneiderman, Nancy S. Jecker, & Albert R. Jonsen, *Medical Futility: Its Meaning and Ethical Implications*, 112 ANNALS INTERNAL MED. 949, 949 (1990).

² Farr Curlin et al., *Religious Characteristics of U.S. Physicians*, 20 J. GEN. INTERNAL MED. 629, 631–632 (2005).

³ *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990) (“But for purposes of this case, we assume the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.”); see

right to *demand* specific treatments.⁴ This is not simply about the ability to pay. Even if an individual's private insurance would cover aggressive treatments, or if the individual had the financial means to pay out of pocket, a physician need not offer treatments to a patient if in her judgment they would be medically ineffective, or futile. Tort law recognizes this professional deference by defeating a negligence claim if the physician complied with the medical standard of care.⁵

To underscore this professional deference, most states have passed so-called "medical futility statutes."⁶ These statutes make it explicit that physicians have immunity from negligence claims if a physician refuses to offer futile treatment, so long as particular statutory safeguards are met.⁷ Physicians are generally quite reluctant to invoke these statutes, but they are *particularly* reluctant to do so when the patient's request for treatment is based on a religious belief in miracles. There is a sense that religious reasons are different and should be given special consideration. Religious-based challenges to medical futility policies place individuals at odds with secular providers and the state, and "frequently generate particularly difficult questions about the proper relationship between religiously faithful citizens and the sovereign government."⁸ Even if there is no general legal entitlement to medical care and physicians may be immunized from negligence claims, can the invocation of a state's medical futility statute violate free exercise? This is the question I address in this article.

also *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1137 (1986) ("[A] person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment.") (citation omitted).

⁴ Abigail All. for Better Access to Dev. Drugs v. Von Eschenbach, 495 F.3d 695, 712 (D.C. Cir. 2007). For a discussion of the restrictions on the limited right to medical care for prison inmates under the Eighth and Fourteenth Amendments, see also Carl Drechsler, Annotation, *Relief Under Federal Civil Rights Acts to State Prisoners Complaining of Denial of Medical Care*, 28 A.L.R. Fed. 279 (1976).

⁵ Joseph H. King, *The Common Knowledge Exception to the Expert Testimony Requirement for Establishing the Standard of Care in Medical Malpractice*, 59 ALA. L. REV. 51, 51 (2007).

⁶ Thaddeus Mason Pope, *Medical Futility Statutes: No Safe Harbor to Unilaterally Refuse Life-Sustaining Treatment*, 75 TENN. L. REV. 1, 1 (2007) ("Over the past fifteen years, a majority of states have enacted medical futility statutes that permit a health care provider to refuse a patient's request for life-sustaining medical treatment.").

⁷ *Id.*

⁸ Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1372 (2013).

This article has just two parts. The first part will contextualize the problem by describing the history of medical miracles, and why there are so many appeals to them in modern medical practice. The second part will explain why medical futility statutes do not violate a patient's religious free exercise, as this concept has developed under the Supreme Court's First Amendment jurisprudence and state and federal Religious Freedom Restoration Acts.

I. THE HISTORY AND UBIQUITY OF MEDICAL MIRACLES

A. *All Five Major World Religions Promote Belief in "Miracles"*

A 2013 Harris Poll indicated that a whopping 72% of Americans believe in divine miracles. This is down from previous polls, but still quite high compared to other Western countries.⁹ An older poll conducted by *Time*/CNN reported that 77% of Americans believed "that God sometimes intervenes to cure people who have serious illnesses."¹⁰ "This same poll report[ed] that 82% of Americans" believe in the power of prayer to heal the sick.¹¹ Eighty-two percent. We are hard-pressed to find any other question related to personal beliefs with such a high percentage of agreement.

Miracle narratives are found in all five of the major world religions, and healing miracles are prominent among them. However, the symbolic value and meaning of miracles is different in the context of each faith. For example, what we would today refer to as a "miracle" has no synonym in Hebrew. The writers of the Jewish bible had no conception of an occurrence that would violate the laws of nature, given that the divine and ordinary worlds could not be separated.¹²

⁹ Larry Shannon-Missal, *Americans' Belief in God, Miracles and Heaven Declines*, HARRIS POLL (Dec. 16, 2013), http://www.theharrispoll.com/health-and-life/Americans_Belief_in_God_Miracles_and_Heaven_Declines.html.

¹⁰ Claudia Wallis, *Faith and Healing*, *TIME*, June 24, 1996, at 58. Peter H. Van Ness & David B. Larson, *Religion, Senescence, and Mental Health*, *AM. J. OF GERIATRIC PSYCHIATRY* 386 (2002).

¹¹ *Id.*

¹² What we would today call "miracles" are clustered around the Moses stories of Exodus and Numbers, and the Elijah and Elisha stories in R. Walter L. Moberly, *Miracles in the Hebrew Bible*, in *THE CAMBRIDGE COMPANION TO MIRACLES* 62 (Graham Twelftree ed., 2011).

Hinduism,¹³ Buddhism,¹⁴ and Catholicism¹⁵ believe that modern miracle-workers exist among us and reinforce our faith. Each of these faiths discourages the display of miracles for their own sake, and enlightened Buddhists who publicize the miracles they perform are frowned upon.¹⁶ The centrality and significance of miracles varies depending on the religion. For example, the many documented miracles of Mohammed are “not at all as central to Muslim faith as the miracles of Jesus are to Christians.”¹⁷

In some religions such as Judaism and Islam, familiar stories that today would be described as “miracles” are contextualized as having occurred thousands of years ago—when new religions competed with magical paganism and needed to prove their divine power and truths.¹⁸ For millennia, Protestants also believed that miracles only occurred in biblical times.¹⁹ However, the notion of the “limited age of miracles” was reconsidered and largely abandoned by Protestant theologians in

¹³ Yogis perform “bodily feats which an outsider might judge to be superhuman”; “[t]hey can live for weeks without nourishment, endure fantastic extremes of heat and cold, go into suspended animation, stop breathing (or nearly so) for hours, [and] change their rate of heartbeat.” Even so, yogis would not likely describe this as a “miracle,” and instead they view these as “psychosomatic techniques that are done at will.” GEOFFREY ASHE, *MIRACLES* 131 (1st ed. 1978). The Hindu faith does not emphasize the distinction between the natural and the unnatural worlds, and so the word “miracle” possesses different connotations than it does for us today. The miracles of the Hindu faith are often the result of power-plays between a manifestation of a Hindu god, and some demon, where the Hindu god prevails and reveals his prowess. All of life is in God’s hands, and so while it seems that the gods are playful and sometimes spiteful, miracles are happening all of the time. KENNETH L. WOODWARD, *THE BOOK OF MIRACLES* 265–66 (2000).

¹⁴ The miracles of the Buddha, Siddhartha, take on cosmic proportions, and reveal his superiority over all other beings. The Buddha was the only being who had complete control of his final rebirth. He chose where, when, and in which family to be reborn for the last time. He also makes someone near him invisible to another and overpowers fiery dragons by himself bursting into flames. See Rupert Gettin, *Tales of Miraculous Teachings: Miracles in Early Indian Buddhism*, in *THE CAMBRIDGE COMPANION TO MIRACLES* 216, 221 (Graham H. Twelftree ed., 2011).

¹⁵ Peter Berger, *The Hospital: On the Interface Between Secularity and Religion*, 52 *SOCIETY* 410, 412 (2015).

¹⁶ WOODWARD, *supra* note 13, at 24.

¹⁷ While the moon was split in two at Mecca when Muhammed asked for a sign from Allah, and he repeatedly fed huge groups of people on tiny amounts of food, these miracles are not central to Muhammed’s biography. They are instead merely referenced in a list format. *Id.* at 184–85 (citing L. ZOLONDEK, *BOOK XX OF AL-GHAZALI’S IHYA’ ULUM AL-DIN* 45 (1963)).

¹⁸ ROBERT BRUCE MULLIN, *MIRACLES AND THE MODERN RELIGIOUS IMAGINATION*, 191–92 (Yale Univ. Press ed., 1996).

¹⁹ *Id.*

the early twentieth century in light of a need to explain the relationship between God and the modern world.²⁰

Whether God intervenes directly to perform modern miracles remains an essential question to many religious thinkers. What one group may refer to as mere providence or good luck, another might attribute to the indirect workings of God. This difficulty differentiating between good luck and divine intervention is nowhere more pronounced than in medicine. The relationship between the healing arts and religious miracles goes back to ancient times and carries through, in some denominations, to the present. The Greek God Asklepios performed miraculous medical feats, including curing facial injuries, kidney stones, weapon wounds, and blindness, and removing tumors, lice, worms, headaches, infertility, chest infections, and disfigured limbs.²¹ Incidentally, he sometimes used snakes in his treatments, and the rod of Asklepios, the snake-entwined staff, remains a leading symbol of medicine.²²

In the present day, Christians are the religious group that most frequently pray for, and expect, modern healing miracles.²³ This is perhaps unsurprising, as so many of Jesus Christ's miracles involved healing the sick and physically disabled.²⁴ Jesus makes the blind see; he renders the paralyzed able to walk; he cures lepers and epileptics.²⁵ Christ is even capable of healing from a distance, as when he removed the fever from a dying boy and restored him to health.²⁶ As Christian sects have divided and

²⁰ Since the early 1900s, Protestant clerics now state that the healing of the present day may be connected with the gifts of healing that the apostles exhibited in the bible. *Id.*

²¹ HOWARD CLARK KEE, *MIRACLES IN THE EARLY CHRISTIAN WORLD* 78–86 (Yale Univ. Press ed., 1983) (“[Asklepios the Healer] appears throughout these centuries not only as the agent of divine cures but also as the founder of the medical profession . . . as a human being with therapeutic skills, as a hero, and as a god . . . attempts to trace the development of this figure have not produced definitive results.”).

²² See *What's in a Symbol*, UF HEALTH, <http://humanism.med.ufl.edu/chapman-projects/art-of-medicine-project-2005-2006/whats-in-a-symbol/> (last visited Nov. 8, 2016).

²³ WOODWARD, *supra* note 13, at 21 (“[O]f all the world religions, Christianity is the one that has most stressed miracles.”).

²⁴ See Patrick J. Kiger, *What Do the World's Religions Say About Miracles?*, NAT'L GEOGRAPHIC, <http://channel.nationalgeographic.com/the-story-of-god-with-morgan-freeman/articles/what-do-the-worlds-religions-say-about-miracles/> (last visited Nov. 8, 2016).

²⁵ See *id.*

²⁶ WOODWARD, *supra* note 13, at 131.

subdivided, there exists great variety between groups in interpreting Jesus's biblical healing miracles. Some groups read these miracles metaphorically, while others view them as having occurred exactly as described.²⁷ Either way, the stories of Jesus's healing miracles hold a central place in the Christian ethos.

The role of healing miracles in Catholicism is particularly well documented. A fascinating and thorough review of the Vatican canonization archives demonstrates that 95% of more than 600 miracles performed by candidates for Catholic sainthood between 1600 AD and 2000 AD involved healing the sick or disabled.²⁸ The connection between miraculously healing the blind, epileptic, those suffering from tuberculosis, unknown paralysis, and other ailments has close scriptural connections to the Catholic faiths, and in the more modern experiences of evangelical Christian faiths.²⁹ Even so, this practice became marginalized with the rise of scientific medicine in the early twentieth century.³⁰

Healing miracles reappeared after 1945 in the Christian Pentecostalism movement.³¹ The practice of "praying for the sick was revived on a scale hitherto unknown."³² As a result, it became commonplace for many Christians to believe that God is "capable of effecting miraculous healings, with significant numbers claiming to have been 'healed' of physical or mental ailments."³³ This branch of Christianity spread throughout the world, particularly in West Africa, India, South Africa, and the Southern United States and gave rise to testaments where "paralytics arise from wheelchairs, stiff knees become flexible, cancerous ulcers disappear, and headaches vanish."³⁴ It is likely this cultural script or story has stuck with

²⁷ See Barry L. Blackburn, *The Miracles of Jesus*, in *THE CAMBRIDGE COMPANION TO MIRACLES* 113, 124 (Graham H. Twelftree ed., 2011).

²⁸ Jacalyn Duffin, *The Doctor Was Surprised; or, How to Diagnose a Miracle*, 81 *BULL. HIST. MED.* 699, 706 (2007); see also WOODWARD, *supra* note 13, at 367.

²⁹ Andrew Singleton, "Your Faith Has Made You Well": *The Role of Storytelling in the Experience of Miraculous Healing*, 43 *REV. RELIGIOUS RES.* 121, 121 (2001).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (quoting JOHN T. NICHOL, *PENTECOSTALISM* 221 (1966)).

³³ *Id.*

³⁴ Jorg Stolz, "All Things Are Possible": *Towards a Sociological Explanation of Pentecostal Miracles and Healing*, 72 *SOC. RELIGION* 456, 456, 458 (2011) ("When critics say that

many Americans and has provided modern exemplars of miraculous healing through prayer.

While not meant to be exhaustive, this brief and sweeping introduction may provide some context for the modern requests for miracles in hospitals across the country. Dating back to ancient times, references to miracles often involved the healing arts as well as the ability of God to change the shape of objects, triumph over supernatural demons, resurrect the dead, or light things on fire.³⁵ The rise of Christian miracle revival stories occurred simultaneously with the growth of modern medical technologies such as sterile surgery, chemotherapy, dialysis, or artificial breathing. In this post-scientific world, the idea that God could save you from floods or burning houses has somewhat receded from our popular landscape.³⁶ But medicine and healing remain a central part of our culture.³⁷ The role of miracle-making in this domain has ballooned where the stories of God proving his existence through threatening species extinction, contests between gods, or transmutation have diminished. The search for God in the modern world has settled on finding his presence in the hospital or clinic.

B. Religious Patients, Secular Physicians

The fact that people turn to religion in times of health crisis does not necessarily render the appeals to miracles suspect. If there were just one time in a person's life when she will pray for a miracle, it is likely to be at the bedside of a dying loved one. Medical crises often lead to intensification of religiosity and powerful religious conversions.³⁸ This phenomenon does not just

[Pentecostal] healers produce 'only a placebo effect,' these anthropologists answer that, precisely, the placebo effect shows that humans are a socio-psycho-physical entity in which the symbolic may have an effect on the physical[.]") (citations omitted).

³⁵ WOODWARD, *supra* note 13, at 63–64, 69–70, 130–31.

³⁶ See e.g. Michael Lipka, *Why American's 'Nones' Left Religion Behind*, PEW RESEARCH CENTER, Aug. 24, 2016, <http://www.pewresearch.org/fact-tank/2016/08/24/why-americas-nones-left-religion-behind/#>.

³⁷ For a representative collection of movies, novels, and other popular culture items that feature medicine, spirituality, and healing, see Jenn Lindsay, Larry A. Whitney & Stephanie N. Riley, *Spirituality, Medicine, & Health – Popular Culture*, BOSTON UNIVERSITY PERSONAL WEBSITES http://people.bu.edu/wwildman/smh/content_popculture.htm.

³⁸ Kenneth Ferraro and Jessica Kelley-Moore, *Religious Consolation Among Men and Women: Do Health Problems Spur Seeking?* 39 J. OF SCI. STUDY OF RELIGION 220, 226–

hold for religious nations, where the religious beliefs parallel the level of religious practice. The more secular a nation is in its public sphere and religious practice, the *more likely* its citizens are to turn to hospitals as religious forums when disease strikes.³⁹ As one researcher put it, in the low-religiosity nation of Denmark, the “[p]rayer houses . . . are no longer the churches but the hospitals.”⁴⁰

There is an intense sociological connection between our culture and the way we die. In addition to the rich history of religiously moderated medical miracles, patients may separately hope for a miracle because of significant changes in the way Americans experience death. In the early part of the last century, we used to die at younger ages, from infections, childbirth, and wounds.⁴¹ We now have nearly doubled our life expectancy from 47 years in 1900 to 78 in 2008.⁴² We are less likely to die from acute infections, and are more likely to die of chronic conditions like heart failure, cancer, and diabetes.⁴³ Many now believe that “sickness, pain, and premature death were no longer viewed as immovable points on the human landscape, but as problems that could be removed through human intelligence and ingenuity.”⁴⁴

This raises another important change in the sociology of the Western Christian world: the “mundanization” of ordinary life.⁴⁵ While earlier Christian cultures in the United States and elsewhere focused on the after-life, there is much greater focus now on *this* life.⁴⁶ Put differently, while good Christians used to

227 (2000).

³⁹ Niels Christian Hvidt, *Patient Belief in Miraculous Healing: Positive or Negative Coping Resource?*, in *THE CAMBRIDGE COMPANION TO MIRACLES* 309, 311 (Graham H. Twelftree ed., 2011) (footnote omitted).

⁴⁰ *Id.*

⁴¹ Tenielle R. Brown, *Denying Death*, 57 *ARIZ. L. REV.* 977, 980 (2015) [hereinafter Brown I].

⁴² *Id.* at 981.

⁴³ *Id.* There is some data to suggest that our life expectancies continued to rise in the latter part of the 20th century, and was correlated with passage of the Medicare Act. However, other countries saw an increase in their life expectancies around the same time and so it is not clear whether the correlation is in fact causal. See Muriel Gillick, *How Medicare Shapes the Way We Die*, 8 *J. HEALTH & BIOMED. L.* 27, 33 (2012); *Expectation of Life at Birth, 1970 to 2008, and Projections, 2010 to 2020, Table 104*, STAT. ABSTRACT U.S. 77 (2012), <http://www.census.gov/compendia/statab/2012/tables/12s0104.pdf>.

⁴⁴ MULLIN, *supra* note 18, at 85.

⁴⁵ *Id.* at 86.

⁴⁶ *Id.*

work toward a good death, now they work toward a good life. Death became a scientific phenomenon to be solved by mortals.⁴⁷ This presented a dramatic change in how Americans died. We used to die at home, surrounded by loved ones.⁴⁸ We struggled to practice a good or “holy” death, where we gracefully accepted the will of God, welcomed the chance to atone our sins, and did not treat illness as a war to be won.⁴⁹ Conversely, the opposite is now true. The degree of one’s religious coping is now positively correlated with receiving more intensive and life-prolonging care.⁵⁰

Despite the fact that most Americans would still prefer to die at home, most of us no longer do; we are much more likely to die in hospitals, acute care facilities, or intensive care units.⁵¹ Hospitals used to be staffed by Catholic nuns when they first began as religious charities that served the poor.⁵² However, hospitals are now are much more likely to serve all socioeconomic groups and have a secular and for-profit corporate structure.⁵³ The secular orientation of most of these facilities means that health care providers (“providers,” going forward) generally do not see their role as a spiritual one.⁵⁴ Even if they are religious in their private lives, they do not see this as bearing on their clinical work.⁵⁵ This means that while

⁴⁷ DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* 6–7 (2008).

⁴⁸ *Id.*

⁴⁹ *Id.* at 6–10 (“The concept of the Good Death was central to mid-nineteenth-century America, as it had long been at the core of Christian practice. Dying was an art, and the tradition of *ars moriendi* had provided rules of conduct for the moribund and their attendants since at least the fifteenth century: how to give up one’s soul ‘gladly and wilfully’; how to meet the devil’s temptations of unbelief, despair, impatience, and worldly attachment. . .”).

⁵⁰ Hanneke W. M. van Laarhoven, Johannes Schilderman & Judith Prins, *Religious Coping and Life-Prolonging Care*, 302 J. AM. MED. ASS’N. 257, 257 (2009).

⁵¹ *Id.*

⁵² Barbra Mann Wall, *The Pin-Striped Habit: Balancing Charity and Business in Catholic Hospitals, 1865–1915*, 51 NURSING RES. 50, 50 (2002) (“Between 1865 and 1915, Catholic sister-nurses built impressive hospital networks throughout the United States. These hospitals were, first, manifestations of religious and charitable ideals.”).

⁵³ Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061 (2000); Jason M. Kellhofer, *The Misperception and Misapplication of the First Amendment in the American Pluralistic System: Mergers Between Catholic and Non-Catholic Healthcare Systems*, 16 J.L. & HEALTH 103 (2002).

⁵⁴ Curlin et al., *supra* note 3, at 632.

⁵⁵ *Id.*

hospitals are the location of death for most of us, they are usually ill-equipped to deal with the religious aspects of death.

While very recent trends show that fewer Americans are dying in hospitals or nursing homes, about 70% still do,⁵⁶ and many die just days after receiving aggressive care.⁵⁷ This relatively new shift from dying at home to dying in a facility may have disrupted cultural notions about the role of health care providers in the end of life. Of course, nurses and doctors treat infection, prematurity, pain, heart disease and cancer, but when these treatments are offered so near one's death, how could the clinical work be so neatly divided from the spiritual?

Medicine has really struggled with this new normal. Indeed, providers and staff are less religious than the patients they treat on average, and are distressed when patients are perceived to shut down the end-of-life conversation by playing the "trump card" of "waiting for a miracle."⁵⁸ Many studies report that providers feel untrained and uncomfortable discussing the spiritual aspects of end of life care.⁵⁹ It is no wonder that the majority of Americans report that providers never spoke to them about what they want their death to be like,

⁵⁶ See CDC, DEATH STATISTICS (Apr. 9, 2008), http://www.cdc.gov/nchs/data/dvs/Mortfinal2005_worktable_309.pdf.

⁵⁷ Murray Enkin et al., *Death Can Be Our Friend: Embracing the Inevitable Would Reduce Both Unnecessary Suffering And Costs*, 343 BRIT. MED. J. 1277, 1277 (2011) ("Too many people are dying undignified graceless deaths in hospital wards or intensive care units, with doctors battling against death way past the point that is humane."); see Derek C. Angus et al., *Use of Intensive Care at the End of Life in the United States: An Epidemiologic Study*, 32 CRITICAL CARE MED. 638–643 (2004) (nearly forty percent of all deaths nationwide occur in the acute care setting and approximately twenty percent involve the use of intensive care services); Alvin C. Kwok et al., *The Intensity and Variation of Surgical Care at the End of Life: A Retrospective Cohort Study*, 378 THE LANCET 1408, 1408 (2011) ("A fifth of elderly Americans die in intensive-care services and of these patients, about half undergo mechanical ventilation and a quarter undergo cardiopulmonary resuscitation in the days before death. Furthermore, the intensity of end-of-life care varies substantially on the basis of the facility where patients receive care.").

⁵⁸ Paul R. Helft, *Waiting for a Miracle*, CANCER NETWORK: ONCOLOGY J. (2014), <http://www.cancernetwork.com/oncology-journal/waiting-miracle#sthash.YP1TbtXB.dpuf> ("[A]lthough it is clear from national survey data that US adults are extraordinarily likely to believe that such supernatural events as divine healing can occur, healthcare professionals are consistently less likely to believe in them. However, because of the special respect we give to faith-based claims, 'waiting for a miracle' can become a sort of 'trump card' that is capable of shutting down further attempts to limit treatments.").

⁵⁹ Bernard Lo et al., *Discussing Religious and Spiritual Issues at the End of Life: A Practical Guide for Physicians*, 287 J. AM. MED. ASS'N. 749, 749 (2002).

or the spiritual aspects of these medical decisions.⁶⁰ Given this portrait, how could this imperfect mixing of the roles of the religious and the medical *not be* perplexing to most Americans? How could it not lead to moral confusion about the role of prayer and religious belief at the end of life? Physicians shepherd their patients through the war on death, but often do little to prepare them for when the battle is ultimately lost.

Another important factor in this equation is the development of artificial life support. More Americans are dying in medical facilities precisely because they are suffering from organ failure that can be supported by relatively new medical devices.⁶¹ A disorder that would have led to an imminent death a hundred years ago can now be treated with machines, and reimbursed through insurance. Our kidneys can be dialyzed, our stomachs can be fed through tubes, our lungs can be ventilated, our bladders can be evacuated, our hearts can be pumped, and our diaphragms can be paced. The advent of these life-sustaining devices is miraculous in one sense of the word, as life can be artificially supported, sometimes indefinitely. However, these advances also challenge our religious beliefs about when to give up hope and acknowledge it is the end. Artificial life support certainly challenges our very definitions of death. Is someone with minimal brain activity, but who is breathing, eating, and performing other life functions that are only possible because of artificial support from machines, still alive? In this metaphysical sense, medicine has been a victim of its own success.

The cultural, religious, institutional and technological developments of the last century have led us to rely on doctors as our partners in fighting death. With more and more medicines, procedures, and data, physicians have become modern day miracle workers in combatting death and disease. They have been our partners in this fight. In one study, eighty percent of Southern respondents viewed physicians as “God’s mechanics.”⁶² But these same doctors are not theologians, they

⁶⁰ Brown I, *supra* note 42, at 987–988.

⁶² Suzanne Prevost & J. Brandon Wallace, *Dying in Institutions*, in *DECISION MAKING NEAR THE END OF LIFE: ISSUES, DEVELOPMENT, AND FUTURE DIRECTIONS* 189–90 (James Werth and Dean Blevins eds., 2008).

⁶² Forty percent believed “God’s will is the most important factor in recovery,” and

are healers, and increasingly driven by data. When we ask these same people to take seriously the hope for religious prayer, some are sympathetic, but many see this final pursuit as outside the realm of their expertise.⁶³

The progress of modern medicine has led us to mutually engage in recovery narratives with our doctors. We are fighting cancer, heart disease, together. We will try subsequent treatments, and we will prevail. But of course this is the optimistic narrative physicians tell, to keep patients hopeful and to avoid uncomfortable conversations about near death. Patients and their surrogates may be particularly flummoxed when providers refer to any additional treatment as “futile,” and recommend withdrawing life-sustaining treatment. Why are these doctors, who have been helping us fight death for so long, suddenly giving up? Do they not believe in miracles? Did they lose their faith? Why will they not give this loved one just a little more time?

It is not always religious differences that motivate conflicts over medical futility. In some cases, the provider’s financial motives, as a steward of hospital or insurance resources, might be questioned.⁶⁴ The surrogate might also distrust the provider on a more personal level, and wonder whether their loved one is being hustled toward death because of his lack of education and money, or because of his race or ethnicity.⁶⁵ Even when the conflict is not borne of distrust, the surrogates might still be in denial of their loved one’s prognosis, and unable to come to grips with the fact that she will never return to the way she was. The provider, as the bearer of this

the study found that spiritual faith in healing was stronger among women than men. Christopher J. Mansfield et al., *The Doctor as God’s Mechanic? Beliefs in the Southeastern United States*, 54 SOC. SCI. & MED. 399–409 (2002).

⁶³ This sentiment is based on my experience on hospital ethics committees and the response to requests for religious miracles.

⁶⁴ Rationing and futility are two different things. “Rationing refers to the allocation of beneficial treatments among patients; [whereas] futility refers to whether a treatment will benefit an individual patient.” Robert D. Truog, *Medical Futility*, 25 GA. ST. U.L. REV. 985, 990 (2009) (quoting Lawrence J. Schneiderman et al., *Medical Futility: Its Meaning and Ethical Implications*, 112 ANNALS INTERNAL MED. 985, 988 (1996)).

⁶⁵ “Futility cases most commonly involve patients and families from the more marginalized and disadvantaged segments of our society. These are families who have lived on the outskirts of our healthcare system, and who have frequently been denied or perceive that they have been denied, care that is beneficial.” *Id.* at 988.

dark and unhopeful news, may be punished for being the messenger. While each of these is important and can work in tandem with other reasons, I am not addressing any of them specifically in this article. Here I will focus on the situation where the patient, surrogate or family believe in God's divine ability to work miracles, and are concerned that this belief is not mirrored or supported by the hospital or staff.

For the surrogate who wants to conserve life, there are likely asymmetrical costs. If we pray for a miracle, it just might happen, but if we withdraw or discontinue life-sustaining treatments, our loved one will almost certainly die. Many things may fuel this belief in miracles: religious tradition, personal spirituality, or even a pop culture recollection of a patient who suddenly "woke up" after years of being on a ventilator.⁶⁶ They hope that their loved one will similarly beat the odds, and they are disappointed that the clinicians hold out no such hope. They are not thinking of balancing data on probable outcomes, costs, and availability of hospital beds. They are understandably just thinking of their loved one.

When patients or families contest the withdrawal of treatment, it puts providers in a very uncomfortable position. In addition to being empiricists rather than theologians, providers may have chosen their profession because they saw something special in the doctor-patient relationship. The latter part of the twentieth century saw a transition in this relationship from a model of "doctor knows best" toward a model that prioritizes the autonomy and wishes of the patient.⁶⁷ This valuable shift has inadvertently engendered a more commercial model of health care, where the patient views herself as a customer.⁶⁸ It is fair to

⁶⁶ See, e.g., NICHOLAS SPARKS, *THE CHOICE* (Grand Central Publishing 2007) (where a woman wakes up after being in a coma for a significant period of time); *WHILE YOU WERE SLEEPING* (Buena Vista Pictures Distribution, Inc. 1995).

⁶⁷ Robert Veatch, *Doctor Does Not Know Best: Why in the New Century Physicians Must Stop Trying to Benefit Patients*, 25 *J. OF MED. AND PHILOSOPHY* 701, 702 (2000).

⁶⁸ Mark A. Hall, *The Legal and Historical Foundations of Patients As Medical Consumers*, 96 *GEO. L.J.* 583, 586 (2008); Robert Pearl, *Are You A Patient Or A Healthcare Consumer?*, *FORBES* (Oct. 15, 2015), <http://www.forbes.com/sites/robertpearl/2015/10/15/are-you-a-patient-or-a-health-care-consumer-why-it-matters/#68088ba65c3a> ("Advocates who insist on calling us 'consumers' believe that high-tech can solve nearly all of healthcare's challenges. They argue that in the digital age, control has shifted to the individual and must continue to do so.")

say that most providers do not like this trend.⁶⁹ They resist medicine becoming just another commercial good, “like breakfast cereal and toothpaste.”⁷⁰ And they do not want to be “indentured servants” or “grocers,” required to provide whatever treatment their patients and surrogates want.⁷¹ This offers yet another reason why the conflict between provider and family can become so intractable when the family demands certain life-sustaining care that the provider believes are inappropriate.

In addition to resisting the commercial model of health care, nurses and physicians also resist feeling complicit in “torturing” a patient with ventilators, pokes, and tracheotomies. If they chose their profession in order to heal, as most nurses and physicians do, then this can be emotionally draining if their present work feels diametrically opposed to this goal. This emotional toll may be especially pronounced when the patient is unlikely to receive any clinical benefit, but the treatments cause visible pain or distress.⁷² In these cases, appeals to medical futility may address the provider’s spiritual as well as professional needs. While the family is praying for a miracle, the provider might be hoping or praying for the patient’s physical pain to end, along with their role in perpetuating it.

C. Tragic (Sometimes Legal) Conflicts Between Patients and Providers

Some reading this will remember the case of Baby Rena, from the early 1990s. Baby Rena was HIV+ and had respiratory distress and cardiac failure.⁷³ She had excessive cerebral spinal fluid in her brain, kidney dysfunction, needed a ventilator to

⁶⁹ Pope, *supra* note 6, at 15.

⁷⁰ George Annas, *Asking the Courts to Set the Standard of Emergency Care – The Case of Baby K*, 330 NEW ENG. J. MED. 1542, 1545 (1994); see also Eric Gampel, *Does Professional Autonomy Protect Medical Futility Judgments?*, 20 BIOETHICS 92, 97 (2006); Pope, *supra* note 6, at 15.

⁷¹ See Pope, *supra* note 6, at 14–15.

⁷² See, e.g., Murray M. Pollack, *Surrogate Decision Makers and Respect: Commentary on “The Many Faces of Autonomy,”* 3 J. CLINICAL ETHICS 303, 303–304 (1992); Benjamin Weiser, *A Question of Letting Go; Child’s Trauma Drives Doctors to Reexamine Ethical Role Series: The Case of Baby Rena Series Number: 1/2*, WASH. POST, July 14, 1991, at A1 [hereinafter Weiser Part I]; Benjamin Weiser, *While Child Suffered, Beliefs Clashed Series: The Case of Baby Rena: Who Decides When Care Is Futile? Series Number: 2/2*, WASH. POST, July 15, 1991, at A1 [hereinafter Weiser Part II].

⁷³ Weiser Part I, *supra* note 72, at A1.

breathe, and had to be constantly sedated due to her expressions of pain.⁷⁴ A Christian couple who intended to foster Baby Rena remained hopeful in the face of her failing health, and were adamant that her care “be motivated by a spiritual sense of obedience to God.”⁷⁵ The treating doctor contended that the prognosis was grim and the ventilator be removed.⁷⁶ Despite initial successes breathing on her own, Baby Rena ultimately died on a ventilator after receiving cardio-pulmonary resuscitation.⁷⁷ The intended foster mother was “stunned,” as her faith held that health was there for anyone who would just claim it through prayer.⁷⁸

Since the popularized case of Baby Rena, the appeals for miraculous medical interventions have not subsided. The family of Bobbi Kristina Brown, daughter of Bobbi Brown and Whitney Houston, “asked friends and fans to pray for a miracle” in early 2015 after she nearly drowned in a bathtub and was rendered unconscious.⁷⁹ In the popular press, the 2013 case of Jahi McMath presents another tragic standoff between surrogates and hospital staff.⁸⁰ Jahi was an Oakland teenager who went into cardiac arrest after a routine tonsillectomy to alleviate sleep apnea.⁸¹ After being placed on a ventilator, the hospital staff declared the patient brain dead and suggested that the artificial support be withdrawn.⁸² Jahi’s mother insisted that as long as Jahi was on a ventilator and her heart was beating, God could work a miracle.⁸³ Unlike the Baby Rena case, this conflict

⁷⁴ *Id.*

⁷⁵ David M. Smolin, *Praying for Baby Rena: Religious Liberty, Medical Futility, and Miracles*, 25 SETON HALL L. REV. 960, 964–65 (1995) (quoting Weiser Part I, *supra* note 40, at A1).

⁷⁶ Weiser Part II, *supra* note 72, at A1.

⁷⁷ Smolin, *supra* note 75, at 966.

⁷⁸ *Id.*

⁷⁹ Kent Sepkowitz, *For Bobbi Kristina Brown, Science and the Miraculous Don’t Have to Be at Odds*, DAILY BEAST (Feb. 11, 2015), <http://www.thedailybeast.com/articles/2015/02/11/for-bobbi-kristina-brown-science-and-the-miraculous-don-t-have-to-be-at-odds.html?via=newsletter&source=DDAafternoon>.

⁸⁰ *Family Continues Legal Battle to Have Brain-Dead Girl Declared Alive*, CBS NEWS (Dec. 24, 2015), <http://www.cbsnews.com/news/family-continues-legal-battle-to-have-brain-dead-girl-declared-alive/>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

actually went before a judge.⁸⁴ The judge ruled that the ventilator could be withdrawn if Jahi's family could not find an alternative facility that would provide her care.⁸⁵ Jahi's family received permission to remove Jahi from Oakland Children's Hospital, and as of December of 2015, Jahi's family was still caring for her in a "home environment" in New Jersey.⁸⁶ Jahi has remained on a ventilator for the last two years with no reported signs of improvement.⁸⁷

These cases represent very private moments that became heartbreaking public spectacles. But much more often, these end-of-life decisions are made by families and providers in the shadow of the media or courtrooms. The cases are not always so clear-cut, where the medical consensus is that the patient is brain-dead and care is absolutely futile. Sometimes, the medical team disagrees about whether the patient would survive withdrawal of mechanical ventilation, and whether she might eventually regain function that would be acceptable to her. While Baby Rena and Jahi's cases challenged futility standards on moral and religious grounds, the word futility may be challenged as well on scientific and empirical grounds. The term itself is a vexing one, but rather than stumble on its imprecision, I will employ it here to mean that additional care is contrary to acceptable standards of care as there is likely no meaningful benefit to the patient. This is an imperfect and fuzzy standard, but in many cases a workable one.

To address the very problem of families requesting that "everything be done,"⁸⁸ when the provider thinks that this care is medically inappropriate, the majority of states have passed medical futility statutes.⁸⁹ The typical medical futility statute prescribes either specific procedures or standards of conduct, and essentially provide immunity from civil or criminal liability for

⁸⁴ *Id.*

⁸⁶ Sergio Quintata, *Family In Talks with Facilities to Move Jahi McMath*, ABC NEWS (Dec. 19, 2013), <http://abc7news.com/archive/9374667/>.

⁸⁶ *Family Continues Legal Battle to Have Brain-Dead Girl Declared Alive*, *supra* note 80.

⁸⁷ *Id.*

⁸⁸ See SCHNEIDERMAN ET AL., *WRONG MEDICINE: DOCTORS, PATIENTS, AND FUTILE TREATMENT* 40 (Johns Hopkins Univ. Press ed., 1995) (describing implications of requests from patients and families seeking extreme treatments and calling for responsive legislative reform).

⁸⁹ See generally Pope, *supra* note 6.

providers who follow the statute when withdrawing futile care.⁹⁰ Some statutes do not specifically mention the term “futility,” and instead just indicate that if a provider chooses for reasons of “conscience” not to provide life-sustaining care, she can do so, but must first satisfy certain requirements.⁹¹

The futility standard is fuzzy because it assumes that there can be general agreement about prognosis. It is also fuzzy because religions provide different guidance on principles such as suffering, impermanence, the role of consciousness, and even the definition of death, which inevitably confuses any clinical standard of futility.⁹² Unfortunately, providers can never be absolutely certain that care is medically ineffective or futile, as patients rarely present in textbook ways. This uncertainty can lead to ambiguity in end-of-life care decision-making. An ideological tug-of-war may take hold between life-conservationists and resource-conservationists, or in other words, between the sympathetic providers and religious family members on one end, and providers who think resources are being wasted, or that the team is complicit in torture, on the other. While appeals to miracles are frequent, particularly on television, their occurrence is not.⁹³ Even if prognosticating is imperfect, there is usually agreement between physicians as to whether the care is futile. But even when the medical team and ethics committee are in agreement that the care is futile, the question looms large: how much time, if any, do we give the patient (and her family) to allow their God to intervene and perform a miracle?

Skeptical providers ask whether God needs a ventilator to perform his miracles, and why he might perform miracles for

⁹⁰ *Id.* at 58.

⁹¹ UTAH CODE ANN. § 75-2a-115 (West 2016).

⁹² Mohamed Y. Rady & Joseph L. Verheidje, *The Determination of Quality of Life and Medical Futility in Disorders of Consciousness: Reinterpreting the Moral Code of Islam*, 15 AM. J. BIOETHICS 14, 14 (2015) (discussing the effects of Islamic bioethics and principles of Westernization on determinations about medical futility); Tuck Wai Chan & Desley Hegney, *Buddhism and Medical Futility*, J. BIOETHICAL INQUIRY 434, 434 (2012) (explaining Buddhist ethical and religious implications of medical futility).

⁹³ Susan Diem et al., *Cardiopulmonary Resuscitation on Television: Miracles and Misinformation*, 334 NEW ENG. J. MED. 1578, 1580 (1996) (“The portrayal of miracles [on television] as relatively common events can undermine trust in doctors and data.”).

some devoted patients but not others.⁹⁴ Believers in miracles focus instead on whether it is right to limit God's potential to intervene by withdrawing life support prematurely, especially when the body is still warm and the heart is beating.⁹⁵ Either way, the two groups are talking past each other, as they employ different meanings of the words "miracle" and "futility" and certainly put different emphases on the cost of getting the decision wrong.

This paper will spend a good deal of time engaging with the constitutional and statutory requirements in this situation. Is there a legal requirement to provide ventilator support indefinitely while a family waits for a religious miracle? Even if the physician is protected from a complaint of medical malpractice, can the provider unilaterally withdraw support without violating religious free exercise?⁹⁶

II. THE LEGAL LANDSCAPE FOR WITHDRAWING CARE WHEN FAMILIES PRAY FOR A MIRACLE

Physicians overestimate the risk of being sued and this guides their day-to-day practice.⁹⁷ Even if the actual risk is low, the menacing specter of a lawsuit is very real, with its reputation-crushing and time-sucking gravity. Many providers report that the fear of liability is a chief reason they would give special consideration to a religious request for futile care.⁹⁸ Avoiding a lawsuit becomes paramount, even if professional ethics and justice warrant the cessation of aggressive treatments. Whether

⁹⁴ See generally Teneille Brown, *Accommodating Miracles* (Jan. 23, 2017) (unpublished manuscript) (on file with the First Amendment Law Review) [hereinafter Brown II].

⁹⁵ *Id.*

⁹⁶ The withdrawal is almost never *truly* unilateral, as the clinical team consults repeatedly with family, social workers, and others before aggressively advocating for removal of futile treatments. Even so, the term reflects that the provider may terminate treatments when the patient does not consent. See Cheryl J. Misak, Douglas B. White & Robert D. Truog, *Medical Futility: A New Look at an Old Problem*, 146 *CHEST* 1667, 1668 (2014) (reframing the futility discussion from the typical lens of a unilateral withdrawal, and instead suggesting that "[m]edical decisions are never made unilaterally . . . [but] are made in the context of an implicit and evolving social contract among patients, physicians, and societies at large.").

⁹⁷ Barbara Phillips-Bute, *Transparency and Disclosure of Medical Errors: It's the Right Thing to Do, So Why the Reluctance?*, 35 *CAMPBELL L. REV.* 333, 336 (2013); Emily Carrier et al, *Physicians' Fears of Malpractice Lawsuits Are Not Assuaged by Tort Reforms*, 29 *HEALTH AFFAIRS* 1585, 1585 (2010).

⁹⁸ Brown II, *supra* note 95, at 5.

defensive medicine is practiced out of fear of an actual lawsuit or just a visit from their General Counsel's office with an institutional reprimand, most providers want nothing to do with lawyers or their unwelcome questions.

And it is not as if the physicians' fears of litigation are baseless. There are several ways that patients or their family members might legally challenge a provider's unilateral decision to withdraw futile life-sustaining measures. The most obvious suit would allege that the providers' withdrawal of the ventilator or refusal to perform cardio-pulmonary resuscitation (or any other treatment) violates the professional standard of care. This could give rise to a civil tort suit for negligence against the provider (i.e., medical malpractice). Although most conflicts are resolved by giving patients a little, though not an indefinite, amount of time, some families persist in their denial about their loved one's likely recovery and insist on futile care.⁹⁹

The medical futility statutes described above were enacted to prevent this sort of scenario and offer peace of mind to physicians invoking futility. However, if the statute predicates the legal safe harbor on practicing according to the standard of care and in good faith, then this standard resembles an ordinary negligence case.¹⁰⁰ Put another way, the patient's family would argue that the medical futility statute does not shield the provider from tort liability because the withdrawal of care was not supported by good clinical judgment, or was not done in good faith, according to the existing professional standard. As Thaddeus Pope has argued, uncertainty over how juries would define the professional standard of care renders hollow the protection that medical futility statutes attempt to provide.¹⁰¹ However, the particular statutory immunity in cases of medical futility does send a strong signal to physicians that if the standard of care is not to provide treatment, they should be protected from a negligence claim.

Notably, malpractice tort suits are different from suits for temporary injunctions against the hospital. An immediate motion for an injunction does not argue that a tort has occurred,

⁹⁹ *Id.* at 9-10.

¹⁰⁰ *See* Pope, *supra* note 6, at 64.

¹⁰¹ *See id.* at 73-74.

but instead argues that a right will be imminently violated or something inequitable will result if the hospital is not stopped from withdrawing care *right now*. A tort suit, on the other hand, would be decided when it is too late to reverse the withdrawal. The plaintiff would just be compensated with money if she prevails on her own, or on her loved one's behalf.

The next type of liability could come by way of the criminal law. While providers may fear criminal liability, this is *exceedingly* unlikely.¹⁰² There is no state that criminally prohibits a provider from withdrawing care that is deemed medically ineffective or futile. It does not meet the criminal definition of a battery. It is not murder. It is not criminal neglect. As long as the providers are honest with the family about why they are withdrawing the care, there is no fraud. These types of lawsuits also would arise too late to enjoin the withdrawal of the care. While the fear of tort or criminal liability poses risks to providers, and will impact their decisions to unilaterally withdraw care, I will not be addressing these types of suits here.

A second type of claim would involve the surrogates suing for constitutional due process violations. Here, the family could assert that the (a) public hospital's policy of unilaterally withdrawing treatment, or (b) the medical futility statute itself violates their procedural due process rights under the Fourteenth Amendment.¹⁰³ This might have some success if the statute does not allow for fair and advanced notice to the patient and a judicial hearing.¹⁰⁴ The most process-oriented medical futility statute that was passed by Texas, the Texas Advance Directive Act (TADA), offers immunity from a civil or criminal lawsuit if the facility treating the patient follows specific notification, consultation, and documentation requirements.¹⁰⁵ The Children's Hospital of Boston has adopted an institutional policy that resembles the TADA.¹⁰⁶

¹⁰² *Id.* at 49 ("Unilateral decisions to stop LSMT have thus led to homicide charges and at least one conviction. Admittedly, health care providers are rarely convicted.").

¹⁰³ See Pope, *supra* note 6, at 76.

¹⁰⁴ *Id.*

¹⁰⁵ TEX. HEALTH & SAFETY CODE ANN. § 166.046 (West 2016).

¹⁰⁶ Robert Truog, *Counterpoint: The Texas Advance Directives Act is Ethically Flawed: Medical Futility Disputes Must Be Resolved by a Fair Process*, 136 CHEST 968, 968 (2009).

Specifically, under TADA, the provider must give the surrogate forty-eight hours' notice before holding a meeting of the hospital's ethics committee.¹⁰⁷ The ethics committee then reviews the provider's determination that the care is futile.¹⁰⁸ If the committee finds that the disputed treatment is medically inappropriate, the surrogate is given the committee's written decision, which is final and not appealable in any court.¹⁰⁹ The patient or surrogate can request an extension from withdrawal from a district or county court, which will be granted "only if the court finds, by a preponderance of the evidence, that there is a reasonable expectation that a physician or health care facility that will honor the patient's directive will be found if the time extension is granted."¹¹⁰ Conversely, under the Boston Children's policy, the hospital must "inform [the surrogate] of their legal right to seek a court order to *block* the hospital from taking this action."¹¹¹

Under TADA, the provider is required to continue providing the disputed care for 10 days,¹¹² and during this time the provider must make reasonable efforts to transfer the patient to another provider that will comply with the surrogate's requests.¹¹³ If the transfer cannot be made, then the provider may unilaterally withdraw treatment, even life-sustaining treatment, on the eleventh day.¹¹⁴ The TADA therefore gives a great deal of authority to the hospital ethics committee. This absolute deference is procedurally suspect given that the majority of members are likely employed by one of the parties to the conflict (the hospital) and are on a first-name basis with the providers.¹¹⁵

¹⁰⁷ TEX. HEALTH & SAFETY CODE ANN. § 166.046(b)(2) (West 2016).

¹⁰⁸ § 166.046(a).

¹⁰⁹ § 166.046(b)(4)(B).

¹¹⁰ § 166.046(g).

¹¹¹ Truog, *supra* note 106, at 968 (emphasis added).

¹¹² TEX. HEALTH & SAFETY CODE ANN. § 166.046(e) (West 2016).

¹¹³ § 166.046(d).

¹¹⁴ § 166.046(e).

¹¹⁵ "[Hospital Ethics Committees (HECs)] are overwhelmingly intramural bodies; that is, they are comprised of professionals employed directly or indirectly by the very same institution whose decision the HEC adjudicates. Consequently, many HECs make decisions that suffer from risks of corruption, bias, carelessness, and arbitrariness." Thaddeus Mason Pope, *Multi-Institutional Healthcare Ethics Committees: The Procedurally Fair Internal Dispute Resolution Mechanism*, 31 CAMPBELL L. REV. 257, 258 (2009).

The TADA, and laws like it, may very well be unconstitutional as a deprivation of a liberty interest without due process, as the required hearing may be inadequate and the decision-maker is not impartial.¹¹⁶

A substantive due process claim could be brought against any state actor who relied on a state law to deprive a patient of a fundamental liberty interest.¹¹⁷ Compared to the procedural due process claim, the Fourteenth Amendment's substantive due process claim is less likely to be successful. Following *Washington v. Glucksberg*,¹¹⁸ whichever "careful description" of the liberty interest one employs—whether it be to require a provider to continue care while the family prays for a religious miracle or to give families time to wait for a miracle in medical treatments—this liberty interest would not be found to be "deeply rooted in the history and tradition" of our nation.¹¹⁹ Because the ability to sustain life through the use of technologically advanced equipment did not exist in our country's early history, there is no case law support for the idea that demanding its use while a family prays for a miracle would be a fundamental liberty interest. Even if it were considered a fundamental liberty

¹¹⁶ See Nora O'Callaghan, *Dying for Due Process: The Unconstitutional Medical Futility Provision of the Texas Advance Directives Act*, 60 BAYLOR L. REV. 527, 585–89 (2008).

¹¹⁷ "If one were forced to find a common thread running through the cases in the privacy strand of modern substantive due process jurisprudence, it would likely be governmental non-interference in intimate, personal decisions, especially those regarding sexuality (*e.g.*, *Griswold and Baird*), reproduction (*e.g.*, *Roe v. Wade*) and marriage (*e.g.*, *Loving v. Virginia*). Nevertheless, despite what for a while seemed like a trend of expanding the ambit of the right to privacy, and perhaps because of the controversy that some of these decisions engendered, especially with regard to abortion, the Supreme Court in recent years has been extremely reluctant to expand the scope of the privacy strand of substantive due process beyond those limits just discussed." See Jerry H. Elmer, *Physician-Assisted Suicide Controversy at the Intersection of Law and Medicine*, 46 R.I. BAR J. 13, 24 (1998).

¹¹⁸ 521 U.S. 702 (1997). The Supreme Court has made it very difficult to advance new "liberty interests." *Id.* at 720–21 (noting the Court's reluctance to expand the notion of substantive due process). The liberty interest must be carefully described, and its protection must be "'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* at 721 (plurality opinion) (citations omitted) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977); then quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)). A right to demand that providers violate their professional standards and provide futile care so that the family can pray for a miracle would fail this test.

¹¹⁹ *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("[S]o rooted in the traditions and conscience of our people as to be ranked as fundamental"); see also *Palko*, 302 U.S. at 325–26 ("[I]mplicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed.").

interest, it could be infringed by the state with compelling interests that are narrowly tailored.¹²⁰ This strict scrutiny is similar to that found under the state and federal Religious Freedom Restoration Acts, and I will analyze this test thoroughly in section [x].

Despite the interesting questions these tort, criminal, and Fourteenth Amendment analyses pose, I have a fourth type of claim in my crosshairs. As I mentioned in the introduction, there is something about the religious request for futile care that makes providers more fastidious. They are particularly concerned about treading lightly on patients' religious freedoms, perhaps even more concerned than they are about deviating from the medical standard of care.¹²¹ I am therefore exploring in this article whether the provider or hospital is violating the patient's free exercise rights under the First Amendment, or their rights under the Religious Freedom Restoration Act of their state. I will evaluate why patients or their family members might make such a religious freedom claim, and its likelihood of success. I will analyze relevant case law developments related to religious exemptions for free exercise to determine whether there might be a violation of the patient's religious free exercise rights when providers unilaterally withdraw treatment. This liability would not attach to individual providers, and would be directed at the constitutionality of state laws and state institutional policies. I will also ask whether the federal or state Religious Freedom Restoration Acts (RFRA) might provide an avenue for successful legal action.

A. Unilateral Withdrawal of Life-Sustaining Care Would Not Violate the First Amendment's Free Exercise Clause

¹²⁰ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 871 (1992).

¹²¹ Curlin et al., *supra* note 2, at 129 (“[P]rofessional attention to patients’ religious and spiritual concerns is one part of a broader movement toward a more patient-centered, culturally competent, narrative, and holistic medicine. This movement emphasizes the notion that patients interact with the health care system from a specific language, culture, community, and tradition, all of which shape patients’ decisions and experiences related to illness.”).

The First Amendment of the U.S. Constitution states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”¹²² The first part of this is called the “Establishment Clause,” and prohibits state endorsement of religion.¹²³ The second focuses on being free from government restraint to express religious beliefs and practices.¹²⁴ Historically, free exercise of religion was the right to act publicly on the choices of religious conscience.¹²⁵ James Madison wrote that religious practices must be protected from government interference because they are inseparable from religious beliefs, as religion consists of both “the duties that we owe to our Creator, and the manner of discharging them.”¹²⁶ However, as we will see, there is a “wide range of alternative content for the first amendment's free exercise clause” and history, case law, and language have “left the clause open for widely disparate interpretation.”¹²⁷

Because many private actions could be swept up under the heading of religious exercise, its protection has never been unrestricted. While nearly every early state constitution guaranteed religious free exercise rights to some degree, they often specified that such exercise “not violate the public peace or the private rights of others.”¹²⁸ The early states usually narrowed their guarantee to “the free exercise of religious worship,” which meant that the protection of indirect forms of religious expression would need to be protected by other means, if at all.¹²⁹ In the United States, despite our history of being founded on religious freedom, states never went so far as to permit “encroaching on the rights of others, disturbing the public peace, or otherwise violating criminal laws” in order to protect it.¹³⁰

¹²² U.S. CONST. amend I (emphasis added).

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ JOHN WITTE, JR. & JOEL NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 45 (3d ed. 2011).

¹²⁶ *Id.*

¹²⁷ Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 299–300 (1986).

¹²⁸ Witte, Jr. & Nichols, *supra* note 125, at 46.

¹²⁹ *Id.*

¹³⁰ Luther Martin, *For the Federal Gazette: No. V.*, FED GAZETTE & BALT. DAILY ADVERTISER, Mar. 19, 1799, at 2 (“The declaration, that religious faith shall be unpunished, does not give impunity to criminal acts, dictated by religious error.”).

With a few exceptions, this is the philosophy of religious freedom that has been endorsed by the U.S. Supreme Court.¹³¹ This explains how a civil right could be inherently viewed in a utilitarian framework, where the externalities of protecting religious freedom have never been ignored.

But before we engage too deeply in this First Amendment free exercise analysis, we need to explain exactly what form this claim would make in the context of medical futility. Importantly, only state actors can be found to violate the First Amendment, as the Constitution only prohibits *Congress* from making any law that would prohibit free exercise.¹³² This prohibition was extended to state governments through the Fourteenth Amendment, but does not reach private actors serving purely private interests.¹³³ Providers could be considered state actors if they serve a public function, such as working at the Veteran's Affairs hospitals, a state prison, a county-run clinic, or a public, state university hospital.

The state action needs to have deprived someone of a constitutional right, which here would be the freedom of religious exercise.¹³⁴ In medical futility cases, the patient's family would be arguing for an accommodation of their religious belief, through an exemption from the state or institution's medical futility law or policy. The patient's family would argue that complying with the policy would require a violation of the patient's religious beliefs of allowing God to act through prayer. There are not very many Supreme Court cases that deal precisely

¹³¹ Clark B. Lombardi, *Nineteenth-Century Free Exercise Jurisprudence and the Challenge of Polygamy: The Relevance of Nineteenth-Century Cases and Commentaries for Contemporary Debates About Free Exercise Exemptions*, 85 OR. L. REV. 374 (2006); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014).

¹³² Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context*, 26 CARDOZO L. REV. 99 (2004).

¹³³ In *West v. Atkins*, the Supreme Court held that a private physician under contract with the state to provide medical services at a state hospital is acting as a state actor for purposes of § 1983, a federal statute that allows plaintiffs to sue private individuals for civil rights violations. See 487 U.S. 42, 57 (1988).

¹³⁴ "Every exercise of judicial review should begin by identifying a governmental actor, a constitutional *subject*. And every constitutional holding should start by saying *who* has violated the Constitution." Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1214 (2010) (emphasis added) (citation omitted).

with religious freedom exemptions from a state or federal law, but these are the cases I will canvass.

Before determining that the patient should receive an exemption from a medical futility law, a court must first determine, as a threshold and definitional matter, whether the belief at issue is religious.¹³⁵ Then it must determine whether the belief is sincerely held.¹³⁶ In theory, the First Amendment does *not* allow questioning the empirical basis for the religious belief, but in practice, courts may dismiss First Amendment claims that are incredulous under either of these prongs.¹³⁷ In *United States v. Ballard*, the Court states that “[m]en may believe what they cannot prove. They may not be put to proof of their religious doctrines or beliefs.”¹³⁸ This means that even if a patient believes something unorthodox, while the sincerity of the belief may be questioned, the underlying religious belief cannot, so long as it passes the threshold test of stemming from a “religion.”¹³⁹

This broad deference to whether the belief is religious is true even if a patient’s beliefs are different from the beliefs of her co-members.¹⁴⁰ If a Muslim family believes in a type of miraculous religious intervention that would not be shared by most Muslims, this does not invalidate the First Amendment religious protection. The Court has reasoned that “it is not within

¹³⁵ “We refused to evaluate the objective reasonableness of the prisoner’s belief, holding that our ‘scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature.’ *Ford v. McGinnis*, 352 F.3d 582, 590 (2d Cir. 2003); *see also*, *Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 171 (3d Cir. 2002), cert. denied, 539 U.S. 942.

¹³⁶ William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 310–11 (1991); *see* Kori Termine, *Ford v. McGinnis: Should Courts Really Enter the Thicket of Theology?* 24 QUINNIPIAC L. REV. 187, 194 (2005).

¹³⁷ “A court is more likely to find against a claimant on definitional grounds when the religion is bizarre, relative to the cultural norm, and is more likely to find that a religious belief is insincere when the belief in question is, by cultural norms, incredulous. The religious claims most likely to be recognized, therefore, are those that closely parallel or directly relate to the culture’s predominant religious traditions.” Marshall, *supra* note 137, at 311 (footnote omitted).

¹³⁸ 322 U.S. 78, 86 (1944).

¹³⁹ *Welsh v. United States*, 398 U.S. 333, 339–40 (1970) (adopting broad definition of “religion” under draft exemption statutes, but also influenced by constitutional concerns); *United States v. Seeger*, 380 U.S. 163, 176 (1965); *Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 834 n.2 (1989) (noting that religious claims must be deemed genuine unless it is patently “bizarre or incredible”); *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 457–58 (1988) (rejecting inquiry into “centrality” of belief or practice on ground that it involves second-guessing believer’s understanding of his religion).

¹⁴⁰ *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 716 (1981).

the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”¹⁴¹ Thus, for First Amendment purposes, it is irrelevant whether one Episcopalian holds beliefs about miracles that are not shared with other Episcopalians.

Importantly, the free exercise of “religion” need not be limited to obeying mandatory rules set down by a church. Although respected First Amendment scholar Doug Laycock recognizes that the rights implicated in free exercise are “at a maximum when government prohibits what faith unambiguously requires, or requires what faith prohibits,”¹⁴² he and others argue that the Free Exercise Clause must protect more than this.¹⁴³ The practice of religion encompasses more than following edicts, because otherwise it would fail to protect most religiously motivated practice. The ability to pray at a given location or be a member of the ministry are not requirements of each member of a faith, but they flow from religious belief. Thus, despite lower court rulings to the contrary, if a state law or regulation placed a substantial burden on the ability to pray, this would likely be considered a substantial burden on religious free exercise by the Supreme Court.¹⁴⁴

Despite this broad deference to how an individual conceives of her religious belief and religiously motivated conduct, the cases based on free exercise have generally not turned out favorably for people claiming that their rights have been violated.¹⁴⁵ As Ira Lupu points out, “[o]n rare occasions, application of these standards has produced important victories for religious freedom. Far more frequently, however, judges have

¹⁴¹ *Id.* at 716.

¹⁴² DOUGLAS LAYCOCK, RELIGIOUS LIBERTY, VOLUME 2: THE FREE EXERCISE CLAUSE 95 (John Witte Jr. ed., 2011).

¹⁴³ Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 142–44 (1989).

¹⁴⁴ *But see* Brandon v. Board of Education, 635 F.2d 971, 977 (2d Cir. 1980); Chess v. Widmar, 480 F. Supp. 907, 917 (W.D. Mo. 1979).

¹⁴⁵ While this dataset includes claims under the free exercise clause as well as RFRA and religiously motivated free speech claims, the plaintiffs’ success rate by two researchers was found to be 35.5%. Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1387–88 (2013).

displayed pseudo-sensitivity to religious freedom.”¹⁴⁶ The next part of this article will investigate the development of the Supreme Court Free Exercise jurisprudence and how it supports this assertion.

B. The Development of Free Exercise Jurisprudence

In 1878, the Court decided *Reynolds v. United States*, the first free exercise case.¹⁴⁷ George Reynolds was a member of the Church of Jesus Christ of Latter-Day Saints (Mormons) who took a second wife and was charged under a criminal anti-bigamy statute.¹⁴⁸ George challenged the criminal statute on free exercise grounds.¹⁴⁹ The *Reynolds* Court held that bigamy could be considered a crime even though Mormons argued it was part of their religious rights, or even duties.¹⁵⁰ In this landmark free exercise case, the Court reasoned that the First Amendment protects religious belief but does not allow exemption from otherwise valid laws based on these religious beliefs.¹⁵¹ To permit an exemption for Reynolds “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”¹⁵² In so holding that the criminal anti-bigamy statute was valid, the Court said that “while [laws] cannot interfere with mere religious belief and opinions, they may with practices.”¹⁵³ This created a categorical prohibition on exemptions from generally applicable laws (i.e., laws that applied to religious and non-religious conduct alike). *Reynolds* has never been explicitly overruled, but its application *has* been limited.¹⁵⁴ For one, the distinction between religious belief and conduct that the *Reynolds* Court

¹⁴⁶ Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. WOMEN’S L.J. 35, 39 (2015).

¹⁴⁷ 98 U.S. 145 (1878).

¹⁴⁸ *Id.* at 146.

¹⁴⁹ *Id.* at 162.

¹⁵⁰ *Id.* at 168.

¹⁵¹ *Id.*

¹⁵² *Id.* at 167.

¹⁵³ *Id.* at 166.

¹⁵⁴ “*Reynolds*, despite its age, has never been overruled by the United States Supreme Court and, in fact, has been cited by the Court with approval in several modern free exercise cases, signaling its continuing vitality.” *State v. Holm*, 2006 UT 31, ¶ 51 (2006); and for the limitations on the *Reynolds*’ holding, see, *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1187 (D. Utah 2013), *vacated*, 822 F.3d 1151 (10th Cir. 2016).

endorsed has been disavowed.¹⁵⁵ The clause currently protects religious conduct as well as religious belief.¹⁵⁶ However, the general principle disfavoring exemptions from otherwise valid and generally applicable laws remains.¹⁵⁷

The Court made a rhetorical shift in 1961 from categorical prohibitions on exemption for generally applicable laws. Instead of categorically prohibiting them, the Court now discussed, and found relevant, the burdens imposed on the religious believer. In *Braunfeld v. Brown*,¹⁵⁸ Jewish shopkeepers argued for an exemption from enforcement of a Pennsylvania criminal statute, which prohibited shops from being open on Sundays.¹⁵⁹ The shopkeepers lost, but the Court nevertheless inquired into the burdens that would be imposed on religious practice by having to work on their Jewish Sabbath in order to stay competitive and comply with mandatory closures on the Christian Sabbath.¹⁶⁰ The Court also asked whether the legislature could draft alternative means of achieving the same legislative goals.¹⁶¹ Even though the religious exercise claim failed, this was an important rhetorical shift to consider the burdens of complying with a generally applicable law.

Two years later, the Supreme Court's decision in *Sherbert v. Verner*¹⁶² built upon the language from *Braunfeld*. In *Sherbert*, a Seventh-day Adventist Church member was denied

¹⁵⁵ “In deciding the [Yoder] case in favor of the Amish parents, the Court also rejected the state's asserted distinction between regulation of ‘beliefs’ and regulation of ‘conduct.’ The Court stated that in cases of this sort, ‘belief and action cannot be neatly confined in logic-tight compartments.’” See Paula A. Monopoli, *Allocating the Costs of Parental Free Exercise: Striking a New Balance Between Sincere Religious Belief and a Child's Right to Medical Treatment*, 18 PEPP. L. REV. 319, 339 (1991).

¹⁵⁶ Kristen A. Berberick, *Marrying into Heaven: The Constitutionality of Polygamy Bans Under the Free Exercise Clause*, 44 WILLAMETTE L. REV. 105, 115–16 (2007).

¹⁵⁷ Smith, 494 U.S. 872

¹⁵⁸ 366 U.S. 599 (1961).

¹⁵⁹ *Id.* at 601–02 (“Appellants contend that the enforcement against them of the Pennsylvania statute will prohibit the free exercise of their religion because, due to the statute's compulsion to close on Sunday, appellants will suffer substantial economic loss, to the benefit of their non-Sabbatarian competitors, if appellants also continue their Sabbath observance by closing their businesses on Saturday. . .”).

¹⁶⁰ *Id.* at 608–09.

¹⁶¹ *Id.* at 603 (“Concededly, appellants and all other persons who wish to work on Sunday will be burdened economically by the State's day of rest mandate . . .”); *id.* at 608 (“[W]e examined several suggested alternative means by which it was argued that the State might accomplish its secular goals without even remotely or incidentally affecting religious freedom.”).

¹⁶² 374 U.S. 398 (1963).

unemployment benefits because she refused to accept available employment that required her to work on Saturday, the day of her Sabbath.¹⁶³ In administrative proceedings under the unemployment benefits statute, the tribunal found that the restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits, because she failed, without good cause, to accept “suitable work when offered . . . by the employment office or the employer”¹⁶⁴ Here, the Supreme Court upheld her free exercise claim by applying strict scrutiny, a framework born of the First Amendment speech protections but maturing in other doctrines.¹⁶⁵

Specifically in *Sherbert*, the Court asked whether the generally applicable and facially neutral unemployment regulations imposed a burden on the free exercise of the appellant’s religion, and whether the regulations were necessary to satisfy a compelling state interest.¹⁶⁶ As to the first requirement, the Court easily found that the law burdened her religious exercise.¹⁶⁷ The Court stated that the benefits ruling “force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”¹⁶⁸ It reasoned that the government imposing such a choice burdens free exercise in the same way as fining her for Saturday worship.¹⁶⁹

Next, the Court asked whether the state’s regulations were the least restrictive possible to further a compelling state interest.¹⁷⁰ The Court answered in the negative, saying that “even if the possibility of spurious claims did threaten to dilute the [unemployment] fund and disrupt the scheduling of [Saturday] work, it would plainly be incumbent upon the appellees to

¹⁶³ *Id.* at 399–400.

¹⁶⁴ *Id.* at 401.

¹⁶⁵ Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 357 (2006).

¹⁶⁶ *Sherbert*, 374 U.S. at 403.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 404.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 407.

demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.”¹⁷¹ The appellees did not assert this interest before the state court, and even if they had, they failed to demonstrate that it was the least restrictive means possible.¹⁷²

Addressing whether the state’s interests could have been deemed compelling, had they been raised, the Court emphasized that “[o]nly the gravest abuses, endangering paramount interests” could justify burdening Sherbert’s religion.¹⁷³ Seeing no compelling asserted interests in denying benefits to Sherbert, the Court held that the Free Exercise clause had been violated.¹⁷⁴ *Sherbert* created a new constitutional standard for testing First Amendment Free Exercise cases that employed the strict scrutiny test from Fourteenth Amendment jurisprudence.¹⁷⁵ That is, Free Exercise cases now included an inquiry into the relative religious burdens on the claimant, and whether the advanced state interests in the law are compelling and the least restrictive possible.¹⁷⁶

For nearly three decades, the Court employed the *Sherbert* test to free exercise claims in many different contexts.¹⁷⁷ It has been said that during this time the Court was “too willing to create exceptions to the doctrine, and lower courts were too willing to find that free exercise rights were not burdened and that governmental interests were compelling.”¹⁷⁸ According to Douglas Laycock, during this time courts routinely underestimated the burdens imposed and overestimated the importance of governmental interests.¹⁷⁹ Even so, the test remained and the Court continued to inquire into the religious burdens imposed by religiously neutral laws.¹⁸⁰ The next

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

¹⁷⁴ *Id.* at 409–410.

¹⁷⁵ *Id.* at 403.

¹⁷⁶ *Id.*

¹⁷⁷ LAYCOCK, *supra* note 142, at 393.

¹⁷⁸ *Id.* at 393.

¹⁷⁹ *Id.* at 394.

¹⁸⁰ *See id.*

landmark case to employ *Sherbert* was *Wisconsin v. Yoder*, decided in 1972.¹⁸¹

In *Yoder*, members of the Amish religion were convicted of violating Wisconsin's compulsory school attendance law.¹⁸² Instead of attending school until the age of sixteen, as the law required, the Amish provided their own vocational education after the eighth grade.¹⁸³

The Court in *Yoder* held that the Free Exercise Clause relieved adult members of the "Old Order Amish" from the obligation to send their children to school until the age of sixteen.¹⁸⁴ The Court argued that respondents have amply supported their claim "that enforcement of the compulsory formal education requirement after the eighth grade would gravely endanger if not destroy the free exercise of their religious beliefs."¹⁸⁵ Complying with Wisconsin's law would mean that the members would receive not only the "censure of the church community," but would also "endanger their own salvation and that of their children."¹⁸⁶ This presented a significant burden on their religious free exercise.¹⁸⁷

The Court also found that the state interest was not compelling.¹⁸⁸ This was not as applied generally to the state's interest in public education, but in the specific state interest in requiring public education until the age of sixteen for the Amish in this case.¹⁸⁹ The Amish experts testified at trial, without challenge, that a few extra years of compulsory education may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child

¹⁸¹ 406 U.S. 205 (1972).

¹⁸² *Id.*

¹⁸³ *Id.* at 205.

¹⁸⁴ *Id.* at 234–35.

¹⁸⁵ *Id.* at 205.

¹⁸⁶ *Id.* at 209.

¹⁸⁷ *Yoder*, at 220–21.

¹⁸⁸ *Id.* at 222.

¹⁸⁹ *Id.* at 221.

for life in the separated agrarian community that is the keystone of the Amish faith.¹⁹⁰

Moreover, the Amish provided an “ideal vocational education for their children in the adolescent years,” in case they should choose to leave the faith.¹⁹¹

Like *Sherbert*, *Yoder* also used the language of “burdening” the believers and requiring “compelling” state interests, and seems to perform a cost-benefit analysis that stacks up the net benefits and burdens to the claimants and the state.¹⁹² The Court ruled in favor of the Amish, but only after a thorough assessment of the impact of the exemption on the state and the religious believers.¹⁹³ Notably, the Court seemed impressed by the historical roots of the Amish people’s religious requests, and the fact that this was a sincere and deeply held belief that was integral to their religious faith.¹⁹⁴ Future cases would challenge the relevance of this finding of sincerity and centrality, but this *dicta* raises interesting questions for medical futility cases that will be discussed later in the article. *Yoder* remained the high-water mark in terms of protecting religious liberties well into the 1980s.¹⁹⁵ After this case, the Supreme Court retreated, and there were very few victories for Free Exercise claimants.¹⁹⁶ Those who did succeed demonstrated explicit discrimination against religion or denials of unemployment compensation, as in *Sherbert*.¹⁹⁷

¹⁹⁰ *Id.* at 222.

¹⁹¹ *Id.* at 224.

¹⁹² *Id.* at 229.

¹⁹³ *Id.* at 236.

¹⁹⁴ *Id.* at 205 (“Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish have demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continuing survival of Old Order Amish communities, and the hazards presented by the State’s enforcement of a statute generally valid as to others.”).

¹⁹⁵ See Steven H. Aden & Lee J. Strang, *When A “Rule” Doesn’t Rule: The Failure of the Oregon Employment Division v. Smith “Hybrid Rights Exception”*, 108 PENN ST. L. REV. 573, 577 (2003) (“Wisconsin v. Yoder was, in many ways, the high water mark of free exercise mandated exemptions.”).

¹⁹⁶ “While the Court continually rejected the claims of free exercise plaintiffs, it continued to invoke the language of the compelling state interest test. It thus appeared that the Supreme Court had settled on applying a watered-down version of strict scrutiny in the area of free exercise.” See *id.* at 579.

¹⁹⁷ Arnold H. Loewy, *Rethinking Free Exercise of Religion After Smith and Boerne: Charting a Middle Course*, 68 MISS. L.J. 105 n.44 (1998); Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 246 (1998) (“Putting aside the unemployment compensation cases, not since

This then brings us to the case of *Department of Human Resources v. Smith*.¹⁹⁸ This case changed everything.¹⁹⁹ In this case, petitioners were fired from their jobs at a private drug rehabilitation center for ingesting peyote for sacramental purposes at a ceremony of their Native American church.²⁰⁰ They sought review of the denial of their unemployment benefits, claiming that their use of the hallucinogen peyote should not have been considered criminal misconduct, making them ineligible for benefits.²⁰¹ Justice Scalia wrote the plurality opinion, which found that their free exercise rights had *not* been violated.²⁰² The Court held that to grant an exemption from a religiously-neutral law would place the employees “beyond the reach of a criminal law that is not specifically directed at their religious practice. . . .”²⁰³ Justice Scalia went on to say that the collection of a general tax might offend the religious freedom of those who do not believe in supporting organized government, but they would still be required to pay the tax.²⁰⁴ If burdening religion “is not the object of the tax, but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”²⁰⁵ Heretofore, indirect burdens on religious practices that apply equally to the religious and non-religious would not be considered violations of the First Amendment’s free exercise clause.

The plurality opinion dismantled the *Sherbert* test, which had required demonstrating that a law that substantially burdened religion be the least restrictive necessary to fulfill a compelling state interest. Justice Scalia noted that “[i]n recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all” and he then listed many different cases where the Court did not require the

Yoder had the Supreme Court required an exemption from a generally applicable law on free exercise grounds.”).

¹⁹⁸ *Emp’t Div., Dep’t. of Human Res. v. Smith*, 494 U.S. 872 (1990).

¹⁹⁹ *See Aden & Strang*, *supra* note 195.

²⁰⁰ *See Smith*, 494 U.S. at 872.

²⁰¹ *Id.* at 872.

²⁰² *Id.* at 874.

²⁰³ *Id.* at 878.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

government to advance a compelling state interest.²⁰⁶ The Court therefore argued that even if they were to apply it to the present case, they would not use it to require a religious exemption from an otherwise neutral and generally applicable law.²⁰⁷ In strong terms, the Court stated that it has “never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”²⁰⁸ The scrutinizing framework of *Sherbert* and *Yoder* were being completely undone.

1. Applying Current First Amendment Free Exercise Precedent to Medical Futility Statutes

So long as *Smith* holds, it is exceedingly unlikely that existing medical futility statutes could be found to violate a patient's First Amendment Free Exercise of religion. While not technically required by any religious faith, belief in the power of prayer to heal the sick is motivated by religion and the free exercise protections ought to apply. The threshold finding that the statutes impact the practice of religion should be met. Courts might disagree on whether the statutes place a substantial burden on religion. Because this component mirrors the analysis under the federal and state Religious Freedom Restoration Acts (RFRA), this prong will be examined in the next subsection of the Article.

Smith holds that for First Amendment purposes, a generally applicable law will not violate free exercise if it is at least related to legitimate government interests.²⁰⁹ The unilateral withdrawal of futile treatment that is permitted under the futility statutes applies generally to religious patients and non-religious patients alike.²¹⁰ The medical futility statutes are thus neutral

²⁰⁶ *Id.* at 883–84.

²⁰⁷ “Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.” *Id.* at 884, *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4.

²⁰⁸ *Id.* at 878–79.

²⁰⁹ *Id.* at 884.

²¹⁰ *See, e.g.*, ALASKA STAT. §13.52.060 (West 2016); CAL. PROB. CODE §§ 4735, 4736 (West 2016); DEL. CODE ANN. tit. 16, § 2508 (West 2016); HAW. REV. STAT. § 327E-7 (West 2016); ME. REV. STAT. ANN. tit. 18-A, §5-807 (West 2016); MISS. CODE

laws that do not mention religious beliefs as a basis for withdrawal or continuance of care. While some requests for futile care might be religiously motivated, many requests have nothing to do with religion at all. And as *Smith* declared, even if the religiously-neutral medical futility statutes incidentally burden the exercise of religion, these will not be invalidated under the First Amendment's Free Exercise Clause. Prior to *Smith*, the relative burdens on religion and benefits to the state would need to be assessed for First Amendment purposes.²¹¹ The state would have had to show that its interests in passing the medical futility statutes were compelling.²¹² After *Smith*, however, the challenge is much easier to overcome. The generally applicable and facially neutral medical futility statutes would not be considered unconstitutional.

However, as much of the preceding case analysis probably made clear, in a medical futility case the plaintiffs' claims would be even *weaker* than for those decided by the Supreme Court in the past. In *Smith*, *Yoder*, and *Braunfeld*, the plaintiffs were not arguing that they should be able to require some third party to act. Rather, they were arguing that they should be exempt from legal sanctions for acting (or not acting) themselves. This is a very important difference, which spells unlikely success for a religious patient praying for a miracle.

In the case of a challenge to a medical futility statute, the religious challengers would be seeking medically futile care, which would require the conscription of objecting hospital staff who may or may not be state actors, as well as the use of insurance resources to cover the oversight and use of the medical equipment in a way that might violate the clinical standard of care. Even under an analysis akin to that which the *Sherbert* or *Yoder* court undertook, it is quite unlikely religious patients would prevail given the moral and economic costs imposed on

ANN. § 41-41-215 (West 2016); N.J. STAT. ANN. §§ 26:2H-62, 26:2H:65 (West 2016); N.M. STAT. ANN. § 24-7A-7 (West 2016); TENN. CODE ANN. § 68-11-1808 (West 2016); TEX. HEALTH & SAFETY CODE ANN. § 166.046 (West 2016); WYO. STAT. ANN. § 35-22-408 (West 2016).

²¹¹ *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

²¹² *Id.* at 406.

third-parties.²¹³ As Frederick Gedicks and Rebecca G. Van Tassel point out, permissive accommodations under the Free Exercise Clause may violate the Establishment Clause when they externalize the cost of protecting religious freedom to non-believing third-parties such as private hospitals and their staff.²¹⁴ Unlike permissive religious accommodations that may be allowed by patients or providers, the structural bars on establishing religion cannot be waived by patients, providers, or the hospital staff.²¹⁵ Thus, to the extent that medical futility statutes or policies carve out religious reasons for special treatment to protect free exercise, the cost-shifting to non-believing third-parties (patients who do not receive ventilator support because they are being used by religious patients, or providers who morally object to providing this care) could then violate the Establishment Clause.²¹⁶

Additionally, the net burdens and benefits skew sharply against the hospital and insurance company, making the accommodation less permissible. The denial of extra time to wait for a miracle may indirectly burden religious practice, but the significance of this burden is hard to quantify. In a medical futility case, the patient's family is never prohibited from praying for a miracle, they are just prohibited from *requiring the providers to perform certain tasks* while they pray for a miracle.²¹⁷ However, if we are to give any independent content to the idea of a "substantive burden," the likelihood of the outcome of the religious exercise must matter as well as the magnitude of what

²¹³ Gedicks & Van Tassel, *supra* note 131, at 349 ("[T]he Court condemns permissive accommodations on Establishment Clause grounds when the accommodations impose significant burdens on third parties who do not believe or participate in the accommodated practice.").

²¹⁴ *Id.*

²¹⁵ *Id.* at 347 ("[T]he Establishment Clause is a structural bar on government action rather than a guarantee of personal rights. Violations of the Establishment Clause cannot be waived by the parties or balanced away by weightier private or government interests, as can violations of the Free Exercise Clause.").

²¹⁶ See Gedicks & Van Tassel, *supra* note 132, at 357 ("[These] decisions demonstrate the Court's general rejection of accommodations that shift the costs of accommodating a religion from those who practice it to those who don't.").

²¹⁷ For example, the Texas medical futility statute provides that "[t]he attending physician, any other physician responsible for the care of the patient, and the health care facility are not obligated to provide life-sustaining treatment after the 10th day after both the written decision and the patient's medical record required under Subsection (b) are provided to the patient or the person responsible for the health care decisions of the patient", but there is no mention of any prohibition on the patient's ability to pray during this procedure. TEX. HEALTH & SAFETY CODE ANN. § 166.046 (West 2016).

is lost by no accommodation. If hospitals recognized religious exemptions for those demanding futile care, there may be no limit to the requests. Hospitals would run out of space and equipment. This would be exacerbated by the difficulty discerning the sincere religious requests from the insincere, a topic we will take up later in the Article.²¹⁸

2. The Response to *Smith* – the Federal Religious Freedom Restoration Act (RFRA)

Academics, politicians, religious leaders, and the media were quick to condemn the *Smith* opinion.²¹⁹ Three prominent First Amendment scholars described the decision as a “sweeping disaster for religious liberty” while Congressman Stephen J. Solarz declared that “the Supreme Court has virtually removed religious freedom from the Bill of Rights.”²²⁰ Congress responded to the *Smith* decision by passing the Religious Freedom Restoration Act (RFRA) three years later in 1993.²²¹ Supported by a diverse coalition of members of Congress and signed into law by President Clinton, RFRA reintroduced the compelling interest test as a statutory right.²²² More precisely, the goal of RFRA was to prevent governments at all levels (local, state, and federal) from substantially burdening Free Exercise rights with generally applicable laws unless the government satisfied strict scrutiny, that is, the law was the least restrictive possible to further a compelling state interest.²²³

²¹⁸ Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 41 (1994) (“In a few cases, however, a claimed exemption, though tolerable on its own, raises a strong risk of bringing on many others, and so poses ‘a substantial threat to public safety or order . . . sometimes granting an exemption will produce ‘an administrative problem of such magnitude’ as to ‘render the entire statutory scheme unworkable.’ . . . The threat of cumulative exemptions comes not only from other sincere religious objectors, but from other persons who could feign the same objection to get the benefits of exemption. The First Amendment itself hampers the government in uncovering such ‘strategic behavior,’ because the government cannot adopt too narrow a definition of what beliefs or practices are ‘religious’ or inquire too closely into their sincerity or their importance to the believer.”).

²¹⁹ See James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407 (1992) (“Members of the media, academics, members of Congress, and religious interest groups greeted the decision with condemnation and despair.”).

²²⁰ *Id.* at 1409–10.

²²¹ Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1373 (2013).

²²² *Id.*

²²³ 42 U.S.C.A. § 2000bb-1 (West 2016).

Through RFRA, Congress sought to undo the consequences of the Court's *Smith* decision and restore a statutory standard that was more protective of religious freedom.²²⁴ Though many others have advanced this argument, the fact that RFRA was never successfully challenged on Establishment Clause grounds is perplexing.²²⁵ However, the Supreme Court has interpreted the statute and has not deemed it unconstitutional, at least as applied to federal government action.²²⁶ In fact, in *Gonzales v. O Centro*, the Supreme Court validated a “focused” read of RFRA that *heightened* the burden on the federal government.²²⁷

The Supreme Court did find that RFRA had overstepped its bounds as it applied to the states. In *City of Boerne v. Flores*, the Court announced that Congress exceeded its Fourteenth Amendment authority by enacting legislation designed to enforce the Free Exercise Clause against the states.²²⁸ In so doing, the Court declared that RFRA cannot be applied to the states.²²⁹ However, while it left undecided whether RFRA is also unconstitutional at the federal level, subsequent case law has apparently decided this in the negative.²³⁰

The *Boerne* case has a significant impact on Free Exercise claims, as only a fraction of laws that burden religious exercise

²²⁴ Heise & Sisk, *supra* note 221, at 1373.

²²⁵ Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 453 (1994) (“Supreme Court decisions make clear that the constitutional power to accommodate religious practice does not license the state to confer privileges upon religious believers indiscriminately.”); see Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 285–86 (1994); see also Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 54 (2014).

²²⁶ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

²²⁷ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 419–20 (2006) (“[T]he Government [must] demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.”).

²²⁸ 521 U.S. 507, 508 (1997) (“Although Congress certainly can enact legislation enforcing the constitutional right to the free exercise of religion . . . its §5 power ‘to enforce’ is only preventive or ‘remedial,’ . . . The Amendment’s design and § 5’s text are inconsistent with any suggestion that Congress has the power to decree the substance of the Amendment’s restrictions on the States.”) (citations omitted).

²²⁹ *Id.* at 534–535.

²³⁰ Aurora R. Bearse, *RFRA: Is It Necessary? Is It Proper?*, 50 RUTGERS L. REV. 1045, 1045 n.4 (1998).

are federal ones. Most religious liberty disputes arise over state and local laws.²³¹ This is the case with medical futility statutes and unilateral decisions to withdraw treatment. The statutes are passed and implemented at the state level, and so the federal RFRA would not apply. This puts a sharp halt to any federal RFRA analysis.

a. The Response to Boerne—state RFRAs

In the aftermath of *Boerne*, RFRA supporters began lobbying in their state capitals for state versions of the federal law.²³² Within just a few years, RFRA legislation had been proposed in several states.²³³ Advocacy groups that were traditionally considered at odds with one another came together to marshal RFRA through state legislatures, and “[t]he results generally rewarded their efforts.”²³⁴

These state RFRAs have now been passed by 21 states and Congress.²³⁵ The state acts are modeled on the federal law, requiring strict scrutiny when a state law burdens the exercise of religion.²³⁶ There are significant differences between states in terms of the threshold burden on religion that is required and whether there are areas where the law does not apply. Regardless of the differences, however, the *Smith* case remains the constitutional floor for protecting free exercise under the First Amendment.²³⁷ States are allowed to create greater protections, which most of the RFRAs do, but they cannot protect religious

²³¹ Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 467 (2010).

²³² James A. Hanson, *Missouri's Religious Freedom Restoration Act: A New Approach to the Cause of Conscience*, 69 MO. L. REV. 853, 856 (2004).

²³³ See Jason Goldman, *Religious Freedom: Why States Are Unconstitutionally Burdening Their Own Citizens As They "Lower" the Burden*, 2015 CARDOZO L. REV. DE NOVO 57, 60–61 (2015).

²³⁴ Hanson, *supra* note 232, at 856.

²³⁵ See 2015 State Religious Freedom Restoration Legislation, NATIONAL CONFERENCE ON STATE LEGISLATORS, <http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx> (“Seventeen states have introduced legislation this year regarding the creation of, or alteration to, a state religious freedom law. Currently, 21 states have Religious Freedom Restoration Acts (RFRAs).”); see also 42 U.S.C. ch. 21B (West 2016) (Congress passed RFRA in 1993).

²³⁶ See Mark Strasser, *Old Wine, Old Bottles, and Not Very New Corks: On State RFRAs and Free Exercise Jurisprudence*, 34 ST. LOUIS U. PUB. L. REV. 335, 358 (2015).

²³⁷ Lund, *supra* note 231, at 493.

free exercise less than *Smith* (i.e., permitting intentional religious discrimination).²³⁸

State courts have struggled to interpret state RFRA.²³⁹ Quite puzzlingly, some state courts have equated the strict scrutiny standard from their RFRA with the watered-down scrutiny of *Smith*, and others have interpreted their RFRA to provide less protection than *Smith*.²⁴⁰ Religious liberty claims should be analyzed differently under the First Amendment's Free Exercise Clause and RFRA. This is because Supreme Court jurisprudence controls Free Exercise claims, while statutory interpretation applies to state RFRA claims.²⁴¹ What the state RFRA have in common, however, is a requirement that the burden on religion be motivated by compelling state interests, as opposed to mere legitimate ones.

To invoke most state RFRA, the plaintiff needs to show that the governmental action placed a "substantial burden" on the plaintiff's exercise of a sincere religious belief.²⁴² If this threshold requirement is not met, then no claim or defense is available under many RFRA.²⁴³ Because the state interest in the law must only be narrowly tailored to further a compelling state interest if religion is found to be burdened, the threshold definition of "burden" under the state RFRA is quite important.

Some states (such as Alabama, Connecticut, Florida, Illinois, New Mexico, Rhode Island, South Carolina, and Texas) have not included a statutory definition of "substantial burden" in their RFRA, leaving the courts to define this term.²⁴⁴ Four state legislatures provided their understanding of what the term should mean.²⁴⁵ Arizona's definition appears the broadest, as it states "the term substantially burden is intended solely to ensure

²³⁸ See Michael D. Currie, *Scrutiny Mutiny: Why the Iowa Supreme Court Should Reject Employment Division v. Smith and Adopt A Strict Scrutiny Standard for Free-Exercise Claims Arising Under the Iowa Constitution*, 99 IOWA L. REV. 1363, 1377 (2014); see also Lund, *supra* note 231, at 466.

²³⁹ Lund, *supra* note 231, at 485–86.

²⁴⁰ *Id.* at 486.

²⁴¹ Hanson, *supra* note 232, at 857.

²⁴² Lund, *supra* note 232, at 477.

²⁴³ *Id.*

²⁴⁴ James W. Wright, Jr., *Making State Religious Freedom Restoration Amendments Effective*, 61 ALA. L. REV. 425, 433 (2010).

²⁴⁵ *Id.*

that this article is not triggered by trivial, technical or de minimis infractions.”²⁴⁶ Idaho and Oklahoma’s RFRA states that to substantially burden religious exercise is merely to “inhibit or curtail religiously motivated practices.”²⁴⁷ Pennsylvania’s statutory definition is the most detailed, and includes any act that:

- (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs.
- (2) Significantly curtails a person's ability to express adherence to the person's religious faith.
- (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion.
- (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.²⁴⁸

Now, let us apply this detailed definition to the medical futility case at hand. One characterization of the burden could be that state RFRA medical futility statutes *impose no substantial burden on religious exercise*. At any point in the patient’s life, the family can pray for a miracle. No state medical futility law prohibits prayer. The question in these potential cases is whether the family should be allowed to pray under a specific set of conditions—namely, while the patient is being supported by artificial life support. No Supreme Court or RFRA case supports this expansive of a view of religious liberty, as this certainly “encroaches” on the rights of others; namely, the rights of the providers not to be required to provide futile care at the expense of other patients who might need their services.²⁴⁹

²⁴⁶ ARIZ. REV. STAT. ANN. § 41-1493.01(e) (West 2016).

²⁴⁷ Wright, Jr., *supra* note 244, at 434.

²⁴⁸ 71 P.S. § 2403 (West 2016).

²⁴⁹ See Kathleen M. Boozang, *Deciding the Fate of Religious Hospitals in the Emerging Health Care Market*, 31 HOUS. L. REV. 1429, 1481–1482 (1995) (“When initially enacted, the Conscience Clauses protected recipients of federal funds and their staffs from being required to participate in abortion or sterilization procedures that conflicted with the providers’ religious or moral beliefs. One year later, Congress expanded the Conscience Clauses to permit a health care provider to refuse to perform any health service or research that conflicts with personal religious or moral beliefs.”); see also Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. OF LEGAL MED. 177, 177 (1993); see also 42 U.S.C. 300a-7(d) (2000).

However, under a few state RFRAs, the denial of additional time to pray for a miracle might meet the threshold statutory definition of “burden.”²⁵⁰ Specifically, under Idaho or Oklahoma’s RFRAs, the denial of life support while the patient prays for a miracle could be said to “inhibit or curtail religiously motivated practices,” such as praying for a miracle. Under Arizona’s definition of a burden, the denial of life support while the patient or his family prays for a miracle would also likely not be considered a trivial infraction of religious free exercise, given that these are often life and death situations of tremendous spiritual and religious significance. In these states where it *could* be found that the denial of futile treatment results in a burden of religious exercise, the state would then need to demonstrate that the medical futility laws are narrowly tailored to advance a compelling state interest.²⁵¹

b. Multiple Compelling State Interests Exist to Deny Religious Exemptions from Medical Futility Laws

Although the states employ different thresholds for what counts as a sufficient burden, each requires that the state advance a compelling interest in the legislation.²⁵² When determining whether a state’s interest is compelling, the courts in most states have said they look to First Amendment jurisprudence.²⁵³ Thus, the compelling interest inquiry would resemble that under the *Smith* and pre-*Smith* decisions, discussed above.

What is the compelling state interest in medical futility laws? There are several state interests that would likely be considered compelling, if the state or federal courts correctly interpreted existing strict scrutiny standards from *Sherbert* and other constitutional precedents. While “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion[,]”²⁵⁴ the medical futility statutes could rather easily clear this hurdle. The states’

²⁵⁰ See Goldman, *supra* note 233, at 69 (describing the different conceptions of “burden” under state RFRAs).

²⁵¹ Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605, 627–28 (1999).

²⁵² Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 478 (2010).

²⁵³ *Id.*

²⁵⁴ *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

compelling interests in prohibiting religious exemptions from medical futility statutes could be:

- 1) respecting provider autonomy,
- 2) respecting physician's professional ethics and integrity by blurring the line between healing and harming,
- 3) not allowing professional standards of care to be trumped by religious requests,
- 4) preserving scarce resources in the event of an epidemic or other public health need,
- 5) the inability to distinguish the potentially abundant religiously insincere from sincere claims, and/or
- 6) the need for some principled and generally-applicable basis for terminating potentially indefinite life support.

Any of these could satisfy strict scrutiny, and some already have.²⁵⁵ For starters, both Congress and the Supreme Court have recognized the need to protect the autonomy, religious beliefs, and professional standards of health care providers.²⁵⁶ Physicians should not be required to perform treatments that run afoul of their conscience or professional ethics, just because a patient or his family is requesting it.²⁵⁷

The Church Amendment, which was passed by Congress in 1973, made clear that the receipt of federal Medicare funds would not provide a basis for mandating a health care provider “to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to

²⁵⁵ See *infra* pp. 42–50.

²⁵⁶ See *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997); see also *United States v. Lachman*, 48 F.3d at 586, 592–593;93 (1st Cir. 1995); *In re Quinlan*, 355 A.2d 647, 70 N.J. 10, 44 (1976) *overruled by* *Matter of Conroy*, 98 N.J. 321 (1985); Dennis Varughese, *Conscience Misbranded!: Introducing the Performer v. Facilitator Model for Determining the Suitability of Including Pharmacists Within Conscience Clause Legislation*, 79 TEMP. L. REV. 649, 659 (2006).

²⁵⁷ See Judith F. Daar, *A Clash at the Bedside: Patient Autonomy v. A Physician's Professional Conscience*, 44 HASTINGS L.J. 1241, 1260 (1993) (“While concern for a physician compromising his or her own concept of professional integrity may seem to have no place in the world of patient autonomy, in fact both courts and legislatures have historically regarded a physician's comfort with his or her actions as a high priority.”).

his religious beliefs or moral convictions.”²⁵⁸ It also provided that no “entity” could be compelled to “make its facilities available for the performance of any sterilization procedure or abortion if [such] performance . . . is prohibited by the entity on the basis of religious beliefs or moral convictions.”²⁵⁹ The protection of a physician’s rights of freedom of speech and freedom of religion is “clearly a compelling state interest.”²⁶⁰ Many states then enacted other healthcare refusal laws in the wake of the Church Amendment.²⁶¹ These laws did not just exempt providers from performing abortions or sterilizations, but were expanded to include contraceptive and other practices that the provider might consider immoral.²⁶² Medical futility statutes are just one type of these laws.²⁶³

In the context of physician-assisted suicide and reproductive rights, the Supreme Court has found that physicians are unique, and the state has an interest in preserving their professional ethics and maintaining a distinction between physician’s duties to heal rather than harm.²⁶⁴ As evidenced by a related survey I conducted and published elsewhere,²⁶⁵ providers think administering futile treatment is unethical as they feel they are potentially harming a patient through forced ventilation or feeding without offering any clinical benefit.²⁶⁶ When a patient is on a ventilator, or breathing machine, she cannot speak and is heavily sedated so that the breathing is relaxed.²⁶⁷ This means that the providers have to use indirect measures to assess

²⁵⁸ 42 U.S.C. § 300a-7(b)(1) (2012).

²⁵⁹ § 300a-7(b)(2)(A).

²⁶⁰ Leora Eisenstadt, *Separation of Church and Hospital: Strategies to Protect Pro-Choice Physicians in Religiously Affiliated Hospitals*, 15 *YALE J.L. & FEMINISM* 135, 167 (2003).

²⁶¹ Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2538 (2015).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) (“The State also has an interest in protecting the integrity and ethics of the medical profession. . . .

[P]hysician-assisted suicide could, it is argued, undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming.”).

²⁶⁵ Brown I, *supra* note 42.

²⁶⁶ *Id.*

²⁶⁷ *What to Expect While on a Ventilator*, NATIONAL HEART, LUNG, AND BLOOD INSTITUTE (Feb. 2011), <https://www.nhlbi.nih.gov/health/health-topics/topics/vent/while>; see also Judith Ann Tate et al., *Anxiety and Agitation in Mechanically Ventilated Patients*, 22 *QUALITATIVE HEALTH RESEARCH* 157, 157 (2012).

discomfort. They cannot ask the patient directly whether she is in pain. In some cases, the patient might need to have her hands tied down so that she does not regain consciousness and try to pull the irritating breathing tube out of her mouth.²⁶⁸ Forcing providers to administer medically ineffective treatment that might cause great discomfort to the patient compromises the professional ethics of the medical community, and blurs the line between healing and harming. This provides a second compelling state interest in denying a religious exemption to medical futility laws.

Even the staunchest of religious freedom supporters recognize that public health and safety concerns present compelling state interests.²⁶⁹ During the last swine flu outbreak, many public health authorities realized they needed to develop guidelines on the proper rationing of ventilators in the event of another flu epidemic.²⁷⁰ This was in response to hospitals being at capacity with their ventilators, and states not having policies in place for how to best allocate these scarce and expensive resources.²⁷¹ If religious patients could commandeer the use of the ventilator indefinitely with First Amendment protection, this could thwart public health efforts. This presents another robust

²⁶⁸ Lorraine Mion et al., *Patient-Initiated Device Removal in Intensive Care Units: A National Prevalence Study*, 35 *CRITICAL CARE MED.* 2714, 2715 (2007) (“...maintenance of therapeutic devices is a primary reason for use of physical restraints in ICUs.”).

²⁶⁹ James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 *VA. L. REV.* 1407, 1442 (1992) (“The National Council of Churches... have suggested that religious practices be restricted only when they threaten ‘public health and safety.’”).

²⁷⁰ One problem identified by North Carolina’s department of health was that in the event of a flu epidemic, there would not be enough ventilators: “During the worst week of an extreme global epidemic, demand could outstrip the state’s supply of these devices by more than 300 percent, federal computer models indicate.” See Jim Nesbitt, *N.C. Arms Against Threat of Flu Pandemic*, *NORTH CAROLINA NEWS & OBSERVER* (Nov. 26, 2006), http://www.ncprogress.org/PDF/120306-newsobserver_com_NC_arms_against_threat_of_flu_pandemic.pdf; see also Press Release, New York State Health Department, *New York State Health Department Seeks Public Engagement on Ventilator Allocation Guidelines* (Aug. 23, 2007), https://www.health.ny.gov/press/releases/2007/2007-08-23_vent_comments.htm; Sheri Fink, *Preparing for a Pandemic, State Health Departments Struggle With Rationing Decisions*, *PROPUBLICA* (Oct. 24, 2009), <https://www.propublica.org/article/preparing-for-a-pandemic-state-health-departments-struggle-rationing-1024>.

²⁷¹ See Nesbitt, *supra* note 270.

and compelling state interest in denying a religious exemption to medical futility laws.

In addition to these professional autonomy and public health compelling interests, the state has an interest in preventing “an administrative problem of such magnitude” as to render the religious exemptions unworkable.²⁷² In the context of medical futility statutes, the state’s interest here is exceedingly strong. The basis for this interest is the inability of distinguishing between sincere and insincere religious requests.²⁷³ A state’s interest may become compelling when viewed in the aggregate, even if it might not be as compelling when viewed through one specific claim.²⁷⁴ As William Marshall explains,

[i]f, for example, one factory is exempt from anti-pollution requirements, the state's interest in protecting air quality will not be seriously disturbed. When many factories pollute, on the other hand, the state interest is seriously threatened. Weighing the state interest against a narrow class seeking exemption is similar to asking whether this particular straw is the one that breaks the camel's back.²⁷⁵

The 2014 *Hobby Lobby* case made clear that the compelling state interest should be determined by looking “beyond broadly formulated interests” to “scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants.”²⁷⁶ This means that the state should question whether the marginal interest is compelling in denying *this particular type of exemption* to this class as opposed to its global state interest in passing the statute as it applies to everyone.

²⁷² *Sherbert v. Verner*, 374 U.S. 398, 408–09 (1963).

²⁷³ *Thomas v. Rev. Bd. of Indep. Emp’t Sec. Div.*, 450 U.S. 707, 716 (1981) (“[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”)

²⁷⁴ Marshall, *supra* note 136, at 312.

²⁷⁵ *Id.*

²⁷⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (quoting *Gonzales v. O Centro Espirita Beneficente do Vegetal*, 546 U.S. 418, 431 (2006)).

c. The Compelling Interests Must Also Be the Least Restrictive Means Necessary

Even though promoting professional autonomy and ethics and public health interests are each considered compelling, just as with all other state interests, they must also be the least restrictive necessary.²⁷⁷ The Seventh Circuit recently reminded us in the context of the Affordable Care Act's mandatory contraception coverage, "[s]trict scrutiny requires a substantial congruity—a close 'fit'—between the governmental interest and the means chosen to further that interest. . . . There are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty."²⁷⁸ The government cannot prevail by articulating general compelling interests.²⁷⁹ The contraceptive mandate in *Hobby Lobby* ultimately failed for this reason, as the Supreme Court conceded that the state interests in not requiring cost-sharing for women might be compelling.²⁸⁰ However, those challenging the mandate successfully argued that the federal government *could* subsidize the purchase of contraceptives for employees whose religious employers rejected coverage.²⁸¹ This meant that the mandatory contraception coverage violated the federal RFRA because it was not the least restrictive means necessary for furthering the cost-sharing and public health interests.²⁸² Because the various state RFRA's also require strict scrutiny, the state's interests must also satisfy this "least restrictive" burden.²⁸³ However, for some of the states' interests in medical futility statutes, this burden is more easily overcome.

²⁷⁷ *Id.* at 2759.

²⁷⁸ *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013).

²⁷⁹ *Burwell*, 134 S. Ct. at 2779 ("HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting 'public health' and 'gender equality' . . . RFRA, however, contemplates a 'more focused' inquiry: it 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.'").

²⁸⁰ *Id.* at 2781.

²⁸¹ *Id.* at 2782.

²⁸² *Id.* at 2782.

²⁸³ See 42 U.S.C.A. §§ 2000bb-1(a)-(b) (West 2016) (requiring the Government to "demonstrate[] that application of [a substantial] burden to *the person* . . . is the least restrictive means of furthering [a] compelling governmental interest" (emphasis added) (as quoted in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014)).

As applied to medical futility statutes, there are, indeed, other ways the state could control against the inability to ration life-sustaining care in the event of a pandemic. Specifically, the state could suspend medical futility statutes in the event of a pandemic, but not before. Therefore, a medical futility statute that applies in non-pandemic situations may not be considered the least restrictive necessary for this particular need to ration life-saving technologies during public health crises. The states would need to advance another compelling interest to ensure that the statute passes a state RFRA analysis.

A better source for upholding medical futility statutes is the state's interest in professional autonomy and ethics. Medical futility statutes that do not provide adequate means for the patient to transfer (e.g., by not affording the family a sufficient amount of time to locate an alternative facility) might violate a state RFRA by not being the least restrictive means necessary to further this specific government interest. However, if the statute provides for some amount of notice to the patient or his family and an opportunity to find an alternative provider, it would likely satisfy strict scrutiny. The state could argue that the provider's autonomy is not excessively infringed if the provider must give the family a week's notice before terminating futile treatments. But the physician's autonomy and professional ethics would be violated by forcing them, on the patient's religious grounds, to provide indefinite futile treatments. The state has a clear interest in limiting the patients' ability to commandeer providers in this way.

The state's interest in managing the administrative burden bolsters the "least restrictive" prong of strict scrutiny. As Thomas Berg explains, "[t]he threat of cumulative exemptions comes not only from other sincere religious objectors, but from other persons who could feign the same objection to get the benefits of exemption."²⁸⁴ Further, the text of the First Amendment constrains any deep scrutiny into desperate patients who might try to game the system, because the state cannot

²⁸⁴ Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 41 (1994).

inquire too closely into whether the belief is truly religious, sincere, or even shared with other members of the same faith.²⁸⁵

Given that many people find religion and God near the end of their lives and in response to medical crisis, limiting the exemptions to a manageable number would be impossible. Here the analysis of whether the interest is compelling dovetails with the question of whether the statute is the least restrictive means necessary. The fact that there is no way to more narrowly tailor the statute to protect religious freedoms renders the interest in categorical non-exemption compelling and also the least restrictive means necessary.

Any patient could request that they be provided indefinite life support on religious grounds. This could happen if patients became aware that this was the only way to receive futile treatment. The inability to distinguish sincere from insincere claims, and the likelihood that most patients could feign sudden belief in miracles bolsters the state's claim that the statutes are the least restrictive means possible to further the stated legislative interests. The nature of medical futility decisions is unique. There are no alternatives to indefinitely providing futile treatments. The only potential concession, though not an alternative, is to grant these patients a certain amount of time to pray for a miracle, which many providers (and futility statutes) already do.²⁸⁶ Unilateral withdrawal is almost never invoked unless the team has already given the patient a significant amount of time to recover.²⁸⁷ Despite this, there must be some principled limit on the amount of time a patient or his surrogate could mandate clinically futile care. Otherwise, without a limit, once clinically futile treatment is provided, it becomes impossible to introduce another non-arbitrary reason for withdrawing the treatment at a later date. The medical standard of care provides that principled limit. Any other standard introduces an arbitrary limit, and creates its own potential for unfair discrimination.

Contrast this with the religious freedom cases where exemptions were granted. The exemptions from working on the

²⁸⁵ See *Thomas v. Rev. Bd. of Indep. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981); *Welsh v. U.S.*, 398 U.S. 333 (1970); *U.S. v. Seeger*, 380 U.S. 163, 176 (1965).

²⁸⁶ See *Brown II*, *supra* note 95.

²⁸⁷ *Misak, White & Truog*, *supra* note 96, at 1668.

Sabbath, are not likely to overwhelm employers or employee benefit programs. For personal reasons, other employees will choose to work on Saturdays and a minority of religions celebrate a Saturday Sabbath. In those contexts, the fear of numerous (even feigned) religious exemptions does not swallow the statute and make it unworkable. There *is* potential for high school students to request not to finish high school on religious grounds, such as those made by the Old Order Amish in *Yoder*.²⁸⁸ However, either the Supreme Court was not concerned that these exemptions would overwhelm the states or they felt that in that particular case the Old Order Amish had demonstrated sufficient sincerity and vocational alternatives.²⁸⁹ Either way, respected religious freedom scholars such as Douglas Laycock agree that “the number of potential claims is relevant to assessing the government's interest . . . if the government has a compelling interest in denying exemption to the whole group of similarly situated objectors, it also has a compelling interest in denying exemption to each one of them.”²⁹⁰

d. There Are at Least Three Compelling State Interests that Are the Least Restrictive Means Necessary

There are at least three state interests that are compelling and the least restrictive means necessary. These are: a) respect for the professional autonomy of physicians, b) the need to distinguish harming patients from healing, and c) the need to manage the administrative burden of numerous claims. Given the multiple compelling state interests in denying a religious exemption in medical futility cases, and the inability to accommodate religious believers without exposing hospitals and providers to an unlimited conscription of services, it seems

²⁸⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

²⁸⁹ *Id.* at 235–36. This concern seems to have been implicit in Justice White's concurring opinion in *Yoder*: “This would be a very different case for me if respondents' claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State.” *Id.* at 238. However, Justice Douglas's dissenting opinion emphasizes his perceived irrelevance of this sort of inquiry: “[T]he emphasis of the Court on the ‘law and order’ record of this Amish group of people is quite irrelevant. A religion is a religion irrespective of what the misdemeanor or felony records of its members might be.” *Id.* at 246 (Douglas, J., dissenting).

²⁹⁰ Douglas Laycock, *RFA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 148 (1995).

quite unlikely that a petitioner would prevail on state RFRA grounds.

i. Religious Patients Would Likely Not Prevail on a Free Exercise Claim

Given that the medical futility statutes likely satisfy the strict scrutiny required of the state RFRA, they therefore also satisfy the lesser-included rational basis test required of the First Amendment. Recall that following *Smith*, the federal Constitution does not require a state's interest in the statute to be compelling if it is generally-applicable, which all of the medical futility statutes are.²⁹¹ The federal RFRA does not apply to state laws. Therefore, we can conclude that religious patients claiming that medical futility statutes violate their religious free exercise will have a very difficult time prevailing. Even so, this only answers the legal questions.

CONCLUSION

Unfortunately, when physicians concern themselves chiefly with the legal ramifications, they lose sight of the important ethical dimensions of these cases. Whereas the courts are not allowed to inquire into whether a patient's religious belief is sincere or shared with members of their faith, this is precisely what a chaplain or social worker should do. Outside of the domain of constitutional law, one medical scholar claimed that:

[c]laims about miracles may . . . be subjected to scrutiny according to the criteria of the patient's faith. Faith is, in this sense, public and not private. Judging the authenticity of patients' or families' claims about miracles therefore involves examining such claims in light of the deposit of faith of the person's own religious tradition.²⁹²

Knowing whether the patient shares these beliefs with members of her faith is crucial to ruling out denial or negative psychological coping. In many cases where a patient begs for more time for a miracle to occur, the patient is likely unprepared

²⁹¹ Emp't Div., Dep't. of Human Res. v. Smith, 494 U.S. 872, 890 (1990).

²⁹² Daniel Sulmasy, *Distinguishing Denial From Authentic Faith in Miracles: A Clinical-Pastoral Approach*, 100 SOUTHERN MED. J. 1268, 1268 (2007).

for death and expressing this in terms of needing a divine intervention. Inquiring into the basis of the belief in miracles would allow the clinical team to determine whether the patient is a true believer, or in need of psychological as well as spiritual counseling before the treatments are refused or withdrawn. Focusing on these dimensions allows providers to ask the pressing ethical questions that would not be allowed or encouraged under a pure constitutional or RFRA analysis. Efforts to educate providers should disambiguate the legal from the ethical, and emphasize the ethical importance of asking questions that are foreign to the law.

OPEN-CARRY: OPEN-CONVERSATION OR OPEN-THREAT?

Daniel Horwitz *

INTRODUCTION

Before the Republican National Convention in July of 2016, a Change.org¹ petition with over 50,000² signatures demanded that open-carry³ firearms be allowed at the convention or the convention be relocated.⁴ The petition used fiery rhetoric proclaiming the “God-given Constitutional right to carry a gun wherever and whenever they please,” and praised the opposition to “Barack HUSSEIN Obama’s gun free zones” by the then three remaining Republican presidential candidates Donald Trump, Ted Cruz, and John Kasich.⁵ Those same candidates uncomfortably deflected questions about the petition, opting to defer to the security judgment of the Secret Service.⁶ It turns out the petition was created as satire, even if many of those who signed it were sincere in their convictions.⁷

Despite its origin, the petition perfectly illuminates a tension at the core of American society: the intersection between free speech and firearms. The vision of a convention packed full—candidates and supporters armed to the teeth—is not as

* Juris Doctor Candidate, University of North Carolina School of Law, 2017; Article Editor, *First Amendment Law Review*.

¹ Change.org is a website that facilitates the creation of electronic petitions. See *About*, CHANGE.ORG, <https://www.change.org/about> (last visited Mar. 31, 2016).

² The Hyperationalist, *Allow Open Carry of Firearms at the Quicken Loans Arena during the RNC Convention in July*, CHANGE.ORG, <https://www.change.org/p/quicken-loans-arena-allow-open-carry-of-firearms-at-the-quicken-loans-arena-during-the-rnc-convention-in-july-2> (last visited Mar. 31, 2016, 11:23 AM).

³ “Open-carry” generally means that individuals are allowed to carry a firearm “open” for the public to see, as opposed to concealed. The definition may vary from state to state. See Chris Stockton, *Concealed vs. Open Carry*, ALAMO DEF., http://alamodefense.net/index.php?option=com_content&view=article&id=81:concealed-vs-open-carry&catid=34:pistol-reviews&Itemid=96 (last visited Mar. 31, 2016).

⁴ The convention was held in Ohio, an open-carry state, in the Quicken Loans Arena, a setting that explicitly bans firearms and other weapons. See Nora Kelly, *Trolling for Open Carry at the GOP Convention*, THE ATLANTIC (Mar. 30, 2016), <http://www.theatlantic.com/politics/archive/2016/03/open-carry-petition-gop-convention/476010/>.

⁵ The Hypernationalist, *supra* note 2.

⁶ See Kelly, *supra* note 4.

⁷ See Kelly, *supra* note 4.

alien in the United States as it may sound to some.⁸ But what exactly is the message of openly carrying a gun? Is it a form of education, a political statement, or an act of public protest? Is openly carrying a gun some form of expression protected by the First Amendment?⁹ Or, are open carry advocates just attempting to use the First Amendment as a clever guise to mask a thinly veiled threat?¹⁰ This distinction matters because the First Amendment has historically been more difficult to limit than the Second Amendment.¹¹

Contrary to the desire of some open-carry activists, First Amendment protection should not be expanded to provide additional protection for gun holders. Furthermore, in circumstances like political rallies involving armed demonstrators and an unarmed audience, courts should skeptically view openly displayed weapons as speech protected for First Amendment purposes. While an activist openly displaying a gun may be doing so for a permissible purpose such as education, guns provide the ever-present ability to inflict violence on an audience and, therefore, intimidate that audience. As the law currently stands, an act that intimidates an audience is not precluded from First Amendment protection.

Any discussion of gun policy in America must begin with the Second Amendment. As such, it is important to first briefly examine the traditional arguments various political groups make to interpret the Second Amendment. This Note, however, will

⁸ See Michael Rubinkam, *Pa. Chief's Hearing Halted When Gun Falls on Floor*, NEWSOK, (Oct. 11, 2013), <http://newsok.com/pa.-chiefs-hearing-halted-when-gun-falls-on-floor/article/feed/602685> (“A hearing for a Pennsylvania police chief who made profanity-laced Internet videos about liberals and the Second Amendment was halted suddenly Thursday night after a handgun belonging to one of his supporters slid out of its holster and crashed onto the concrete floor.”).

⁹ U.S. CONST. amend. I. (“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.”).

¹⁰ Patrick Blanchfield, *What Do Guns Say?*, N.Y. TIMES: OPINIONATOR (May 4, 2014, 6:00 PM), <http://opinionator.blogs.nytimes.com/2014/05/04/what-do-guns-say/> (“It’s bringing a gun to an idea-fight, gesturing as close as possible to outright violence while still technically remaining within the domain of speech. Like a military ‘show of force,’ this gesture stays on the near side of an actual declaration of war while remaining indisputably hostile. The commitment to civil disagreement is merely provisional: I feel so strongly about this issue, the gun says, that if I don’t get my way, I am willing to kill for it.”).

¹¹ *Id.*

not attempt to analyze the Second Amendment in a new way. Instead, this Note will cover how and why proponents of an individual right to bear arms have attempted to advocate for their position using the First Amendment. This Note will proceed in three parts. Part I will discuss the current debate over the meaning of the Second Amendment. Part II will discuss the gun rights identity politics movement and explain why gun rights activists are attempting to use the First Amendment to bolster their position. Part II will also discuss the meaning conveyed by openly carrying a gun to the gun holder as well as his or her audience. Part III will discuss the current state of First Amendment jurisprudence as it relates to guns, the extent that the government can regulate guns used as symbolic speech, and areas where the policy can be improved.

I. INTERPRETATION OF THE SECOND AMENDMENT

The Second Amendment states, “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹² Some scholars believe this is one of the worst drafted provisions of the Constitution.¹³ It is unclear how the two clauses of the Second Amendment interact. Is there an individual right of the people to bear arms? Or is there a right for states to maintain militias? Nonetheless, constitutional analysis begins with the written text.

Those who wish to limit the force of the Second Amendment often focus on the opening clause and assert that it has a restrictive purpose.¹⁴ The purpose of this clause, they argue, “was to allow the states to keep their militias and to protect them against the possibility that the new national government will use its power to establish a powerful standing army and eliminate the state militias.”¹⁵ It follows that the right of the Second

¹² U.S. CONST. amend. II.

¹³ Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 644 (1989); see also Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 108 (1987).

¹⁴ See Levinson, *supra* note 13.

¹⁵ *Id.*

Amendment is a state's right and not an individual right.¹⁶ Therefore, states have the power to regulate individual gun ownership, or restrict ownership completely.¹⁷ This is called the collective right to bear arms.¹⁸

On the other hand, advocates of an individual right to bear arms argue that if the Framers of the Constitution intended to prevent the federal government from prohibiting state-organized militias, they would have said so more explicitly.¹⁹ The legislative history of the Second Amendment is hotly debated by scholars and does not provide clarification.²⁰ Historical arguments over the Second Amendment include contradictory views grounded in "original intention, original meaning, past practices and understandings, and the trend, or direction, of practices and understandings."²¹ In fact, summarizing the arguments between Second Amendment theorists for either model may serve advocates in the modern gun control debate at the expense of being a barrier to a more truthful historical understanding.²²

The Supreme Court of the United States has only directly addressed the Second Amendment a handful of times – most notably in *United States v. Miller*²³ in 1939, and more recently in *District of Columbia v. Heller*²⁴ in 2008. The law concerning the right to bear arms has developed as challenges have been made against federal attempts to regulate arms.

On Valentine's Day, 1929, members of Al Capone's gang lured seven members of the rival Bugs Moran gang into a garage

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ *See* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 487–88 (2004).

¹⁹ Levinson, *supra* note 13, at 645.

²⁰ George A. Nation III, *The New Constitutional Right to Guns: Exploring the Illegitimate Birth and Acceptable Limitations of this New Right*, 40 *RUTGERS L. J.* 353, 380 (2009) (discussing how majority is able to conclude that the Amendment protects a right to armed private self-defense even though absolutely nothing in text of the Amendment nor in its legislative history even mentions private self-defense).

²¹ Calvin Massey, *Elites, Identity Politics, Guns, and the Manufacture of Legal Rights*, 73 *FORDHAM L. REV.* 573, 583 (2004).

²² *See* Nation, *supra* note 20.

²³ 307 U.S. 174 (1939).

²⁴ 554 U.S. 570 (2008).

to supposedly receive a shipment of hijacked whiskey.²⁵ Rather than complete the illicit transaction, the Capone gang lined the Moran gang up against a walled and machined-gunned them to death.²⁶ The hit failed at dispatching Capone's primary rival for the illegal alcohol market, Bugs Moran, and ignited intense public backlash.²⁷ Newspapers featured full front-page articles with pictures of the massacre and mug shots of the victims.²⁸ In response, the Congress passed the National Firearms Act (NFA) in 1934.²⁹ The NFA "taxed the manufacture, sale, and transfer of short-barreled rifles and shotguns, machine guns, and silencers; required registration of covered firearms; and prohibited interstate transportation of unregistered covered firearms."³⁰ Disguised as a tax, the true purpose of the NFA was to deprive the "gangster . . . of his most dangerous weapon, the machine gun."³¹ The NFA purposefully was not intended to restrict pistols or "sporting arms" that a citizen could use for their own protection, rather, it focused on "gangster weapons"³²

A decade later, an entirely different set of gangsters would be responsible for the next advancement of gun law. In 1938, police stopped two bank robbers for possessing an unregistered sawed-off shotgun in violation of the National Firearms Act.³³ In *United States v. Miller* the Supreme Court narrowly held that as applied to one indicted for transporting an unregistered, "double barrel 12-gauge shotgun having a barrel less than 18 inches" the National Firearms Act did not violate the Second Amendment and remanded the case for further proceedings.³⁴ The Court noted that short-barreled shotguns are not part of the "ordinary military equipment or that its use could contribute to the common defense," and, therefore, may be taxed by the NFA.³⁵

²⁵ Seth Harp, *Globalization of the U.S. Black Market: Prohibition, the War on Drugs, and the Case of Mexico*, 85 N.Y.U. L. REV. 1661, 1661 (2010).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ National Firearms Act, 73 P.L. 474, 48 Stat. 1236 (1934).

³⁰ Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48, 60–61 (2008).

³¹ *Id.* at 61.

³² *See id.* at 62–63.

³³ *See id.* at 48–49.

³⁴ *United States v. Miller*, 307 U.S. 174, 175 (1939).

³⁵ *Id.* at 178.

However, the Court seems to suggest, “The Second Amendment guarantees an individual right to possess and use a weapon suitable for militia service.”³⁶ Courts struggled to interpret *Miller* and Second Amendment scholars find that it is an “impenetrable mess” with both collectivists and advocates of an individual right claiming *Miller* as their own.³⁷

Seven decades later, the Supreme Court decided to clear up some of the confusion left from *Miller* in *District of Columbia v. Heller*. In a five-to-four decision, the Supreme Court struck down portions of the Firearms Control Regulation Act of 1975 and found that the Second Amendment protects an individual’s right to possess firearms.³⁸ At the time, it was generally prohibited in the District of Columbia to possess a handgun.³⁹ No person could carry a handgun without a license issued by the chief of police for one-year periods.⁴⁰ Lawfully owned firearms had to be stored “unloaded and disassembled or bound by a trigger lock or similar device unless they are located in a place of business or are being used for lawful recreational activities.”⁴¹ The respondent was a special police officer authorized to carry a handgun while on duty, but denied registration to keep it at home.⁴²

Writing for the majority, Justice Scalia determined that the prefatory clause announces a purpose for the operative clause rather than limiting it grammatically.⁴³ In other words, the “right to bear arms” is not limited to the “militia.”⁴⁴ Furthermore, just as the First Amendment protects modern forms of communication, the Second Amendment does not protect only those arms in existence in the 18th century.⁴⁵ Because *Heller* was the first time the Supreme Court examined the Second

³⁶ See Frye, *supra* note 30, at 50.

³⁷ *Id.* at 49.

³⁸ *Heller*, 554 U.S. 570 (2008); see also Paul Duggan, *Lawyer Who Wiped Out D.C. Ban Says It's About Liberties, Not Guns*, WASH. POST, (Mar. 18, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/17/AR2007031701055.html> (Interestingly, the case was manufactured by a wealthy lawyer who had never owned a gun but had an interest “vindicating the constitution.”).

³⁹ See *Heller*, 554 U.S. at 574–75.

⁴⁰ *Id.* at 575.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 577.

⁴⁴ See *id.*

⁴⁵ See *id.* at 582.

Amendment in-depth, Scalia believed, “one should not expect it to clarify the entire field.”⁴⁶ The Court declined to define the outer limits of the Second Amendment, acknowledging the problem of handgun violence and the “the many *amici* who believe that prohibition of handgun ownership is a solution.”⁴⁷ Specifically, the Court held that nothing in *Heller* “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”⁴⁸ Additionally, the Court reiterates the holding in *Miller* that the Second Amendment protects weapons that were “in common use at the time.”⁴⁹ Essentially, modern military weapons like an M-16 rifle may be banned even at the expense of making a modern day militia ineffective against a modern military that has access to a combat drones and a nuclear arsenal. Scalia concedes, “the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.”⁵⁰

Justices Stevens, Souter, Ginsburg, and Breyer dissented.⁵¹ Justice Stevens argued that the court held in *Miller* that the Second Amendment “protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons.”⁵² He believed that the hundreds of lower court decisions based on that understanding over the past seven decades should bind the Supreme Court in *stare decisis*.⁵³ In a separate dissent Justice Breyer criticized the circular reasoning of the majority: “if Congress and the States lift restrictions on the possession and use of machineguns, and people buy machineguns to protect their homes, the Court will have to

⁴⁶ *Id.* at 635.

⁴⁷ *Id.* at 636.

⁴⁸ *Id.* at 626.

⁴⁹ *Id.*

⁵⁰ *Id.* at 627–28.

⁵¹ *Id.* at 636 (Stevens, J., dissenting).

⁵² *Id.* at 637–38 (Stevens, J., dissenting) (citing *Miller*, 307 U.S. at 178).

⁵³ *Id.* at 677 (Stevens, J., dissenting).

reverse course and find that the Second Amendment does, in fact, protect the individual self-defense-related right to possess a machinegun.”⁵⁴

There has been extensive work on the preceding categories of Second Amendment analysis of textual, structural, and historical arguments as well as further doctrinal, prudential and ethical arguments.⁵⁵ This Note, however, will not focus on the nuances of Second Amendment arguments over gun control; instead, it will instead focus on the alternative strategy of incorporating the First Amendment as a tool in the gun debate. Advocates on both sides of the debate argue that guns convey a form of speech. Both sides have looked to the First Amendment to enhance or restrict gun regulation.

II: IDENTITY POLITICS AND THE USE OF GUNS TO CONVEY MEANING

This section discusses the identity politics movement based on support for gun rights and how it is influencing public policy. This section also explores how the constitutional protection for an individual right to bear arms is present in both the First and Second Amendments. Members of the gun rights movement see themselves as educating the public when they openly display guns in public. Unarmed audiences exposed to guns in the context of rallies or demonstrations often feel intimidated by the threat of violence. To fully understand the differences between the two groups, Part II reviews what guns mean, specifically openly carried guns, to both those who bear them and those exposed to them.

The issue of gun control has become more than just a political dispute. For many it has become a matter integrally related to their identity. Identity politics helps to explain why the gun debate is so heated. Identity politics is “political activism by identity groups.”⁵⁶ “Identity groups” may be made up of people who share similar anatomical attributes, or people who share

⁵⁴ *Id.* at 721 (Breyer, J., dissenting).

⁵⁵ See Levinson, *supra* note 13, at 643.

⁵⁶ Jessica Knouse, *From Identity Politics to Ideology Politics*, 2009 UTAH L. REV. 749, 752 (2009).

similar ideologies.⁵⁷ More simply stated, identity politics is a term that can be used to describe “[w]hen women vote for female candidates because of their sex or when African Americans vote for an African American candidate because of their race.”⁵⁸

Identity groups who appear particularly vulnerable and sympathetic are more likely to gain public support, and public support is likely to effectuate legal change. Professor Dorf of Columbia University School of Law argues,

Although courts may speak the language of original understanding and subsequent translation when justifying their decisions, the driving force of doctrinal change is rarely the discovery of some previously unknown scrap of paper from Madison's notes or a state ratifying convention. Nor do courts simply decide in response to a lawyer's argument that some changed circumstance demands a changed understanding of the Constitution's original meaning. Courts adjust doctrine largely in response to social and political movements.⁵⁹

In the 1960s, civil rights activists successfully argued that Jim Crow was a system of institutionalized white supremacy.⁶⁰ More recently, the Supreme Court of the United States held that the denial of marriage licenses to same-sex couples violated the Due Process and Equal Protection clauses of the Fourteenth Amendment of the Constitution.⁶¹ Hence, social and political movements stimulate judicial action.⁶²

Dorf caricatures the identity politics movement for the individual right to bear arms as “angry white men . . . that [are], very broadly speaking, anti-abortion, anti-affirmative action, anti-gay marriage, anti-tax, and pro-gun.”⁶³ Dorf believes that proponents of an individual right to bear arms are

⁵⁷ *See id.*

⁵⁸ *See id.* at 751.

⁵⁹ Michael C. Dorf, *Identity Politics and the Second Amendment*, 73 *FORDHAM L. REV.* 549, 550 (2004).

⁶⁰ *Id.* at 551; *see* Civil Rights Act of 1964, 2 U.S.C.A. § 1311 (Westlaw through Pub. L. No. 114-219).

⁶¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

⁶² *See* Dorf, *supra* note 59, at 572.

⁶³ *Id.* at 552.

“disproportionately white, male, and rural.”⁶⁴ Dorf’s view is shared by many on the left⁶⁵ but is not without criticism.

Professor Massey of University of California, Hastings College of Law responds to Dorf’s caricature of the gun rights movement by examining the composition of gun owners in the United States.⁶⁶ As a whole, the gun rights supporters do not see themselves as extremist, fringe, racist, or any of the other stereotypes that are often applied to them. Rather, they see themselves as responsible citizens exercising their constitutional rights.⁶⁷ While the precise statistics Massey cites may be disputed,⁶⁸ his general point stands—it is incorrect to assume that all gun rights advocates fit one simple stereotype.⁶⁹ Ultimately, it is up to the competing political groups to make their case because, as Massey concedes, Dorf may be right that identity politics drive the development of some constitutional rights.⁷⁰

There is a sense among gun control supporters that “the American far right—from elements of the Tea Party to bigoted bloggers to conspiracy theorists—is working itself into an absolute frothy uproar at even the possibility that it may become more difficult to purchase a military-style assault rifle or a magazine that carries dozens of bullets.”⁷¹ This sense is buttressed by reports of armed fringe or extremist groups

⁶⁴ *Id.*

⁶⁵ See *infra* notes 74–75, 78–79.

⁶⁶ See Massey, *supra* note 21, at 575–576 (“While it may be a literal truth that gun owners are disproportionately white, male, rural, Republicans living in the South, West, or Midwest, it is a truth that obscures the large numbers of gun owners who are none of those things: racial minorities, women, Easterners, Democrats or Independents, and urban dwellers.”).

⁶⁷ See e.g., *Gun Owners for Responsible Ownership*, GUN OWNERS FOR RESPONSIBLE OWNERSHIP, <http://www.responsibleownership.org/> (last visited Apr. 1, 2016); *L.A.R.G.O., LAWFUL AND RESPONSIBLE GUN OWNERS*, <http://www.largo.org/> (last visited Apr. 1, 2016) (“The vast majority of citizens who own firearms are good, decent people from all walks of life. Doctors, teachers, mothers, police officers, and virtually every other respectable profession consists of many law-abiding individuals who own firearms.”).

⁶⁸ See Rich Morin, *The Demographics and Politics of Gun-Ownning Households*, PEW RESEARCH CENTER (July 15, 2014), <http://www.pewresearch.org/fact-tank/2014/07/15/the-demographics-and-politics-of-gun-owning-households/>.

⁶⁹ See Massey, *supra* note 21, at 576.

⁷⁰ See Massey, *supra* note 21, at 588.

⁷¹ Don Terry, *Far Right in Frenzy over Possibility of Gun Legislation*, SOUTHERN POVERTY LAW CENTER (Jan. 3, 2013), <https://www.splcenter.org/hatewatch/2013/01/03/far-right-frenzy-over-possibility-gun-legislation>.

intimidating unarmed groups or blatantly breaking the law.⁷² The media reports armed biker gangs in Arizona who “intentionally antagonize Muslims” outside of their place of worship,⁷³ armed militias in Oregon seizing a federal wildlife refuge,⁷⁴ and counter-demonstrators armed with loaded “AR-15 semi-automatic weapons in full view” protesting a gun safety rally.⁷⁵

The Coalition to Stop Gun Violence voices a sentiment that many gun control advocates share, “[o]ur politicians, intimidated by the political power of the National Rifle Association (NRA), have refused to act in the wake of tragedy after tragedy.”⁷⁶ Despite a year plagued with mass shootings, and even criticism that the NRA was somehow complicit in these shootings, 58% of Americans said they had an overall favorable impression of the NRA.⁷⁷ In turn, advocates of an individual right to bear arms have begun to pursue alternative strategies to expand the debate on gun control including arguing that the First Amendment protects their right to symbolically display guns in various contexts.

A. What Guns Mean to Those Who Bear Them

⁷² See Mark Follman, *Spitting, Stalking, Rape Threats: How Gun Extremists Target Women*, MOTHER JONES (May 15, 2014, 6:00 AM), <http://www.motherjones.com/politics/2014/05/guns-bullying-open-carry-women-moms-texas>.

⁷³ Bridge Initiative Team, *In Arizona, Bikers Plan Armed Protest Outside of Mosque*, THE BRIDGE INITIATIVE (May 27, 2015, 2:29 PM), <http://bridge.georgetown.edu/in-arizona-bikers-plan-armed-protest-outside-of-mosque/>.

⁷⁴ Julie Turkewitz & Kirk Johnson, *Ammon Bundy and 7 Oregon Protesters Held; LaVoy Finicum is Reported Dead*, N.Y. TIMES (Jan. 26, 2016), <http://www.nytimes.com/2016/01/27/us/oregon-armed-group-arrest-bundy.html>.

⁷⁵ Diana Reese, *Moms Demonstrate for Gun Control, Armed Men Stage Counter-Protest in Indiana*, WASH. POST: SHE THE PEOPLE (Mar. 29, 2013), <https://www.washingtonpost.com/blogs/she-the-people/wp/2013/03/29/moms-demonstrate-for-gun-control-armed-men-stage-counter-protest-in-indiana/>.

⁷⁶ See THE COALITION TO STOP GUN VIOLENCE, <http://csgv.org/about-us/> (last visited Mar. 28, 2016); see also MOMS DEMAND ACTION FOR GUN SENSE IN AMERICA, <http://momsdemandaction.org/about/> (last visited Mar. 28, 2016) (“For too long, those who stand to profit from easy access to guns have controlled the conversation about gun violence.”) (hereinafter “MOMS DEMAND ACTION”).

⁷⁷ See Art Swift, *Despite Criticism, NRA Still Enjoys Majority Support in U.S.*, GALLUP (Oct. 28, 2013), <http://www.gallup.com/poll/186284/despite-criticism-nra-enjoys-majority-support.aspx>.

Given the number⁷⁸ and diversity of gun owners, there is not a single answer as to why some advocate so forcefully for their firearms, but there are some common themes. Sixty percent of Americans say that personal safety or protection is one reason why they own guns.⁷⁹ Other top reasons include hunting, “recreation/sport,” and target shooting.⁸⁰ Perhaps surprisingly, only five percent of those polled listed their “Second Amendment right” as a reason why they own a gun.⁸¹ Certainly these numbers do not seem to explain why Wayne LaPierre, Chief Executive of the NRA, would describe the gun control debate as a “once-in-a-generation fight for everything we care about.”⁸² Critics suggest that gun manufacturers use fear of any form of gun regulation as marketing tool⁸³ for a multi-billion dollar industry.⁸⁴

Regardless of why some gun owners have such strong convictions, the conflict between gun rights activists and gun control supporters comes to a head when gun owners openly carry their weapons in public spaces. Given the political backdrop and rhetoric surrounding the gun control issue, in practice, openly bearing guns can have a very different meaning to those who are carrying the guns and any audience exposed to those guns. Many open carry advocates have argued that the symbolic action of openly carrying a gun in a public space is

⁷⁸ About one-third of American households own guns, down from about one-half in the 1970s. See Sabrina Tavernise & Robert Gebeloff, *Share of Homes with Guns Shows 4-Decade Decline*, N.Y. TIMES (March 9, 2013), http://www.nytimes.com/2013/03/10/us/rate-of-gun-ownership-is-down-survey-shows.html?pagewanted=all&_r=0.

⁷⁹ See Art Swift, *Personal Safety Top Reason Americans Own Guns Today*, GALLUP (Oct. 28, 2013), <http://www.gallup.com/poll/165605/personal-safety-top-reason-americans-own-guns-today.aspx>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Dana Davidsen, *NRA's LaPierre Says Gun Rights Struggle a 'Long War'*, CNN (last updated May 4, 2013), <http://www.cnn.com/2013/05/04/politics/nra-lapierre/>.

⁸³ See Bernd Debusmann, *Guns in America: the Business of Fear*, REUTERS (July 30, 2012), <http://blogs.reuters.com/bernddebusmann/2012/07/30/guns-in-america-the-business-of-fear/> (“Gun lovers taking their cue from the NRA fear that any kind of regulation – restrictions on the sale of magazines holding 100 rounds, for example – is a step on the road to the elimination of the U.S. constitution’s Second Amendment . . .”).

⁸⁴ See Brad Plumer, *How the U.S. Gun Industry Became So Lucrative*, WASH. POST (Dec. 19, 2012), <https://www.washingtonpost.com/news/wonk/wp/2012/12/19/seven-facts-about-the-u-s-gun-industry/>.

protected as free speech under the First Amendment.⁸⁵ For them, a gun is not a so much a weapon as it is an educational tool.⁸⁶

Individual open-carry advocates routinely argue that the purpose of carrying a gun for the public to see is, at least in part, motivated by a desire to educate.⁸⁷ This purpose is even clearer in the context of a demonstration or rally. In 2010, one such rally took place simultaneously in Alexandria, Virginia and across the Potomac River in Washington D.C.⁸⁸ The Second Amendment March was formed for the purpose of organizing a nationwide gathering of pro-Second Amendment supporters to stage public rallies.⁸⁹ Protesters carried signs reading, “Guns save lives” and, “Which part of ‘shall not be infringed’ confuses you?”⁹⁰ In compliance with the strict gun laws in Washington D.C., protesters remained unarmed but in Alexandria, protesters were allowed to carry holstered handguns and sling unloaded rifles over their shoulders.⁹¹

“The shot heard ‘round New York,” was fired to protest gun control legislation passed in New York State.⁹² Unlike the Second Amendment March, this protest took place far from large crowds or counter protesters and was composed of about fifty people, standing in the pouring rain.⁹³ The goal of the protest was to create a symbolic gesture reminiscent of the “Shot Heard Round the World” that was the start of the Revolutionary War

⁸⁵ Blanchfield, *supra* note 10 (“According to open carry advocates, their presence in public space represents more than just an expression of their Second Amendment rights, it’s a *statement*, an ‘educational,’ communicative act — in short, an exercise of their First Amendment freedom of speech.”).

⁸⁶ *See id.*

⁸⁷ *The Elephant in the Room*, OPEN CARRY TEXAS, <https://opencarrytexas.wordpress.com/2013/09/15/the-elephant-in-the-room/> (last visited Apr. 1, 2016, 2:04 PM) (“We’ve just proven the only thing we ‘knowingly’ and ‘intentionally’ do is educate.”).

⁸⁸ *See* Nick Wing, Arthur Delany & Sam Stein, *Gun Rally: Second Amendment Activists Swarm DC, VA Rallies*, HUFF. POST. (last updated May 25, 2011) http://www.huffingtonpost.com/2010/04/19/gun-rally-second-amendmen_n_542872.html.

⁸⁹ *See* SECOND AMENDMENT MARCH, <http://2amarch.com/about> (last visited Mar. 28, 2016).

⁹⁰ *See* Wing, *supra* note 88.

⁹¹ *Id.*

⁹² Zach Hirsch, *2nd Amendment Advocates Fire Their Weapons in Protest*, NORTH COUNTRY PUBLIC RADIO (Jan. 15, 2014), <http://www.northcountrypublicradio.org/news/story/23769/20140115/2nd-amendment-advocates-fire-their-weapons-in-protest>.

⁹³ *Id.*

in Concord, Massachusetts.⁹⁴ The Second Amendment advocates argued, “[m]ost people who buy guns are responsible sportsmen, not criminals.”⁹⁵ They are opposed to what they see as the “progressive liberal agenda” that does not “like guns” and passes “laws without talking to people who use them appropriately.”⁹⁶ There are a variety of non-threatening ways that responsible gun owners use their guns, so responsible gun owners may be surprised when people exposed to their guns are alarmed.

B. What Guns Mean to Those Exposed to Them

Gun owners openly displaying their weapons in a public space intimidate unarmed civilian audiences in a way that they may not intend and of which they might not be aware. The AR-15 semi-automatic rifles displayed by counter protesters in Indiana were loaded because, after all, “[a]ny weapon that is not loaded is just a rock or a club.”⁹⁷ One armed protester at the rally in Indiana said the purpose of walking around with his gun was as “a demonstration because a lot of people believe this is some kind of vicious item.”⁹⁸ In response to the claim that a gun is just a tool for self-protection, one unarmed onlooker from Moms Demand Action⁹⁹ responded that her self-protection was the right to be free “from people like you carrying loaded guns on the street.”¹⁰⁰ Another member of Moms Demand Action reported being “unsettled” by the presence of armed counter protesters and would “have to think twice before holding another event, particularly one where children could be present.”¹⁰¹ In the often-heated exchanges of a protest there is always the

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Reese, *supra* note 75.

⁹⁸ See Sara Galer, *Gun Control Debate Comes to Indianapolis*, WTHR, (Mar. 28, 2013), <http://www.wthr.com/story/21819707/gun-control-debate-comes-to-indianapolis>.

⁹⁹ Moms Demand Action for Gun Sense in America was created to demand action from legislators, state and federal; companies; and educational institutions to establish common-sense gun reforms. See MOMS DEMAND ACTION, *supra* note 76.

¹⁰⁰ See Galer, *supra* note 98.

¹⁰¹ Igor Volsky, *Men With Loaded Rifles Intimidate Moms Gathered at Gun Safety Rally*, THINK PROGRESS (Mar. 28, 2013, 5:36 PM), <http://thinkprogress.org/politics/2013/03/28/1791361/men-with-loaded-rifles-intimidate-moms-gathered-at-gun-safety-rally/>.

possibility that an armed protester might escalate from words to violence without warning.¹⁰²

On the other hand, some armed protesters are fully aware of the intimidating effect their guns convey. In Arizona, a group of bikers staged a “Freedom of Speech Rally” outside of a mosque where they urged their followers to bring guns in response to the deadly attack on the “Draw Muhammad” cartoon contest in Garland, Texas.¹⁰³ The organizer of the rally called on the group to “to utilize there [sic] second amendment right at this event just in case our first amendment comes under the much anticipated attack.”¹⁰⁴ Police separated the two sides as demonstrators yelled and taunted each other.¹⁰⁵ The anti-Muslim demonstrators were mostly armed and wore profanity-laced shirts denouncing Islam.¹⁰⁶ While no shots were fired at this demonstration, the possibility of violence increases when large numbers of armed protesters pack an ideologically-charged arena.¹⁰⁷ Former Alabama Minutemen leader, Mike Vanderboegh, told one crowd “[i]f I know I’m not going to get a fair trial in federal court . . . I at least have the right to an unfair gunfight.”¹⁰⁸ Many messages may be communicated to an unarmed audience by a gun-toting protester, but one message is certain: the gun carrier is prepared to kill someone.¹⁰⁹

Openly displayed guns only harm freedom of speech when the audience is intimidated. Therefore, the only justification for regulating guns that are used in a way that should

¹⁰² See e.g., Tessa Berenson, *Protesters at Donald Trump Rallies Face Increasing Violence*, TIME (Oct. 28, 2015), <http://time.com/4090437/donald-trump-violence-protests-republican-debate/>.

¹⁰³ See Bridge Initiative Team, *supra* note 73. See also, Kevin Conlon & Kristina Sgueglia, *Two Shot Dead After They Open Fire At Mohammed Cartoon Event in Texas*, CNN (May 4, 2015), <http://www.cnn.com/2015/05/03/us/mohammed-drawing-contest-shooting/>.

¹⁰⁴ See Bridge Initiative Team, *supra* note 73.

¹⁰⁵ See Evan Wyloge, *Hundreds Gather in Arizona for Armed Anti-Muslim Protest*, WASH. POST (Mar. 30, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/05/30/hundreds-gather-in-arizona-for-armed-anti-muslim-protest/>.

¹⁰⁶ See *id.*

¹⁰⁷ See Bridge Initiative Team, *supra* note 73.

¹⁰⁸ Wing, *supra* note 88.

¹⁰⁹ See Dahlia Lithwick & Christian Turner, *It’s Not My Gun. It’s “Free Speech.”*, SLATE (Nov. 12, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/open_carry_demonstrations_is_carrying_a_gun_to_a_protest_protected_by_the.html.

be protected by the First Amendment is to do so when an audience is reasonably intimidated. By way of illustration, the United States government faces no reasonable threat from armed individuals engaging in protests. The “Shot Heard ‘Round New York”¹¹⁰ posed no threat to the security of the New York state government.

In 2014, the U.S. Bureau of Land Management sent agents to Cliven Bundy’s ranch in Nevada to round up his cattle because he had refused to secure the necessary permits or pay required fees.¹¹¹ Anti-government groups and other supporters gathered in the hundreds to blockade a federal interstate—many wearing tactical gear and training their weapons on federal agents.¹¹² The federal agents backed down, “citing safety concerns and returned the cattle they had seized.”¹¹³ Unlike in 2014, the FBI and Oregon State police did not back down in arresting Cliven Bundy’s son Ammon Bundy for seizing a federal wildlife refuge in Oregon in 2016.¹¹⁴ During the arrest, one member of Bundy’s group “Citizens for Constitutional Freedom” was killed and another was injured.¹¹⁵ The United States government possesses sufficient military and police forces, as well as other remedies, to negate any threat of intimidation.

Guns mean different things to different people. Gun owners may see themselves as responsible citizens exercising a fundamental right and teaching fellow citizens about that right, while at the very same time a counter-protester may see someone who has the power to kill when a situation becomes too heated. But does the First Amendment protect openly displaying guns as a form of symbolic speech?

PART III: GUNS AND THE FIRST AMENDMENT

A. Are Guns Speech?

¹¹⁰ Hirsch, *supra* note 92.

¹¹¹ Reuters, *Nevada Rancher Cliven Bundy Indicted For 2014 Standoff*, HUFF. POST (Feb. 18, 2016), http://www.huffingtonpost.com/entry/cliven-bundy-indicted_us_56c5605ae4b0c3c55053ccee.

¹¹² Blanchfield, *supra* note 10.

¹¹³ See Reuters, *supra* note 112.

¹¹⁴ See Turkewitz & Johnson, *supra* note 74.

¹¹⁵ *Id.*

Simply put, no, guns are not speech.¹¹⁶ Burning a flag may be speech, but the flag itself is not speech but a symbol;¹¹⁷ a gun by itself is only a symbol. In other words, “[s]omeone has to do something with the symbol before it can become speech.”¹¹⁸ Whether or not an action constitutes speech for First Amendment purposes is the primary, and most crucial, question of the analysis. It is also the question in which most claims for First Amendment protection for openly carrying firearms as a form of speech will fail.¹¹⁹ That being said, some conduct involving guns may constitute speech for First Amendment purposes subject to some limitations.

The First Amendment protects speech, but it may also protect conduct, if that conduct is “sufficiently imbued with elements of communication.”¹²⁰ Expressive conduct, or symbolic speech, is not without limit. The Supreme Court has “rejected ‘the view that an apparently limitless variety of conduct can be labeled “speech” whenever the person engaging in the conduct intends thereby to express an idea.’”¹²¹ In order for expressive conduct to qualify as speech for First Amendment purposes, “the court must determine that (1) there was intent to convey a particularized message at the time of the conduct; and (2) there was a great likelihood that ‘the message would be understood by those who viewed it.’”¹²² Additionally, the “context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol.”¹²³ Finally, the court may look to other factors such as the long-

¹¹⁶ *Nordyke v. King*, 319 F.3d 1185, 1189 (9th Cir. 2003) (“[A] gun itself is not speech.”). See *Wortman v. United States*, No. 5:14-CV-04567-PSG, 2015 U.S. Dist. LEXIS 63622, at *10 (N.D. Cal. May 13, 2015); *Enos v. Holder*, No. 2:10-CV-2911-JAM-EFB, 2011 U.S. Dist. LEXIS 73932, at *15 (E.D. Cal. July 7, 2011);

¹¹⁷ *Texas v. Johnson*, 491 U.S. 397, 404-07 (1989).

¹¹⁸ *Nordyke*, 319 F.3d at 1189.

¹¹⁹ See *Nordyke*, 319 F.3d at 1190; *Chesney v. City of Jackson*, 171 F. Supp. 3d 605 (E.D. Mich. 2016); *Deffert v. Moe*, 111 F. Supp. 3d 797, 814 (W.D. Mich. 2015); *Baker v. Schwarb*, 40 F. Supp. 3d 881, 895 (E.D. Mich. 2014); *Burgess v. Wallingford*, 2013 U.S. Dist. LEXIS 69755 (D. Conn. May 15, 2013).

¹²⁰ *Johnson*, 491 U.S. at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)).

¹²¹ *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

¹²² *Spence*, 418 U.S. at 410-11.

¹²³ *Id.* at 410.

recognized “communicative connotations” of actions or objects,¹²⁴ such as flags.¹²⁵

Free-speech litigation often arises when gun carriers legally display their firearms in open carry states but nevertheless are detained or arrested. In *Deffert v. Moe*,¹²⁶ the plaintiff was legally and openly carrying a FNP-45 tactical pistol in a leg holster, with a TLR-2 rail-mounted tactical and laser sight,¹²⁷ while walking down a public sidewalk.¹²⁸ A person spotted the plaintiff who at the time was wearing camouflage pants, and singing to himself “Hakuna Matata,” a song from the movie, *The Lion King*.¹²⁹ The concerned citizen who spotted the plaintiff called the police because “it just seemed alarming” to see the plaintiff wearing camouflage and openly carrying a pistol and the caller did not know if it was legal to carry a gun.¹³⁰ The plaintiff alleges that he was also wearing a shirt with the slogan “It’s not the Tool, it’s the Fool” to show his opposition to gun control measures, although it was cold and the shirt was concealed by his jacket.¹³¹ The Court in *Deffert* was rightfully skeptical that the plaintiff intended to “carry his [gun] in his leg holster to increase awareness on the topic of gun control.”¹³²

Similarly, in *Chesney v. City of Jackson*,¹³³ the plaintiff was arrested after openly carrying a pistol while trying to obtain a new title for one of his motorcycles from the Michigan Secretary of State office.¹³⁴ The plaintiff argued unsuccessfully that he openly carried “in order to promote awareness of and educate others, including law enforcement, on the legality of open carry.”¹³⁵ The court noted in its decision that the plaintiff, in his deposition testimony, failed to state that his purpose in traveling

¹²⁴ *Id.*

¹²⁵ See e.g., *Stromberg v. California*, 283 U.S. 359 (1931); *Board of Education v. Barnette*, 319 U.S. 624, 632 (1943).

¹²⁶ 111 F. Supp. 3d 797 (W.D. Mich. 2015).

¹²⁷ The TLR-2 rail-mounted tactical and laser sight is a combination flashlight, and red aiming laser that can be attached to firearms.

¹²⁸ *Deffert*, 111 F. Supp. 3d at 814.

¹²⁹ *Id.* at 803.

¹³⁰ *Id.* at 802.

¹³¹ *Id.* at 814.

¹³² *Id.*

¹³³ *Chesney*, 171 F. Supp. 3d 605 (E.D. Mich. 2016).

¹³⁴ *Id.* at 610.

¹³⁵ *Id.* at 617.

to the Secretary of State office was to educate on the legality of open carry, and that he routinely carried his gun whenever he could, suggesting there was nothing especially noteworthy about openly carrying his gun at the Secretary of State's office.¹³⁶ The argument that simply exercising the right to openly carry guns is a form of communication falls flat. Unlike flags, courts have not recognized guns as having longstanding communicative connotations.¹³⁷ Courts consistently and rightfully reject the claim that simply carrying a gun is a protected form of speech.¹³⁸

Even when the open-carrier's purpose is to educate the public on the legality of open-carry, courts often reject First Amendment claims based on the likelihood that those who viewed it would understand the message.¹³⁹ The plaintiff in *Burgess v. Wallingford* was charged with disorderly conduct for openly carrying a gun at a pool hall even though he was wearing a shirt that quoted the Connecticut State Constitution regarding the right to bear arms and also had copies of a Connecticut Citizens Defense League¹⁴⁰ brochure stating the group's position.¹⁴¹ The court noted that despite the fact that the plaintiff's "shirt makes it more likely that those who viewed his overall conduct would understand his message than if he were only openly carrying his weapon," and some may interpret "his weapon as a particularized message regarding the Second Amendment" it was also reasonable to believe that the plaintiff was simply carrying a weapon for self-protection.¹⁴²

In *Nordyke*, the Ninth Circuit suggested in *dicta* that "a gun protestor burning a gun may be engaged in expressive conduct. So might a gun supporter waving a gun at an anti-gun

¹³⁶ *Id.*

¹³⁷ See *Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003).

¹³⁸ *Id.* at 1189 ("[A] gun itself is not speech."); *Wortman v. United States*, No. 5:14-CV-04567-PSG, 2015 U.S. Dist. LEXIS 63622, at *10 (N.D. Cal. May 13, 2015); *Enos v. Holder*, No. 2:10-CV-2911-JAM-EFB, 2011 U.S. Dist. LEXIS 73932, at *15 (E.D. Cal. July 7, 2011).

¹³⁹ See *Burgess v. Wallingford*, No. 11-CV-1129, 2013 U.S. Dist. LEXIS 69755, at *3-4 (D. Conn. May 15, 2013).

¹⁴⁰ The Connecticut Citizens Defense League is an organization that advocated for the right of citizens to bear arms. See CONNECTICUT CITIZENS DEFENSE LEAGUE, INC. (Aug. 25, 2015, 6:47 PM), <http://www.ccdl.us/aboutus/about-us>.

¹⁴¹ See *Burgess*, 2013 U.S. Dist. LEXIS 69755, at *3-4.

¹⁴² *Id.* at *28.

control rally.”¹⁴³ Courts should be receptive to the idea that a gun openly carried in the context of a political rally supporting the Second Amendment constitutes a form of symbolic speech. In many cases, guns carried in these events really can be used to make a statement, for “educational” purposes. In the context of rallies, some groups such as Open Carry Texas assert that another reason for openly carrying weapons is to “condition Texans to feel safe around law-abiding citizens that choose to carry them.”¹⁴⁴ Certainly the “Shot Heard ‘Round New York” was intended to convey a particular message at the time of the conduct and there was a great likelihood that those who viewed it would understand the message.¹⁴⁵ The message was certainly louder by utilizing guns to amplify the message, and it is unlikely that the media would bother reporting that story if guns were conspicuously absent.

If the plaintiff in *Deffert* had more clearly stated ahead of time his purpose of educating the public, perhaps by advertising an event on a website, the court may have been more receptive to his First Amendment claim.¹⁴⁶ After all, the Plaintiff was the cause of an impromptu educational conversation between the concerned citizen and emergency dispatch in which the dispatcher explained to the caller that open carry is legal in Michigan,¹⁴⁷ precisely the goal the plaintiff claimed to have in mind.¹⁴⁸ Similarly, the plaintiff’s unsuccessful claim in *Burgess* prompted a discussion between police officers on “whether Connecticut state law permitted the unconcealed carry of a firearm and whether someone could be arrested for disturbing others by unconcealed carry of a firearm.”¹⁴⁹ Activists hoping to use guns as symbols may have more success convincing courts

¹⁴³ *Nordyke*, 319 F.3d at 1190.

¹⁴⁴ Doug Stanglin, *Armed Protesters Rattle Texas Moms' Gun-Control Meeting*, USA TODAY (Nov. 11, 2013), <http://www.usatoday.com/story/news/nation/2013/11/11/moms-demand-action-open-carry-texas-guns-rifles/3497895/>.

¹⁴⁵ Hirsch, *supra* note 92.

¹⁴⁶ *Deffert v. Moe*, 111 F. Supp. 3d 797 (W.D. Mich. 2015).

¹⁴⁷ *Id.* at 802.

¹⁴⁸ *Id.* at 813–14.

¹⁴⁹ *Burgess v. Wallingford*, No. 11-CV-1129, 2013 U.S. Dist. LEXIS 69755, at *6 (D. Conn. May 15, 2013).

of their intention if they do so while demonstrating at a traditional march or rally.

It is important to look closely at both the message of demonstrators openly displaying guns at rallies and how observers will understand that message. For example, courts should be skeptical that the armed bikers staging a “Freedom of Speech Rally” outside of a mosque in Arizona intended to communicate a particularized message with their guns that viewers would understand.¹⁵⁰ Comments on the organizer of the rally’s Facebook page indicated protesters should bring guns for the purpose of self-defense—there is no mention of any communicative purpose.¹⁵¹

The First Amendment does not protect the right of a person to say something when it constitutes a “true threat.”¹⁵² “True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹⁵³ Courts and commentators have struggled with the level of intent necessary to constitute a true threat.¹⁵⁴ As Professor David Hudson of Vanderbilt Law School asks,

[M]ust a speaker subjectively intend to intimidate or threaten others? Or is it sufficient if the speaker makes a comment that a recipient reasonably believes is a threat? Should true threats be interpreted under a “reasonable speaker” or “reasonable recipient” standard? Is there a difference between a true threat and intimidation or is intimidation a special subset of the more general category of true threats?¹⁵⁵

Hudson concludes by asking whether intimidation becomes a “synonym for, or subset of, true threats” and when speech

¹⁵⁰ See Bridge Initiative Team, *supra* note 73.

¹⁵¹ See *id.*

¹⁵² See *Virginia v. Black*, 538 U.S. 343, 359 (2003).

¹⁵³ *Id.*

¹⁵⁴ See David L. Hudson Jr., *True Threats*, FIRST AMENDMENT CTR. (May 12, 2008), <http://www.firstamendmentcenter.org/true-threats>.

¹⁵⁵ *Id.*

crosses the line from “protected speech into unprotected threats or intimidation.”¹⁵⁶

It appears likely that the armed protesters outside of the mosque in Arizona were at least in part attempting to convey a threat to their targets based on their intentionally provocative rhetoric and the large number of guns carried by protesters.¹⁵⁷ Regardless of the true intent of each individual armed protester, given the apparent circumstances in Arizona, a reasonable audience member could certainly feel threatened.

Guns cannot convey speech without an action by an individual, but any time an individual openly displays a gun, intentional or not, the message is clear: that individual now has the power to kill. The harm of restricting the free speech of armed protesters must be weighed against the harm of audiences exposed to the immediate possibility of being killed.

B. Can the government regulate symbolic displays of guns?

Governments may reduce the danger to the public from armed demonstrations subject to the limitations of the First Amendment. When a court determines that conduct is sufficiently expressive to receive First Amendment protection, the next step is to determine whether the government has the power to regulate that conduct.¹⁵⁸ If the regulation in question is related to the suppression of free expression then a court must apply strict scrutiny.¹⁵⁹ If the government regulation only incidentally limits First Amendment freedoms then the four-part *O'Brien* test is applied:

If [the regulation] 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.¹⁶⁰

¹⁵⁶ *Id.*

¹⁵⁷ See Bridge Initiative Team, *supra* note 73.

¹⁵⁸ *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

¹⁵⁹ *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

¹⁶⁰ *O'Brien*, 391 U.S. at 377. The *O'Brien* test for non-communicative conduct is less stringent than First Amendment strict scrutiny. *Johnson*, 491 U.S. at 403.

The government has an important and substantial interest in promoting public safety. Public demonstrations have the potential to quickly escalate to violence without proper policing.¹⁶¹ While gun rights activists may dispute the efficacy of the government restricting guns or creating a “gun-free zone” at public rallies and demonstrations,¹⁶² determining the most effective way to promote public safety is a political decision best left to the expertise of legislators or government agencies.

If the government decides to regulate guns that are being used as a form of symbolic speech, the regulation that the government chooses must be unrelated to the suppression of free expression.¹⁶³ Furthermore, the incidental restriction on First Amendment freedoms must be “no greater than is essential.”¹⁶⁴ Police have asked armed protesters to take steps like holstering and unloading their guns,¹⁶⁵ or even sticking tiny American flags into the barrel of their guns.¹⁶⁶ The line separating a limitation that is overly burdensome from an acceptable one is thin. Furthermore, token steps to circumvent otherwise valid laws will not be successful. A facial attack on an ordinance prohibiting the presence of firearms at gun shows failed because “the presence of a handful of NRA Tribute Rifles at a show at which the vast majority of the prohibited guns bear no message whatsoever does not impugn the facial constitutionality of the Ordinance.”¹⁶⁷ Further litigation is necessary to fully define the boundaries of the right of individuals to use guns as a form of symbolic speech.

C. Is the current state of the law adequate?

¹⁶¹ In 1979 in Greensboro, North Carolina, 5 demonstrators were shot and killed by members of the Klu Klux Klan before a planned “Death to the Klan” march in what became known as the “Greensboro Massacre.” See Greensboro Truth & Reconciliation Commission Final Report, GREENSBORO TRUTH & RECONCILIATION COMM’N, http://www.greensborotrc.org/1979_sequence.pdf (last visited Mar. 31 2016).

¹⁶² See John Lott, *A Look at the Facts on Gun-Free Zones*, NAT’L REV. (Oct. 20, 2015), <http://www.nationalreview.com/article/425802/gun-free-zones-don't-save-lives-right-to-carry-laws-do>.

¹⁶³ *O'Brien*, 391 U.S. at 377.

¹⁶⁴ *Id.*

¹⁶⁵ Wing, *supra* note 88.

¹⁶⁶ Blanchfield, *supra* note 10.

¹⁶⁷ *Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003).

The First Amendment may protect the open display of guns as speech in certain situations, but more protection should be given to audiences exposed to intimidation by guns. In situations like the Freedom of Speech Rally at the mosque in Arizona, political minorities may have no recourse to make their voices heard over a majority that is willing to use guns for intimidation or threats. Governments may be forced to disperse demonstrations that are attended by armed counter-protesters to reduce the risk of gun violence and in effect a “heckler’s veto”¹⁶⁸ will occur – only this time the hecklers will be armed. This runs counter to the spirit of the First Amendment, which protects the “freedom of speech” and the “right of the people to peaceably assemble,”¹⁶⁹ presumably without fear of being shot.

The true threat doctrine is not developed enough in its present state for lower courts to apply it consistently and fairly. As it stands, the public’s, and more importantly, law enforcement’s understanding of what constitutes a true threat is too hard to meet. The average unarmed protester will not be comforted by some of the meager steps¹⁷⁰ police have asked armed protesters to take to limit the risk of intimidation, while simultaneously avoid infringing the First Amendment’s protection of expressive activity. When unarmed audiences are aware that guns are easily accessible, it is reasonable for them to experience harmful intimidation even if that intimidation does not rise to a level that is currently unprotected by the First Amendment.

CONCLUSION

Open-carry protesters may view themselves as responsible gun owners educating the public, or may be more insidiously attempting to threaten targets through a show of

¹⁶⁸ Ken White, *Lawsplainer: How the Sixth Circuit Stood Up to Hecklers (And Cops)*, POPEHAT (Nov. 5, 2015), <https://popehat.com/2015/11/05/lawsplainer-how-the-sixth-circuit-stood-up-to-hecklers-and-cops/> (“‘Heckler’s veto’ is a term used to describe situations where authorities limit or punish speech because of angry, threatening, or violent responses to the speech.”).

¹⁶⁹ U.S. CONST. amend. I.

¹⁷⁰ Demanding protesters keep “guns . . . unloaded . . . or . . . otherwise hav[e] the barrel or action blocked” is insufficient when it would only take moments to make the gun fully operational. Blanchfield, *supra* note 10.

force. Either way, the perspective of the audience should be the focus of the analysis by lawmakers and courts alike. In the context of demonstrations involving armed protesters, the true threat doctrine should be clarified to hold that the First Amendment does not protect speech a reasonable audience would find intimidating. This test has the benefit of promoting political speech without the possibility of violence, as well as permitting demonstrations against the government without excessively limiting the rights of gun carriers. While it is certainly possible that in the future armed political party conventions will be the norm, until reasonable audiences are not intimidated by the possibility of violence, guns and “free speech” are largely incompatible.

A FIRST AMENDMENT ANALYSIS OF VOTING RIGHTS OF THE MENTALLY INCAPACITATED: WHY ARE YOU CALLING ME AN IDIOT, WHY CAN'T I VOTE?

Tiffany Yates*

INTRODUCTION

In August of 2012, Clinton Gode went before Judge Lee Jantzen to petition for the right to vote.¹ Clinton Gode has Down Syndrome, and when he was eighteen years old his parents became his legal guardians to manage his medical and financial affairs.² Gode lives in Arizona, so he was disqualified from voting when his parents were granted guardianship over him.³ Arizona is a state that has no provision for allowing those who are declared mentally incompetent to vote, but Gode was afforded the right to vote by Judge Jantzen, who stated that, “by clear and convincing evidence.”⁴ Gode illustrated “sufficient understanding to exercise the right to vote.”⁵

Donald Trump? Hillary Clinton? Who did you vote for? If you can answer this question by going to the polls and casting a vote, then you have a right denied to adults adjudged to be mentally incompetent in fourteen states.⁶ There are roughly 1.5 million adult guardianships in the United States with an estimated total of \$273 billion in assets.⁷ The question arises—can they vote to protect their interests? The answer is—it depends on where they live. For example, as described above, Clinton Gode had to fight for the right to vote by petitioning the

* Juris Doctor Candidate, University of North Carolina School of Law, 2017; Article Editor, *First Amendment Law Review*.

¹ Deanna Pan, *Protecting the Voting Rights of People with Mental Disabilities*, MOTHER JONES (Nov. 5, 2012, 5:01 PM) <http://www.motherjones.com/politics/2012/11/voting-rights-mental-disabilities>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See Sally Hurme & Paul Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 935 (2007).

⁷ Ariana Campo-Flores & Ashby Jones, *Abuse Plagues System of Legal Guardians for Adults*, WALL ST. J. (Oct. 30, 2015), <http://www.wsj.com/articles/abuse-plagues-system-of-legal-guardians-for-adults-1446225524>.

court, because Arizona does not allow those who are adjudged mentally incompetent to vote.⁸ This contrasts with the experience of Roberta Blomster, a forty-one-year-old woman diagnosed with mild mental retardation, who lives in St. Paul, Minnesota, and is allowed to vote because she was given a hearing where she presented sufficient evidence in court that she should retain the ability to vote.⁹

There is a common misconception that voting is a form of speech that is protected by the First Amendment of the United States Constitution. It isn't. Voting is looked at through a very different lens. As the two legal scholars describe it, "[v]oting is a fundamental right protected by the federal and state constitutions, and it is a hallmark of our democracy. However, the states have authority to regulate their election processes, including defining who is eligible to vote."¹⁰ Laws intended to prevent voter fraud in elections are reviewed for whether or not the law is "justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"¹¹ Further, it is thought that preventing people who are adjudicated as incompetent from voting will limit voter fraud. This belief arises from the stereotype that those who are adjudicated as incompetent are considered to be vulnerable to exploitation and manipulation. This belief perpetuates the idea that their vote is compromised because someone seeking to exploit or manipulate how they vote, could effectively get two votes. Why is this a concern?

First, it is necessary to evaluate the process by which adjudication of incompetence is determined, the course of action taken when someone is adjudged to be mentally incompetent, and the approaches that states take to allowing those who are found to be mentally incompetent to vote. Then, it is necessary to review the general reasoning behind the revocation of the ability to vote for those declared mentally incompetent taken by states, and why rational basis is the wrong standard. This Note will argue that a First Amendment approach would better protect those who are being denied the right to vote on the grounds that

⁸ Pan, *supra* note 1.

⁹ Kimberly Leonard, *Keeping the 'Mentally Incompetent' From Voting*, THE ATLANTIC (Oct. 17, 2012), <http://www.theatlantic.com/health/archive/2012/10/keeping-the-mentally-incompetent-from-voting/263748/>.

¹⁰ Hurme & Appelbaum, *supra* note 4, at 931.

¹¹ Crawford v. Marion County Election Bd., 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

they have been adjudged as mentally incompetent. This argument is grounded in the scrutiny that is afforded to those practices that are found to be considered “free speech,” and seeks to make the case for a departure from the rational basis standard utilized by the court in approach to some laws regarding voting regulation.

Part I will provide a general overview of how adult incompetency proceedings progress. Part II will delve into a discussion of the various forms of guardianship. Then Part III of this Note will describe the different restrictions to voting when someone has been adjudged incompetent. There are four approaches that states have taken, and this Note will categorize and analyze each one. Part V will explore different reasons that have been articulated for restricting voting for those who have guardians. Part VI will examine the Court’s approach to incompetency and voting. Part VII will explain why reform is necessary, and further, Part VII will argue that a First Amendment view of the voting issue would protect the rights of more people and limit disenfranchisement.

I. WHAT IT MEANS TO BE MENTALLY INCOMPETENT AND WHEN DOES INCOMPETENCE ADJUDICATION OCCUR

This overview of guardianship is not state specific, and therefore it is not dispositive of any particular process, but North Carolina is the primarily cited model. This overview is a conceptual one.

Mental incompetence is the inability of a person to make or carry out important decisions regarding his or her affairs. An individual is defined as mentally incompetent if h/she is manifestly psychotic or otherwise of unsound mind, either consistently or sporadically, by reason of mental defect.¹²

This definition appears if you search for the term “mental incompetence.” If a person is adjudged to be mentally incompetent it can be because they have a mental illness,

¹² *Mental Incompetence*, US LEGAL, <http://definitions.uslegal.com/m/mental-incompetence/> (last visited Oct. 6, 2016).

developmental disability, or traumatic brain injury that renders them incapable of making basic living decisions for themselves, such as where to live or how to spend money.¹³

People with developmental disabilities can also be placed under the care of a guardian.¹⁴ For example, consider a person who is diagnosed with autism, which is a spectrum disorder.¹⁵ Some individuals with autism are high functioning, such as individuals with Asperger's syndrome and are "highly intelligent," while others are not capable of speech or day-to-day tasks.¹⁶ It is the same with mental competence because there is a spectrum. For example, "a patient with severe dementia may be judged incompetent but . . . a patient may be judged competent despite some forgetfulness and confusion."¹⁷

Who needs a guardian and what type of guardian is needed is determined on an individual basis, and the process varies widely from state to state.¹⁸ For example, in Florida there exists an ability to appoint a "voluntary guardian," who manages the affairs of a person who is still competent (there is no incompetency proceeding), but is "incapable of the care, custody, and management of his or her estate by reason of age or physical infirmity and who has voluntarily petitioned for the appointment."¹⁹ In contrast, North Carolina does not allow for the voluntary appointment of a guardian of the estate; the person would have to go through an incompetency proceeding and be found incompetent to have someone appointed as the guardian of the estate.²⁰ The only mechanism that allows for someone to manage another's estate without an incompetency proceeding in

¹³ See Michele J. Feinstein & David K. Webber, *Voting Under Guardianship: Individual Rights Require Individual Review*, 10 NAT'L ACAD. OF ELDER LAW ATT'YS J. 125, 126 n.3 (2014).

¹⁴ See *id.*

¹⁵ *What is Autism? What is Autism Spectrum Disorder?* AUTISM SPEAKS, <https://www.autismspeaks.org/what-autism> (last visited Dec. 18, 2016).

¹⁶ Jeannette Kennett, *Autism, Empathy, and Moral Agency*, 52 PHIL. Q. 340, 345-46 (2002).

¹⁷ *Competency – Drawing the Line Between Competency and Incompetence – Clinical, Patient, and Decision*, MEDICINE ENCYCLOPEDIA, <http://medicine.jrank.org/pages/319/Competency-Drawing-line-between-competency-incompetence.html> (last visited Nov. 16, 2016).

¹⁸ Feinstein & Webber, *supra* note 12, at 126.

¹⁹ FLA. STAT. § 744.341(a) (2016).

²⁰ N.C. GEN. STAT. § 35A-1251 (2016).

North Carolina is a durable power of attorney.²¹

Another aspect that varies widely from state to state is how many and to what degree “fundamental rights,” or tenets of citizenship, are taken away.²² The most prevalent fundamental federal right that is revoked is voting.²³ People who are adjudged to be incompetent lose the right to vote in many states.²⁴ There are states that have recognized that “incompetent” encompasses a wide spectrum of people and tried to mitigate their policies.²⁵ However, there are a large number of states which still consider it within their discretion to limit voting or take away the right completely.²⁶ A large number of people are losing the most important right granted by the United States Constitution—the right that guarantees that individuals can hold their political leaders accountable for the choices that they make in office—voting.

Both the Due Process and Equal Protection clauses of the Fourteenth Amendment protect voting:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²⁷

People who are adjudicated as mentally incompetent are still citizens of the United States, and their rights should be protected by the Fourteenth Amendment. However, because a declaration of incompetence impedes so many of their fundamental rights (the right to contract, to marry, to bring suit), it would seem that those who are adjudged mentally incompetent no longer fit into

²¹ *Id.* § 32A-8.

²² Feinstein & Webber, *supra* note 12, at 126.

²³ *See id.*

²⁴ *Id.*

²⁵ *Id.* at 132.

²⁶ *Id.* at 132-33.

²⁷ U.S. CONST. amend. XIV, § 1.

the category of “citizen.”²⁸ Even when those who are adjudged mentally incompetent have vast amounts of wealth, they no longer are afforded the right to decide how it is used.²⁹ So does the Fourteenth Amendment protect them? It should—“[l]egally and constitutionally, it must be presumed that all citizens are equal before the law . . . [t]he Bill of Rights does not speak of competents and incompetents.”³⁰ A person who is incompetent is still responsible for paying taxes; they are afforded deductions,³¹ but must still pay taxes.³² As people who contribute to society, they should be protected by traditional liberty safeguards. One of those safeguards is due process.

Under traditional due process principles, deprivation of a fundamental right requires notice and an opportunity to be heard. That right may be limited, by state law, for lack of mental capacity, as enumerated in Section 8(a) of the National Voter Registration Act of 1993: “In the administration of voter registration for elections for Federal office, each State shall . . . provide that the name of a registrant may not be removed from the official list of eligible voters except . . . as provided by State law, by reason of criminal conviction or mental incapacity. . . . [T]he federal government delegated the authority to restrict voting rights to the states subject to those criteria. However, the Equal Protection Clause of the Fourteenth Amendment prohibits categorical restrictions on fundamental rights, requiring instead that an individualized inquiry be performed. In the guardianship context, this means that states cannot disenfranchise individuals merely for being under guardianship; instead, they must inquire whether “those who cast a vote have the mental capacity to make their own decision by being able to understand the

²⁸ Amy L. Bruggeman, *Guardianship of Adults with Mental Retardation: Towards a Presumption of Competence*, 14 AKRON L. REV. 321, 329 (1980).

²⁹ *Id.* at 327.

³⁰ *Id.* (quoting Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39, 65, 72 (1975)).

³¹ IRS, *Tax Benefits for Disabled Taxpayers*, <https://www.irs.gov/uac/tax-benefits-for-disabled-taxpayers>.

³² *Id.*

nature and effect of the voting act itself.”³³

Guardianship laws vary state by state, but typically “guardianship laws define ‘incapacity’ or ‘incompetency’ through a combination of two or more of the following components:” medical, functional, cognitive, or necessity.³⁴ “A ‘medical’ component [typically] requires that the respondent’s incapacity be caused by a diagnosed medical condition or identified mental or physical impairment, such as mental illness, developmental disability, or chronic intoxication.”³⁵ “A ‘functional’ component [typically] requires that the respondent’s incapacity limit [their] ability to manage [their] own affairs or property or to care for [their] essential personal needs such as medical care, food, clothing, shelter, and safety.”³⁶ “A ‘cognitive’ component requires that the respondent’s incapacity involve a mental or physical condition that limits his or her ability to make or communicate ‘rational decisions.’”³⁷ “A ‘necessity’ component requires that the respondent’s incapacity endanger the respondent’s person or property to such an extent that appointment of a guardian, as opposed to some other ‘less restrictive’ alternative, is necessary and in the respondent’s best interest.”³⁸ These are the generally recognized fields through which it is possible to question a person’s competency.

But what if voting were protected by the First Amendment of the United States Constitution? What if, instead of a compelling interest standard, voting rights had a strict scrutiny standard? When the Supreme Court classifies an activity as free speech entitled to First Amendment protection, the Court subjects any law restricting that activity to strict scrutiny.³⁹ This

³³ Feinstein & Webber, *supra* note 12, at 129 (emphasis omitted).

³⁴ UNC SCHOOL OF GOVERNMENT, *North Carolina Guardianship Manual*, 73, 76, <http://defendermanuals.sog.unc.edu/guardianship/6-incapacity> (last visited Oct. 6, 2016).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See Armand Derfner & J. Harold Hebert, *Why Doesn't the Law Give Full Free Speech Protections to Voters?*, HUFF. POST (Dec. 1, 2012), http://www.huffingtonpost.com/armand-derfner/full-free-speech-protection_b_1929620.html. See *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dept. v. Mosley*, 408 U.S. 92 (1972); *United States v. Eichman*, 110 S. Ct. 2404 (1990). *But see*, *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

results in the law being viewed skeptically.⁴⁰ That means that the law will be upheld only if the state can prove the law advances an actual “compelling interest” of the government by the least restrictive means possible.⁴¹ The burden of proof in such a case falls to the state.⁴²

The idea that casting a vote is engaging in a form of free speech seems natural because a vote, after all, is an individual’s mechanism for speaking to society about how they want society to be governed. However, the Supreme Court approaches voting laws in a deferential way in terms of mental illness or other forms of incompetence. Other laws that are not considered too discriminatory are also treated with deference, for example, the Indiana voter ID laws were upheld even though there were virtually no cases of voter ID fraud.⁴³ It is an interesting dichotomy that the votes themselves are not protected by the First Amendment, but the money contributed to campaigns is considered free speech and is protected.⁴⁴

II. VARIOUS FORMS OF GUARDIANSHIP

Guardianship is a court procedure where a legal relationship is created between a person or organization, with another vulnerable person.⁴⁵ The guardian is given the responsibility to care for and make decisions for another individual over the age of eighteen, the ward, who is not competent to handle their own affairs, or is unable to make important decisions.⁴⁶ There are several types of guardianship that can be ordered by the court. The four types are “Guardian of the Person,” “Guardian of the Estate,” “General Guardian,” and “Limited Guardianship.”

The first type of guardianship is “Guardian of the Person,” and it entails handling personal affairs, medical

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*; see also *Citizens United v. FEC*, 555 U.S. 1028 (2008).

⁴⁵ PAMELA TEASTER ET. AL., *PUBLIC GUARDIANSHIP: IN THE BEST INTERESTS OF INCAPACITATED PEOPLE?* 21 (Praeger, 2010).

⁴⁶ *Id.*

decisions, decisions about where the person lives, participation in educational or vocational programs, and other decisions regarding the person who is determined to be incompetent.⁴⁷

Another form that guardianship can take is “Guardian of the Estate,” which is where the appointed guardian handles the financial affairs, investment decisions, bill payments, as well as real and personal property.⁴⁸

Another form that guardianship can take is “General Guardian,” where the guardian has the responsibilities of both of the aforementioned types of guardianship.⁴⁹ The type of guardian that is appointed is based on what the judge deems necessary.⁵⁰ For example, if an older person was struggling with memory loss and they were competently handling their personal affairs, but they were incapable of managing their financial affairs, the judge would likely rule that they needed a “Guardian of the Estate.” It is important to note that guardianships are only meant for cases in which they are immediately necessary, and they are not meant as a planning tool, so they cannot be done in advance.⁵¹ It is also important to note that there are vast differences between guardianship cases for adults and guardianship cases for children, which make these two separate fields legally incomparable.

Limited guardianship is another common type of guardianship.⁵² It is based on the idea that there are people who are only partially incapacitated (*i.e.* somewhat competent) and retain “sufficient capacity to exercise certain rights or make or participate in certain decisions.”⁵³ For example, persons with a developmental disability may lack the capacity to make medical decisions, but remain capable of making a decision about where they want to live. In such instances, they should be placed under a limited guardianship, where a guardian is appointed to help them make decisions that they lack the capacity to make (in this

⁴⁷ UNC SCHOOL OF GOVERNMENT, *supra* note 32.

⁴⁸ N.C. GEN. STAT. § 35A-1253 (2016).

⁴⁹ THE LAW AND THE ELDERLY IN NORTH CAROLINA 215 (Michael J. McCann & John L. Saxon eds., 2d ed. 1996).

⁵⁰ N.C. GEN. STAT. § 35A-1212(a) (2016).

⁵¹ TEASTER ET AL., *supra* note 45, at 21.

⁵² THE LAW AND THE ELDERLY, *supra* note 49, at 215.

⁵³ TEASTER ET AL., *supra* note 45, at 22.

example, medical decisions), but allows the adjudged incompetent individuals to make decisions that they are capable of making on their own (in this example, where to live).

The role of guardian can be filled by family, friends, a corporation, or a public guardian. Family is the preferred solution because it is believed that the family will act in accord with what is in the best interests for the ward.⁵⁴ Public guardianships occur when a person has been declared incompetent and has an estate, but has no person that could be appointed as guardian.⁵⁵ A public guardian is an individual appointed by a clerk of superior court for a term of eight years as guardian.⁵⁶ One concern that should be taken into consideration during appointment is whether the proposed guardian is prepared to have “regular contact” with the ward and to act in the best interest of the ward so as to ensure a life as “comfortable, healthy, and safe as possible.”⁵⁷ This concern is the reason that a Guardian *ad litem* (“GAL”) will conduct an investigation into whether to appoint a guardian, and who should be appointed; then, the GAL will make a recommendation based on their investigation.⁵⁸

III. STATES APPROACHES TO ALLOWING THOSE FOUND MENTALLY INCOMPETENT TO VOTE⁵⁹

Voting laws are left to the discretion of the states. The states have generally taken one of four approaches regarding the mentally incompetent and voting: (1) not allowing those adjudged mentally incompetent to vote at all; (2) after someone has been adjudicated to be mentally incompetent there is a

⁵⁴ See N.C. GEN. STAT. § 35A-1214 (2016); THE LAW AND THE ELDERLY, *supra* note 49, at 216.

⁵⁵ N.C. GEN. STAT. § 35A-1214 (2016).

⁵⁶ *Id.*

⁵⁷ N.C. DEP’T OF HEALTH AND HUMAN SERV., GUARDIANSHIP OF INCOMPETENT ADULTS IN NORTH CAROLINA, DHHS-6226 (1997).

⁵⁸ See generally Bradley Geller, *Manuals for Guardians ad Litem and Appointed Counsel*, Michigan Center for Law and Aging, 1, 5–6 (2014) (explaining the role of guardians ad litem).

⁵⁹ See generally BAZELTON CTR. FOR MENTAL HEALTH LAW, *State Laws Affecting the Voting Rights of People with Mental Disabilities*, http://www.bazelton.org/LinkClick.aspx?fileticket=-Hs7F_Ohfgg%3D&tabid=543 (last visited Oct. 6, 2016) (referencing statutes used in this section).

presumption of *inability* to vote unless information otherwise is presented during adjudication; (3) after someone has been adjudicated to be mentally incompetent there is a presumption of the *capability* to vote unless information otherwise is presented during adjudication; and (4) allowing those judged mentally incompetent to vote. Each of these approaches has different implications depending on the state where the person was adjudicated incompetent, and they have very different benefits and drawbacks.

A. The First Approach

The first approach that many states have elected to follow for those adjudicated incompetent is simply not allow people with that adjudication to vote. Period. No one found to need a guardian is permitted to vote. This occurs in eighteen states and the District of Columbia. These states are: Arizona,⁶⁰ District of Columbia,⁶¹ Georgia,⁶² Hawaii,⁶³ Mississippi,⁶⁴ Missouri,⁶⁵ Montana,⁶⁶ Nebraska,⁶⁷ Nevada,⁶⁸ New Jersey,⁶⁹ New York,⁷⁰ Ohio,⁷¹ Rhode Island,⁷² South Carolina,⁷³ Utah,⁷⁴ Virginia,⁷⁵ West Virginia,⁷⁶ and Wyoming.⁷⁷ Many of these statutes require that someone be deemed competent before they are allowed to participate in voting again.

South Carolina's statute states that "[a] person is disqualified from registering or voting if he is adjudicated

⁶⁰ See *id.* at 1 (citing ARIZ. CONST. art. VII, § 2(c)).

⁶¹ See *id.* at 4 (citing D.C. CODE §1-1001.02 (2016)).

⁶² See *id.* (citing GA. CONST. art. II, § 1, ¶ 3(b)) (then citing GA. CODE ANN. § 21-2-216(b) (West 2016)).

⁶³ See *id.* (citing HAW. CONST. art. II, § 2).

⁶⁴ See *id.* at 8 (citing MISS. CONST. art. XII, § 241).

⁶⁵ See *id.* (citing MO. CONST. art. VIII, § 2).

⁶⁶ See *id.* at 9 (citing MONT. CONST. art. IV, § 2).

⁶⁷ See *id.* (citing NEB. CONST. art. VI, § 2).

⁶⁸ See *id.* (citing NEV. CONST. art. II, § 1).

⁶⁹ See *id.* at 10 (citing N.J. CONST. art. II, § 1, ¶ 6).

⁷⁰ See *id.* at 11 (citing N.Y. ELEC. LAW § 5-106(6) (McKinney 2016)).

⁷¹ See *id.* at 12 (citing OHIO CONST. art. V, § 6).

⁷² See *id.* at 14 (citing R.I. CONST. art. II, § 1).

⁷³ See *id.* (citing S.C. CONST. art. II, § 7).

⁷⁴ See *id.* at 15 (citing UTAH CONST. art. IV, § 6).

⁷⁵ See *id.* at 16 (citing VA. CONST. art. II, § 1).

⁷⁶ See *id.* at 17 (citing W. VA. CONST. art. IV, § 1).

⁷⁷ See *id.* at 19 (citing WYO. CONST. art. VI, § 6).

mentally incompetent by a court of competent jurisdiction.”⁷⁸ Nevada includes the requirement that to regain the ability to vote, a person’s competency must be restored—“[n]o person who has been adjudicated mentally incompetent, unless restored to legal capacity, shall be entitled to the privilege of elector”⁷⁹

Other states use less precise language for the competency requirement. For example, Mississippi’s constitution reads “[e]very inhabitant of this state, except idiots and insane persons. . . .”⁸⁰ is a qualified elector. However, Mississippi does not stop there; the code goes on to explain that “[e]very citizen, except persons adjudicated *non compos mentis* . . .” shall be permitted to vote.⁸¹ In these states, those deemed to need limited guardianships or full guardianships are not permitted to vote.

B. The Second and Third Approaches

The second and third approaches to whether or not those adjudged mentally incompetent should vote only differ in the presumption regarding the ability to vote during adjudication. In some states, the court is required to make a specific determination of the voting capacity of a person under guardianship.⁸² In other states, it is within the court’s discretion to decide whether to issue an order regarding capability to vote. For example, under South Dakota law:

The appointment of a guardian or conservator of a protected person does not constitute a general finding of legal incompetence unless the court so orders, and the protected person shall otherwise retain all rights which have not been granted to the guardian or conservator.⁸³

In many states, such as North Carolina and Oklahoma, when a person is adjudged to be mentally incompetent and they retain

⁷⁸ *See id.* at 14 (citing S.C. CODE ANN. § 7-5-120(B)(1) (West 2016)).

⁷⁹ *See id.* at 9 (citing NEV. CONST. art. II, § 1).

⁸⁰ *See id.* at 8 (citing MISS. CONST. art. XII, § 241).

⁸¹ *See id.* (citing MISS. CODE ANN. § 23-15-11 (West 2016)).

⁸² *See id.* at 12 (citing OKLA. STAT. ANN. tit. 30 § 3-113(B)(1) (West 2016)).

⁸³ *See id.* at 14 (citing S.D. CODIFIED LAWS § 29A-5-118 (2016)).

some of their rights, such as the right to vote, they are considered partially incapacitated or under some form of limited guardianship.⁸⁴ In other states, it is possible to be under a limited form of guardianship, but still not have the right to vote.⁸⁵

For example, in Texas, the statute reads, “[t]o be eligible to register as a voter, a person must not have been determined totally mentally incapacitated or partially mentally incapacitated without the right to vote by a final judgment of a court exercising probate jurisdiction.”⁸⁶ There are twenty-one states that allow those who have been adjudged to be incompetent to vote based on information that is presented in court.⁸⁷ The key difference between these approaches is the following: there is an assumption of capacity to vote, there is an assumption of incapacity to vote, or it is left to the court to determine based on information presented during the adjudicative process. These states are: Alabama,⁸⁸ Alaska,⁸⁹ Arkansas,⁹⁰ California,⁹¹ Connecticut,⁹² Delaware,⁹³ Florida,⁹⁴ Iowa,⁹⁵ Kentucky,⁹⁶ Louisiana,⁹⁷ Maryland,⁹⁸ Massachusetts,⁹⁹ Michigan,¹⁰⁰ Minnesota,¹⁰¹ New Mexico,¹⁰² North Carolina,¹⁰³ North

⁸⁴ See e.g., *id.* at 12 (citing OKLA. STAT. ANN. tit. 30 § 3-113(B)(1) (West 2016)).

⁸⁵ See generally *id.*

⁸⁶ See *id.* at 15 (citing TEX. ELEC. CODE ANN. tit. 2, § 13.001(a)(3) (West 2016)).

⁸⁷ See generally *id.*

⁸⁸ See *id.* at 1 (citing ALA. CODE § 38-9C-4(7) (2016)).

⁸⁹ See *id.* (citing ALASKA STAT. ANN. § 13.26.150(e)(6) (West 2016)).

⁹⁰ See *id.* at 2 (citing ARK. CODE ANN. § 28-65-106 (West 2016)).

⁹¹ See *id.* (citing CAL. PROB. CODE § 1910(b) (West 2016)).

⁹² See *id.* at 3 (citing CONN. GEN. STAT. ANN. § 45a-703 (West 2016)).

⁹³ See *id.* (citing DEL. CODE ANN. tit. 15, § 1701 (West 2016)).

⁹⁴ See *id.* at 4 (citing FLA. STAT. ANN. § 744.331(3)(g)(2) (West 2016)).

⁹⁵ See *id.* at 6 (citing IOWA CODE ANN. § 633.556(1) (West 2016)).

⁹⁶ See *id.* (citing KY. REV. STAT. ANN. § 387.580(3)(C) (LexisNexis 2016)).

⁹⁷ See *id.* (citing LA. STAT. ANN. § 18:102(A)(2) (2016)).

⁹⁸ See *id.* at 7 (citing MD. CODE ANN. ELEC. LAW § 3-102(b)(2) (LexisNexis 2016)).

⁹⁹ Mass. Sec. of State, *Persons Subject to Guardianship That Do Not Specifically Forbid Voting Are Eligible Voters*, PUB. RECORDER (Jan. 1991), <http://www.margolis.com/hs-fs/hub/29051/file-13683957-pdf/docs/guardianship.pdf> (interpreting MASS CONST. amend. art. III).

¹⁰⁰ See BAZELTON CTR. FOR MENTAL HEALTH LAW, *supra* note 59, at 8 (citing MICH. CONST. art. II, § 2).

¹⁰¹ See *id.* (citing MINN. STAT. ANN. § 524.5-313(v)(8) (West 2016)).

¹⁰² See *id.* at 11 (citing N.M. STAT. ANN. § 45-5-301.1 (West 2016)).

¹⁰³ North Carolina does not have a statutory provision or a section in its constitution prohibiting voting for those under guardianship. See *id.* at 11.

Dakota,¹⁰⁴ Oklahoma,¹⁰⁵ Oregon,¹⁰⁶ South Dakota,¹⁰⁷ Tennessee,¹⁰⁸ Texas,¹⁰⁹ Washington,¹¹⁰ and Wisconsin.¹¹¹ Determination of capacity in these proceedings varies based on the state where the proceedings are taking place. For example, in California a “[p]erson under conservatorship is disqualified from voting if court determines that he or she is not capable of completing voter registration affidavit; must review their capability of completing the affidavit during the yearly or biennial review of conservatorship.”¹¹²

When compared to the first approach, both the second and third approaches allow more freedom to exercise the right to vote; however, there is a lack of consistency and determinations are highly dependent on where incompetence proceedings take place. In addition to a lack of consistency between states, there is often a lack of consistency within a state as well. For example, in Alabama, the state constitution states that “[n]o person who is mentally incompetent shall be qualified to vote unless the disability has been removed”¹¹³ and that “[p]ersons disqualified under the [Alabama] Constitution are not entitled to vote.”¹¹⁴ In the Alabama Code, this section clarifies the role of the court in limiting rights:

The court shall exercise the authority conferred in this division so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's mental and adaptive

¹⁰⁴ See *id.* (citing N.D. CENT. CODE ANN. § 30.1-28-04(3) (West 2016)).

¹⁰⁵ See *id.* at 12 (citing OKLA. STAT. ANN. tit. 30, § 3-113(B)(1) (West 2016)).

¹⁰⁶ See *id.* (citing OR. CONST. art. II, § 3).

¹⁰⁷ See *id.* at 14 (citing S.D. CODIFIED LAWS § 29A-5-118 (2016)).

¹⁰⁸ See *id.* (citing TENN. CODE ANN. §34-3-104(8) (West 2016)).

¹⁰⁹ See *id.* at 15 (citing TEX. CONST. art. VI, § 1(a)(2)).

¹¹⁰ See *id.* at 17 (citing WASH. REV. CODE ANN. § 11.88.010(5) (West 2016)).

¹¹¹ See *id.* at 18 (citing WIS. STAT. ANN. § 54.25(2)(c)(1)(g) (West 2016)).

¹¹² See *id.* at 2. (citing CAL. PROB. CODE § 1910 (2016)); see also CAL. ELEC. CODE §§ 2208-2209 (West 2016).

¹¹³ Feinstein & Webber, *supra* note 13, at 134 n.75 (quoting ALA. CONST. art VII, § 177(b)).

¹¹⁴ See BAZELTON CTR. FOR MENTAL HEALTH LAW, *supra* note 59, at 1. (citing ALA. CODE § 17-3-30 (2016)).

limitations or other conditions warranting the procedure.¹¹⁵

Facially, the state constitution and the section above do not seem inconsistent, but consider that only those who are determined to be mentally incompetent and in need of “limited guardianship” are still eligible for consideration to vote.¹¹⁶ Those who are determined to be mentally incompetent and in need of full guardianship are not afforded that same consideration.

Further, these approaches to mentally incompetent voting laws result in required litigation. In Connecticut “[n]o mentally incompetent person shall be admitted as an elector,”¹¹⁷ but if the guardian or the conservator believes their ward to have the capacity to vote, then “[t]he guardian or conservator of an individual may file a petition in probate court to determine such individual’s competency to vote in a primary, referendum or election.”¹¹⁸ This is unnecessarily replicating work. There should be a presumption that the person who has been adjudged to be mentally incompetent has the ability to vote unless the ward is in a state so as to render it impossible for them to be able to make a decision regarding who to vote for (such as a vegetative state).

Some states do not have a statute or a portion of the constitution that requires a specific determination of incompetence to vote. Instead, these states have policies dictated by case law and opinions (specifically, attorney general opinions) that provide guidance regarding voting after a finding of incompetence. For example, in Massachusetts “[e]very citizen . . . excepting persons under guardianship . . . shall have a right to vote in such election,”¹¹⁹ but the Secretary of State has issued an opinion in a “Voters’ Bill of Rights” that interprets this provision as requiring a specific finding of incompetence before disenfranchising the adjudged incompetent.¹²⁰

¹¹⁵ See *id.* at 1 (citing ALA. CODE § 26-2A-105(a) (2016)).

¹¹⁶ See *id.*

¹¹⁷ See *id.* at 3 (citing CONN. GEN. STAT. § 9-12(a) (2016)).

¹¹⁸ See *id.* at 3 (citing CONN. GEN. STAT. § 45a-703 (2016)).

¹¹⁹ See *id.* at 8 (citing MASS. CONST. amend. art. III).

¹²⁰ SEC’Y OF THE COMMONWEALTH OF MASS., *2012 Information for Voters: Massachusetts Voters’ Bill of Rights*, http://www.sec.state.ma.us/ele/ele12/ballot_questions_12/ma_voter_rights.htm (last visited Oct. 6, 2016).

C. The Fourth Approach

The fourth approach that is taken by several states is having no restrictions on those who are adjudged mentally incompetent to vote. There are nine states that allow everyone to vote regardless of mental capacity. These states are: Colorado,¹²¹ Idaho,¹²² Illinois,¹²³ Indiana,¹²⁴ Kansas,¹²⁵ Maine,¹²⁶ New Hampshire,¹²⁷ Pennsylvania,¹²⁸ and Vermont.¹²⁹ These states have no constitutional disqualification provisions. Some of them have affirmative statutes that reiterate the right to vote, while others do not. Pennsylvania's constitution states that, "[s]ubject to state law, anyone who is over twenty-one, has been a citizen of the United States for at least one month, and has resided in the state and election district for the specified time may vote."¹³⁰

Only one of these states has a limitation regarding capacity, but is not directed specifically at those who have been adjudged to be mentally incompetent. That state is Vermont, whose constitution states that "[t]o be entitled to the privilege of voting, persons must be of 'quiet and peaceable behavior.'"¹³¹

IV. STATE REASONING FOR DISENFRANCHISING AN ENTIRE GROUP OF PEOPLE

As described above, there is a lot of variety in the approaches that states take regarding if and when a person who has been adjudged as mentally incompetent can vote. One of the reasons that so many states take either the "no voting" approach or the judicially determined ability to vote approach is because of a fear of voting fraud.

There is a fear of "vote harvesting." Vote harvesting is a

¹²¹ See BAZELTON CTR. FOR MENTAL HEALTH LAW, *supra* note 59, at 3 (citing COLO. REV. STAT. § 1-2-103(5) (2016)).

¹²² *Id.* (stating that there is no disqualification statute for this state).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Jennifer Mathis, *Voting Rights of Older Adults with Cognitive Impairments*, 42 CLEARING HOUSE REV. J. POVERTY L. & POL'Y, 292, 294 n.20 (2008) (stating that the secretary of state's office issued a memo contradicting Maine's constitution after a federal court found it was "unlawful" to bar individuals with guardians from voting).

¹²⁷ BAZELTON CTR. FOR MENTAL HEALTH LAW, *supra* note 59, at 10.

¹²⁸ See *id.* at 13 (citing PA. CONST. art. VII, § 1).

¹²⁹ See *id.* at 16 (citing VT. STAT. ANN. tit. 17, § 2121 (West 2016)).

¹³⁰ See *id.* at 13 (citing PA. CONST. art. VII, § 1).

¹³¹ *Id.* (quoting VT. CONST. ch. II, § 42).

term coined to refer to voting in nursing homes and assisted living facilities, where it is believed that there are people who do not have the capacity to vote and caretakers at these facilities are taking advantage of this lack of capacity and voting in their stead.¹³² Entering the terms “nursing home voting fraud” brings up several blogs and online newspapers alleging that various individuals have been “victims,” in the sense that someone has assumed their identity to cast a ballot, of voter fraud.¹³³ Also present are articles questioning the validity of the voter fraud search.¹³⁴ The director of the American Bar Association’s Commission on Law and Aging, Charles Sabatino, stated that “[t]here’s a lot of people out there who either don’t have adequate access to the ballot and should, or could be vulnerable to overreaching political types who want to take advantage of their votes to swing an election.”¹³⁵

It is difficult to determine exactly how many cases of voting fraud occur; however, the U.S. Justice Department conducted an investigation for three years under President George W. Bush.¹³⁶ The Justice Department studied voter fraud in federal elections and “[o]ut of 197,056,035 votes cast in the two federal elections held during that period, the rate of voter

¹³² Kimberly Leonard, *Keeping the ‘Mentally Incompetent’ from Voting*, THE ATLANTIC (Oct. 17, 2012), <http://www.theatlantic.com/health/archive/2012/10/keeping-the-mentally-incompetent-from-voting/263748/>.

¹³³ See e.g., Emily Nohr, *Vulnerable Adults Deserve Better Protection from Voter Fraud, Citizens Tell Nebraska Legislators*, OMAHA WORLD-HERALD (Oct. 14, 2016), http://www.omaha.com/news/legislature/vulnerable-adults-deserve-better-protection-from-voter-fraud-citizens-tell/article_ed77e237-8169-529c-90a0-a37deaeedf29.html (discussing an alleged case of voter fraud lasting 20 years of a woman in a nursing home); *Voter Fraud Uncovered at Nursing Home?*, MACIVER INSTITUTE (May 30, 2012), <http://www.maciverinstitute.com/2012/05/vote-fraud-uncovered-at-nursing-home/> (recounting one grandson’s belief that his grandfather had been a victim of voter fraud; the author could not find an unbiased source that confirms this account).

¹³⁴ See Michael Waldman, *What’s Behind the Voter Fraud Witch Hunt?*, BRENNAN CTR. FOR JUST. (Mar. 30, 2016), <https://www.brennancenter.org/blog/whats-behind-voter-fraud-witch-hunt> (stating “conservative activists focused on one thing that hadn’t occurred: voter fraud, specifically voter impersonation at the polls.”).

¹³⁵ Pam Belluck, *States Face Decisions on Who is Mentally Fit to Vote*, N.Y. TIMES (Jun. 19, 2007), http://www.nytimes.com/2007/06/19/us/19vote.html?_r=0.

¹³⁶ Lorraine C. Minnite, *The Misleading Myth of Voter Fraud in American Elections*, SCHOLARS STRATEGY NETWORK, (Jan. 2014) <http://www.scholarsstrategynetwork.org/brief/misleading-myth-voter-fraud-american-elections>.

fraud was a miniscule 0.00000132 percent.”¹³⁷ To date there has been no showing in any state of any substantial amount of voting fraud regarding those people who have been adjudged as mentally incompetent.¹³⁸ This raises the question, if there is no data indicating that fraudulent voting is a problem, then why are there concerns regarding the exploitation of those declared incompetent?

There are concerns about fraudulent voting based on stereotypes of incompetency, which led to inherently biased laws regulating voting rights of those who are mentally incompetent.¹³⁹ The laws are “‘based on a faulty stereotype’ that ‘people with mental disabilities can’t make decisions, don’t have a preference in a political issue or among political candidates, or can’t express that preference in a way that is reliable.’”¹⁴⁰ There needs to be a shift in how voting laws are regulated by the courts, which would not allow the states to create laws based on stereotypes. This note seeks to suggest an alternative judicial approach to laws that do not allow those who have been adjudicated as mentally incompetent to vote.

V. THE COURTS’ APPROACH

Footnote four in *United States v. Carolene Products*¹⁴¹ establishes that there are different levels of judicial scrutiny that can be used when examining the constitutionality of a particular law.¹⁴² The three levels of judicial scrutiny that will be discussed in this section are: strict scrutiny, intermediate scrutiny, and rational basis. The level of scrutiny that is applied depends on several factors, including who the law effects and which part of the constitution is allegedly being violated.¹⁴³ In determining which standard to apply in reviewing a law challenged on constitutional grounds, the Supreme Court considers whether

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Pan, *supra* note 1.

¹⁴⁰ *Id.*

¹⁴¹ 304 U.S. 144 (1938).

¹⁴² *Id.* at 152.

¹⁴³ *Id.*

the law disproportionately impacts members of certain classes.¹⁴⁴

When reviewing claims based on the Equal Protection Clause of the Fourteenth Amendment, a court determines the level of scrutiny to apply based on whether the affected individual is a member of a suspect class.¹⁴⁵ In *Hirabayashi v. United States*¹⁴⁶ and *Korematsu v. United States*,¹⁴⁷ the Supreme Court established the judicial precedent for suspect classifications. National origin and race are classes that the Supreme Court recognizes as suspect.¹⁴⁸ Alienage was added to the list in the 1970s.¹⁴⁹ Gender and religion, it could be argued, are also deserving of strict scrutiny.¹⁵⁰ When a law targets one of these clearly defined “suspect classes” the court uses a “strict scrutiny” approach to determine whether the law is invalid. “[I]f strict scrutiny is applicable, the government action is unconstitutional unless: (1) it furthers an actual, compelling government interest and (2) the means chosen are necessary (narrowly tailored, the least restrictive alternative) for advancing that interest.”¹⁵¹ In other words, when analyzing a law under strict scrutiny, the court presumes that the challenged policy is invalid unless the government can demonstrate a compelling interest to justify the policy.¹⁵²

The Supreme Court has two other standards of review that it uses: intermediate scrutiny and rational basis. Intermediate scrutiny is a form of scrutiny between rational basis and strict scrutiny, and a court will likely uphold a discriminatory law under intermediate scrutiny if the law has

¹⁴⁴ *Id.*

¹⁴⁵ See Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL’Y 143, 143, 147 (2008).

¹⁴⁶ 323 U.S. 81 (1943).

¹⁴⁷ 320 U.S. 214 (1944).

¹⁴⁸ *Id.* at 216; Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 144 (2011).

¹⁴⁹ *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

¹⁵⁰ See, e.g., Deborah L. Brake, *Sex as a Suspect Class: An Argument for Applying Strict Scrutiny*, 6 SETON HALL CONST. L.J. 953 (1996); Steven G. Calabrisi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 1005-06 (2013) (arguing that footnote four in *Carolene Products* requires strict scrutiny for laws burdening religious rights).

¹⁵¹ Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 453 (1988), citing *Bernal v. Fainter*, 467 U.S. 216, 219 (1984), *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984).

¹⁵² *Id.*

persuasive justification.¹⁵³ Rational basis means that there is a “reasonable basis in the law . . . [and that] the application of the law [is] in a just and reasonable manner.”¹⁵⁴ “Rational basis is the most deferential of the standards of review that courts use in due-process and equal-protection analysis.”¹⁵⁵

The Supreme Court has split, in recent years, in regards to what kind of scrutiny should apply to laws that restrict voting access for people who are not members of a “suspect class.” This is most clearly demonstrated in the 2008 case, *Crawford v Marion County Election Board*.¹⁵⁶ In this case, the Supreme Court considered a challenge to Indiana’s strict voter identification law that required all voters to present a driver’s license, passport, or a state-issued photo identification card at the polls.¹⁵⁷ Voters also had the option to cast a provisional ballot, but in order to have their votes validated they were required to present a valid photo ID at a designated government office.¹⁵⁸ Delivering the judgment of the Court, Justice Stevens, with whom Justices Roberts and Kennedy joined, thought that if the law places a substantial burden on a person’s ability to vote it may justify heightened scrutiny, but they say that it is not appropriate for a facial challenge to the law.¹⁵⁹ Concurring in the judgment, Justices Scalia, Thomas, and Alito, believed that Indiana’s law should be subjected only to rational basis consideration because the state’s interest in preventing voting fraud constituted a legitimate state interest.¹⁶⁰ Scalia further felt that the law was sufficiently neutral such that an imposition of some burden on a small amount of voters was constitutionally permissible.¹⁶¹

Justice Souter, with whom Justice Ginsburg joined, dissented based upon the fact that Indiana could not rely on “abstract interests,” even if legitimate, in burdening the right to

¹⁵³ See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982); see also *Nguyen v. INS*, 533 U.S. 53, 70-71 (2001).

¹⁵⁴ *Rational Basis*, BALLENTINE’S LAW DICTIONARY, (3d ed. 1969).

¹⁵⁵ *Rational-Basis Test*, BLACK’S LAW DICTIONARY, (10th ed. 2014).

¹⁵⁶ 553 U.S. 181 (2008).

¹⁵⁷ *Id.* at 185.

¹⁵⁸ *Id.* at 186.

¹⁵⁹ *Id.* at 199.

¹⁶⁰ 553 U.S. 181, 204 (Scalia, J., concurring).

¹⁶¹ *Id.*

vote.¹⁶² Justice Breyer similarly dissented, asserting that the Indiana Law failed the balancing test because of its disproportionate impact on eligible voters without acceptable identification (including the homeless, the elderly, and those who do not drive).¹⁶³ This case is illustrative of the lack of cohesion on the part of the Supreme Court in regards to voting laws that restrict groups that do not fall into the classification of “suspect class.”

Deference to state laws in many areas of governance is rational and effective, but in the arena of voting laws there are groups who are not being protected because they are not recognized as a suspect class by the Supreme Court. Does that mean that those adjudged as mentally incompetent deserve less protection and to be denied something seen as a fundamental right—the right to vote? No. The Supreme Court disagreed and determined that “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”¹⁶⁴

VI. THE NECESSITY OF REFORM

Currently, many individuals who would like to vote are excluded because of overly broad classifications in statutes and the level of deference applied by courts on review. The population of the United States is aging,¹⁶⁵ which means that the amount of voter disenfranchisement as a result of age-related diseases (such as Alzheimer’s, dementia, Huntington’s, Parkinson’s, and amyotrophic lateral sclerosis).¹⁶⁶

In *Doe v. Rowe*,¹⁶⁷ the court held that Maine’s denial of the

¹⁶² 553 U.S. 181, 209 (Souter, J., dissenting).

¹⁶³ 553 U.S. 181, 237 (Breyer, J., dissenting).

¹⁶⁴ *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

¹⁶⁵ Jennifer M. Ortman, Victoria A. Velkoff, & Howard Hogan, *An Aging Nation: The Older Population in the United States*, U.S. CENSUS BUREAU 2 (May, 2014) <https://www.census.gov/prod/2014pubs/p25-1140.pdf>.

¹⁶⁶ *Degenerative Disorders*, BRAINFACETS.ORG, <http://www.brainfacts.org/diseases-disorders/degenerative-disorders/> (last visited Nov. 10, 2016).

¹⁶⁷ 156 F. Supp. 2d 35 (D. Me. 2001).

right to vote in guardianship proceedings violated both the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.¹⁶⁸ Maine's constitutional provision left the decision as to whether or not a ward could vote in the hands of the probate court judge (which meant that it was applied in a very inconsistent manner).¹⁶⁹ Further, while the person whose competency was in question was warned of the consequences of being found incompetent, the impact that a finding of incompetence would have on their ability to vote was never discussed, which raised significant due process issues.¹⁷⁰ Defendants tried to save the constitutional provision by proposing additional language to the provision, but the court found that proposing language was not the same as altering the constitution so that those who were found to be mentally incompetent were sufficiently protected by the constitution.¹⁷¹ The court reasoned that the Due Process Clause was violated because persons being disenfranchised were "not given advance notice they might lose their right to vote because of the guardianship proceeding, leading to an inadequate opportunity to be heard."¹⁷² The court further found that Maine was violating the Equal Protection Clause because the means that Maine had selected were too broad for ensuring that "those who cast a vote have the mental capacity to make their own decision by being able to understand the nature and effect of the voting act itself."¹⁷³ The court determined that Maine has a compelling state interest in making sure that individuals who vote are capable of understanding their action.¹⁷⁴

The category of those "under guardianship for mental illness" was not held to be a permissible surrogate for "mental incapacity to vote."¹⁷⁵ Many people with traditional psychiatric

¹⁶⁸ *Id.* at 49; see also *The Right to Vote: Interplay of Federal and State Law on Voting Rights*, DISABILITY JUST., <http://disabilityjustice.org/right-to-vote/> (last visited Aug. 30, 2016).

¹⁶⁹ 156 F. Supp. 2d at 43.

¹⁷⁰ *Id.* at 48-49.

¹⁷¹ *Id.* at 49-51.

¹⁷² *The Right to Vote*, *supra* note 168.

¹⁷³ 156 F. Supp. 2d at 51 (quoting Defs. Mot. for Summ. J. at 8).

¹⁷⁴ *The Right to Vote*, *supra* note 168; see also *Doe v. Rowe*, 156 F. Supp. 2d at 51.

¹⁷⁵ 156 F. Supp. 2d at 55-56.

disorders disenfranchised under this provision were capable of understanding the nature and effect of the act of voting; conversely, many people permitted to vote under this standard—those with developmental disabilities or senility—might not understand the nature and effect of voting.¹⁷⁶ The *Rowe* decision has important ramifications in terms of what is permissible statutory language. Language that is overly broad and disqualifying because of mere “mental illness” is sometimes substituted for determining actual incapacity. This case promulgates the idea that incapacity to vote and adjudged mental incompetence are not synonymous and that there are strong due process arguments if cases are not looked at on a case by case basis. Unfortunately, despite the fact that this decision made an important distinction between mental illness and actual incapacity, because this comes from a federal district court, it is not binding on any other court and may only be marginally persuasive.

Another consideration for reform for adult guardianship voting laws, and mentioned briefly above, is that the United States has an aging population.

The number of Americans with Alzheimer's disease and other dementias will grow each year as the size and proportion of the U.S. population age 65 and older continue to increase. By 2025, the number of people age 65 and older with Alzheimer's disease is estimated to reach 7.1 million – a 40 percent increase from the 5.1 million age 65 and older affected in 2015.¹⁷⁷

“Many people with mild dementia are able to understand the issues in an election,” just as many people in the early stages of Alzheimer's are able to understand election issues.¹⁷⁸ There are many people with Alzheimer's and dementia who lack the

¹⁷⁶ *The Right to Vote*, *supra* note 168.

¹⁷⁷ David Dutcher, *2015 Alzheimer's Disease Facts and Figures*, CAIRN PARK (Apr. 15, 2015), <http://cairnpark.com/2015-alzheimers-disease-facts-and-figures/>.

¹⁷⁸ Shankar Vedantam, *As Americans Age, Dementia Poses a Voting-Rights Quandry*, WALL. ST. J. (Sept. 15, 2004), <http://www.wsj.com/articles/SB109518930299917583>.

capacity to vote;¹⁷⁹ however, the fact that some people with a disease lack the capacity should not be determinative of the entire population. Disenfranchising such a large portion of the United States should require a higher degree of scrutiny than rational basis. It should require strict scrutiny.

VI. HOW A FIRST AMENDMENT APPROACH COULD SOLVE THE PROBLEM

If you were to ask a person on the street if voting was a form of speech protected by the First Amendment, you would likely get an answer of “yes” to that question. It follows that, by picking a candidate and voting for them, you are letting your voice be heard in society. There are five constitutional amendments that are said to protect voting: Fifteenth Amendment,¹⁸⁰ Nineteenth Amendment,¹⁸¹ Twenty-Third Amendment,¹⁸² Twenty-Fourth Amendment,¹⁸³ and Twenty-Sixth Amendment.¹⁸⁴ Each of these amendments targets voting discrimination; however, the strongest argument for protecting voting is through the freedom of speech and the First Amendment.

In the United States, political speech is held to be sacred and is one of the most highly valued forms of speech. There is a line of cases that illustrate how much we value being able to “vote” for candidates in the form of campaign contributions. In *Buckley v. Valeo*¹⁸⁵ the majority of justices in a *per curiam* opinion held that the limits that were placed on election spending by candidates by the Federal Election Campaign Act of 1971 were unconstitutional, but the court upheld limits on campaign contributions.¹⁸⁶ Then in *First Nat'l Bank v. Bellotti*¹⁸⁷ the Supreme Court struck down a Massachusetts law that prevented

¹⁷⁹ *Id.*

¹⁸⁰ U.S. CONST. amend. XV.

¹⁸¹ U.S. CONST. amend. XIX.

¹⁸² U.S. CONST. amend. XXIII.

¹⁸³ U.S. CONST. amend. XXIV.

¹⁸⁴ U.S. CONST. amend. XXVI.

¹⁸⁵ 424 U.S. 1 (1976) (*per curiam*).

¹⁸⁶ *Id.* at 1.

¹⁸⁷ 435 U.S. 765 (1978).

corporations from contributing to a referendum regarding tax policy because the Court found that corporations have a First Amendment right to contribute.¹⁸⁸ However, there were also cases that went against this line of reasoning.

In *McConnell v. Federal Election Commission*,¹⁸⁹ “limits on electioneering communications were upheld.”¹⁹⁰ “The holding of *McConnell* rested to a large extent on an earlier case, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 . . . [which] held that political speech may be banned based on the speaker’s corporate identity.”¹⁹¹ Both of these cases are mentioned and dismissed summarily by the Supreme Court in the landmark case preserving First Amendment protections for corporate contributions in the political arena—*Citizens United v. Federal Election Commission*. Further, in *Citizens United*, the Supreme Court notes that *Austin* has long been considered “a significant departure from ancient First Amendment principles.”¹⁹² *Citizens United* is a case about a non-profit corporation, which took money from non-profit corporations and from corporations for profit, who wanted to disseminate a video about Hillary Clinton and show advertisements for the video leading up to the 2008 election.¹⁹³ These actions were considered in violation of a law that prohibited corporations from electioneering communications in close proximity to an election.¹⁹⁴ The Supreme Court approached the issue of whether or not this form of “speech” is protected by delineating the following:

Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker. It must be noted, moreover, that this undertaking would require substantial litigation over an extended time, all to

¹⁸⁸ *Id.* at 765.

¹⁸⁹ 540 U.S. 93 (2003).

¹⁹⁰ *Citizens United v. FEC*, 558 U.S. 310, 319 (2010).

¹⁹¹ *Id.*

¹⁹² *Id.* (quoting *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 490 (2007)).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

interpret a law that beyond doubt discloses serious First Amendment flaws. The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable. First Amendment standards, however, “must give the benefit of any doubt to protecting rather than stifling speech.”¹⁹⁵

This illustrates the high premium that the Supreme Court has placed on activities that are considered free speech and their hesitation to draw questionable distinctions that poses the risk of “stifling speech” and granting the “benefit of any doubt” to protecting that speech.¹⁹⁶ The Supreme Court goes on to say that “[l]aws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”¹⁹⁷ Hence, arguably, free speech affords the most protection by the Supreme Court.

By approaching state laws that limit voting rights for certain classes of people described above, free speech would not only afford the most protection to individuals found to be incompetent through “strict scrutiny,” but also it would be the best argument as “mentally incompetent” is not a suspect class. This is how the Supreme Court has protected a form of “speech,” especially political speech, outside of suspect classifications. In *Citizens United*, the Supreme Court struck down a law limiting political donation by corporations finding that campaign contributions are protected as speech under the First Amendment.¹⁹⁸ A restriction on the amount of money that can be spent on “political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and

¹⁹⁵ *Id.* at 326-27 (quoting *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469 (2007)).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 340 (quoting *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

¹⁹⁸ *Id.* at 339 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (*per curiam*)).

the size of the audience reached.”¹⁹⁹ The Court also stated that “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”²⁰⁰ This illustrates how highly freedom in political speech is regarded by the Supreme Court.

A parallel argument for voting rights for those adjudged mentally incompetent can be made here. In *Citizens United*, the Court illustrated the deprivations that would occur if donations from corporations were to be limited.²⁰¹ Here, the deprivation challenges the ideological constructs of our society—if you must abide by the law, then you should be able to determine who represents you. Voting is the mechanism for effecting change. The deprivation here is not the dissemination of information, like in *Citizens United*, but rather, it is the deprivation of the individual to “speak” through voting. Voting is a communication by an individual with the government. The Court in *Citizens United* held that campaign donations are free speech because the Court objects to a candidate’s inability to communicate with the electorate.²⁰² The Court should protect voters from being disenfranchised with the same scrutiny that is applied to campaign financing. The scope is different in these cases; one is about nationwide dissemination of information and the other is an individual communicating with the government.

A public policy argument stemming from *Citizens United* can be made. Our society benefits from information about candidates being disseminated because of high campaign contributions. This notion is secondary to the concept that corporations “speech” should not be limited in the form of campaign contributions, but it is nonetheless an important point. In *Citizens United*, the Supreme Court protected free political speech on the grounds that free speech should be given every protection and that there is value in information being distributed about candidates even if it is from a skewed perspective because of the belief that our election system will be balanced by the

¹⁹⁹ *Buckley*, 424 U.S. at 19 (footnote omitted).

²⁰⁰ *Citizens United*, 558 U.S. at 339.

²⁰¹ *Id.* at 354-55.

²⁰² *See id.* at 355-56.

response from the other side.²⁰³ The Supreme Court asserts that there is value in political discourse and free political speech because it is better that the American public be given as much information as possible and make a decision based on all the information that is brought to bear during an election cycle.

Similarly, there is a public policy argument that our society believes there is a benefit in all members participating in the electoral process, which is evidenced by the five amendments to the United States Constitution that extended the right to vote to people other than property-owning, educated white males. In *Citizens United*, the Supreme Court stated that “[b]y taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice.”²⁰⁴ Here, *Citizens United* made the case that every person or class has the right to utilize speech to further their interest and the interests of those similarly situated in this country through free speech. Of course, in *Citizens United*, the Court was reviewing actions already considered “speech” under the First Amendment; however, as described above a vote is in essence speech as it is a citizen’s communication with their government regarding who they think would be best suited to run the country. If this concept from *Citizens United* is applied to the concept of voting as an act of free speech, then laws that deprive those who have been declared mentally incompetent of the right to vote are a governmental deprivation that is clearly in violation of the First Amendment. The Court in *Citizens United* acknowledged that they had “upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions.”²⁰⁵ The speech restrictions that the Court has upheld arguably do not apply to classes of voters because by voting no one is impeding the ability of governmental entities to perform their functions.

There is one case where the Supreme Court has

²⁰³ *See id.* at 320.

²⁰⁴ *Id.* at 340-41.

²⁰⁵ *Id.* at 341.

considered the possibility of voting as free speech. The Supreme Court has held that legislators' votes do not fall under the First Amendment free speech protections, but rather the votes belong "to the people."²⁰⁶ This case is *Nevada Ethics Commission v. Carrigan*, which is about elected officials voting when they have a conflict of interest and their voting history being public.²⁰⁷ This case is distinct from using the First Amendment to protect the voting rights of those who are adjudged to be mentally incompetent because the affected class is different—legislators acting in their official capacity versus individuals acting on their own behalf.

The Supreme Court has repeatedly upheld that political speech is sacrosanct and that it is deserving of every protection and all benefit of the doubt. By redefining "free speech" to include voting, the Supreme Court could protect the citizenry from having a fundamental right stripped away in a blanket manner without regard for individual capability. There is an argument that to approach voting with a broader conception, such as free speech, would create an inefficient and backlogged system arising from the necessity of a broader ruling because free speech is afforded more protection. The Supreme Court also presented the concern that "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."²⁰⁸ However, as the Supreme Court stated in *Citizens United*, "a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling."²⁰⁹ This would indicate that the Supreme Court would agree, if voting is approached through the lens of speech, that to shy away from making a broader ruling that protects the "free speech" rights of those who have been declared incompetent would be negligent.

²⁰⁶ Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117 (2011).

²⁰⁷ *Id.* at 120.

²⁰⁸ Burdick v. Takushi, 504 U.S. 428, 433 (1992).

²⁰⁹ *Citizens United*, 558 U.S. at 329.

CONCLUSION

Laws that prohibited certain races from voting, poll taxes that kept the poor from voting, literacy tests that kept the poor from voting, laws that prohibited women from voting, and laws that required that you own land to vote—all of these were struck down by the Supreme Court as unconstitutional. State voting laws that restrict voting rights of people who have been adjudicated as mentally incompetent, are another means of discrimination in regards to voting.

Identification requirements are one example of this discrimination, but a much more potent example is that as this country's population ages and our understanding of mental illness is greater than ever before more and more people will be disenfranchised as they are adjudged mentally incompetent. The Supreme Court has ardently protected political speech and going so far as to say that it can "find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion."²¹⁰ A First Amendment, political speech centered approach would more accurately reflect societal views of voting as free speech, while affording better protection to those who are adjudged mentally incompetent. By acknowledging that voting is an exercise of political speech the courts would better protect an act that is the cornerstone of society in any democracy: the act of casting a ballot.

To make it hard, to make it difficult almost impossible for people to cast a vote is not in keeping with the democratic process. Someone once said, "Man is not made for the law; law is made for man." Customs, traditions, laws should be flexible, within good reason, if that is what it takes to make our democracy work. We should be creative, and we should accommodate the needs of every community to open up the democratic process. We should make it easy and accessible for

²¹⁰ *Id.* at 341.

every citizen to participate.²¹¹

²¹¹ Andrew Cohen, *Rep. John Lewis: 'Make Some Noise' on New Voting Restrictions*, THE ATLANTIC (Aug. 26, 2012), <http://www.theatlantic.com/politics/archive/2012/08/rep-john-lewis-make-some-noise-on-new-voting-restrictions/261549/>.