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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

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ARTICLES

NOTES

THE 50-YARD LINE OF TEACHERS' RIGHTS: EXAMINING SCHOOL DISTRICT POLICY PERTAINING TO EMPLOYEE SPEECH AND RELIGIOUS EXPRESSION FOLLOWING THE *KENNEDY* DECISION

Spencer C. Weiler,[*] Heidi Erickson,[**] Anna Lea Atkinson,[***] Chie Fujii, [***] Katie Oliver, [***] Nathan Schmutz,[****] and Joseph Hanks[*****]

INTRODUCTION

Public schools in the United States face a tension between two foundational tenets in the Constitution: The Free Exercise Clause, which protects individuals' right to freely express their religious views, and the Establishment Clause, which prohibits government from establishing any state religion.[1] Public schools must tolerate individual religious expression while remaining neutral on the matter of religion. The challenges associated with balancing these two competing demands have resulted in legal disputes that have culminated in rulings from the Supreme Court that collectively provide greater clarity related to the place of religious expression at school for students and school district employees.

Though the Court is poised to provide practitioners with greater clarity related to the interplay between the Free Exercise and Establishment Clauses, in *Minersville School District v. Gobitis,* Justice Frankfurter, writing for the majority, noted that "the court-room is not the arena for debating issues of educational policy."[2] Despite the Court's reluctance to debate "issues of educational policy," it is often forced to do so as divisive legal issues arise within the hallways and classrooms of America's public schools. The end result is that the Supreme Court's

[*] Professor of Educational Leadership & Foundations at Brigham Young University.
[**] Assistant Professor of Educational Leadership & Foundations at Brigham Young University.
[***] Undergraduate student at Brigham Young University in early childhood/elementary education.
[***] Undergraduate student at Brigham Young University in early childhood/elementary education.
[***] Undergraduate student at Brigham Young University in early childhood/elementary education.
[****] School law attorney licensed in Washington State and shareholder with Vandeberg, Johnson, Gandara, PS.
[*****] Director of Research and Evaluation for the APWP Division of the University of Arkansas for Medical Sciences.
[1] U.S. Const. amend. I; *See also* Justin Driver, *Three Hail Marys: Carson, Kennedy, and the Fractured Détente Over Religion and Education*, 136 HARV. L. REV. 208, 212 (2022).
[2] Minersville School District v. Gobitis, 310 U.S. 586, 598 (1940).

accumulated holdings pertaining to public education constitute a profound federal influence over the schooling process. According to Constitution scholar Justin Driver, no other branch of government "comes close to matching the cultural import of the Supreme Court's jurisprudence governing public schools."[3]

In 2022, the Supreme Court handed down a decision in *Kennedy v. Bremerton*[4] that deviated from over 70 years of jurisprudence related to the First Amendment's Establishment Clause.[5] Specifically, the Court, asserting the right of Coach Kennedy to pray at the 50 yard-line at the end of football games, ruled that "the First Amendment's Free Speech and Free Exercise Clauses as incorporated by the Due Process Clause of the Fourteenth Amendment protect public employees from government 'reprisal.'"[6] The Court's *Kennedy* decision was dubbed "stunning"[7] by legal scholars who supported Coach Kennedy's right to pray at the 50-yard line following football games and was seen as the Court's "propensity to discount the Establishment Clause concerns and elevate rights under the Free Exercise Clause of the First Amendment []" by those who questioned the holding.[8]

Ultimately, for school district officials, the *Kennedy* decision appears "to raise more questions than it answered."[9] In 2024, two years after this controversial holding, we sought to document *Kennedy*'s influence on public education. Specifically, we examined policy pertaining to employee speech and religious expression in randomly selected school districts in all 50 U.S. states to answer the following research questions:

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[3] JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND, 9 (Pantheon Books, 2018).
[4] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).
[5] Brady Stimpson et. al., *From Released Time Religious Instruction to a Coach Praying at the 50-yard Line: Using* McCollum *to Explain the Radical Nature of* Kennedy, 24 Rutgers J. L. & Religion 187, 188–89 (2025).
[6] Isabella Henry, Kennedy v. Bremerton School District: *Throwing a Red Flag for the Public-Employee Speech Arena to Challenge the Court's Hail Mary*, 82 MD. L. REV. 1067, 1067 (2023).
[7] Charles J. Russo & William E. Thro, *Respect for Religious Expression is Indispensable in a Free and Diverse Republic: The Supreme Court Upholds Prayer by Public School Employees*, 400 ED. LAW REP. 885, 886 (2022).
[8] Martha M. McCarthy, Kennedy v. Bremerton School District*: Farewell to the Establishment Clause*, 402 ED. LAW REP. 557, 557 (2022).
[9] John Dayton, *One Year After* Kennedy v. Bremerton*: An Analysis of the Impact of the Court's Decision on Church-State Law in Public Schools*, 416 ED. LAW REP. 729, 729 (2024).

1. Have policies pertaining to employee speech or religious expression been revised by school boards following the *Kennedy* decision?
2. Are larger school districts, in terms of student population, more likely to revise policy following the *Kennedy* decision?
3. Does the geographic location of school districts contribute to school boards revising school district policy following the *Kennedy* decision?

This empirical legal analysis is divided into five main sections. Part I serves as the introduction. Part II reviews the first 70 years of jurisprudence concerning public education and the Establishment Clause and examines *Kennedy*'s distinctive position in relation to that precedent. Part III explains the methodological approaches used to collect and analyze the data necessary to address the three research questions. Part IV presents the findings. Part V discusses the implications of those findings.

I. REVIEW OF 70 YEARS OF JURISPRUDENCE ON THE ESTABLISHMENT CLAUSE

Although included in the Bill of Rights and added to the United States Constitution in 1791, it was not until 1947 that the United States Supreme Court ("Court") heard a public school-related case pertaining to First Amendment religion clauses.[10] The Court considered a New Jersey statute which authorized local school boards to "make rules and contracts for the transportation of children to and from schools," along with a school board's exercise of that authority to generally reimburse all families within its boundaries who transported their children to school using the public transportation system.[11] Some of this money reimbursed families who transported their children to Catholic parochial schools.[12]

In its analysis of the law, the Court examined the history related to the First Amendment's religious protections and prohibitions, and found in summary that:

> [t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church.

[10] U.S. Const. amend. I.
[11] Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 3 (1947).
[12] *Id.*

> Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'[13]

Pursuant to that standard, the Court recognized that the state could not, "consistently with the 'establishment of religion' clause of the First Amendment, contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."[14] However, at the same time, the Court balanced citizens' "free exercise of their own religion."[15] "Consequently, [the state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[16] The Court held that parents' choice in how to use the generally-offered tax-raised funds, whether or not to use them to transport their kids to parochial schools, was not a First Amendment violation on the part of the State.

Since the *Everson* decision in 1947, the Court has taken the opportunity many times to develop the law surrounding the Establishment Clause, with many significant decisions coming from the public and private school context. Unfortunately, for

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[13] *Id.* at 15–16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1879)).
[14] *Id.* at 16.
[15] *Id.*
[16] *Id.* (emphasis added).

many, by the turn of the millennium, the wall of separation was not always clearly delineated, with meandering lines and varying heights. In 1998, articulating the confusion surrounding Establishment Clause jurisprudence, the Fifth Circuit Court of Appeals opened its opinion in *Helms v. Picard* by stating, "[t]his case requires us to find our way in the vast, perplexing desert of Establishment Clause jurisprudence."[17] This jurisprudential journey is described below.

A. Leading to Lemon

In 1962, again assessing the "wall of separation" and Establishment Clause of the First Amendment, the Court considered the New York State Board of Regents-established prayer, which was intended "to be said aloud by each class in the presence of a teacher at the beginning of each school day," and which stated "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[18] The Court again looked to the history of the passing of the First Amendment and noted that "[i]t is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America."[19] The Court held that this "program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer" violated the First Amendment, finding the First Amendment's "prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[20]

The next year, the Court heard a similar matter involving a Pennsylvania statute requiring "[a]t least ten verses from the Holy Bible [to] be read, without comment, at the opening of each public school on each school day,"[21] along with the school district's recitation of the Lord's Prayer in conjunction with the Bible-reading.[22] At the same time, the Court examined a similar

[17] Helms v. Picard, 151 F.3d 347, 350 (5th Cir. 1998).
[18] Engel v. Vitale, 370 U.S. 421, 422 (1962).
[19] *Id.* at 425.
[20] *Id.* at 424–25.
[21] Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 205 (1963).
[22] *Id.* at 205–06.

Maryland rule.[23] Both allowed for students to be exempted based on parent request.[24] The Court again referenced the history supporting the First Amendment, and found that

> [t]he wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees.[25]

Based on its previous decisions regarding the Establishment Clause, the *Abington* Court summarized its findings into a test articulated "as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."[26] The Court clarified that "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[27]

In 1970, although not related to public schools, the Court decided a case that directly impacted Establishment Clause precedent. In *Walz v. Tax Commission of City of New York*, an injunction was sought to enjoin the New York City Tax Commission from its practice of providing tax exemptions to religious organizations for their religious properties.[28] The Court incorporated the prior discussion and review of First

[23] *Id.* at 211.
[24] *Id.* at 205, 212.
[25] *Id.* at 222.
[26] *Id.*
[27] *Id.*
[28] Walz v. Tax Commission of City of N.Y., 397 U.S. 664, 666 (1970).

Amendment history from previous cases in its ruling that tax exemptions for religious organizations do not violate the Establishment Clause, briefly noting "that for the men who wrote the Religion Clauses of the First Amendment, the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[29]

In reference to governmental neutrality towards religion, the Court found neutrality "cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited."[30] While prohibiting "governmentally established religion or governmental interference with religion," the Court recognized "room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[31]

With that understanding and balance, the Court established an additional test to avoid "an excessive government entanglement with religion."[32] The Court added that "[t]he test is inescapably one of degree," requiring analysis and judgment on the part of the lower courts.[33] Further, "The *Walz* test asks 'whether the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.'"[34]

The next year, in *Lemon v. Kurtzman,* when considering a Pennsylvania statute designed to contract for secular services from non-public schoolteachers and a Rhode Island statute providing salary supplements to non-public school teachers, the Court merged the *Abington* test with the *Walz* test to create the tripartite "*Lemon* test."[35] The *Lemon* test consists of three prongs: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[36] The

[29] *Id.* at 668.
[30] *Id*. at 669.
[31] *Id.*
[32] *Id.* at 674.
[33] *Id.*
[34] *Id.* at 675.
[35] Lemon v. Kurtzman, 403 U.S. 602, 611–12 (1971).
[36] *Id.* at 612 (citations omitted).

Court provided that, to determine whether there is excessive entanglement between church and state, courts must "examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship."[37]

While it did find a secular purpose in both statutes, the Court nonetheless determined that "the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."[38] Considering the religious nature of the schools and the integral part played in the mission of the Catholic Church, with Catholic schools largely the sole beneficiaries of the statutes in question, the oversight necessary to implement the statutes amounted to excessive entanglement between the State and religion.[39]

The Court distinguished *Lemon* with the argument presented in *Walz,* which claimed that a tax exemption would inevitably lead to the establishment of state churches. The Supreme Court rejected this claim, noting that it could not override over 200 years of consistent practice rooted in "colonial experience and continuing into the present."[40] It further observed that, unlike tax exemptions, there was no long-standing history of providing state aid to religious schools. The Court characterized the state programs at issue as "something of an innovation,"[41] and speculated that they could gradually result in an impermissible entanglement between church and state.[42]

B. Applying (or Not Applying) Lemon

Jumping forward to 1983, more than a decade after the *Lemon* test was established, the Eighth Circuit Court of Appeals held that Nebraska's chaplaincy practice violated each of the three prongs of the test, because the purpose and effect of the practice were to promote religion and employing a chaplain led to excessive entanglement.[43] Upon granting certiorari, however, the Court reversed the Court of Appeals' decision based on the longstanding history and tradition of opening legislative sessions

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[37] *Id.* at 615.
[38] *Id.* at 614.
[39] *Id.*
[40] *Id.* at 624.
[41] *Id.*
[42] *Id.* at 624–25.
[43] *See* Marsh v. Chambers, 463 U.S. 783, 786 (1983).

with prayer.[44] Based on a practice dating back over a century, the Court reasoned that "legislative prayer presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations."[45]

In 1984, the Court acknowledged the difficulty of creating a bright-line rule regarding the Establishment Clause.[46] The Court described the wall of separation as a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[47]

Within that context, the Court stated that "we have often found it useful to inquire whether the challenged law or conduct" passes the *Lemon* test.[48] However, "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."[49] The Court noted that,

> [i]n two cases, the Court did not even apply the *Lemon* "test." We did not, for example, consider that analysis relevant in *Marsh v. Chambers* []. Nor did we find *Lemon* useful in *Larson v. Valente* [], where there was substantial evidence of overt discrimination against a particular church.[50]

With that said, the Court did proceed to examine whether there was a secular purpose under the first prong of the test, and found under the second prong that any benefit to religion was "indirect, remote and incidental."[51] When examining whether there was excessive entanglement, the Court looked to both Congressional history and the "calm history" evident in the "40-year history of Pawtucket's Christmas celebration."[52] In addition to there being no evidence of divisiveness prior to the litigation, the Court referenced the "literally hundreds of religious paintings

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[44] *Id.* at 783.
[45] *Id.* at 791 (citing Everson v. Bd. of Educ., 330 U.S. 1, 3 (1947); Tilton v. Richardson, 403 U.S. 672 (1971); Walz v. Tax Commission of City of N.Y., 397 U.S. 664, 678).
[46] *See* Lynch v. Donnelly, 465 U.S. 668, 678–79 (1984) (considering the inclusion of a creche as part of a city's annual Christmas display and stating that "[t]he line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test").
[47] *Id.* at 679 (quoting *Lemon*, 403 U.S. at 614).
[48] *Id.*
[49] *Id.*
[50] *Id.* (citing *Marsh*, 463 U.S. at 783; Larson v. Valente, 456 U.S. 228 (1982)).
[51] *Id.* at 681–83.
[52] *Id.* at 684.

in governmentally supported museums" and "the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass'" to find that the inclusion of the creche did not constitute excessive entanglement.[53]

The next year, in 1985, the Court considered a complaint regarding Alabama statutes providing for a "period of silence in [all public schools] 'for meditation or voluntary prayer.'"[54] The Court affirmed the Court of Appeals' reversal of a District Court's conclusion that the Establishment Clause "does not prohibit the state from establishing a religion," which District Court decision was based on its own historical analysis of the First Amendment.[55] The Court upheld the Court of Appeals, which found "[t]he *stare decisis* doctrine and its exceptions do not apply where a lower court is compelled to apply the precedent of a higher court . . . no matter how misguided the judges of those courts may think it to be."[56] Again invoking *Lemon*, the Court explained that "[w]hen the Court has been called upon to construe the breadth of the Establishment Clause, it has examined the criteria developed over a period of many years."[57] Thus, "no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose."[58] Accordingly, because the statute undisputedly had a religiously motivated purpose, the Court found the statute violated the First Amendment.[59]

In dissent, Justice Rehnquist expressed criticism of *Lemon* and proposed "that we abandon *Lemon* entirely, and in the process limit the reach of the Establishment Clause to state discrimination between sects and government designation of a particular church as a 'state' or 'national' one."[60]

In response to Justice Rehnquist's dissent, Justice O'Connor stated that, "[p]erhaps because I am new to the struggle, I am not ready to abandon all aspects of the *Lemon* test. I do believe, however, that the standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment."[61]

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[53] *Id.* at 683.
[54] Wallace v. Jaffree, 472 U.S. 38, 40 (1985).
[55] *Id.* at 45.
[56] *Id.* at 47 n.26.
[57] *Id.* at 55.
[58] *Id.* at 56.
[59] *Id.* at 61.
[60] *Id.* at 68 (O'Connor, J., concurring).
[61] *Id.* at 68–69.

Justice O'Connor referred to the United States' amicus brief, which "suggest[ed] a less sweeping modification of Establishment Clause principles . . . suggest[ing] that the *Lemon*-mandated inquiry into purpose and effect should be modified,"[62] where allowing for a moment of silence as a religious accommodation for "the desire of some public school children to practice their religion by praying silently" would address free exercise values.[63]

Addressing Justice Rehnquist's reference to history and the purpose of the First Amendment, Justice O'Connor noted that Justice Rehnquist

> does not assert, however, that the drafters of the First Amendment expressed a preference for prayer in public schools, or that the practice of prayer in public schools enjoyed uninterrupted government endorsement from the time of enactment of the Bill of Rights to the present era. The simple truth is that free public education was virtually nonexistent in the late 18th century.[64]
>
> When the intent of the Framers is unclear, I believe we must employ both history and reason in our analysis. The primary issue raised by Justice Rehnquist's dissent is whether the historical fact that our Presidents have long called for public prayers of Thanks should be dispositive on the constitutionality of prayer in public schools. I think not. At the very least, Presidential Proclamations are distinguishable from school prayer in that they are received in a noncoercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination. This Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government

[62] *Id.* at 79.
[63] *Id.*
[64] *Id.* at 80 (citation omitted).

> endorsement is much more likely to result in coerced religious beliefs.[65]

1. Anti-Coercion In Lieu of *Lemon*

Again, considering prayer in public schools, the Court in *Lee v. Weisman (Lee)* held that school-sponsored graduation prayer was unconstitutional.[66] However, this time it did so by openly avoiding its analysis of the issues under *Lemon v. Kurtzman*, despite affirming the District Court and Court of Appeals decisions, which were both determined based on the three-part *Lemon* test.[67] Justice Kennedy, writing for the *Lee* Court, found that "[w]e can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured," i.e., the "*Lemon* test."[68] The Court cited as "central principles" that, "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a state religion or religious faith, or tends to do so.'"[69] Based on the pervasive role played by the school principal in selecting who would pray and in directing the contents of the prayer, as well as the psychological coercion of students who were not genuinely free to be excused from participation, the Court found the graduation prayers unconstitutional.

In concurrence, Justice Blackmun, joined by Justice Stevens and Justice O'Connor, expressed concern with the Majority's decision to ignore *Lemon*, making note of only one of the thirty-one decisions since *Lemon* in which the Court did not base "its decision on the basic principles […] in *Lemon*."[70]

In dissent, Justice Scalia, joined by Chief Justice White and Justice Thomas, also noted the departure from use of the *Lemon* precedent, stating that "[o]ur Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test, which has received well-earned criticism from many Members of this

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[65] *Id.* at 80–81 (Frankfurter, J., concurring).
[66] 505 U.S. 577 (1992).
[67] *See id.* at 585–587.
[68] *Id.* at 587.
[69] *Id.* (quoting *Lynch*, 465 U.S. at 669 (1984)).
[70] *Lee,* 505 U.S. at 603 n.4.

Court."[71] Justice Scalia observed that "[t]he Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it."[72]

The next year, in 1993, the Court again invoked *Lemon* in finding that denying the use of school facilities after hours by a religious organization violated the Freedom of Speech Clause.[73] Where the film would have been shown after hours, was not a school sponsored event, was generally open to the public, and "District property had repeatedly been used by a wide variety of private organizations,"[74] the Court determined that there "would not have been an establishment of religion under the three-part test articulated in *Lemon v. Kurtzman*."[75]

In concurrence, Justice Scalia, joined by Justice Thomas criticized the Court's renewed use of the *Lemon* test, stating:

> like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman*, conspicuously avoided using the supposed "test," but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so . . . The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will.[76]

2. Modifying *Lemon*

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[71] *Id.* at 644 (Scalia, J., dissenting) (citation omitted).
[72] *Id.*
[73] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).
[74] *Id.* at 395.
[75] *Id.*
[76] *Id.* at 398–399 (Scalia, J., concurring) (citations omitted).

In 1997, when reviewing a former injunction ordered in *Aguilar v. Felton,* which found a program that sent public school teachers into parochial schools to provide remedial support to students under Title I of the Elementary and Secondary Education Act of 1965, the Supreme Court reversed the lower court's ruling.[77] However, the Court in *Agostini v. Felton*, held that the Establishment Clause jurisprudence relied upon in *Aguilar* was no longer good law.[78] Particularly, the Court noted that assumptions relied upon by *Aguilar* in finding that a Shared Time program with a secular purpose had the effect of advancing religion were later undermined by subsequent decisions.[79]

Regarding the entanglement prong of the *Lemon* test, the Court reasoned the following:

> Whether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis. We have considered entanglement both in the course of assessing whether an aid program has an impermissible effect of advancing religion, and as a factor separate and apart from "effect." Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect.". . . Indeed, in *Lemon* itself, the entanglement that the Court found "independently" to necessitate the program's invalidation also was found to have the effect of inhibiting religion.[80]

With that, the Court found that "it is simplest to recognize why entanglement is significant and treat it—as we did in *Walz*—as an aspect of the inquiry into a statute's effect."[81] The Court also acknowledged that its precedent had "pared somewhat the factors that could justify a finding of excessive entanglement."[82]

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[77] Aguilar v. Felton, 473 U.S. 402 (1985).
[78] Agostini v. Felton, 521 U.S. 203, 209 (1997).
[79] *Id.* at 204.
[80] *Id.* at 232–233 (citations omitted).
[81] *Id.* at 233.
[82] Mitchell v. Helms, 530 U.S. 793, 794 (2000) (citing *Agostini*, 521 U.S. at 233–234) (noting that "[i]n modifying the *Lemon* test. . . *Agostini* examined only the first and second of those factors").

C. Applying Lee *and* Lemon *Together*

In 2000, the Court considered whether a District policy allowing for students to vote on whether prayer should be allowed and by whom the prayer should be delivered in pre-game ceremonies before varsity home football games, and on whom should deliver the prayers, violated the Establishment Clause.[83] This policy was a revised version of a similar policy under which a Santa Fe High School student was elected as student council chaplain and prayed before home varsity football games.[84] Being guided by the principles endorsed in *Lee*,[85] the Court rejected the District's arguments that this new policy was not government coercion because either (1) it was private student speech, or (2) it was insulated by a majoritarian election process.[86] Finding that the "policy involves both perceived and actual endorsement of religion . . . as we found in *Lee*, the 'degree of school involvement' makes it clear that the pregame prayers bear the 'imprint of the State and thus put school-age children who objected in an untenable position.'"[87] Furthermore, "[t]he text and history of this policy, moreover, reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school."[88]

Further, addressing the District's argument that the facial challenge to its revised policy, which had not yet been implemented, the Court stated that when addressing facial challenges, "we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman*, which guides 'the general nature of our inquiry in this area.'"[89] The Court reasoned that, where "[u]nder the *Lemon* standard, a court must invalidate a statute if it lacks 'a secular legislative purpose,'" then it was "proper, as part of this facial challenge, for us to examine the purpose of the October policy."[90]

Ultimately, although in "a different type of school function, [the Court's] analysis is properly guided by the principles that we endorsed in *Lee*," finding "that, at a minimum, the Constitution

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[83] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).
[84] *Id.* at 294.
[85] *Id.* at 302.
[86] *See id.* at 302–06.
[87] *Id.* at 305 (citing *Lee*, 505 U.S. at 590).
[88] *Id.* at 308.
[89] *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (quoting Mueller v. Allen, 463 U.S. 388, 394 (1983)).
[90] *Id.* (quoting *Lemon*, 403 U.S. at 612).

guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so."[91] The Court held that many students, such as band members, athletes, and cheerleaders, were required to attend and participate, and that others experienced substantial pressure to also participate, and therefore found the policy and prayer to have a coercive effect.[92]

In dissent, Chief Justice Rehnquist was joined by Justice Scalia and Justice Thomas in criticizing the use of the *Lemon* standard to facially invalidate the District's policy.[93] Noting the Court's unwillingness in the past to be bound by "any single test or criterion in this sensitive area,"[94] the Dissent called attention to the fact that in "*Lee v. Weisman*, an opinion upon which the Court relies heavily today, we mentioned, but did not feel compelled to apply, the *Lemon* test."[95] However, in argument about whether or not to invalidate on its face, the Dissent argued that "the policy itself has plausible secular purposes."[96]

D. The Court's Refusal to Apply Lemon *in Non-School Related Establishment Cases*

Outside of the school context, the Court in 2014 considered whether a town's practice of opening town board meetings with prayer offered by various members of religious sects within the town boundaries violated the Establishment Clause.[97] The Court likened this situation to its decision in *Marsh v. Chambers*,[98] where it found that based on history and tradition, "legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause."[99] The Court again found longstanding tradition allowed for legislative prayer, including many "local legislative bodies."[100]

The Court addressed Justice Brennan's *Marsh* dissent, in which he described this appeal to history and tradition as "'carving out an exception' to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without

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[91] *Id.* at 301–02 (quoting *Lee*, 505 U.S. at 587).
[92] *See id.* at 311–12.
[93] *Id.* at 319 (Rehnquist, J., dissenting).
[94] *Id.* (quoting *Lynch*, 465 U.S. at 679).
[95] *Id.* at 320.
[96] *Id.* at 322.
[97] Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 570 (2014).
[98] 463 U.S. 783, 792 (1983).
[99] *Town of Greece*, 572 U.S. at 575.
[100] *See id.* at 576.

subjecting the practice to 'any of the "formal tests" that have traditionally structured' this inquiry," referring to the *Lemon* test.[101] The Court explained that the *Marsh* Court "found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause."[102] Further, "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'"[103] Evaluated through the lens of the history and tradition of legislative prayer, the Court ultimately held that the prayers as practiced by the town were not in violation of the Establishment Clause.[104]

In a 2019 plurality opinion written by Justice Alito, the Court found that, based on its examination of the history and tradition of using crosses for marking graves of soldiers, particularly since World War I, the Bladensburg Peace Cross memorial did not violate the Establishment Clause.[105] Applying the *Lemon* test, the District Court found for the Commission and American Legion on summary judgment, while the Court of Appeals reversed. With regard to the use of the *Lemon* test by the lower courts, the Court noted that

> After grappling with [Establishment Clause] cases for more than 20 years, *Lemon* ambitiously attempted to distill from the Court's existing case law a test that would bring order and predictability to Establishment Clause decisionmaking. . . .
> [I]f the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it . . .
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> This pattern is a testament to the *Lemon* test's shortcomings. As Establishment Clause cases

[101] *Id.* at 575 (quoting *Marsh*, 463 U.S. at 797 (Brennan, J., dissenting)).
[102] *Id.*
[103] *Id.* at 576 (quoting *Cnty. of Allegheny v. ACLU Greater Pitt. Chapter*, 492 U.S. 573, 670 (Kennedy, J., concurring in part and dissenting in part)).
[104] *Id.* at 591–592.
[105] Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 30 (2019).

> involving a great array of laws and practices came to the Court, it became more and more apparent that the *Lemon* test could not resolve them. It could not "explain the Establishment Clause's tolerance, for example, of the prayers that open legislative meetings . . . certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving." The test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars.[106]

As such, Justice Alito, writing for the plurality, acknowledged that "in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance."[107]

In concurrence, Justice Breyer wrote that he had "long maintained that there is no single formula for resolving Establishment Clause challenges."[108] Justice Breyer explained that "[t]he Court must instead consider each case in light of the basic purposes that the Religion Clauses were meant to serve assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its 'separate sphere.'"[109] Finally, despite the plurality decision's reference to history and tradition, Justice Breyer stated that he did not "understand the Court's opinion today to adopt a 'history and tradition test' that would permit any newly constructed religious memorial on public land," noting that his opinion would likely be different if the Cross had either "deliberately disrespected members of minority faiths or if the Cross had been erected only recently, rather than in the aftermath of World War I." [110]

Also in concurrence, Justice Kavanaugh stated that, "[c]onsistent with the Court's case law, the Court today applies a history and tradition test in examining and upholding the

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[106] *Id.* at 48–50 (citations omitted).
[107] *Id.* at 60.
[108] *Id.* at 66 (Breyer, J., concurring).
[109] *Id.* at 66–67 (citing Zelman v. Simmons-Harris, 536 U.S. 639, 717–723 (2002) (Breyer, J., dissenting)).
[110] *Id.* at 67–68.

constitutionality of the Bladensburg Cross."[111] Justice Kavanaugh went on to explain that, if decided based on the *Lemon* test, "many of the Court's Establishment Clause cases over the last 48 years would have been decided differently."[112] Justice Kavanaugh split the past Establishment Clause cases into five different categories, including "(1) religious symbols on government property and religious speech at government events; (2) religious accommodations and exemptions from generally applicable laws; (3) government benefits and tax exemptions for religious organizations; (4) religious expression in public schools; and (5) regulation of private religious speech in public forums," and stated that "[t]he *Lemon* test does not explain the Court's decisions in any of those five categories."[113]

> In the first category of cases, the Court has relied on history and tradition and upheld various religious symbols on government property and religious speech at government events. The Court does so again today. *Lemon* does not account for the results in these cases.
>
> In the second category of cases, this Court has allowed legislative accommodations for religious activity and upheld legislatively granted religious exemptions from generally applicable laws. . . . But accommodations and exemptions "by definition" have the effect of advancing or endorsing religion to some extent. . . . *Lemon*, fairly applied, does not justify those decisions.
>
> In the third category of cases, the Court likewise has upheld government benefits and tax exemptions that go to religious organizations, even though those policies have the effect of advancing or endorsing religion. Those outcomes are not easily reconciled with *Lemon*.
>
> In the fourth category of cases, the Court has proscribed government-sponsored prayer in public schools. The Court has done so not because of

[111] *Id.* at 68 (Kavanaugh, J., concurring).
[112] *Id.* at 69.
[113] *Id.*

> *Lemon*, but because the Court concluded that government-sponsored prayer in public schools posed a risk of coercion of students. The Court's most prominent modern case on that subject, *Lee v. Weisman*, did not rely on *Lemon*. In short, *Lemon* was not necessary to the Court's decisions holding government-sponsored school prayers unconstitutional.
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> In the fifth category, the Court has allowed private religious speech in public forums on an equal basis with secular speech. . . . That practice does not violate the Establishment Clause, the Court has ruled. *Lemon* does not explain those cases.[114]

1. *Shurtleff v. Boston* – Prelude to *Kennedy*

Three years later, in 2022, in a 9-0 decision, the Court reversed the First Circuit's decision and found that Boston's flag-raising program, allowing for various groups and entities to fly their flag on designated flag poles, did not constitute government speech, and to deny the petitioners from flying their flag based on its religious viewpoint was impermissible viewpoint discrimination.[115] Notably, the Court pointed out that "Boston acknowledge[d] that it denied Shurtleff's request because it believed flying a religious flag at City Hall could violate the Establishment Clause."[116]

In concurrence, Justice Kavanaugh wrote that "[t]his dispute arose only because of a government official's mistaken understanding of the Establishment Clause. A Boston official believed that the City would violate the Establishment Clause if it allowed a religious flag to briefly fly outside of City Hall…."[117] Justice Kavanaugh explained that the "government does not violate the Establishment Clause merely because it treats religious persons, organizations, and speech equally with secular persons, organizations, and speech in public programs, benefits, facilities, and the like."[118] Rather, the "government *violates* the Constitution when (as here) it *excludes* religious persons,

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[114] *Id.* at 69–70 (citations omitted).
[115] Shurtleff v. City of Bos., Mass., 596 U.S. 243, 248 (2022).
[116] *Id.* at 258.
[117] *Id.* at 261 (Kavanaugh, J., concurring).
[118] *Id.*

organizations, or speech because of religion from public programs, benefits, facilities, and the like," or "treat[s] religious persons, religious organizations, or religious speech as second-class."[119]

Also in concurrence, Justice Gorsuch, who would later go on to write for the majority opinion in *Kennedy v. Bremerton* below, attached "at least some of the blame,"[120] to the Court's decision in *Lemon v. Kurtzman* for the City's admission "that it refused to fly the petitioner's flag while allowing a secular group to fly a strikingly similar banner," because it "thought [that] displaying the petitioner's flag would violate the Constitution's Establishment Clause."[121]

Calling the *Lemon* test a "malleable test"[122] and an "abstract and ahistoric test," causing "confusion [that] grew over time,"[123] Justice Gorsuch observed that "[w]hile it is easy to see how *Lemon* led to a strange world in which local governments have sometimes violated the First Amendment in the name of protecting it, less clear is why this state of affairs still persists. *Lemon* has long since been exposed as an anomaly and a mistake."[124] Further, Justice Gorsuch argued that "[r]ecognizing *Lemon's* flaws, this Court has not applied its test for nearly two decades."[125]

Addressing the question of why Boston and "other localities and lower courts" continue to follow *Lemon,* "allowing *Lemon* even now to 'sit up in its grave and shuffle abroad,'"[126] Justice Gorsuch gave two reasons: (1) using the *Lemon* test to obtain results hostile to religion; and (2) a reticence to engage in "a proper application of the Establishment Clause[,] [which] no doubt requires serious work and can pose its challenges."[127]

As to the first, Justice Gorsuch found:

> M]ore than a little in the record before us to suggest this line of thinking. As city officials tell it, Boston did not want to 'display flags deemed to be

[119] *Id.*
[120] *Id.* at 276 (Gorsuch, J., concurring).
[121] *Id.*
[122] *Id.* at 279.
[123] *Id.* at 278.
[124] *Id.* at 280–281.
[125] *Id.* at 283.
[126] *Id.* at 284 (citing *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring)).
[127] *Id.* at 285.

> inappropriate or offensive in nature or those supporting discrimination, prejudice, or religious movements.' Instead, the city wanted to celebrate only 'a particular kind of diversity. And if your policy is to lump in religious speech with fighting words and obscenity, if it is to celebrate only a 'particular' type of diversity consistent with popular ideology, the First Amendment is not exactly your friend. Dragging *Lemon* from its grave may be your only chance.[128]

Regarding the second, Justice Gorsuch argued that there is "at least a partial remedy. For our constitutional history contains some helpful hallmarks that localities and lower courts can rely on."[129] The "telling traits" of "founding-era religious establishments"[130] included:

> First, the government exerted control over the doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And sixth, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function. Most of these hallmarks reflect forms of "coercion regarding religion or its exercise."[131]

Finally, in prelude to the tone and decision in Justice Gorsuch's *Kennedy v. Bremerton*[132] majority opinion, Justice Gorsuch stated that the "Constitution was not designed to erase

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[128] *Id.* at 284–285 (citations omitted).
[129] *Id.* at 285.
[130] *Id.* at 285–286.
[131] *Id.* at 286 (quoting *Lee*, 505 U.S. at 587).
[132] *Kennedy,* 597 U.S. 507.

religion from American life; it was designed to ensure 'respect and tolerance.'"[133] Further, Justice Gorsuch opined that, "[t]o justify a policy that discriminated against religion, Boston sought to drag *Lemon* once more from its grave. It was a strategy as risky as it was unsound. . . . This Court long ago interred *Lemon*, and it is past time for local officials and lower courts to let it lie."[134]

2. *Kennedy v. Bremerton*

In June 2022, one month after *Shurtleff v. City of Boston*,[135] Justice Gorsuch wrote the majority opinion for *Kennedy v. Bremerton*, mirroring much of the tone in his *Shurtleff* concurrence.[136] However, in contrast to the 9-0 *Shurtleff* decision, three justices dissented from the majority's decision in the football coach's favor. In large part, the main disagreement is found in the difference between how the majority opinion, written by Justice Gorsuch, and the dissent, written by Justice Sotomayor, frame the issues and describe the facts of the case.

For the Majority, the main issue was whether the District was justified in terminating the football coach's employment for the act of "kne[eling] at midfield after games to offer a quiet prayer of thanks,"[137] based primarily on the justification that allowing him to do so would "lead a reasonable observer to conclude (mistakenly) that it endorsed Mr. Kennedy's religious beliefs."[138] Considering history and tradition, the Court found that "[n]o historically sound understanding of the Establishment Clause begins to 'make it necessary for government to be hostile to religion'" in a way that requires government role models to "eschew any visible religious expression."[139]

Ultimately, the Court rejected the school district's concern that Kennedy's actions violated the Establishment Clause, based on its understanding of the endorsement prong of the *Lemon* test, and that an objective observer would infer that the district endorsed Kennedy's religious expression.[140] The Court noted that the *Lemon* test was "long ago abandoned,"[141] and held that there is not an automatic violation if the government does not

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[133] *Shurtleff*, 596 U.S. at 288 (quoting *Am. Legion*, 588 U.S. at 66).
[134] *Id.*
[135] 596 U.S. 243 (2022).
[136] *Kennedy*, 597 U.S. at 512.
[137] *Id.* at 512–513.
[138] *Id.* at 514. For a more detailed discussion of *Kennedy*, *see* Stimpson, *supra* note 5.
[139] *Id.* at 510 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).
[140] *Id.* at 535.
[141] *Id.* at 534.

"censor private religious speech,"[142] nor is the government required "to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious."[143]

Neither did the Court accept the District's argument that Kennedy's speech violated the coercion principle, pointing out that the Ninth Circuit also did not adopt that line of reasoning because of the lack of evidence.[144] The Court noted the District's concession that there was no evidence of director coercion of students.[145] Further, the Court found that, with regard to the three prayers Kennedy was disciplined for, where he "even considered it acceptable to say his prayer while the players were walking to the locker room or bus, and then catch up with his team,"[146] that Kennedy "did not seek to direct any prayers to students or require anyone else to participate."[147]

In her dissent, joined by Justice Breyer and Justice Kagan, Justice Sotomayor took a broader look at Kennedy's conduct, and found that "[t]he last three games proved that Kennedy did not intend to pray silently, but to thrust the District into incorporating a religious ceremony into its events, as he invited others to join his prayer and anticipated in his communications with the District that students would want to join as well."[148] In contrast to the Majority Opinion, Justice Sotomayor framed the issue as "whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event."[149]

Furthermore, drawing on the reasoning from *Santa Fe* regarding the school's policy change, which allowed students to vote about whether to have prayer before home football games, the Dissent argued that "Kennedy's 'changed' prayers at these last three games were a clear continuation of a 'long-established tradition of sanctioning' school official involvement in student prayers."[150] In addition, the Dissent challenged the Majority's

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[142] *Id.* at 534.
[143] *Id.* at 535.
[144] *Id.* at 536.
[145] *Id.* at 537.
[146] *Id.* at 538.
[147] *Id.*
[148] *Id.* at 566 (Sotomayor, J., dissenting).
[149] *Id.* at 545; *see id.* at 549–566 (showing images of prayers occurring at midfield and discussing what part of the record was left out of the Majority Opinion).
[150] *Id.* at 563.

position that coercion, particularly in the K-12 school context, required a showing of direct, or explicit, coercion.[151]

Finally, while acknowledging that the *Lemon* test "does not solve every Establishment Clause problem,"[152] the Dissent nevertheless criticized the Majority's abandonment of the test and hypocrisy in introducing a new "grand unified theory" in holding "that courts must interpret whether an Establishment Clause violation has occurred mainly 'by reference to historical practices and understandings.'"[153] According to the Dissent, this "history-and-tradition test offers essentially no guidance for school administrators."[154]

The confluence between the Majority's position on the *Lemon* test, particularly its rejection of the endorsement prong, and Justice Sotomayor's Dissent and critiques--specifically regarding this deviation from precedential jurisprudence and lack of guidance for school officials--both serve to articulate the basis for this study. School boards and school officials across the country have since been faced with determining how to approach issues related to employee religious expression.

II. METHODOLOGY

Our research questions are:

1. Have policies pertaining to employee speech or religious expression been revised by school boards following the *Kennedy* decision?
2. Are larger school districts, in terms of student population, more likely to revise policy following the *Kennedy* decision?
3. To what extent do school district policy revisions vary by the geographic region?

We detail the sample, data collection, and analysis in this section.

A. Sample Selection and Data Collection

The sample includes nine school districts in each state plus Hawaii, which includes the entire state in one governing body, for a total sample of 442 school districts (49 states with 9 school districts plus Hawaii). We used a stratified random sampling

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[151] *Id.* (stating that "existing precedents do not require coercion to be explicit, particularly when children are involved.")
[152] *Id.* at 572.
[153] *Id.* at 573 (citation omitted).
[154] *Id.*

technique to ensure that the nine districts in each state include three small, three medium, and three large districts.[155] We stratified all districts within each state by total student enrollment into small, medium, and large. The top third of school districts in each state were classified as large, the middle third as medium, and the bottom third as small. This technique allowed us to compare similarly situated school districts in terms of relative size to other school districts in each state, across all fifty states. We also included the census classification for regions in the United States: West, Mid-west, East, and South.

After randomly selecting the 442 school districts, we accessed each district's website to locate its policies on employee speech and/or religious expression. If we were unable to find a policy addressing employee speech and/or religious expression on a specific school district's website,[156] we contacted district personnel to confirm the absence of such a policy. In total, we collected 507 policies from the 442 school districts.

B. Data Analysis

Next, we analyzed each policy and classified it into one of three categories:

1. *No Policy*: Indicates no evidence of any district policy addressing employee speech or religious expression. This category also includes policies that had related titles but provided no direction related to employee speech and/or religious expression,
2. *Implicit Policy*: The policy does not directly address employee speech or religious expression but offers some related direction on teaching religion, or
3. *Explicit Policy*: The policy clearly addresses employee speech and/or religious expression.

An example policy in each category follows: *No policy* included a policy in Sheridan Wyoming titled *Distribution of Non-school-sponsored Materials on Premises by Students and Employees*, which appeared pertinent. However, upon closer examination, this policy had no content applying to employee religious expression or the teaching of religious topics in the classroom.[157]

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[155] *See infra* Appendix A for a list included districts.

[156] Search terms used to access pertinent policy from the randomly selected school districts included religion, religious, speech, expression, *Kennedy*, and faith.

[157] SHERIDAN CNTY. SCH. DIST. NO. 2 (WYO.), *R4.14—Student Media & the Distribution of Literature, BOARD POLICY MANUAL* (May 2020), https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/1779854/21-22_SSD_Board_Policy_Manual.pdf.

Implicit policies address topics with religious significance but not about personal expression. Many of these policies define teaching practices for "controversial issues," which may include religion, or define nondiscrimination in the curriculum. Emery Utah's *Non-Discrimination* Policy specifically defines the following:

> In keeping with the requirements of federal and state law, Emery School District strives to remove *any vestige of discrimination* in employment, assignment, and promotion of personnel; *in educational opportunities and services offered students, in their assignment to schools and classes, and in their discipline*; in location and use of facilities; and in educational offerings and materials.[158]

Explicit policy clearly addresses employee religious expression while at work. Granite Utah's *Religious Belief, Expression, and Exemptions* policy states:

> To a significant degree, praying and other forms of religious expression are protected under the First Amendment in the limited public forum of schools. . . . *Reasonable, personal expressions of faith* by students and employees shall not be denied by the District or schools, and the District and schools shall be receptive to requests for accommodations to allow for such personal expressions.[159]

We also recorded the year of each policy adoption or latest revision. If the policy was revised or adopted in 2022, the year *Kennedy* was decided, we noted the month of adoption to determine if it occurred before or after the Court's ruling. If a school district had multiple policies addressing employee speech

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[158] EMERY CNTY. SCH. DIST. (UTAH), *Policy AC - Non-Discrimination* (Nov. 2024) (emphasis added), https://irp.cdn-website.com/da090524/files/uploaded/AC_-_Nondiscrimination-49816eaf.pdf.

[159] GRANITE SCH. DIST. (UTAH), *Article V.C.5. Religious Belief, Expression, and Exemptions* (Jan. 2024) (italics added for emphasis), https://www.graniteschools.org/legal/wp-content/uploads/sites/22/2024/01/V.C.5.-Religious-Belief-Expression-and-Exemptions.pdf.

or religious expression, we recorded the year of the most recent update.

We identified 105 selected policies from 82 districts that were updated after the *Kennedy* decision. To understand the substance of the changes, we requested a copy of the policy's previous iteration from the school district. We secured 32 previous versions of the 105 policies, 30 percent. We analyzed the policies and identified the differences between the current and previous editions, noting language that was dropped or added from one version to the next.

III. FINDINGS

This section begins with a summary of the distribution of *explicit* and *implicit policies*. We then summarize the most recent year in which school district policies addressing employee speech or religious expression were revised. Next, we examine these findings based on the size and geographic region of the school district. Finally, we isolate the 105 policies revised after the *Kennedy* decision to better understand how school districts responded to this ruling.

A. Rating School District Policies

We present the distribution of *explicit* and *implicit policies* examined in Table 1. For school districts with multiple policies, we classified the district based on its highest rated policy in the second column of Table 1.[160] However, each of the school district's policies are included in the third column of Table 1.

Table 1: School District Policy Rating

Policy Rating	**Number of School Districts**	**Number of Policy Statements**
Explicit	257 (58.1%)	326 (64.3%)
Implicit	93 (21.0%)	181 35.7%)
No Policy	92 (20.9%)	Not Applicable
TOTAL	442	507

The data presented in Table 1 suggest that when school districts enact or revise relevant policy, the policy is essentially twice as likely to provide employees with clear direction related

[160] As an example, if a school district had four pertinent policies and three of these policies were rated as *implicit* and one was rated as *explicit*, the school district was counted as explicit.

to expressing personal religious beliefs in the workplace than it is to provide unclear or no direction.

1. Revised School District Policies: Research Question #1

In Table 2, we report the year the most recent school district policy was updated.

Table 2: Most Recent Year School District Policy was Updated

Year	Number	Explicit	Implicit
1977	1	1	0
1994	3	3	0
1995	6	1	5
1996	1	0	1
1997	1	0	1
1998	1	0	1
1999	1	0	1
2000	5	3	2
2001	2	2	0
2002	5	5	0
2003	12	10	2
2004	11	8	3
2005	7	5	2
2006	6	1	5
2007	2	2	0
2008	8	3	5
2009	10	8	10

2010	10	7	2
2011	16	11	3
2012	21	11	10
2013	32	19	13
2014	24	14	10
2015	12	9	3
2016	23	17	6
2017	20	8	12
2018	26	14	12
2019	21	19	2
2020	32	20	12
2021	37	25	12
2022	41	26	15
2023	73	51	22
2024	13	9	4
Unknown	24	14	10

Note: The collection of 2024 policies occurred in the spring of 2024. We do not capture any policy revisions past this point.

In Table 3, we summarize the findings reported in Table 2.

Table 3: Summary of Most Recent Year School District Policy was Updated

	Total	**Explicit Policies**	**Implicit Policies**
Total	507	326	181

Average Policies Revised per Year	15.8	11.6	6.7
Average excluding the Unknown	15.09	11.1	6.3
School Districts with no Policy	92	0	0

The data reported in Tables 2 and 3 demonstrate an uptick in policy revisions in 2022, 2023, and possibly 2024. The average number of revisions per year was 15.8, but in 2022 there were 41 policy revisions and in 2023 another 73 policies were revised. We have no baseline data to which we can compare these findings, and we do not know if this reported level of policy revision following *Kennedy* aligns with policy revisions following previous Supreme Court decisions impacting public education. Nor do we know the specific reasons for these policy revisions following *Kennedy*. The answer to the first research question is that there is an observable increase in policy revisions addressing employee speech and religious expression following the *Kennedy* decision, which we assume is attributable to the Court's decision.

2. School District Size and Policy Revisions: Research Question #2

We summarize the distribution of school districts with policies addressing employee speech or religious expression by district size in Table 4.

Table 4: Distribution of School Districts Addressing Employee Speech or Religious Expression, By Size

School District Size	**Explicit School Districts Policies**	**Implicit School Districts Policies**	**Total**
Large	87 (76.3%)	27 (23.7%)	114
Medium	93 (75.6%)	30 (24.4%)	123
Small	76 (67.8%)	36 (32.2%)	112
TOTAL	256	93	349

Note: The data reported in Table 4 excludes Hawaii due to its one-school-district status.

Our hypothesis was that large school districts would be more likely to have policies related to employee speech and religious expression, but this did not prove to be the case. While the percent of school districts with policies was relatively consistent across the three school district sizes, it is noteworthy that nearly 21 percent of the randomly selected school districts did not have a policy addressing employee speech or religious expression. Given the Court's decision in *Kennedy*, it seems alarming that more than one in five school districts do not have any policy addressing the balance between the Establishment and Free Exercise Clauses for employees.

We next disaggregate the data by school district size and the type of policy that was in place (*implicit* or *explicit*), which is summarized in Table 5.

Table 5: Distribution of School Districts Addressing Employee Speech or Religious Expression, By Size and Policy Rating

School District Size	**Explicit School Districts Policies**	**Implicit School Districts Policies**	**Total**
Large	87 (76.3%)	27 (23.7%)	114
Medium	93 (75.6%)	30 (24.4%)	123
Small	76 (67.8%)	36 (32.2%)	112
TOTAL	256	93	349

Note: The data reported in Table 4 excludes Hawaii due to its one-school-district status.

Even after the data specific to school district size are disaggregated by the policy rating, there does not appear to be a clear indication that the size of the school district, in terms of student population, is connected to the likelihood of a school district creating or revising policy addressing employee speech or religious expression. The data in Tables 4 and 5 do not suggest that student population affects a school district's likelihood to revise policy following the *Kennedy* decision.

3. Geographic Location and Policies Revision: Answer to Research Question #3

Next, we examine school district policy by region: West, Mid-west, South, or East. The distribution of school districts with and without policy addressing employee speech and religious expression is reported in Table 6.

Table 6: Distribution of School Districts Addressing Employee Speech or Religious Expression by Region

School District Location	School Districts with Policy		School Districts without Policy	Total
	Explicit Policy	Implicit Policy		
West	71 (65.2%)	27 (24.7%)	11 (10.1%)	109
Mid-west	61 (56.5%)	37 (34.2%)	10 (9.3%)	108
South	89 (65.9%)	16 (11.9%)	30 (22.2%)	135
East	36 (40.0%)	13 (14.4%)	41 (45.6%)	90
TOTAL	257	93	92	442

The data reported in Table 6 appear to suggest that school districts in eastern states are less likely to have policies addressing employee speech or religious expression than school districts in the other three regions of the United States. While we identify a few trends among regions, we do not know the driving cause behind these trends.

B. School District Policies Revised After the Kennedy *Decision*

Next, we analyze school district policies that were revised following the *Kennedy* ruling in June of 2022. Of the 507 policies examined in this study, 105 were revised following *Kennedy*. All the sampled policies revised before or after the *Kennedy* decision are presented in Table 7.

Table 7: Examining School District Policies Before and After the Kennedy Decision

Variables	All Policies (N=507)	Pre-*Kennedy* Policies (n=402)	Post-*Kennedy* Policies (n=105)
Large	171 (33.5%)	136 (33.8%)	35 (32.4%)
Medium	179 (35.3%)	142 (35.3%)	37 (35.2%)
Small	157 (30.9%)	124 (30.8%)	33 (31.4%)
TOTAL	507 (100%)	402 (100%)	105 (100%)
West	143 (28.2%)	119 (29.6%)	24 (22.8%)
Mid-west	155 (30.5%)	118 (29.3%)	37 (35.3%)

South	149 (29.3%)	117 (29.1%)	32 (30.4%)
East	60 (11.8%)	48 (11.9%)	12 (11.4%)
TOTAL	507 (100%)	402 (100%)	105 (100%)
Explicit Policy	326 (64.2%)	251 (62.4%)	75 (71.4%)
Implicit Policy	181 (35.8%)	151 (37.6%)	30 (28.4%)
TOTAL	507 (100%)	402 (100%)	105 (100%)

We observed little variation with post-*Kennedy* trends, in terms of size and region of the school district, when compared to the pre-*Kennedy* policies. Specifically, the size or location of the school district does not appear to have an influence on the prevalence of policy in school districts before or after the *Kennedy* decision, as illustrated by the lack of variation between the pre-*Kennedy* and post-*Kennedy* data reported in Table 7. However, we note that the post-*Kennedy* policies are more likely to explicitly address what an employee can and cannot do in terms of speech or religious expression, as demonstrated by the 9 percent increase from pre-*Kennedy* to post-*Kennedy* data reported in Table 7.

The revised school district policies were clustered together, which resulted in the development of six classifications based on the emphasis of the policy. These six clusters are identified in Table 8.

Table 8: Clusters of Revised School District Policies

Category Clusters	**Number**	**Percent**
Focused on Instructional Practices	38	36%
Affirmed the Importance of the Establishment Clause	36	34%
Protected Employees' Private Speech or Expression	17	16%
Maintained the School District's Neutral Stance	10	10%
Protected Academic Freedom	3	3%
Established a High Professional Standard	1	1%
TOTAL	105	100%

The impetus for revising the 105 policies after the *Kennedy* decision, which are summarized in Table 8, is not known. To

better define each of the clusters, we provide passages from school district policies for each category below:

- *Focused on Instructional Practices*: The Spartanburg School District No. 7 (South Carolina) policy, which was revised in February 2023, reads:

  > The board recognizes that one of the district's educational goals is to advance students' knowledge and appreciation of the role that religion has played in the social, cultural, and historical development of civilization. Religious instruction in the context of history, literature, art, music, and other core subjects is encouraged. Religious instruction provides an opportunity for learning about different cultures and fostering understanding and tolerance of diversity among students. . . . Religious instruction to enhance the curriculum for social, cultural, and historical purposes is encouraged. However, the promotion of religion in the classroom is not permissible. Instruction will include a variety of religions and cultures to promote diversity and tolerance.[161]

- *Affirmed the Establishment Clause*: The Salem-Keizer Public Schools (Oregon) policy, which was revised in October 2022, reads:

  > Salem-Keizer School District . . . must, however, give primary weight to the United States Constitution and the Oregon State Constitution, state laws, and the decisions made by the respective courts when establishing guidelines for making decisions regarding religious-related activities and practices. The Establishment Clause within the Bill of Rights prohibits a government entity, including public schools, from creating any law or rule that favors one religion, or none. The right to practice religion, or no religion at all, is

[161] SPARTANBURG SCH. DIST. NO. 7, *Policy IHAL Religious Instruction* (Feb. 2023), https://boardpolicyonline.com/?b=spartanburg7&s=273551

> among the most fundamental of freedoms guaranteed by the Bill of Rights.[162]

- *Protected Employees' Private Speech or Expression*: The Sergeant Bluff-Luton School District (Iowa) policy, which was revised in April 2024, reads:

  > The board believes the district has an interest in maintaining an orderly and effective work environment while balancing employees' First Amendment rights to freedom of expression and diverse viewpoints and beliefs. When employees speak within their official capacity, their expression represents the district and may be regulated. The First Amendment protects a public employee's speech when the employee is speaking as an individual citizen on a matter of public concern. Even so, employee expression that has an adverse impact on the district operations and/or negatively impacts an employee's ability to perform their job for the district may still result in disciplinary action up to and including termination.[163]

- *Maintained the School District's Neutral Stance*: The Fairview School District (Montana) policy, which was revised in August 2023, reads:

  > In keeping with the United States and Montana constitutions and judicial decisions, the District may not support any religion or endorse religious activity. At the same time, the District may not prohibit private religious expression by students. The purpose of this policy is to provide direction to students and staff members about the

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[162] SALEM-KEIZER SCH. DIST., *CUR-A002-Religious Curricula Content and Activities in Public Schools* (October 2022), https://resources.finalsite.net/images/v1759963483/salkeizk12orus/dbrrc7wczujafncw63zr/CUR-A002_eng_ReligiousCurriculaContentandActivities.pdf.

[163] SERGEANT BLUFF-LUTON SCH. DIST., *Policy 401.14: Employee Expression* (April 2024), https://simbli.eboardsolutions.com/Policy/ViewPolicy.aspx?S=36031356&revid=txACMNle7wAgXk1u9wyGMw==&PSID=

> application of these principles to student religious activity at school. . . . Staff may not encourage, discourage, persuade, dissuade, sponsor, participate in, or discriminate against a religious activity or an activity because of its religious content when in the course of completing official duties.[164]

- *Protected Academic Freedom*: The Barnwell County Consolidated School District (South Carolina) policy, which was revised in August 2022, reads:

  > The board believes that academic freedom is essential to the fulfillment of the purposes of the school system. Board policy must protect teachers from any censorship or restraint which might hinder their duty to perform their classroom functions. The district will maintain an atmosphere of academic freedom in the schools.[165]

- *Established a High Professional Standard*: The Branford Public Schools (Connecticut) policy, which was revised in October 2022, reads:

  > The Branford Board of Education (the "Board") requires all Board employees to follow any applicable Board policy concerning employee conduct, maintain high ethical and professional standards, and exhibit professional conduct and responsibility. Board employees shall comply with the following standards . . . [a]void using positions for personal gain through political, social, religious, economic, or other influence.[166]

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[164] FAIRVIEW SCHOOL DISTRICT, *Policy 2332: Religion and Religious Activities* (August 2023), https://simbli.eboardsolutions.com/Policy/ViewPolicy.aspx?S=36031307&revid=CuCAVyUCnCslshfl1VcxrnEXQ==&PSID=.

[165] BARNWELL COUNTY CONSOLIDATED SCHOOL DISTRICT, *Policy IB Academic Freedom* (August 2022).

[166] BRANFORD PUB. SCHS., *Policy 4000 Code of Ethics and Professional Responsibility for Personnel*, (October 2022), https://z2policy.cabe.org/cabe/browse/branford/branford/z20000043.

The final level of analysis of school district policy following the *Kennedy* decision centered on the *Lemon* test. In the *Kennedy* ruling, Justice Gorsuch wrote for the majority that the Court had "long ago abandoned *Lemon* and its endorsement test offshoot."[167] However, six of the 105 post-*Kennedy* policies analyzed in this study cite the *Lemon* test.[168] These six school districts are reported in Table 9.

Table 9: School District Policies Revised After *Kennedy* with *Lemon* Test References

School District	**Size**	**State**	**References *Kennedy***
Blair	Large	Nebraska	No
Carlisle	Medium	Iowa	No
Mount Markham	Small	New York	No
New Millenium Academy	Medium	Minnesota	No
Sergeant Bluff-Luton	Medium	Iowa	No
Sioux City	Large	Iowa	Yes

Of particular interest is Sioux City School District's policy, which not only cites the *Lemon* test, but also includes both *Kennedy* and *Lemon* in its legal references.

C. Comparing Policies

Hawaii School District and East St. Louis District best demonstrated the differences between pre-*Kennedy* and post-*Kennedy* policies. In May 2015, Hawaii's policy stated, "[p]rayer and other religious observances shall not be organized or sponsored by schools and the administrative and support units of

[167] *Kennedy,* 597 U.S. at 510.

[168] In Blair School District (Nebraska), the policy reads, "It shall be the responsibility of the superintendent to ensure the study of religion in the schools in keeping with the following guidelines: 1. the proposed activity must have a secular purpose; 2. the primary objective of the activity must not be one that advances or inhibits religion; and 3. the activity must not foster excessive governmental entanglement with religion." BLAIR SCH. DIST. (NEB.), *POLICY 604.09* (on file with author). This policy was updated again in August 2024.

the public school system*, especially where students are in attendance or can observe the activities.*"[169]

In the same section in the 2023 revised version the italicized section above is omitted, and a new section is added stating, "Department of Education employees may engage in *brief, quiet, and personal religious observances* when not engaged in the responsibilities of their job duties as long as their observances are not disruptive or coercive."[170]

Hawaii's policy borrows language from *Kennedy* to state that district employees can engage in religious expression if efforts are not disruptive or coercive.

In October 2016, the East St. Louis School District's policy addressing religious expression stated, "[t]he District shall not endorse or otherwise promote invocations, benedictions, and group prayers at any school assembly, ceremony, or other school-sponsored activity."[171]

In December 2022, the same section was expanded as follows: "*While the District respects an individual's brief, quiet, personal religious observance(s),* it shall not endorse or otherwise promote invocations, benedictions, and group prayers at any school assembly, ceremony, or other school-sponsored activity."[172]

Much like Hawaii, East St. Louis' policy borrows language from the *Kennedy* decision to provide specific parameters to a previously broad statement on religious expression.

IV. DISCUSSION

The findings presented in this study have several implications related to the Court's decision in *Kennedy*. The overarching implication is that the data from this study suggest school district officials and school boards are uncertain how to balance the *Kennedy* ruling with the previous 70 years of Establishment Clause jurisprudence. This implication is discussed in detail in this section.

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[169] HAW. DEP'T OF EDUC., *Policy 900-3 Religion and Public Schools* (May 2015). The outdated version of the Hawaii Department of Education's policy was obtained by contacting the department.

[170] HAW. DEP'T OF EDUC., *Policy 900-3 Religion and Public Schools* (2023) (emphasis added).

[171] EAST ST. LOUIS SCH. DIST., *6:255 Assemblies and Ceremonies*, (Oct. 2016). The outdated version of the East St. Louis policy was obtained by contacting the school district.

[172] EAST ST. LOUIS SCH. DIST., *6:255 Assemblies and Ceremonies*, (Dec. 13, 2022), https://www.boardpolicyonline.com/?b=east_st louis_189 (emphasis added).

Prior to exploring practitioner confusion with *Kennedy*, it is important to examine the overall landscape of school district policy addressing employee speech or religious expression. Of the 442 randomly selected school districts in this study, 92, or nearly 21 percent, did not have any policy addressing employees' religious actions while at work (as reported in Table 3). This is surprising, given how divisive faith is in public education.[173] Clear policy provides employees a framework to work within, whereas the absence of clear polices results in more opportunities for employees to challenge permissible and impermissible religious expression while at work/school. Enacted school district policies that clearly define what school district employees can and cannot do in terms of their personal religious expression at work provides a legal framework for governing employees' actions. By contrast, the absence of such a framework empowers employees to test boundaries.[174] State school board associations should work with districts within each state to ensure policy has been adopted providing school district employees with clear direction on acceptable forms of personal religious expression in the workplace. Clear policy serves to mitigate future legal challenges to Free Exercise Clause restrictions imposed by school districts on employees.[175]

Returning to the conclusion that school district officials are uncertain how to incorporate the *Kennedy* ruling into daily practice, 54.4 percent of school districts in the East had policy addressing employee speech or religious expression. By contrast, over 90 percent of school districts in the Mid-west had relevant policy. While 77.8 percent of school districts in the South region had policy focused on employee speech or religious expression, 84.7 percent of southern policies were rated *explicit*, which was

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[173] *Religion in the Public Schools*, PEW RESEARCH CENTER (Oct. 3, 2019) https://www.pewresearch.org/religion/2019/10/03/religion-in-the-public-schools-2019-update ("Americans continue to fight over the place of religion in public schools. . . . Some Americans are troubled by what they see as an effort on the part of federal courts and civil liberties advocates to exclude God and religious sentiment from public schools. Such an effort, these American believe, infringes on the First Amendment right to free exercise of religion. Many civil libertarians and others, meanwhile, voice concern that conservative Christians and others are trying to impose their values on students.").

[174] *See* Tess Bissell, *Teaching in the Upside Down: What Anti-critical Race Theory Laws Tell Us about the First Amendment*, 75 STAN. L. REV. 205, 211 (2023). Bissell refers to this testing of boundaries as "a distorted, parallel dimension where even the basics of constitutional law are inverted." *Id.* While policy provides employees with clear direction, its absence fosters greater confusion and possible chaos. *Id.*

[175] We note that Bremerton School District paid Coach Kennedy a $1.7 million settlement following the Supreme Court's decision.

the highest of any of the four regions. In short, the ranges reported in Tables 6 and 7 illustrate inconsistencies between school districts, based on geographic location, in terms of enacted policy addressing employee speech or religious expression.

The findings reported in Table 9 also support the conclusion that school district officials are confused by the *Kennedy* holding. Of the 105 post-*Kennedy* policies analyzed in this study, only 20, or 19 percent, were clustered in categories that explicitly enumerate protections for employees (the clusters were *Protected Employees' Private Speech* or *Expression* and *Protected Academic Freedom*). The remaining 85 policies were clustered in categories that focused on defining religious instructional practices, affirming the Establishment Clause, or maintaining the school district's neutrality in terms of religion. If *Kennedy* had provided practitioners with clarity when navigating the balance between the Establishment and Free Exercise Clauses, then we would expect to find more evidence of this balance in enacted policy language.[176]

Finally, the persistence of the *Lemon* test in six school district policies, despite the clear denunciation of this test and its related offshoots in the *Kennedy* decision, may serve as additional evidence of practitioner confusion. While the Court's holding asserts that the *Lemon* test was "long ago abandoned," our sample of revised policy following *Kennedy* shows that some school districts continue to ensure that any religious-oriented effort in schools "a) has a secular purpose; b) has a primary effect that neither advances nor inhibits religion; and c) avoids excessive entanglement with religion."[177] If *Kennedy* provided clear direction to school districts, it stands to reason that school district policy would not include language deemed obsolete by the Court.

The documented confusion surrounding the *Kennedy* holding is potentially concerning for school district stakeholders. In *Kennedy*, the Court affirmed an employee's right to religious expression at work when specific considerations are met. However, the policies analyzed in this study demonstrate a wide

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[176] We note that the observed delay in school district response to *Kennedy* in the form of updated policy related to employee speech and/or religious expression could be attributable to several factors beyond the scope of this study.

[177] SIOUX CITY CMTY. SCH. DIST., *AR681 Religion* (Mar. 21, 2023), https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/3389/SCCS/2578543/AR681.pdf.

range of school district positions following the ruling in 2022, which was exemplified by the six clusters reported in Table 8. As a result of these wide-ranging policies, it stands to reason that employees could either be afforded a greater or lesser degree of speech and religious expression freedoms than intended by the Court. Employees who are extended more speech and religious freedoms than intended by the Court are likely to engage in religious activities at work that violate the Establishment Clause and infringe upon the rights of students. By contrast, employees who are extended fewer speech and religious expression freedoms are likely to experience violations to their Free Exercise Clause rights.[178]

CONCLUSION

The purpose of this study was to document the influence of *Kennedy* on school district policy two years after the Court handed down its controversial decision by analyzing school district policies in nine randomly selected school districts in all 50 states. The data reported in this analysis document a wide range of school district policy in terms of: (a) the existence of policy, (b) when existing policy was most recently revised, and (c) the position taken in the policy. These variations on key points related to employee speech and religious expression appear to have fostered confusion within public education and could invite employees with strong religious convictions to test the limits of the *Kennedy* decision, at the peril of students who are required by state law to attend public schools.

[178] Other possible explanations include school district officials not paying attention to Supreme Court rulings and school district policy slowly changing when dealing with controversial issues.

Appendix A
Randomly Selected School Districts by State

State	**Large School Districts**	**Medium School Districts**	**Small School Districts**
Alabama	Tuscaloosa City Shelby Cnty. Baldwin Cnty.	Mountain Brook City Jackson Cnty. Chilton Cnty.	Midfield City Brewton City Opp City
Alaska	Nenana Kodiak Island Matanuska	Annette Island Alaska Gateway Yupiit	Tanana City Kake City Chatham
Arizona	Tempe Union Queen Creek Unified Sunnyside Unified	Baboquivari Unified Tuba City Unified Union Elementary	Mountain Institute CTED Grand Canyon Duncan Unified
Arkansas	Green Forest Dardanelle Hot Springs	Magnet Cove Bismarck Genoa Central	Calico Rock Brinkley Woodlawn
California	Garden Grove Unified Corona-Norco Unified	Redwood City Elementary Alum Rock Union Elementary	Briggs Elementary Kentfield

	Fresno Unified	Kings Canyon Joint Unified	Lamont Elementary
Colorado	Poudre Aurora Pub. Sch. Douglas Cnty.	Summit Adams Cnty. Pueblo City	Genoa-Hugo North Conejos Sch. Dist. Woodland Park
Connecticut	New Britain Stamford New Haven	Branford Avon Naugatuck	Willington Bolton Somers
Delaware	Indian River Appoquinimink Red Clay	New Castle Capital Colonial	Delmar Woodbridge Seaford
Florida	Seminole Co. Polk Hillsborough	Walton Martin Cnty. Leon	Jefferson Cnty. Hamilton Washington
Georgia	Houston Cnty. Atlanta Pub. Schs. Cobb Cnty.	Monroe Cnty. Habersham Cnty. Lowndes Cnty.	Glascock Cnty. Lanier Cnty. Rabun Cnty.
Hawaii	State Dep't	State Dep't	State Dep't
Idaho	Courdalene Nampa Boise	Snake River Blackfoot Caldwell	Salmon River Bruneau Valley
Illinois	Dolton Sch. Dist. Bethalto Cmty. Unit Sch. Dist.	Galena Unified Sch. Dist. Gillespie Cmty.Unit Sch. Dist.	Shiloh Cmty. Unit Sch. Dist. Wayne City Cmty. Unit Sch. Dist.

	East St. Louis Sch. Dist.	Monticello Cmty. Unit Sch. Dist.	Forest Park Sch. Dist.
Indiana	Clay Cmty. Schs. Westfield-Washington Schs. Msd Wayne Township	Bremen Pub. Schs. Eastbrook Cmty. Sch. Dist. Scott Cnty. Sch. Dist.	South Central Cmty. Sch. Corp. Clinton Prairie Sch. Corp. South Adams Sch.
Iowa	Waterloo Ankeny Sioux City	Sergeant Carlisle College Cmty.	Maquoketa Osage Forest
Kansas	Prairie View Emporia Wichita Pub. Schs. Unified Sch. Dist.	Woodson Oskaloosa Pub. Schs. Beloit	Copeland/USD 371 South Gray Schs. Bucklin Dighton
Kentucky	Fort Thomas Indp. Cnty. Simpson Cnty. McCracken Cnty.	Caldwell Cnty. Knott Cnty. Breckinridge Cnty.	Fairview Indep. Cnty. Hickman Cnty. Nicholas Cnty.
Louisiana	Iberia Par. Pub. Schs. Ascension Par. Pub. Schs. Jefferson Par. Schs.	West Baton Rouge Par. Pub. Schs. Webster Par. Pub. Schs. St. Bernard Par. Pub. Schs.	Tensas Par. Pub. Schs. Caldwell Par. Pub. Schs. Grant Par. Pub. Schs.

Maine	Reg'l Sch. Unit Auburn Pub. Schs. Portland Pub. Schs.	Yarmouth Schs. Falmouth Pub. Schs. Biddeford Pub. Schs.	Castine Pub. Schs. Baileyville Pub. Schs. Winslow Pub. Schs.
Maryland	Harford Cnty. Baltimore City Prince George's Cnty.	St. Mary's Cnty. Carroll Cnty. Charles Cnty.	Dorchester Cnty. Caroline Cnty. Worcester Cnty.
Massachusetts	Wachusett Pub. Schs. Quincy Pub. Schs. Lynn Pub. Schs.	Tewksbury Pub. Schs. Berverly Pub. Schs. Acton-Boxborough Reg'l Sch. Dist.	Rockport Pub. Schs. Acushnet Pub. Schs. Millis Pub. Schs.
Michigan	Holland City Lapeer Warren	Essexville-Hampton Comstock Pennfield	Glenn Tekonsha Cmty. Akron-Fairgrove
Minnesota	Litchfield Centennial North St. Paul-Maplewood Oakdale	Adrian Pact Charter Sch. New Millenium Acad.	Nett Lake Campbell-Tintah Trek North
Mississippi	Jackson Cnty. Sch. Dist.	Greenwood-Leflore Consol. Sch. Dist.	Quitman Cnty. Sch. Dist.

	Harrison Cnty. Sch. Dist. DeSoto Cnty. Sch. Dist.	Petal Sch. Dist. Ocean Springs Sch. Dist.	Moss Point Separate Sch. Dist. Lafayette Cnty. Sch. Dist.
Missouri	Central R-III Union R-XI Independence 30	Green Ridge R-VIII Wellington-Napoleon R-IX Mid-Buchanan Cnty. R-V	Roscoe C-1 Westview C-6 Buchanan Cnty. R-IV
Montana	Livingston Helen Pub. Schs. Billings Pub. Schs.	Fairview Elementary Thompson Falls High Sch. Dillon Elementary	Ekalaka Elementary Lavina K-12 Sheridan High Sch.
Nebraska	Blair Cmty. Schs. Lexington Pub. Schs. Papillion La Vista Cmty. Schs.	Pawnee City Pub. Schs. Hemingford Pub. Schs. Wisner-Pilger Pub. Schs.	Arthur Cnty. Elba Pub. Schs. Diller-Odell Pub. Sch.
Nevada	Elko Cnty. Washoe Cnty. Clark Cnty.	Humboldt Cnty. Douglas Cnty. Nye Cnty.	Eureka Cnty. Mineral Cnty. Lincoln Cnty.
New Hampshire	Timberlane Reg'l Sch. Dist. Concord Sch. Dist.	Somersworth Sch. Dist. Lebanon Sch. Dist.	Moultonborough Sch. Dist. Littleton Sch. Dist.

	Nashua Sch. Dist.	Laconia Sch. Dist.	Hampton Sch. Dist.
New Jersey	Princeton Pub. Sch. Garfield Pub. Sch. Hamilton Township Pub. Sch.	River Vale Pub. Sch. Sussex-Wantage Reg'l Sch. Denville Township K-8	Garwood Boro Brigantine Pub. Sch. Franklin Borough
New Mexico	Estancia Santa Rosa Gallup	Ft. Sumner Hagerman Clayton	Wagon Mound Animas Las Montanas Charter
New York	Sachem Cent. Sch. Dist. Buffalo Pub. Schs. NYC Geographic Dist. No. 10	Indian River Cent. Sch. Dist. Hilton Cent. Sch. Dist. Cent. Islip Union Free Sch. Dist.	Sackets Harbor Central Red Creek Cent. Sch. Dist. Mount Markham Cent. Sch. Dist.
North Carolina	Iredell-Statesville Schs. Cabarrus Cnty. Schs. Guilford Cnty. Schs.	Person Cnty. Schs. Haywood Cnty. Schs. Wilkes Cnty. Schs.	Washington Avery Cnty. Schs. Thomasville City Schs.
North Dakota	New Town 1 Grand Forks 1 Rugby 5	Lakota 66 Tioga 15 Central Valley 3	Apple Creek Elgin-New Leipzig 49 Sawyer
Ohio	Fairfield City Sch. Dist.	Edgewood City Sch. Dist.	Mogadore Local Sch. Dist.

	Dublin City Sch. Toledo City Sch. Dist.	Princeton City Sch. Dist. Milford Exempted Village Sch. Dist.	Buckeye Local Sch. Dist. Tecumseh Local Sch. Dist.
Oklahoma	Jenks Pub. Schs. Broken Arrow Pub. Schs. Moore Pub. Schs.	McLoud Pub. Schs. Glenpool Pub. Schs. Durant Indep. Sch. Dist.	Boise City Pub. Schs. Hooker Pub. Schs. Merritt Pub. Schs.
Oregon	Springfield Sch. Dist. Bend-LaPine Sch. Dist. Salem-Keizer Sch. Dist.	St. Helens Sch. Dist. Lebanon Cmty. Sch. Dist. Centennial Sch. Dist.	Elgin Sch. Dist. Vale Sch. Dist. Seaside Sch. Dist.
Pennsylvania	Bethlehem Area Sch. Dist. Pittsburgh Pub. Schs. Philadelphia City Sch. Dist.	Central York Sch. Dist. Dallastown Area Sch. Dist. Seneca Valley Sch. Dist.	Susquehanna Cmty. Sch. Dist. Slippery Rock Area Sch. Dist. South Fayette Twp Sch. Dist.
Rhode Island	Pawtucket Cranston Providence	Chariho Reg'l West Warwick Cumberland	Glocester Tiverton East Greenwich
South Carolina	Sumter Sch. Dist.	Anderson Sch. Dist.	McCormick Cnty. Sch. Dist.

	Lexington Cnty. Sch. Dist. One Berkeley Cnty. Sch. Dist.	Colleton Sch. Dist. Spartanburg Sch. Dist. Seven	Barnwell Sch. Dist. 45 Abbeville Cnty. Sch. Dist.
South Dakota	Baltic 49-1 Huron 02-2 Brookings 05-1	Wolsey-Wessington 02 Alcester-Hudson 61-1 Ipswich Pub. 22-6	Lake Preston 38-3 Waverly 14-5 Scotland 04-3
Tennessee	Robertson Cnty. Sch. Dist. Hamilton Cnty. Sch. Dist. Metro Nashville Pub. Schs.	Arlington Cmty. Schs. Roane Cnty. Sch. Dist. Sullivan Cnty. Sch. Dist.	Clinton City Sch. Dist. Sweetwater City Sch. Dist. Wayne Cnty. Sch. Dist.
Texas	Mission CSD North East ISD Pharr-San Juan-Alamo ISD	Bonham ISD Ferris ISD Greenville ISD	Aquilla ISD Alpine ISD Ballinger ISD
Utah	Cache Washington Granite	San Juan Sevier Park City	Wayne Garfield Emery
Vermont	Lamoille South South Burlington Essex Westford	Northern Mountain Valley Oxbow Caledonia Cooperative	Twinfield Echo Valley Cmty. Cabot

Virginia	Newport News City Pub. Schs. Chesterfield Cnty. Pub. Schs. Prince William Cnty. Pub. Schs.	Orange Cnty. Pub. Schs. Manassas City Pub. Schs. Rockingham Cnty. Pub. Schs.	Lancaster Cnty. Pub. Schs. Greensville Cnty. Pub. Schs. Fluvanna Cnty. Pub. Schs.
Washington	Everett Sch. Dist. Kent Sch. Dist. Spokane Sch. Dist.	Montesano Sch. Dist. East Valley Sch. Dist. West Valley Sch. Dist.	Odessa Sch. Dist. Naselle-Grays River Valley Sch. Dist. Columbia Sch. Dist.
West Virginia	Jackson Marion Cabell	Hardy Brooke Nicholas	Gilmer Pendleton Grant
Wisconsin	Appleton Area Sch. Dist. Green Bay Area Pub. Sch. Dist. Milwaukee Pub. Schs.	Holmen Sch. Dist. Beloit Sch. Dist. Middelton-Cross Plains Area Sch. Dist.	Owen-Withee Sch. Dist. Maple Sch. Dist. Antigo Unified Sch. Dist.
Wyoming	Sheridan #2 Sweetwater #1 Natrona #1	Hot Springs #1 Weston #1 Niobrara #1	Park #16 Platte #2 Big Horn #4

LIBRARY BOOK BANS TODAY

R. George Wright*

ABSTRACT

Public library book bans and their associated litigation have become increasingly prominent. In the absence of much authoritative judicial guidance, the case law of library book bans has fractured at the most fundamental levels. Herein, we examine those fracture lines, with attention to the emerging controversy over the distinction between government regulation of private party speech and speech by the government itself. As it turns out, the relevant free speech case law has descended into arbitrariness, manipulability, jurisprudential dead ends, and, most importantly, into cultural and technological insignificance. Equal protection law might constitute an alternative approach to the library book ban cases. But the controversy over equal protection claims in the library book ban cases actually serves mainly to alert us to broader political and legal considerations. Doctrinal constitutional issue discussions generally ignore the important symbolic and expressive elements of book bans and access to books. A concluding part thus emphasizes the typically underweighted symbolic effects of library book bans.

* Professor of Law, Indiana University Robert H. McKinney School of Law.

INTRODUCTION

Public library book bans[1] and associated litigation have become increasingly prominent.[2] In the absence of much authoritative judicial guidance,[3] the case law on library book bans has fractured at the most fundamental levels.[4] Below, we examine those fracture lines, with attention to the emerging controversy over the distinction between government regulation of private-party speech and speech by the government itself.[5] As it turns out, the relevant free speech case law has descended into arbitrariness, manipulability, jurisprudential dead ends, and, most importantly, into cultural and technological insignificance.[6] Equal protection law might constitute an alternative approach to the library book ban cases. But the controversy over equal protection claims in the library book ban cases actually serve mainly to alert us to broader political and legal considerations.[7] Doctrinal constitutional issue discussions generally ignore the important symbolic and expressive elements of book bans and access to books. A concluding part thus emphasizes the typically underweighted symbolic effects of library book bans.[8]

I. SOME BASIC FREE SPEECH PROBLEMS AS ILLUSTRATED IN *LITTLE V. LLANO COUNTY*

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[1] This Article takes no position on whether the term "book bans" is flawlessly descriptive of all of the incidents discussed herein. The term is used herein solely for convenience. All of the substantive legal issues remain in play.

[2] For some recent numbers, *see, e.g.*, Kasey Meehan, Sabrina Baêta, Madison Markham & Tasslyn Magnusson, *Banned in the USA: Narrating the Crisis*, PEN AMERICA (Apr. 16, 2024), https://pen.org/report/narrating-the-crisis; Kasey Meehan, Sabrina Baêta, Madison Markham & Tasslyn Magnusson, *Banned in the USA: Beyond the Shelves*, PEN AMERICA (Nov. 1, 2024) https://pen.org/report/beyond-the-shelves/; Tasslyn Magnusson, *Book Banners Take the Fight to Public Libraries*, PEN AMERICA (May 7, 2024) https://pen.org/book-banners-take-the-fight-to-public-libraries. *See also* Mila Mascenik, *NC Legislation Targets Public School Libraries*, THE LOCAL REPORTER (May 1, 2025) https://thelocalreporter.press/nc-legislation-targets-public-school-libraries (merely one example of relevant state legislation). For a discussion of recent book removal trends and their possible causes, *see* https://www.ala.org/books/book-ban-data (2025).

[3] The Supreme Court's leading case in the public school library context is Bd. of Educ. v. Pico, 457 U.S. 853 (1982). The ways in which *Pico* does not currently provide optimal guidance are explored herein throughout.

[4] *See generally* Little v. Llano Cnty., 138 F.4th 834 (5th Cir. 2025) (en banc).

[5] *See infra* notes 72–104.

[6] *See infra* Parts II-IV.

[7] *See infra* notes 148–51.

[8] *See infra* Part V.

The recent and highly significant en banc decision in *Little v. Llano County*[9] provides a vantage point for examining the most important free speech problems that arise in contemporary public library book ban cases. The *Little* case involved a county public library, as distinct from a public school library.[10] A number of local public library patrons sued the library administration and other officials on a free speech theory.[11] The plaintiffs objected in particular to the removal[12] from the shelves of seventeen racially or sexually themed books.[13] The majority in *Little* dismissed the plaintiffs' free speech claims.[14]

The majority first determined that an affirmative or "positive"[15] right to have the government provide access to particular books is not established by the federal Constitution.[16] Free speech rights protect readers and potential readers, along with publishers, authors, and speakers.[17] But the contours of a purported free speech right that a book not be removed from a library's shelves struck the *Little* majority as murky, readily contestable, subjective, and unmanageable in practice.[18]

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[9] *See Little*, 138 F.4th at 834 (majority opinion), *id.* at 866 (Ho, J. concurring), *id.* at 867 (Higginson, J. dissenting).

[10] *See id.* at 836–37 (majority opinion).

[11] *See id.*

[12] As distinct from the failure to purchase or otherwise obtain a book, and from the failure to catalogue and freely display a book. There are also middle-ground cases in which access to particular books is somehow limited, or denied to persons below a certain age.

[13] *See Little*, 138 F.4th at 836.

[14] *See id.*

[15] *See* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986) (for background on the possible distinction between negative and positive rights). *See generally* HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY (Princeton Univ. Press, 2d ed. 1996). In the human rights context, very roughly, a positive right is thought to call forth some sort of costly, affirmative act of compliance and fulfilment. A negative right is correspondingly thought to require something like merely passive inaction or non-interference. Generally, a right to food might require affirmative provision of food, or of resources exchangeable for food, perhaps by the government, and would thus count as a positive right. In contrast, a government could fulfil a right against unreasonable searches or seizures by merely refraining from such a search or seizure; *see* Gideon v. Wainwright, 372 U.S. 335 (1963) (establishing an affirmative right that counsel be provided on request of indigent criminal defendants). For an example of a recognized positive constitutional right, a right to have the government buy and make readily available a particular book would be a positive right. It is less clear that a right that a purchased book not be intentionally physically removed from the shelves should also be classified as positive. For a further discussion of negative and positive rights at the constitutional level, *see* Cass R. Sunstein, *Against Positive Rights*, 2 E. EUR. CONST. REV. 35 (1993).

[16] *See Little*, 138 F.4th at 836.

[17] *See id.* at 837.

[18] *See id.*

On this basis, the court in *Little* declared that any constitutional right to the affirmative provision of information does not encompass a "right to challenge a library's decisions about which books to buy, which books to keep, or which books to remove."[19] This is a crucial claim. We pursue the relevant considerations below.[20]

The *Little* en banc majority determined that the library's book selection, curation, and retention decisions themselves amount to speech.[21] Crucially, such speech was then categorized as speech of and by the government itself, rather than speech by any book author, publisher, or other private party.[22] The government was said to speak in its own right in editorially shaping its public library collection over time.[23] The theory here is thus that "the government speaks through its selection of which books to put on the shelves and which books to exclude."[24]

The court in *Little* specified that this approach does not imply that the government endorses whatever message, or messages, that anyone might attribute to one or more library books, or to one or more characters therein, who may disagree among themselves. The speaking government in question may not have given much thought to, say, Tolstoy's theory of history[25]; Dante's cosmology[26]; Shakespeare's views on suicide

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[19] *Id.*

[20] *See infra* Parts II-IV.

[21] *See Little*, 138 F.4th at 837.

[22] *See id.; see also* People for the Ethical Treatment of Animals (PETA) v. Gittens, 414 F.3d 23, 28 (D.C. Cir. 2005) ("[T]he government speaks through [public library] selection of which books to put on the shelves and which books to exclude.") (discussed in Parnell v. Sch. Bd., 731 F. Supp. 3d 1298, 1312–13 (N.D. Fla. 2024)); Zykan v. Warsaw Cmty., 631 F.2d 1300, 1308–14 (7th Cir. 1980) (showing *Parnell* ultimately did not decide the government speech issue); *but see* Campbell v. St. Tammany Par. Sch. Bd., 64 F.3d 184, 189–90 (5th Cir. 1995) (discussed in *Parnell* 731 F. Supp. 3d at 1312–13, in support of the suggestion that there are some limits to how libraries may remove books under the government speech rule, especially in school libraries).

[23] *See Little*, 138 F.4th at 837.

[24] *Id.* at 837 (quoting PETA, 414 F.3d at 28). *Cf.* PEN Am. Ctr. v. Escambia Cnty., 711 F. Supp. 3d 1325, 1331 (N.D. Fla. 2024), *and* Crookshanks v. Elizabeth Sch. Dist., 775 F. Supp. 3d 1160, 1175 (D. Colo. 2025) (articulating that the First Amendment does protect the right to receive information through books in libraries to some extent and emphasizing the dangers in expanding the definition government speech); *with* GLBT Youth v. Reynolds, 114 F.4th 660, 667–68 (8th Cir. 2024) (holding that Iowa should not be forced to tolerate speech that is not consistent with its primary message of education for children).

[25] LEO TOLSTOY, WAR AND PEACE (Constance Garnett trans., Carlton House New York 2002) (1869).

[26] DANTE ALIGHIERI, THE DIVINE COMEDY (John Ciardi trans. 2003) (c. 1321).

and revenge[27]; Melville's approach to fate and evil[28]; or Virginia Woolf's approach to feminism.[29] Whatever message the government may wish to say has an almost completely indeterminate relationship to the multiple and contradictory authorial messages in the library collection.

As well, books deemed worthy of library access may be deeply ambiguous,[30] far from clear in expressing any real message,[31] or explicitly self-contradictory in crucial respects.[32] If the government is indeed speaking through Father Mapple's sermon in Moby Dick,[33] an Establishment Clause problem is thereby raised. The character of Father Mapple is not merely describing a particular religious outlook; he clearly expresses, endorses, and seeks his own audience's approval of his religious outlook, as expounded at some length. If the government were approving the ideas of the character Father Mapple, or conveying those ideas as its own, the fact that other views are expressed in the book might not resolve the possible Establishment Clause issue.[34]

Even a single library book, let alone a number of library books collectively, will often express utterly conflicting and incompatible ideas. A single book, and certainly one book along with another, may promote, say, both libertarian free will and hard determinism,[35] or both utilitarianism and its explicit rejection.[36] So, if the government speech, or message, is believed to occur at this level, there is something of a problem. A government with any substantial library must be thought to be

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[27] SHAKESPEARE, HAMLET (Barbara A. Mowat & Paul Werstine eds. 2012) (c. 1601).
[28] HERMAN MELVILLE, MOBY DICK (Penguin Classics 2003) (1851).
[29] VIRGINIA WOOLF, A ROOM OF ONE'S OWN (Julie Luker ed. 2025) (1929).
[30] *See generally* WILLIAM EMPSON, SEVEN TYPES OF AMBIGUITY (Chatto & Windus, 2d ed., reprinted in 1949); ANTHONY OSSA-RICHARDSON, A HISTORY OF AMBIGUITY (Princeton Univ. Press, 2019).
[31] *See generally* Arthur M. Melzer, Philosophy Between the Lines: The Lost History of Esoteric Writing (2017); Leo Strauss, Persecution and the Art of Writing (1952).
[32] *See*, *e.g.*, NATURAL LAW: 5 VIEWS (Andrew T. Walker & Ryan T. Anderson eds., Zondervan Academic 2025); JOHN MARTIN FISCHER ET AL., FOUR VIEWS ON FREE WILL (Wiley Blackwell 2d ed. 2024); J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST (Cambridge Univ. Press 1973).
[33] *See* MELVILLE, *supra* note 28, at 36–44.
[34] For a sense of the Supreme Court's thinking, see the distinctions and boundary lines sought to be drawn in Greece v. Galloway, 572 U.S. 565 (2014) (seeking to distinguish permissible sectarian, non-neutral prayers from impermissible prayers that proselytize or disparage). In the book context, of course, no single character, or multiple characters, may speak for the author. The author may have no articulable message.
[35] *See* JOHN MARTIN FISCHER, ET AL., *supra* note 32.
[36] *See* SMART & WILLIAMS, *supra* note 32.

babbling not just prodigiously, on topics of which it is largely ignorant, but babbling self-contradictorily and incoherently at the most basic level.[37]

It is certainly possible that a book author may have actually intended no articulable message with which the government's adoption or removal policy is concerned. And a library collection curation policy itself need not intend to convey any relevant idea. Nor need the removal of books from the shelves amount to an attempt to convey any articulable government message. But there are, as well, self-consciously politicized book curation policies, and there are books even for young readers with an overt, more or less political message.

The en banc majority in *Little* sensibly assumed that the purported government library speech does not typically take the form of speaking through, or even approving of, any message conveyed by a particular book.[38] The en banc majority focused instead on a presumed government message at a broader level.[39] The government message would be something like: "We think that the books in our collection are worth the attention of and use by some patrons, at least more so than some other collection of books that would reflect different curation policies," or, more concisely, "[w]e think these books are worth reading."[40]

The en banc majority in *Little* declared that government speech in the form of refusal to purchase, or the removal of, a book has only limited practical consequences for would-be readers. Specifically, the court argued that "[i]f a disappointed patron can't find a book in the library, he can order it online, buy it from a bookstore, or borrow it from a friend."[41]

The problem with this claim is that even controversial books cost money to purchase.[42] Price concerns may be

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[37] *See, e.g.*, Walker v. Texas Div., 576 U.S. 200, 221–23 (2015) (Alito, J., dissenting) (exemplifying an interesting court discussion). The State of Texas can certainly wish the best to both Notre Dame and the University of Texas in the context of their pending football game, at least within Establishment Clause limits. But it can hardly wish that each defeat the other in that game.

[38] Little v. Llano Cnty., 138 F.4th 834, 837 (5th Cir. 2025).

[39] *Id.*

[40] *Id.* Of course, whether any given book is worth reading—Shakespeare without notes for children, perhaps—may depend upon the abilities and interests of individual patrons. Some books may be worth reading, but more expensive than the library's budget allows. And the government message may be mistaken even on its own terms.

[41] *Id.* at 838.

[42] MAIA KOBABE, GENDER QUEER: A MEMOIR (2019). The often-contested book is currently priced on Amazon at $19.19, which may be entirely reasonable, though a significant cost for many young adolescents.

especially significant for key audiences of racial, ethnic, migrant, homeless, and poverty or income-focused books.[43] Books on sensitive topics may be difficult to borrow from a peer in a way that does not involve risks and anxieties. Valuable reference books may be especially expensive or require new editions.[44] In such cases, libraries may delude themselves into thinking that non-purchase decisions have no political dimension and no political ramifications. A patron's friends are unlikely to have encyclopedia volumes or reference books to lend.

The court in *Little* then alluded to the defendant library's general rationale for retaining or removing shelved books.[45] The library's broad rubric was known as "Continuous Review, Evaluation, and Weeding" or "CREW."[46] More substantively, shelved books were assessed pursuant to a further acronym, referred to as "MUSTIE".[47] MUSTIE stands for Misleading, Ugly, Superseded, Trivial, or Elsewhere.[48] The MUSTIE book removal factors thus addressed, in order: a book's potential to mislead or contain inaccuracies;[49] its physical condition;[50] whether it has been superseded or become outdated;[51] its triviality;[52] its lack of circulation;[53] and being elsewhere

[43] As one might imagine, reliable books about, for example, adolescent development, or immigration and citizenship, may range in cost from a few dollars to several hundred dollars.

[44] As of this writing, merely for example, the four-volume set of MacMillan's Encyclopedia of Race and Racism, in its second edition, dated as of 2013, is priced, in used condition, at $378.

[45] *See Little*, 138 F.4th at 839.

[46] *See id.*

[47] *See id.*

[48] *Id.*

[49] *See id.*; *see also* ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1206–07 (11th Cir. 2009) (authorizing school library book removals based on inaccuracies). The ACLU case does not especially clarify the distinctions among a significant, substantial, motivating, or a sole and exclusive government intent.

[50] *See Little*, 138 F.4th at 839. Removing and not replacing a book that had been intentionally damaged or sabotaged would raise what amounts to a free speech heckler's veto problem. *See generally* R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RSRV. L. REV. 156 (2017).

[51] *See Little*, 138 F.4th at 839. As through the passage of time, cultural change, or a newer, superseding edition of the same work, judgments about a book's suitability may naturally shift.

[52] *See id.* Query, though, whether an entirely unrealistic plot intended as fantasy for young readers should count as "silly" or "trivial."

[53] *See id.* A library might well consider lack of circulation in its culling and purging decisions. There may, however, be books that are rarely checked out, but are consulted for specific points within the library itself, as for a short entry on some particular topic. Consider a comprehensive book, for example, with many short discussions of prescription and recreational drugs. Such books may or may not be non-circulating reference books. The more important point, though, is that the

available,[54] and its availability at another branch within the same library system.[55]

The fundamental problem with all such book removal criteria is really not that they can serve as a mere pretext for book removal decisions made on other grounds.[56] The fundamental problem is that in a number of respects, these supposedly neutral criteria inevitably depend upon readily contestable political and moral beliefs. The library's political priorities, of whatever valence, can readily be given effect in applying, in more or less good faith, these purportedly neutral criteria. Briefly put, these criteria invite the application of the library's own contestable politics under the guise of common sense and neutrality.

Consider, for example, the possibility of removing a book because it is said to be inaccurate or misleading.[57] This criterion does not require that the book be largely or pervasively inaccurate or misleading, or that it be inaccurate or misleading in some directly dangerous way, as in an inadvertently poisonous recipe. So, a library could, in reasonably good faith, remove any book on history, politics, economic policy, biology, medicine and public health, religion, or the environment on the grounds that the book contains one or more seriously inaccurate or misleading informational claims.

Why would any even minimally political partisan feel forced to conclude that a book embracing opposed political beliefs is not inaccurate or misleading? But, in contrast, why could someone not say that one reason to keep copies of the Declaration of Independence and the Constitution on the library shelves is precisely to study and critique the ways in which those

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circulation or lack of circulation of a book may have little to do with the "relevance" or "irrelevance" of a book. That a book about basic math, basic science, or basic language use is rarely checked out does not tell us that the book is 'irrelevant' in the most important senses. Relevance need not be a matter of popularity. Nor does popularity imply relevance in the most important senses. The popularity of a book is compatible with its triviality or silliness; *see also supra* text accompanying note 52.

[54] *See id.* Whether the book in question is realistically available via a timely, no-cost inter-library loan process should be factored into any assessment of its genuine availability, especially to persons with limited transportation options.

[55] Presumably, this factor is overridden in the case of popular books. The danger, though, is that the "elsewhere available" factor can be used to limit practical access to controversial books. Multiple branches of a library could point to the book's technical availability at a remote branch of the library, where it may be checked out, overdue, or lost. *See, e.g.*, N.J. Stat. § 18A:34A (Effective December 9, 2025) (New Jersey's "Freedom to Read Act") (elaborating on permissible grounds for library book removal).

[56] *See Little*, 138 F.4th at 839 (describing the plaintiffs' contention).

[57] *See id.*; ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1206–07 (11th Cir. 2009).

documents are misleading?[58] To take a stance on any debatable matter—from mandatory vaccines in a pandemic to string theory—is necessarily to believe that one's opponents are, in some relevant respect, presenting inaccurate or misleading claims. The inaccuracy need not be intentional. Belief that a book, or one or more of its claims or messages, is inaccurate or misleading may thus license the book's removal.[59] Buying another book in hopes that it will effectively combat those inaccuracies and misleading claims may well not be effective and inevitably involves some additional expense. There can be no assurance that a reader who is misled by one book will be set straight, in that respect, by reading another book.

Now, one might be tempted to think of the criterion of an "ugly" or "damaged" book as immune from political abuse. This criterion thus may seem a "content-neutral" restriction on an author's speech, at worst.[60] But in the context of controversial books, one person's "ugly" or "damaged" book is another's battle-scarred veteran of the cultural wars. A worn or ugly book may suggest its popularity and value. Wear and tear on a book might imply that it should be replaced by multiple copies. Damage to a book might be thought of in some cases as an attempt to exercise an illegitimate heckler's veto of its message.[61]

At a minimum, there is thus an often unrecognized subjective element to many such book removal decisions. Music that one does not care for may "be thought to be loud and raucous" at the same volume as one's preferred music, where the latter is judged to be merely spirited.[62] The objective difference, by analogy, between "age lines" and "character" on a face may

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[58] *See, e.g.*, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913); FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958); Frederick Douglass, *The Meaning of July Fourth for The Negro*, Rochester, NY (1852), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 188 (Philip Foner & Yuval Taylor, eds., 1999).

[59] There are, however, alternative responses to what is believed to be error. *See, e.g.*, JOHN STUART MILL, ON LIBERTY ch. 2 (Gertrude Himmelfarb ed. 1974) (1859) (discussing the classic "steel manning" argument).

[60] *See generally* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49 (2000) (discussing content neutral restrictions); Reed v. Town of Gilbert, 576 U.S. 155, 159 (2015) (holding that content-based regulations of speech did not survive strict scrutiny).

[61] *See Little*, 138 F.4th at 839; Wright, *supra* note 50.

[62] *But see* Kovacs v. Cooper, 336 U.S. 77 (1949) (restricting amplified soundtrack speech in the 5-4 majority decision).

be minimal. But the subjective difference, depending upon one's own commitments, may be substantial.

Even more clearly, the further criterion of a book's being superseded or outdated[63] invites decisions based on contested political claims. Of course, some new editions of a book may provide uncontroversial updates, as in the case of many directories. But a new edition may also amend, or seek to disavow or retract, substantive claims made in an earlier edition, perhaps on controversial grounds. In such cases, there may be a case for having both editions available.[64]

The more important problem, though, involves removal decisions where no later edition of the same work is available. Especially in a highly politicized and intensely polarized culture, judgments as to which beliefs are outdated, obsolete, or retrograde cultural holdovers of a bygone era often follow cultural fault lines. Such cases may well involve contested judgments as to the nature of cultural progress and tradition.[65] One person's unthinking epistemic prejudice[66] may be thought of as another's tacit, inarticulable knowledge.[67] More narrowly, a book that seems outdated on its own terms may document its own times in a distinctly valuable way, and may even have value that transcends its own time and culture.[68]

As well, a book that is rarely checked out need not fall thereby into the category of irrelevant books.[69] Discarding a classic, or a set of classics, as not having been checked out may

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[63] *See Little*, 138 F.4th at 839 (discussing presumably outdated, stereotypic, biased, and unbalanced content); *see also supra* text accompanying note 51.

[64] It would not be unreasonable for a large scholarly library to have a copy of the famous Eleventh Edition of the Encyclopedia Britannica, first made available in 1910-1911. The point would not be currency, but access to articles by a number of exceptionally distinguished authors. *See generally* Nate Pedersen, *The Magic of Encyclopedia Britannica's 11th Edition*, THE GUARDIAN (Apr. 10, 2012), https://www.theguardian.com/books/booksblog/2012/apr/10/encyclopedia-britannica-11th-edition (last visited July 14, 2025).

[65] *See, e.g.*, ROBERT NISBET, TRADITION AND REVOLT (Routledge 2018) (1968); EDWARD SHILS, TRADITION (reprint ed. 2006) (1981); R. George Wright, *On the Logic of History and Tradition in Constitutional Rights Cases*, 32 S. CAL. INTERDISC. L.J. 1 (2022).

[66] *See* GORDON W. ALLPORT, THE NATURE OF PREJUDICE (25th Anniversary ed., Basic Books 1979) (1954).

[67] *See* MICHAEL POLANYI, THE TACIT DIMENSION (Univ. Chi. Press 2009) (1966).

[68] Thus, an attempt to remove any version of Frederick Douglass's autobiography on the theory that circumstances have substantially changed would nevertheless have to address the book's continuing, largely irreplaceable value for our contemporary culture. *See* FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE (Ira Dworkin ed., Penguin Books 2021) (1845).

[69] *See* Little v. Llano Cnty., 138 F.4th 834 (5th Cir. 2025) (en banc)*; see also supra* text accompanying note 53.

be understandable. Books of Shakespeare plays converted into simple contemporary language, and purged of unfamiliar references, may indeed be charged out more often than more authentic versions with or without explanatory references. But it then becomes unclear why "updated" versions of Shakespeare's plays are worth reading or retaining.[70]

We must also ask why a controversial book might have a low circulation count. There may be a number of reasons why books on, say, homelessness, addiction, immigration, or gender and sexuality may not be checked out, especially by juveniles from their own school library. Students in particular may have less than complete faith in the anonymity and confidentiality of circulation records.[71] Charging a book out of a school library may involve carrying the book, visibly, to one's later classes or school events. Reading parts of the book and perhaps copying a few pages may seem more prudent, with no book circulation, than maintaining it for a longer period. In addition, controversial books may be charged out but not returned, or simply taken physically from a library, by either friends or foes of any controversial message the book may bear.[72] In neither of these cases book circulation numbers are suppressed.

Finally, the consideration that a removed library book will remain available at another library[73] branch is plainly open to subjectivity and abuse. At some point, however determined, the availability of a book at some geographically remote branch becomes irrelevant. Imagine a public library's claim that removing the Constitution, or basic religious texts, or a high school equivalency or citizenship test prep book, is justifiable, given the availability of such items in some other library

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[70] *See* Amanda MacGregor, *To Teach or Not to Teach: Is Shakespeare Still Relevant to Today's Students?* SCH. LIBR. J. (Jan. 4, 2021), https://www.slj.com/story/to-teach-or-not-to-teach-is-shakespeare-still-relevant-to-todays-students-libraries-classic-literature-canon. For a defense of Shakespeare's continuing relevance, *see, e.g.*, HAROLD BLOOM, SHAKESPEARE: THE INVENTION OF THE HUMAN (1998).

[71] For a sense of the state statutory protections of the privacy of library records, *see* American Library Association, *State Privacy Laws Regarding Library Records*, AM. LIBR. ASSOC. (Nov. 2021), www.ala.org/advocacy/privacy/statelaws.

[72] Thus, it has been said that "[a]lmost everywhere, librarians reported that the No. 1 stolen item is books dealing with the occult, satanism, witchcraft, or astrology. Books on gay and lesbian issues also vanish." Edward Epstein, U.S. Libraries Checking Out Book Theft/'Most Stolen' List Will Help Curb Crime (May 15, 2001), https://www.sfgate.com/news/article/U-S-libraries-checking-out-book-theft-2921164.php.

[73] *See Little*, 138 F.4th at 839; *see also supra* text accompanying notes 54–55.

branches.[74] Often, judgments as to whether a book's availability in another branch suffices may reflect the gatekeeper's views on the merits and significance of the book and its message.[75]

The bottom line for all of the supposedly neutral book removal criteria is that even the most apparently benign, uncontroversial, non-partisan criteria for removing books are utterly vulnerable to unconscious bias, to ideology, and to political weaponization. A library decision maker who is driven even by clearly viewpoint-based considerations can typically rationalize a book removal on supposedly neutral grounds. Which book that one opposes on political grounds could not be claimed to contain misleading, inaccurate, or outdated statements?

The ready adaptability of supposedly neutral removal criteria to conscious or subconscious political purposes poses a free speech concern, though only if the library is regulating the speech of some non-governmental party, such as book publishers, authors, or potential readers. If the government is instead doing all of the relevant speaking, the government is generally free, constitutionally, to say what it wishes. This is the essence of the so-called government speech doctrine.[76]

The basic idea underlying the government speech doctrine is that governments could not realistically function if they were required to be politically neutral, however that might conceivably be measured, in their own official speech.[77] In its own speech, a government must explain and defend its own policies, without giving equal time to all opposing views.[78]

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[74] Whether the copy, or copies, in that remote branch are chronically charged out or missing, or not.

[75] Relatedly, political priorities may be reflected in the number of library books written in languages other than English, as the demographics of the community change with immigration patterns. For a library's multiple language policy, *see* WORLD LANGUAGE COLLECTION, MADISON PUB. LIBR. https://www.madisonpubliclibrary.org/collection/specialized-collections/world-language-collection.

[76] For discussion of the scope and limits of government speech, *see, e.g.,* Shurtleff v. City of Boston, 596 U.S. 243, 252 (2022); Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207–08 (2015); Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009). For an illuminating treatment of the government speech doctrine, and its relation to public forum doctrine in particular, *see* Caroline Mala Corbin, *Government Speech and First Amendment Capture*, 107 VA. L. REV. ONLINE 224 (2021); Caroline Mala Corbin, *The Government Speech Doctrine Ate My Class: First Amendment Capture and Curriculum Bans*, 76 STAN. L. REV. 1473 (2024). *See also* R. George Wright, *Managing the Distinction Between Government Speech and Private Party Speech*, 34 QUINNIPIAC L. REV. 347 (2016).

[77] *See, e.g.*, *Summum*, 555 U.S. at 468.

[78] *See Shurtleff*, 596 U.S. at 247–48.

The court in *Little* was thus confronted with the question of whether the public library's removal of books amounted to largely discretionary speech by the government itself, or else to government regulation of private party speech, albeit in a public space.[79] The *Little* majority determined that the library's removal of books from its shelves amounted to government speech, rather than, or as opposed to, government regulation of speech by private party speakers.[80]

The court granted that a book removal could amount either to speech by the government or to a government restriction of speech by private parties in public spaces.[81] But the weight of the relevant considerations, according to the majority, favored the category of government speech.[82] In support of this conclusion, the *Little* majority relied first on the broader principle that curating, editing, assembling, reorganizing, and selecting from among the speech of private parties can count as a form of speech in its own right.[83] The government speech in *Little* was thought to convey a more or less particularized message.[84] The court articulated that the presumed government message was "these books are worth reading,"[85] but with no implied government agreement with any particular book's own message.

The government's message cannot be that no discarded books are worth reading, as some discarded books may be duplicates of books that are retained.[86] The government's message also cannot be that the library's collection is worth reading by everyone.[87] Crucially, the government's message cannot be the logically weak claim that the collection, as a whole,

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[79] Government regulation of speech by private parties in government-owned spaces, including public libraries, invokes the categories of public forum doctrine. For a useful debate on the boundaries between government speech and private party speech in one sort of public forum or another, contrast the majority and dissenting opinions in *Walker*, 576 U.S. 200 (2015).

[80] *See Little*, 138 F.4th at 851–58.

[81] *See id.* at 852; *see generally* Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008). We set aside a library's removal of books authored by the government, as opposed to a private speaker.

[82] *See Little*, 138 F.4th at 865.

[83] *See id.* at 852 (citing Moody v. NetChoice LLC, 144 S. Ct. 2383, 2400 (2024); *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 570 (1995)). Thus, private parties would have no free speech right to place clearly worthy books on vacant public library.

[84] *See id.* at 853.

[85] *Id.* at 837. It bears mention that several books may all be worth reading, even, if not especially, if they fundamentally contradict one another. *See* MILL, *supra* note 59.

[86] *See supra* notes 54–55.

[87] Books about basic arithmetic belong in a general public library, though they hold no value for advanced students or for mathematicians.

or in the aggregate, is worth reading. That claim could be made even if a number of clearly unworthy books remained in the collection.[88] But such a claim would then be vulnerable to a response by a purged book's authors or would-be readers. Even if the purged book's own message is unworthy in the eyes of the government, the library's collection would still be worthy of reading, overall, if the purged book were reinstated. The government message must, therefore, be the logically stronger or more ambitious claim that all of the retained books are, for at least some patrons, worth reading, without necessarily endorsing the message of any particular book.

But this stronger and more ambitious claim is unrealistic. The government cannot be expected to have read all of the library books it has acquired, catalogued, and displayed. Even if a librarian has read every page, that reading cannot have been from all times, circumstances, potential perspectives, and with all possible objections in mind. This gold standard is thus unattainable. But what degree of diligence in critically examining its own collection is constitutionally necessary for government speech claims to be credible is left entirely unclear.

It would certainly be difficult to credit a government speech claim if the library did little or no vetting of its own collection, leaving such work to private parties. The government speech in such a case would not be "these books are worth reading," but more like "some third party in whom we repose trust believes these books meet whatever our own criteria of worthiness may be." While that message would still count as a form of government speech, its constitutional sufficiency as against a private party free speech claim would be at best entirely unclear.[89] At some point, the government's implicit acceptance of a vague, assumed message expressed by some third-party book evaluator becomes merely attenuated government speech at best.

The majority in *Little* emphasized the differences between public library shelves and, say, a general purpose lecture room or auditorium in the same library building.[90] Nor are public library shelves akin to a bulletin board in a public library space, whether

[88] By loose analogy, a box of popcorn could be deemed worthy of consumption, overall or in general, even if it contained an unpopped or burnt kernel.

[89] At a minimum, there would be a loose free speech analogy to the principle that government itself, as distinct from private parties, must do the actual legislating. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), along with the more recent discussions in Gundy v. United States, 588 U.S. 128 (2019).

[90] *See Little*, 138 F.4th at 858–60.

the bulletin board is limited by user or by topic, or not.[91] If public library shelves were instead deemed to amount to any type of public forum, any regulation of private party speech therein would, at a very minimum, have to be content or viewpoint neutral.[92] A public library whose collection is amassed entirely without regard to the content or viewpoint of any of the books would be problematic at best and, more typically, just bizarre. Failing to consider book content or viewpoint would lead to an essentially random collection of books, with only spotty inclusion of popular and classic texts and reference books.

The court in *Little* then considered the factors relied upon by the Supreme Court in circumscribing the category of government speech.[93] The Supreme Court in the recent *Shurtleff* case thus focused on, respectively, the history of the particular kind of expression at issue; public perceptions as to whether the government or else a private party is doing the speaking in question, and the degree to which the government has been responsible for the content of the speech at issue.[94] The *Little* majority determined that each of these considerations supported a finding of government, rather than private party, speech.[95]

The problem with applying the *Shurtleff* factors to the library book removal cases is that they really do little more than ambiguously restate what is either obvious or otherwise obviously contested. They are therefore not particularly helpful in the book ban cases. As a matter of history, public libraries have long ordered, catalogued, and at various points, culled their collections on various grounds. It is hardly clear that all such book removals are validated by limitations on our private party free speech traditions.[96] The library's otherwise ample discretion in removing books cannot, on at least one popular view, "be exercised in a narrowly partisan or political manner."[97]

In the library context, then, asking about public perceptions as to who is doing the speaking also does not meaningfully advance the argument. Presumably, the public believes that the private author has spoken through the book.

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[91] *See id.*
[92] *See id.*
[93] *See* Shurtleff v. City of Bos., Mass., 596 U.S. 243, 248–52 (2022); *see also* McGriff v. City of Miami Beach, 84 F.4th 1330, 1334 (11th Cir. 2023) (reciting and applying the Shurtleff factors).
[94] *See Little*, 138 F.4th at 860.
[95] *See id.*
[96] *See, e.g.*, *Pico*, 457 U.S. at 870–71 (plurality opinion of Brennan, J.).
[97] *Id.* at 870.

The public might also believe that the library is, in a sense, implicitly or tacitly itself speaking in and through[98] its removal of the book. But this common understanding does not advance the case toward resolution. The author, publisher, potential reader, and the government are all arguably speaking, or attempting to speak, at some point in the overall process. Asking which one of these parties is doing the speaking does not further the analysis.

Similarly, asking about the degree to which the government controls, guides, or contributes to the speech in question[99] is also unhelpful. The government presumably contributed nothing to the content or message of the book in question. But then, the removal decision may be thought to count as government speech, contrary to the speech embodied in the removed book. Again, we are left by the *Shurtleff* factors merely with the initial conflicting claims, with no obvious impetus toward one solution or another.

Nor does *Little* offer much clarity on the question of what a library is saying when it more or less consciously chooses, in contrast, to retain a distinctly controversial book on the shelves. The *Little* majority declares that "[a] library that includes Mein Kampf on its shelves is not proclaiming 'Heil Hitler!'"[100] Some books, of course, may be selected for especially conspicuous display, perhaps as part of a holiday celebration. Perhaps some such displays may amount to something like an official endorsement.[101] Some books may be featured, and others not.

There is no dispute, though, that the intended availability of Mein Kampf on generally accessible library bookshelves sends some sort of implicit government message. The *Little* majority seems committed to the doubtless and unappealing conclusion that the government's implied message must be something suggesting, for example, that Mein Kampf, like the rest of generally accessible books, is "worth reading;"[102] is worth one's

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[98] The removal of the library book from the shelves, as a form of speech, would have what are called illocutionary and perlocutionary meanings and effects. *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisa, 2d ed. 1975) (originally delivered as the Williams James Lectures in 1955).

[99] *See Pico*, 457 U.S. at 870–71; *see, e.g.*, GLBT Youth in Iowa Sch. v. Reynolds, 114 F.4th 660, 667–68 (8th Cir. 2024) (the view that placing and removing library books does not amount to government control sufficient to infer government speech).

[100] *Little*, 138 F.4th at 864.

[101] Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003) (holding that the display of Ten Commandments monument violated the Establishment Clause).

[102] *Little*, 138 F.4th at 864–65. *But see* Crookshanks v. Elizabeth Sch. Dist., 775 F. Supp. 3d 1160, 1175 (D. Colo. 2025) ("No one would seriously argue that placing

time;[103] and affords education and edification.[104] But neither the library nor the court actually believes any such proposition.

It bears emphasis that the relevant government speech cannot take the logically weaker, more plausible, less ambitious form of asserting merely that some, but not necessarily all, of the books in the collection are worth reading, thereby avoiding any sort of implied approval of any message of Mein Kampf.[105] If the government's speech is merely to that modest effect, the author of any purged book could, again, argue that reinstating the purged book would not challenge or deny the government speech claim that some or most, but not all, of the collection is worth reading. The government's speech claim or message would remain unaffected by restoring the purged book.

Overall, then, it seems fair to conclude that the free speech law of public library book bans has taken the wrong track, if it has not jumped the tracks entirely. Let us, then, take stock.

II. SUMMING UP THE BOOK BAN FREE SPEECH CASE LAW

The problematic character of the library book ban case law was predictable from the outset, given the indeterminacies at the heart of the Supreme Court's case law. What does the Supreme Court tell us about the removal of controversial books, particularly from a public school library?

Consider the Court's fractured decision in the *Pico* case.[106] The plurality in *Pico* focused on the state of mind or intentions of the public school library book removers, apart from any unintended, but actual consequences of the removal decision.[107] The school library's "significant discretion" in book selection and removal must not be, the plurality declared, exercised in "a narrowly partisan or political manner."[108] There is a broad sense in which removing Mein Kampf, or a pro-slavery, or a Holocaust denial book could be thought of as somehow "political" or "partisan".[109] But the plurality's use of the qualifier "narrowly" suggests that removing Mein Kampf would not carry a

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[Mein Kampf] in a school library constitutes government speech") (citing GLBT Youth, 114 F.4th at 667–68). Query whether this would also apply to removing Mein Kampf.

[103] *See Little*, 138 F.4th at 864–65.

[104] *See id.*; *see also supra* text accompanying notes 40, 85.

[105] *See* note 88.

[106] Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

[107] *See id.* at 871 (plurality opinion).

[108] *Id.* at 870.

[109] *See id.* at 870.

"narrowly" partisan or political intention, and might therefore be permissible.[110]

In many cases, though, there will be entirely reasonable debate as to how narrow the idea of "narrow" partisanship should be construed.[111] And in the *Pico* plurality's attempt to provide further guidance, the Court actually sank into nearly complete equivocation. The Court attempted to construct a disjunction, if not a stark, exhaustive dichotomy, as to a library's intention in removing a book. On one side of the disjunction is a library's intention to deny students access to ideas with which the library disagrees.[112] That would be constitutionally objectionable. And on the other side of the disjunction, there is a library's intention to remove a book because it is either "pervasively vulgar"[113] or otherwise educationally unsuitable.[114] That would be constitutionally permissible.

The problem, though, seems clear, even in the extreme case of Mein Kampf. Suppose a public school does indeed remove Mein Kampf from the library. A court must now probe for the library's intention. Was that the intention to deny student access to ideas with which the library disagreed? Without attempting to read the minds of the book removers, one could easily imagine that yes, certainly, the library intended to deny the students access, in at least one venue, to that book's pernicious ideas of the most virulently racist and antisemitic nature.[115]

But the other side of the dichotomy, in the Mein Kampf removal case, is equally plausible, natural, and appropriate. The text may not be pervasively vulgar, at least in the sense of the frequent use of profane or crude bodily references. But removing Mein Kampf as educationally unsuitable[116] for the students is an obvious and entirely straightforward, sincere, and authentic account of the school's intention.

The *Pico* Court plurality thus asks courts to determine whether book removal decisions were motivated by a desire to deny access, in whatever sense, to the ideas or message of a book, or instead by a desire to remove a pervasively vulgar or otherwise

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[110] *See id.*
[111] *See id.*
[112] *See id.* at 871.
[113] *Id.*
[114] *See id.*
[115] *See id.* In this specific case, the library's removal decision would be entirely justifiable.
[116] *See id.*

educationally unsuitable book.[117] Typically, the answer will be both. Unfortunately, a dichotomous legal test that typically fails to discriminate between the two jointly exhaustive alternatives is of minimal value.

Similarly, freedom of speech in the context of school library books in particular would ordinarily cut in favor of retaining a given book. Experience with controversial ideas and with freedom of speech is typically important for effective citizenship.[118] Free speech is among the "fundamental values necessary to the maintenance of a democratic political system."[119] The value of freedom of speech bars efforts "to strangle the free mind at its source[,]" or to "teach youth to discount important principles of our government as mere platitudes."[120]

These general principles underlying freedom of speech are all quite sensible. The problem is that they do not help decide the Mein Kampf removal case, or many other controversial book removal cases. he difficulty, however, is that principles of civility, tolerance, and respect for others weigh in favor of removing Mein Kampf rather than retaining it. And these values are essential to effective citizenship.[121] These latter values are similarly generally essential, as is free speech, to a functioning democratic system.[122] Removing Mein Kampf, however, certainly need not amount to an attempt to "strangle the free mind at its source[.]"[123] And while freedom of speech is doubtless an "important principle[] of [] government[,]"[124] so, especially in this case, are principles of civility, tolerance, and respect for others as equals.[125] Appropriately upholding those latter values,

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[117] *See id.* at 875.
[118] *See id.* at 864.
[119] *Id.* (quoting Ambach v. Norwick, 441 U.S. 68, 76–77 (1979) (the alien public employment case)).
[120] *Id.* at 865 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).
[121] *See id.* at 864.
[122] *Id.* (quoting *Ambach*, 441 U.S. at 76–77 (the alien public employment case)).
[123] *See id.* at 865 (quoting *Barnette*, 219 U.S. at 637). Nor need it have any such effect in practice. Many, if not most, contemporary free minds and informed free thinkers have never read even excerpts from Mein Kampf, or any other Nazi text.
[124] *See id.* (citing *Barnette*, 319 U.S. at 637).
[125] *See id.* For further discussion of the distinction between pervasive vulgarity or educational unsuitability and narrowly partisan or politically motivated book removal, *see* Campbell v. St. Tammany Par. Sch. Bd., 64 F.3d 184, 188–89 (5th Cir. 1995); *see also* May Lonergan, *Obscenity and Book Banning: Properly Defining "Pervasively Vulgar,"* 34 GEO. MASON U. CIV. RTS. L.J. 293, 317–19 (2024) (inquiring whether a book removal on grounds of vulgarity could ever be permissible even though the vulgarity, however intense, is confined to one chapter of a book, and thus

in the course of removing Mein Kampf from the school library shelves, hardly teaches youth that any basic governmental principles, including freedom of speech, are in reality mere platitudes to be hypocritically disdained.

Ultimately, the overall case law of public school and other public library book removals, or what we might broadly refer to as book bans, is unpersuasive, fundamentally equivocal, or otherwise of minimal practical value. This conclusion is crucially reinforced by placing the issue of library book bans in their cultural and technological context. Let us therefore consider the general book ban problem in that rapidly evolving cultural and technological context.

III. LIBRARY BOOK BANS IN THEIR CONTEMPORARY CULTURAL AND TECHNOLOGICAL CONTEXT

The historical significance of public libraries is clear enough. The library philanthropist Andrew Carnegie declared the public library to be "a never failing spring in the desert."[126] Alternatively viewed, "from the fall of Rome to Nazi Germany to Mao's Cultural Revolution, the dismantling of libraries has been a mark of cultural decline."[127]

We have no quarrel with any such assessments. It remains true today that libraries are repositories of knowledge. It is, instead, their role as gatekeepers of access to knowledge that has recently diminished to insignificance. The courts have been concerned over whether any given book removal was intended to deny access to the presumably disfavored ideas in question.[128]

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not 'pervasive'); *see also* Catherine J. Ross, *Are "Book Bans" Unconstitutional? Reflections on Public School Libraries and the Limits of the Law*, 76 STAN. L. REV. 1675, 1690–91 (2024) (discussing book removals based solely and exclusively on educational suitability, as distinct from mixed motive cases); *see also* Marisa Shearer, *Banning Books or Banning BIPOC?*, 117 NW. U.L. REV. ONLINE 24, 34–36 (2022); *see also* Eugene Volokh, *The Fifth Circuit on Library Selection and Removal Decisions and First Amendment Rights of Listeners*, THE VOLOKH CONSPIRACY (May 3, 2025, 3:06 PM), https://reason.com/volokh/2025/05/23/the-fifth-circuit-on-library-selection-and-removal-decisions-and-first-amendment-rights-of-listeners/?nab=1. For the classic American Library Association Library Bill of Rights statement, *see* ALA, *Library Bill of Rights*, https://www.ala.org/advocacy/intfreedom/librarybill. ("[m]aterials should not be excluded because of the origin, background, or views of those contributing to their creation[.]") (adopted June 19, 1939) (as amended Jan. 29, 2019).

[126] As quoted in Robert C. Thornett, *Save the Libraries*, LAW & LIBERTY (June 16, 2025), https://lawliberty.org/save-the-libraries.

[127] *Id.*

[128] *See Pico*, 457 U.S. at 871 (asking whether the government "intended" by their removal decision to deny "access to ideas with which [the government] disagreed")

But whatever historic significance this inquiry may have once held has, for cultural and technological reasons, now largely evaporated.

The judicial focus, in particular, on the intent of the book remover is at this point largely a distraction. The substantive free speech significance of an attempt by the library to deny access to ideas by removing a library book from the shelves is likely to be effectively nil. Controversial ideas are found readily, on many other venues and formats, including social media. However reprehensible the censorial motive, the substantive effect of such removals, apart from perhaps calling attention to the censored message or generating a backlash, will commonly be minimal.

The notion of denying access to the ideas in a book, or denying access to the book itself, is now inherently ambiguous. A librarian can clearly deny access to a physical copy of a particular book. But the same disfavored idea may remain, to begin with, in copies of other books within the library collection. There may even be better, more readable, more articulate, and more powerfully evocative expressions of that idea, or some sufficiently close substitute for that idea, elsewhere in the same library.[129]

But then the question arises of whether a government could ever remove a library book based on someone's [130] hostility to the ideas expressed in the book, without intending, let alone at all expecting, to deny anyone access to those disfavored ideas. Perhaps not, in a narrow, but now commonly trivial sense. Removing a book from the shelves implies an intent to deny access to that particular book-token,[131] an intent that is clearly given fully successful effect.

(emphasis on the original). Actually, the government itself may remove a library book only under pressure from the community or some faction, without itself disagreeing at all with the message of the book in question; *see also Little*, 138 F.4th at 842–45; Volokh, *supra* note 125, at 2. For a contemporary instance, *see* Dylan Saul, *School Curricula and Silenced Speech: A Constitutional Challenge to Critical Race Theory Bans*, 107 MINN. L. REV. 1311 (2023).

[129] As perhaps in a classic general encyclopedia, or a more specialized subject matter encyclopedia.

[130] *See Pico*, 457 U.S. at 871 (asking whether the government "intended" by their removal decision to deny "access to ideas with which [the government] disagreed") (emphasis on the original). Actually, the government itself may remove a library book only under pressure from the community or some faction, without itself disagreeing at all with the message of the book in question. *See also Little*, 138 F.4th at 842–45; Volokh *supra* note 125, at 2. For a contemporary instance, *see* Saul, *supra* note 128.

[131] For the distinctions among a token, an occurrence, and a type, *see* Linda Wetzel, Types and Tokens, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, https://plato.stanford.edu/entries/types-tokens (April 28, 2006).

No such limited intent, however, is of much real significance for freedom of speech in general, or for anyone's realistic free speech rights. This is a matter of our evolving culture and technology. To begin with, some public libraries across the country have made provision for even young persons to have realistic no-cost access to books banned elsewhere, in e-book or audio book format, regardless of their residence.[132] At a minimum, such libraries currently include the public library systems of Brooklyn, New York; Boston; Los Angeles County; San Diego; and Seattle.[133]

This realistically available no-cost alternative access option is clearly only a small part of the broader cultural and technological shifts that have affected traditional libraries. Physical library buildings are "still a repository for information."[134] But there has obviously been "a major shift from traditional print materials to a blend of physical and digital resources, including: e-books, online databases, and multimedia resources."[135]

By itself, this shift trivializes the actual effect of even multiple site book removals, or of failures to purchase a book in the first place. Such removals and failures to purchase books today have only minimal effects on the realistic availability to most students of the disfavored ideas in question. The books, in one convenient format or another, will likely be freely available elsewhere, as will similar, perhaps better, expressions of the ideas in question.[136]

Even more significantly, though, a library intermediary is typically not necessary for anyone's access to the desired ideas. The ideas in question are available, to begin with, at interest

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[132] *See, e.g.*, *Books Unbanned*, San Diego Public Library, https://www.sandiego.gov/public-library/booksunbanned#:~:text=Anyone%20ages%2012%2D26%20living,Library%20or%20Seattle%20Public%20Library? (where "teens and young adults ages 12 to 26 living anywhere in the U.S. can access San Diego Public Library's online collection of eBooks and eAudiobooks for FREE.") (September 26, 2023).

[133] *See Books Unbanned*, Brooklyn Public Library, https://www.bklynlibrary.org/books-unbanned; *see also* Jensen Rehn, *Battlegrounds for Banned Books: The First Amendment and Public School Libraries*, 98 NOTRE DAME L. REV. 1405, 1438 (2023).

[134] Carrie Friday, *Beyond the Bookshelves: 3 Ways School Libraries Have Evolved to Meet Students' Needs*, ESCHOOL NEWS: SCH. LIBR. INNOVATIONS (Sept. 12, 2024), https://www.eschoolnews.com/innovative-teaching/2024/09/12/3-ways-school-libraries-have-evolved-students/.

[135] *Id.*

[136] *See supra* notes 129–31.

group websites easily reached by a search engine prompt.[137] Texts, or summaries and commentaries thereon, are sometimes available even in their entirety.[138] Online discussion forums are readily accessible.[139] And if all else fails, rapidly evolving AI sources are increasingly responsive to even simple prompts and requests.[140] The interesting limitation is not accessibility, but one of privacy compared to that of checking out and carrying a library book.

Simply put, then, typical public library book bans are now so readily bypassed by most persons as to minimize any significant reader free speech issue. The law of free speech indeed often holds that speech should not be banned in some appropriate place on the plea that the same speech may be uttered in some other place.[141] There may certainly be a dignitary injury in being told by a police officer to stop speaking in one place, and to speak instead in some adjacent spot that equally, if not better, fulfills one's free speech and other practical interests.[142] And there can certainly be a dignitary injury as well, of variable severity, in a library's removal or failure to order a book. Equal protection arguments can be raised, whether successfully or not.[143] But in no such case, realistically, are the free speech rights, interests, and values of the would-be readers significantly burdened.[144]

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[137] Consider the results of Googling the word 'Satanism', merely for example. Beyond an immediate and easily expandable AI overview, there is a dedicated Wikipedia article; the official website of the Satanic Temple; links to numerous videos; links to definitions and books; and an extended series of links to a wide variety of favorably and unfavorably disposed services, along with a clickable list of subdivisions and related topics. The sheer convenience and perhaps privacy of such free access far exceed that of a physical visit to any library building.

[138] The Google query "Satanism full text" results, at the very top, in an Internet Archive full text of 'Satanism'; a link to the Satanic Temple Library; the Nine Satanic Statements; and a .pdf of the Satanic Bible.

[139] As through clicking on the favorably disposed websites cited *supra* note 137, or Reddit, Quora, and similar sites.

[140] As through, e.g., ChatGPT search, Perplexity, Claude, Gemini, and Grok.

[141] *See* Schneider v. State, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of [one's] liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

[142] For surveys of an individual person's underlying interests in free speech, *see* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); Kenneth Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

[143] *See infra* notes 148–51.

[144] We may assume that book authors and publishers have no general free speech rights that their works be purchased by anyone in the first place, or that their works not be purchased and then hidden away, discarded, or even destroyed by the legal owner of the individual book-token in question, whether on content-neutral grounds

In such cases, if not much more broadly, the crucial free speech question is one of the realistic availability of the speech in question, with all the considerations of cost, convenience, comprehensibility, accuracy, emotional effect, and source authority and prestige, that the circumstances may render salient.[145] All of these considerations should be taken into account, primarily from the perspective of the party whose freedom of speech is in question.[146] The overall consideration should be on what might be called the realistic availability, or unavailability, of equally or more valuable alternative speech channels, venues, or sources.[147]

As well, the law of library book bans should be sensitive to the broader, evolving cultural circumstances of both libraries and book reading. Book bans are irrelevant to the more than eight thousand public schools that do not have a school library in the first place,[148] and partly irrelevant to school libraries that primarily serve various non-library purposes.[149] Among students and the general public, the reading of books and the comprehension thereof are today plainly at less than historically elevated levels.[150] These cultural and technological phenomena,

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or not. *See generally* Bonnie Berkowitz & Adrian Blanco, *A Record Number of Confederate Monuments Fell in 2020, but Hundreds Still Stand. Here's Where*, WASHINGTON POST: NATIONAL (Mar. 12, 2021), https://www.washingtonpost.com/graphics/2020/national/confederate-monuments/(providing that Confederate monuments are being removed by governments from public property across the country without any First Amendment violations). Free speech is not generally a matter of compelled purchase and retention. *See generally* R. George Wright, *The Captive Audience Doctrine Today*, 20 DUKE J. CONST. L. & POL'Y 1 (2025).

[145] *See generally* R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57, 9 (1989) (arguing that "[t]he 'captive audience' doctrine is an essential component of First Amendment freedoms since the same interest in personal autonomy underlies both the right to speak and the right to be left alone" (emphasis added)).

[146] *See id.*

[147] *See id.*

[148] *See School Libraries and Education*, American Library Association, https://www.ala.org/advocacy/school-libraries ("NCES data reveals that approximately 8,830 public schools across the nation do not have a school library"); *see also* Lydia Kulina-Washburn, *Book Bans? My School Doesn't Even Have a Library: How Underfunding Is Its Own Form of Censorship*, EDUCATION WEEK (July 26, 2022), https://www.edweek.org/policy-politics/opinion-book-bans.

[149] *See* Jeannie Chiang, *At My High School, the Library Is For Everything But Books*, THE NATION (July 24, 2024), https://www.thenation.com/article/high-school-library-books-reading.

[150] *See* Dana Goldstein, *American Children's Reading Skills Reach New Lows*, N.Y. TIMES (Jan. 29, 2025), https://www.nytimes.com/2025/01/29/reading-skills-naep.html; Eric Levitz, *Is The Decline of Reading Poisoning Our Politics?: Your Brain Isn't What It*

as well, further diminish the practical impact of library book bans on free speech rights.

A possible alternative, basic-constitutional approach to library book bans might, however, be available. The typical book removal controversy involves what one might call the disparate and invidious treatment of ideas, books, or messages. We know that even in its own speech, governments cannot constitutionally establish a religion.[151] There are thus already some constitutional limits to government speech. Perhaps a government's own speech, expressing its own views, can fall afoul of the separate constitutional requirement of the equal protection of the laws for all persons. The theory would be that even if pure government speech can discriminate among favored and disfavored ideas, such government speech cannot discriminate, in such a way as to deny equal protection, among favored and disfavored cognizable groups of persons. In such cases, the levels of equal protection scrutiny for suspect and quasi-suspect classifications could presumably come into play.[152]

For the present, the possibility of challenging pure government speech on equal protection grounds is judicially

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Used to Be, VOX (June 3, 2025) https://www.vox.com/politics/414049/reading-decline-attention-span; Brittany Luse, et al., *Books vs. Brain Rot: Why It's So Hard to Read*, NPR (Feb. 3, 2025), https://www.npr.org/2025/02/03 ("Americans are reading fewer books and spending less time reading than ever"); Robert Pondiscio, *Students' Lack of Basic Knowledge of U.S. History and Civics Remains a National Embarrassment*, AM. ENTER. INST. (Sep. 18, 2023), https://www.aei.org/education/students-lack-of-basic-knowledge; Elliott Ruvalcaba, *The Decline of Literacy and the Rise of AI: Are We Losing the Ability to Think?*, S.J.H. EXPRESS (Feb. 28, 2025), https://sjhexpress.com/opinion/2025/02/28/the-decline-of-literacy-and-the-rise-of-ai-are-we-losing-the-ability-to-think/; Donna St. George, *Students' Understanding of History and Civics Is Worsening*, WASH. POST (May 3, 2023), https://www.washingtonpost.com/education/2023/05/03/students-history-civics-decline; Nadia Tamez-Robledo, *Reading Skills Are in Sharp Decline. Rescuing Them Won't Be Easy*, EDSURGE (Feb. 6, 2025), https://www.edsurge.com/news/2025-02-06-reading-skills-sharp-decline; Jean M. Twenge, *Are Books Dead? Why Gen Z Doesn't Read*, GENERATION TECH BLOG (Mar. 5, 2024), https://www.gentechblog.com/2024/03/05/gen-z-reading-decline ("[E]ven academically inclined teens aren't turning the pages anymore").

[151] *See, e.g.*, *Shurtleff*, 596 U.S. at 252; Pleasant Grove City v. Summum, 555 U.S. 460 (2009); *id.* at 482 (Stevens, J., concurring); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Simpson v. Chesterfield Cnty. Bd. of Sup'rs, 404 F.3d 276, 288 (4th Cir. 2005).

[152] For a recent discussion, *see* the opposing opinions in United States v. Skrmetti, 145 S. Ct. 1816 (2025) (disputing the appropriate equal protection scrutiny level for classifications at least arguably based on transgender status). At the federal statutory discrimination level in employment contexts, *see* Bostock v. Clayton Cnty., 590 U.S. 644 (2020).

controversial.[153] Ultimately, though, courts should recognize that governments put their words to many purposes, with many intended and predictably substantial effects.[154] Removal of a particular book or a broader set of library books, even if not itself a violation of a group's equal protection rights, is likely to be accompanied by further government speech, seeking to justify the book's removal, that may violate equal protection rights.

The very possibility of an equal protection challenge to a library book decision puts the free speech analysis of library book removals in a new light. Library book bans often focus on the cultural ideas of groups with limited or controversial political status and legitimacy. Let us now place the analysis of public library book bans in that light.

IV. LIBRARY BOOK BANS AND THE IMPORTANCE OF SYMBOLIC AND STIGMATIC POLITICS

As we have seen,[155] for a variety of reasons, the substantive impact on a patron's free speech rights of the bare removal of one or more library books is typically negligible. The same or better access to the relevant books and, crucially, their ideas remains easily available through varied book and non-book venues.[156] In this sense, a free speech challenge to library book removals will typically miss the mark. But this conclusion itself is, however, far from the full story.

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[153] *See, e.g.*, *Summum*, 555 U.S. at 482 (Stevens, J., concurring) (favorable to such a potential claim); Fields v. Speaker of Pa. House of Reps., 936 F.3d 142, 160 (3d Cir. 2019) (rejecting such a possibility) (citing Poway Unified Sch. Dist., 658 F.3d 954, 970 (9th Cir. 2011)); Sutcliffe v. Epping Sch. Dist., 584 F.3d 314, 331 n.9 (1st Cir. 2009) (equal protection rights may limit government speech doctrine); PETA v. Gittens, 414 F.3d 23, 28–29 (D.C. Cir. 2005) (holding open the possibility of an equal protection challenge to government speech) (dicta); L.E. by Esquivel v. Lee, 728 F. Supp. 3d 806, 837 (M.D. Tenn. 2024) (citing *Fields*, *supra*, rejecting such a possibility); New Mexico v. McAleenan, 450 F. Supp. 3d 1130, 1210 (D. N.M. 2020) ("the Equal Protection Clause prohibits government speech that promotes discrimination on the basis of race, religion, national origin, or gender"); Golden v. Russford Exempted Village Sch. Dist., 445 F. Supp. 2d 820, 826 (N.D. Ohio 2006) (government speech is "not subject to the strictures of the Equal Protection Clause") (citing *Simpson*, 404 F.3d 276, 288); R. J. Reynolds Tobacco Co. v. Bonta, 272 F. Supp. 2d 1085, 1180–09 (E.D. Cal. 2003) (holding open the possibility of at least minimum scrutiny equal protection challenges to government speech). For recent treatments of these issues, *see* Johnny G. Dubon, *Rereading Pico and the Equal Protection Clause*, 92 FORDHAM L. REV. 1567 (2024); Sarah Ryan, *Liberty and Equality Under the First Amendment: Scrutinizing Book Bans Through an Equal Protection Framework*, 90 BROOK. L. REV. 299 (2024).

[154] *See generally* J.L. Austin, *supra* note 98.

[155] *See supra* Parts II.-III.

[156] *See id.*

Especially in a politicized and polarized culture,[157] public library book purchases and removals can carry a significant symbolic cultural impact. It has been broadly argued that "[s]ymbols dominate American politics and permeate the law."[158] Which persons, groups, and causes receive acknowledgement or apparent endorsement through public recognition and celebration matters.[159] Groups often seek the apparent official approval of government through specialized license plate programs.[160] A group that seeks such apparent official approval could obviously convey its message more conspicuously through a larger print, day-glo bumper sticker. But the point is not solely about speaking through the license plate, but also about winning some sort of real or apparent official government recognition.[161]

For groups at the political margins, there eventually arise tradeoffs between largely symbolic official recognition and more substantive rights fulfilment.[162] But for such groups, at emerging stages of their public acceptance, official acknowledgement, however symbolic, can certainly be worth pursuing.[163] Official slights can be damaging. Symbolism, in the form of perceived government endorsement or legitimization, can be important for emerging groups and identities. Symbolic stigma and delegitimization can be costly. Library acquisition and retention

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[157] *See, e.g.*, Neil Fasching, et al., *Persistent Polarization: The Unexpected Durability of Political Animosity Around U.S. Elections*, 10 SCI. ADV. 1 (Sep. 6, 2024), https://doi.org/10.1126/sciadv.adm9198; *see also* Polarization & Partisanship, Stanford Univ., Ctr. on Democracy, Development & the Rule of Law, https://democracy.stanford.edu/themes-0/polarization-partisanship.

[158] Eric A. Posner, *Symbols, Signals and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 765 (1998).

[159] *See id.* at 772 (discussing the signaling and symbolic intention and effects of recognizing the Dr. Martin Luther King, Jr. national holiday).

[160] *See, e.g.*, Walker v. Texas Div., Sons of Confed. Vets., Inc., 576 U.S. 200 (2015).

[161] *See id.* For the classic account of political symbolism, *see* Murray Edelman, *The Symbolic Uses of Politics* (1964). *See also* Cass R. Sunstein, *On the Expressive Function of the Law*, 144 U. PA. L. REV. 2021 (1996).

[162] *See, e.g.*, Michael Denzel Smith, *The Seductive Danger of Symbolic Politics*, THE NATION (Jan. 21, 2016), https://www.thenation.com/article/archive/the-seductive-danger-of-symbolic-politics/ ("symbols, as powerful as they can be in some respects, are largely a distraction").

[163] This is partly a matter of shifting the proverbial Overton Window delimiting the realistically adoptable public policies. *See What Is the Overton Window?*, NEW STATESMAN, www.newstatesman.com/poltics/2015/04/what-overton-window-politics. Consider, e.g., the historical shift in popular acceptance of gay marriage over time. *See* the reversal of public opinion on that issue between 1996 and 2015, GALLUP, https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx; *see also* "American Library Association, Banned Books Week", https://ala.org/bbooks/banned.

decisions can help foster group identity and morale; collective belonging; and a sense of an ability to help share public opinion and public policy.[164] Free speech law, however, and to its discredit, currently does not capture any such important cultural and political dynamics.

[164] For a sense of this kind of importance of symbolic politics, *see, e.g.*, Sarah Lee, *The Power of Symbols*, NUMBER ANALYTICS (May 24, 2025), https://www.numberanalytics.com/blog/the-power-of-symbols. *More broadly, see* Graeme Gill & Louis F. Angosto-Fernandez, *Introduction: Symbolism and Politics*, 19 POL., RELIGION & IDEOLOGY 429 (2018); Edward Shils & Michael Young, *The Meaning of the Coronation*, 1 SOCIOLOGICAL REV. 63, 64 (1953) (on the substantive cultural power of some political symbols). *See also* Michael Walzer, *On the Role of Symbolism in Political Thought*, 82 POL. SCI. Q. 191 (1967).

LIGHTS, CAMERA, ARREST! *SHARPE V. WINTERVILLE POLICE DEPARTMENT* REPRESENTS A NOVEL COLLISION OF LAW ENFORCEMENT PRIORITIES AND THE FIRST AMENDMENT

Owen Robert Breen*

INTRODUCTION

Almost five years have passed since the death of George Floyd.[1] A videotaped confrontation between Floyd and law enforcement ignited a national discourse around police and criminal justice reform in the United States. Absent the recording of this event, this conversation and any resulting social shifts in the country may not have occurred.[2] Activists now seek to document public-facing officials, particularly law enforcement, in the name of accountability and transparency. These tactics have implicated the First Amendment right of people to record and publish their experiences and raised questions as to what limits exist on this ability to record.

A recent case, *Sharpe v. Winterville Police Department*, represents a contemporary clash of people's First Amendment rights and public safety. Courts are often left to balance the competing interests of an individual's rights and what police can lawfully do. In *Sharpe*, plaintiff Dijon Sharpe had sought to livestream a traffic stop on Facebook Live as a passenger in a vehicle when Officer Myers Helms of the Winterville Police sought to stop him from doing so.[3] The United States Court of Appeals for the Fourth Circuit held that unless the Winterville Police Department can prove its purported livestreaming ban furthers its interests and is narrowly tailored to them, the Department cannot stop people from livestreaming police officers during traffic stops.[4]

Sharpe is one of many cases where courts had to weigh the public's speech rights and public safety interests. New forms of communication, specifically social media, with the ability to draw many eyes and potentially activate public protest, present new challenges that stress the traditional lines drawn by courts

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* Juris Doctrinal Candidate at the University of North Carolina School of Law, Class of 2026. I would like to thank the editors and staff of the First Amendment Law Review, my family, and the teachers who helped cultivate my writing and communication abilities.

[1] *See* Evan Hill et al., *How George Floyd Was Killed in Police Custody*, The NEW YORK TIMES: VISUAL INVESTIGATIONS (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

[2] *Id.*

[3] *See* Sharpe v. Winterville Police Dep't, 59 F.4th 674, 678 (4th Cir. 2023).

[4] *Id.* at 678–79.

in these areas. Recent protest movements, like those on college campuses about the Gaza war, reflect how social media can fuel these occurrences.[5] This Note will discuss the *Sharpe* case and the relevant cases preceding it to illuminate the modern understanding of how individual rights to freedom of speech and expression interact with the state's police powers. Limits to this ability of individuals to record police and how legislatures have structured policies on these topics will be highlighted.

This Note proceeds in two other parts. Part I will describe the *Sharpe* case and the Court's reasoning behind its finding that the Town must provide evidence of how this policy furthers an important government interest. Furthermore, Part I will outline how the *Sharpe* case likely extends the reach of previous court findings protecting the right to record police. Part II will pick up on some of the time, place, and manner restrictions that affect the right to record touched upon in the cases talked about in Part I. The danger present in traffic stops for police and statutes aimed at preventing people from obstructing the duties of police officers will receive special attention in Part II. This Note seeks to find a balance between recording and documenting police activity, a vital right for society, and ensuring public safety for police officers and individuals.

I. THE *SHARPE* CASE AND ITS PREDECESSORS

A. Sharpe v. Winterville Police Department*: A Potential First Amendment Frontier*

Sharpe v. Winterville Police Department is a perfect example of a case that the Founders, at the time of the Bill of Rights ratification, could not imagine would one day test the boundaries of the First Amendment. The plaintiff, Dijon Sharpe, sued the Winterville Police Department and Officer Myers Helms in his personal capacity after Officer Helms attempted to stop Sharpe from livestreaming his traffic stop on Facebook Live.[6] Sharpe alleged the officers violated his First Amendment rights by telling him he could record them but not livestream due to officer safety

[5] *See How Has Social Media Changed Protest Movements? A Sociologist Weighs in*, NHPR (Apr. 30, 2024, 12:06 PM), https://www.nhpr.org/2024-04-30/social-media-protest-college-campus-pro-palestinian-effective; *see also* Kiara Alfonseca & Nadine El-Bawab, *Organizing Massive Campus Protest Required Logistical Savvy. Here's How Students Pulled It off.*, ABC NEWS (May 11, 2024, 5:05 AM), https://abcnews.go.com/US/organizing-massive-campus-protests-required-logistical-savvy-students/story?id=110021775.

[6] *See Sharpe,* 59 F.4th at 678.

concerns.[7] They also said that if he continued livestreaming, they would arrest him.[8] The Fourth Circuit Court of Appeals threw out the lawsuit against the individual officer on qualified immunity grounds and signaled, absent further evidence to the contrary, that the Town's policy violates the First Amendment.[9]

In its opinion, the Court is not clear which level of scrutiny it applies to analyze the apparent livestreaming ban in the Town of Winterville. If the plaintiff can prove the town does have an existing policy stopping individuals from livestreaming police during traffic stops, it would infringe upon protected speech, according to the Court.[10] Then, to survive First Amendment scrutiny, "the Town needs to justify the alleged policy by proving it is tailored to weighty enough interests," which the Court says the Town of Winterville hasn't done.[11]

A crucial component of the Court's analysis is a discussion of how Sharpe's livestreaming constitutes protected speech. The Court cites *Sorrell v. IMS Health Inc.* for its proposition that producing and promulgating information is protected speech under the First Amendment.[12] Central to the purpose of the First Amendment is to promote an open conversation about the government.[13] The Court asserts that recording police, which includes livestreaming, generates information about the government.[14] Therefore, a livestream of a police traffic stop is speech protected by the First Amendment.[15]

The test the Court employs then shifts to the Town to prove that its livestreaming policy, if there is one, survives First Amendment scrutiny. To do so, the Town would have to show "(1) the Town has weighty enough interests at stake; (2) the policy furthers those interests; and (3) the policy is sufficiently tailored to furthering those interests."[16] The Court writes that the Town has to demonstrate it has an interest in restricting people

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[7] *See id.*
[8] *See id.*
[9] *See id.*
[10] *See id.* at 679.
[11] *Id.*
[12] *See id.* at 680–81 (citing Sorrel v. IMS Health Inc., 564 U.S. 552, 570 (2011)).
[13] *See id.* at 681 ("'[A] major purpose of the First Amendment 'was to protect the free discussion of governmental affairs.'" (quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 755 (2011))).
[14] *See id.*
[15] *See id.*
[16] *Id.* (citing Reynolds v. Middleton, 779 F.3d 222, 228–29 (4th Cir. 2015)).

from livestreaming police.[17] The Town argues that the policy should be allowed due to officer safety concerns.[18] As the Town's reasoning goes, the contemporaneous nature of livestreaming technology could allow the public watching a traffic stop to find officers and obstruct them from carrying out their official duties.[19]

At this point of the opinion, the Court leaves the door open to revisiting this decision if the Town of Winterville can substantiate its claims about how law enforcement is put at risk by permitting people to livestream their encounters with police.[20] The Court acknowledges there is "undoubtedly a strong government interest" in officer safety,[21] and traffic stops are especially dangerous for law enforcement.[22] The Town, in the Court's view, had not specified how its policy promoted this interest or how it tailored the policy to that interest.[23]

The concurring opinion conceptualized the issue raised in this case as a Fourth Amendment matter.[24] Judge Niemeyer emphasizes that this exchange between Dijon Sharpe and officers occurred during a lawful Fourth Amendment seizure of a traffic stop.[25] During the stop, Sharpe refused to comply with police commands to stop livestreaming the officers and communicating with outside parties.[26] The issue, under a Fourth Amendment framework, is whether this livestreaming restriction was reasonable and, more broadly, if police during a traffic stop can limit individuals seized in a traffic stop from electronically communicating with others.[27] Much like the majority opinion, Judge Niemeyer asserts that traffic stops present numerous difficulties for police to navigate.[28] He also outlines the many instances where courts have upheld officers taking control of a traffic stop to protect themselves and public safety.[29] These methods employed by law enforcement include demanding all of a vehicle's occupants out of a car, frisking any occupants an

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[17] *See id.* at 681.
[18] *See id.* at 682.
[19] *See id.*
[20] *See id.* ("This officer-safety interest might be enough to sustain the policy. But on this record we cannot yet tell.").
[21] *Id.* (quoting Riley v. California, 573 U.S. 373, 387 (2014)).
[22] *See id.* (citations omitted).
[23] *See id.*
[24] *See id.* at 685 (Niemeyer, J., concurring).
[25] *See id.* at 685.
[26] *See id.*
[27] *See id.*
[28] *See id.* at 687.
[29] *See id.*

officer suspects may have a weapon, and searching the vehicle compartments of a seemingly dangerous individual.[30] This Fourth Amendment analysis relies simply on whether the actions taken by officers were "reasonable" in the vein of other traffic stop cases.[31]

B. Other Circuits Have Protected a Broad Right to Record Police

Sharpe is the first federal appellate case involving the livestreaming of police being First Amendment expression.[32] However, other U.S. Federal Circuit Courts have made parallel findings protecting an individual's right to record police. These rights take root in core First Amendment protections found in cases such as *Sorrell v. IMS Health Inc.*[33] and *Buckley v. Valeo*[34] which the court in *Sharpe* cites.[35] More specifically, *Project Veritas Action Fund v. Rollins* extends the findings of two previous First Circuit cases, *Glik v. Cunniffe*[36] and *Gericke v. Begin*[37] in upholding the right to record audio and video of police, even in secret.[38] On the other hand, *Fields v. City of Philadelphia* created some ambiguity as to whether the right to record police could be limited to just public settings, whereas *Irizarry v. Yehia* made it clear that time, place, and manner restrictions limit the First Amendment right to record.[39] Finally, the reasonableness test applied in Judge Niemeyer's concurrence to analyze whether this was a proper search and seizure under the Fourth Amendment is worthy of a brief analysis. Understanding this line of cases allows for the nuances of this area of law to be acknowledged as the First Amendment right to record police developed over time.

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[30] *Id.*
[31] Sharpe v. Winterville Police Dep't, 59 F.4th 674, 687 (4th Cir. 2023) ("[T]he touchstone of [the] analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." (quoting *Maryland v. Wilson*, 519 U.S. 408, 411 (1997)).
[32] *See* Jeff Welty, *Fourth Circuit Rules That the First Amendment May Protect a Vehicle Occupant's Right to Livestream a Traffic Stop*, N.C. CRIMINAL L.: A UNC SCH. OF GOV'T BLOG (Feb. 27, 2023), https://nccriminallaw.sog.unc.edu/fourth-circuit-rules-that-the-first-amendment-may-protect-a-vehicle-occupants-right-to-livestream-a-traffic-stop/.
[33] 564 U.S. 552 (2011).
[34] 424 U.S. 1 (1976).
[35] *See Sharpe*, 59 F.4th at 681.
[36] 655 F.3d 78 (1st Cir. 2011).
[37] 753 F.3d 1 (1st Cir. 2014).
[38] *See* Project Veritas Action Fund v. Rollins, 982 F.3d 813, 832 (1st Cir. 2020).
[39] *See* Fields v. City of Philadelphia, 862 F.3d 353, 358–62 (3d. Cir. 2017); *see also* Irizarry v. Yehia, 38 F.4th 1282, 1292 n.10 (10th Cir. 2022).

1. The First Amendment Underpinnings of the Right to Record

The Court in *Sharpe* cites foundational First Amendment cases to support the right to record. Firstly, the *Sharpe* Court points to *Sorrell v. IMS Health Inc.*, which held that creating and publishing information is speech under the First Amendment.[40] In *Sorrell*, the state of Vermont sought to argue that pharmaceutical manufacturers selling, disclosing, and using prescriber-identifying information was conduct, not speech.[41] Therefore, this activity, according to the state, could be regulated without heightened judicial scrutiny.[42] The *Sorrell* Court made clear that Vermont's regulation of pharmaceutical manufacturers targets one class of speakers using this information for one particular reason: marketing.[43] Therefore, it was an unconstitutional content and speaker-based restriction on speech.[44] Part of the finding in *Sorrell* took root in the idea that if the state places a restriction on how a person uses information, its actions impact the person's speech rights.[45]

The second case cited in *Sharpe* to substantiate the right to record was *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.[46] The arguments in the *Bennett* and *Buckley* cases centered on political candidates and campaign contributions. From this case, the foundation of the First Amendment and its central purpose comes into focus. The court asserts that most would agree that a crucial objective of the First Amendment "was to protect the free discussion of governmental affairs."[47] Furthermore, this consensus reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[48] These ideals about fostering free expression around topics of government affairs and public issues were also essential to the court's argument in *Sharpe.*

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[40] *See Sharpe*, 59 F.4th at 680–81 (citing Sorrel v. IMS Health Inc., 564 U.S. 552, 570 (2011)).
[41] *Sorrel*, 564 U.S. at 570.
[42] *See id.* at 566–67.
[43] *See id.* at 564.
[44] *Id.* at 563–64.
[45] *See id.* at 568–69 (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984)).
[46] *See* Sharpe v. Winterville Police Dep't, 59 F.4th 647, 681 (4th Cir. 2023).
[47] *See id.* ("'[A] major purpose of the First Amendment 'was to protect the free discussion of governmental affairs.'" (quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 755 (2011))).
[48] Buckley v. Valeo, 424 U.S. 1, 14 (1978) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

2. *Project Veritas Action Fund v. Rollins*: The Right Extends to Secret Audio and Video Recording

The United States Court of Appeals for the First Circuit held in *Project Veritas Action Fund v. Rollins* that a Massachusetts ban on surreptitious audio recordings of others could not extend to individuals seeking to record the police.[49] In determining whether a First Amendment right exists in the activity of secretly recording law enforcement, the First Circuit first looked at two of its previous cases, *Glik v. Cunniffe* and *Gericke v. Begin*.[50] *Glik* stood for the premise that the First Amendment protected the recording of government officials, including police, carrying out their duties in public.[51] These recordings could be gathered with or without the other party's consent.[52] The Court in *Glik* made this finding by considering how at the core of the First Amendment is a desire to protect the ability to collect information about civic officials.[53] Disseminating information and promoting discussion, especially in regard to law enforcement, protects the public from abuse of power by the government.[54]

The second case that the Court in *Project Veritas Action Fund v. Rollins* frames its First Amendment analysis on, *Gericke v. Begin*, involves a fact pattern similar to the *Sharpe* case.[55] The person trying to record police in *Gericke* was the individual police pulled over.[56] Unlike *Glik*, where the event leading to the lawsuit transpired in a public park, *Gericke* took place on the side of a highway, a less recognized site of a First Amendment expression in the eyes of the Court.[57] Notwithstanding these facts, the First Circuit in *Gericke* extended First Amendment protection to the activity undertaken, applying the same logic about how the recording is "newsgathering" in its depiction of government officials.[58] The First Circuit in *Project Veritas Action Fund v. Rollins* notes its decision is in line with other U.S. Circuit Courts that

[49] *See* Project Veritas Action Fund v. Rollins, 982 F.3d 813, 817–18 (1st Cir. 2020).
[50] *See id.* at 831.
[51] *See id.* (citing Gilk v. Cunniffe, 655 F.3d 78, 85 (1st Cir.2011)).
[52] *See id.* (citing *Gilk*, 655 F.3d at 80).
[53] *See id.* (citing *Gilk*, 655 F.3d at 82).
[54] *See id.* (citing *Gilk*, 655 F.3d at 82–83).
[55] *See id.* at 831.
[56] *See id.* (citing Gericke v. Begin, 753 F.3d 1, 7 (1st Cir. 2014)).
[57] *See id.* at 831–32 (citing *Gericke*, 753 F.3d at 3–4).
[58] *Id.* at 832 (citing *Gericke*, 753 F.3d at 7–9).

have all found a First Amendment right exists to some degree in these recordings.[59]

3. *Fields v. City of Philadelphia*: Is There a Difference Between Recording in Public and Private?

There seems to be a consensus among the U.S. Circuit Courts that people can record the police, with or without their knowledge, even if they are the principal person involved in the law enforcement interaction. Absent a dramatic shift, the debate about this issue moving forward will be what, if any, limits there are to this right. The Third Circuit Court of Appeals in *Fields v. City of Philadelphia* repeats throughout its opinion how the right to record encompasses only police carrying out their duties in *public* spaces.[60] This minor deviation in how the Third Circuit articulates the issue central to the case caught the attention of First Amendment absolutists, who preferred the formulation of the case facts as "recording police officers performing their official duties."[61] In *Fields*, the Court also emphasized that if the person recording interfered with police, which did not happen in *Fields,* "that activity might not be protected."[62] These apparent limitations on the right to record signal how limits may exist to this broadly recognized right.

4. Time, Place, and Manner Restrictions, Along with Privacy Rights, Still Apply

Courts have stressed how the right to record police, as protected by the First Amendment, is subject to reasonable time, place, and manner restrictions. The Tenth Circuit held in *Irizarry*

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[59] *See, e.g.*, ACLU v. Alvarez, 679 F.3d 583, 600 (7th Cir. 2012) (holding "the eavesdropping statute burdens speech and press rights" because "it interferes with the gathering and dissemination of information about government officials performing their duties in public"); *see also* Fields v. City of Philadelphia, 862 F.3d 353, 359 (3d Cir. 2017) ("[R]ecording police activity in public falls squarely within the First Amendment right of access to information."); *see also* Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing the First Amendment "right to gather information about what public officials do on public property" and "to record matters of public interest"); *see also* Fordyce v. City of Seattle, 55 F.3d 436, 442 (9th Cir. 1995) (finding a genuine dispute of material fact as to whether officers had infringed upon with the plaintiff's "First Amendment right to gather news").

[60] *See Fields*, 862 F.3d at 358–60.

[61] Adam Schwartz & Sophia Cope, *Third Circuit Declares First Amendment Right to Record Police*, ELEC. FRONTIER FOUND. (July 17, 2017) (*Fields*, 862 F.3d at 359), https://www.eff.org/deeplinks/2017/07/third-circuit-declares-first-amendment-right-record-police.

[62] *Fields*, 862 F.3d at 360.

v. Yehia that the right to film police publicly executing their duties deserves First Amendment protection.[63] In *Irizarry,* officers stopped an online journalist and blogger who frequently comments on the police from filming a DUI traffic stop.[64] However, citing *Glik*, the Court underscored how the First Amendment right involved in the case is subject to reasonable time, place, and manner restrictions.[65] The Tenth Circuit asserted how in *Irizarry*, no time, place, and manner implications arise due to the case involving a "'peaceful recording' of a traffic stop in 'a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation.'"[66] The converse of this characterization that would permit time, place, and manner restrictions would, therefore, be a hostile recording of a traffic stop that is either not in a commonly recognized public space or interferes with law enforcement carrying out their duties.

Judges have additionally raised concerns about how allowing the videotaping and audio recording of police encounters impacts individual's privacy, especially the privacy of victims of crime. People talking to police could be someone being questioned, a bystander to a crime, or an injured person.[67] These individuals may be least likely to want their conversations published online to the whole world. Judge Posner calls attention to how both privacy and public safety are "social value[s]" in considering if an Illinois eavesdropping statute can limit people's ability to record the police.[68] In the eyes of Judge Posner, the rule that the majority would establish would not only damage the social value of privacy but would hinder police from carrying out their duties to the fullest extent.[69] As a result, this license to record harms public safety.[70]

Police may not have privacy rights when exercising their role in public; however, citizens do, to a certain extent. Judge Posner, in his dissent, argues that not only the police, but these private citizens, will be recorded in some instances under the court's ruling.[71] Moreover, even if people record openly, as the

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[63] Irizarry v. Yehia, 38 F.4th 1282, 1292 (10th Cir. 2022).
[64] *See id.*
[65] *See id.* at 1292 n.10 (citing Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011)).
[66] *Id.* (quoting *Glik*, 655 F.3d at 84); *see also* Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000).
[67] *See* ACLU v. Alvarez, 679 F.3d 583, 611 (7th Cir. 2012) (Posner, J., dissenting).
[68] *Id.*
[69] *See id.* at 611–12.
[70] *See id.*
[71] *Id.* at 613.

American Civil Liberties Union (ACLU) suggested its members would seek to do, it may not be readily evident.[72] The prevalence of cell phones and other mobile devices would not lend to police and the public being able to discern whether they are being recorded.[73] Individual privacy could be eroded, which would be a detriment to public safety in this view. This perspective suggests that another argument exists to justify some limits on a blanket ability for people to record the police. "[S]ignificant social costs" necessitate, according to Judge Posner, a "basis in fact or history, in theory or practice, in constitutional text or judicial precedent, for weighting [these privacy priorities] less heavily than the social value of recorded eavesdropping."[74]

5. A Reasonableness Test for a Search and Seizure under the Fourth Amendment

Judge Niemeyer's argument in his *Sharpe* concurrence is that the Court in the *Sharpe* case could have decided the case under a Fourth Amendment framework.[75] Niemeyer cites the Supreme Court case *Maryland v. Wilson* to underscore how to lower the risk that exists in a traffic stop, an officer can "routinely exercise unquestioned command of the situation."[76] Some of the actions an officer may take during a traffic stop could naturally infringe upon a person's rights, such as ordering people out of a car or frisking suspects.[77] In *Wilson*, a passenger challenged a Maryland state trooper's action of ordering him out of a car and finding cocaine on him during a lawful traffic stop.[78] *Wilson*, cited by Niemeyer, references how a court should determine whether the actions taken were constitutional under the Fourth Amendment.[79] Courts in these cases are to apply a reasonableness test.[80]

The reasonableness analysis considers a person's right to individual security in comparison to the purported intrusion of an officer's actions.[81] In the *Pennsylvania v. Mimms*, which the

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[72] *Id.*
[73] *See id.*
[74] *Id.* at 614.
[75] *See* Sharpe v. Winterville Police Dep't, 59 F.4th 674, 685 (4th Cir. 2023) (Niemeyer, J., concurring).
[76] *Id.* (quoting Maryland v. Wilson, 519 U.S. 408, 414 (1997)).
[77] *See Sharpe*, 59 F.4th at 685 (Niemeyer, J., concurring).
[78] *See Wilson*, 519 U.S at 410–11.
[79] *See Wilson*, 519 U.S at 411 (quoting Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977)).
[80] *See id.*
[81] *See id.* (citing *Mimms*, 434 U.S. at 109).

Wilson opinion bases part of its ruling on, the Supreme Court noted it was the officer's practice to order people out of the car to protect officer safety.[82] There, the Supreme Court considered it "too plain for argument" that an officer safety justification given by police was "both legitimate and weighty."[83] Additionally, the danger faced by the officer when standing at the driver's window in the road was "appreciable," according to the Supreme Court.[84] To illustrate the inherent danger present in policing, the Supreme Court points to how, in 1994 alone, 5,672 officer assaults and 11 officer killings occurred during traffic stops to substantiate its conclusion.[85]

On the other side of the analysis, for an individual already lawfully stopped in a traffic stop, the further intrusion of being ordered out of the car was "*de minimis*."[86] The Supreme Court in *Wilson* extends this reasoning to passengers in the car.[87] In the eyes of the Court, passengers, if left inside a vehicle, could help perpetrate the cover-up of a more serious crime.[88] This cover-up could involve violence towards police.[89]

II. A BALANCE BETWEEN THE FIRST AND FOURTH AMENDMENTS

As courts interpret Constitutional rights over time, their relationship to each other will take on different forms. The traditional thinking of how the First and Fourth Amendments interact may be due for a reinvention. It is hard to maintain the same rule allowing people to record police using all mediums when individuals can not only record and preserve their encounters with law enforcement but transmit them to others simultaneously. Furthermore, it would be misguided to allow subtle, omnipresent technology to override long-established understandings of the Fourth Amendment. There will be points of conflict between the protections afforded to citizens in the First Amendment and the allowance of power given to the state under the Fourth Amendment. Where legislators and courts have tried to strike a balance in the exercise of these rights is an

[82] *See id.* at 412 (citing *Mimms*, 434 U.S. at 109–10).
[83] *Id.* (citing *Mimms*, 434 U.S. at 110).
[84] *Id.* (citing *Mimms*, 434 U.S. at 111).
[85] *Id.* at 413.
[86] *Id.* at 412 (citing *Mimms*, 434 U.S. at 111).
[87] *See id.* at 413–14.
[88] *See id.* at 414.
[89] *See id.*

apt starting point to envision where, if any, reformulation is possible.

Some have traced back the roots of so-called "First Amendment auditing," that is the documentation, often through video, of public officials and police, to the assault on Rodney King in 1991.[90] In the case of Rodney King, the sound of police activity outside awakened a Los Angeles resident, who grabbed his new camcorder, videotaped the interaction between King and four police officers, and sent it along to a local news station.[91] Later, when a court acquitted those officers on the use of excessive force charges, the incident, captured on video for the world to see, set off the 1992 Los Angeles riots.[92] The Rodney King case involved a mere camcorder. Today's technology at the public's disposal has far greater strength and reach. The speed at which someone can record and upload a video or other piece of media and have it in front of the public online is instant. The case of *Sharpe* is an excellent representation of this acceleration of First Amendment auditing from even the 1990s, exemplified by the fact that people followed along Dijon Sharpe in real-time as he documented his interaction with police on Facebook Live.[93]

This section will illuminate how the *Sharpe* case extends the outer boundary of the First Amendment defense. Analyzing his conduct by comparing it to prior cases will be a useful exercise. State statutes governing interference with police will be a focus on this section as well. Placing Sharpe's actions within this legal framework and the broader First Amendment auditing movement will help inform if there is a balance that can be struck between the right to speak and record and public safety.

A. The Sharpe *Case Stresses the Limits of the Freedom of Speech Defense*

Dijon Sharpe began livestreaming to Facebook at the time when officers pulled him over.[94] He was not continuing an existing recording, so his purpose presumably was to videotape his traffic stop for a digital audience. This action, in the words of the court, "provoked live responses" from people watching like "[b]e [s]afe [b]ro!" and "[w]here y'all at" along with others

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[90] Deborah J. Fox & Kristof D. Szoke, *First Amend. Auditors*, L.A. LAW. July–Aug. 2023, at 20, 22.
[91] *See id.*
[92] *See id.*
[93] *See* Sharpe v. Winterville Police Dep't, 59 F.4th 674, 678 (4th Cir. 2023).
[94] *See id.* at 685 (Niemeyer, J., concurring).

referring to the police as "SWINE."[95] When officers tried to seize Sharpe's phone after he refused to stop livestreaming, they explained how his activity posed an officer-safety issue.[96] In response, Sharpe moved his hand and phone further out of reach of officers and declared to his Facebook Live audience, "[l]ook at your boy. Look at your boy."[97]

Officer Helms later explained that livestreaming creates an officer-safety issue because livestreaming allows the potential for a possibly large number of people watching "to know where an officer is and what he or she is doing in real time."[98] Furthermore, Officer Helms underscored how this ability can "turn a routine traffic stop into a crowd-control operation, leaving the officer in an unsafe position."[99] This reasoning was more persuasive to Judge Niemeyer in his concurrence, which positioned this case around what is a reasonable search and seizure governed by the Fourth Amendment and not a First Amendment issue.[100] This case very well may have had a different result if the Court had to contend with either Sharpe inciting his Facebook Live audience more explicitly or any number of people showing up to his traffic stop and assisting in his resistance to law enforcement's instructions.

The First Circuit in *Gericke*, a traffic stop case resembling the facts of *Sharpe*, wrestled directly with the at-times diverging consequences of a First Amendment right to free speech and the Fourth Amendment allowance of police to search and seize individuals suspected of a crime. In *Gericke*, the court conceded that an individual's right to record is not absolute and can be limited.[101] The *Gericke* court quoted *Glik v. Cunniffe*, a First Circuit case often cited alongside *Gericke*, which stated that "a traffic stop is worlds apart from an arrest on the Boston Common in the circumstances alleged."[102] In *Glik*, the plaintiff recorded an arrest of a young man as a bystander in a public park when police arrested and charged him for his actions.[103] The *Gericke* court made this distinction between a traffic stop and a more public setting because traffic stops may be "especially fraught with

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[95] *Id.*
[96] *See id*.
[97] *Id.* at 685–86.
[98] *Id.* at 687–88.
[99] *Id.* at 688.
[100] *See id.* at 685.
[101] *See* Gericke v. Begin, 753 F.3d 1, 7 (1st Cir. 2014).
[102] *Id.* (quoting Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011)).
[103] *See Glik*, 655 F.3d at 79.

danger to police officers."[104] It cited *Glik*'s proposition that the right to film may be subjected to reasonable time, place, and manner restrictions when the situation requires.[105]

A scenario, like the presence of an armed suspect, may compel the police to order an area clear of bystanders, which would curtail an individual First Amendment right to film by effect.[106] The *Gericke* court does allow room for a police order to stop filming to pass constitutional muster if an officer "can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties."[107] *Gericke* restates an "admonition" found in *Glik* that "[i]n our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights."[108] Courts expecting the police to carry a heavy burden to protect citizen's rights, according to the court in *Gericke*, will weigh in determining whether an officer's orders were reasonable.[109] *Gericke* makes clear that a person is completely free under the First Amendment to record police until a restriction is established.[110] According to the plaintiff in *Gericke*, she followed all law enforcement instructions, and those instructions did not include the order to stop filming.[111] Her compliance with law enforcement's orders led the court to decide that the officers violated her First Amendment right; since the police imposed no restriction on her filming, her right to do so was unrestrained.[112] The compliance of the plaintiff in *Gericke* marks a distinct contrast to the plaintiff in *Sharpe*, who did not follow the order of police to cease livestreaming during his traffic stop.[113]

B. Legislative Solutions Governing Some Clashes Between Police and the Public Leave a Gray Area

Some states have crafted legislative solutions in an attempt, albeit some not as successful as others, to bridge this divide between officer safety and public expression. Texas, for example, has a law making it an offense if a person "interrupts,

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[104] *Gericke*, 753 F.3d at 7 (quoting Arizona v. Johnson, 555 U.S. 323, 330 (2009)).
[105] *See Gericke*, 753 F.3d at 7 (citing *Glik*, 655 F.3d at 84).
[106] *See id.* at 8.
[107] *Id.*
[108] *Id.* (quoting *Glik*, 655 F.3d at 84).
[109] *See id.*
[110] *See id.*
[111] *See id.* at 8–9.
[112] *See id.* at 10.
[113] *See* Sharpe v. Winterville Police Dep't, 59 F.4th 674, 685–86 (4th Cir. 2023).

disrupts, impedes, or otherwise interferes with… a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law."[114] Cases in Texas involving people trying to record police have precipitated legal challenges involving this provision and provide an instructive framework for conceptualizing a person's rights under the law.[115] In one such challenge, a person sought to film his traffic stop, and when an officer tried to arrest him, he moved the camera and his arms out of the officer's reach.[116] To resolve the claim that the officer's conduct infringed upon the plaintiff's First Amendment rights, the court held that the individual's actions went beyond speech in resisting arrest.[117] In another example from Texas, this time, a cop-watcher - someone with the intent to document another's interaction with law enforcement - would not comply with the orders of the police, who ended up arresting him under the state's interference with an officer statute.[118] In the end, the court did not side with the cop-watcher in this case, but reiterated the Fifth Circuit precedent that people have a right to record police while they perform their duties in public.[119]

Texas case law demonstrates how some action on the part of individuals that is more than them just exercising their First Amendment right triggers the interference statute. Other states, like California and Oregon, have similar laws about obstructing a police officer's official activities.[120] Arizona attempted to pass a statute that made it illegal to record a police officer within eight feet if the officer told the person to stop filming.[121] On private property, the officer could still order a person to stop recording, even if the property's owner allowed it.[122] A federal judge in Arizona blocked enforcement of the law by law enforcement

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[114] TEX. PENAL CODE ANN. § 38.15 (2025).
[115] *See* Aracely Rodman, Comment, *Filming the Police: An Interference or a Public Service*, 48 ST. MARY'S L.J. 145, 157–59 (2016).
[116] *See* Berrett v. State, 152 S.W.3d 600, 603 (Tex. App. 2004).
[117] *See id.* at 604.
[118] *See* Buehler v. City of Austin, No. A-13-CV-1100-ML, 2015 WL 737031, at *4–6 (W.D. Tex. Feb. 20, 2015).
[119] *See id.* at *9, *14; *see also* Enlow v. Tishomingo City, 962 F.2d 501, 509–10 (5th Cir. 1992) (holding that recording a police officer constitutes a valid basis for a First Amendment claim because such speech "fails to rise above 'inconvenience, annoyance, or unrest'").
[120] *See* CAL. PENAL CODE § 148(a)(1) (2025); OR. REV. STAT. ANN. § 162.247 (2023).
[121] *See* The Associated Press, *Federal Court Strikes Down Limits on Filming of Police in Ariz.*, FREE SPEECH CTR. AT MIDDLE TENN. ST. UNIV. (Jul. 26, 2023), https://firstamendment.mtsu.edu/post/federal-court-strikes-down-limits-on-filming-of-police-in-ariz/.
[122] *See id.*

ruling, "The law prohibits or chills a substantial amount of First Amendment-protected activity and is unnecessary to prevent interference with police officers given other Arizona laws in effect."[123] Placing a blanket distance requirement on recording or otherwise hampering people's protected speech rights, absent additional aggravating behavior on their part, does not seem likely to pass the constitutional scrutiny imposed by a court.

North Carolina has a similar statute on the books that a person is guilty of a Class 2 misdemeanor if "any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge an official duty."[124] If the "resistance, delay, or obstruction" is the proximate cause of an officer's "serious injury," the individual's offense is a Class I felony.[125] The statute provides for further escalation to a Class F felony if a person's actions are the proximate cause of an officer's "serious bodily injury" as defined by the statute. [126]

Another case from the Town of Winterville, *State v. Harper*, outlines the elements of an offense of resisting, delaying, or obstructing a public officer, which are:

> (1) "the victim was a public officer"; (2) "the defendant knew or had reasonable grounds to believe the [officer] was a public officer"; (3) "the [officer] was [lawfully] discharging or attempting to discharge a duty of his office"; (4) "the defendant resisted, delayed, or obstructed the [officer] in discharging or attempting to discharge a duty of his office"; and, (5) "the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse."[127]

In *Harper*, it was up to the jury to decide as a factual matter in dispute whether the defendant's refusal to provide his identification to law enforcement constituted "resisting, delaying, or obstructing" the officers.[128]

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[123] *Id.*
[124] N.C. GEN. STAT. § 14-223(a) (2025).
[125] § 14-223(b).
[126] § 14-223(c).
[127] State v. Harper, 877 S.E.2d 771, 776–77 (N.C. Ct. App. 2022) (citing State v. Peters, 804 S.E.2d 811, 815 (N.C. Ct. App. 2017)).
[128] *Harper*, 877 S.E.2d at 778–79.

C. Plaintiff Sharpe's Actions Diverge from N.C. Law and the First Amendment Auditing Movement

1. Sharpe's Actions Contrast with Case Law and N.C. Statute

It is worth spending a moment discussing whether Dijon Sharpe's behavior is like other cases where courts have upheld the right to record police. It is well-established that there is a broad right to record the police, even as the principal involved in the police encounter.[129] The case of *Gericke*, as noted previously, is a direct parallel to the *Sharpe* case because *Gericke* also centered on an individual being pulled over by the police seeking to record.[130] The First Circuit in *Gericke* made a specific point of stressing that the First Amendment protects the right to record for an individual until an officer puts a restriction in place.[131] If law enforcement can reasonably infer that what a person is doing will obstruct their duties, their actions pass constitutional muster.[132] Unlike the plaintiff in *Gericke* who complied with law enforcement,[133] Sharpe, who continued to record after officers asked him not to and pulled his phone away from officers, did not.[134] If the North Carolina obstruction statute applied to the actions of Sharpe in this case, it is arguable that he "willfully and unlawfully resisted, delayed, or obstructed a public officer in discharging or attempting to discharge an official duty," which is a Class 2 misdemeanor.[135] Sharpe's case on appeal to the Fourth Circuit was not about his resistance to police charges but his First Amendment claims, however.

The majority opinion of the Fourth Circuit in *Sharpe* did not address Sharpe's recalcitrance directly, as it focused on the narrow issue of the constitutionality of the Town of Winterville Police Department's alleged policy banning the livestreaming of officers.[136] However, Sharpe disregarding law enforcement's directives during his traffic stop seems like an important fact that distinguishes this case from others. Discussing whether qualified immunity protects the officers in this case, the Court does

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[129] *See supra* Section I.B.
[130] *See* Gericke v. Begin, 753 F.3d 1, 2 (1st Cir. 2014).
[131] *See id.* at 8.
[132] *See id.*
[133] *See id.* at 10.
[134] Sharpe v. Winterville Police Dep't, 59 F.4th 674, 685–86 (4th Cir. 2023) (Niemeyer, J., concurring).
[135] N.C. GEN. STAT. § 14-223(a) (2025).
[136] *See Sharpe*, 59 F.4th at 678.

include in their balancing analysis that Sharpe is the person pulled over in the case, and he wants to livestream, not record.[137] These factors weigh in favor of the police officers, who may not have known that stopping the principal person engaging with police from livestreaming them may be unconstitutional.[138] The concurrence by Judge Niemeyer focused much more on Sharpe's role in what is a lawful traffic stop.[139] In this Fourth Amendment framework, the officers were reasonable in their actions stopping Sharpe's recording as part of their search and seizure of him.[140]

2. *Sharpe* Occupies an Unsure Place in the First Amendment Auditing Line of Cases

Sharpe's behavior also seems disjointed from the roots of the First Amendment auditing movement. Some have described First Amendment auditors as highly informed about the Constitution, laws, and policies surrounding the activity they seek to undertake.[141] They pick an opportune time to descend on a public location like a courthouse, library, or police station to test the officials' response to their presence and if it comports with the First Amendment.[142]Auditors often will post the records of these encounters online to spark conversation.[143] There is an argument that cop-watching - the recording of a police encounter - is critically different than a First Amendment audit.[144] In this view, cop-watching documents a public interest while First Amendment auditing tries to create something in the public interest.[145] First Amendment auditors may not have anything to post online if there is no potentially embarrassing or controversial exchange with a public employee.[146]

There is no doubt recording a police encounter can shed light on critical matters like protecting people from abuse. Nothing in the *Sharpe* case indicates that police sought to stop him from recording his traffic stop.[147] What the officers did not want him to do was simultaneously communicate with his online

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[137] *See id.* at 683–84.
[138] *See id.* at 684.
[139] *See id.* at 685 (Niemeyer, J., concurring).
[140] *See id.* at 687–88.
[141] *See* Anna Thérèse Beavers, Comment, *First Amendment Audits: A Socio-political Movement*, 93 MISS. L.J. 527, 529 (2023).
[142] *See id.* at 528–29.
[143] *See id.* at 530.
[144] *See id.* at 557–58.
[145] *See id*.
[146] *See id.* at 558.
[147] *See* Sharpe v. Winterville Police Dep't, 59 F.4th 674, 678 (4th Cir. 2023).

followers through livestreaming.[148] If Sharpe believed he was a victim of police brutality or misconduct, he was seemingly free to post his exchange on Facebook later and bring awareness to his claims. It is a departure from traditional First Amendment auditing and cop-watching to allow people momentarily detained by police to dictate the terms of their detainment by broadcasting it online in the same moment. If police have to allow plaintiffs to set up a livestream during their arrest, public safety will suffer. Furthermore, unlike other auditing scenarios, the conduct of Sharpe and his followers did not demonstrate an exchange centered on the First Amendment or other constitutional rights.

A trend garnering alarm is when First Amendment auditing departs from its roots of holding the government accountable and morphs into an attention-grabbing or incendiary tactic. Some have noted that the ability to monetize content on platforms like YouTube and bring lawsuits in federal courts, possibly with lucrative settlements, incentivizes auditing and cop-watching activity.[149] There are instances of so-called auditors engaging in increasingly provoking behavior towards the police to generate more explosive content that a larger audience will, in turn, watch.[150] These videos can lead to individuals seeking out the private social media accounts of officers and posting information like their home addresses and phone numbers online.[151]

Activists also frequently turn to the judicial system to litigate their claims under civil rights statutes like 42 U.S.C § 1983, which allows individuals to sue state and local officials for violations of their constitutional rights. Qualified immunity insulates law enforcement from unknowingly infringing upon one's constitutional rights.[152] Qualified immunity does not generally extend to the right to record police as courts have clearly protected it.[153] Section 1983 also opens an additional cause of action to auditors known as the "Monell doctrine."[154]

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[148] *See id.* at 685–86 (Niemeyer, J., concurring).
[149] *See* John I. Winn, *Weaponizing the First Amendment*, 29 N.C. ST. BAR J. 12, 12 (Spring 2024).
[150] *See id.* (noting instances of auditors openly carrying firearms, using profane language, and resisting arrest).
[151] *See id.* at 13.
[152] *See id.*
[153] *See id.*
[154] *Id.* ((citing Monell v. Department of Social Services of the City of New York, 436 US 658 (1978) (held that female employees could sue the Department due to an

This doctrine allows individuals to sue a municipality for the wrongdoings of their agents or employees due to failure to train or oversee them.[155] The Court in *Sharpe* permitted the plaintiff's claims to proceed against the town under *Monell*.[156] All this litigation ensnarls municipalities and their taxpayers in potentially months and years of court expenses.

Police departments have sought to address the rise of First Amendment auditing and an overall proliferation of recording technology among the public.[157] Methods like reinforcing professionalism, courtesy, and respect with the public, alongside limiting constitutional debates and confrontations with auditors, are seen as ways to take the sting out of the medium.[158] There is an understanding in the First Amendment auditing and cop-watching space that positive encounters rarely get published due to people's lack of interest in them.[159] Police departments and training organizations have also published resources about the public's right to record police.[160]

D. A Person's First Amendment Right to Record Should Be Broad but Not All-Consuming

The wrong takeaway of the *Sharpe* case is that the Fourth Circuit upheld an individual's First Amendment right to livestream police. Instead, the correct impression is that if the Town of Winterville does not provide evidence of how its officer safety concerns justify its anti-livestreaming policy or is narrowly tailored to that government interest, it violates a person's First Amendment right.[161] More generally, it is an incorrect assertion that the First Amendment protects all recordings of police. The Court protected the officer's actions in the *Sharpe* case under the qualified immunity doctrine because livestreaming was not clearly established under a person's First Amendment rights at the time of the encounter.[162] Moreover, this note has detailed limits to an individual's right to record police, such as how they

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official policy which required pregnant employees to take unpaid leave before it was medically necessary)).

[155] *See id.*

[156] *Id.*

[157] *See id.* at 14.

[158] *See id.*

[159] *See* Beavers, *supra* note 141 at 559.

[160] *See Public Recording of Police*, THE INT'L ASS'N OF CHIEFS OF POLICE, https://www.theiacp.org/prop.

[161] *See* Sharpe v. Winterville Police Dep't, 59 F.4th 674, 678 (4th Cir. 2023).

[162] *See id.*

are subject to time, place, and manner restrictions.[163] Courts have recognized the danger for law enforcement in high-risk situations like traffic stops.[164] When a person resists police officers' instructions or impedes their ability to carry out their duties, it may be constitutional for the officers to order them to stop filming.[165] Statutory provisions in states address this obstruction of police activity.[166] Courts have drawn a line in these laws between those statutes imposing a blanket restriction for people just exercising their rights and those policies that target individuals seeking to go beyond what is protected by the First Amendment by impeding law enforcement from carrying out their duties.[167]

It is not always in the control of the police officers, though, what the public's response will be to an instance of cop-watching. In *Sharpe*, it seems nothing materialized from comments asking where the police encounter was taking place.[168] It is not a stretch to imagine what a more sophisticated suspected criminal or group of criminals could do with the power of livestreaming. Communicating with and potentially activating co-conspirators or other concerned parties in real-time opens up the police to unknown risks, as discussed by Officer Helms in the *Sharpe* case.[169] Unlike recordings that people can watch back after the fact, livestreaming does not provide the time to cool down in these sometimes-tense encounters and invites outside people into an ongoing dispute. This reality not only endangers law enforcement, but the public involved in a police interaction and bystanders as well. Additionally, privacy concerns come into play when individuals seek to broadcast some of the most intimate moments of crisis during a law enforcement event online.

If something happened in one of these instances of livestreaming where the public or law enforcement is hurt or worse, it could harm the case for allowing this First Amendment protection and spark a backlash against cop-watching and First Amendment auditing more broadly. Courts would have to work in an elevated security threat in their balancing analysis, which

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[163] *See supra* Section Part I.B.iv–I.B.v.
[164] *See, e.g.*, Gericke v. Begin, 753 F.3d 1, 8 (1st Cir. 2014).
[165] *See id.*
[166] *See supra* Section II.B.
[167] *See supra* Section II.B.
[168] *See* Sharpe v. Winterville Police Dep't, 59 F.4th 674, 685–86 (4th Cir. 2023) (Niemeyer, J., concurring).
[169] *See id.* at 687–88.

would weigh in favor of police departments, the same organizations First Amendment auditors and cop-watchers seek to reform. The Town of Winterville and the Winterville Police Department in *Sharpe* will likely marshal evidence relating to its interest in officer safety and detail some of the threats facing law enforcement in response to the Fourth Circuit's remand and in an effort to bolster its case. The Fourth Circuit should be made aware, if not already, of the 5,672 officer assaults and 11 officer killings that occurred during traffic stops in 1994, a year the Supreme Court took up a case like *Sharpe*.[170] To add insult to injury, from May 25, 2020, the day of George Floyd's death, to July 31, 2020, 2,037 officers were injured in 8,700 protests that took place during this time across the United States.[171]

The public should want to encourage serious recordings of law enforcement activity that illuminate actual wrongdoings. The line of cases from Rodney King to George Floyd illustrates how good-meaning observers exercising their First Amendment right to record police can push real change in the country. Agitators seeking to monetize other people's experiences online or latch onto large organizations to push wins in court go against this legacy. A thriving Constitutional order necessitates the balance of individual rights and not a scheme where one right overpowers the rest of them.

CONCLUSION

The Fourth Circuit in *Sharpe* takes a measured approach when confronted with the question of whether the First or Fourth Amendment wins out in a case between an individual and the police. The Court applies the framework of an existing test that requires the Town of Winterville and its police department to prove its ban on livestreaming a police encounter is narrowly tailored to meet a weighty enough government interest. It may be tough for the Town to substantiate its purported interest in officer safety without more livestreaming incidents and/or out-of-control traffic stops. The question remains if the Court had to go this far to protect Dijon Sharpe's speech rights in the first place. Fundamental understandings of the Fourth Amendment that appear in case law defining the limits of the First Amendment right to record police and in legislation elucidating

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[170] *See* Maryland v. Wilson, 519 U.S. 408, 413 (1997).

[171] INTEL. COMMANDERS GRP., MAJOR CITIES CHIEFS ASS'N, REPORT ON THE 2020 PROTESTS AND CIVIL UNREST 10 (2020), https://majorcitieschiefs.com/wp-content/uploads/2021/01/MCCA-Report-on-the-2020-Protest-and-Civil-Unrest.pdf.

the punishments for refusing arrest or compliance with an officer's instructions offer an alternative view of this case. It should not have to take an incident involving the livestreaming of police causing injury or threat of injury for courts to intervene and apply a remedy of common sense. Antithetical to a common-sense approach to public safety is allowing a person under suspicion by law enforcement to vlog their experience and get instant feedback from their followers about it. In doing so, we allow people suspected of various infractions to manipulate the terms of their own investigation to allow their filming. This subservience to the right to document and record has the potential to undermine the Constitutional order and public safety principles that we all benefit from.

BUT WORDS WILL NEVER HURT ME: RECONCILING PARENTAL FREE SPEECH AND VERBAL ABUSE OF CHILDREN

Madeleine A. Chapman*

ABSTRACT

The protection of parental rights and free speech has long been fundamental to American constitutional law. While these liberties occupy distinct areas within constitutional doctrine, they are deeply interconnected with issues of child welfare and family law.[1] Throughout history, courts have emphasized the importance of safeguarding parental authority over children and recognizing the family as a fundamental unit deserving protection from undue government interference.[2] At the same time, the First Amendment protects the right to free speech. [3]Both of these priorities raise complex questions when they conflict with the need to keep children safe from harm. One area of law that has not been thoroughly explored is the unique dynamics of the parent-child relationship in the context of verbal and emotional abuse. This tension prompts a critical examination of whether these laws should continue to be framed primarily as a family law issue addressing parental expression, or if the protection of children requires rethinking the limits of free speech within the home.

* Juris Doctor Candidate at the University of North Carolina School of Law, Class of 2026. I would like to especially thank my First Amendment professor, Professor William Marshall, my high school Constitution teacher, Gretchen Wulfing, and my husband, Jason Chapman.

[1] *See The Supreme Court's Parental Rights Doctrine*, PARENTAL RIGHTS, https://parentalrights.org/understand_the_issue/supreme-court/ (last visited Oct. 8, 2025) [hereinafter PARENTAL RIGHTS]; *see generally* Michael Kent Curtis, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000).

[2] *See id.*

[3] *See* U.S. Const. amend. I.

INTRODUCTION

"Sticks and stones may break my bones, but words will never hurt me."[4] This familiar childhood saying suggests that words are harmless, implying that playground taunts can be forgotten as easily as a scraped knee or a sprained wrist from the jungle gym. However, words can have a lasting and significant impact on children, particularly when those words are wielded by a parent against their own child.[5]

The First Amendment guarantees the fundamental right to free speech, but it does not necessarily protect "good" speech—speech that is productive, kind, or constructive.[6] Instead, it shields speech that can be hurtful, hateful, or outright aggressive, often raising the question of whether such protections should be absolute.[7] While harmful and hateful speech is typically safeguarded between adults, the dynamic shifts when this speech is directed at children.[8] In these cases, the context and impact of speech take on greater significance. The inherent power imbalance between parent and child complicates our understanding of free speech protections, particularly when such speech causes psychological harm to vulnerable young minds.[9]

Part I of this Note begins by exploring the historical foundations of free speech and parental rights in the United States. It examines the development of free speech protections both inside and outside the home, as well as the evolution of parental rights. Part II then addresses the First Amendment's limitations on parental free speech, focusing on the state's compelling interest in protecting children and the mechanisms available for state intervention. Part III considers verbal abuse as a First Amendment issue, analyzing its potential classification under existing free speech doctrines such as fighting words, true threats, and strict scrutiny. It also explores whether verbal abuse

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[4] *Sticks and Stones May Break My Bones: Definition, Meaning, and Origin*, U.S. DICTIONARY (Feb. 13, 2024), https://usdictionary.com/idioms/sticks-and-stones-may-break-my-bones/.

[5] This paper acknowledges the legal protections extended to parents as well as other types of legal guardians. While the term "parent" is used throughout, it is intended to encompass other adult-child legal relationships, including guardianships and caregiving roles held by family members who are not the child's parent.

[6] *See* Randall P. Bezanson, *The Quality of First Amendment Speech*, 20 HASTINGS COMM. & ENT. L.J. 275, 277 (1998).

[7] *See generally* Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887 (1991–1992).

[8] *See generally* Snyder v. Phelps, 580 F.3d 206 (2009).

[9] *See* A.H. MACK, *Hurtful Words: Association of Exposure to Peer Verbal Abuse with Elevated Psychiatric Symptom Scores and Corpus Callosum Abnormalities*, *in* 2012 Y.B PSYCHIATRY & APPLIED MENTAL HEALTH 21, 21–22 (2012).

warrants a new category of unprotected speech or an expansion of current doctrines, while acknowledging the risks of overregulation. Ultimately, this Note asks how verbal abuse should be assessed within a free speech framework and what, if any, limits should be placed on speech that harms a child's well-being.

I. HISTORY OF FREE SPEECH AND PARENTAL RIGHTS

A. Free Speech in and out of the Home

Freedom of speech is a fundamental right that has been vigorously protected since the drafting of the Constitution.[10] This right is considered a cornerstone of individual liberty, allowing citizens to express their opinions, challenge authority, and engage in public discourse without fear of government censorship.[11] Over time, the Court has consistently reinforced the importance of safeguarding free speech, recognizing it as essential to the functioning of a free and open society.[12]

One of the most compelling examples of this strong protection is the landmark case *Cohen v. California*.[13] In this case, Cohen was arrested for breach of the peace under a California law prohibiting offensive conduct in public after wearing a jacket displaying an expletive opposing the draft.[14] He challenged his conviction, arguing that his actions were protected by the First Amendment's guarantee of free speech.[15] The Supreme Court ruled in Cohen's favor, emphasizing that the government cannot restrict speech merely because it is offensive or provocative.[16] This decision highlighted the Court's commitment to preserving the broad protections of free expression, even when that expression challenges societal norms or stirs discomfort. By ruling in favor of Cohen, the Court reinforced the principle that the First Amendment's protections extend to speech that is controversial, provocative, or unpopular, illustrating the robust defense of free speech within American constitutional law.

The ruling and reasoning of *Cohen*, however, is in contrast with *FCC v. Pacifica Foundation* in which the Court allowed the

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[10] *See generally* Curtis, *supra* note 1.
[11] *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech,* 25 UCLA L. REV. 964, 966 (1978).
[12] *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 598 (1982).
[13] 403 U.S. 15 (1971).
[14] *Id.* at 16, 22.
[15] *See id.* at 18.
[16] *See id*. at 26.

government to regulate offensive language on broadcast radio.[17] The case arose after a radio station aired George Carlin's "Filthy Words" monologue during the day, prompting a complaint from a parent whose child heard the broadcast, which contained explicit language, during a car ride.[18] As a result, the Court permitted limited restrictions on broadcast radio content to prevent children from encountering harmful language.[19] This reasoning acknowledged the medium's influence and the potential for harmful exposure to children within their private spaces.

These rulings highlight a key difference in how the law treats speech: while *Cohen* upheld the robust protection of explicit language in public spaces, *FCC* allowed the government to regulate similar harmful speech that could impact children in their private environments, leading to different outcomes despite both cases involving profane language.[20] This balance emphasizes the importance of both safeguarding children and upholding the principles of free expression. While free speech is a fundamental right, private spaces such as a home or a car are unique environments where the protection of children from harmful influences is especially important.[21] In these settings, parents, as primary caregivers, bear the primary responsibility to regulate what their children are exposed to, including the speech they hear, in order to shield them from potentially harmful content.[22]

B. The History of Parental Rights

The strong protection of free speech, while essential to individual liberty, shares a similar foundation with the rights of parents to raise their children as they see fit, free from

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[17] *Compare* Cohen v. California, 403 U.S. 15, 26 (1971) (upholding robust protections of explicit language in public spaces), *with* FCC v. Pacifica Found., 438 U.S. 726, 550 (1978) (upholding narrow restrictions on explicit language on broadcast radio to protect children).

[18] *See* FCC v. Pacifica Found., 438 U.S. at 729–30.

[19] *See id.* at 750.

[20] *Compare* Cohen v. California, 403 U.S. 15, 26 (1971) (upholding robust protections of explicit language in public spaces), *with* FCC v. Pacifica Found., 438 U.S. 726, 550 (1978) (upheld narrow restrictions on explicit language on broadcast radio to protect children).

[21] *See id.* at 748–50.

[22] *See id.* at 758–60 (Powell, J., concurring in part) (noting the changes in technology, the influence of various media platforms on parental control over the content their children are exposed to has evolved significantly. From broadcast radio in cars in 1978 to the broader range of digital platforms and devices today, which have increased exposure and access).

unwarranted government interference. Both rights are strongly protected by the law, with the legal system recognizing the fundamental importance of these freedoms.[23] This is particularly evident in the longstanding legal recognition of parental rights, which the Supreme Court has upheld as essential to the autonomy of the family unit.[24] For decades, parents have been presumed to be the best caretakers of their children unless proven otherwise.[25] This principle underscores the sanctity of family life, affirming that parents have primary responsibility for raising their children and preparing them for life beyond state control.[26]

The origins of the legal doctrine of parental rights can be traced back to the early 20th century.[27] This principle was solidified in the Court's rulings in landmark cases that shaped the constitutional protection of parental autonomy. One such case is *Meyer v. Nebraska*, where the Court struck down a state law prohibiting the teaching of foreign languages to young children, affirming that the Due Process Clause of the Fourteenth Amendment protects a parent's right to direct their child's education and upbringing.[28] Similarly, in *Pierce v. Society of Sisters,* the Court invalidated a statute requiring children to attend public schools, recognizing the rights of parents to choose private or religious education as an alternative.[29] Although both cases focused on education, these Court decisions extended beyond the educational context, establishing a foundation for the constitutional protection of parental autonomy as a critical aspect of individual liberty and family integrity.[30]

Parental autonomy, however, is not an absolute right and was challenged in *Prince v. Massachusetts*, which navigated the tension between parental rights and the state's role in

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[23] *See* Redish, *supra* note 12, at 594; *See generally* PARENTAL RIGHTS, *supra* note 1.
[24] Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).
[25] *See id.* at 2445 n.133.
[26] *See* PARENTAL RIGHTS, *supra* note 1.
[27] *See generally* Meyer v. Nebraska, 262 U.S. 390 (1923).
[28] *See id.* at 399.
[29] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 531 (1925).
[30] *See generally* PARENTAL RIGHTS, *supra* note 1; For more information on the harms of removing children from their homes, *see generally* Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523 (2019). This concept reflects the "penumbra of rights," which refers to implicit rights derived from explicit constitutional guarantees create a broader right to privacy. This concept later became foundational in *Roe v. Wade*, 410 U.S. 113 (1973), where the Court ruled that a woman's decision to have an abortion was protected under this constitutional right to privacy (*see generally* Griswold v. Connecticut, 381 U.S. 479 (1965)).

safeguarding child welfare.[31] *Prince* involved a child who, under the direction of her aunt, distributed religious literature in public, violating a Massachusetts child labor law.[32] The Court upheld the law, ruling that the state's interest in protecting children outweighed parental or guardian authority.[33] While the Court upheld certain limitations on parental authority to protect children from harm, it emphasized the importance of avoiding excessive state interference in family life, thereby reinforcing the delicate balance between public interests and private rights.[34]

The ruling in *Prince* supports the conclusion that while the state has a vested interest in protecting a child's welfare, it cannot overstep the boundaries of parental rights without significant justification.[35] The state may intervene if a parent is proven unfit or if there is clear evidence of abuse or neglect.[36] However, the parent-child relationship remains strongly safeguarded by the Constitution. This principle was further emphasized in cases like *Quilloin v. Walcott*, where a man sought to adopt a child raised by his wife, and the biological father had not established legal parental rights or provided consistent support.[37] The Georgia Supreme Court allowed the adoption, ruling that the biological father lacked standing to block it under state law, as he had never legitimated the child and only the mother's consent was required for the adoption of an illegitimate child.[38] On appeal, the Supreme Court found that due process was not violated.[39] However, it clarified that severing the bond between a parent and child without evidence of parental unfitness would violate the Due Process Clause in other circumstances.[40]

The Court has consistently upheld parents' fundamental right to raise their children, as demonstrated in landmark cases like *Meyer, Pierce, Prince,* and *Quilloin*. While these cases affirm strong protection for parental autonomy, they also establish that such rights are not unlimited. The state may intervene when there is evidence of harm or abuse, ensuring that parental rights do not extend to actions that threaten a child's well-being.

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[31] *See* Prince v. Massachusetts, 321 U.S. 158, 165 (1944).
[32] *See id.* at 160–61, 162.
[33] *See id.* at 165.
[34] *See id.* at 166.
[35] *See id.* at 166–67.
[36] *See* Douglas J. Besharov, "*Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention*, 8 HARV. J. L. & PUB. POL'Y 539, 554 (1985).
[37] *See* Quilloin v. Walcott, 434 U.S. 246, 247 (1978).
[38] *See id.* at 251–52.
[39] *See id.* at 256.
[40] *See id.* at 255.

II. THE FIRST AMENDMENT AND LIMITATIONS ON PARENTAL FREE SPEECH

A. Compelling State Interest in Protecting Children

Parental rights and free speech are foundational to American legal principles, yet both may be limited when their exercise harms children. For example, parental autonomy may conflict with state interests in child welfare, or speech entering the home might endanger a child's well-being.

The intersection of free speech, parental rights, and a child's welfare is particularly evident in cases of verbal abuse. Verbal abuse, a form of emotional abuse, uses speech as a means to harm, intimidate, or demean a child.[41] This type of abuse can manifest in many forms, such as constant criticism, belittling remarks, threats, or verbal neglect—when a parent fails to offer emotional support or encouragement.[42] Unlike isolated verbal outbursts, verbal and emotional abuse are typically part of a larger, ongoing pattern that shapes the parent-child relationship.[43] This toxic dynamic undermines a child's psychological health, and "impairs a child's emotional development or sense of self-worth."[44]

Children subjected to verbal abuse often experience emotional harm, such as low self-esteem, fear, distress, and anxiety.[45] These emotional impacts can lead to behavioral changes, such as oppositional tendencies, attention-seeking, or antisocial actions.[46] They may also contribute to developmental and educational challenges while hindering social development, resulting in difficulties forming relationships, withdrawal, isolation, or increased aggression.[47]

Recognizing the profound and enduring harm caused by verbal and emotional abuse, child protection laws are designed to protect minors from a broad spectrum of abuse and neglect.[48]

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[41] *See* Shanta R. Dube et al., *Childhood Verbal Abuse as a Child Maltreatment Subtype: A Systematic Review of the Current Evidence*, 144 CHILD ABUSE & NEGLECT 1, 4 (2023). Verbal and emotional abuse is not restricted to a parent-child relationship. However, this is the context that it will be referred to throughout this paper.

[42] *See id.* at 8.

[43] *See id.* at 7.

[44] *Id.*

[45] *See id.* at 18–19.

[46] *See id.*

[47] *See id.*

[48] *See Verbal Abuse in Child Custody: Legal Implications and Protections*, LEGAL CLARITY (Nov. 12, 2024) https://legalclarity.org/verbal-abuse-in-child-custody-legal-implications-and-protections/#google_vignette [hereinafter *Verbal Abuse in Child Custody*].

These laws acknowledge that children are inherently vulnerable and require heightened safeguards to ensure their well-being.[49] While traditional forms of abuse such as physical harm and neglect have long been recognized, emotional and verbal abuse have increasingly garnered attention for their significant an lasting effects on children.[50] Experts emphasize that verbal abuse may have the same lasting mental health effects as violence, leading to more frequent documentation of its effects.[51] The growing recognition of these effects has driven reforms in child protection laws, aiming to provide a more comprehensive approach to safeguarding children from all forms of harm, not just physical.[52]

Given its profound effects, verbal abuse clearly falls within the state's mandate to protect children.[53] However, addressing this harm requires a careful balance: the state must act to shield children from abuse while respecting parental rights and free speech within the family. This balance becomes even more complex as government intervention brings verbal abuse into the realm of state action, raising constitutional questions about the extent of state power to regulate family dynamics and private speech.

B. Mechanisms of State Intervention

To navigate these competing issues, the state employs specific mechanisms designed to protect children from harm while addressing the constitutional challenges of regulating family dynamics and private speech. These measures not only recognize the issue of verbal abuse but also implement concrete protective actions, such as criminalizing such behavior and imposing legal penalties. For example, North Carolina makes it a crime for a parent to "[c]reate[] or allow[] to be created serious emotional damage to the juvenile; serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others" which can

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[49] *See, e.g.*, CHILD WELFARE INFORMATION GATEWAY, https://www.childwelfare.gov/ (last visited Oct. 21, 2025).

[50] *See* Ben Mathews & Shanta Dube, *Childhood Emotional Abuse is Becoming a Public Health Priority: Evidentiary Support for a Paradigm Change*, 4 CHILD PROT. & PRACTICE 1, 2 (2024).

[51] *See* Heather L. Dye, *Is Emotional Abuse as Harmful as Physical and/or Sexual Abuse?*, 13 J. CHILD & ADOLESCENT TRAUMA 399, 406 (2020); *see Verbal Abuse in Child Custody*, *supra* note 48.

[52] *See Verbal Abuse in Child Custody*, *supra* note 48.

[53] *See* Rebecca Gutwald & Michael Reder, *How to Protect Children? A Pragmatic Approach: On State Intervention and Children's Welfare*, 27 J. ETHICS 77, 77–95 (2023).

result from verbal abuse.[54] This highlights the seriousness with which certain jurisdictions address verbal abuse.

Child protection laws empower courts to issue protective orders as a form of state intervention, either alongside or in place of criminal penalties.[55] Protective orders, which may restrict an abusive parent's contact with their child, are designed to prioritize the child's safety while balancing the state's duty to protect children and the rights of parents.[56] However, monitored visitation—a common intervention ordered by courts—can indirectly limit a parent's First Amendment rights by restricting their ability to speak freely with their children.[57] This silencing effect may lead parents to remain quiet during visits to avoid further jeopardizing their custody rights.

In cases where protective orders alone are insufficient, Child Protective Services (CPS) often steps in to conduct thorough investigations, enabling family courts to take more decisive action when a child's safety is at risk.[58] In cases where CPS finds sufficient evidence of abuse, the family court may become even more involved. The court can issue protective orders to temporarily or permanently remove the child from the harmful environment.[59] When a child is taken out of a parent's life and all contact is severed, the parent's ability to communicate with their child is undeniably restricted, effectively chilling their speech regarding their child.

The state can mandate counseling or parenting classes for the abusive parent.[60] These programs address the root causes of verbal abuse, teach healthy communication strategies, and provide tools for managing emotions and disciplining children constructively. Courts may require parents to attend these sessions as part of a broader case plan, aiming to improve the parent-child relationship and reduce the likelihood of further abuse. While this is a positive tool to improve the parent-child relationship and hopefully reintegrate the child fully back into the home, it also functions as a form of regulating parental

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[54] N.C. GEN. STAT. § 7B-101(1)(e) (2025); *see supra* Section II.A.
[55] *See, e.g.*, VA. CODE ANN. § 16.1-279.1 (2025); *see* IND. CODE § 31-34-2.3-5 (2025); *see also* KAN. STAT. ANN. § 38-2242 (2025).
[56] *See Verbal Abuse in Child Custody*, *supra* note 48.
[57] *See, e.g.*, KAN. STAT. ANN. § 38-2242 (2025).
[58] *See* Frank E. Vandervort, *Child Protection Law and Procedure*, 2 MICHIGAN FAMILY LAW 1467, 1482–88 (M. J. Kelly, J. A. Curtis & R. A. Roane eds., 7th ed. 2011).
[59] *See* Besharov, *supra* note 36, at 555–56.
[60] *See id.* at 549; *see Verbal Abuse in Child Custody*, *supra* note 48.

speech by instructing certain types of communication while discouraging others.

To help the child cope with the emotional damage caused by verbal abuse, the state may also provide therapeutic support, including counseling or therapy for the child.[61] These services can help the child rebuild self-esteem, process trauma, and develop healthy coping mechanisms. Therapy can also teach the child to recognize and express their emotions, which is critical for those who have experienced emotional harm.

If verbal abuse is part of a larger pattern of neglect or harm, the state may petition the court to limit the parent's custody or visitation rights.[62] This action is typically taken after a thorough investigation and legal proceedings, and it may result in supervised visitation or, in severe cases, the termination of parental rights.[63] For example, in the case *In re A.M.*, the juvenile court found that the parents subjected their children to emotional and verbal abuse, which impaired their ability to safely parent.[64] As a result, the state removed the children from the parents' custody due to the verbal abuse, illustrating the state's intervention in cases where a parent's speech constitutes harm to a child's emotional and psychological health.[65] Removing the child from the home ultimately restricts the parent's ability to both parent and communicate with the child.

In extreme cases, if verbal abuse is ongoing and severe, the court may decide to remove the child from the home entirely.[66] The court may also mandate therapy, counseling, or parenting classes for the abusive parent to address their behavior. If the verbal abuse includes threats or puts the child in immediate danger, the state can issue a restraining or protection order

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[61] *See* Danya Glaser, *Emotional Abuse and Neglect (Psychological Maltreatment): A Conceptual Framework*, 26 CHILD ABUSE & NEGLECT 701–02 (2002); *see* Besharov, *supra* note 36, at 549.

[62] *See* Besharov, *supra* note 36, at 549.

[63] *See, e.g.*, KAN. STAT. ANN. § 38-2242 (2025).

[64] *See* 433 P.3d 781, 782 (Or. Ct. App. 2018).

[65] *See id.* In this case, the Oregon Court of Appeals found that substance abuse was an additional factor when determining dependency jurisdiction. *See id.* The Court affirmed that the factors for dependency jurisdiction were "[t]he mother has subjected the child to verbal and emotional abuse resulting in impairment of the child's emotional well-being and functioning; The mother's substance abuse impairs her judgment and ability to safely parent the child; The father is aware of the mother's verbal and emotional abuse and has failed to protect child from it; and [t]he father's substance abuse impairs his judgment and ability to safely parent the child." *Id*. (internal quotations omitted).

[66] *See* Besharov, *supra* note 36, at 580.

against the abusive parent.[67] Such orders can prevent further contact and reduce the risk of continued harm.

Ultimately, all these forms of state intervention—whether through protective orders, CPS investigations, or family court proceedings—are grounded in the concept of state action based on the parent's speech if it constitutes verbal abuse. This raises the constitutional question of whether such speech should receive First Amendment protection in the face of state action.[68]

III. VERBAL ABUSE AS A FIRST AMENDMENT ISSUE

Speech that is characterized as verbal abuse is considered a "never acceptable" parenting practice.[69] Given the limited or complete lack of social value that is associated with verbal abuse, this form of speech would naturally fall into the "low-value" categorization of speech, which typically does not receive First Amendment protections.[70]

A. Application of the Fighting Words Doctrine and Offensive Speech

Given the concerns about competing constitutional protections, the challenge lies in determining when speech within the family context moves beyond the realm of protected expression and begins to cause harm to a child's well-being. While parents generally have autonomy over their interactions with their children, the state's duty to protect children from emotional and psychological harm may require limitations on certain speech, especially when it leads to lasting damage. In this context, the application of constitutional principles becomes critical, particularly in considering whether verbal abuse should

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[67] *See id.* at 549.

[68] One way to reduce the extent to which state action infringes on First Amendment parental speech is by making such interventions less intrusive. Research indicates that removing children from their parents and homes—even on a temporary basis—can have severe and lasting consequences on a child's mental health and overall development. Given these potential harms, shifting away from state-imposed separations and instead emphasizing therapeutic interventions within the family court system could serve as a less restrictive means of addressing family-related concerns. By prioritizing rehabilitative approaches—such as family counseling, parenting programs, and supervised support services—the state can mitigate the need for direct interference in parental rights while still ensuring the child's well-being. This shift would reduce the overlap between state action in family law cases and potential infringements on First Amendment parental speech, thereby striking a better balance between the government's interest in child welfare and constitutional protections.

[69] Charles Schaefer, *Defining Verbal Abuse of Children: A Survey*, 80 PSYCH. REP. 626, 626 (1997).

[70] John D. Moore, *The Closed and Shrinking Frontier of Unprotected Speech*, 36 WHITTIER L. REV. 1, 5–7 (2014).

cross the line into speech that is unprotected by the First Amendment.

One of the closest current analyses of parent-child verbal abuse is the doctrine of true threats. This doctrine, clarified in *Virginia v. Black*, provides a basis for determining when speech crosses the line from protected expression to actionable harm.[71] In *Black*, the Supreme Court held that speech constituting a "serious expression of an intent to commit an act of unlawful violence" is not protected under the First Amendment.[72] In this case, Barry Black was convicted under a Virginia statute criminalizing cross burning, with jury instructions allowing intent to be inferred solely from the act.[73] The Supreme Court held that while banning cross burning with intent to intimidate is permissible, the prima-facie-evidence provision was overbroad, failing to distinguish intimidation from protected symbolic expression which would subsequently chill free speech.[74] This decision underscores the harm-prevention rationale that serves as the foundation for exceptions to First Amendment protections, emphasizing the delicate balance between safeguarding free expression and protecting individuals from the psychological and societal harm caused by certain types of speech.

This harm-prevention approach offers a useful way to think about hurtful speech, but it becomes harder to apply in certain contexts. Specifically, applying the true threats doctrine to the parent-child relationship is challenging. The doctrine requires a "serious expression" of intent, which may not capture the unique power dynamics and emotional dependency in the parent-child relationship.[75] Many parent "interactions with their children, while harmful, are thoughtless and misguided rather than intending harm."[76] However, children are particularly vulnerable to the emotional impact of a parent's words, and speech falling short of a true legal threat could still profoundly affect their well-being.

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[71] *See* 538 U.S. 343, 359–360 (2003).
[72] *Id.* at 359.
[73] *See id.* at 348–49.
[74] *See id.* at 365.
[75] *Id.* at 359.
[76] Glaser, *supra* note 61, at 704; *see also* Daniel Cruz et al., *Developmental Trauma: Conceptual Framework, Associated Risks and Comorbidities, and Evaluation and Treatment*, FRONTIERS IN PSYCHIATRY 1, 1 (July 22, 2022) ("Children are more likely than adults to lack the cognitive and behavioral capacities to understand and respond to traumatic circumstances effectively.").

Additionally, children often lack the capacity to assess whether a threat is credible, heightening their susceptibility to emotional harm resulting from the threat, even if it is not sincere.[77] If we were to apply the doctrine of true threats to the parent-child relationship, it suggests the need for a less stringent standard—one that considers the child's perspective and the parent's authority while addressing speech that causes significant emotional harm, even if it does not meet the traditional threshold for true threats.

The other adjacent First Amendment principle to child verbal abuse is the doctrine of fighting words. The fighting words doctrine, articulated in *Chaplinsky v. New Hampshire*, excludes from First Amendment protection speech that "tend[s] to incite an immediate breach of the peace."[78] In *Chaplinsky,* a Jehovah's Witness, called a city marshal a "God damned racketeer" and "a damned Fascist" after being warned about a restless crowd while distributing religious literature.[79] He was convicted under a New Hampshire law prohibiting offensive speech on public streets.[80] The Supreme Court upheld the conviction, reasoning that certain speech categories, such as fighting words, lack social value and fall outside First Amendment protection.[81] While traditionally applied in public disputes, its principles are relevant when considering the unique dynamics of verbal abuse within the family. Abusive language aimed at humiliating or degrading a child can provoke extreme emotional reactions, similar to the harm caused by fighting words.[82] However, the doctrine's requirement of an "immediate breach of the peace" may not apply in the parent-child context, as children often suppress outward reactions due to fear or dependency.[83] Similarly, verbal abuse is recognized as a pattern of behavior rather than isolated incidents, meaning the harm caused by it may not be immediate but can accumulate over time as the abuse persists.[84]

Nonetheless, these doctrines underscore the idea that speech primarily intended to harm, rather than to communicate ideas, may lose constitutional protection.[85] Expanding its

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[77] *See* Cruz et al., *supra* note 76, at 5–6.
[78] 315 U.S. 568, 572 (1942).
[79] *Id.* at 569.
[80] *See id.*
[81] *See id.* at 572; *see also* Michael J. Mannheimer, *Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1534–35 (1993).
[82] *See* Schaefer, *supra* note 69, at 626.
[83] *Chaplinsky*, 315 U.S. at 572.
[84] *Verbal Abuse in Child Custody*, *supra* note 48.
[85] *See* Moore, *supra* note 70, at 9.

principles to the parent-child relationship could provide a framework for addressing verbal abuse and acknowledge the profound harm abusive speech can inflict on vulnerable individuals like children.

B. Expanding the Scope of Free Speech Restrictions in the Family Context

Currently, the First Amendment does not specifically address parent-child verbal abuse. Expanding free speech limitations to cover this issue would require courts to reassess established doctrines, such as true threats and fighting words, and adapt them to the private, domestic context. A child-centered approach might better account for the power imbalance and emotional dependency inherent in the parent-child relationship.[86] For example, speech causing severe emotional harm—while not meeting traditional thresholds for true threats or fighting words—could warrant restriction if it undermines the child's psychological well-being and sense of security.

While these doctrines suggest that speech intended to harm may lose constitutional protection, applying them to the parent-child relationship remains challenging. As free speech scholar Frederick Schauer points out, categorizing free speech issues into defined "buckets" can be problematic when new cases do not fit neatly within existing categories.[87] He explains that difficulties occur either when a case does not align with a category's description or when it technically fits but produces an outcome inconsistent with current understandings of fairness or justice.[88] Parent-child verbal abuse highlights this tension, as it does not easily fall under existing categories like fighting words or true threats.

This raises a critical question: Should issues of parent-child verbal abuse remain within the family law context, as they are currently handled, or do they warrant First Amendment

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[86] *See* Gail Winkworth & Morag McArthur, *Being 'Child Centred' in Child Protection: What Does It Mean?,* 31 CHILD. AUSTL.13, 14 (2006) ("the child is seen and kept in focus throughout . . . and that account is always taken of the child's perspective.").
[87] Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 288 (1981). Frederick Schauer was an American legal scholar, serving as the David and Mary Harrison Distinguished Professor of Law at the University of Virginia and the Frank Stanton Professor of the First Amendment at Harvard University. He was renowned for his work in constitutional law, free speech, and legal reasoning. *See* Michael S. Rosenwald, *Frederick Schauer, Scholar Who Scrutinized Free Speech, Dies at 78*, N. Y. TIMES (Sept. 18, 2024), https://www.nytimes.com/2024/09/18/us/frederick-schauer-dies.html.
[88] *See* Schauer, *supra* note 87, at 288.

consideration? Since this involves speech limited or penalized through state action, a First Amendment analysis appears necessary. This prompts further inquiry: What might that analysis look like? Should it involve expanding or creating subcategories for doctrines like true threats and fighting words to address the unique nature of parent-child speech? Or does the situation demand an entirely new doctrinal framework tailored to the specific context of the family?

1. New Category of Unprotected Free Speech

Creating a new category of unprotected speech has its complications. In recent years, the Supreme Court has made significant shifts in its approach to low-value speech, fundamentally changing the legal landscape:

> [T]he Court has completely rejected the balancing approach in favor of a strict historical-categorical analysis. In doing so, the Court has effectively closed the frontier of categorically unprotected speech. In addition, the Court's jurisprudence over the past half century has steadily diminished the instances of speech that fall within those categories that do exist. These two trends create a frontier of categorically unprotected speech that is both closed and shrinking.[89]

Given this narrowing, the introduction of any new category of unprotected speech must be approached with caution, ensuring it is precisely defined to avoid constitutional concerns of overbreadth or vagueness and warrant a new category of unprotected speech. For instance, its scope could be confined to speech targeting minors in public spaces, where it serves no legitimate purpose and results in demonstrable harm.[90] It would focus on protecting vulnerable minors in public, without infringing on speech in private or more personal environments. However, this approach contrasts with the concept upheld in *FCC*, which traditionally allows for greater regulation of speech within private spaces than in public.[91]

Another possibility is to propose a narrower exception specifically for schools, where courts have already recognized

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[89] Moore, *supra* note 70, at 1.
[90] *See supra* Sec. II.A.
[91] *See* FCC v. Pacifica Found., 438 U.S. 726, 749 (1978).

that First Amendment protections for speech are more limited.[92] In some states, such laws are already implemented. For instance, California mandates that professionals, including teachers and healthcare workers, report suspected verbal abuse, while Texas requires these professionals to undergo specialized training to recognize signs of emotional abuse.[93]

While cases like *Pierce* and *Meyer* affirm that parents have the right to determine their children's education, legal systems also acknowledge the importance of educational support in cases of abuse.[94] This includes ensuring that teachers and school counselors are informed and actively involved in monitoring the child's progress, particularly through therapeutic interventions.[95] That said, it is important to note that schools typically do not have direct oversight of parental interactions with their children outside of the school setting, making it challenging to witness or identify harmful speech between parents and children.

However, these approaches fail to address the complex issue of speech within the home. Given the strong protections afforded to free speech in private settings, particularly within family relationships, the likelihood of carving out a new category of unprotected speech for verbal abuse in the home remains unlikely.

2. Expanding Current Doctrines

An alternative approach to incorporating verbal abuse of a minor as unprotected speech could involve expanding the existing doctrines of true threats and fighting words to include a new subcategory specifically addressing the parent-child dynamic, or by increasing the level of scrutiny currently applied to child abuse cases. This raises necessary questions regarding the applicability of the imminence and harm requirements traditionally associated with these doctrines and the consequences of an elevated level of scrutiny on constitutional freedoms.

a. True Threats

A potential solution for this subcategory could shift the focus away from the "serious expression of an intent"

[92] *See* Moore, *supra* note 70, at 57–58.
[93] *See Verbal Abuse in Child Custody*, *supra* note 48.
[94] *See id.*
[95] *See id.*

traditionally required in the doctrine of true threats.[96] Instead, the emphasis would be placed on the effect of the expression, specifically whether the child perceived the threat as serious, regardless of the speaker's actual intent. This approach aligns with the recognition that children are particularly vulnerable to harm due to their developmental stage and dependence on parental figures, making the perception of threats more critical than the intent behind them.[97]

Limiting this adaptation strictly to the parent-child relationship narrows its scope and minimizes concerns about broader impacts on free speech rights. This approach recognizes the unique authority and influence parents have over their children, which amplifies the potential harm of verbal abuse.[98]

An essential component of this framework is creating a mechanism for the child to communicate the perceived harm caused by verbal abuse. This could involve allowing testimony from child psychologists or counselors, as well as evaluations from social workers, teachers, or caregivers who have observed changes in the child's behavior, providing the court with insight into the nature and impact of the threats.[99]

b. Fighting Words

The "fighting words" doctrine, which applies to words intended to provoke violence or disturb the peace, could serve as a framework for addressing the unique harm caused by verbal abuse.[100] In the context of parent-child relationships, it may be necessary to recognize a specific subset of harm that, while not immediately imminent, still has significant and lasting impacts on the child's well-being.

In potential fighting words cases, the breach of peace would be less about physical violence, as suggested by the original fighting words doctrine established in *Chaplinsky*, and more about psychological harm.[101] Verbal abuse from a parent or guardian could create a profound sense of emotional unrest,

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[96] Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1226 (2006).

[97] *See* Laura E. Miller, *Perceived Threat in Childhood: A Review of Research and Implications for Children Living in Violent Households*, 16 TRAUMA, VIOLENCE, & ABUSE 153, 165 (2015).

[98] *See generally* Ming-Te Wang & Sarah Kenny, *Longitudinal Links Between Fathers' and Mothers' Harsh Verbal Discipline and Adolescents' Conduct Problems and Depressive Symptoms*, 85 CHILD DEV. 908–923 (2014).

[99] *See Verbal Abuse in Child Custody*, *supra* note 48.

[100] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

[101] *See id.* at 573.

leaving the child feeling unsafe or unsettled within their own home and family environment. This psychological breach of peace is particularly significant in the parent-child relationship, where trust and security are fundamental. Adapting the fighting words doctrine to account for this kind of harm would recognize the unique and deeply personal nature of the family dynamic while addressing the long-term impact of verbal abuse on a child's well-being.

c. Strict Scrutiny

Another possible solution is to make custody and child-welfare cases subject to strict scrutiny due to the fundamental constitutional rights involved. The Supreme Court recognizes both parental rights and freedom of speech as fundamental liberty interests, requiring strict scrutiny to justify any state action that infringes upon these rights.[102] However, family courts often make significant decisions regarding parental rights and parental speech, such as imposing monitored visits, without applying the rigorous standards of strict scrutiny.[103] Without the requirement of strict scrutiny in family law cases, judges have broad discretion, which can sometimes conflict with Supreme Court precedent and legislative intent, especially when these cases involve other fundamental rights.[104] To safeguard parental rights and free speech, family court proceedings could adopt stricter evidentiary standards and set higher thresholds for state intervention, ensuring a consistent application of strict scrutiny.

While this approach would address the issue of balancing liberty interests and child welfare by holding them to the same level of scrutiny, it could lead to cases of verbal abuse being overlooked, as they might not meet the highest standard of scrutiny required, leaving vulnerable minors without the necessary protection of the state.

C. The Slippery Slope of Regulating Harmful Speech

Verbal abuse falls at the crossroads of several legal and professional fields, which makes it difficult to settle on a single, authoritative definition of what constitutes verbal abuse. To do so, there must first be agreement on which entity, whether the

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[102] *See* Bridget Neal, *Monitored Visits and the Removal of Parental Constitutional Rights*, INST. FOR CHILD CUSTODY ADVOC. (June 15, 2022), https://www.childcustodyadvocacy.org/monitored-visits-and-the-removal-of-parental-constitutional-rights.

[103] *See id.*

[104] *See id.*

courts, a legislative body, or another governing authority, will take responsibility for setting that definition. Without such a decision, the meaning of verbal abuse is likely to remain fragmented and inconsistent across different settings. In the mental health field, definitions tend to focus on repeated behavior and the emotional or psychological harm it causes, rather than on isolated incidents.[105]

From a legal and policy standpoint, these definitions are often narrower and more rigid, emphasizing conduct that can be proven in court and that meets specific harm thresholds.[106] The difficulty lies not only in reconciling the psychological and legal perspectives but also in deciding which authority's definition will carry the most weight and be applied in practice.

Choosing who defines verbal abuse would have major consequences for how broad the definition is and how it can be enforced. If courts take on this role, the definition will likely develop through case law, shaped by past decisions and limited by constitutional protections—especially those under the First Amendment.[107] This method could allow for nuanced, case-specific rulings but might lead to inconsistent results in different jurisdictions. If legislatures create the definition, the result would likely be a more uniform, codified standard, but one that could be influenced by politics or risk being overly broad, particularly where it overlaps with parental rights and cultural traditions. If professional organizations, such as those for psychologists or social workers, took the lead, the definition would likely focus on the clinical harm and developmental impact, offering strong guidance in child welfare cases but lacking legal force unless adopted into law. In the end, the choice of who defines verbal abuse will shape not only its meaning but also the balance between protecting vulnerable individuals and safeguarding constitutional speech rights.[108]

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[105] *See* Sherri Gordon, *What Are the Signs of Verbal Abuse?*, VERYWELL MIND (May 20, 2024), https://www.verywellmind.com/how-to-recognize-verbal-abuse-bullying-4154087; *see also Emotional Abuse,* DICTIONARY.APA.ORG, https://dictionary.apa.org/emotional-abuse (last visited Aug. 11, 2025).

[106] *See Emotional and Psychological Abuse: Is Emotional and Psychological Abuse Against the Law?* WOMENSLAW.ORG, https://www.womenslaw.org/about-abuse/forms-abuse/emotional-and-psychological-abuse/ending-abuse/emotional-and-psychological (last visited Aug. 11, 2025).

[107] *See Common Law*, BLACK'S LAW DICTIONARY 345 (11th ed. 2019).

[108] The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is an example in which definitions and standards for child welfare cases are explicitly stated. The UCCJEA has been adopted by every U.S. State except Massachusetts, as

Framing verbal abuse as a free speech issue highlights certain tensions but also raises concerns about the potential overreach of regulating speech—particularly when such regulation conflicts with parental rights and constitutional protections. For example, speech that negatively influences a child—such as radicalizing them or disparaging the other parent—often falls within First Amendment protections, as parents have the right to raise their children according to their beliefs.[109] This includes the freedom to express their viewpoints and shape the child's worldview, even if those beliefs are controversial, factually inaccurate, or potentially harmful.[110] Consequently, using free speech principles to regulate parental speech risks creating a slippery slope, where restrictions intended to protect children inadvertently infringe on constitutionally protected expression. Relying too heavily on free speech doctrines to shape parenting guidelines could unintentionally undermine fundamental freedoms, all in the name of child welfare.

However, as previously mentioned, certain speech is deemed unworthy of protection.[111] Verbal abuse can be framed as falling under the category of "low-value speech," which historically receives less protection under the First Amendment because it does not contribute to the exchange of ideas or the search for truth—two central purposes of free speech.[112] Courts have long recognized that certain types of speech, such as obscenity, defamation, fighting words, and true threats, fall outside the protections of the First Amendment based on

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of June 2024. *See Child Custody Jurisdiction and Enforcement Act*, UNIFORM LAW COMMISSION, https://www.uniformlaws.org/committees/community-home?CommunityKey=4cc1b0be-d6c5-4bc2-b157-16b0baf2c56d (last visited October 13, 2025). The UCCJEA provides a consistent set of standards for courts to determine jurisdiction over child custody matters and to enforce foreign child custody judgments. *See Uniform Child Custody Jurisdiction and Enforcement Act Summary*, UNIFORM LAW COMMISSION (2023), https://www.uniformlaws.org/viewdocument/enactment-kit-11?CommunityKey=4cc1b0be-d6c5-4bc2-b157-16b0baf2c56d&tab=librarydocuments.

[109] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

[110] Cults provide a striking example, as children are raised in extreme environments. *See* DANIELLA MESTYANEK YOUNG & BRANDI LARSEN, UNCULTURED: A MEMOIR (2023); *but see Six Former Cult Leaders Sentenced in Kansas City Forced Labor Case*, KANSAS REFLECTOR, (Aug. 12, 2025), https://kansasreflector.com/2025/08/12/six-former-cult-leaders-sentenced-in-kansas-city-forced-labor-case/ (showing where state intervention occurs when these groups engage in illegal activities that exploit or endanger the children).

[111] *See supra* Section I.

[112] *See generally* Moore, *supra* note 70.

historical exceptions, allowing them to be regulated without violating constitutional principles.[113]

Verbal abuse, particularly in the parent-child context, shares some characteristics with these categories of unprotected speech. For instance, verbal abuse often aims not to inform, persuade, or express ideas but to demean, harm, or exert control over another individual.[114] This lack of contribution to public discourse or personal development aligns it more closely with fighting words or true threats.

This framing underscores the complexity of defining and regulating emotional abuse—particularly in the context of diverse cultural and parental practices—and reveals the challenge of balancing child protection with respect for parental rights. Given the variation in childrearing practices, the cultural relevance of defining emotional abuse and neglect often comes into question.[115] While broad categories of verbal abuse—such as emotional unavailability, negative attributions, or developmentally inappropriate interactions—are widely recognized, the specific ways these behaviors manifest can differ across communities.[116] What one group considers developmentally appropriate or socially adaptive for a child may differ from another's perspective.

It is important to recognize that differences in childrearing practices among certain groups do not inherently constitute abuse. Parenting behaviors that may appear unconventional to some are often rooted in the unique values, traditions, and circumstances of the group.[117] To ensure these differences are understood and respected, it is helpful to evaluate such interactions within their cultural context. For example, presenting specific scenarios or vignettes of the behaviors in question to individuals with expertise in the cultural practices involved can provide invaluable insight. This approach fosters a

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[113] *See id.* at 32. It is important to acknowledge that the scope of these speech categories and the limits placed on them are continually developing.

[114] *See* Bilal Hamamra et al., *Verbal violence and its psychological and social dimensions in intimate and familial relationships*, 5 DISCOVER MENTAL HEALTH 1, 1 (2025) ("This form of abuse, however, operates through insidious mechanisms such as insults, humiliation, mockery, and threats, all of which aim to undermine the victim's sense of self-worth and maintain control over them.").

[115] *See* Besharov, *supra* note 36, at 588.

[116] *See* Child ABUSE: AN AGENDA FOR ACTION 82–83 (G. Gerbner, C. Ross & E. Zigler eds. 1980); *see generally* Glenn D. Wolfner & Richard J. Gelles, *A Profile of Violence Toward Children: A National Study*, 17 CHILD ABUSE & NEGLECT 197 (1993).

[117] *See* Marc H. Bornstein, *Parenting and child mental health: A cross-cultural perspective*, 12 WORLD PSYCHIATRY 258–265 (2013).

balanced evaluation, upholding diversity while prioritizing the child's well-being.

Ultimately, this illustrates the delicate task of creating guidelines that respect both constitutional freedoms and the diverse practices of childrearing, while ensuring the well-being of the child remains the central focus.

CONCLUSION

The legal and social welfare challenge lies in balancing the protection of children from the psychological harm of verbal abuse with parents' constitutional rights. This includes both their right to raise their children as they see fit and their freedom of speech. Verbal abuse presents a unique issue, as it not only affects child welfare but also implicates broader constitutional principles, particularly those related to the First Amendment.

Speech within the family context, including potentially harmful language that does not rise to the level of abuse, is often protected from regulation under the principles of free expression and parental autonomy. However, current legal frameworks inadequately address the lasting emotional and developmental harm that misuse of speech within the private sphere can inflict on children, suggesting a need to reexamine the boundaries of First Amendment protections when speech transitions into abuse.

State intervention in cases of verbal abuse exemplifies the fragile balance between these competing interests. A state's duty to protect children from significant harm justifies restrictions on harmful speech and state action. However, such interventions must be carefully tailored to avoid overreach into family life, undue infringement on constitutional rights, and potential harm to the child by limiting parental interactions. Mechanisms such as protective orders and mandated counseling aim to address specific harms while preserving the broader framework of parental rights and free expression.[118]

Current doctrines, such as "true threats" and "fighting words," provide some guidance, but were designed for adult interactions and fail to fully capture the complexities of harmful speech in a familial context. Parental speech often involves patterns of emotional harm that, while not meeting traditional legal thresholds, can have profound and lasting impacts on

[118] *See generally Verbal Abuse in Child Custody*, *supra* note 48.

children. This calls for a nuanced legal framework that accounts for context, frequency, and harm in evaluating parental speech.

Ultimately, the regulation of parental speech that constitutes verbal abuse challenges the boundaries of First Amendment protections and parental autonomy. By drawing on doctrines such as true threats and fighting words, courts must navigate complex questions of harm and context, acknowledging the unique vulnerabilities of children within the parent-child relationship. This balancing act underscores the need for a legal framework that upholds the constitutional principles of free speech and parental rights while also prioritizing the well-being of children as a compelling state interest. This is best done by creating a sub-section of the existing free speech doctrines, true threats and fighting words, to address this specific relationship. Through this approach, the legal system can better address the intersection of these rights in a way that respects individual freedoms and fulfills the state's protective role.

THE VESTIGIAL APPEARANCE OF CORRUPTION: CAMPAIGN FINANCE AND THE SHRINKING ROLE OF REGULATION

Joe Marcucci*

ABSTRACT

The definition of corruption in campaign finance jurisprudence has evolved significantly over time. In Buckley v. Valeo*, the Court defined corruption broadly to include both quid pro quo corruption and the appearance of corruption, justifying limits on contributions as a means to preserve public trust in the political process.* McConnell v. FEC *affirmed this broad conception, upholding the Bipartisan Campaign Reform Act's limitations on soft money and emphasizing the government's interest in preventing both actual corruption and the broader appearance it. Not long after, in the context of expenditures, the Court in* Citizens United v. FEC *narrowed the definition of corruption to require a showing of actual quid pro quo arrangements, holding that independent expenditures by corporations and unions did not pose a corruption risk.* McCutcheon v. FEC *then extended this narrower conception to from an expenditure case to contributions, striking down aggregate contribution limits and further constraining the government's ability to regulate based on the appearance of corruption. In all, this marks the retreat from the broader conception of corruption. This progeny of cases highlights the tightening of the judicial standard, now requiring evidence of an actual quid pro quo and thereby reducing the appearance of corruption to a legal vestige. The most recent addition to this progeny of cases,* FEC v. Cruz *invokes* Buckley*'s framework to evaluate a contribution limitation. The Court proceeds to significantly downplay the evidentiary showing of appearance of corruption as sufficient evidence to support a legitimate governmental interest. This Note traces that doctrinal shift, characterizing* FEC v. Cruz *as emblematic of the vestigial treatment of the appearance of corruption. This Note then goes on to explore the implications of a narrowed foundation for regulating campaign finance, including the likely challenges facing future doctrinal reform efforts.*

INTRODUCTION

The 2024 presidential election saw an explosion of money, even after reaching meteoric heights in 2020.[1] The trend of extreme spending on elections and campaigning will likely not slow down. This feels especially true in the wake of political polarization, in which both sides firmly believe that the other's victory will be the demise of democracy as we know it.[2] Interestingly, greater investment in the political system has not seemed to improve its functionality. Rather, despite an influx in spending, distrust and lack of faith in our political processes is growing on both sides of the aisle.[3]

Building to this moment, the Supreme Court in recent decades has systematically reshaped the landscape of campaign finance regulation, steadily eroding Congress's ability to curb the influence of money in politics. From its inception in *Buckley v. Valeo*, the Court started with the assertion that spending money is deeply tied to politics.[4] Under First Amendment scrutiny, the government must present a substantial governmental interest and employ "means closely drawn to avoid unnecessary abridgment" of political rights.[5] As decided in *Buckley,* and as the jurisprudence exists today, the Court only recognizes one governmental interest sufficient to justify campaign finance regulations: the governmental interest of preventing corruption or the appearance of corruption.[6] However, public faith in the legitimacy of the political process is seemingly falling to festering lows, even manifesting into civil revolt.[7] This Note explores that tension: if corruption or its appearance is the only justification

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* Juris Doctrinal Candidate at the University of North Carolina School of Law, Class of 2026.

[1] *See* Jaclyn Jeffery-Wilensky, *$16 Billion Will Be Spent in the 2024 Election. Where's It All Going?,* U.S. NEWS & WORLD REP. (Nov. 1, 2024), https://www.usnews.com/news/national-news/articles/2024-11-01/16-billion-will-be-spent-in-the-2024-election-wheres-it-all-going.

[2] *See* Michael S. Kang, *Hyperpartisan Campaign Finance*, 70 EMORY L.J. 1171, 1173 (2021).

[3] *See* Michael Caudell-Feagan, *How to Restore Trust in Elections*, PEW: TREND MAGAZINE, (Oct. 17, 2024), https://www.pew.org/en/trend/archive/fall-2024/how-to-restore-trust-in-elections.

[4] *See* 424 U.S. 1, 19–20 (1976) ("This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.").

[5] *Id.* at 25.

[6] *See id.* at 26–27; *see also* FEC v. Cruz, 596 U.S. 289, 305 (2022) ("This Court has recognized only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance.").

[7] *See* Tony Dokoupil, *Democratic and Republican Voters Share a Mistrust in the Electoral Process*, CBS NEWS (Jan. 6, 2022), https://www.cbsnews.com/news/democratic-and-republican-voters-share-their-mistrust-in-the-electoral-process/.

for regulating campaign finance, why does the system outwardly appear as corrupt as ever? The answer lies in the Court's treatment of the appearance of corruption, not as a substantive concern, but as a vestige of a once-robust doctrine, marginalized since its inception in *Buckley*.

A vestige is a remnant of something that once held significance but has since diminished in function.[8] Biologically, a vestige is a physical trait or organ that is reduced in size and has little or no original function, remaining as a remnant from a species' evolutionary past. Similarly, in legal doctrine, a vestigial principle may still exist in name, but its function as a meaningful justification for regulation has been greatly reduced. *Buckley* initially recognized the appearance of corruption to be of "almost equal concern as the danger of actual quid pro quo arrangements."[9] However, subsequent decisions, particularly *Citizens United v. FEC*[10] and *McCutcheon v. FEC*,[11] have systematically eroded its force without explicitly overruling it. As a result, while the Court still recites the language of the appearance of corruption, it increasingly treats it as an empty justification. All too easily dismissed when analyzing campaign finance regulations. By the time of *FEC v. Cruz,* the appearance of corruption had become little more than a formalistic nod to precedent, stripped of its practical weight to uphold regulations.[12] Given the rise of free speech absolutism,[13] what was once a cornerstone of campaign finance law has become a vestige that no longer functions as a real constraint on the influence of money in politics.

Part I of this Note served as an introduction. Part II discusses the development of the government's interest in regulating campaigns, focusing on the foundational cases driving the development of the law. Part III explores the most recent addition to the lineage of campaign finance cases in *Cruz* and its implications. Overall, this Note argues that Cruz has raised, and will continue to raise, serious concerns for any governmental effort to regulate campaign finance. In doing so, it highlights

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[8] *Vestige*, BRITANNICA DICTIONARY, https://www.britannica.com/dictionary/vestige (last visited Apr. 4, 2025).
[9] *Buckley*, 424 U.S. at 27.
[10] *See generally* 558 U.S. 310 (2010).
[11] *See generally* 572 U.S. 185 (2014).
[12] *See* 596 U.S. 289, 315 (2022) (Kagan, J., dissenting).
[13] *See* Zachary S. Price, *Our Imperiled Absolutist First Amendment*, 20 U. PA. J. CONST. L. 817, 824 (2018) ("Modern First Amendment doctrine thus provides near-absolute protection for expression of ideas, no matter how hateful, offensive, indecent, or illiberal.").

both the significance of Cruz and the troubling consequences of the Court's steadfast insistence that spending money is political speech, even when that commitment constrains Congress's ability to enact meaningful reform.

I. FREE SPEECH AND THE GOVERNMENT'S INTEREST IN REGULATING CAMPAIGN FINANCE

Federal law has a long history of concern regarding the influence of money on the democratic process. These anxieties stretch back well before the rise of the modern corporate form, reflecting an early and persistent recognition that concentrated financial power can distort representative government. In 1905, President Roosevelt called for all contributions by corporations to any political committee or for any political purpose to be forbidden by law.[14] In 1907, the passage of the Tillman Act prohibited corporations from contributing directly to federal campaigns.[15] Congress further addressed this concern with the passage of the Taft-Hartley Act of 1947, which permanently banned contributions to federal candidates from unions, corporations, and interstate banks.[16] The question remains: how has federal law surrounding campaign finance been reduced to such a narrow framework in the past 118 years if its risk to undermining democracy has been well-recognized for so long? It started with the declaration that spending money is bound up with political speech. Under the umbrella of the First Amendment, campaign finance regulation has been the subject of constitutional scrutiny of the highest degree. Accordingly, it comes as no surprise that this has systematically reduced protections against corruption in the democratic process.[17] This section examines the inception of the expenditure–contribution framework, the development of the sole permissible governmental interest, and the subsequent tightening of that framework by later precedent.

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[14] *See* John Woolley & Gerhard Peters, *Theodore Roosevelt: Fifth Annual Message*, AM. PRESIDENCY PROJECT (Dec. 5, 1905), https://www.presidency.ucsb.edu/documents/fifth-annual-message-4 (last visited Oct. 25, 2025).

[15] *See Important Dates: Federal Campaign Finance Legislation*, CTR. FOR PUB. INTEGRITY (Mar. 25, 2004), https://publicintegrity.org/politics/important-dates-federal-campaign-finance-legislation/.

[16] *See id.*

[17] *See e.g.*, Buckley v. Valeo, 424 U.S. 1, 25–27 (1976); *see also* Citizens United v. FEC, 558 U.S. 310, 345 (2010); *see also Cruz*, 596 U.S. at 310–13.

A. Buckley v. Valeo*: The Birth of the Modern Framework*

In *Buckley*, the Supreme Court established the foundational principles of how campaign finance intersects with political speech.[18] The plaintiff-appellees challenged the constitutionality of the Federal Election Campaign Act of 1971 and the Presidential Election Campaign Fund Act.[19] In its per curiam opinion, the Supreme Court declared certain provisions of the election contribution laws constitutional and other provisions relating to election expenditures unconstitutional.[20]

Beginning with the fundamental question of any First Amendment inquiry, the Court addressed whether spending money on the political process itself is speech.[21] To secure a more permissive standard for judicial review, appellees contended that the Act regulated conduct and that "its effect on speech and association [was] incidental at most."[22] Conversely, appellants argued that contributions and expenditures are at the core of political speech and that any limitations on such speech must be subject to exacting scrutiny.[23] Considering this issue in light of *United States v. O'Brien*,[24] the Court concluded that spending money "simply cannot be equated with such conduct as destruction of a draft card." [25] Because political expression necessarily requires spending money, its constitutional protections should not be reduced by subjecting it to the less protective *O'Brien* test.[26] As a result, spending money on the political process was deemed to be protected First Amendment activity. This conclusion was rooted in the perception that virtually any and every means of communication in society requires some expenditure of money, for even "the distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs."[27]

Recognizing the role spending money plays in the political process, the Court proceeded to examine the constitutionality of contribution and expenditure limits,

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[18] *See Buckley*, 424 U.S. at 14–16.
[19] *See id.* at 7–9.
[20] *See id.* at 143–44.
[21] *See id.* at 14–16.
[22] *Id.* at 15.
[23] *See id.*
[24] *See* 391 U.S. 367, 376 (1968) (explaining that the Court in *O'Brien* upheld the regulation because the government's administrative interest in preserving draft cards was unrelated to suppressing the expressive element of draft-card burning).
[25] *Buckley*, 424 U.S. at 16.
[26] *See id*.
[27] *Id.* at 19.

establishing a dual framework for analysis. First, the Court held that contribution limitations were constitutional.[28] Contributions refer to the amount of money an individual gives directly to a candidate, which serves as a "general expression of support for the candidate and his views."[29] As to the First Amendment interest, the contribution limitation did not unduly infringe upon the right of the donor to speak through spending money because the donor may still freely engage in independent political expression, associate actively with the candidate, and "assist to a limited but nonetheless substantial extent in supporting [the] candidate[]."[30]

Moreover, such contribution limitations serve a sufficient governmental interest to limit corruption and the appearance of corruption.[31] Specifically, when a candidate lacking personal wealth must rely on the financial support of others to conduct a successful political campaign, there is an increased risk that large contributions are given to secure "political quid pro quo[s]."[32] Such influence has the potential to undermine the integrity of our representative democracy because a quid pro quo is essentially the act of buying a politician, as the contribution is given for a political favor or official act.[33] Moreover, the Court recognized this danger as twofold. Beyond the danger of actual quid pro quo arrangements, the Court recognized there is a danger of "almost equal concern" when the public develops a strong sense of the appearance of corruption.[34] Here, the Court is importantly recognizing how critical public confidence is to the system of representative democracy.[35] If the public fears the system is inequitable or unresponsive to the needs of the citizenry, there is a very real consequence of diminished confidence to engage in voter participation and activism because such efforts understandably feel futile.[36]

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[28] *See id.* at 35 ("In view of these considerations, we conclude that the impact of the Act's $1,000 contribution limitation on major-party challengers and on minor-party candidates does not render the provision unconstitutional on its face.").
[29] *Id.* at 21.
[30] *Id.* at 28.
[31] *See id.* at 26.
[32] *Id.*
[33] *See id.* at 26–27.
[34] *See id.* at 27.
[35] *See id.*
[36] *See id.* ("[T]he avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" (quoting CSC v. Letter Carriers, 413 U.S. 548, 565 (1973)).

Second, the Court held that independent expenditure limitations were unconstitutional because, in contrast to the associational aspect of contributions, expenditures are funds spent independently of the candidate, that independently promote the political speech of the speaker.[37] Such restrictions function as a direct restraint on the speaker's First Amendment rights to self-expression by imposing direct and substantial restraints on the quantity of funds that can be spent.[38] This is because communication in modern mass society requires the spending of money. From distributing handbills or leaflets to hosting speeches and rallies, campaigning via mass media has made "these expensive modes of communication indispensable instruments of effective political speech."[39]

Furthermore, the governmental interest in preventing corruption or the appearance of corruption is not sufficiently addressed by the expenditure limitations for two reasons.[40] First, the First Amendment does not allow limiting political speech just to level the playing field or reduce influence.[41] Second, the expenditures do not pose the same dangers of corruption or its appearance as compared to those identified with contributions.[42] This is because independent expenditures do not directly benefit the candidate's campaign, and the lack of coordination with the campaign may make such expenditures counterproductive to the campaign's goals.[43] The absence of coordination "alleviates the danger that expenditures will be given as a quid pro quo" for impropriety.[44] For these reasons, the expenditure limitations placed substantial restrictions on the ability of candidates and citizens to engage in political expression, the type of restrictions that "the First Amendment cannot tolerate."[45]

Despite the efforts of the Federal Election Campaign Act to regulate greater spending and the increased role of media in elections, the Supreme Court in *Buckley* took several meaningful

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[37] *See id.* at 18–19.
[38] *See id.* at 39.
[39] *Id.* at 19.
[40] *See id.* at 45.
[41] *See id.* ("So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.").
[42] *See id.* at 46.
[43] *See id.* at 47 (explaining that expenditures may be counterproductive because they may misalign with a candidate's strategy and even harm their campaign message rather than help it).
[44] *Id.*
[45] *Id.* at 58–59.

steps to insulate political speech from being regulated in the name of campaign finance. First, the Court insulated political speech by rejecting alternative governmental interests as indefensible.[46] Beyond the prevention of corruption and its appearance, the Court rejected the legitimacy of the alternative governmental interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections."[47] The Court reasoned that the concept of restricting the speech of some "to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed 'to secure the widest possible dissemination'" of speech.[48] The Court brushed off the risk that spending money to a certain point might drown out the speech of others, discarding any sort of interest rooted in ensuring the relative power of speech or how representative it is.

Second, within the contribution/expenditure framework, the Court recognized only one legitimate governmental interest: preventing corruption or its appearance.[49] The Court also expanded upon the definition of corruption, recognizing how money in the political process can infect the political system.[50] In the contribution context, to facilitate a flourishing democracy, the ability to protect against corruption must extend beyond what bribery laws prescribe. Such laws "deal with only the most blatant and specific attempts" of donors to influence government action.[51] Accordingly, Congress is well within its discretion to recognize that such laws are only a partial measure to deal with corruption.[52] Here, the legislature recognized a high potential for corruption when large individual contributions place a candidate lacking immense personal wealth in a position to rely on donors for the success of their campaign.[53] Such reliance greatly increases the risk of undue influence on the elected official's judgment, placing them in a position beholden to the donor.

B. McConnell v. FEC*: Affirming* Buckley*'s Conception of Corruption*

In *McConnell v. FEC*, the Supreme Court considered the constitutionality of the Bipartisan Campaign Reform Act

[46] *See id.* at 48–49.
[47] *Id.* at 48.
[48] *Id.* at 48–49.
[49] *See id.* at 48.
[50] *See id.*
[51] *Id.* at 28.
[52] *See id.*
[53] *See id.* at 26–27.

(BRCA)'s limitations on "soft money" contributions to political parties. Prior to the BCRA, only "hard money," funds advanced for the purpose of influencing a federal election, and that are subject to federal disclosure requirements, source requirements, and amount limitations.[54] "Soft money" relates to money outside of federal regulation, often from corporate or union treasuries, and nominally designated for state or local election activity or general party-building efforts, even though these funds were frequently used to influence federal elections indirectly.[55] As the permissible uses of soft money exponentially grew, donors and political candidates began exploiting a loophole that allowed a federal candidate to solicit soft money from donors who had already maxed out their contributions to make additional contributions to joint programs supporting federal, state, and local candidates of that particular political party.[56] The BCRA sought to address this circumvention of hard money limitations by regulating soft money contributions directly.[57]

In line with *Buckley*, the Majority respected "proper deference to Congress's ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."[58] Giving equal weight to quid pro quo arrangements and the appearance of corruption, the Court reasoned that the contribution limitations were justified by recognizing the "broader threat" from politicians too compliant with the influences from large contributors, an aspect of corruption that goes beyond explicit bribery.[59] The Court identified the danger that elected officials would decide issues according to the wishes of those who have made large financial contributions is "[j]ust as troubling to a functioning democracy as classic quid pro quo corruption."[60] Accordingly, the best means of prevention is to recognize and remove the temptation proactively.[61]

Importantly, the Majority dismissed the plaintiffs' argument that concrete evidence that a federal office holder actually switched a vote is necessary, reasoning that such a high evidentiary bar "misunderstands the legislative process" and

[54] McConnell v. FEC, 540 U.S. 93, 122 (2003).
[55] *Id.* at 122–23.
[56] *See id.* at 124–26.
[57] *See id.* at 133.
[58] *Id.* at 137.
[59] *Id.* at 144–46.
[60] *Id.* at 153.
[61] *See id.*

how it can be influenced.[62] In fact, the substantial evidentiary record did not show any concrete evidence of vote buying, but the ability for donors to "gain access" to government officials "certainly gave the 'appearance of such influence.'"[63] Properly respecting the appearance of corruption, the Supreme Court upheld the contribution limitations on "soft money."

This case is crucial in understanding the scope of corruption and its appearance as it was envisioned in *Buckley*. By reinforcing the idea that corruption or its appearance includes not only direct bribery but also the perception of improper influence, *McConnell* marked a pivotal moment in strengthening the government's ability to regulate campaign finance to protect the integrity of the political system. The *McConnell* Majority's strong language makes that clear in its criticism of the Dissent's call for actual evidence of voting buying to uphold the contribution limit. The Majority called this a "crabbed view of corruption" that "ignores precedent, common sense, and the realities of political fundraising."[64] Unfortunately, as the later cases demonstrate, an abrupt departure is ahead, leaving the appearance of corruption behind as a vestige of regulatory justification. In the name of free speech absolutism, the effect of this departure results in less comprehensive regulation aimed at targeting impropriety.

C. Citizens United v. FEC*: Narrowing the Corruption Rationale in the Independent-Expenditure Context*

In *Citizens United v. FEC*, Citizens United challenged a provision of the BCRA that prohibited corporations from using their general corporate treasury funds to make independent expenditures for electioneering communications or for speech expressly advocating the election or defeat of a candidate.[65] The nonprofit group sought to promote its film about Hillary Clinton,

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[62] *Id.* at 149–50.

[63] *Id.* at 150–51 ("Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. . . . These are not idle chit-chats about the philosophy of democracy. . . . Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way." (quoting McConnell v. FEC, 251 F. Supp. 2d 176, 496 (D.C. Cir. 2003))).

[64] *Id.* at 152.

[65] *See* Citizens United v. FEC, 558 U.S. 310, 320–21 (2010) (explaining how the statute defines "electioneering communication" as "any broadcast, cable, or satellite communication," which "refers to a clearly identified candidate for Federal office."); 2 U.S.C. § 434(f)(3)(A).

which expressly advocated against her election.[66] To promote the film, Citizens United produced advertisements that it wished to run on broadcast and cable television.[67] Specifically, § 441b of the BCRA prohibited corporations, including nonprofits, from using general treasury funds to make direct contributions or independent expenditures that "advocate [for] the election or defeat of a candidate" through any form of media in connection with an upcoming election.[68] The Court concluded that the film was covered under this definition of the law.[69] Analyzing § 441b solely in light of the corruption or appearance of corruption interest, the Majority firmly declared that independent expenditures, even those made by corporations, do not give rise to corruption or its appearance.[70]

This decision is most notable for prohibiting regulatory distinctions based on the speaker's identity. Most important for this analysis is how the Court defined corruption. On its way to invalidating expenditure limitations for corporations, the Court employed a narrow definition of corruption. It narrowly constrained what constitutes a sufficient showing of corruption, requiring concrete evidence of quid pro quo arrangements, the direct exchange of dollars for political favors.[71] The Court recognized a lack of "influence over or access to elected officials"[72] as it relates to expenditures because independent expenditures are not coordinated with the candidate.[73] *Citizens United* differentiated independent expenditures from contributions, asserting that the former do not lead to broader manifestations of corruption due to the lack of "influence over or access to elected officials."[74] The Majority made explicit reference to *Buckley* and stated that the *Buckley* Court did not "extend this rationale [about the reality or appearance of corruption] to independent expenditures, and the Court does not do so here."[75] Moreover, this holding fits squarely with *McConnell*, which based its broader definition of corruption on the idea that direct contributions to candidates or their closely

[66] *See Citizens United*, 558 U.S. at 319–20.
[67] *See id.* at 320.
[68] *Id.*
[69] *See id.* at 323.
[70] *Id.* at 357.
[71] *Id.* at 359.
[72] *Id*.
[73] *See id.*
[74] *Id*.
[75] *Id.* at 357.

associated groups are more likely to result in broader corruptive pressures given the increased access to elected officials.[76]

At this point, *Citizens United* left the interest of corruption or its appearance unbothered in the contribution context. However, as it relates to the next case, the strict definition of corruption formulated in *Citizens United* for expenditures was soon after applied to a case about contribution limits in *McCutcheon v. FEC*. The *McCutcheon* Majority, importing language from *Citizens United*, applied a restrictive definition of corruption that seems nearly entirely at odds with the principles of *Buckley* and *McConnell* regarding the scope of permissible regulation.

D. McCutcheon v. FEC*: Narrowing the Corruption Standard in the Contribution Context*

In *McCutcheon v. FEC,* appellant Shaun McCutcheon challenged a federal law that restricted him from contributing to 28 different federal candidates under an aggregate contribution limitation.[77] Specifically, the statute at issue imposed an aggregate limit to restrict how much money a donor may contribute in total to all candidates or committees.[78] Appellants moved for a preliminary injunction against enforcement.[79] In response, the FEC argued that the aggregate limit on contributions prevented circumvention of the individual-candidate limit.[80] Despite previously holding that aggregate contribution limits were constitutional in *Buckley*,[81] the Court here reasoned that the present appellants brought distinct legal arguments that *Buckley* did not address.[82] Since the *Buckley* decision came down, the safeguards against circumvention have been significantly strengthened.[83] Specifically, limitations on contributions to political committees and the ability of donors to

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[76] *See* McConnell v. FEC, 540 U.S. 93, 150–51 (2003).
[77] McCutcheon v. FEC*,* 572 U.S. 185, 194 (2014).
[78] *Id.* at 192.
[79] *See id.* at 195.
[80] *See id.* at 192.
[81] *See id.* at 198–99 ("The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." (quoting Buckley v. Valeo, 424 U.S. 1, 38 (1976))).
[82] *See id.* at 200 (explaining how *Buckley* did not address an overbreadth challenge with respect to aggregate limits; therefore, it should not wholly control the present inquiry).
[83] *See id.*

create or control multiple political committees.[84] Upon review, the Supreme Court struck down the aggregate contribution limits as unconstitutional because of a substantial mismatch between the governmental interest and the means selected to achieve it.[85]

Importantly for this analysis, the Court reasoned that aggregate contribution limits do not advance a sufficient governmental interest.[86] As discussed above, prior precedent establishes that only actual corruption or its appearance can justify campaign finance regulation.[87] However, the plurality redefined this principle, narrowing corruption or its appearance to mean no more than "a direct exchange of an official act for money."[88] The plurality's definition described corruption as akin to clear-cut bribery.[89]

However, as the Dissent pointed out, case law does not support such a narrow conception of corruption in the contribution context.[90] Justice Breyer opined, "the kinds of corruption that can destroy the link between public opinion and governmental action extend well beyond those the plurality describes," reasoning that "the plurality's notion of corruption is flatly inconsistent with the basic constitutional rationale" of *Buckley* and its progeny.[91] The Dissent emphasized that *Buckley* upheld similar aggregate limits in part because public trust in the democratic process is undermined when large donations create the perception of undue influence, even absent a provable quid pro quo.[92] By disregarding this broader rationale, the plurality enables a system in which wealthy donors can legally channel vast sums of money into elections, eroding confidence in political integrity and reinforcing the perception that political access and influence are for sale.[93]

The plurality rejected a definition of corruption that covered more intangible attempts to garner "influence over or

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[84] *See id.* at 200–01.
[85] *See id.* at 199.
[86] *See id.* at 193 ("We conclude, however, that the aggregate limits do little, if anything, to address that concern, while seriously restricting participation in the democratic process.").
[87] *See* Buckley v. Valeo, 424 U.S. 1, 26–27 (1976); *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 388–89 (2000); *see also* McConnell v. FEC, 540 U.S. 93, 120–21 (2003).
[88] *McCutcheon*, 572 U.S. at 192 (plurality opinion).
[89] *See id.*
[90] *See id*. at 239 (Breyer, J., dissenting).
[91] *Id.*
[92] *See id.*
[93] *See* Buckley v. Valeo, 424 U.S. 1, 28 (1976); *see also* McConnell v. FEC, 540 U.S. 93, 117 (2003).

access to" elected officials,[94] despite *Buckley* and *McConnell* expressly recognizing that corruption goes beyond what bribery laws can prescribe.[95] In support of its restrictive definition, the Court relied on *Citizens United*. However, as the Dissent points out, *Citizens United* based its narrow definition on the fact that the restriction in question pertained to expenditures, something that *Buckley* did not extend to the broader conception of corruption.[96] Moreover, the plurality's use of *Citizens United's* definition in the contribution context is flatly inconsistent with *McConnell's* holding.[97] As a result, the vestige of *McConnell* is left without proper functionality, despite its doctrinal roots still firmly rooted in *Buckley* and reiterated by the Court in *McConnell*.

One potential counterargument is that *McCutcheon* only curtailed the appearance of corruption rationale in the specific context of aggregate limits, where the Court believed there was no risk of direct quid pro quo arrangements. This argument is weak because the Court did nothing to limit the reach of the opinion. Specifically, the Court used no limiting language in its opinion. The Court could have cabined its ruling to just aggregate limits, but it did not. Rather, the plurality broadly applied *Citizens United's* narrow definition of corruption, recognizing only quid pro quo arrangements in the contribution context.[98] This suggests that contribution regulations may be vulnerable if they rely on the appearance of corruption, despite the *Buckley* framework still perfunctorily requiring an analysis of the appearance of corruption.

E. FEC v. Cruz*: The Vestigial Appearance of Corruption in Action*

The Court's fractured decision in *FEC v. Cruz* reflects a deep divide over the meaning of corruption in the campaign finance context. To clarify this divide, Part A will explore the Majority's reasoning for striking down the contribution limitation. Part B will analyze the Dissent's firm rejection of the Majority's reasoning, emphasizing how the appearance of corruption remains an important part of the doctrine. Part C will examine the implications of this shift, starting with the direct concerns arising from invalidating the BCRA § 304. Then, exploring how the weakened appearance of corruption

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[94] *McCutcheon*, 572 U.S. at 187 (syllabus of opinion).
[95] *See Buckley*, 424 U.S. at 28; *see also McConnell*, 540 U.S. at 117.
[96] *See McCutcheon*, 572 U.S. at 243–44 (Breyer, J., dissenting).
[97] *See id.*
[98] *See* Citizens United v. FEC, 558 U.S. 310, 359 (2010).

justification may undermine future campaign finance regulation in other provisions.

1. Majority Opinion

The *Cruz* Majority rejected concerns that allowing post-election donations for the purpose of repaying a candidate's personal loans created an obvious appearance of corruption and rejected concerns that wealthy donors may use such post-election contributions to win favors with elected officials who are now in clear positions of power. Just as the *McCutcheon* Dissent warned that disregarding the appearance of corruption would erode public trust,[99] the *Cruz* Dissent makes a similar argument, emphasizing that these post-election donations create a clear risk of influence-peddling.[100] By limiting a sufficient showing of corruption to only explicit quid pro quo arrangements but retaining the phrase "or the appearance of corruption," the Court has made it increasingly difficult to justify campaign finance regulations aimed at preserving public confidence in democracy.

The most recent addition to this lineage of First Amendment cases is *FEC v. Cruz*. Arising from his 2018 senatorial race, Senator Ted Cruz loaned himself $260,000, in excess of the limitations under federal law.[101] Under § 304 of the BCRA and its subsequent regulations, a candidate who loans money to his campaign may not be repaid more than $250,000 of such loans from *contributions* made to the campaign *after* the date of the election.[102] Additionally, § 304 requires that if more than $250,000 remains unpaid 20 days post-election, the excess is to be treated as a contribution to the campaign, precluding later repayment.[103] Cruz alleged that § 304 of the BCRA violated his First Amendment rights to loan his campaign money.

The Majority, led by Chief Justice Roberts, sided with Senator Ted Cruz and declared that the First Amendment safeguards the candidate's ability to use personal funds to finance campaign speech, "to speak without legislative limit on behalf of his own candidacy."[104] The Court stated that § 304 is a burden on the candidate's ability to spend money on behalf of their own

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[99] *See McCutcheon*, 572 U.S. at 243–44 (Breyer, J., dissenting) (explaining how importing a narrow definition of appearance of corruption has greatly limited the scope and effectiveness of campaign finance regulation).
[100] *See* FEC v. Cruz, 596 U.S. 289, 314–15 (2022) (Kagan, J., dissenting).
[101] *See id.* at 295 (majority opinion).
[102] *Id.* at 294 (emphasis added).
[103] *See id.*
[104] *Id.* at 302 (quoting Buckley v. Valeo, 424 U.S. 1, 54 (1976)).

candidacy because it restricts the use of personal funds (the loan). They reasoned that it restricts this use because § 304 increases the risk that such loans will not be repaid, which in turn disincentivizes the candidate from loaning to their own campaign.[105] The Court also emphasized that the ability to lend money is a key aspect of financing a campaign, an ability that is even more critical for new candidates challenging incumbents.[106]

After recognizing the First Amendment interest at stake, the Court refused to determine which side of the expenditure-contribution framework § 304 falls under because it reasoned that the government had not proven the statute pursues a "legitimate objective."[107] The government argued that the contributions at issue raise the risk of corruption for two key reasons: (1) these contributions directly repay the candidate's personal loans; and (2) these contributions are "particularly troubling" because the donor knows for a fact that the recipient is in a position for a quid pro quo arrangement.[108] The Court dismissed these concerns because the post-election contributions would still be subject to the individual contribution limits.[109] Such a "prophylaxis-upon-prophylaxis approach" indicates that § 304 was not necessary for preventing corruption and that any "marginal corruption deterrence" by the additional measure is "hard to imagine."[110] The Majority contended that the government's inability to identify concrete cases of quid pro quo corruption in this context reduced the legitimacy of anti-corruption concerns.[111]

The Majority found § 304's interest in curtailing the appearance of corruption unconvincing. In support of the government's argument that § 304 limits the appearance of corruption, the government submitted scholarly articles, poll data, and statements made by members of Congress that such contributions "carry a heightened risk" of at least the appearance

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[105] *See id.* at 302–03.
[106] *See id.* at 304.
[107] *Id.* at 305.
[108] *Id.* at 306.
[109] *See id.* at 306–07 (explaining how absent § 304, contributions are capped at $2,900 per election and nontrivial contributions must be publicly disclosed under existing campaign finance regulation).
[110] *Id.*
[111] *See id.* at 307–08 ("The Government instead puts forward a handful of media reports and anecdotes that it says illustrate the special risks associated with repaying candidate loans after an election. But as the District Court found, those reports 'merely hypothesize that individuals who contribute after the election to help retire a candidate's debt might have greater influence with or access to the candidate.'" (quoting Cruz v. FEC, 542 F.Supp. 3d 1, 15 (2021))).

of corruption.[112] Nonetheless, citing two expenditure cases,[113] the Majority disregarded such evidence because it did not point to explicit "record evidence or legislative findings" of quid pro quo corruption in this context.[114] Thus, the governmental interest could only be supported by explicit proof of quid pro quo arrangements.

Moreover, the Majority rejected the government's analogy that post-election contributions that are exclusively used to repay loans are "akin to a gift" because they add to the candidate's personal wealth.[115] The Majority challenged the "akin to a gift" analogy in several ways. First, the Majority downplayed the ability of a candidate to be enriched by loan repayment.[116] Specifically, because the candidate is merely returning to the level of wealth they were at before. "If the candidate did not have the money to buy a car before he made a loan to his campaign, repayment of the loan would not change that in any way."[117] Additionally, the Majority reasoned that a loan would only enrich a candidate if the candidate did not expect to be repaid.[118] Following the government's logic, if all post-election contributions are gifts, but federal law forbids senators from accepting gifts worth $250 or more, then federal law is either "openly tolerating . . . gifts," or retiring debt obligations is not a gift.[119] The Majority found the latter more persuasive.[120]

Finally, the Majority dismissed the government's argument that the Court should defer to the legislative judgment of Congress that § 304 furthers an anti-corruption goal. Specifically, deference is not warranted where the evidence is "scant" and the potential that Congress may have passed this legislation with the intent to insulate incumbents from challengers.[121] For the foregoing reasons, the Majority struck down the limitation of § 304 as an unconstitutional burden on core political speech, thereby eliminating both the cap on the

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[112] *Id.* at 308.
[113] *See* McCutcheon v. FEC, 572 U.S. 185, 210 (2013); *see also* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 618 (1996).
[114] *Cruz*, 596 U.S. at 307 (quoting *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 618).
[115] *Id.* at 311.
[116] *See id.* at 311.
[117] *Id.*
[118] *See id.*
[119] *Id.* at 312.
[120] *See id.*
[121] *Id.* at 313.

amount a candidate may loan to their own campaign and the 20-day post-election limitation on repayment.[122]

This case illustrates the vestigial appearance of corruption in full effect. The Majority in *Cruz* narrowed *McCutcheon's* broad conception of the appearance of corruption, ultimately reducing the justification to something far narrower. This diminished conception, which originated from an expenditure case, now applied to contributions, greatly limiting the ability of Congress to regulate campaign finance. To put it simply, the framework that recognizes both actual corruption and apparent corruption can now only be proven by actual corruption. As a result, if the Court now demands explicit proof of corruption to justify contribution restrictions, then appearance of corruption is effectively no longer an independent justification. Rather, it collapses into the requirement to prove actual corruption. The holding in *Cruz* suggests that the Court now treats the appearance of corruption arguments as speculative unless it is backed by concrete proof of explicit quid pro quo arrangements, something the Court has recognized is inherently difficult to prove.[123] Accordingly, the required evidentiary showing for the appearance of corruption is nearly insurmountable.

2. Justice Kagan's Dissent

The Dissent, written by Justice Kagan, viewed corruption or its appearance broadly, refusing to limit legitimate regulation to actual evidence of quid pro quo exchanges by recognizing concerns that loan repayments to candidates could erode public trust.[124]

Absent § 304, a candidate may extend unlimited amounts of money to their campaign in the form of a loan. This is especially concerning given how ubiquitous personal loans for campaign purposes are. In fact, "some 97% come from candidates themselves."[125] The Dissent recognized that when contributions occur after the election, their "corrupting potential further increases."[126] Specifically, once elected, officials undoubtedly will devote themselves to recovering that money. They may

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[122] *See id.*
[123] *See* Buckley v. Valeo, 424 U.S. 1, 27–28 (1976) (describing laws making criminal giving and taking of bribes as the only dealing with the most blatant and specific attempts of those with money to influence political action).
[124] *See id.* at 314 (Kagan, J., dissenting).
[125] Alexei V. Ovtchinnikov & Philip Valta, *Self-Funding of Political Campaigns*, 69 MANAGEMENT SCIENCE 2425, 2440 (2022).
[126] *Cruz*, 596 U.S. at 320 (Kagan, J., dissenting).

solicit donations for wealthy individuals, "making clear that the money they give will go straight from the campaign to him, as repayment for his loan."[127] Interestingly, there is also a disparity in which type of candidates are most likely to be repaid in full. Not surprisingly, winning candidates are more often repaid than losing ones.[128] This presents a very real incentive for donors who recognize such desires of elected officials and presents the donor with a unique opportunity to make the elected official feel beholden to them. Far more so than for an ordinary contribution because ordinary contributions do not go straight into the elected official's pocket.[129] As the Dissent astutely points out, the politician is happy; the donors are happy; the only loser is the public.[130]

Additionally, whether loan repayment constitutes personal enrichment depends on the baseline used. The Majority reasoned that repayment is not "akin to a gift" because it simply restores the candidate to their pre-loan financial position.[131] But this assumes the baseline for a candidate loan is repayment, ignoring the fact that candidate self-loans are classified as contributions from the candidate,[132] whose appropriate baseline is non-repayment. Think of a candidate who contributes to their own campaign to fund an upcoming rally; there is no reimbursement to the candidate. From that perspective, post-election contributions to repay a self-loan functionally enrich the candidate by allowing them to offload personal financial risk onto donors after electoral success. In other words, if they lose, they eat the loss (like any ordinary contribution); but if they win, they can solicit donor contributions to be made whole. The Majority's framing of repayment as neutral restoration thus obscures the financial advantage embedded in the self-loan system.

The Dissent further challenged the notion that § 304 impedes the candidate's ability to self-fund. In reality, all § 304 limits are the ability of candidates to use other people's money to fund their campaign, something that permissible contribution

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[127] *Id.* at 314.
[128] *Id.* at 322.
[129] *Id.* at 314.
[130] *Id.*
[131] *Id.* at 311.
[132] *Personal Loans From the Candidate*, FEC, https://www.fec.gov/help-candidates-and-committees/handling-loans-debts-and-advances/personal-loans-candidate/ (last visited Apr. 4, 2025).

limitations already do.[133] This distinction between lending and spending is important. Independent spending for one's own campaign has traditionally been protected because it actually reduces the candidate's dependence on donors.[134] Loans, by definition, have the opposite effect. Candidates who lend substantial funds to their campaign have an inherent interest in being repaid, making them entirely dependent on donors to make them financially whole again.[135] This carries a heightened appearance of corruption that § 304 sought to address.

Focusing on the governmental interest, the Dissent argued § 304 sufficiently addressed corruption or its appearance, highlighting that the effects of the appearance of corruption are not lost on Justice Kagan.[136] Much like the Court in *Buckley* and *McConnell*, Justice Kagan's Dissent recognized that avoiding the appearance of corruption "is 'critical' if public 'confidence in the system of representative Government is not to be eroded to a disastrous extent.'"[137] As discussed above, the "recipe for quid pro quo corruption" is in place when an elected official is seeking financial reimbursement from donors after an election.[138] This presents a unique corruption risk for personal loans that base contribution limitations cannot address. Thus, the scope of § 304 is anything but a "prophylaxis-upon-prophylaxis."[139]

Moreover, Justice Kagan recognized the near impossibility of proving concrete quid pro quo exchanges in this context, especially because such impropriety can so easily be disguised as mere repayment contributions.[140] Following this recognition, Justice Kagan appeared much more convinced by the evidence presented by the government. She reasoned that the scholarly research, public poll results, and congressional statements all adequately support the notion that § 304 targets the exact dangers Congress envisioned to address.[141]

3. Analysis of the Appearance of Corruption Evidence

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[133] *Cruz*, 596 U.S. at 315 (Kagan, J., dissenting).
[134] *Id.* at 318–19.
[135] *Id.* at 319.
[136] *Id.* at 327.
[137] *Id.* (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000)).
[138] *Id.* at 320.
[139] *Id.* at 321.
[140] *See id.* at 323–24.
[141] *Id.* at 324.

The fundamental disagreement between the Majority and the Dissent exemplifies the lingering concept of corruption, as their starkly divided opinions hinge on differing interpretations of the scope of the appearance of corruption in campaign finance. Despite *Buckley* and *McConnell* both recognizing that the appearance of corruption extends beyond a showing of explicit quid pro quo,[142] the *Cruz* Majority relied on *McCutcheon* to support an assertion that the government cannot limit the appearance of "influence or access" because that is not the type of corruption that the government may target.[143] Thus, the Majority supplanted the broader concept of the appearance of corruption with a narrower one, a concept that originated from an expenditure case and has now been applied to contributions. Such a maneuver allowed the Majority to downplay the evidence of the appearance of corruption because it failed to prove the most blatant and specific attempts of donors to win influence. This ignored viable precedent that recognized that the appearance of corruption extends beyond what bribery laws prescribe.[144] By definition, the appearance of corruption is about public perception. It is a standard concerned with how political spending *appears* to the public, not necessarily whether explicit corruption can be proven to have actually taken place. The Court's demand for concrete evidence of actual corruption means that the perceived appearance of corruption on its own is insufficient, effectively stripping it of its independent weight as a justification for regulation.

The Majority and Dissent disagree on the evidentiary burden to justify campaign finance regulation. Analyzing the scholarly research, public polling data, and congressional testimony highlights this divide. In particular, this section will focus on the Majority's insistence on requiring direct evidence of corruption or quid pro quo arrangements, while also exploring how the Dissent viewed these same materials in a broader context of the appearance of corruption. This analysis sets the stage for reflecting on how campaign speech jurisprudence has

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[142] *See* Buckley v. Valeo, 424 U.S. 1, 28 (1976); McConnell v. FEC, 540 U.S. 93, 144–46 (2003) (explaining the court's recognition of the broader threat from politicians too compliant with improper influences from large contributors, an aspect of corruption that goes beyond explicit bribery).

[143] *Cruz*, 596 U.S. at 308 (citing McCutcheon v. FEC, 572 U.S. 185, 207–08 (2013)).

[144] *See, e.g.*, *Buckley*, 424 U.S. at 28; *McConnell*, 540 U.S. at 144–46 (explaining the court's recognition of the broader threat from politicians too compliant with improper influences from large contributors, an aspect of corruption that goes beyond explicit bribery).

diminished the role of the appearance of corruption by instilling an insurmountable evidentiary hurdle.

a. Scholarly Research

The first piece of evidence was scholarly research on the effects of the BCRA on self-funding.[145] The research analyzed the issue of indebted politicians, both before and after § 304 was enacted. The empirical studies found that politicians carrying campaign debt were more likely to change their votes after receiving contributions from special interests compared to those without debt.[146] Data before the enactment of § 304 showed that politicians carrying campaign debt were significantly more likely than their debt-free counterparts to "switch their votes after receiving contributions from special interests."[147] After § 304 went into effect, the data showed that politicians with debt exceeding $250,000 became "significantly less responsive to contributions."[148] This led to a reduction in vote switching, strongly suggesting that § 304 worked to limit improper influence, accomplishing "just what Congress thought it would."[149]

The Majority found this research unconvincing.[150] They emphasized the article's expressly acknowledged limitation, its inability to distinguish between legitimate donor influence and improper quid pro quo arrangements.[151] In the Majority's view, this failure rendered the study insufficient to satisfy its heightened evidentiary bar, which demands evidence of actual quid pro quo corruption rather than generalized influence or appearance-based risks.[152]

In contrast, the Dissent substantively grappled with the content of the research. Justice Kagan acknowledged the "nigh-impossib[ility]" of proving quid pro quo exchanges and instead gave greater weight to the risks of apparent corruption.[153] She recognized the inherent limitations of social science, namely its inability to offer absolute certainty, yet emphasized that the research still showed that § 304 meaningfully reduced the

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[145] *Cruz*, 596 U.S. at 325 (Kagan, J., dissenting) (citing Ovtchinnikov & Valta, *supra* note 125).
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Cruz*, 596 U.S. at 325.
[150] *Id.* at 309–10 (majority opinion).
[151] *Id.* at 308–09.
[152] *Cruz*, 596 at 308.
[153] *Id.* at 324–25 (Kagan, J., dissenting).

influence of post-election contributions on politicians' behavior.[154] Taken as a whole, Justice Kagan understood the difficulty of proving quid pro quo arrangements and would recognize that the correlation between debt repayment and political behavior, as outlined in the scholarly article, reasonably leads the public to perceive a risk of corruption.

b. Public Poll Data

Next, the Court evaluated the evidentiary weight of public poll data. The poll asked respondents to evaluate the likelihood "that a person who 'donate[s] money to a candidate's campaign after the election expects a political favor in return.'"[155] Most respondents found it "very likely" or "likely" that a person who donates money expects a political favor.[156] The Majority rejected the polling evidence for several reasons. First, Justice Roberts cast doubt on the objectivity of the poll by implying it was manufactured evidence.[157] Second, he reasoned that the data did not sufficiently compare views on pre-election contributions to post-election contributions.[158] Third, the poll did not narrowly define political favors to mean only actual quid pro quos. [159]

In contrast, the Dissent found these subtle critiques of the polling insufficient to negate the fact that an overwhelming majority of respondents perceived an appearance of corruption. Specifically, 81% of respondents recognized the potential for impropriety, a fact that the Majority overlooked entirely.[160] Justice Kagan called out the Majority for flyspecking the polling question with exacting scrutiny.[161] She argued that the poll results were so lopsided that "such tinkering" would not have made up for the overwhelming public perception of impropriety.[162] The Dissent's position highlights a broader view that public opinion polling, even when expressed through imperfect data, is an essential indicator of the existence or the appearance of corruption. To reject such evidence is to potentially disregard overwhelming public recognition that self-loans of unrestricted amounts, and without repayment

[154] *Id.* at 323–24.
[155] *Id.* at 309 (majority opinion).
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.* at 326 (Kagan, J., dissenting).
[161] *Id.*
[162] *Id.* at 326–27.

limitations, enhance the perception of the appearance of corruption.[163]

Even if this particular poll had methodological shortcomings, the Majority and Dissent's starkly different treatment of its evidentiary value reflects a deeper jurisprudential divide over how courts should assess public perception. The Majority's criticism may appear narrowly tailored to the poll at hand, but it sets a precedent that will make it increasingly difficult for public polling to serve as a legitimate evidentiary basis for future contribution limitations. Lower courts will almost certainly read *Cruz* as a signal that generalized perceptions of corruption are not enough, even if polling data reveals these perceptions are overwhelmingly widely shared. This alone is a significant doctrinal shift, even if the Court frames its reasoning to be limited to one dataset.

c. Congressional Testimony

Finally, the Court evaluated statements made by members of Congress prior to the enactment of the BCRA. The testimony focused on the idea that allowing unlimited contributions for loan repayment could create the appearance that politicians are more responsive to donors who help them pay off significant campaign debts.[164]

Given the dismissal of other evidentiary submissions, the Majority's rejection of congressional testimony necessarily followed. In the absence of other relevant evidence, isolated floor statements could not constitute sufficient evidence of corruption or its appearance. While such evidence in the form of formal "legislative findings" could suffice, informal statements by members of Congress alone lack the necessary evidentiary weight.[165] In sum, because the Majority dismissed the other evidence admitted supporting an assertion of impropriety, the informal legislative statements were insufficient on their own.

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[163] *Id.* ("The public knows that to be true. The public's representatives in Congress knew it to be true. Only this Court—somehow—does not.").
[164] 147 CONG. REC. 3882 (2001) (remarks of Sen. Domenici) (explaining the risk of perceived corruption at post-election fundraising events where a winning candidate can now ask "how would you like me to vote now that I am a senator?"); 147 Cong. Rec. 3970 (2001) (remarks of Sen. Hutchison) ("[Candidates] have a constitutional right to try to buy the office, but they do not have a constitutional right to resell it.").
[165] *Cruz*, 596 U.S. at 310 (citing Colo. Republican Fed. Campaign Comm., 518 U.S. 604, 618 (1996)).

II. WHY APPEARANCE OF CORRUPTION SHOULD BE REVIVED

This section builds the argument that the appearance of corruption should be given greater legal weight as a justification for campaign finance regulation, emphasizing that the appearance of corruption reaches far beyond explicit bribery and that explicit bribery itself is extraordinarily difficult to prove.

Following the holding in *Cruz*, the appearance of corruption justification is effectively functionless in modern application. That conclusion is even more striking given how narrow the regulated slice of activity was and how squarely it felt within Congress's core expertise. In fact, it's difficult to imagine "two topics about which Congress has more expertise than the pressures of campaign fundraising and the temptations arising from personal gifts received from contributors and supporters."[166] This raises the question: has the narrowing of the corruption standard left a dangerous gap in First Amendment jurisprudence, one that could leave our democracy vulnerable to improper influence? Or is the vestigial appearance of corruption inconsequentially duplicative to serve the same goal as actual corruption, such that protecting both interests only targets the same harm? This Note aligns with the former, recognizing that legitimate threats to democracy exist beyond quid pro quo arrangements.

Despite its vestigial existence doctrinally, the appearance of corruption is a very real political concern. The public's perception of corruption has tangible effects on democracy, and it should be regulatable.[167] *Buckley* rightly noted that avoidance of the appearance of improper influence is critical "if confidence in the system of representative Government is not to be eroded to a disastrous extent."[168] Inherent in a well-functioning representative democracy is a general sense of the citizenry feeling represented. The clearest form of corruption comes in the form of bribery; however, public perception is shaped by more than just explicit proof of quid pro quos. Efforts to better understand public perception have produced polling data that suggests the public's perception of corruption is influenced by

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[166] Tara Malloy, *Corruption Risk is Clear in* FEC v. Cruz for Senate, CAMPAIGN LEGAL CENTER (Aug. 9, 2021), https://campaignlegal.org/update/corruption-risk-clear-fec-v-cruz-senate

[167] Buckley v. Valeo, 424 U.S. 1, 27 (1976).

[168] *Id.*

more than just outright exchanges of votes for money.[169] These perceptions are powerful enough to shape voter behavior, influencing not only *whether* people vote but *how* they vote. This highlights the potential for the appearance of corruption to undermine the integrity of the democratic process, causing a reduction in political representation, a breakdown in reasoned discourse, and a weakening of the legitimacy of the electoral system itself.

Even in the absence of concrete evidence of quid pro quos, the appearance of corruption should warrant regulation because it very well may distort democratic processes. In examining the consequences of high levels of perceived corruption, this Note seeks to build the argument that regulation of campaign speech should be permissible, even without explicit evidence of quid pro quos, because appearance alone can still profoundly damage the health of a democracy.

One way the appearance of corruption can shape public behavior is by influencing voter abstention. Rationally, if citizens perceive that their civic engagement is inconsequential to democracy, it is understandable for them to stop participating entirely. Researchers have shown a negative effect of perceived corruption on voter turnout.[170] This can have devastating effects on democracy by creating a vicious cycle: as corruption increases, the percentage of voters who go to the polls decreases In such an environment, good faith efforts to clean up the system are blocked or ignored because large segments of the voting population that would be interested in such reform do not trust the officials proposing it. Accordingly, a democratic death spiral forms, where the only legislation passed is the one that benefits those who still feel represented by the system. Specifically, by those buying it.

Second, high levels of appearance of corruption can fuel political polarization and extremism. For instance, consider the 2020 presidential election, in which Donald Trump predicted that the election would be "the most corrupt election in the history of our country."[171] After the election was called for Joe Biden, Donald Trump insisted that the electoral process was

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[169] *Id.*

[170] Joel W. Simmons, *Corruption and Voter Turnout: Evidence From Second Generation Americans*, 57 COMPAR. POLIT. STUD. 101 (2023).

[171] Maegan Vazquez & Donald Judd, *Trump Predicts 'Most Corrupt Election' in US History While Making False Claims About Mail-in Voting*, CNN (June 23, 2020), https://www.cnn.com/2020/06/23/politics/donald-trump-mail-voter-fraud-most-corrupt-election/index.html.

rigged. Thousands of people believed him and showed up outside to invade the U.S. Capitol.[172] With such a recent example in mind, extremism in response to perceived corruption is not hard to imagine. When people believe their vote does not matter, they seek someone to blame. This fosters an "Us vs. Them" mentality, rendering a portion of the population unresponsive to constructive discourse and only satisfied with radical action.[173]

By dismissing appearance-based concerns absent direct proof of bribery, the Court risks ignoring the systemic consequences the appearance of corruption has on democracy. As trust in government declines, so may participation in the electoral process, and in its place rises an environment ripe for populist backlash and political extremism. If democracy is to function effectively, campaign finance regulation must account for not only actual corruption but also its perceived presence. Such regulation is essential to ensure the system is not "eroded to a disastrous extent."[174]

III. CHALLENGES TO REVIVING THE APPEARANCE OF CORRUPTION

The vestigial appearance of corruption is here to stay. While this Note normatively argues that the appearance of corruption should carry more weight as a justification for regulation, the reality is that such recognition is unlikely. Meaningful campaign finance regulation has been structurally constrained since *Buckley*, which placed political spending under the broad protection of the First Amendment. By recognizing the role spending money has on the political process, *Buckley* created an inherent tension. Now, any attempt to regulate campaign finance to prevent corruption or its appearance must contend with the Court's rigid speech protections. This tension has only deepened over time, making it increasingly difficult for policymakers to justify restrictions, even in the name of preserving democratic legitimacy. Accordingly, the only way to restore meaningful campaign finance regulation is to loosen the

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[172] John Gramlich, *A look back at Americans' Reactions to the Jan. 6 riot at the U.S. Capitol*, PEW RESEARCH CENTER (Jan. 4, 2022), https://www.pewresearch.org/short-reads/2022/01/04/a-look-back-at-americans-reactions-to-the-jan-6-riot-at-the-u-s-capitol/.

[173] Madeleine Albright, *'Us vs. Them' Thinking is Tearing America Apart. But Here's Why I'm Still Hopeful About the Future,* TIME (Jan. 15, 2021), https://time.com/5929843/madeleine-albright-us-vs-them-thinking/.

[174] Buckley v. Valeo, 424 U.S. 1, 27 (1976).

framework or overturn *Buckley* altogether. However, both options are highly unlikely.

A. Loosening the Framework

One way to restore meaningful campaign finance regulation is to loosen the existing framework. Nonetheless, in all its potential forms, a doctrinal loosening is also unlikely because of both the doctrine's inherent rigidity and the Court's ideological composition.

1. Inherent Rigidity as a Barrier

Inherently, there is not much to loosen because *Buckley's* two key assertions do not offer much flexibility. Holding that spending money on elections is speech and that only corruption or its appearance justifies regulation severely limits governmental authority from the outset. Unlike other early cases articulating a newly defined First Amendment right, the Court found it necessary to specify the specific contours of a sufficient governmental interest.[175] Unlike other early cases articulating a newly defined First Amendment right, the Court found it necessary to specify the contours of a sufficient governmental interest.[176] For example, scholars have identified how the "clear and present danger" doctrine illustrates the customary practice of the Court not to attempt to prescribe all dangers that Congress may prevent; rather, the Court opted to leave the term open-ended for future advancement of the doctrine.[177] Here, the departure from custom illustrates the development of campaign finance regulations and informs its narrowing scope as subsequent cases consistently limit the authority of the government to regulate "speech" in the form of political spending.

2. Ideological Composition as a Barrier

Moreover, given the ideological composition of the Court, a doctrinal loosening is unlikely. As discussed in this Note, *McConnell* demonstrated a greater openness to campaign finance regulation.[178] However, in only a few short years, the Court shifted course, ushering in a new era of skepticism toward

[175] Frank J. Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMMENT. 97, 105–06 (1986).
[176] *Id.*
[177] *Id.*
[178] Richard Briffault, *Decline and Fall? The Roberts Court and Challenges to Campaign Finance Law*, 6 FORUM 1 (2008).

such regulations. This shift was no coincidence. Driving the shift was the changing composition of the Court as Chief Justice Roberts assumed leadership.[179] For the past two decades and counting, the Roberts Court has consistently constrained the ability of Congress to regulate campaign financing.[180] Any potential hope for stronger campaign finance regulation cannot ignore the current makeup of the court and its unwavering interest in staunchly protecting the First Amendment. Accordingly, the Court, as it currently stands, is uninterested in pursuing a more liberal approach to campaign finance regulation.

B. Overturning Buckley

Another equally challenging avenue to strengthen the state of campaign finance regulation would be to remove it from the existing expenditure-contribution framework altogether. Such a maneuver would require overturning *Buckley*. The broadest and most vocal grounds for overturning *Buckley* would be challenging the notion that spending money constitutes speech in the election context.[181] If spending money on elections were considered conduct, Congress would be able to pass stronger regulations of campaign finance by means of a lower level of judicial scrutiny. Nonetheless, such a maneuver is improbable. The Court is unlikely to overturn *Buckley* for several reasons.

Primarily, the decision to overturn *Buckley* would have tremendous consequences for the First Amendment jurisprudence. As the foundation of modern campaign finance law, dismantling *Buckley* would disrupt nearly fifty years of precedent and unravel an entire lineage of decisions built upon its framework. Moreover, such a meaningful shift would require not only a compelling doctrinal rationale but also a strong judicial motivation to do so, both of which are currently absent. The development of the corruption framework itself suggests that the Court has opted for gradual erosion rather than direct

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[179] *Id.* ("With the appointment of Chief Justice Roberts in 2005 and, especially, the replacement of Justice O'Connor by Justice Alito in 2006, the Court has become more hostile to campaign finance regulation.").

[180] Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade*, 68 STAN. L. REV. 1597, 1600 (2016) ("Where the Court has greatly constrained choice, only minor improvements are possible absent a change in the Supreme Court's personnel.").

[181] Alan B. Morrison, *What If … Buckley Were Overturned?*, 16 CONST. COMMENT. 347, 355–58 (1999).

confrontation. Over the past two decades, the Roberts Court has grown increasingly skeptical of the governmental interest in regulating money in politics, signaling a reluctance to expand regulatory authority. Importantly, even Justice Kagan's dissent in *Cruz*, though sharply critical, did not call for a reevaluation of *Buckley*. This absence of judicial appetite—on both ideological wings of the Court—underscores the improbability of *Buckley* being overturned in the foreseeable future.

CONCLUSION

Despite its inception in *Buckley* and its legitimacy affirmed in *McConnell*, the Supreme Court has systematically reduced the appearance of corruption to a legal vestige. By the time of *Cruz*, the appearance of corruption has become little more than a formalistic nod to precedent, stripped of its practical weight. In the wake of free speech absolutism, what was once a cornerstone of campaign finance law has become a vestige that no longer functions as a real constraint on the influence of money in politics.

This doctrinal erosion has been achieved primarily by raising the evidentiary bar, demanding proof of actual quid pro quo exchanges, despite a regulatory interest claiming it addresses perception. It is a standard concerned with how political spending *appears* to the public, not necessarily whether explicit corruption can be proven to have actually taken place. By definition, the appearance of corruption is about public perception, and that is exactly what *Buckley* recognized. Perception as a risk "of almost equal concern" to actual corruption, that the system is perceived to be corrupt by the public.[182] The lineage of cases from *Citizens United, McCutcheon*, to *Cruz* has essentially invalidated that interest, requiring proof of actual corruption when the interest itself was created to address broader concerns. This, undeniably, has left democracy exposed to corruptive forces that exist beyond the most blatant and specific forms of bribery.[183]

Moreover, change is unlikely. Given the specificity of *Buckley's* reasoning and the jurisprudential makeup of the Court, there is little chance for a doctrinal loosening that would be necessary to revive the appearance of corruption. What remains is a legal vestige, once central to campaign finance law but now significantly diminished, sidelined by a First Amendment

[182] Buckley v. Valeo, 424 U.S. 1, 27 (1976).
[183] *Id.* at 28.

jurisprudence that places less weight on public perception as a basis for regulation.