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Public access to American court proceedings is a metaphor for justice in America. Open courtrooms encourage truthfulness and discourage perjury, they encourage fairness and discourage abuse, and most important, they place our system of justice before the public and thus make it accountable. Open courtrooms, however, are not the norm for America’s system of juvenile justice. Since the creation of the juvenile court system at the start of the twentieth century, the juvenile court has been largely closed to the public. Closed proceedings fit with the early juvenile court reformers’ philosophy, which was not to punish, but to treat and rehabilitate children who had committed criminal acts. Closed proceedings were seen as protecting children from the trauma of publicity, protecting children from the stigma of being labeled delinquents, and accommodating an informal setting, which was conducive to the parental role reformers envisioned for juvenile court judges. One hundred years later, there is much debate about the wisdom of closed courtroom proceedings for children who have committed criminal acts. As a result, juvenile delinquency hearings have become more open to the public. There has been limited debate, however, about the practice of the closed courtroom for children in dependency proceedings, a group also subject to the jurisdiction of juvenile courts. Children who are abused or neglected and thus in need of the protective services of the state are also subject to the closed courtroom of the juvenile court system. The wisdom of closing those child dependency hearings is the subject of this article.
The last two decades of debate about closed-door juvenile hearings has concerned the court's delinquency population. Critics argued, and continue to argue, that the juvenile court's rehabilitative philosophy, including its closure and confidentiality, simply cover up a system that is not working. In particular, critics charge that confidentiality conceals a "too lenient" system that "coddles" and lets juveniles "get away" with

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little punishment for their crimes. Further compounding the problem, confidentiality also withholds knowledge from the public concerning which juveniles are threats to public safety. Because the system is not working, argue the critics, neither is the rehabilitation of the delinquents. The closed juvenile delinquency system, then, does "little more than conceal the . . . system's failures and abuses."

The same can be said of the dependency system — the closed door of dependency court has too long concealed from the public a system that leads to failure and abuse. Advocates for closed dependency courtrooms can make arguments similar to those made in defense of closed delinquency courtrooms. While juvenile courtrooms were originally closed to the public in order to contribute to the rehabilitation of delinquents, dependency proceedings, like delinquency proceedings, are similarly meant to protect the child and to treat the problem. The state seeks to rehabilitate and preserve the family if possible, not to punish anyone. Advocates can thus argue that open proceedings will inhibit this rehabilitation. Open proceedings can subject children to invasions of privacy by the press and public. Having one's family story told in public can embarrass, humiliate, traumatize, stigmatize and thus delay the psychological healing that must take place. A closed hearing can contribute to an informal atmosphere, making it more conducive to the social work approach that might best heal and protect the child. Indeed, it is argued that the need for confidentiality is more compelling for dependency hearings than it is for delinquency hearings, and when the issue is neglect or abuse, it is hard to deny the appeal of protecting a child from the public gaze. Given these considerations, closed hearings in dependency court certainly appear to be "in the best interest" of the affected child, a standard that reflects the overall charge to courts when dealing with neglected and abused children. But there is fallacy in a rationale that considers only the immediate and isolated effects of a closed or open hearing in a particular case. The cumulative effects of a dependency court system that is presumptively and customarily closed to public access must also be con-

9. Id. at 370.
considered. These effects are visited upon all children in dependency court, as all are subject to the court's justice. The current status of the dependency court suggests that the presumptively closed courtroom has not resulted in a system that serves the best interest of all children.

The health of dependency court is not good. Those who have tried to stir interest in reform search for words to describe what they see. "Crisis[,] shambles,"4 "terrible plight,"5 "widespread frustration,"6 "so troubled,"7 and, with much frequency, "failure,"8 are words used time and again to try to communicate to the public the state of dependency court. The reports of participants and others with some access confirm these descriptions. Dependency court facilities are inadequate. Personnel are underpaid, under-appreciated and under-trained. The caseload is massive. The issues are serious and complex and at the same time, state and federal laws require courts to move quickly to determine a permanent home for each child.9 Most telling, however, are the results of the system, the stories of children harmed and more while under the jurisdiction of the system charged with their protection. The frequent news stories of dependency courts' child protective efforts gone deadly wrong are the easiest evidence to recite. Even closed courtroom doors cannot keep these horrific stories from the media. In Georgia:

Once doctors concluded the child was a victim of battered child syndrome, records show that Miller [the chief of social work at the children's hospital] hounded Fulton [Department of Family and Children Services (DFACS)] not to return the child to the guardian. DFACS went to court to remove the child but failed to subpoena Miller or the doctors. On Feb. 10, 1995, a Fulton Juvenile Court judge returned the child to the guardian without hearing any testimony from hospital staff. By April 1996 Tavelle [the child] was dead.20

In Washington, D.C.:

On Dec. 22, [1999,] D.C. Superior Court Judge Evelyn E.D. Queen ordered Brianna out of foster care and back to her biological mother, who had been found neglectful of Brianna and her seven siblings during a trial last year. Brianna died two weeks later in what was ruled a homicide. D.C. police and a grand jury are investigating.

18. Id.
19. Discussion infra, Parts III.B.
The attorney representing Brianna said the toddler's social worker told him the mother's house was safe. The social worker denies that. The social worker also hadn't turned in a report on time to Judge Queen urging that Brianna not be returned to her mother.

In Florida:

Judge Lockett said Thursday he won't hear any more cases in which DCF [the state Department of Children and Families (DCF)] investigators are unprepared. Lockett is the judge who sent Kayla back to her home after getting incomplete information on her case from DCF investigators. Later, after the child was slain, Lockett vowed he would never again send a child home without complete background.

We at least know part of what went wrong in Tavelle, Brianna and Kayla's cases. A witness was not subpoenaed, a report was not timely filed, and an investigation was not completed – all possibly deadly mistakes. In many cases we do not even know this much. In Indiana:

Eight-month-old Ashley Whetzel died, prosecutors allege, at the hands of a man who had been hurting her much of her short life.

Exactly what happened is unclear—since Indiana law keeps child-protection cases and their records secret, and many of the people involved in the case would not talk about it.

In Missouri:

Eight-year-old Larry Bass weighed less than 30 pounds when he died Wednesday. Because case records are closed to the public, the Missouri Division of Family Services would not release any details about the family's case or say whether it had investigated the family.

These stories, of course, are among the most notorious failures of dependency court – children returned to the homes of their abusers, or children abused by the foster families meant to protect them. But hundreds of thousands of children are subjected to the dependency court process every year, in a system that can afford "no longer than five or

25. Jane Waldfogel, Rethinking the Paradigm for Child Protection, in THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT 104, 104, 107 Figure 1 (Richard E. Behrman, M.D. ed., 1998). Close to a half million children a day, for example, can be counted in foster care. Gavin, supra note 14, at 10.
10 minutes,"'26 "about ten minutes,"'27 or "an average of 16 minutes"'28 to hear and decide a case. While closed doors keep unknown the specific justice or injustice meted out in individual cases, most accounts of dependency court do not inspire confidence. Most describe a system that has learned simply to make do with its grossly inadequate resources, one that focuses on processing cases at the expense of protecting children:

[H]eavy calendars . . . require cases to be moved through quickly. There is no time for thorough and careful consideration of all the facts and concerns. Giving too much time to any one case disrupts the entire calendar. Neither the judges nor the attorneys can be completely familiar with these cases because of the number of cases which they handle. . . . The caseloads maintained by most professionals working in these systems [are] too high to expect quality performance.29

The children who are the subjects of these ten minute hearings in today's dependency court, will, if they are lucky, never make the headlines of the newspapers. But most assuredly, dependency court is failing many of these children too.

The state of today's dependency court and the known failures of the court require that we reconsider the wisdom of closed proceedings. First, as a practical matter, to demand accountability from the delinquency proceedings of juvenile court and not to do so with dependency proceedings is shortsighted. The two are linked. Personnel within the juvenile court system frequently comment that they expect to see many of the children now in dependency court — abused, neglected or abandoned children — "down the hall" in delinquency court a few years later.30 Their

26. Juvenile Court Improvement: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means 105th Cong. 25, 28 (Feb. 27, 1997) (statement of Kathi L. Grasso, American Bar Association Center on Children and the Law, on behalf of the American Bar Association).


30. Personal observations of author during two year stint as Court Appointed Special Advocate (CASA). CASA is a well-known and respected example of an organization that trains and coordinates lay volunteers to serve as guardian ad litems (GALs) in dependency proceedings, sometimes alongside the child's lawyer. Mark Hardin, Responsibilities and Effectiveness of the Juvenile Court in Handling Dependency Cases, in THE FUTURE OF CHILDREN: THE JUVENILE COURT 111, 113-20 (Richard E. Behrman, M.D. ed., 1996).
suspicions are correct. Children who end up in juvenile delinquency court often enter the system of juvenile justice first as abused or neglected children. That violence is a predictor of violence, and thus delinquency, is well known. That neglect is a predictor of delinquency, however, is also supported by research. Some researchers have concluded that neglect, which constitutes the majority of dependency cases, "may be more harmful to a child's emotional development than abuse," and that it is the combination of abuse and neglect that often produces "antisocial behavior." Other factors are implicated, including sub-standard housing, sub-standard health care, inadequate education, and there is a strong correlation between poverty and delinquency. Most indicators, however, which appear to be linked with the child's earliest developmental years, implicate family functioning including, most prominently, abuse and neglect. The impact is tangible. A child who is subject to abuse or neglect, compared to a child who is not abused or neglected, has "a 53% greater chance of being arrested as a juvenile, a 38% greater chance of being arrested as an adult, and a 38% greater chance of being arrested for a violent crime." Protecting these children now from abuse and neglect will pay off in the long run.

More fundamentally, however, to argue about access and accountability in the delinquency wing of juvenile court in the name of protecting the public, without considering it in the dependency wing, is to relegate to secondary status the protection of our nation's children. These children are a part of the public that must be protected.

That the system is failing, of course, does not mean public access is the answer, and it does not mean that public access will bring reform. It is possible that a presumption of public access to dependency proceedings would not have made a difference in the quality of the court's efforts in the cases of Tavelle, Brianna, Kayla, Ashley, or Larry, for example, or in many of the thousands of other cases dependency courts hear. But it seems likely that it would have. Further, if children are dying because of careless mistakes; if courts are consistently deciding in ten minute hearings to take children from parents, or to leave children with parents accused of neglect or abuse; if all of this is going on behind closed doors; and if, as Chief Justice Burger writes, "the presumptive openness

32. Id. at 247.
34. Watson, supra note 31, at 247.
35. Id.
37. Id. at 426-27; see also Watson, supra note 31, at 246-47.
of the trial” has long been regarded as “one of the essential qualities of a court of justice,” why do we continue to deny public access to dependency proceedings as a matter of course? The public needs to see the inadequate system of justice dependency court offers to its children. Whether that opportunity for public accountability will bring reform and a greater measure of justice for the children of dependency court remains to be seen. But the case for creating the possibility is a persuasive one.

I. HISTORY AND FUNCTION

While I argue that public access to dependency proceedings should be legislated because it is in the best interest of children and not because it may be constitutionally required, the Supreme Court’s constitutional analysis in court access cases is a good starting point. In a series of opinions in the 1980s, the Court recognized the public’s First Amendment right of access to criminal proceedings, beginning with Richmond Newspapers, Inc. v. Virginia and Globe Newspaper Co. v. Superior Court (trials) and continuing with Press-Enterprise Co. v. Superior Court (hereinafter Press Enterprise I) (jury selection process) and Press-Enterprise Co. v. Superior Court (hereinafter Press-Enterprise II) (preliminary hearings). In each case, the Court relied upon a two-fold analysis, looking first at the history of access to the proceeding and second, at the function served by access to the particular proceeding. The Court’s analysis suits a policy discussion in two respects. First, the Court’s analytical framework informs the discussion in two essential areas: (1) reviewing the history of access to dependency proceedings provides an opportunity to look at society’s judgment about access to proceedings over time and (2) examining the functional role of access to dependency proceedings provides an opportunity to consider the logic of open proceedings today. In addition, however, the Supreme Court’s analysis in these cases also contributes substantively to a discussion of dependency proceedings. While the cases in which the Court considered access questions all involved criminal proceedings, the Court’s analysis

41. 448 U.S. 555, 575-581 (1980) (plurality opinion); Id. at 597-98 (Brennan, J., concurring).
42. 457 U.S. 596, 604-06 (1982).
44. 478 U.S. 1, 10-13 (1986).
45. See also Waller v. Ga., 467 U.S. 39, 46-47 (1984) (using the same analysis as the First Amendment access cases, held that a closed suppression hearing, over defendant’s objection, violated defendant’s Sixth Amendment rights).
46. The Supreme Court has thus far explicitly recognized a right of access only in criminal cases. But see Richmond Newspapers, Inc. v. Va., 448 U.S. 555, 580 (1980) (“[W]e note that
includes the history and function of access to courtrooms generally, thus also providing an introduction to these aspects of dependency proceedings.

The Court’s opinions first consider the history of courtroom access in America. In Justice Brennan’s words, “a tradition of accessibility implies the favorable judgment of experience.” In other words, our historical experience tells us something about how we have valued access. Chief Justice Burger provides the foundational history lesson in the Court’s plurality opinion in *Richmond*. His discussion gives more focus to the criminal trial, the issue before the Court, but also tells the history of trials generally in the Anglo-American justice system, and makes plain that not only criminal, but also civil trials have traditionally been open. In tracking the open trial from England to America, Justice Burger begins “before the Norman Conquest [when] cases in England were generally brought before moots, such as the local court of the hundred or the county court, which were attended by the freemen of the community.” These were courts of general jurisdiction and heard both civil and criminal matters. Justice Burger’s discussion moves on to another court of general jurisdiction, “the Eyre of Kent, a general court held in 1313-1314, [which] evince[d] a recognition of the importance of public attendance apart from the ‘jury duty’ aspect.” From the Eyre of Kent, Justice Burger takes us to the colonies:

historicall[y] both civil and criminal trials have been presumptively open.”); *Richmond*, 448 U.S. at 599 (Stewart, J., concurring) (“[T]he First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal.”); Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 384 (1979) (observing that history demonstrates a “common-law rule of open civil and criminal proceedings”).

Lower courts, however, have relied upon *Richmond*, *Globe* and subsequent cases and found that the right of access extends to civil cases also. NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 359 (Cal. 1999); Publixer Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984); In re Cont. Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984); Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177-79 (6th Cir. 1983). A few authors have also argued that the public may well have a constitutional right of access to dependency proceedings. E.g., Jeanne L. Nowaczewski, Comment, The First Amendment Right of Access to Civil Trials After *Globe Newspaper Co. v. Superior Court*, 51 U. Chi. L. Rev. 286, 306-10; Sokol, supra note 28, at 881; Brelsford & Myers, supra note 3, at 14; Gofen, supra note 13, at 857.

47. The historical analysis the Court uses can serve two objectives. First, a history of access can suggest a constitutional right. Important to a policy analysis, however, is the second objective, what our experience tells us about the value of access. Nowaczewski, supra note 46, at 290-91.


49. *Id.* at 556.

50. *Id.* at 565 (citing Pollock, *English Law Before the Norman Conquest*, 1 SELECT ESSAYS IN ANGLO-AM. LEGAL HIST. 88, 89 (1907)).

51. Nowaczewski, supra note 46, at 294. Nowaczewski also notes both criminal and civil trials were open in England and that there was originally no significant distinction between the two. As the two became more distinct, public access remained constant. “[E]arly commentators either expressly or implicitly regarded civil trials as necessarily open to the public.” *Id.* at 295.

52. *Richmond*, 448 U.S. at 566.
When in the mid-1600's the Virginia Assembly felt that the respect due the courts was 'by the clamosrous unmannersness of the people lost, and order, gravity and decoram which should manifest the authority of a court in the court it selfe neglected,' the response was not to restrict the openness of the trials to the public, but instead to prescribe rules for the conduct of those attending them.53

And in a footnote, Chief Justice Burger notes that "historically both civil and criminal trials have been presumptively open."54

Justice Burger then turns to the second part of the Court's analysis, asking what function is served, what values are gained, by public access to trials.55 And again, while the Chief Justice looks specifically at the function public access serves in criminal trials, his rationale extends to civil proceedings.56 Presumptive openness, Justice Burger observes, has "long been recognized as an indispensable attribute of an Anglo-American trial."57 Hale in the 17th Century, Blackstone in the 18th century, and Bentham in the 19th century all recognized the value of the open trial.58 Among those benefits accruing from access Burger discusses were giving assurance of fair proceedings, discouraging perjury, discouraging other misconduct, enhancing the performance of participants, protecting the judge from "imputations of dishonesty," discouraging decisions based on "secret bias or partiality," educating the public, and encouraging public confidence in the system.59

The Court's discussions on the history and the functional role of access suggest dependency proceedings should be subject to public access. First, history has valued highly public access to trials, and dependency hearings are trials. The dependency court adjudicates.60 Further, the matters adjudicated in dependency court are no less worthy or needful of the benefits access brings – fair proceedings, truthfulness, credibility, an educated public, public confidence in the system – than are the matters adjudicated in criminal court. Dependency courts decide whether a child

53. Id. at 567 (internal source omitted).
54. Id. at 580 n.17. See also Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 387 (1979): For many centuries, both civil and criminal trials have traditionally been open to the public. . . . [And] in the American Colonies . . . [f]rom the beginning, the norm was open trials. . . . Indeed, many of the advantages of public criminal trials are equally applicable in the civil trial context. While the operation of the judicial process in civil cases is often of interest only to the parties in the litigation, this is not always the case [citations omitted]. Thus, in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.
55. Richmond, 448 U.S. at 575-78, 580.
56. Id. at 569.
57. Id.
58. Id.
59. Id. at 569, 572. These latter observations served as the basis for the "function" prong of the Court's history and function analysis. See also Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 606 (1982) (listing the benefits of public access to criminal trials).
has been abused or neglected; they determine whether a child needs the intervention of the state for protection; they decide the parents’ rights to the custody of their children; they separate children and parents; they place children in foster homes. If preliminary hearings and voir dires in criminal cases are, as the Supreme Court has said, as important as the trial itself, and thus subject to public access, then a dependency proceeding, which is the “trial,” should be as well.

The Supreme Court has also recognized that access to proceedings is even more critical when no jury participates and the judge acts as both fact finder and decision maker, as is the case in dependency hearings. The Court’s statement concerning preliminary hearings applies equally to other proceedings conducted without juries: “[T]he absence of a jury, long recognized as ‘an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint [sic], biased, or eccentric judge,’ makes the importance of public access . . . even more significant.”

Thus, the Supreme Court’s general discussion of the history and function of access supports the wisdom of public access to dependency trials. Justice Brennan, in Richmond, however, cautions against generalities, and rightly so. Just as the protection of the First Amendment can theoretically be made “endless” by asserting that an action informs the public and thus should be protected, we need to be cautious in a policy analysis of access to court proceedings. A policy analysis, like a constitutional analysis, “is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.” Here, trials that they are, one cannot ignore a one hundred year history that has treated America’s juvenile proceedings, including dependency, differently, and treated them so for particular policy reasons. Accordingly, it makes sense to examine specifically the history of dependency court proceedings to see if it reveals any “judg-

62. The Supreme Court has described the role of preliminary hearings in criminal matters as “often the final and most important step” and often the “sole occasion for public observation of the ... system.” Press Enterprise Co. 478 U.S. at 12. Federal and state courts have extended the Richmond right of criminal trial access to numerous types of legal proceedings, including bail hearings, change of venue hearings, chambers conferences, and closure proceedings, by interpreting “trial” broadly. Eugene Cerruti, “Dancing in the Courthouse”: The First Amendment Right of Access Opens a New Round, 29 U. RICH. L. REV. 237, 266-67 (1995).
63. Juries are sometimes involved in termination of parental rights cases. See e.g., WIS. STAT. § 48.31(2) (West Supp. 2000). However, judges almost always decide abuse and neglect dependency proceedings. See Gofen, supra note 13, at 857; Sokol, supra note 28, at 917-18. But see COLO. REV. STAT. § 19-3-202 (2000) (providing for a right to jury trial).
64. Press-Enterprise Co., 478 U.S. at 12-13 (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).
66. Richmond, 448 U.S. at 589.
ment of experience.” Likewise, we need to analyze specifically the nature of dependency proceedings to determine if the function of access is important in terms of that particular process.

II. THE HISTORICAL JUDGMENT OF JUVENILE DEPENDENCY PROCEEDING

While our country’s modern dependency proceeding, with its confidentiality strictures, is directly traceable to the invention of the juvenile court in 1900, its earlier origins are legitimately traced to English laws and judicial proceedings as far back as the 1300s. These early statutes and proceedings show that confidentiality was initially not a concern, but then, neither was protection of children. Both concepts came later. The historical starting point includes England’s Poor Laws and to a lesser extent, the English Court of Chancery’s recognition of parens patriae in cases concerning children.

A. England’s Poor Laws

Modern dependency proceedings are probably most frequently traced to the English Poor Laws. The Poor Laws were England’s legal mechanism for dealing with its poor in the 1300s through the 1800s. Beginning with the Statutes of Laborers of 1349 and 1350 and leading up to the Poor Law Act of 1601, the Poor Laws sought to deal with several economic and social issues that involved the poor and adversely affected the rich and middle classes. Certainly the earliest legislation was not motivated by a desire to aid the poor or to protect dependent children. The Statutes of Laborers, frequently cited as the beginning of the Poor


69. Id. at 210; William P. Quigley, Backwards Into the Future: How Welfare Changes in the Millenium Resemble English Poor Laws of the Middle Ages, 9 STAN. L. & POL’Y REV. 101, 102-03 (1998); Quigley, supra note 67, at 125.

70. The Statute of Labourers, 1349, 23 Edw. 3 (Eng.) and A Statute of Laborers, 1350, 25 Edw. 3 (Eng.), reprinted in I The Statutes at Large 248-253 (Owen Ruffhead, ed., 1763).

71. An Act for the Relief of the Poor, 1601, 43 Eliz., ch. 2 (Eng.), reprinted in II The Statutes at Large 702-05 (Owen Ruffhead, ed., 1763). The exact span of the Poor Laws varies from author to author, but the 1601 law is usually seen as the high mark. See Jacobus TenBroek, California’s Dual System of Family Law: Its Origin, Development, and Present Status, 16 STAN. L. REV. 257, 258 (1964).

72. For example, the early acts forced the poor to work for fixed wages; the later acts provided some means of relief for the “impotent” poor. Rendleman, supra note 68, at 210-11; Quigley, supra note 69, at 102-03. Much of the need for the Poor Laws was triggered by the decline and breakup of the system of feudalism and the resulting social and economic changes. The black plague, famine and the resulting labor shortage, along with various other factors, also contributed. Quigley, supra note 67, at 73, 77, 82-83; Rendleman, supra note 68, at 210; Quigley, supra note 69, at 102.
Laws,\textsuperscript{73} were designed to accomplish two goals: to keep scarce workers from taking advantage of their position in the labor market by demanding excessive wages, and further, to deal with those poor who would rather live by begging than live by working – a situation becoming increasingly disturbing to the public.\textsuperscript{74} The statutes dealt with these concerns by first keeping the wages of the working poor in check; in effect, the laws established maximum wages.\textsuperscript{75} Second, these maximum wages were coupled with forced labor of the able-bodied poor, who “shall be bound to serve him that doth require him, or else committed to [prison].”\textsuperscript{76} Finally, as added insurance for the labor pool, and as a way to eliminate the scourge of idleness, vagrancy and begging, the public was prohibited from almsgiving to those “able to labour.”\textsuperscript{77}

By the 1500s, economic and political changes had resulted in a large number of poor and homeless in England,\textsuperscript{78} resulting in significant economic strain and social disorder,\textsuperscript{79} and, consequently, in a 1535 Poor Law that established a system of public relief.\textsuperscript{80} Once the public assumed the burden of supporting the poor, it also felt the price tag, and one way of keeping the price as low as possible was to put poor children to work, either as indentured servants or apprentices. Under the Elizabethan Stat-

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\textsuperscript{73} TenBroek, \textit{supra} note 71, at 261; Quigley, \textit{supra} note 67, at 82 n.50.


First, they were poor, lacking any regular income apart from wages from casual labor. Secondly, they were able-bodied – 'sturdy', 'valiant' and fit to work. Thirdly, they were unemployed, or in contemporary terms 'masterless' and 'idle'. Fourthly, they were rootless: wandering, vagrant, 'runnagate' [sic]. Finally, they were lawless, dangerous, and suspected of spreading vice and corruption. . . . [Laws against vagrancy] reflected a conviction of the ruling elites that vagabondage was a hydra-headed monster poised to destroy the state and social order, for of the vagrant’s five characteristics the leitmotiv that ran through them all was disorder.

\textit{Id.} at 4. See also Quigley, \textit{supra} note 67, at 83-84 (discussing the birth of the Poor Laws pursuant to the Black Plague); TenBroek, \textit{supra} note 71, at 270-71 (describing the rise of the Poor Laws in response to the English labor shortage); The Statute of Labourers, 1349, 23 Edw. 3 (Eng.), \textit{reprinted in} I The Statutes at Large 248-49 (Owen Ruffhead, ed., 1763).

\textsuperscript{75} Quigley, \textit{supra} note 67, at 84-91 (a labor shortage was causing workers to demand "excessive" wages).

\textsuperscript{76} The Statute of Labourers, 1349, 23 Edw. 3, ch. 1 (Eng.), \textit{reprinted in} I The Statutes at Large 249 (Owen Ruffhead, ed., 1763). \textit{See also} Quigley, \textit{supra} note 69, at 102 (laws establishing maximum wages).

\textsuperscript{77} The Statute of Labourers, 1349, 23 Edw. 3, ch. 7 (Eng.), \textit{reprinted in} I The Statutes at Large 250 (Owen Ruffhead, ed., 1763). \textit{See also} Quigley, \textit{supra} note 67, at 87 (delineating who was eligible for alms giving). The 1349 statute gave some nod to “helping” the poor by requiring that some necessities be sold at “reasonable prices.” The Statute of Labourers, 1349, 23 Edw. 3, ch. 6 (Eng.), \textit{reprinted in} I The Statutes at Large 250 (Owen Ruffhead, ed., 1763).

\textsuperscript{78} Thirteen to twenty percent of the population in the 1520s was destitute, and the number continued to rise throughout the 1500s. Quigley, \textit{supra} note 67, at 92-93.


utes of Artificers of 1562, in children as young as one year and up to age twenty could be involuntarily apprenticed as workers for “seven years at the least.” In theory, “apprenticeship involved training [in] the master’s ‘craft, mystery, or occupation . . . .’” Indenture, on the other hand, was “simply a work contract.” “In practice, both usually involved little training,” and both involved separating the child from its parents, as the child was required to live with the master for whom the apprenticed or indentured child worked. Putting children “to service” reduced the drain on the public purse and as a further benefit, kept them off the streets, a particular concern of the Crown’s at the time. The homeless of these years were called a “new class of poor, the wandering ones,” triggered by the large number of “wandering, vagrant, [and] ‘runnagate’[sic]” persons “terroriz[ing] town and country.”

The next major legislation in the succession of Poor Laws was the Act of 1601. While England continued to revise its laws concerning the poor after this date, the 1601 legislation is the trademark of the English

81. An Act Containing Divers Orders for Artificers, Labourers, Servants of Husbandry & Apprentices (Statute of Artificers), 1562, 5 Eliz., ch. 4 (Eng.), reprinted in II The Statutes at Large 535-43 (Owen Ruffhead, ed., 1763). See e.g., Rendleman, supra note 68, at 210 (referring to it as the Statutes of Artificers).

82. An Act Containing Divers Orders for Artificers, Labourers, Servants of Husbandry & Apprentices (Statute of Artificers), 1562, 5 Eliz., ch. 4, § 27, 35, 43 (Eng.), reprinted in II The Statutes at Large 540, 541, 542 (Owen Ruffhead, ed., 1763). See also Quigley, supra note 69, at 103 (children one years old to twenty years old were eligible for apprenticeship); TenBroek, supra note 71, at 274, 279-82 (defining the apprenticeship).

83. Areen, supra note 79, at 895 n.35 (citing G. ABBOTT, THE CHILD AND THE STATE 79-255 (1938)).

84. Id.

85. Id.

86. Id. at 895-96. While the training extended to many children was probably minimal or non-existent, some surely did acquire skills they would not have otherwise had. Id. at 896 n.43. Further, child labor “in this pre-child labor law era” was not untoward, nor was sending children away to acquire skills; “upper class families of the time frequently sent adolescents to other families for training.” Id. at 894-96. “Adolescents” are a far cry from one year olds, however.

87. Id. at 894-96.


89. Beier, supra note 74, at 4. See also Quigley, supra note 67, at 83-85, 87 (describing how much of the population left the feudal manor in pursuit of better work); Areen, supra note 79, at 894-95 (detailing how the “sturdy beggar began to fill the roads”); TenBroek, supra note 71, at 270-71 (describing the relationship between Poor Laws and the maintenance of the labor supply).

90. Areen, supra note 79, at 895. Children were again addressed in a 1576 act where the value of providing work for children was specifically mentioned – “[t]o the intent youth may be accustomed and brought up in labor and work” – but so was the public concern with the homeless poor – “and then not to like to grow to be idle rogues.” Philip Harvey, Joblessness and the Law Before the New Deal, 6 GEO. J. ON POVERTY L. & POL’Y 1, 16 (1999) (quoting An Act for the Setting of the Poor on Work, and for the Avoiding of Idleness, 1575-1576, 18 Eliz., ch. 3, § 4 (Eng.) (spelling in quotations was modified)).
Poor Laws. It “fixed the character of poor relief for three centuries,”91 and served as an archetype for early efforts in the American colonies, and later, for legislative efforts in the states.92 The Poor Law Act of 1601 continued forced work for children, but also specifically linked forced work and apprenticeships to children of those poor thought not “able to keep and maintain their children.”93 By 1601, then, the Poor Laws had established a pattern that is discernible in today’s dependency court. The legislation empowered the state to deal with children whose parents were unable to support them and part of that legislative model included taking those children from the custody of their parents.94

While the obligation of the public to care for the poor became the focus of the Poor Laws, protecting poor relief recipients, whether children or not, from any associated stigma or trauma was not a special concern.95 Generally the laws did not seek to stigmatize affirmatively those individuals sanctioned as needing relief;96 there was simply little effort to

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91. TenBroek, supra note 71, at 258.
92. Id. See also Quigley, supra note 67, at 127-28 (explaining how the English Poor Laws represented the first attempt to remedy poverty through legislation).
93. An Act for the Relief of the Poor, 1601, 43 Eliz., ch. 2, § 1 (Eng.), reprinted in II The Statutes at Large 702 (Owen Ruffhead, ed., 1763). The statute also made financially able family members of “every poor, old, blind, lame and impotent person, or other poor person not able to work” financially responsible for each other, thus imposing a legal duty upon parents to support their children, a duty not found in the common law. Id. at § 7 (included were fathers, grandfathers, mothers, grandmothers and children), reprinted in II The Statutes at Large 703 (Owen Ruffhead, ed., 1763). The responsibility laws applied only to the poor, and “the common law did not seek to augment the poor law.... The courts continued to find that parents were under a natural duty and a moral responsibility [to support their children] but not a legal obligation.” TenBroek, supra note 71, at 290. “If the son is left to starve, the exclusive remedy of the law is to apply to the parish poor law authorities who will ‘compel the father, if of ability, to pay for his son’s support.’” Id. at 291 n.148 (quoting Shelton v. Springett, 138 Eng. Rep. 549, 550 (1851)). See also Quigley, supra note 67, at 127-28 (discussing how children of the poor could be taken from their families by operation of law).
94. TenBroek, supra note 71, at 286.
95. The concern was control and regulation by the state:
   The Elizabethan poor law system proved...a fertile source of special legal provisions about the poor. These governed their subjection to public control, their condition of idleness or labor, their freedom of choice of living arrangements, their right to travel and settle where they pleased, their personal and civil rights, and their family relationships. Regulation of those family relationships included the denial or subordination of parental rights to custody, control, and determination of training or education.... The poor law was thus not only a law about the poor but a law of the poor. It dealt with a condition, and it governed a class....
   Id. (emphasis in original).
96. See generally Quigley, supra note 67, at 84, 87, 93, 102. By contrast, those designated as not legitimate recipients, those seen as able-bodied persons refusing to work, were singled out for punishment, and sometimes for the stigma of public punishment. The 1531 Act, for example, provided that an unauthorized beggar who was a repeat offender would have “the upper part of the gristle of his right ear cut off.” An Act Concerning Punishment of Beggars and Vagabonds, 1531, 22 Hen. 8, ch. 12 (Eng.), reprinted in V Historical Documents 1485-1558 at 1027 (C.H. Williams, ed., 1971). Further, legitimate recipients were not always spared. The Poor Relief Act of 1662, An Act for the Better Relief of the Poor of this Kingdom (The Act of Settlement), 14 Car. 2, ch. 12 (Eng.), reprinted in III The Statutes at Large 243 (Owen Ruffhead, ed., 1763), for example, was enacted primarily to respond to a concern that the rural poor were moving to cities and placing an
eliminate social stigma associated with poor relief. Workhouses, for example, establishments designed to thus reducing the cost of poor relief, were designed to "make the receipt of aid so psychologically devastating and so morally stigmatizing that only the truly needy would request it." While the implicit humiliation of the workhouse was theoretically reserved for the able-bodied, their children were not exempt. A description of a 1795 workhouse: "The number of Paupers in the workhouse at present... is 136.... Of these 38 are under 10 years of age; 26 between 10 and 20.... Their employments are various... [and] children are generally sent to the different manufactories...."
With the exception of providing poor relief to children in various ways, the histories of the Poor Laws and any attendant institutions or practices reflect little concern with protecting children. Relief was grudgingly given, many apprenticeships and indentures were harsh, and the stigma and trauma visited upon the recipients, including the children, were largely irrelevant to the public paying for the support of the poor. The Poor Laws may have established the legislative basis for modern dependency court, but they did not establish a practice or custom, a historical judgment, favoring confidentiality in dependency proceedings.

B. England’s Parens Patriae in Chancery Court

While lacking support for confidentiality, the Poor Laws do provide a good basis for arguing that the intervention in the parent-child relationship in today’s dependency court is a descendent of the English legislative branch. The rationale for the court’s authority to intervene, parens patriae (“parent of the country”), however, was borrowed from judicial law developed in the English chancery courts. It makes sense that the English chancery court felt obligated to justify its intervention. The Poor Laws dealt with only the children of the poor; the chancery courts, however, dealt primarily with the children of the rich. The English chancery court appears to have been, like other English courts, an “open court.” However, the operation of the chancery court, along with its jurisdiction over matters involving children, does provide some support for a historical judgment of confidential hearings for children.

The history of the Court of Chancery and parens patriae is difficult to review briefly. Ample literature is available for more detail, but the following summary will do for our purposes. The chancery court’s

be generously given nor made too easy to accept,” thus helping to ensure that “only those worthy of help receive it.” Quigley, supra note 67, at 126-27. Similarly, the removal of children from their families and homes was not to safeguard children from the hands of neglectful or abusive parents; it was to put the children to work, a “product of cost consciousness.” Areen, supra note 79, at 896.

101. Rendleman, supra note 68, at 223.


103. See generally Neil Howard Cogan, Juvenile Law, Before and After the Entrance of “Parens Patriae,” 22 S.C.L. REV. 147 (1970); Rendleman, supra note 68, at 210; TenBroek, supra note 71, at 262.

104. Rendleman, supra note 68, at 210-11; Quigley, supra note 69, at 102-03.

105. For two excellent histories, see John Seymour, Parens Patriae and Wardship Powers: Their Nature and Origins, 14 OXFORD J. OF LEGAL STUD. 159 (1994) and Cogan, supra note 103. Cogan’s self-appointed task was to show how the court’s authority to take “special care” of infants had evolved from extending care to infants “who were properly before [the court]” to when “the court could properly bring infants before it to give them special care.” Id. at 180. As Seymour warns, however, it is important to exercise caution when drawing any conclusions from these or other histories. “It is . . . impossible to be sure about the character of Chancery’s jurisdiction at this time. . . . No inference can be drawn from the irregular proceedings of ancient times, when grievances of every kind were pressed upon the Chancellor’s attention.” Seymour, supra, at 166 (quoting MACPHERSON, A TREATISE ON THE LAW RELATING TO INFANTS 103 (1842)).
origin is traced to matters that originally were brought before the King’s Council. These matters were often referred to the Chancellor, as a member of the Council and the King’s “chief secretary” and advisor. By the close of the fifteenth century, this custom had evolved into a chancery court. The court’s parens patriae authority seems to have developed from its jurisdiction in wardship and guardianship issues, which originally concerned land and profits, and only incidentally, children. “Wardship . . . procedures . . . (and the role of the courts in administering these procedures) were directed towards the administration of the property of infant heirs. Wardship procedures were not designed with the purpose of facilitating judicial intervention in the lives of vulnerable infants.” By the seventeenth century, however, so long as the ward-child was properly before the court on an accounting or other similar matter, the reported cases show the chancery court beginning to reflect a broader concern for the child’s care, for example, in matters related to custody. By name, however, parens patriae seems to have first appeared (as “Pater patriae”) in a chancery “infant case” in 1696. was a testamentary trust case in which the court was asked to release an infant from a condition precedent to a legacy, the condition precedent being a mar-

107. The Chancellor sat at the hearings and issued decrees in his name. Id. at 118.
108. Seymour, supra note 105, at 167.
109. Id. at 172. Wardships arose when a tenant of the land would die and leave an infant heir. In wardships arising from military tenures (knight service), the lord who held the wardship, including when the King was the direct holder, had the right to the profits of the lands until the child came of age, along with other significant feudal benefits, including custody of the child and the right to arrange the child’s marriage. Id. at 162-163. See also Lawrence B. Custer, The Origins of the Doctrine of Parens Patriae, 27 EMORY L. J. 195, 196 n.12 (1978); Cogan, supra note 103, at 148-49. These wardships, and thus their benefits and profits, could be purchased and were a source of revenue for their holders, particularly the King who was “always lord and never tenant.” Seymour, supra note 105, at 164. See also Cogan, supra note 103, at 148. By contrast, there were also wardships of land held in socage, not military tenure. In these cases, the wardship of the child went to “the nearest relation to whom the land could not descend” and the holder of the wardship was required to account to the child for any profits of the land. Seymour, supra note 105, at 163-665 nn.16 & 17. Because socage tenure required the holder to account to the ward-child for any profits of the land, socage wardships suggested the fiduciary aspect inherent in a modern guardianship of a child; it reflected an obligation of the guardian to the child. Id. at 162-65. Still, “[t]he orphaned infant was treated as an adjunct to his lands,” id. at 165 (quoting THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 545 (5th ed., 1956)), and a guardianship at that time did not resemble a modern day fiduciary relationship.
110. Cogan, supra note 103, at 154-55.
111. E.g., Corsellis v. Corsellis, 23 Eng. Rep. 192, 194 (1678) (ordering that a guardian could not have custody of “the Infant, but that he shall remain at Eaton till this Court give farther [sic] Direction”).
112. See Cogan, supra note 103, at 166. Cogan questions whether the phrase was in the case at the outset, however. Id. at 167-68.
113. 23 Eng. Rep. 814 (Ch. 1696).
riage.\textsuperscript{114} The court in \textit{Falkland} recognized its \textit{parens patriae} duty and authority to take care of infants:

And as to the plea of infancy, it is true infants are always favoured. In this court there were several things that belonged to the \textit{King as Pater patriae}, and fell under the care and direction of this court, as charities, infants, ideots, lunatics, etc., afterwards such of them as were of profit and advantage to the King, were removed to the \textit{Court of Wards} by the statute; but upon the dissolution of that court came back again to the Chancery, where the interests of infants are so far regarded and taken care of. . . .\textsuperscript{115}

The phrase appeared in a handful of chancery infant cases after \textit{Falkland},\textsuperscript{116} but the 1827 \textit{Wellesley v. The Duke of Beaufort}\textsuperscript{117} infant case is traditionally the case cited for the clear recognition that \textit{parens patriae} gave the chancery court broad power to make orders that would protect the child, without first having the child before it on some property matter.\textsuperscript{118}

The facts of \textit{Wellesley} began when Mr. Wellesley had an extramarital affair; as a result, Mrs. Wellesley left with their children. Not long afterwards, Mrs. Wellesley died. The children remained in the physical custody of Mrs. Wellesley’s sisters. Mr. Wellesley filed a habeas corpus action to retrieve his children, and the sisters petitioned the chancery court for relief.\textsuperscript{119} The chancery court’s discussion of the basis for its jurisdiction in the case, a private custody case, included a discussion of \textit{parens patriae},\textsuperscript{120} and the court concluded that it had jurisdiction to protect the child:

The important consideration is, — is it necessary that the Court should thus interpose? If this Court has not the power to interpose, what is the provision of law that is made for the children? . . . . Wherever the power of the law rests with respect to the protection of children, it is clear that it ought to exist somewhere: if it be not in this Court, where does it exist?\textsuperscript{121}

\textsuperscript{114} \textit{Falkland}, 23 Eng. Rep. at 814.
\textsuperscript{115} \textit{Id.} at 818.
\textsuperscript{117} 38 Eng. Rep. 236 (Ch. 1827).
\textsuperscript{118} See Cogan, \textit{supra} note 103, at 180.
\textsuperscript{120} \textit{Id.} at 243 (“[w]ith respect to the doctrine that this authority belongs to the King as \textit{parens patriae}”).
\textsuperscript{121} \textit{Id.} at 244.
Thus, by the time of Wellesley, the Poor Laws had established the legislative basis for separating children from their parents when necessary; Wellesley then provided the rationale for the judiciary to intervene in the parent-child relationship. This legislation and this judicial rationale would eventually combine to create America's juvenile court, where confidential dependency proceedings would reside. But while the groundwork for the proceedings existed, closed hearings for these types of proceedings were not yet factors, or at least not yet newsworthy factors. Until this point, discussions concerning confidentiality in any of these proceedings, especially as needed to serve the child's best interest, are lacking in the reported cases and histories.

However, while histories of the English Court of Chancery, from which parens patriae emerged, suggest that the court was, by all indications, open; Wellesley and a smattering of other authorities around the same time indicate that there were some exceptions, sometimes in cases involving children. In addition, even "open court," at least in chancery court, did not necessarily provide public access in the way that open court does today.

Wellesley is notable for its mention of a private hearing for "matters of [its] kind," and the case provides a brief discussion indicating some matters in chancery court, and perhaps some matters involving children, were heard in private. It also suggests some matters should be held in private. What is not clear is whether the court's concern for privacy in the immediate case was for the children, the adult parties, or the public:

I will give no opinion (because it does not become me to do so), as to whether it were a discretion properly or improperly exercised, that this matter was not heard in private. In most cases, certainly, it has

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122. The absence of sources discussing private or confidential hearings indicates public access was the norm for chancery court. In his book, W. J. Jones frequently refers to the Chancellor holding hearings in "open" court. W. J. JONES, THE ELIZABETHAN COURT OF CHANCERY 54, 208, 253, 253 n.1, 295 (1967). Other descriptions, by omitting any reference to closed hearings, imply the hearings were open. E.g., EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW 165-169 (6th ed., Methuen & Co., Ltd, London 1949). Other sources affirmatively suggest the court was open. E.g., Vernon Valentine Palmer, "May God Protect Us from the Equity of Parlements": Comparative Reflections on English and French Equity Power, 73 Tul. L. Rev. 1287, 1296-97 (1999) (comparing the French and English Equity powers: "[T]he [French] parlements [judicial tribunals] operated in total secrecy. . . . In contrast, the English Chancellors operated an open court and pronounced reasons for their decrees."). In addition, the reproduction of the illustration "The Lord Chancellor's Court at Lincoln's Inn Hall," E.S. TURNER, MAY IT PLEASE YOUR LORDSHIP 193 (Michael Joseph Ltd. 1971), shows an open court with spectators, and one author describes the King's Bench and the chancery court "at the upper end of Westminster Hall" as "both remaining open to the hall, and a bar being erected to keep off the multitude from pressing on the judges." JOHN G. HENDERSON, CHANCERY PRACTICE 143 (T.H. Flood & Co. 1904).

been thought expedient that matters of this kind should be heard in private . . . .\textsuperscript{124}

Also notable is that in the same breath in which the court acknowledged the possibility of a private hearing, thereby contributing to a historical judgment favoring closed dependency hearings, it also contributed to a discussion about the functional value of public court proceedings for the important matter before it:

[B]ut if the parties choose to have matters of so much delicacy, but of such mighty importance, discussed and argued in public, I know that it is one of the best securities for the honest exercise of a judge’s duty, that he is to discharge that duty in public. That duty I will discharge as well as I can – recollecting that what I am called upon to do is a strong measure; that the interposition of this Court stands upon principles, which it ought not to put into operation without keeping in view all the feelings of a parent’s heart, and all the principles of the common law with respect to a parent’s rights; and that, though the Court has interposed in many instances of this sort, the application is one of the most serious and important nature.\textsuperscript{125}

Wellesley is not the only evidence indicating that hearings involving children around this time could be closed in chancery court. One infant case decided six years prior to Wellesley, Lyons v. Blenkin,\textsuperscript{126} also mentions a hearing held in chambers in another (unnamed) case. The court states in a note to the opinion, “In a case which was heard in private before the Lord Chancellor in August 1821, his Lordship observed, that where the infant was a ward of the Court there were many circumstances to which he could give attention . . . .”\textsuperscript{127} Lyons appears to have been held in open court. Other infant cases, cited in the major articles discussing the evolution of \textit{parens patriae} in chancery court, also appear to have been held in open court. However, none of the cases make any mention of private or in-chambers hearings.\textsuperscript{128}

In addition to cases sometimes mentioning private or closed hearings for children, a later report by John David Chambers, from 1842 (fifteen years after Wellesley), states that, by that time at least, some suits in chancery court involving infants were closed: “[P]etitions regarding infants were heard before ‘all proper parties,’ but if a bill leads to a suit ‘no person can so attend . . . without special leave.’”\textsuperscript{129} Other commentators who have described the operations of Chancery court and infant \textit{par-
ens patriae cases (mostly from earlier years), however, have not mentioned that infant cases were subject to any special rules concerning being held in private.\(^{130}\)

Another factor to consider, when reviewing the history of hearings involving children in chancery, is that chancery hearings were not conducted like modern day trials. As a result, there was at least a coincidental lack of openness. Generally, witness testimony was taken with written interrogatories administered by court-appointed examiners; these proofs, and others, were placed before the court, and the court, after hearing the arguments of the lawyers, would issue its decree.\(^{131}\) Viva voce, or oral examinations of witnesses in open court, appear to have been limited.\(^{132}\) In addition, because of the great number of cases, a matter set for hearing would frequently be referred to an administrative “Master,” who would “draw up a report on which the Lord Chancellor would base his decision.”\(^{133}\) And, when detailed inquiries were needed before a court could

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130. Id. at 909 n.210 (stating that S. Atkinson, Practice of the Court of Chancery 15-19 (London, S. Sweet et al. eds., 1842) and Charles Barton, An Historical Treatise of a Suit in Equity (Dublin, Byrne ed., 1796), never mentioned this). See also Jones, supra note 122; Cross & Hall, supra note 106.

131. Cross & Hall, supra note 106, at 148-49. A typical description of witness testimony is as follows:

[A] number of questions in writing were framed by the party calling the witnesses, and these questions...were put to the witness by an examiner appointed by the court. The answers, given on oath, were recorded and copies could be taken by the other side. . . . When the depositions...had all been taken the case was set down for hearing and eventually would come on in court. The allegations of each side would be explained to the Chancellor (who had copies of the affidavits before him) and counsel would address him on the points of law involved. It was then for the Chancellor to make up his mind on all the issues of law and fact involved in the case and to pronounce a decree . . . .

Id. While the witness testimony was “published” (made available to the parties after the examiners deposed the witnesses), the parties had separate examinations and did not have access to copies of the other party’s examinations until publication. This ensured that the “adversary party’s ‘cross-examination’ could not be inspired by any knowledge of the witness’s evidence in chief.” Jones, supra note 122, at 238-39.

132. Jones, supra note 122, at 252-54.

133. Cross & Hall, supra note 106, at 153.

134. Jones, supra note 122, at 253. A part of this process might include the advantage of some oral examination of witnesses; the disadvantage is that this was done not in open court, but in chambers: “In the privacy of his chambers, a Master...could get to grips with a witness, or for that matter with one of the parties, and fight it out with the aid of flexible cross-examination.” Id. at 254. In addition, while “[t]he Lord Chancellor might order viva voce examination at a hearing . . . [t]his was a rare procedure in open court . . . .” Id. at 253. One author also reports a method used for a time by which witnesses were examined ad informandum conscientiam iudicis, id. at 250, “intended for the sight of the judge alone.” Id. at 499. Examinations ad informandum conscientiam iudicis were meant for circumstances when embarrassing information might be revealed by the interrogatories put to the witness. This evidence, “regarded as unfit for general publication, and thus reserved for the eye of the bench, was often concerned with the interests, activities, or investments of the Crown.” Id. at 250-51. Such examinations were also frequently used even when there was not potential for embarrassment, but simply to obtain more information when the ordinary interrogatories failed to cover matters relevant and important to the suit. Id. at 252. Examinations ad informandum conscientiam iudicis were no longer used by the latter half of the seventeenth century, however. Id. at 252 n.3.
rule, such as when the question was whether a trustee had discharged the necessary duties, 135 "the Chancellor, who was far too busy a person for such details, would refer the matter to a Master for investigation in the presence of the parties and for a report on which the Chancellor could subsequently found his decree." 136

It seems likely that, given the chancery court's procedures and practices, some of its proceedings were not routinely subject to public access. With the court's awakening concern for protecting children and its willingness to act as parens patriae, it is also likely that some of those proceedings involved children. Histories of the court, however, do not suggest any substantial portion of the court's "courtroom proceedings" involving children were purposefully and routinely conducted in a courtroom closed to the public until Chambers' report in 1842. Nor do the earlier histories suggest the public was frequently barred from hearings involving children in order to "protect" the children. Finally, even when some hearings were being closed, the court's comment in Wellesley also indicates the chancery court was aware of the value of open court, including in cases involving the welfare of children. 137

C. America's Poor Laws and Parens Patriae

The Poor Laws and parens patriae both found their way to America. Colonial America first relied on forced apprenticeships and institutional "houses" to deal with the children of the poor 138 and, when the original thirteen states enacted legislation, England's Poor Laws were quite evident. 139 At least eleven of the thirteen states provided that poor or unruly

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135. CROSS & HALL, supra note 106, at 122.
136. Id. at 123. In addition, many matters were not dealt with in hearings before the Chancellor, but referred to administrative personnel for action or resolution in chambers. W.J. Jones' thorough description of the Elizabethan Court of Chancery (1558-1603) also shows that court personnel did much of the work of the Chancery court. JONES, supra note 122, at 6, 52, 208, 287. How "open" these investigations and other inquiries were is not clear. Descriptions or references to the Chancery court suggest much work was done in chambers, CROSS & HALL, supra note 106, at 271; JONES, supra note 122, at 6, 52, 208, 287, and also done with very little oversight by the court. "[T]he detailed, and often very important, administrative business which was transacted in chambers was left entirely to the Masters and clerks of the court." CROSS & HALL, supra note 106, at 271.

From time to time a Chancellor would issue a set of "general orders" prescribing (among other matters) the method of procedure to be followed in the prosecution of accounts and enquiries [sic] before the Masters, but in the nature of the case he was not able to exercise much control in the matter, and the masters were in fact given practically a free hand .... Id. at 155.

137. The Wellesley court did not take it upon itself to close the proceedings, apparently believing it could do so only upon request of one of the parties. Wellesley v. The Duke of Beaufort, 38 Eng. Rep. 236, 243 (Ch. 1827) ("but if the parties choose to have matters ... discussed and argued in public").

children could be "bound out" or apprenticed for work. Children were institutionalized in almshouses and poorhouses, along with workhouses, houses of correction, and houses of employment. Thus, children of the poor continued to be separated from their parents and were subjected to forced labor under harsh conditions, just as they were under the English Poor Laws. While this separation was "independent ... of any Latin rubric," the Latin rubric would eventually join up with the Poor Laws, although not until 1839. There are hints that in the interim, some concern existed for "protecting" children from stigma in related welfare areas. An 1804 Washington, D.C., act making public schooling available to poor children, for example, provided that the names of the children who could not pay for their education should be withheld from public reports. Similar statutes in Delaware and Pennsylvania, however, had no such provisions, and like in England, most legislation was focused on caring for the poor at the least cost to the public.

In 1839, the rationale for court intervention to protect children and the legislative provisions for separating children from their parents finally joined. Ex parte Crouse, a Pennsylvania case, is credited with first using parens patriae to justify a state committing a child to an institution over the objection of the parent. The court committed the "incorrigible" girl, Mary Ann Crouse, to a house of refuge without a jury trial after her mother complained that the child was beyond her control. Her father brought a habeas corpus action arguing that the authorizing legislation was unconstitutional. The court upheld the statute and the commitment, reasoning:

The House of Refuge is not a prison, but a school. . . . The object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates. To

140. Id. at 119-40, and 153.
141. Id. at 156.
142. Id.
143. Rendleman, supra note 68, at 212.
144. Ex parte Crouse, 4 Whart. 9 (Pa. 1839).
146. Id. at 252.
147. Id. at 253.
148. Id. at 251.
149. See Mason P. Thomas, Jr., Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix, and Social Perspectives, 50 N.C. L. REV. 293, 301 (1972).
150. Ex Parte Crouse, 4 Whart. 9, 11 (Pa. 1839).
151. Crouse, 4 Whart. at 11.
152. Rendleman, supra note 68, at 212.
153. Crouse, 4 Whart. at 11.
154. Id.
this end may not the natural parents, when unequal to the task of edu-
cation, or unworthy of it, be superseded by the parens patriae, or
common guardian of the community? It is to be remembered that the
public has a paramount interest in the virtue and knowledge of its
members, and that of strict right, the business of education belongs to
it. That parents are ordinarily intrusted with it is because it can sel-
dom be put into better hands; but where they are incompetent or cor-
rupt, what is there to prevent the public from withdrawing their fac-
culties, held, as they obviously are, at its sufferance?\textsuperscript{155}

What indeed? Under a theory of child protection, \textit{Ex parte Crouse}
upheld a state’s authority to separate a child from its parents, or in the
words of one author, to “sever … poor parents from their children.”\textsuperscript{156}
Most courts followed suit, upholding the reach of the Poor Laws into the
lives of poor families and, later, upholding the reach of the juvenile
court.\textsuperscript{157}

\textbf{D. America’s Child Savers in the 1800s}

At the beginning of the 1800s in America, just as in England, poor
children and poor children neglected by their parents were taken from
their parents and apprenticed or placed in almshouses or similar facili-
ties, many of which also housed “adult outcasts – paupers and insane and
mentally retarded persons.”\textsuperscript{158} Except for that intervention into the lives
of the poor, however, public intervention into the family life to protect
children was rare.\textsuperscript{159} Parental child abuse was frequently overlooked be-
cause the right of parents to discipline their children usually legitimated
all but the most egregious cases of abuse.\textsuperscript{160} Children accused and con-
victed of crimes were not subjects of protection for the state; they were
tried and punished much like adults were, often sharing space in the
same correctional institutions.\textsuperscript{161} Reformers sought to change this, how-
ever, and their nineteenth century reform agenda pushed for a more pro-
tective attitude concerning the country’s children and culminated into the
country’s first juvenile court. Not until the advent of the juvenile court,
however, would closed hearings and confidential proceedings be a cog-
nizant aspect of the protective agenda.

\begin{footnotes}
\item 155. Id.
\item 156. Rendleman, \textit{supra} note 68, at 212.
\item 157. See, \textit{e.g.}, Marlow v. Commonwealth, 133 S.W. 1137 (Ky. 1911); Commonwealth v.
\hfill Fisher, 62 A. 198 (Pa. 1905).
\item 158. Thomas, \textit{supra} note 149, at 301-03. See also, Rendelman, \textit{supra} note 68, at 205-12
(reasoning that statutes designed to protect children makes the state the legitimate guardian of the
child).
\item 159. Thomas, \textit{supra} note 149 at 301.
\item 160. Id. at 300-06.
\item 161. Paul R. Rudof, \textit{Throwing out the Baby with the Bathwater: Utah’s Serious Youth Offender
REV.} 104, 106 (1909).
\end{footnotes}
Although social reform efforts at the start of the century were broad-based, they particularly targeted children. "Child savers," as they came to be called, sought to address issues associated with poor children, including education, nutrition, and neglect and abuse.\footnote{162} Also, they were concerned with child crime.\footnote{163} Central to the child-savers' philosophy was that children were products of their environments. Any criminal behavior by a child was, thus, "learned" behavior.\footnote{164} To reform a child who had committed a crime, and to prevent the pre-delinquent child from adopting a life of crime, it was necessary to address the child's environment.\footnote{165} This meant public intervention into the child's family life.\footnote{166}

Because of the large number of immigrants entering the country and especially the cities in the 1800s, public intervention was a remedy that particularly invited abuse. The new city dwellers were poor and "different":

Immigrants from southern and eastern Europe and from rural America flooded into the burgeoning cities to take advantage of new economic opportunities and crowded into ethnic enclaves and urban ghettos. The "new" immigrants' sheer numbers and their cultural, religious, and linguistic differences hindered their assimilation and acculturation, and posed a significant nation-building challenge for the dominant Anglo-Protestant Western Europeans who had arrived a few generations earlier. . . . Progressives attempted to "Americanize" the immigrants and poor through a variety of agencies of assimilation and acculturation to become sober, virtuous, middle-class Americans like themselves.\footnote{167}

Reformers targeted the children of these new urban dwellers not only to keep them from crime, but also because they were a threat to the social order middle-class child-savers were accustomed to and favored. Just as England enacted its Poor Laws to protect society from the "wan-
dering" poor "terroriz[ing] town and country," the child-savers sought to use similar legislative remedies to save not only children, but also America's middle-class culture. Consequently, the child-savers' early legislative efforts, directed at preventing children from lives of crime, went beyond delinquent and predelinquent children and focused on a broad range of indicators reformers considered to be troubling. This meant dependent and neglected children were included in the reformers' child-protective efforts, but lines were blurred. Poor children became dependent or neglected children; dependent and neglected children became delinquent children. An 1875 Wisconsin statute defining children who could be committed to industrial schools, for example, included children who had been abandoned "in any way" by their parents; children "without means of subsistence or support"; children "begging or receiving alms"; children "being in any public street or place for the purpose of begging or receiving alms"; children "found wandering and not having any home or settled place of abode"; and children "found wandering in streets, alleys or public places, and belonging to that class of children called 'ragpickers.'" Some states defined "wayward behavior" as criminal conduct; others "broadened[ed] the committal grounds for noncriminal conduct." Children subject to institutional commitment during this period were "broadly worded under the aegis" of social reform, and these broad definitions would be used in the twentieth century juvenile court legislation.

The salvation of these children and, thus, of society, required removing them from the corrupting influences of their home environments and acculturating them anew. Many were sent to institutions, and especially to "Houses of Refuge." Beginning with New York in 1825 and, over the next twenty-five years, continuing in Philadelphia, Boston, New Orleans and other cities, "laws authorized the courts to commit neglected, destitute, abandoned, and vagrant children to the houses of ref-

168. See supra text accompanying notes 89-90.
169. Fox, supra note 167, at 1192.
170. Thomas, supra note 149, at 306, 323-25; Corinne Schiff, Child Custody And The Ideal Of Motherhood In Late Nineteenth Century New York, 4 GEO. J. ON FIGHTING POVERTY 403, 413 (1997).
171. Thomas, supra note 149, at 314 (quoting 1875 Wis. Laws 633, ch. 325, § 5).
173. Thomas, supra note 149, at 314.
174. Fox, supra note 167, at 1189. These actions were done with little regard for the rights of the parents or the children. "The child-savers expounded the Protestant work ethic, were primarily philanthropic, and supported the rehabilitation model. They had little real interest in the law or legal issues. Any overreach of the legal rights of the children was excused under the concept of parens patriae." CLIFFORD E. SIMONSEN, JUVENILE JUSTICE IN AMERICA 18 (3d ed. 1991). See also Thomas, supra note 149, at 315 (also reporting that parens patriae served as the catch-all justification for removing children from their homes).
175. Thomas, supra note 149, at 306; RYERSON, supra note 164, at 18-19.
Unfortunately, refuge houses and their successors were not always the protective facilities envisioned by their backers. The New York house, for example, "evolved into a prison-like structure without facilities for rehabilitation." Other institutional facilities that continued from earlier years, or developed after refuge houses, were subject to similar criticism. The Reverend Charles Loring Brace's "program of 'moral disinfection,'" according to one cynic, which took children from their homes and their urban environments to live in foster homes with Western farmers, or, in Brace's words, "good families in the country," was a noteworthy alternative placement.

Until the latter part of the 1800s then, dependent and neglected children were included within the child-savers' efforts, but primarily under the rubric of delinquent or predelinquent children. In 1874, however, the New York Society for the Prevention of Cruelty to Children (NYSPCC) was established. The NYSPCC emphasized removing children from their homes and placing them in institutions. Their efforts, however, seemingly were directed more towards protecting children from abuse and neglect per se, than preventing delinquency. The NYSPCC was not only instrumental in seeking out neglected and abused children, but also was dedicated to punishing adult offenders by encouraging criminal prosecution of abusive or otherwise harmful parents. Their focus was, therefore, distinguishable from that of the English Poor Laws and the earlier child-saving efforts.

Similar anti-cruelty groups were established in other localities over the next twenty-five years. Massachusetts and Philadelphia, for example, moved further and adopted a less punitive and more remedial approach to the problem, aimed at helping families and keeping children in the

176. Thomas, supra note 149, at 306.
179. Thomas, supra note 149, at 307.
180. Id.
182. Thomas, supra note 149, at 310-12.
This social work approach found some favor in the early 1900s with professionals in the field who were supportive of family preservation, especially when poverty was the only issue. While concern for children was perhaps a greater motivation for the anti-cruelty groups' efforts than others, however, "these reformers [also] were responding to the new urban poverty and immigration" and the resulting fear:

The "large influx of foreigners who are not familiar with our laws," explained Elbridge Gerry, the president of the NYSPCC, in 1895, "necessarily leads to the continual ill-treatment of children, under the pernicious idea that liberty means license and that children are born slaves of their parents." Without the work of the NYSPCC, Gerry maintained, nothing would be done to protect the children of the "poor and unfortunate," and most of these "little outcasts" would become "mature criminals."

In addition to implementing efforts to rescue children from lives of crime, reformers also had some success in changing the judicial procedures that removed children from their homes and committed them to institutions or foster homes. Some legislation specifically provided for children's hearings to be separate from adult court. An 1870 Massachusetts statute, for example, provided that children in Suffolk under the age of sixteen should have "complaints against them heard and determined, by themselves, separate from the general and ordinary criminal business of said courts." New York provided, by 1892, that "[a]ll cases involving the commitment or trial of children for any violation of the Penal Code . . . may be heard and determined by such court, at suitable times to be designated therefore by it, separate and apart from the trial of other criminal cases . . . ." Rhode Island too provided for children's hearings to be separate from the rest of the court business. Closed hearings were not statutorily mandated, but the separateness of the hearings presumably accommodated or encouraged private hearings. Further, juvenile commitment hearings also were likely to be informal, summary, and with little due process, making it probable that some were held away from public view. Closed and confidential hearings per se, however, seem not to have been a concern.

Thus, at the close of the nineteenth century, the institutions, legislation, and procedures designed to deal with abused and neglected children had their problems: the motivation for removing children from their homes was often suspect, the due process accorded the families was of-

185. Walling & Debele, supra note 184, at 794-96; Thomas, supra note 149, at 312.  
186. Thomas, supra note 149, at 312; Pleck, supra note 183, at 129.  
187. Schiff, supra note 170, at 413.  
189. Id. at Vol. II, 495.  
190. Id. at Vol. II, 495-96.  
ten absent, a family’s poverty was frequently the basis for a child’s removal, and the institutions or homes to which some of the children were sent were far from nurturing and humane places. Indeed, these same problems were present during the enactment and implementation of the Poor Laws in England. As for confidential hearings, some delinquency or dependency-type proceedings may have been heard separately from the other court business. Also, there may have been, as there was in England’s chancery court, specific cases heard in chambers, either upon request of the parties or perhaps even at the initiative of the judge. It does not appear, however, that these type hearings were traditionally closed to the public.\footnote{There was, however, at least in the rhetoric of the late nineteenth century, an intent by society to protect children—to reform, rehabilitate, and treat—instead of merely punishing them for their wrongful acts or removing them from their homes and forcing them to work. Eventually, the modern dependency proceeding emerged from this philosophy and justified the confidentiality provision of modern proceedings. In the juvenile court born in 1900, however, protecting dependent and abused children remained a handmaiden to protecting society from delinquent children.}

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\section*{E. America’s Juvenile Court and its Confidentiality Provision}

In 1899, Illinois passed legislation, which created the country’s first juvenile court.\footnote{Act of April 21, 1899, 1899 Ill. Laws § 3, 130, 132.} By 1904, other states embraced the concept and eleven states had juvenile court legislation; by 1912, twenty-two states; and by 1925, forty-six of the country’s forty-eight states had juvenile court legislation.\footnote{There has been some mild controversy about the exact place of origin of the first juvenile court. Various earlier pieces of special legislation bore resemblance to the latter-day juvenile court. It seems clear, however, that the first real juvenile court, as we understand the institution today [1958], was organized in the United States during 1899. Most authorities agree that Illinois deserves credit for fathering the juvenile court movement, though Colorado’s ebullient Judge Lindsey claimed this honor on the basis of his use of the state’s “school law” for the handling of juvenile offenders some months before the Illinois law was enacted . . . . [But] Colorado’s legislature did not specifically organize the state’s juvenile court until 1903.} When Illinois founded its court in 1900, however, the goal was to deal with children committing crimes and, in society’s view, children destined to commit crimes. Earlier legislation grouped delinquent, neglected, abused, abandoned, and poor children together and Illinois continued that grouping.\footnote{See Brelsford & Myers, supra note 3, at 17.} Central to the treatment of these delinquent and
pre-delinquent children, however, was not punishment, but remedial acculturation. The goal of the juvenile court was to identify and remedy factors in the child’s life that had led, or might lead, the child astray. While the protective aspects of a confidential modern dependency proceeding were not the focus of the court, the genesis of the proceeding was there; so was the genesis of legislated confidentiality.

The Illinois legislation did not mandate confidentiality. The statute did require, however, “[a] special court room, to be designated as the juvenile court room . . . .” Still, this provision has long been recognized as a “confidentiality” provision and it seems apparent that it soon was treated as such. In addition, it also seems likely that many juvenile court hearings initially were confidential by practice and, later, by legislative

the “dependent child and neglected child” mixed what would today be classified as status offenses, dependency, abuse and simple poverty:

[A]ny child [under age 16] who for any reason is destitute or homeless or abandoned; or dependent upon the public for support; or has not proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill fame or with any vicious or disreputable person; or whose home, by reason of neglect, cruelty or depravity on the part of its parents, guardian or other person in whose care it may be, is an unfit place for such a child; and any child under the age of 8 years who is found peddling or selling any article or singing or playing any musical instrument upon the streets or giving any public entertainment.

1899 Ill. Laws §1. The effect of the Illinois statute was no discernable category for children who needed to be protected from abuse or neglect, but instead a catch-all grouping of poor children, pre-delinquent children, and delinquent children, who were to be “treated in substantially the same manner.” Charles E. Springer, Vice-Chief Justice, Supreme Court of Nevada, U.S. Dep’t of Justice, Office of Juvenile Justice and Delinquency Prevention, Justice for Juveniles at 21 (1986). The definition of delinquent was expanded substantially in a 1905 amendment, Act of May 13, 1905, 1905 Ill. Laws § 1, and all sorts of acts or conditions qualified a child as “delinquent,” including children who were “incorrigible,” children who ran away from home, children visiting pool rooms, and children who “habitually used vile, obscene, vulgar, profane or indecent language.” Id.

196. RYERSON, supra note 164, at 35-37.

197. See id.


199. “A special court room, to be designated as the juvenile court room shall be provided for the hearing of [cases under this act], and the findings of the court shall be entered in a book or books to be kept for that purpose and known as the ‘Juvenile Record’ . . . .” 1899 Ill. Laws § 3.
provisions. Judge Thomas Murphey, a Police Justice in Buffalo, N.Y., described in 1904 how he ran his court:

At the first session over the court at which I presided I announced that thereafter children would be tried separately and apart from adults, . . . and I insisted that at the trial of the children the court room be cleared of all spectators. No one was allowed to be present at the trials but the defendants, the complainants, and the court officers and witnesses.

A 1958 article discussing confidentiality of juvenile court proceedings also reports that the practice of excluding the public seems to have occurred early on. “By 1901, judges were reported to be employing their own authority to hold the hearings of juveniles in private,” relying on their contempt power to do so. And “a hit or miss survey” done in 1910 showed that “a few states” excluded the public from juvenile court trials. By 1939, a substantial number of states had some confidentiality provisions concerning their juvenile courts. “[T]he public was excluded from juvenile courts by law in seven jurisdictions, and could be excluded in twenty-four additional jurisdictions. Eight states specifically prohibited the publication of the names of juveniles without the court’s consent.”

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200. Determining precisely how and where the confidentiality aspect of juvenile court originated is difficult. From early on, affirmative mentions of confidentiality were not explicitly associated with the stigma, shame and embarrassment concerns for the juvenile delinquent. It may be that the need for closed hearings was so apparent, and so much a part of the prevailing philosophy, that there was no need to discuss it. “Removing these cases from the criminal courts” may have also meant keeping them from the public eye, without explicit mention of that need. The custom of the predecessor proceedings also probably played a part. These proceedings were sometimes confidential; it seems, not so much from an affirmative legislative decision, but from a practice of informal, “summary,” and chambers-like proceedings that did little to suggest there should be a public involvement. Thus, it is likely that hearings concerning delinquent, abused or neglected children, were occasionally closed in the later 1800s, that closed hearings simply continued at the beginnings of juvenile court, and that they quickly became legislatively or rule mandated.

201. The applicable statute provided that the proceedings for commitment or trial of any children charged with violating the Penal Code “may be heard . . . separate and apart from the trial of any other criminal cases, of which session a separate docket shall be kept.” See Barrows, supra note 198, at 10.

202. See id.


204. See id.

205. Id. (citing Abbott, A Topical Abstract of Juvenile Court Laws Governing the Trial and Disposition of Juvenile Offenders, in JUVENILE COURT LAWS OF THE UNITED STATES 132 (Hart. ed. 1910)).

206. See id. at 116-17.

207. Id. at 117. Geis says there were only “insignificant roadblocks” as the juvenile court made its way through some constitutional challenges, and in “none of the early cases did the question of the publication of juveniles’ names by newspapers, the coverage of juvenile court hearings by the press, or the privacy of the hearings come into controversy.” Id. at 110, 110 n.37.
One of the factors that probably contributed to the quick evolution of confidential hearings was the informality thought critical to delinquency hearings. Richard S. Tuthill, Judge of the Circuit Court of Illinois, described the Illinois statute in a Congressional Report in 1904, writing that the "[the hearing of the case is in the open court," but adding that it was done:

> with little of the formality usually observed in court proceedings. I have always felt and endeavored to act in each case as I would were it my own son that was before me in my library at home charged with some misconduct. . . . I first speak to him in a kindly and considerate way, endeavoring to make him feel that there is no purpose on the part of anyone about him to punish, but rather to benefit and help . . .

The lack of formality was consistent with the reformers' reform philosophy and set the tone for concern and help, as opposed to judgment and punishment. Closed hearings were conducive to this desired informality.

Closed or confidential hearings also were consistent with another concern the reformers had – protecting the delinquent child from the stigma of being branded a criminal. Keeping delinquency proceedings confidential would bury the errors of the child's youthful mistakes from others and further protect the child from the stigma and trauma of publicity generally. "[T]he duty of the state . . . [is] not to degrade but to uplift, not to crush but to develop, not to make [the child] a criminal but a worthy citizen."

208. See Barrows, supra note 198, at 3.
209. See id. Judge Julian Mack, one of Chicago's juvenile court's first judges, described the scene juvenile court proponents envisioned:

> The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career. . . . The child who must be brought into court . . . [must] be made to feel that he is the object of its care and solicitude. The ordinary trappings of the court-room are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge . . . will gain immensely in the effectiveness of his work.

Mack, supra note 161, at 119-20.

210. "The elimination of procedural formality in the courtroom presumably freed the judge to employ all available resources in gaining the child's confidence . . . thereby beginning the resocialization process." Ryerson, supra note 164, at 39. See also Mack, supra note 161, at 107, 120.


Although not a criminal conviction, a delinquency adjudication has the same stigmatizing effect in practice. The stigma can have serious, adverse consequences for a juvenile offender and his chances for rehabilitation. . . . Society perceives delinquency as deviant
Both of these concerns however – informal hearings and eliminating stigma – along with closed hearings, were associated with delinquency proceedings. Abuse and neglect matters remained secondary to delinquency concerns and the literature discussing juvenile court during the first half of the century reflected that. A 1909 Harvard Law Review article by Judge Julian Mack, for example, talked about “the juvenile court” in connection with “the delinquent child.”

A 1943 article in the Pennsylvania Bar Association Quarterly observed that “[i]t is the aim of our laws to protect society and its members. It is the aim of our juvenile laws to save an erring and oftentimes headstrong boy from continuing a life of crime.” A children’s court judge in White Plains, New York wrote in 1949 that the purpose of the juvenile court,

in working with children is to endeavor to understand the problems which have caused them to become in need of the care and protection of the State, to alleviate adverse conditions as far as possible, and to bring understanding and guidance to the children who have become delinquent, as well as to those verging on delinquency because of neglect.

A 1957 article on confidentiality in juvenile court began by noting that “[j]uvenile court proceedings are often regarded as the most progressive and promising avenue for the handling of youthful offenders.”

Eventually, however, governmental involvement in children’s issues would elevate abuse and neglect concerns. In 1909 the White House held its first Conference on Children and three years later, Congress created

behavior; therefore, society responds negatively to juveniles who have been labeled delinquent. Specifically, once aware of the juvenile’s label, as well as his deviant acts, society responds differently to the juvenile, attempting to ostracize him from the community. At this point, the juvenile becomes aware of his delinquency label and his self-image is adversely affected. The juvenile begins to believe that “he is no good or that he can’t make it on the outside.” Eventually, the juvenile “becomes committed to deviant activities and peers” and views himself as a deviant. Unable to escape society’s label, the juvenile engages in more delinquent behavior. Consequently, the label’s stigma creates a self-fulfilling prophecy that tends to incite and exacerbate the very behavior that was complained about in the first instance.


213. See Mack, supra note 161, at 104.
216. Geis, supra note 193, at 101; see also Roger J. Waybright, Florida’s New Juvenile Court Act, 6 MIAMI L. Q. 1 (1951); Helen S. MacPherson, The Juvenile Court in Connecticut, 11 CONN. B. J. 231 (1937) (treating the dependency aspects of juvenile court more fully and independently, while still viewing the juvenile court as one created primarily for delinquency problems).
217. See Thomas, supra note 149, at 312.
the United States Children's Bureau.\textsuperscript{218} In 1935, The Aid to Dependent Children program was established to provide states with federal funds (on a matching basis) to help support children in single parent homes.\textsuperscript{219} The Act also encouraged states to develop protective programs for children who were dependent or neglected and, consistent with the philosophy of juvenile court, for children "in danger of becoming delinquent."\textsuperscript{220}

In 1962 amendments to the Social Security Act required states to adopt plans extending child protective services to "every political subdivision."\textsuperscript{221} By 1967 every state had passed some form of a child abuse reporting bill.\textsuperscript{222} The 1974 Child Abuse Prevention and Treatment Act\textsuperscript{223} further encouraged states to enact mandatory reporting laws. In addition, the 1974 Act provided funding and model legislation.\textsuperscript{224} States responded by developing procedures for investigating child abuse and neglect and creating "the government entity known as child protective services."\textsuperscript{225} In the late 1970s Congress held hearings on the concern that children adjudged dependent because of neglect, abuse or abandonment were being left in foster care for years.\textsuperscript{226} The hearings resulted in the Adoption Assistance and Child Welfare Act of 1980 (AACWA),\textsuperscript{227} which emphasized family preservation and keeping children in their homes if possible. Then in 1997, Congress passed the Adoption and Safe Families Act of 1997 (ASFA),\textsuperscript{228} an act that emphasized finding adoptive homes for those children who would not successfully be returned to their parents.\textsuperscript{229} Today, dependency court proceedings are no longer mere adjuncts to delinquency prevention; they are a separate and significant part of juvenile court designed to protect children from neglect and abuse. They retain, however, one of the early and primary characteristics of juvenile delinquency hearings: they are presumptively closed to the public.

The history of dependency proceedings, extending from its Poor Law origins in England to today's modern child protective proceedings, does not reflect a "virtually immemorial custom"\textsuperscript{230} of either closed or

\textsuperscript{218} See Leroy Ashby, Endangered Children, Dependency, Neglect and Abuse in American History 189 (1997).

\textsuperscript{219} See Thomas, supra note 149, at 313; Walling & Debele, supra note 184, at 799.

\textsuperscript{220} Thomas, supra note 149, at 313 (quoting 42 U.S.C. §§ 601-626 (1970)).

\textsuperscript{221} Walling & Debele, supra note 184, at 799 n.132 (quoting 42 U.S.C. § 625 (1970)).

\textsuperscript{222} See Pleck, supra note 183, at 173; see also Walling & Debele, supra note 184, at 801.


\textsuperscript{224} See id. § 5102.


\textsuperscript{226} Id.

\textsuperscript{227} 42 U.S.C. § 620 et seq. (1980).

\textsuperscript{228} 42 U.S.C. § 678 (1997).


open proceedings, as does the history of open trials generally. The Poor Laws seemed not concerned with confidentiality, stigma, or any matters relevant to protecting children, with the exception of providing poor relief. The English Court of Chancery also seemed not concerned with protecting children at the outset. When it began to show broader concern for the child’s welfare, however, evidence suggests some hearings were probably held in private.

In this country, although the evidence is not absolute, it appears that, while dependency-type hearings sometimes may have been held away from full public access, closed courtrooms were not an articulated mandate for delinquency or dependency-type proceedings until at least the late 1800s and, more likely, until the juvenile court began to establish itself in the first part of the 1900s. Even then, the confidentiality practice was motivated by proceedings concerned with delinquency. The protective dependency hearing of today had not yet emerged as a focus of most juvenile courts.

The history of closure for dependency hearings then, is not only relatively recent, but, in America, is also largely rooted in its affiliation with juvenile delinquency proceedings. That the practice had some origins in England, that it began in America over one hundred years ago, and that it has continued in dependency court despite its American origins being primarily anchored in delinquency proceedings, certainly speaks to the historical judgment. But this history, contrasted with the “virtually immemorial” and “abiding adherence to the principle of open trials” considered in Richmond and its related cases, does not reflect any “profound judgment about the way in which” dependency hearings should be conducted. Further, while historical judgment informs, it does not dictate. Looking at the functional role access might play today remains critical. As Justice Brennan stated in Richmond, “what is crucial . . . is whether access to a particular government process is important in terms of that very process.”

III. FUNCTION: IS PUBLIC ACCESS TO DEPENDENCY COURT IMPORTANT TODAY?

The composition of juvenile court varies from state to state, but usually includes delinquency cases, status offense cases and dependency cases. Delinquency cases, which tend to give juvenile court its identity, involve children who violate the law and who, but for their age, would be

231. Richmond, 448 U.S. at 593 (Brennan, J., concurring).
232. Id. (Brennan, J., concurring).
233. Id. at 589 (Brennan, J., concurring).
charged with criminal offenses. Status offenses involve children who have committed acts that are not illegal for adults, but are made so for children, such as truancy, running away, and violating curfew. Delinquency and status offenses involve some act of wrongdoing on the part of the juvenile. Dependency cases, on the other hand, involve situations where children are believed to be victims of neglect or abuse and the state moves to protect those children by bringing an action in dependency court.

A usual dependency case arises from a report of neglect or abuse. Neglect occurs when a child's parents or guardians fail to provide even minimal care for the child, including abandonment. Abuse can be physical or sexual. Once a report has been made, the state's child welfare or child protective agency determines if an investigation is warranted. If so, and if the case is substantiated, that is if there is "good reason" to suspect abuse and neglect, further action is taken. In most cases, the child agency deals informally with the family, without a court petition or

235. See id. at 6, 7; Howard N. Snyder, The Juvenile Court and Delinquency Cases, in THE FUTURE OF CHILDREN: THE JUVENILE COURT 53, 53-58 (Richard E. Behrman, M.D. ed., 1996). Instead of being charged criminally and tried for their crimes, juveniles are charged with committing a delinquent act and the court is asked to "adjudicate" them as delinquent. Whereas adults are sentenced and imprisoned, juveniles are committed and provided "treatment" so that they can be rehabilitated. Id. at 58; Siegel & Senna, supra note 166, at 8. The court's disposition can include residential placement (detention facilities), restitution, community service, fines or probation, or the court can "dismiss the case in consideration of actions already taken." Id. Residential placement can range from placement in a large custodial institution such as a state training school, to a group home to a wilderness program or boot camp. See Peter W. Greenwood, Responding to Juvenile Crime: Lessons Learned, in THE FUTURE OF CHILDREN: THE JUVENILE COURT 75, 79-81 (Richard E. Behrman, M.D. ed., 1996). Further, state laws vary, but courts generally lose jurisdiction for purposes of disposition when the juvenile reaches a certain age. It is usually 18 or 21, but in some states it can extend past age 30. See Snyder, supra at 58-59; Spring, supra note 178, at 1352 n.5. Whether a juvenile court has jurisdiction to begin with varies widely from state to state, but often involves a consideration of several factors, including age, type of crime committed, and whether it is a first offense or not. See Eric K. Klein, Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice, 35 AM. CRIM. L. REV. 371, 390 (1998); Zierdt, supra note 36, at 416 n.109.

236. See Stevenson, supra note 234, at 13 (discussing that status offenses can also include underage drinking and children who are "ungovernable"). Delinquent behavior is often preceded by status offenses, and today we would think of status offenses as "predelinquent" behavior. See James W. Payne, Our Children's Destiny, 35 TRIAL 83, 85 n.4 (1999). Many of the status offense problems, "as many as 80% of all cases," are addressed primarily through diversion and dealt with through community service programs or the school system and are not formally a part of the court caseload. See Stevenson, supra note 234, at 13; David J. Steinhardt, Status Offenses, in THE FUTURE OF CHILDREN: THE JUVENILE COURT 86, 88 (Richard E. Behrman, M.D. ed., 1996). Examples of dispositional alternatives for status offenders, in addition to commitment, include probation, community service, fines, and canceling the juvenile's driver's license. See Erin M. Smith, In a Child's Best Interest: Juvenile Status Offenders Deserve Procedural Due Process, 10 LAW & INEQ. 253, 784 n.75 (1992).

237. See Stevenson, supra note 234, at 15-16.

238. See id.

court oversight. In essence, the agency "offers voluntary services," and the family "agrees" to those services. When this does not work, however, the agency files a petition, initiating the court's jurisdiction.

Dependency cases are usually heard in juvenile court, although more recently states with family courts have placed juvenile and, thus, dependency proceedings there. Once a petition is filed, the court is charged with several tasks, primary of which are making sure the child is protected and seeking a permanent home for the child, either with the child's family or elsewhere.

To evaluate the functional role public access might play in the "particular government process" we are concerned with (today's dependency court), it is important first to look at the current state of the court. Commentators and scholars, almost en masse, characterize juvenile court, including dependency court, as overcrowded, under funded, and failing to protect adequately the children who are subject to its rule of closure. Further, understanding something of the legal, procedural and substantive requirements in neglect and abuse cases provides some appreciation for the scope of the dependency court's responsibilities and, thus, the characterizations of failure. The issues the courts must deal with are many and are complicated, the hearings are frequent and the number of participants is considerable. Dependency courts devote much of their efforts to just getting through the docket. Time for thoughtful consideration of issues is rare. Finally, an understanding of the culture of dependency court is important. The cultural dynamics, largely defined by the emotional issues with which the courts deal, the imbalance of power between the parties, and the informal but ingrained customs of the regular participants, characterize the system. All of this gives form to the particular government process of dependency court.

A. The Current State of Dependency Court

Juvenile court, including its dependency proceedings, is, by most accounts, a dismal mess. First, the workload is simply too great and the resources too meager for court personnel to adequately protect the children. Second, too many juvenile court personnel are untrained for or

242. See id.

244. See infra Part III.B.
uninterested in their work. Finally, the court and its work are often held in low esteem, sometimes even by those who work there, and turnover of personnel is great.

The juvenile court must oversee too many cases with complex issues and must do so with far from adequate resources. One source reports that Chicago judges who hear dependency matters have up to 3000 cases at any given time. \(^\text{245}\) "[F]rustrations of being responsible for an unmanageable number of cases" can lead judges to "eventually stop seeing respondent parents as individuals."\(^\text{246}\) As a result, judges can end up doing their jobs with resigned attitudes produced by the seeming impossibility of their task. "In this overburdened system, then, an effective lawyer . . . is essential to making [the] client's circumstances fully known to and understood by the court."\(^\text{247}\) Unfortunately, that part of the system also is overburdened: children's lawyers in Chicago, for example, represent an average of 350 children each;\(^\text{248}\) "reporters have compared hearings in the overwhelmed juvenile courts to cattle calls."\(^\text{249}\) Further, it is not just the judges and lawyers who are overloaded. The rest of the system looks the same. "Every facet of the child welfare system is now overburdened. Social workers and their supervisors regularly handle more cases than recommended by licensing organizations: in some jurisdictions, more than four times more."\(^\text{250}\)


\(^\text{247}\) Bailie, supra note 246, at 2313.


\(^\text{249}\) Gordon, supra note 17, at 679.

\(^\text{250}\) \textit{Id. See also} Geraghty, supra note 246, at 232 (Juvenile courts everywhere "struggle with [a] lack of resources and [an] inability to obtain meaningful services for children."). Massachusetts, for example, passed a court reform act directed at improving "a fragmented [juvenile court system] nearly strangled by an ever increasing caseload of matters involving more complex and demanding issues of family dysfunction." Five years later, the system "remain[ed] under funded: the lack of resources for adequate courthouse facilities and court personnel contributes to docket delays and severely limits the ability to address serious family needs." Gavin, supra note 14, at 15-16. New York's child protective system was described by Judge Elaine Slobod: not enough foster parents, not enough trained aides and caseworkers in child protective services, inadequate mental health services for children, only intermittent services for families to help them keep their children — in short, there is not the "necessary services and resources" needed. \textit{In re S Children}, 532 N.Y.S.2d 192, 198-199 (N.Y. Fam. Ct. 1988). \textit{See also} Marcia Sprague \\& Mark Hardin, \textit{Coordination of Juvenile and Criminal Court Child Abuse and Neglect Proceedings}, \textit{35 U. Louisville J. Fam. L.} 239, 293 (1997) (arguing that coordination of juvenile and criminal proceedings resulting from a single incident can, in part, increase court efficiency).
Professor Weinstein described how this overload plays out within the juvenile court system for dependency cases:

[H]eavy calendars . . . require cases to be moved through quickly. There is no time for thorough and careful consideration of all the facts and concerns. Giving too much time to any one case disrupts the entire calendar. Neither the judges nor the attorneys can be completely familiar with these cases because of the number of cases which they handle. . . . The caseloads maintained by most professionals working in these systems is too high to expect quality performance. . . . It is not unusual to see judges reading through case files during the presentation of the case, nor to have critical reports distributed on the day of the hearing. In ordinary litigation, that would be sufficient reason for delay. In these cases, however, each cause for delay means that a child's life is put on hold.

The work of attorneys, too, is impacted by high caseloads. Attorneys may be unable to investigate their cases, consult with experts, or prepare for hearings. It is typical for cases to settle just before a scheduled hearing, not because the parties suddenly discovered a way to resolve their differences, but simply because this may be the first time all of the attorneys have had the opportunity to discuss the case with each other . . .

High caseloads prevent social workers from designing case-specific services for families, as required by [federal law]; instead, families often receive "boilerplate" service plans which can add to, rather than alleviate the families' problems, waste valuable resources and time, and heighten levels of frustration for all participants . . .

Support services for families are very limited . . . In the child protection arena, services are mandated by . . . federal requirement[s] . . . but are underfunded and often inadequate or unavailable to families due to long waiting lists or inconvenient locations. 251

Kathi Grasso, testifying in Congressional Hearings in 1997 on behalf of the American Bar Association Center on Children and the Law, reported that "emergency removal hearings, foster care review hearings, and other pertinent court reviews [too often] last no longer than five or 10 minutes." 252 The Report of the ABA’s Working Group on the Unmet Legal Needs of Children and Their Families states that "Chicago juvenile

251. Weinstein, supra note 29, at 118-121.
court judges have about ten minutes to devote to each case.\textsuperscript{253} These are not descriptions that evoke confidence.

Given these working conditions, it is not surprising that the juvenile court sits at the bottom of most judicial hierarchies. Whether the court's lack of resources is responsible for the court's low status or vice versa, the result is the same.\textsuperscript{254} Many judges and other personnel are discouraged from coming to and staying in juvenile courts. There are good and dedicated judges, lawyers and other personnel in juvenile court – this author has seen them – but many are ready to leave it and its many problems. Turnover of juvenile court personnel is high and is one of the biggest obstacles to protecting children within the system.\textsuperscript{255}

Second, although many have interest, not all personnel in juvenile court have adequate training and desire:

\begin{quote}
[N]o jurisdictions choose attorneys for children in child protection proceedings merely because the attorneys have expressed an interest in representing children; many of these attorneys bring to this task no special training in child advocacy and consequently may, despite good efforts and intentions, provide less than optimal representation to children.\textsuperscript{256}
\end{quote}

Some lack even minimum qualifications: "In some jurisdictions, where juvenile courts are regarded as legally unsophisticated, judges are appointed to juvenile court who wouldn't be trusted to judge major civil or criminal cases."\textsuperscript{257} Others simply do not have the interest: "Attorneys often accept appointments to specialized juvenile courts hoping for later promotion to higher judicial positions."\textsuperscript{258} All of these scenarios result in

\begin{footnotes}
254. See Joshua M. Dalton, At the Crossroads of Richmond and Gault: Addressing Media Access to Juvenile Delinquency Proceedings Through A Functional Analysis, 28 SETON HALL L. REV. 1155, 1181 n.172 (1998) ("The juvenile court generally ranks low in state judiciary hierarchy; this [too] keeps many qualified judges away.") "Many juvenile courts have meager staff support and other resources. This is probably due to their lack of visibility within the court system, a lack of understanding of their unique characteristics, their typically low position in the judicial hierarchy, and the low regard in which they are held by the judiciary as a whole." Mark Hardin, Child Protection Cases in a Unified Family Court, 32 FAM. L. Q. 147, 197 (1998).
256. Annette R. Appell, Responses to the Conference: Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children, 64 FORDHAM L. REV. 555, 1968 (1996). "[T]he poor quality of some legal representation of children has been linked to low compensation . . . , high caseloads, and judicial concerns about the impact of hourly payment of these attorneys on courts' coffers." Id. at 1967.
257. Hardin, supra note 254, at 197.
258. Id.
\end{footnotes}
personnel who lack the necessary commitment and training to discharge their responsibilities to the children committed to dependency court.\footnote{529}

The low esteem in which juvenile court is held is reflected in other ways too. "Many juvenile courts . . . are old and dilapidated or located in the basement of the local courthouse. The physical appearance of the courts often reflects their [low] position within the court system."\footnote{526} In addition, "[i]n many jurisdictions, specialized juvenile court judges or referees draw the lowest judicial salaries."\footnote{526}

B. The Responsibilities of Dependency Court

Dependency courts are responsible for a much greater number of dependency proceedings today than they were twenty-five years ago.\footnote{526} In 1976, there were 10 reports of abuse or neglect per 10,000 children; in 1994, there were more than 40 reports per 10,000 children, numbers totaling four percent of America's children.\footnote{526} The real impact on workload, however, has come from the increased scope of responsibilities in the typical abuse or neglect case, and most of that comes from the requirements of the Adoption Assistance and Child Welfare Act of 1980 (AACWA)\footnote{524} and the Adoption and Safe Families Act of 1997 (ASFA).\footnote{525} These federal acts, along with some additional state and constitutional requirements, have resulted in a greater complexity of issues and an increased number of hearings. Finally, an increased number of participants in dependency cases has also contributed to the system overload.\footnote{526}

As discussed earlier, the usual dependency case starts with a report of neglect or abuse.\footnote{527} While sexual and severe physical abuse cases tend to be those cases the public hears about, the majority of cases are neglect

\begin{footnotes}
\item[529] Advocates for children, be they prosecutors or defense lawyers, repeatedly have their efforts undermined by inefficient, ill-informed, or downright hostile judges. Judges who want to make a difference find themselves hamstrung by lawyers and child welfare personnel who are not as knowledgeable or as committed as they should be. Geraghty, supra note 246, at 234. See also Appell, supra note 256, at 1968 (commenting on the lack of training child advocates have).
\item[526] Hardin, supra note 254, at 197.
\item[526] Id.
\item[526] See Stevenson, supra note 234, at 16; Barth, supra note 239, at 102.
\item[526] Barth, supra note 239, at 102. All states require certain professionals who serve children to "report suspected child abuse" to the proper authorities. Stevenson, supra note 234, at 15-16. Of these 2.9 million children on whom reports are made, "[n]early one half" were reported as neglected; twenty-six percent as victims of physical abuse; and fourteen percent as victims of sexual abuse. \textit{Id.} at 16. See also Barth, supra, at 239.
\item[527] See Hardin, supra note 30, at 113-20.
\item[527] See Stevenson, supra note 234, at 16.
\end{footnotes}
situations. The state’s child protective agency investigates the report and, assuming the report is substantiated, takes appropriate action, which may include filing a petition in state court. Prior to AACWA in 1980, a judge in a dependency proceeding was charged primarily with determining whether child abuse or neglect had occurred and deciding whether the child could stay in the home with agency supervision, or whether the child needed an out-of-home placement (foster care). Two hearings were involved in the usual case. Since 1980, however, the courts are responsible for much more. “The Child Welfare Act [AACWA] tripled the number of issues to which lawyers and judges must attend in juvenile court proceedings.”

AACWA came about in part from the criticism that children were being placed in foster homes when, with state-provided support services, they might have been able to stay safely in their homes. AACWA responded by shifting emphasis to “permanency planning” for children, so they would not languish in foster homes. The centerpiece of the Act’s permanency planning mandate was the “reasonable efforts” requirement. States were now required to provide support services to make “reasonable efforts” to maintain or reunite the child’s in-home placement by providing services to the family, thus maintaining the stability and permanency of that placement. Instead of emphasizing foster care placement as a means of protecting abused or neglected children, the Act shifted the focus to protecting the child while the child remained in his or her home; foster care was to be the “last resort,” not the first.

To carry out AACWA’s reasonable efforts provision, states were required to develop a case plan for each child in foster care. Each child’s plan was to detail what had been done to try to keep the child in his or her home: the foster care placement; the services to be provided to the child, the foster family and the child’s family; and the plans for returning the child to his or her home or another permanent placement. “A typical case plan specifies case goals, such as family reunification, and areas of parental improvement; agency and parental tasks needed to

268. See English, supra note 33, at 43-46.
269. See Stevenson, supra note 234, at 16-17. See also Barth, supra note 239, at 101.
271. Gordon, supra note 17, at 679.
272. See Kim, supra note 229, at 287-89. The emphasis was on protecting children by placing them in foster homes, as was the focus of federal funding. After congressional hearings on the foster care system in the late 1970s the AACWA legislation was passed.
273. See id. at 288-89. Permanency advocates emphasized stability and finding permanent homes for children. The widespread use of long-term “temporary” placement, foster homes, was the antithesis of permanency. See also Hardin, supra note 30, at 112.
274. See Kim, supra note 229, at 289-90.
275. See id.
276. Id. at 290 n.22 (quoting 126 Cong. Rec. 6942 (1980)).
277. See id. at 290.
278. See id.
achieve the goals; and timetables for the achievement of the identified goals and tasks.\textsuperscript{279}

AACWA also increased the number of court hearings required for most dependency cases. States were required to judicially review the child agency’s actions to see if there were “reasonable efforts” to keep the child with the family\textsuperscript{280} and to conduct periodic administrative or judicial review hearings for children in foster placements “to determine, among other things, the appropriateness of the placement, the extent of case progress, and compliance with the [child’s] case plan.”\textsuperscript{281} In addition, state courts were required to hold permanency planning hearings (so that a new permanent home could be “secured” for children for whom reunification with families was not a safe option) within eighteen months after foster care placement.\textsuperscript{282}

Then in 1997, additional federal legislation was added. While AACWA was prompted in large part by children “languishing” in foster homes,\textsuperscript{283} the Act did not necessarily remedy the foster care problem.\textsuperscript{284} The states had interpreted the Act’s reasonable efforts provision as requiring them to work towards reuniting children with families, even when there was little or no prospect of that becoming a safe placement.\textsuperscript{285} As a result children were kept in foster homes while fruitless efforts were expended to make their former homes safe for them.\textsuperscript{286} When Congress passed ASFA in 1997, then, it attempted to clarify and limit the reasonable efforts requirement.\textsuperscript{287} It did so in various ways, primarily, however, by shifting greater emphasis to the child’s safety and to permanency, as opposed to family preservation and reunification.\textsuperscript{288} ASFA specifically emphasizes finding adoptive homes for those children who will not successfully be returned to their parents.\textsuperscript{289} Consistent with these goals, ASFA also requires a permanency hearing within twelve months after a...
child enters foster care (as opposed to eighteen months under AACWA) and moves states more quickly towards initiating termination of parental rights hearings (to facilitate adoptions). 290

The requirements of AACWA in 1980, combined with those of ASFA in 1997 have significantly expanded the courts' responsibilities in dependency actions in the last twenty to thirty years. 291 Today's dependency court, in addition to determining the validity of abuse or neglect allegations, may need to determine emergency placement issues, 292 assess reasonable efforts to keep the child in the home, 293 assess reasonable efforts to get the child back in the home, review case plans, review implementation efforts of case plans, hold (more quickly) a hearing to terminate parental rights, and deal with adoption issues. 294 "In 1976, the same case might have had two hearings and two issues for the court to deal with. Today the court might have to hold an emergency hearing, several review hearings, several permanency planning hearings, a parental rights termination hearing, and an adoption hearing." 295

Adding further to the complexity of cases with which juvenile dependency court must deal is the increased number of persons, including lawyers, needed or required to participate in the hearings. Federal and state constitutional and statutory requirements regulate who is represented in child dependency proceedings and at what stage. 296 First, the child's interests must be represented. The Child Abuse and Neglect Prevention and Treatment Act of 1974 (CAPTA) requires the appointment of a guardian ad litem (GAL) for each child who is the subject of a child protection proceeding. 297 While the GAL does not have to be a lawyer, many states provide lawyers to children. 298 The rest of the states use Court Appointed Special Advocates (CASAs) or other laypersons. 299 Some children have both a lawyer and a GAL. 300

290. See Kim, supra note 229, at 309-14. Even in 1996, prior to ASFA, Mark Hardin reported an increase in termination proceedings resulting from "[t]he emphasis on finding permanent families for foster children who cannot safely be returned home." Hardin, supra note 30, at 115.

291. See Hardin, supra note 30, at 114. See also Hardin, supra note 254, at 154-60.

292. Stevenson, supra note 234, at 17.

293. Hardin, supra note 30, at 113.

294. Id.

295. Id. at 116. See also Kim, supra note 229, at 302 (describing the shelter care hearing, adjudicatory hearing, dispositional hearing and review hearing typical of the juvenile court process).

296. See generally Hardin, supra note 30, at 118-19.


299. Richard J. Gelles & Ira Schwartz, Children and the Child Welfare System, 2 U. PA. J. CONST. L. 95, 108 (1999) ("[I]n only half of the states... do children in dependency actions have attorneys. In the other half... children are represented either by [CASA or laypersons."]) (citing
Next, the interests of the parents must be represented. In each case that involves termination of parental rights the court must determine whether the parents have a constitutional right to legal representation. However, most states give parents the right to request or the court the discretion to appoint counsel. Fewer, but still most, states give parents the right to request or the court the discretion to appoint counsel at all stages in child dependency cases. In some cases separate counsel represents each parent.

While in theory lawyers assist the court in substantive and procedural matters, this is not always the case. Inadequate training of juvenile court personnel, high employee turnover, inadequate pay, and status issues influence the outcome. CASA volunteers, either serving as GALs or as an additional voice for the child, enjoy a deserved reputation for their contributions to ensuring that the child’s interests are represented. However, “they generally offer neither expertise (training is good, but does not turn volunteers into social workers or psychologists) nor a particularly intimate knowledge of the child.” In addition, while lawyers and GALs theoretically ensure that the interests of the parties are represented, representation of varied interests can also make for a more adversarial hearing, and thus increase the court’s workload.

Lawyers or representatives, along with other participants have changed the look of the dependency case. In 1976, a dependency pro-

Interview with Howard Davidson, Director of the American Bar Association Center on Children and the Law (Feb. 1999).  
300. Hardin, supra note 30, at 118-19; Levine, supra note 297, at 2025.  
304. See e.g., John Haney & Lisa Kay, Making Reasonable Efforts in Iowa Foster Care Cases: An Empirical Analysis, 81 IOWA L. REV. 1629, 1650 n.140 (1996) (“In some cases, the court will appoint separate attorneys for each parent when their interests conflict.”).  
305. Hardin, supra note 30, at 118-19.  
ceeding typically included only the caseworker and the custodial parents. Today, participants might include the caseworker, the custodial parents, the noncustodial parents, the parents’ attorney or attorneys, the child’s attorney, the child protective agency’s attorney, a CASA volunteer (acting as a GAL) and even foster parents.

Increased caseloads, increased complexity of cases, and inadequate resources, including personnel, and the resulting overload and ineffectiveness of dependency courts are all important to understanding the “particular government process” of dependency court. However, one must understand another aspect of the court in order to evaluate the relative costs of open versus closed proceedings; perhaps more than anything, the culture most characterizes the institution of dependency court.

C. The Culture of Dependency Court

The government wields enormous power in dependency court. It takes children away from their parents, and often thrusts children “into strange surroundings with perhaps no understanding of why this traumatic event is happening or when it might end.” At the same time, the government deprives the parents of the “liberty to direct and control [their] care and upbringing.” Further, while the parents and children are usually strangers to the dependency court, the other participants are not. The judge, the lawyers, the social workers, the GALs, and the other court workers are usually daily participants in dependency court. The familiarity that these court workers have with the system and with each other can breed a “go along to get along” philosophy that pressures not only the regular participants, but also the parents and thus their children to conform and comply. The culture that results is one that does not always encourage thorough and accurate fact-finding or thoughtful decisions about the important matters before the court.

It is important to grasp the nature of a dependency action. “A dependency case . . . pits parent against state.” “[I]t is no secret that the people affected by the child welfare system are some of the least powerful members of our society: women, many of whom belong to racial minority groups and virtually all of whom are desperately poor,” and children. Further, it is possible that neither mother nor child will have a lawyer. If they do have lawyers, it is likely the lawyers are not highly

308. Hardin, supra note 30, at 115.
309. Id.
311. Sinden, supra note 302, at 363.
312. Id. at 362.
313. Id. at 346.
314. Id. at 364-65. See also Sokol, supra note 28, at 917 (“[T]he parents who end up in dependency court frequently are drawn from the most powerless segments of our society.”) (citing Santosky v. Kramer, 455 U.S. 745, 763 (1982); Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 30 (1981)).
trained or experienced. This is in spite of the fact that the government is there to take or interfere with the parent’s right to direct the upbringing of her child. The Supreme Court’s language in Stanley v. Illinois\(^{315}\) concerning this right bears repeating:

> The rights to conceive and to raise one's children have been deemed 'essential,' . . . 'basic civil rights of man,' . . . and 'rights far more precious . . . than property rights,' . . . 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' . . . 'The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment.\(^{316}\)

The government, through the dependency court judge, has the power to deny parents this precious right. The judge has the ultimate power to terminate the child’s legal relationship with his or her parents.\(^{317}\) The result is that the government presides over a critical court proceeding that is initiated by the government against a poor and vulnerable private party.

In addition, all the participants in this proceeding, except the parent and the child, are regular dependency court participants.\(^{318}\) The repeat presence of these individuals fosters a “clubbiness” and contributes to the court’s informality, both of which can influence the dynamics and the results of the hearings.\(^{319}\) First, the regulars in dependency court know each other. They know each other's children, partners and lives. When people know each other well and see each other regularly, they develop "a set of unwritten rules and shared expectations that govern the expected and accepted behavior."\(^{320}\) Theoretically, this familiarity, "learning each other’s styles, understanding expectations, and developing trust," could work to the advantage of the court system, "but only if each participant is vigilant in monitoring the professional behavior of

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\(^{315}\) 405 U.S. 645 (1972).


\(^{318}\) Sinden, supra note 302, at 351-52.

\(^{319}\) Id. at 352-55. See Bremner, supra note 145, Vol. III at 1162-65, for an excellent discussion of this dynamic.

\(^{320}\) Sinden, supra note 302, at 352 ("[F]rom the lawyers and social workers to the judges, their courtroom deputies, stenographers and clerks — [all] have well-established relationships and a kind of collegiality that comes from daily contact."). See also Bremner, supra note 145, Vol. III at 1162-65.
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others. Instead of vigilance, however, this clubbiness too often encourages judges, lawyers, and others to place collegiality and relationships ahead of their responsibilities. They conform to the group's expectations and make implicit pacts of non-aggression. This is especially true because of the tremendous caseloads in dependency court. "Giving too much time to any one case disrupts the entire calendar." Lawyers and other court workers understand this and understand that raising troublesome issues or arguments will consume time and resources that are simply not available. This may be particularly true of attorneys appointed by the court under a contract system. Again, because of the limited resources allocated to dependency court, the pay under these contracts is inadequate compensation given the services they require. Still, "the attorney must agree to these demands or risk receiving no future appointments. . . . The judge is clearly in a dominant position . . . because the judge has control over whether the attorney may appear in the courtroom in the first place."

The familiarity with which these regular courtroom participants interact also contributes to what is already a purposeful atmosphere of informality in juvenile dependency proceedings. This informality creates yet another obstacle to the court fulfilling its responsibility. Formal, open court adversarial proceedings are associated with relevant and accurate fact-finding. While even formal court proceedings can include decisions based on prejudices and other factual inaccuracies, informal proceedings exacerbate these problems. Without formal constraints, decision-making is more "susceptible to being swayed by prejudices, stereotypes, and snap judgments based on innuendo and rumor." Similarly, part of the informality of dependency court is influenced by the "social work norms and discourse" that dominate. Social work norms discourage conflict and emphasize cooperation and non-adversarial means of resolving issues. Amy Sinden, a lawyer who has represented parents in dependency court, argues persuasively that these values oper-

322. Sinden, supra note 302, at 354-55.
323. Weinsein, supra note 29, at 118.
324. Id.
325. Shink, supra note 321, at 40.
326. Id.
327. Id. See also Proceedings of the Conference on Ethical Issues in the Legal Representation of Children, Report of The Working Group on the Judicial Role, 64 FORDHAM L. REV. 1389, 1392 n.18 (1996) ("Many members of the Group, including the three members of the judiciary, believed that an appointment process that relieves judges of the responsibility for selecting and monitoring attorneys may be an appropriate step in assuring high quality representation for children.").
328. See supra text accompanying notes 208-210.
329. Sinden, supra note 302, at 379-80. See also infra, § III.D.1. (examining the importance of full and accurate information in dependency court).
330. Sinden, supra note 302, at 380.
331. Id. at 353.
ate especially to pressure parents to cooperate. A non-cooperating parent already accused of neglect or abuse, risks being accused of harming his or her child a second time.\(^{332}\) Cooperation in these situations, says Sinden, is "frequently just a code word for the parent doing whatever the social worker tells" the parent to do, if that parent wants to be reunited with his or her child.\(^{333}\) This pressure to cooperate can also generate unreliable facts on which the court might base its decision.

It is the convergence in dependency court of all of these factors—the imbalance of power, the emotionally charged issues that are before the court, the conformity and cooperation required of all participants, and the informality of the proceedings—that defines the culture of dependency court. The stakes are high in dependency cases, and the issues—child rearing, child abuse, child neglect—are particularly susceptible to prejudices. When possible harm to a child is the issue, the temptation to "cut corners" in order to reach the outcome one wants to reach is great.\(^{334}\) As Sinden so succinctly points out, this combination of factors is designed to produce inaccurate information:

> [S]ince *Miranda v. Arizona*, we have recognized that informality in the context of the power imbalance that exists when the state elicits information from an individual under a palpable threat of a substantial deprivation of liberty (there, physical restraint—here, removal of child) is a recipe for coercion and that such coercion can actually result in inaccurate information being elicited.\(^{335}\)

Each act of conformity and cooperation in a child's dependency proceedings—every agreement of non-aggression—runs the risk of hurting a child whose best interest needs someone at that particular moment not to conform, not to cooperate, not to operate on instinct or prejudice, but to find the facts and to "make waves."\(^{336}\)

Thus, the proceeding to keep in mind as we look at the function of open or closed dependency hearings is a proceeding about a child the government believes is abused or neglected; it can separate the child from his or her parents; it takes place in a grossly overburdened and underfunded system that resides at the bottom of the judicial hierarchy; it is one of an overwhelming number of cases with complex issues; and it

\(^{332}\) Id. at 353-54.

\(^{333}\) Id. at 354. See also Sokol, *supra* note 28, at 914, n.233 (arguing that dependency cases often place parents in the awkward position of being required to admit wrongdoing in order to be "acquitted").

\(^{334}\) Sinden, *supra* note 302, at 380.

\(^{335}\) Id. at 381 (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

is resolved in an informal environment in which there is great pressure to “not make waves.” And, it takes place in a system that was charged with protecting Tavelle, Brianna, Kayla, Ashley, and Larry. The question is, what function would public access to this proceeding serve?

D. The Value of Access to Dependency Court

Even if history yielded a stronger judgment about the confidentiality of dependency proceedings, the functional role of access today must be closely scrutinized. Historical judgments yield the judgment of the past, not the present. The function of closed dependency proceedings is largely defended as being in the best interest of the children whom the court is to protect, and the historical origins link the practice to that purpose. The seemingly dismal state of the dependency court system today, however, raises the question of “how?” How exactly does presumptively closing dependency hearings serve the best interest of the children?

Dependency court is charged with the responsibility of protecting children from abuse and neglect; to that end, dependency court is accorded the power of disrupting and severing the parent-child relationship. Such responsibility should be carefully discharged and such power should be carefully exercised; the consequences of the courts’ actions will likely have significant and irrevocable consequences for the children and their parents.

The best interest of the children would first seem to demand that the court be designed to encourage the fullest and most accurate information about the important issues before it. Further, to operate in the best interest of the children, the court also needs the confidence and support of the public. Closed hearings discourage full and accurate information and closed hearings fail to provide to the public information needed for the public’s confidence and support. It is “the sure knowledge that anyone is free to attend [a trial that] gives assurance that established procedures are being followed and that deviations will become known.”337 A closed hearing can sometimes serve the best interest of a child, but presumptively closed hearings do not serve the best interest of children.338

1. Full and Accurate Information

Full and accurate information about the matters before dependency court ought to be a major factor in determining how dependency court will operate. “No decisions have a more profound impact on the daily lives, emotional well-being, and safety of litigants than those made every

day in family courts.

Dependency court factual questions are also “among the most difficult . . . and most sensitive [questions] litigated in American courtrooms.” An open courtroom has long been recognized as one of the most important means of enhancing the reliability of judicial evidence and should help to make more accountable those who testify or otherwise provide evidence in dependency proceedings. The public scrutiny of open proceedings can further encourage accurate and reliable evidence in dependency proceedings by countering the culture of informality and familiarity of current proceedings. Finally, public scrutiny should encourage dependency court decisions based on reliable evidence, and discourage decisions based on prejudice, bias and good intentions – all of which are more likely to prosper behind closed doors.

Dependency court proceedings are judicial proceedings. The court engages in fact-finding and makes decisions based on those findings. One premise of our judicial system is the belief that justice emerges from full and truthful testimony, and it has long been recognized that open courtrooms help ensure the reliability of the testimony offered and thus the accuracy of the fact-finding. A courtroom audience who knows the truth can discourage perjury and encourage full and complete testimony. The same audience might also realize they have additional information to share that might be helpful.

While dependency proceedings may have more than the normal share of specific situations that require private testimony, such as when a child is testifying about sexual abuse, for example, dependency proceedings are still court proceedings. There is no general reason to except them from the rationale that applies to testimony in all other court proceedings. Children testifying about sensitive matters can be dealt with in the way other courts deal with it – using the court’s discretion on a case by case basis to determine if the testimony should be taken in private.

Further, inaccurate and unreliable evidence that may also result from the culture of informality and familiarity in dependency court can

341. See supra text accompanying notes 57-59. See also Sokol, supra note 28, at 913 (examining dependency court fact finding).
343. Karla G. Sanchez, Barring the Media From the Courtroom in Child Abuse Cases: Who Should Prevail?, 46 BUFF. L. REV. 217, 224-25 (1998). See also Brelsford & Myers, supra note 3, at 15-16 (examining mandatory closure and conditional closure of juvenile proceedings); Gofen, supra note 13, at 864 (discussing the lower court recognition of the First Amendment right of access to dependency proceedings).
344. Sokol, supra note 28, at 914.
be countered somewhat with public access. While informality was central to the original vision of juvenile court, and while both familiarity and informality can and likely do contribute to some beneficial outcomes in dependency court, an open courtroom can provide a check to their possible negative effects. "Several courts acknowledge that juvenile cases exhibit far more procedural errors than do comparable adult cases and suggest that confidential proceedings and the absence of counsel may foster a judicial casualness toward the law that visibility and appellate accountability might constrain." This state of affairs seems particularly troubling when it concerns cases as critical as dependency proceedings. Amy Sinden emphasizes some of the benefits of both formality and formal rules in courtroom hearings:

The formal rules that govern trial procedure also help to assure accuracy. Witnesses testify under oath under threat of penalty for perjury. The judge excludes unreliable evidence, like hearsay, as well as evidence likely to cause prejudice. The requirement that judges state the basis for their decisions helps to ensure that decisions are based on a rational view of the evidence and not on prejudice or bias. Numerous rules governing judges’ conduct in adversarial proceedings encourage impartiality and the appearance of impartiality. Thus, judges sit higher than and at some distance from the parties, and usually address only the lawyers. When they do address the parties directly they do so formally and on the record. And they do not communicate with one party out of the presence of the other party.

Open hearings would not preclude informality in dependency proceedings, but the openness should operate to minimize procedural errors resulting from that informality. It should similarly help prevent actions and decisions based on bias or prejudices, and abuses, some of which are aided by the culture of dependency court.

As discussed earlier, the process and dynamics of dependency court create a significant imbalance of power between the family and the government. The informality and clubbiness, the fact that a child’s health and safety are at issue, and the significant discretion accorded the court can skew the proceedings to result in the resolution that the government

345. See supra, text accompanying notes 57-59. See also Sokol, supra note 28, at 918 (arguing that public access would heighten procedural regularity in dependency cases).
347. Sinden, supra note 302, at 379-80.
favors.\textsuperscript{349} Because dependency courts are charged with making major decisions about children’s lives, the potential for misuse of power is great.

In addition, the subject matter in dependency court requires judges to exercise a great deal of discretion.\textsuperscript{350} Standards are vague\textsuperscript{351} and judges must ultimately decide where and with whom a child will do best. Solutions must often be fashioned around: 1) parents who love a child, but do not know how to care for that child; 2) support services that are assumed to exist, but that do not – because the resources are not there; and 3) a foster system that is overloaded and inadequate. Because of the overload on the system, judges must often make their decisions with hurried hearings and incomplete information. Prejudices or biases are more likely to be called upon when reliable information is lacking and are especially called on in such an “emotionally-charged arena” like dependency court. The safety of a child is at stake and if cutting corners – procedural corners and evidentiary corners – will keep a child from what the judge suspects is a dangerous situation, cutting corners is likely to be done.\textsuperscript{352}

Public access can check the shortcuts and abuses that stem from these probably good-intentioned impulses. Indeed, the inappropriateness of many of these actions may not be visible to the daily participants in dependency court. The implicit agreements fostered by the familiarity in juvenile dependency court, for example, those which discourage participants from “making waves,” and challenging the decisions or actions of colleagues, may be so much a part of the culture of the court that the regular participants simply fail to see them. It sometimes takes the outside view, someone to say “but why do you do that?” before insiders can see practices that need to be reformed. Thus, open hearings would work to create self-awareness in a system that may have become so closed that it has lost the ability to see some of its own faults. Open hearings would give insiders a fresh view, not only of the court, its personnel, and its practices, but of the employees of the social services agency, all of whom “wield vast authority on the State’s behalf.”\textsuperscript{353}

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\textsuperscript{349} Abuse can first result from governmental oppression. Formality not only aids in accurate fact finding, but it also helps to “prevent . . . governmental oppression.” See Smith, supra note 348, at 260.

\textsuperscript{350} Sokol, supra note 28, at 916.

\textsuperscript{351} Id. at 916.

\textsuperscript{352} Id. at 917. See generally Sinden, supra note 302, at 380-81 (arguing that the evidentiary constraints and protections against bias and prejudice provided by formality are important in the child welfare context).

\textsuperscript{353} Brelsford & Myers, supra note 3, at 17 (quoting Kahn v. Bower, 232 Cal. App. 3d 1599, 1613 (Cal. Ct. App. 1991)). See also Sokol, supra note 28, at 917-18 (arguing that public access would heighten procedural regularity in dependency cases).
Finally, without public scrutiny, court personnel can intentionally hide or explicitly agree to ignore shortcuts they might feel are needed for the system to produce what they perceive as the needed result.\(^{354}\) Almost all persons are a bit more conscientious about not rounding the edges of their performances if their actions are open to scrutiny by others.\(^{355}\) Critical decisions about a child's future must not be the result of bias, prejudice or "instinct." Open hearings provide an accountability that can help prevent this.\(^{356}\)

2. Educate and Inform the Public

A court charged with serving the best interest of abused and neglected children also needs the confidence and support of the public. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."\(^{357}\) For the dependency system to have the support of the public, the public must either believe the system is functioning properly or understand what is necessary for reform. In either event, the public needs access to dependency proceedings. Further, the "public" includes those who appear before the court. Parents, children, foster parents and other affected individuals need to know about the court that decides matters so important and central to their lives.

Again, the dependency court system deals with important and critical issues. The system must have the support and confidence of the public. Further, not only is juvenile court a public institution, the public is also a party to dependency proceedings, alleging through its government that a child is in need of protection. Thus, the public has a need, but also a right to know what occurs in its own judicial proceedings. The opportunity for criticism of government institutions is also particularly valued in our society.\(^{358}\)

The first reason to provide access to dependency court proceedings is to provide the knowledge necessary for intelligent public discussion and debate. Public access can let the public know if judges are making decisions based on what the evidence supports, or on individual biases or personal beliefs.\(^{359}\) Public access can let the public see the choices dependency court judges are too frequently faced with today. Often there is a choice between an inadequate parent and an inadequate foster care

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\(^{354}\) Sokol, supra note 28, at 920-22.

\(^{355}\) See supra text accompanying note 57; Sokol, supra note 28, at 918.

\(^{356}\) See supra text accompanying note 57. While many states give the court the discretion to open the proceedings to the public or any interested person, this still requires the court to act affirmatively to bring accountability to the system. Few willingly hold themselves out to public scrutiny. See Sokol, supra note 28, at 920; Brelsford & Myers, supra note 3, at 14-15.


\(^{358}\) Brelsford & Myers, supra note 3, at 14-15.

\(^{359}\) Gofen, supra note 13, at 876-77.
system.\textsuperscript{360} "If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism."\textsuperscript{361}

Public action can occur if the public can see for itself the inadequacies of the system, such as the need for better facilities; the need for more staff, better trained staff, better paid staff, and better qualified staff; the need for daycare subsidies, more healthcare support, more home support services, and better support for foster families; and the overall need for substantially more financial resources. The action may be as pointed and immediate as voting a judge out of office or applying public pressure to remove a lawyer from court appointments; it may be as broad as demanding more funding to attract better personnel, train better personnel, and retain better personnel. But knowledge is the prerequisite to action, and the public first needs access to the system.\textsuperscript{362}

Further, if the public sees a court treating the issues fully and the parties fairly, and making the best choices under the circumstances, the public will be less likely to blame the court when tragic events occur.\textsuperscript{363} The outrage at a child’s death might offend less and motivate more if the public understood the limited resources with which the court must function.\textsuperscript{364}

It is ongoing daily access and first hand information that is needed to motivate, and ultimately support a public call for action and reform. The current limited access to dependency court information lets the public hear of cases only when there has been a horrible result – when a child subject to the jurisdiction of dependency court is found terribly abused or dead. The community response is often a short-lived outrage over the “mistake” made in that particular case. Community members simply do not have enough information for a more constructive and long-term response. “A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted."\textsuperscript{365} If, however, the public could see the daily inadequacies of the system – the daily mistakes, and the daily tragic circumstances of smaller cases needing a day care voucher,

\textsuperscript{360} "Dependency court factual questions are among the most difficult, and most sensitive [questions] litigated in American courtrooms." Sokol, \textit{supra} note 28, at 913. \textit{See also In re the Welfare of R.L.K.}, 269 N.W.2d 367, 368 (Minn. 1978) ("The public has a right to know how this Court conducts its business, especially in a Court having as much power as this one.").


\textsuperscript{362} RLR v. State, 487 P.2d 27, 35-40 (Alaska 1971); \textit{In re Dino}, 359 So. 2d 586, 597 (La. 1978) (overruled on other grounds by \textit{State v. Fernandez}, 712 So.2d 485 (La. 1998)). \textit{See also Gofen, supra} note 13, at 875-78; Trasen, \textit{supra} note 348, at 381.

\textsuperscript{363} Sanchez, \textit{supra} note 343, at 225-26, 226 n.49.

\textsuperscript{364} Sokol, \textit{supra} note 28, at 926.

\textsuperscript{365} Richmond Newspapers Inc. v. Va., 448 U.S. 555, 571 (1980).
public transportation vouchers to obtain medical care, weekly home nurse visits, or good and accessible counseling services – perhaps the public could respond in a more meaningful and lasting way.

A trial court judge in Oregon recognized the difference between the public knowing about one case with a horrific ending and the public understanding the repeated nature of the daily shortcomings of the system. The trial court ordered specific treatment for a troubled thirteen-year-old girl over the objection of the state, which argued that the Children’s Services Division did not have the funds to pay for the court-ordered treatment. The trial court judge explained why he admitted the press (with some restrictions) to a trial involving an adolescent girl with a sensitive history of sexual abuse and other troubles:

[T]he Court knows from its own experience this [case] is not an isolated incident where this particular issue has been involved, and the Court feels that one of the reasons we have this problem is because the people of the State of Oregon and, specifically, members of the Legislature, are not really aware of the magnitude of the problem; and I believe it is the function of the press as well as the function of all of us to see that the people of this state, and, particularly, members of the Legislature, are confronted with the grave reality and stark reality of children in need in this state whose needs are not being met now; and I can’t do that, and I think that the press can. Exercising my discretion under the statute, I have allowed the press to be present.366

Finally, public access can also facilitate research and scholarly input.367 The problems dependency court must deal with are difficult and challenging. The easier access to dependency court is, the easier it will be for others to amass the information and knowledge needed to offer informed views and proposed solutions.

If, with knowledge, the public judges dependency proceedings to be fair and effective, then the discussion and debate will end there and the public will support the institution. If the public judges dependency proceedings to be less than desired, however, and the resources too limited, perhaps instead of an outrage defined by anger at and blame on the court, the public outrage will instead be defined by public debate about how the system can better protect our children.

366. State ex rel. Juv. Dept. of Multnomah Co. v. L., 546 P.2d 153, 155 n.1 (Or. 1976). [The 13 year old girl] was removed from her parental home when she was 11 years old after a long and disturbing history of sexual abuse by her stepfather and the child's rejection by her mother. She was first sexually assaulted when she was five years old. Since [the Children's Services Division] took custody of the child, she has been placed in a number of institutional and foster homes and has spent a considerable amount of time in juvenile detention. During the year and a half preceding the hearing [she] ran away from these homes at least 15 times and was often picked up in various parts of the state in the company of older boys and young men. Id. at 155. See also Hendrickson, supra note 338, at 41.

367. See Sokol, supra note 28, at 927.
Public disclosure might assist in drawing attention to the terrible plight of children in this country and to the ever shrinking resources allocated to both them and the system which is designed to protect them. . . . [T]he press can assist juvenile courts . . . by providing the public with greater knowledge of the child welfare system and the adequacy, or lack thereof, in (child protective) service delivery systems.  

With full information over a sustained period of time, the public may well make meaningful contributions to what seems now like a hopeless task.

**IV. Function: Is Public Access in the Best Interest of the Children in Dependency Court Today?**

The ultimate function test for dependency court access is whether it is in the best interest of the children whose futures are decided daily by the dependency court system. Indeed, best interests of the children are at the heart of mandatory or presumptive closure of juvenile court, including dependency proceedings. Unfortunately, an analytical framework that pits public access to dependency court against the best interest of children assumes that, on balance, an open courtroom hurts the interest of children. This is a false premise. A particular child might benefit from his or her case being closed to the public, but a standard of closure does not benefit the system that decides that same child’s future. If access is presumed, however, individual assessment of cases in which closure is requested can continue to respond to the particular privacy needs of any child. At the same time, the standard of presumed access will continue to benefit the judicial system, and thus benefit the children the system serves. In this way, the best interests of the children are served.

The fatal flaw behind mandatory or presumptive closure in dependency cases is the assumption that closure is generally in the best interest of all children. Court decisions taking this position correctly review the history of access, emphasizing the juvenile court’s practice of closure

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368. Brelsford & Myers, supra note 3, at 14.
369. Gofen, supra note 13, at 878. Just as important as the public at large are the parents, children, foster parents and others who are subject to the juvenile court institution. If the public is barred from observing the proceedings, when members of that public are called before the court, they do not know what they are called before. They are less likely to know what the process is, what goes on, how it functions, and what is expected of the subject. The disadvantage is all the more apparent because everyone else – the judges, lawyers, social services, and other court personnel – do know what is going on. But the public, the parent and the child, whose lives will be greatly affected by decisions made, are barred from information about the system until they are subject to it. Further, publicity also gives notice – it lets parents, foster parents and others understand what their responsibility is to the children they care for.
370. See generally Brelsford & Myers, supra note 3, at 14-17; See also Dienes, supra note 3, at 1, 3-4; Gofen, supra note 13, at 875-76.
and therefore its historical judgment that closure is best, but the courts generally ignore the relatively brief history of juvenile court. Courts also appropriately look at the purpose and function of closed juvenile proceedings, but their analysis too often sounds like a mantra, e.g., "[t]he interests of the juvenile . . . are most often best served by anonymity and confidentiality." The result is that courts too often conclude the best interests of children require mandatory or presumptive closure in all proceedings without fully considering the cost such closure brings to the system of justice that must serve those same children. Thus in Florida, the supreme court upheld mandatory closure of termination of parental rights hearings, simply noting the historical "overriding interest in, among other things, protecting the child from stigma, publicity, and embarrassment and promoting rehabilitation." In Natural Parents of J.B., it was the dissenting opinion that provided a discussion of the "strong policy concerns" supporting open hearings, not the majority.

Certainly there are situations where public access might interfere with a child's best interest, and where testifying in open court might traumatize children, or where the fairness of the trial might otherwise be prejudiced. But these situations can be dealt with by closure in any given case; closure should not be deemed as being in the best interest of all children at all times. The Supreme Court recognized this in Globe, when holding a statute unconstitutional because it excluded the public from trials of specified sexual offenses involving a victim under the age of eighteen:

[S]afeguarding the physical and psychological well-being of a minor is a compelling one. But as compelling as that interest is, it does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. . . . In short, [the statute] cannot be viewed as a narrowly tailored means of accommodating the State's asserted interest: That interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure. Among the factors to be weighed are the minor victim's age, psychological maturity and

375. Id. at 14-15 (Anstead, J., dissenting, with Pariente, J., concurring in the dissent).
376. In addition to keeping a child from suffering the additional stigma and embarrassment that can occur with open hearings, closed hearings can better accommodate the informality and social work approach proponents of juvenile court have traditionally favored, and perhaps the rehabilitation that must occur afterwards. While the informality and social work aspects of dependency court produce mixed results, see supra text accompanying notes 208-10, 327-33, there may be reasons besides stigma, embarrassment and trauma that justify partial or full closure of a hearing.
understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives.\footnote{Globe Newspaper Co. v. Super. Ct. for County of Norfolk, 457 U.S. 596, 607-09 (1982).}

Similarly, \textit{Globe} also rejected the other rationale offered for excluding the press and public from sex-offense trials — "the encouragement of minor victims of sex crimes to come forward and provide accurate testimony."\footnote{Globe, 457 U.S. at 609.} That assertion, according to \textit{Globe}, was "speculative in empirical terms" and "open to serious question as a matter of logic and common sense."\footnote{Id. at 609-10.}

Consistent with the Court's opinion in \textit{Globe}, many courts have recognized the heavy burden closure bears when weighing these issues in the context of the First Amendment analysis. The U.S. Supreme Court has held that the presumption of open public proceedings (for proceedings pertaining to criminal trials) can only be overcome by an "overriding interest"\footnote{Richmond Newspapers, Inc. v. Va., 448 U.S. 555, 581 (1980).} — a "compelling interest,"\footnote{Globe, 457 U.S. at 607.} "articulated in findings"\footnote{Press-Enterprise Co. v. Super. Ct. of Cal., Riverside County, 464 U.S. 501, 511 (1984).} "specific enough that a reviewing court can determine whether the closure order was properly entered.\footnote{Globe, 457 U.S. at 606-07.} The Court further held that the closure must be "narrowly tailored to serve that interest."\footnote{NBC Subsidiary (KNBC-TV), Inc. v. Super. Ct., 980 P.2d 337 (Cal. 1999).} Federal circuit courts considering the issue in civil proceedings have held similarly,\footnote{NBC Subsidiary, 980 P.2d at 365.} as has the California Supreme Court.\footnote{See also Westmoreland v. Columbia Broadcasting System, Inc., 752 F.2d 1059, 1070 (3d Cir. 1983) ("to limit the public's access to civil trials there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest"); Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983) ("closure is proper only if necessary to achieve a legitimate purpose"); "less intrusive alternatives must be considered"; and "if closure is warranted, the restriction on access must be narrowly drawn with only that part of the proceeding as is necessary closed."); \textit{In re Iowa Freedom of Information Council, 724 F.2d 658, 661 (8th Cir. 1983); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1178-79 (6th Cir. 1983).}
the issue specifically as it relates to dependency court and ruled that the person seeking closure of a dependency hearing bears the burden of establishing "(1) there exists a reasonable and substantial basis for believing that public access could harm the child or endanger the fairness of the proceeding, and (2) the potential for harm outweighs the benefits of public access." 388

Mandatory or presumptive closure is still the norm in dependency proceedings, 389 however, and "protection of the children" by closure usually trumps access in cases challenging the constitutionality of closed juvenile hearings, 390 whether they are mandatory or presumptive closure provisions.

In California, the Court of Appeal was faced with deciding whether the public had a constitutional right of access to child dependency proceedings. 391 The court fully discussed the important policy concerns supporting open proceedings. The court found itself "at the crossroad," 392 deciding that the function of access (e.g., encouraging accurate fact-finding, checking judicial abuse) favored opening the proceedings, but that the historical judgment of America's juvenile court would not grant access to dependency proceedings. 393 In the end, the court worried that finding a constitutional right of access would "mean that the proceeding constitutionally could not be closed unless the judicially created strict test for closure is met. . . . With the welfare of minors at stake, we are reluctant to impose the strict standard for closure required for a First Amendment right." 394

Similarly, the Georgia Supreme Court, even when holding invalid mandatory closure of juvenile hearings (on delinquency, deprivation and unruliness matters), 395 ruled that it was permissible to legislate a presumption of closure. 396 Thus, the public or press requesting access must show that the "state's or juveniles' interest in a closed hearing is overridden by the public's interest in a public hearing." 397 Unfortunately with such a presumption, most courts will likely agree with the Supreme

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388. "ordinary civil proceedings in general, and not any . . . particular proceedings governed by specific statutes." Id. at 361 n.30. The court thus did not include dependency hearings within its holding. Id.
389. In re T.R., 556 N.E.2d 439, 451 (Ohio 1990) (ruling, however, that dependency hearings had neither a presumption of closure nor access). See also State ex rel. Plain Dealer Publ'g Co. v. Geauga Co. Ct., 734 N.E.2d 1214 (Ohio 2000); and State ex rel. Dispatch Printing Co. v. Lias, 628 N.E.2d 1368 (Ohio 1994) for helpful dicta interpreting In re T.R.
390. See supra note 5.
392. See San Bernardino, 283 Cal. Rptr. at 343.
393. Id. at 342.
394. See id.
395. Id. at 343.
396. See Fla. Publ'g Co. v. Morgan, 322 S.E.2d 233, 238 (Ga. 1984).
397. Id.
Court of New Jersey in *New Jersey Division of Youth and Family Services v. J.B.*, that "[t]he factual settings presented in the vast majority of [child protection] cases involve allegations that warrant closure."  

One of the myths that access to dependency court would correct is the assumption that most dependency cases involve allegations of sexual and other severe physical abuse. Sexual and physical abuse cases, while numerically substantial, still constitute a minority of dependency cases. After looking at various surveys, studies and reports, Diana English concluded that neglect "apparently affects about twice as many children as do physical and sexual abuse." Most dependency cases are neglect cases, children who lack basic emotional and physical care, and most neglect is rooted in poverty. While all such cases are tragic, they do not necessarily involve allegations that would cause sufficient trauma to a child such that closure would be appropriate. Even assuming most sexual and physical abuse cases should be closed to the public, along with some of the neglect cases, a substantial number of cases would still be heard in open court.

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398. 576 A.2d 261 (N.J. 1990). The court said J.B. involved "the rare situation in which the public’s right to attend judicial proceedings is not outweighed by the state’s compelling interest in conducting a private hearing." *N.J. Div. of Youth*, 576 A.2d at 270.

399. Id. at 269.

400. See English, *supra* note 33, at 43.

401. Id.

402. See id. at 41 Box 1.


404. Most of the cases in dependency court are indeed tragic. The tragedy of these cases, however, is the poverty and ignorance in which they are rooted. Most are not cases that suggest trauma or stigma as a result of public access. For example, in her recent book, Jane Waldfogel asserts that the current foster care population may be grouped into three categories. First, the most serious category, constituting about 10% of current caseloads, includes "serious and criminal cases." The second group encompasses serious cases that do not require criminal justice intervention. The final group of cases are those in which a child is at a relatively lower risk of serious harm, and the parents may be willing to work with an agency to secure needed services. Together, the latter two groups comprise 90% of the caseload. Typically, these cases involve less serious physical abuse (for example, a single, minor injury such as a bruise or a scratch) or less severe neglect (such as parental drug or alcohol abuse with no other apparent protective issues, dirty clothes or a dirty home, lack of supervision of a school-age child, or missed school or medical appointments). Many of these lower-risk neglect cases are poverty-related, resulting from inadequate housing or inappropriate child-care arrangements while a parent works.


405. However, the Supreme Court's caution in *Globe* applies here: "the measure of the State's interest lies not in the extent to which minor victims are injured by testifying, but rather in the incremental injury suffered by testifying in the presence of the press and the general public." *Globe Newspaper Co. v. Sup. Ct.*, 457 U.S. 596, 609 n.19 (1982).
For this to happen, however, the standard of access must incorporate the value of the open courtroom. Only with a standard that recognizes this value, and thus assumes access, will dependency proceedings stand to benefit from that access and thus better serve the interests of the children and other litigants before the court.

Trauma, stigma, embarrassment, and similar concerns for children in dependency court can all be addressed on a case-by-case basis. However, concerns about obtaining reliable and accurate information, about court decisions being based on evidence, about lawyers and judges being held accountable for their performances, and about a judicial system earning the confidence of the public—these are concerns resulting from the "particular government process" of dependency court. These concerns cannot effectively be addressed in a closed courtroom; they must be addressed systemically by legislating public access back into the juvenile dependency system. If a party wishes to bar the public from a particular hearing, and there is a sufficient reason to do so, that party can request closure. Because the system and thus the children should benefit substantially from public access, however, the reason offered for closure must also be substantial. "Closed proceedings . . . must be rare and only for cause shown that outweighs the value of openness."

The type of harm that must be established and the probability of its occurrence with an open trial needs to be that which can overshadow the value open proceedings bring. It could be the Supreme Court’s standard in criminal proceedings: "an overriding interest based on findings that closure is essential to preserve higher values and . . . narrowly tailored to serve that interest." It could be "reasonable likelihood of substantial prejudice;" "substantial probability " of substantial prejudice; or a "realistic likelihood of prejudice to a fair trial." It could meet the Ohio Supreme Court’s "reasonable and substantial basis" that the child could be harmed or the fairness of the proceeding endangered. In any event, the harm and the probability of it occurring must outweigh the benefits of public access, "one of the essential qualities of a court of justice."

V. CONCLUSION

"[T]he paramount question," said Judge Elaine Slobod in her Orange County, New York Family courtroom in 1988, "is whether the parad-

406. See Globe, 457 U.S. at 607-09.
ties and children are better served by retaining the veil of confidentiality that covered the Family Court from its inception or by lifting that veil and laying bare the breadth of society's ills which lie beneath. Access will lay bare the state of dependency court and access can bring reform to the court. Presumptive access can better serve the children and others in dependency court than can closure. It may be, as the New Jersey Supreme Court posited, that "[i]t will be the unusual case in which a factual context that poses no danger of trauma or embarrassment to the child coincides with the general public's interest in following the proceedings." But I believe otherwise. With daily access presumed in dependency courts across the nation, I believe the public will follow the proceedings. I believe access will work as it was intended to work and as it has worked in courts for centuries. I believe it will—perhaps slowly—bring reform to dependency court.

For some time now, legislatures and courts have "retain[ed] the veil" of closure. Their answer to the paramount question Judge Slobod presented has left us with a dependency system that is in crisis and failing many of our children. My argument is that public access can help; only access and time will tell us if I am correct. But "[t]he only way one can fully comprehend the realities with which the Family Court deals is to be here to see what is presented on a daily basis." I have sat in dependency court as an observer, and I have participated in dependency court as a CASA. I have seen judges and lawyers and others do exceptional jobs with the resources they had, but the resources were not sufficient. I have also seen judges and lawyers who needed to do more than they were doing, even with the inadequate resources they had. Access gives hope for reform, whereas now there is little. I believe the children who will be in dependency court tomorrow should have that hope.

418. See supra text accompanying footnotes 14-29.
I. INTRODUCTION

The debate over selecting and retaining judges is long standing and reflects a fundamental disagreement regarding a judge’s political and social role. There exists a tension between a judge’s dual role as a lawmaker and interpreter of existing law.

One view, functionalism, maintains that the courts serve as an institutional check on the legislative and executive branches and that judicial independence is essential for the judiciary to protect the rule of law. To function effectively, judges must be free from the influence of the electorate, the executive, and the legislature.

In tension with the idea of judicial independence is the need for judicial accountability. Judges must be aware of the majority’s political, social, economic and ethical views when interpreting and applying the law. Furthermore, accountability advances democratic principles by legitimizing popular vote.

The second part of this paper outlines various ideologies regarding a judge’s proper political and social role when exercising power and engaging in decision making. The third part discusses the three primary selection and retention methods currently used and the effects of Political Action Committees (“PACs”) on campaign expenditures. The final sec-

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2. See Webster, supra note 2, at 2.

3. See Dubois, supra note 1, at 34.


5. See Dubois, supra note 1, at 34.

6. See Webster, supra note 2, at 3.

7. See Dubois, supra note 1, at 34.

8. See Webster, supra note 2, at 11.
tion of the paper asserts that an election system better serves democratic principles.

Rather than replacing election systems with either appointment or merit systems, meaningful reforms must be instituted. Lengthening judicial terms, reforming campaign financing, eliminating constraints on judicial speech, and increasing voter education are a few reforms that will increase voter participation, add legitimacy to the institution, and decrease the negative effects that are associated with current elections.

II. JUDICIAL THEORY AND JUDICIAL SELECTION AND RETENTION: DIFFERING VIEWS REGARDING THE COURT’S ROLE IN AMERICAN SOCIETY

The debate over the judiciary’s proper role dates to the nation’s founding. The argument about whether a selection method should serve judicial accountability or independence is limited to the state arena and does not extend into the federal sphere. Judicial independence is interpreted to mean that judicial decisions will be decided fairly, impartially, and in good faith without outside considerations and without judicial accountability to the electorate for judicial conduct.

Central to the debate on whether a selection system should preserve judicial independence or accountability is what political and social role a judge should play. If it is believed that a judge applies a well-established body of legal rules and principles, then accountability to the electorate is of secondary concern. A judge is better able to make fair and impartial judicial decisions in the absence of outside influences and pressures.

A particular candidate’s training and legal knowledge is the key in the selection process with professional peers or other judges considered to be the most qualified to assess and recognize a particular judicial can-

9. See id. at 2
10. Federal judges are appointed to a life tenure with removal for cause. Therefore, popular criticism will not affect the judge’s independence. See Steven Lubet, Judicial Discipline and Judicial Independence, 61 LAW & CONTEMP. PROBS. 59, 59 (1998).
11. See id. at 61.
12. There are two aspects to judicial independence: (1) institutional independence: judicial independence from executive and legislative branch control; and (2) decisional independence: the theory that judges should decide a case on the merits free from outside pressures and influences. Webster, supra note 1, at 4. See also, Erwin Chemerinsky et al., What is Judicial Independence? Views from the Public, the Press, the Profession, and the Politicians, 80 JUDICATURE 73, 74 (1996) (defining judicial independence similarly).
13. Accountability is used to denote accountability to the majority of the electorate.
14. Judicial accountability is seen as less of a concern if a judge exercises no discretion or independent power but is viewed as society’s conscience. See Dubois, supra note 1, at 36-37.
15. A judge should be free from public pressure but should also be free from his or her own personal, social, political, or economic views. See id. at 36.
JUDICIAL SELECTION METHODS

Under this system, judicial peers select and retain judges and conduct periodic performance reviews. Essential to true independence are life tenure, salary protection, and removal for cause subject to a constitutionally adequate procedure. Institutional appellate review and peer pressure serve as a check on judicial discretion and erroneous decisions.

Other commentaries believe that a judge's social and political role is expansive and that there are no institutional constraints on judicial discretion and decision-making. Because judges are, in fact, vested with partisan political authority and judicial acts and decisions are influenced in a politically partisan manner, then judges should be democratically accountable to the electorate. Direct political accountability to an electorate is a check on unlimited judicial discretion.

A third view in determining a judge's political and social role focuses on the jurisdictional level of the court. Because a trial and intermediate appellate court judge is engaged in applying a well-established body of legal rules and principles, judicial discretion and decision-making is limited and constrained by the job's intrinsic nature. Judicial discretion is inherently limited because creating new law is a very small part of what a judge actually does. A judge will be acting in a legislative capacity only when engaging in statutory interpretation. Greater independence is allowed and direct political accountability to the electorate is unnecessary because statutory interpretation is a minute part of the judge's judicial duties. Institutional appellate review, constitutional amendment, or legislative action are checks on unpopular judicial decisions and the development of new law.

A fourth view of a judge's political and social role is a formalism approach. The belief is that a judge's purpose is to protect individual

16. See Webster, supra note 1, at 5.
19. See id. at 31.
21. See id.
23. See Dubois, supra note 1, at 36-37.
24. Under this view there are two types of judiciary created law. The first is modifying, extending or contracting the common law. The second type is statutory interpretation as a gap filler where a statute is ambiguous or silent regarding the case before the court. See Webster, supra note 1, at 6.
25. See id. at 6-7.
27. See Grodin, supra note 22, at 1976.
liberties and minority rights from encroachment by the electorate majority. Judicial independence and discretion are essential when minority and individual rights conflict with the majority's will. Accordingly, judges are seen as activists and are expected to change the law in order to protect individual and minority rights. Because of tension between the majority and minority, changes in the law may be unpopular with the electorate or other government branches. Judicial independence and freedom from majority retaliation is critical in order for a judge to perform effectively. As Alexander Hamilton stated, “Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their [judge’s] necessary independence.” The court in Chisom v. Roemer, echoes this view:

public opinion should be irrelevant to the judge’s role because the judge is often called upon to disregard, or even to defy, popular sentiment. The Framers of the Constitution had a similar understanding of the judicial role, and as a consequence, they established that Article III judges would be appointed, rather than elected, and would be sheltered from public opinion by receiving life tenure and salary protection.

However, judicial independence from accountability to other government branches or the electorate may not be practically or factually accurate. First, judicial independence does not guarantee that judges will, in fact, protect individual liberties or minorities’ rights. Second, state judges may not require the same degree of independence as federal judges because most civil rights cases are brought in federal court not state court. Third, the judicial independence argument assumes that the

28. As Hamilton put it: This independence of judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular conjectures sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. THE FEDERALIST NO. 78, at 231 (Alexander Hamilton) (Roy P. Fairfield ed., 1966). Additionally, Hamilton expressed a structuralist view of judicial independence. Judges need to be free from influence and encroachment by the legislative and executive branch. Id.
30. See Webster, supra note 2, at 7.
31. See Kaufman, supra note 18, at 9.
32. THE FEDERALIST NO. 78, supra note 29, at 232.
34. Chisom, 501 U.S. at 400.
35. See Dubois, supra note 1, at 39.
36. As a result, state courts will rarely decide cases involving minority rights or individual liberties, thus decreasing the need for judicial independence. See Robert S. Thompson, Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986, 61 S. CAL. L. REV. 2007, 2055-56 (1988).
democratic electoral process inherently corrupts judges.\textsuperscript{37} This author believes that an individual possesses a corrupt nature and it is the individual, not the system, which guides individual choice.

A judicial independence argument also contains the correlated argument that a perception of judicial independence and propriety must be maintained.\textsuperscript{38} Judicial authority, judicial legitimacy, and judicial effectiveness are products of public support and respect for the judiciary. Public respect for the institution is produced by the belief that judicial decisions are made fairly and impartially based on the merits of a particular case, and not from outside influences.\textsuperscript{39} Therefore, even if judges remain free from outside pressure, there may be a perception that a judicial decision was influenced by political considerations\textsuperscript{40} and the institution as a whole is devalued.\textsuperscript{41} Respect for the institution and the rule of law is needed for voluntary compliance with the law. If people believe that judges are deciding cases because of outside influences then people will fail to voluntarily comply with the law or use the courts to solve problems.\textsuperscript{42} Additionally, public perception of a biased and unfair system is prevalent among minorities holding a belief that there is unequal treatment in the justice system.\textsuperscript{43} Furthermore, the lack of confidence in the legal system is evidenced by an increase of \textit{pro se} litigants particularly in the area of family law.\textsuperscript{44}

Independence supporters argue that election systems are more likely to produce perceptions of influence and corruption.\textsuperscript{45} Political campaigning and fundraising create the impression that judicial decisions are exchanged for votes.\textsuperscript{46} As a result, public confidence in the institution is diminished and judicial decisional independence is constrained.

Additionally, it is claimed that judges should remain independent and unaccountable to the electorate because judges are unique and do not

\textsuperscript{37} See id. at 2056-57.
\textsuperscript{38} See Webster, \textit{supra} note 1, at 9-10.
\textsuperscript{39} Outside influences can include special interest groups or popular opinion. See Abner J. Mikva, \textit{How Should We Select Judges In a Free Society?}, 16 S. ILL. U. L.J. 547, 555 (1992).
\textsuperscript{40} Political is used in the sense that the decision will most likely result in the judge continuing to hold office. A judge will be more concerned in making a decision that will keep him employed.
\textsuperscript{41} See Webster, \textit{supra} note 1, at 9-10.
\textsuperscript{43} See id.
\textsuperscript{44} \textit{Id.} However, the increase of \textit{pro se} litigation may be the result of more than the erosion of public confidence in judges and may be the result of a lack of confidence in attorneys, the increased ease of \textit{pro se} divorces, and attorney fees.
\textsuperscript{45} See id.
act in a legislative capacity. Judicial accountability to the electorate is unnecessary because judges apply but do not make law. The need for representation and democratic accountability is lessened because courts do not act in a representative capacity and are legally prohibited from having constituents.

Accountability addresses a number of practical concerns. First, judges function in a legislative capacity and make policy when engaging in statutory interpretation or departing from prior case law. Judicial policy decision-making is in opposition to the democratic principles upon which the nation was founded. Second, judges are human and can make mistakes. Therefore, they should be accountable to the electorate for erroneous decisions. Third, elections contribute to judicial accountability, increase voter awareness and interest, and produce better judges.

III. METHODS OF SELECTION AND RETENTION

A. Appointment

In the majority of states, regardless of the selection system used, initial judicial selection is made by gubernatorial appointment to fill unexpired terms. Six states and the federal government use appointments as the exclusive selection method. Selection procedures vary among the states. Current methods are appointment by the legislature, the governor, and merit selection through nominating committees.

48. Id. at 420-22.
50. See Webster, supra note 2, at 6.
52. See Webster, supra note 1, at 11.
56. In Maine, the governor appoints, subject to legislative confirmation, supreme and superior court judges for a 7-year term with re-appointment for 7-year terms. McFadden, supra note 56, at 181. The New Hampshire governor, with the approval of a five member executive council, appoints
Proponents of the appointment system to select and retain judges argue that judicial independence is guaranteed because judges are insulated from criticism and threats of removal and do not have to rely on popular approval for their decisions. Democratic principles are served by indirect accountability to the public through the elected appointing authority.  

Appointment advocates are concerned with the negative effects that campaign financing, fundraising, and conduct has on judicial performance.  

Fundraising and election contests by judicial candidates create public distrust of judicial fairness, independence and competence.  

Candidates not having to compete in contested, contentious, and raucous elections maintain the appearance of judicial propriety and independence.  

In order to maintain independence, judges must be appointed to long or life terms of office, be ensured salary protection, and must be removed only for cause.  

Supporters also contend that the appointment process results in better-qualified judges.  

First, because negative campaigning costs are not
present in the appointment system, the most qualified lawyers will seek judicial posts. Second, the electorate is incapable of making an informed decision on judicial qualifications and is more likely to be influenced by political or personal considerations. As a result, the populace elects judges who are not the most qualified but rather the easiest to elect. Third, a committee or individual possessing a greater knowledge of judicial qualifications and responsibilities is responsible for selecting judicial candidates. Therefore, judges will be selected on merit and not from emotional or political considerations.

Appointment methods may also promote diversity in the judiciary's composition. Commentators argue that the judicial independence from the electorate results in more women and minority judges than elective systems.

The appointive system's greatest strength is also its greatest weakness. There is no guarantee that judicial decisions will be decided fairly and impartially even though judges are free from all limits on their decision-making. There is no substantive check on judicial decision-making and discretion after the initial appointment. The trade off for judicial independence is the risk that judges will pursue personal agendas that are in conflict with their judicial responsibilities.

Furthermore, political considerations are not absent in the appointment system. Gubernatorial and legislative appointments are often based on political considerations rather than on judicial qualifications. Generally, judicial appointments are more likely to embrace the same political principles as the appointing authority. Additionally, former legislators are more likely to be judicial appointments in systems where the legislature is the appointing agency. As a result, the appointment

65. "Given the nature of the judicial elections, voters lack clues to gage [sic] the merits of individual candidates, such as party affiliations, committee assignments, voting records, press releases or policy positions." The Price of Justice: A Los Angeles Area Case Study in Judicial Campaign Financing, Frontline, at http://www.pbs.org/wgbh/pages/frontline/shows/justice/que/studies.html (last visited Oct. 1, 2001) (discussing the findings of a survey conducted by the 1995 California Commission on Campaign Financing).

66. See, ABRAHAM, supra note 59, at 25-27.


68. See Champagne, supra note 59, at 58.

69. See Webster, supra note 2, at 42 n.67.

70. The appointing authority may be concerned with ideology, party loyalty, and friendship. See Champagne, supra note 59, at 58.

71. See Dubois, supra note 55, at 25.

72. See id. See also AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, COMMISSION ON STATE JUDICIAL SELECTION STANDARDS, STANDARDS ON STATE JUDICIAL SELECTION 16 (July 2001) (asserting that executive branch officials choose candidates with similar political leanings).

method may not lessen partisan politics, but instead may play a significant role in appointing judges.  

Also, appointment methods do not guarantee that money will not play a factor in influencing a candidate’s selection. Large amounts of money were spent to defeat Judge Bork’s nomination to the United States Supreme Court and to support Clarence Thomas during the confirmation hearings.

B. The Merit selection system and Missouri Plan

The Missouri Plan is a combination of appointment and election systems. There are three elements to the Missouri Plan:

1. A nonpartisan commission nominates qualified individuals.
2. The governor or executive appoints a nominee to a judicial post.
3. Retention elections follow the initial term.

The Missouri plan is the archetype for reforming state judicial election processes. Approximately 34 states and the District of Columbia use a form of merit selection. Six states use a combination of commissions and retention elections. Ten other states use merit selection for some judges. In Missouri, merit selection is used for appellate court judges and some of the circuit courts, which resulted from a distrust of the elective and appointment systems. The goal of the merit selection system is to obtain an “intelligent and impartial” judiciary, eliminate the...

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74. “If the power of making them [periodic appointments] was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either...” THE FEDERALIST, NO. 78, supra note 29, at 232.
75. See Harold See, supra note 5, at 146.
76. See id.
77. See id. at 146-47.
78. Although there is a difference between merit systems and the Missouri plan, commentators also use the designations interchangeably. See e.g., id. at 143-144.
80. See Brauer, supra note 60, at 379.
81. See Lozier, supra note 80 at 918-920.
82. Alabama, Colorado, Florida, Iowa, Nebraska, Utah, and Wyoming. See id.
83. Arizona, Florida, Indiana, Kansas, Maryland, Missouri, New York, Oklahoma, South Dakota, and Tennessee. See id.
84. See Lozier, supra note 80, at 920. The plan is used in 5 out of the 45 metropolitan circuit courts. Id. These circuit courts include the most populated counties of St. Louis and Jackson County. Id.
85. See id.
chaotic results of the election system, and alleviate judicial candidates from campaign pressures.  

The distinguishing feature of the merit system is nonpartisan nominating committees. Nonpartisan nomination committees insulate gubernatorial political influences from an initial selection committee. Attorneys, judges, and lay people serve on the committee for a six-year staggered term. The staggered six-year terms were designed to keep the commission free from domination by the appointing executive. The governor must select from a list of three candidates that the committee recommends. The candidate is initially appointed to a one-year term. After the initial term, the judge runs in an uncontested retention election for a six-year term if a trial judge or a twelve-year term if an appellate judge. Voters cast a yes or no ballot when asked if the judge should remain in office. If the majority votes not to retain the judge in office then another candidate is selected and the process begins anew.  

Merit selection advocates argue that the system assures a competent judiciary free from political affiliation, while allowing popular accountability in a retention election. Proponents argue that choosing judges according to professional standards will produce a better-qualified candidate. The problem with the claim that a merit system produces a more professional judge is that it is difficult to define and evaluate the qualities that make a good judge. Also, other factors beside the method of selection and retention affect the quality of the judiciary.  

Advocates argue that judicial stability is advanced because there is little turnover in retention elections. Stability is increased because

86. See John M. Scheb, II, State Appellate Judge’s Attitudes Toward Judicial Merit Selection and Retention: Results of a National Survey, 72 JUDICATURE 170, 170 (1988).
87. See Lozier, supra note 80, at 920.
88. See id.
89. See id.
90. See id.
91. See id.
92. See id.
94. See Lozier, supra note 80, at 920.
95. See id.
96. See Brauer, supra note 60, at 379.
97. See Lozier, supra note 80, at 921.
98. See Scheb, supra note 87, at 170.
99. See Dubois, supra note 2, at 33.
100. Formal qualifications such as age and length of practice, salaries and benefits, pension plans, retirement laws, length of terms, judicial discipline procedures, and the court’s physical environment are all factors that affect the makeup and quality of judicial candidates. See id.
101. See Dougherty, supra note 94, at 317, 320.
judges are less likely to be disciplined or removed. Supporters also argue that retention elections lessen the appearance of judicial corruption because retention election costs are low, reducing the risk that judges are selling decisions for votes. In addition, judges are freed from the campaigning distractions of contested elections.

However, the reality is that large sums of money are spent in retention elections in order to influence the outcome of particular elections. In California, opponents raised over seven million dollars to defeat California Supreme Court Justice Rose Bird. Furthermore, Justice Bird and two incumbent California Supreme Court justices spent over four million dollars in the same election.

Some supporters argue that judges selected from this system are less political than judges from other selection systems. However, in reality, the retention system is not devoid of political influences. "The political aspects of the process are transferred from an elected and accountable official to a committee that is not elected by the people." There is also a greater chance for political patronage because a committee recommends to the Governor who then appoints the candidate.

Additionally, "the organized bar asserts too great an influence in the selection process." In the federal selection process the American Bar Association’s influence in selecting federal judges was perceived as too great and as a result there is discussion of removing the ABA from the initial screening process. Commentary surrounding the President’s decision highlighted the political aspects of the selection process.

Appointed officials can be influenced by threats of removal, impeachment, or requests for resignation in cases where a judge rendered an unpopular decision. Judge Harold Baer’s pro-defendant suppression
ruling in United States v. Bayless\textsuperscript{117} led to Senator Dole threatening impeachment if Judge Baer did not reverse his ruling.\textsuperscript{118} President Clinton intimated that he might request Judge Baer's resignation if the ruling remained the same.\textsuperscript{119} In a Motion for Reconsideration, Judge Baer subsequently ruled for the government stating that the search was justified as a result of additional evidence produced by the government.\textsuperscript{120} 

The merit selection system is also undemocratic. Merit selection insulates judges from the electorate and decreases accountability.\textsuperscript{121} Judges are selected from a small group of candidates, and the nomination process is done in secret.\textsuperscript{122} Voter apathy and ignorance about qualifications is demonstrated by low voter turnout in retention elections.\textsuperscript{123} Furthermore, retention elections allow for lifetime tenure since few candidates are defeated in retention elections.\textsuperscript{124}

C. Elections\textsuperscript{125}

Approximately 82\% of state appellate court judges and 87\% of state trial court judges run in some type of election.\textsuperscript{126} Thirty percent of trial judges have initial terms of four years or less.\textsuperscript{127} Initial terms for 28\% of appellate judges are two years or less.\textsuperscript{128}

Although the majority of judicial elections are uncontested, elections are becoming more contentious and malicious.\textsuperscript{129} Single issues such as the “death penalty, criminal law enforcement, and reproduction choices have assured controversial elections.”\textsuperscript{130} The dominant issues in elections systems are the effect of judicial accountability to the elector-

\textsuperscript{117} 913 F. Supp. 232 (S.D.N.Y. 1996), vacated on reconsideration by 921 F. Supp. 211 (S.D.N.Y. 1996) (ruling that under the Fourth Amendment police officers did not have reasonable suspicion of criminal activity for an investigative stop of the defendant's automobile and as a result suppression of the videotaped confession and $4 million in drugs was warranted).
\textsuperscript{118} Michael J. Gerhardt, Impeachment Defanged and Other Institutional Ramifications of the Clinton Scandals, 60 Md. L. Rev. 59, 74 (2001).
\textsuperscript{119} Id.
\textsuperscript{121} See Dougherty, supra note 94, at 322.
\textsuperscript{122} Id. at 319.
\textsuperscript{123} See id. at 322.
\textsuperscript{124} See Champagne, supra note 59, at 62. Only one percent of judges were defeated in retention elections. Id.
\textsuperscript{125} See Harold See, supra note 4, at 142 (defining popular elections as the direct and contested election by the populace).
\textsuperscript{127} Id. at 4 (increasing to 44\% when mid-term vacancies are included).
\textsuperscript{128} Id. (increasing to 69\% when judges are appointed to mid-term vacancies are included).
\textsuperscript{129} See id.
\textsuperscript{130} See Kathryn Abrams, Some Realism About Electorism: Rethinking Judicial Campaign Finance, 72 S. Cal. L. Rev. 505, 512 (1999).
ate, the appearance of judicial impropriety, and corruption resulting from skyrocketing campaign costs and fundraising.

1. Partisan Elections

Partisan elections resulted from the popular democracy period during Andrew Jackson’s presidency and were a reaction to appointment methods. Wealthy landowners needed to control the judiciary because they were constantly engaged in landlord-tenant disputes. Elections were instituted to promote “Jacksonian Democracy” and break landowner judicial control.

The popular sentiment was that the appointment method produced corrupt, elitist, and arrogant judges because judicial discretion was unconstrained by the majority’s will. Popular opinion was that appointed judges “invalidated laws enacted by democratically elected legislatures.” As a result, “elections allowed the judiciary to unite popular support to counter legislative and executive power.” Currently, eight states use partisan elections as a judicial selection method with 33.9% of state judges running in contested partisan elections.

Partisan elections serve democratic and constitutional principles and promote participation by ensuring judicial accountability. There is a public expectation that judges should be answerable for misconduct. Incompetent judges can be removed by facing the electorate for periodic elections. Since judges, through interpreting statutes, act like legislators and

131. See Harold See, supra note 5, at 142 (defining partisan election as a judicial candidate being identified with a political party).
132. See Webster, supra note 1, at 16. The original 13 colonies had 3 appointment systems: appointment by the legislature, by the governor and a council, and appointment by the governor with council approval. Id. at 13.
133. Lozier, supra note 80, at 918. But see Dubois, supra note 1, at 35 (explaining that partisan elections were influenced by moderate Whig, Republican and Democratic lawyers and judges).
134. See Berkson, supra note 82, at 71.
135. See id. at 71 n.78.
136. See Lozier, supra note 80, at 918.
137. Dubois, supra note 1, at 35.
138. Erwin Chemerinsky, Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections, 74 CHI.-KENT L. REV. 133, 134 (1998). Alabama judges are reelected every 6 years. MCFADDEN, supra note 55, at 178. Illinois appellate court judges are elected for an initial 10-year term and retention elections every 10 years thereafter. Id. at 180. Circuit court judges are elected to an initial 6-year term and then retention elections every 6 years. Id. All North Carolina judges are elected for 8-year terms of office. Id. at 184. In Pennsylvania, all judges are elected for 10-year terms and then subject to retention elections every 10 years. Id. at 185. In Texas, appellate judges are elected for 6-year terms and district court judges for 4-year terms. Id. at 186. West Virginia appellate judges are elected every 12 years and circuit court judges for 8-year terms. Id. at 187.
139. Chemerinsky, supra note 139, at 136.
140. See Hansen, supra note 54, at 70.
141. Id.
142. See Lubet, supra note 11, at 60.
make new law and public policy, they should be responsible to the electorate for their decisions.\(^{143}\)

Party identity simplifies fund raising efforts and increases judicial campaign contributions.\(^{144}\) Identity with a particular party may aid a candidate in garnishing votes for those who vote by party identification.\(^{145}\) However, party identity can also hurt particular candidates and result in party candidates being defeated if voters are reacting against a specific party, particularly in off-year elections.\(^{146}\)

Opponents argue that current campaign elections and “fundraising practices are a serious threat to judicial independence.”\(^{147}\) Elections create concerns about judicial corruption and impartiality.\(^{148}\) The view is that current elections and campaign financing create an impression of impropriety, bringing into question a judge’s ability to impartially interpret and apply laws and administer justice.\(^{149}\) “There is also a concern that if judges can be influenced by campaign contributions then they will be unable to resist the difficulties that a judge faces through friendships and associations that come before the court.”\(^{150}\)

One reason for the high costs of judicial campaigns is the use of television and radio to educate the public about judicial elections.\(^{151}\) “Commercial slate mailers have also increased the costs of election campaigns because positions are often sold to the candidate who can pay the most.”\(^{152}\)

It is further argued that “judicial decision-making will be influenced by the fear that the electorate will retaliate for unpopular decisions.”\(^{153}\) Judicial decisions protecting constitutional rights, the environment, and consumer interests are producing visible and controversial judicial actions resulting in more contentious and costly judicial elections.\(^{154}\) It is argued that the fear of removal by the electorate pressures a judge to “neutralize or avoid criticism” by tempering judicial decisions and re-

\(^{143}\) See Harding, supra note 20, at 1163.

\(^{144}\) See Brauer, supra note 60, at 372. Currently, Minnesota’s Code of Judicial Conduct, Canon 5, forbids party endorsement. However, there is a case currently pending in the Eighth Circuit to allow endorsements. Id.

\(^{145}\) See Harold See, supra note 5, at 142-43.

\(^{146}\) See id.

\(^{147}\) Chemerinsky, supra note 139, at 134.

\(^{148}\) See Brauer, supra note 60, at 374.

\(^{149}\) See id.; Chemerinsky, supra note 139, at 138.


\(^{151}\) Abrams, supra note 130, at 525.

\(^{152}\) Id.


\(^{154}\) See Roy A. Schotland, Statement of Roy A. Schotland Before the Joint Select Committee on the Judiciary of the Texas Legislature, 72 JUDICATURE 154, 155 (1988).
ducing the judge’s willingness to protect minority rights and individual liberties.\footnote{See Chemerinsky et al., supra note 13, at 76.}

However, judicial activism should rarely occur in state trial courts. Trial court decisions generally apply legal rules to facts. Rarely does a trial court engage in constitutional issues or statutory interpretation, which are the two largest areas that produce judicial activism and controversial decisions. Additionally, appellate courts serve as an institutional check on judicial activism in trial courts.

One commentator argues that since popular sentiment plays no role in judicial decision-making or function it is inappropriate “to hold judges accountable to the will of the people.”\footnote{See id. supra note 49, at 132.} However, this view is dependent on a belief that a judge simply applies law to a particular case and does not engage in policy making.\footnote{See id. (defining “judging” as the act of deciding on the merits of a matter).} This argument is weakened when judicial decisions affect the greater populace. Furthermore, this argument does not take into account that a positive image of the judiciary is needed for the people to voluntarily obey the rule of law and not resort to self-help techniques.

Election rivals argue that judicial neutrality or the appearance of neutrality is threatened because contributors are attorneys, special interest groups, or litigants who appear before the judge.\footnote{See Chemerinsky, supra note 139, at 138.} It is feared that judges will not be able to render a decision in a case against those who are past or future contributors.\footnote{Id. at 134, 138.} There is an additional concern that litigants, lawyers or others will actively campaign against a judge in retaliation for an unpopular decision.\footnote{See id.}

Attorney contributions are not as sinister as election rivals argue. First, attorneys rarely comprise greater than 50% of the contributors of a particular campaign.\footnote{See Schotland, supra note 155, at 155.} Second, lawyers who are more frequently exposed to judges should know which judges are worthy of support and which are not.\footnote{See id.}

Opponents argue that the appearance of impropriety resulting from elections will erode public confidence in the judicial system.\footnote{“[L]itigants and the public will perceive that decisions were influenced by money.” See Chemerinsky, supra note 139, at 138.} The alarm is sounded that “no matter what, the appearance inevitably will be that the judges’ rulings were bought and paid for.”\footnote{Id.} High cost campaign fundraising and contentious elections discourage qualified judicial can-
candidates from running or seeking re-election. Few competent lawyers are willing to surrender a successful legal career to engage in rigorous and expensive political campaigning. Election antagonists further argue that judges are distracted from their jobs and instead focus on campaigning. It is believed that voter apathy and ignorance results in voting along party lines and name recognition, and not on qualifications.

However, it should be noted that opponents offer no empirical evidence that campaign fundraising actually affects judicial decision-making or the existence of actual widespread judicial corruption. In fact, a judge may have decided in a particular manner, regardless of a donation's source and size. Additionally, judges are guided by a judicial code of conduct that limits improper behavior by requiring recusal when a judge has a possible monetary outcome in a particular case. However, one commentary cites evidence that questions a judge's impartiality in particular cases where a litigant is also a contributor.

In Minnesota, judicial election behavior is limited by Canon 5 of the Judicial Code of Conduct, as well as the Fair Campaign Practices Act. Canon 5 prohibits a candidate from personally soliciting campaign contributions. Additionally, judicial candidates are expected to maintain a barrier between themselves and contributors by not knowing who contributed to their campaigns. Furthermore, the Minnesota Ethics in Government Act requires disclosure of campaign contributions.

Elections also serve as a check on judicial discretion. Where there is a clear rule of law, a judge should apply the rule of law regardless of the...
popularity of the law or the litigant.\textsuperscript{180} Also, voter retaliation should be minimal or non-existent when judicial decisions are decided according to the unambiguous rule of law.\textsuperscript{181} However, the electorate should be able to remove a judge when there is no clear rule of law and judicial discretion is at a maximum.\textsuperscript{182}

Texas is the most frequently cited example of the evil of judicial elections. Candidates for Texas Supreme Court elections are spending millions of dollars.\textsuperscript{183} In 1986, attorneys accounted for 80 to 90 percent of the total campaign funds, in three out of four campaigns, for three Texas Supreme Court seats.\textsuperscript{184} In another case, one individual contributed more than 90\% of the funds to an unsuccessful Texas Supreme Court candidate’s campaign.\textsuperscript{185}

Jack Hampton, a Texas District Court Judge, demonstrates the viability of the election system. Judge Hampton imposed a 30-year sentence, rather than life imprisonment, to a murderer of two gay men.\textsuperscript{186} Hampton publicly justified the sentence with homophobic remarks.\textsuperscript{187} The State Commission on Judicial Conduct censured Hampton, but did not remove him from office.\textsuperscript{188} In 1992, gay rights groups organized to defeat his election for the Texas Court of Appeals.\textsuperscript{189} This demonstrates that the election system and voter accountability is a viable selection method when the political apparatus fails to adequately address judicial misconduct.

There is little electorate interference with judicial independence.\textsuperscript{190} Individual decisions are generally not known or examined by the electorate.\textsuperscript{191} Lengthy terms of office ensure that unpopular decisions will lose their negative impact by the next election term.\textsuperscript{192} Furthermore, most judicial incumbents are re-elected without opposition.\textsuperscript{193}

\begin{itemize}
\item \textsuperscript{180} See Karlan, \textit{supra} note 154, at 541.
\item \textsuperscript{181} See \textit{id}.
\item \textsuperscript{182} See \textit{id}.
\item \textsuperscript{183} For example, in 1994 and 1996, over $9 million was raised between seven candidates seeking Texas Supreme Court positions. See Hansen, \textit{supra} note 53, at 70.
\item \textsuperscript{184} See Schotland, \textit{supra} note 155, at 155.
\item \textsuperscript{185} See Anthony Champagne, \textit{Judicial Reform in Texas}, \textit{72 JUDICATURE 146, 149} (1988).
\item \textsuperscript{187} “I don’t care much for queers cruising the streets picking up teen-age boys.” \textit{Id}.
\item \textsuperscript{188} See \textit{Judge Is Censured Over Remark On Homosexuals}, \textit{N.Y. TIMES}, Nov. 29, 1989, at A28.
\item \textsuperscript{190} See Karlan, \textit{supra} note 154, at 543.
\item \textsuperscript{191} See Chemerinsky et al., \textit{supra} note 12, at 76.
\item \textsuperscript{192} See Karlan, \textit{supra} note 154, at 543.
\item \textsuperscript{193} See \textit{id. But see Webster, supra} note 1, at 18 (arguing that contested judicial elections have increased, are more heated, and are generating more voter interest).  
\end{itemize}
2. Political Action Committee ("PAC") Contributions and Judicial Elections

North Carolina is an example of PACs' influence on judicial elections. North Carolina judges are elected in partisan elections with PACs having great influence. Thus, PACs are considered the major reason for escalating judicial election costs in North Carolina.

There is a difference between PACs' influence in general political elections versus judicial elections. In general elections, PAC contributors expect to impact political decisions; however they do not expect to influence judicial decision-making. Judicial codes of ethics governing campaign activities are responsible for the different expectations by insulating judicial candidates. For example, Codes of Conduct often prohibit judicial candidates from making campaign promises other than faithfully executing their duties.

Although the reality is that PACs have limited impact on judicial decision-making, there is a perception that judicial quid pro quo is occurring in secret between judicial candidates and PACs. However, this perception is less significant in states where there are non-partisan elections, such as Michigan.

D. Non-Partisan Elections

Currently, twelve states use non-partisan elections for judicial selection and retention. Terms vary among the states from four to ten years. Non-partisan judicial elections remove partisan political consequences while ensuring judicial accountability. Such elections are more likely to produce a higher number of qualified judicial candidates than

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194. BLACK'S LAW DICTIONARY 1133 (7th ed. 1999); see also Political Action Committee (PAC), MICROSOFT ENCARTA ONLINE ENCYCLOPEDIA 2001 (Sept. 6, 2001), at http://encarta.msn.com (defining PACS and their role of soliciting campaign contributions).

195. See Brauer, supra note 60, at 381.

196. See Traciel V. Reid, PAC Participation in North Carolina Supreme Court Elections, 80 JUDICATURE 21, 29 (1996).

197. See Brauer, supra note 60, at 381.

198. See Reid, supra note 197, at 24.

199. See id.

200. See Brauer, supra note 60, at 381.

201. See id. at 382.

202. See id.


204. See MCFADDEN, supra note 56, at 180-87.

205. See Webster, supra note 1, at 25 (explaining that candidates do not have to be loyal to party ideology or party factions); See also Champagne, supra note 59, at 63 (discussing how candidate merit, not party affiliation, drives non-partisan elections).
partisan elections. The non-partisan election system allows for democratic participation while reducing judicial turnover, which ensures stability.

Non-partisan election opponents argue that voter ignorance is prevalent in non-partisan elections. Because of the absence of party identity it is believed that in non-partisan elections, voters are more likely to vote based on name recognition and ballot position than based on information. However, one study suggests that voter awareness differs according to the type of election. Voters in primary elections are more civic minded and knowledgeable than general election voters.

It is believed that attorneys will have a greater influence over non-partisan elections. Voters being less aware of judicial qualifications will rely more on expert advice from the legal community in electing candidates.

As in partisan elections, opponents argue that increased non-partisan elections have eroded public confidence in the impartiality, dignity and independence of judges. First, non-partisan elections are often cited for exorbitant campaign costs. Second, opponents argue that candidate's are becoming more aggressive in elections by attacking their opponents, stating their personal views on legal and political issues, and soliciting support from PACs and special interest groups.

Ohio judicial elections are a combination of partisan and non-partisan elements. Partisan committees nominate candidates, candidates compete in partisan primaries and are elected in non-partisan elections. The Ohio Supreme Court in 1995 enacted campaign financing and fund-raising rules to fight the negative perception of partisan influences. These regulations limit contributions by individuals, PACs, and political

206. See Champagne, supra note 59, at 63 (explaining that votes in a non-partisan election are cast on a candidate’s qualifications, rather than party association).
208. See Champagne, supra note 59, at 64.
209. See Lozier, supra note 80, at 920.
211. See id.
212. See id.
213. See id.
215. See Brauer, supra note 60, at 368, 376.
217. See Brauer, supra note 60, at 380.
Additionally, non-uniform expenditure limits were imposed depending on the court and the size of the population in the court’s district. Regulations were also adopted limiting the time frame for which campaign contributions could be raised. The campaign finance reform’s goal was to strengthen the judiciary’s legitimacy by enhancing judicial independence and accountability.

Whether campaign reforms will have an impact remains to be seen. Current election rhetoric still focuses on whether elections serve democratic principles and if judges are impartial.

Although it is still too early to measure the practical effects of Ohio’s reform laws, the courts are testing the law’s constitutionality. Ohio state court judges sought an injunction, alleging the expenditure limits violated their First Amendment rights of free speech. Relying on Buckley v. Valeo, the District Court stated that “a statute may constitutionally restrict campaign finances to prevent corruption or the appearance of corruption.” The court rejected the argument that judicial election is different from legislative election speech because of the uniqueness of judicial office. The Court upheld the constitutionality of campaign contributions, but enjoined the imposition of the expenditures. Suster’s ruling is important when trying to draft reform proposals to curb the negative effects of large campaign expenditures. Unless the court allows limits on expenditures, expensive elections will continue.

However, it should be noted that the United States Supreme Court in Federal Election Commission v. Colorado Republican Federal Campaign Committee, recently held that coordinated party expenditure limits were not unduly burdensome to political parties and as a result passed First Amendment constitutional scrutiny. The Court relied on the argument that party expenditures will result in influence and corruption of candidates. The Court reasoned that coordinated party expenditures “perform functions more complex than simply electing candidates…they

220. See id. at Canon 7(C)(6)(d) and 7(C)(8). Canon 7(C)(6)(d) limits expenditures for a candidate for the court of common pleas to $75,000.
221. See id. at Canon 7(4)(a)-(c).
222. See Allbritian, supra note 218, at 1341.
225. 424 U.S. 1 (1976) (holding that campaign expenditures burdened core political speech and therefore must be narrowly tailored to serve a compelling state interest).
227. See id. at 698-99.
228. See id. at 695.
231. See id. at *12.
act as agents for spending on behalf of those who seek to produce obligated officeholders." It should be noted that Federal Election Committee applies to coordinated party expenditures to political candidates and does not apply to individual candidate expenditures. As a result, in judicial elections candidates receiving money from political parties will be affected, but candidates will still be allowed to expend large amounts of money in elections.

IV. RECOMMENDATIONS FOR CHANGE IN ELECTION SYSTEMS

In order to adequately satisfy the competing concerns of judicial accountability and independence there must be reforms in all systems. Rather than replacing elective systems with appointment or merit systems, reforms should be instituted that increase voter participation, and eliminate concerns of judicial corruption.

Elections provide an aspect of judicial accountability and popular democracy that is absent in lifetime appointment systems. However, concerns of judicial impropriety and corruption need to be addressed. Term length, campaign financing, and campaign conduct are three areas where reforms must be instituted.

To address these concerns and allow for greater independence, judicial terms should be lengthened. One recommendation is a minimum eight-year term for all judges. Longer terms add to the attractiveness of a judicial position by enhancing job security and decreasing competition for judicial seats. Longer terms also allow a judge to focus more on applying the law rather than on fundraising and campaign efforts. Additionally, longer terms will decrease the influence that campaign costs have on judicial elections. Furthermore, longer terms promote judicial accountability and aid voter awareness. Voters will better be able to evaluate a candidate's judicial record and professional behavior. However, longer terms can also isolate judges from community sentiments.

In order to prevent judicial isolation, terms should be limited to no longer than 6 to 8 years.

Short terms subject judges to the political pressures of the electorate or the appointing authority more often. The problem associated with shorter terms is the need for judges to run more often and increasing the appearance of impropriety and corruptibility associated with campaign

232. Id.
233. See id. at *17.
235. See id. These minimum terms apply to all judges whether they are elected or appointed.
236. See id. at 5.
237. See id.
238. See id. However, this is dependent on voters having access to disciplinary procedures that may have been instituted against a judge.
239. See id.
financing. Additionally, shorter terms discourage qualified candidates from initially running and promote instability since incumbents will not run for re-election. Electorate participation is thereby promoted.

Campaign financing concerns also need to be addressed. Another recommendation for improving the elective system is to provide public funding for political candidates. However, there is a debate on the scope of public funding to political candidates. Some argue that there should be modest public funding while another view is there should be complete funding thereby assuring impartiality. One method would be for state legislatures to fund campaigns. The legislature would establish a fund to be split among all candidates or guarantee a particular dollar amount per candidate. This second alternative would allow a candidate to better plan campaign expenditures. It would be difficult for a candidate to effectively budget in a pool arrangement since the ultimate dollar amount would vary according to the number of candidates and legislative expenditures which could not be known before budgeting and spending.

Another reform measure is to provide equal funding among all candidates. However this raises constitutional concerns. The United States Supreme Court in Buckley v. Valeo held that limits on campaign expenditures violated a candidate’s First Amendment rights. A reform measure that provides for equal funding to all candidates is simply an expenditure limit in disguise. However, given the Court’s Federal Election Commission decision, expenditures by a group could be limited and as a result reduce the perception of influence and corruption produced by elections.

Rather than limiting expenditures, there should be reasonable limits on campaign contributions and establishment of mandatory disclosure. Campaign contribution limits and full disclosure requirements will eliminate public perception that judicial decisions are being bought and paid for. Full disclosure will allow the electorate to determine who is giving what amounts to which judges, and adjust their political philosophy accordingly.

Furthermore, less expensive advertising means must be employed to educate the public. One alternative is for candidates to use free voter

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240. See id. at 4.
241. See id.
242. See id.
243. See Phillips, supra note 151, at 135.
244. See id. at 135-136.
245. See Brauer, supra note 60, at 388.
246. See id.
247. See id. at 389-390.
250. See supra notes 152-53 and accompanying text.
pamphlets if they agree not to use slate mailers.\textsuperscript{251} Internet access to voter pamphlets could also provide low cost alternatives.\textsuperscript{252}

Additionally, eliminating limits on judicial speech during elections will provide for alternative methods of communication. The elimination of constraints on judicial speech will serve First Amendment values, democratic principles, and allow for a more informed body politic. The United States Supreme Court in \textit{New York Times v. Sullivan}\textsuperscript{253} stated that there is “a profound national commitment to a principal that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”\textsuperscript{254} Judges should not be immune from criticism simply because reputations may be injured.\textsuperscript{255} Rather than limiting speech, the Court recognized that the counter to negative or damaging speech is to allow more speech.\textsuperscript{256} In this context, judges should be allowed to counter negative campaign rhetoric by engaging in more speech.

However, the Eighth Circuit Court of Appeals upheld restrictions on judicial candidate speech determining that the restrictions do not violate the First Amendment.\textsuperscript{257} The court reasoned that there is an inherent difference between the legislative and executive branches and the judiciary.\textsuperscript{258} The court determined that in executive and legislative elections “the public has the right to know the details of the programs that candidates propose to enact into law and administer.”\textsuperscript{259} However, the court stated that the judicial system is different as it is “based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by the other branches of government.”\textsuperscript{260} The court further reasoned that states may regulate judicial speech because a “judicial candidate simply does not have a First Amendment right to abuse his office.”\textsuperscript{261}

The argument that judges may be buying votes by promising to decide a certain way in particular matters is unlikely. First, appellate review serves as a check on judicial abuse of discretion. Second, the true value of campaign speech will allow a candidate to counter rhetoric that attacks a judge’s particular decision. A candidate, through the allowing of greater speech will be able to explain the basis for a particular decision.

\textsuperscript{251} See Abrams, \textit{supra} note 131, at 526.
\textsuperscript{252} See id.
\textsuperscript{253} 376 U.S. 254 (1964).
\textsuperscript{254} \textit{Sullivan}, 376 U.S. at 270.
\textsuperscript{255} See id. at 273.
\textsuperscript{256} See id. at 304.
\textsuperscript{257} Republican Party of Minnesota v. Kelly, 247 F.3d 854 (8th Cir. 2001).
\textsuperscript{258} Kelly, 247 F.3d at 862.
\textsuperscript{259} Id.
\textsuperscript{260} Id.
\textsuperscript{261} Id.
Judicial candidates will be able to respond and neutralize single issue
groups attacking and defeating judicial candidates.

Additionally, eliminating restrictions on speech educate the body
politic.262 Through campaign speeches, candidates can inform the public
as to the functions of a judge and the system.263 Candidates need to be
able to tell the public why an issue is important, resulting in institutional
respect and legitimacy. Finally, in order to create a more informed voting
public, voting guides should be printed and distributed.264

Reforming the election system will not address all the concerns with
the perception of impropriety that is inherent in the debate. The lack of
respect for the legal profession lends to the decreased respect for judges.
Popular culture is currently replete with shows about attorneys’ and
judges’ misconduct.265 The People’s Court, Judge Judy, Judge Mills Lane
to mention a few come into people’s homes on a daily basis. As popular
culture, these shows reflect current popular beliefs and attitudes.

These shows may be an individual’s only contact with the judicial
system and therefore, the only information that serves as a basis for an
individual’s beliefs. In order to gain viewers and increase ratings the
judges on these shows must create drama and controversy. The judges on
these shows frequently fail to maintain decorum through lecturing the
litigants and refusal to hear all the evidence. This negative perception of
the judicial system is perhaps the most difficult perception to neutralize
when attempting to influence voters and win elections. However, this is
not a failure of the election system but rather a failure of the institution as
a whole to win the people’s respect and confidence.266

V. CONCLUSION

The tension between judicial accountability and independence is an
ongoing debate that encompasses concerns of a judge’s social and politi-
cal role and democratic principles. Furthermore, judges must maintain an
appearance of fairness and impartiality in order to foster respect for the
institution that legitimizes the judiciary in the public’s eye. The founding

262. See Harold See, supra note 5 at 141-42.
263. See id.
264. See id.
265. Inside the Law Specials on Lawyers and Democracy: The Legal Profession, available at
showed that one out of every five Americans have no respect for the legal profession. Id.
http://www.courts.state.mn.us/cio/docs/public_opinion.htm (last visited Aug. 7, 2001). It should
be noted that a survey in Minnesota showed that seventy-eight percent of respondents had either “a
great deal or some confidence” in the Minnesota State Courts.” Id. While thirteen percent had “only a
little or no confidence at all” in the Minnesota State Courts and twelve percent had little or no
confidence in the United States Supreme Court. Id.
fathers recognized that states had election systems for state judges and did not suggest that states abandon the established system.

Although campaign costs have increased significantly in recent years, the solution is not to abandon elections. Instead election systems must address concerns and make substantive reforms. Campaign contributions must be limited, and candidates need to engage in greater speech in order to educate the electorate.
THE LAW OF THE SACRED COW: SACRIFICING THE FIRST AMENDMENT TO DEFEND ABORTION ON DEMAND

CHARLES LUGOSI*

I. INTRODUCTION

Judge Frank Easterbrook reminded the legal community that focusing on a single strand of law was “doomed to be shallow” and would “miss [the] unifying principles” that bring integrity and consistency to legal doctrine. 1 His metaphor was the “Law of the Horse,” and his concern was about the development of a law unique to cyberspace. 2 In this essay, I have identified a different kind of animal that has escaped its enclosure and has run amok in the field of constitutional law, depositing its manure all over First Amendment jurisprudence, leaving it a mess. What I am referring to is the “sacred cow” of abortion. 3

Roe v. Wade 4 and its progeny 5 has had in the field of constitutional law the same kind of effect as yeast working its way through a batch of dough. Ordinarily that might be of no concern, unless we are talking about unleavened bread fit for Passover. Intellectual integrity has been sacrificed to defend the “sacred cow” of abortion by claiming the First Amendment as its latest victim, 6 subordinating the constitutional right of

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2. Id. at 207-8.
3. This descriptive term is in no way intended to offend any Hindus or to bear any resemblance to any established religion that in fact worships cows. In this essay, “sacred cow” means the veneration of the right to an abortion and the elevated status of Roe v. Wade, 410 U.S. 113 (1973), in the hierarchy of values defended emotionally and passionately by members of the Supreme Court.
free speech to the lesser interest or right to be let alone. This essay asserts that the right to be let alone is not constitutionally equal to the preferred position of free speech and must give way in the contest between these two values in order to preserve democracy. The purity of constitutional law has been contaminated by grafting into the tree of life and liberty the right to be let alone, which does not fit within a democratic society treasuring the free exchange of ideas based upon the constitutional right that “Congress shall make no law . . . abridging the freedom of speech . . . .” It is my contention that the engrafted branch of law supporting the right to be let alone from other people in the public forum is unnatural and incompatible with its host, and will one day be rejected, die, whither and drop off the constitutional tree.

7. Judge Thomas Cooley, in his treatise on the law of torts, used the phrase, “[t]he right . . . to be let alone” in the context of an individual’s right to be free from physical trespass. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1888). Louis Brandeis and Samuel Warren have generally been credited with popularizing the phrase, “the right to be let alone,” in their article, SAMUEL D. WARREN & LOUIS D. BRANDEIS, THE RIGHT TO PRIVACY, 4 HARV. L. REV. 193 (1890), which dealt with the tort liability and intrusiveness of yellow journalists, who behaved like the modern day paparazzi who chased Princess Diana to her death. After his appointment to the Supreme Court, Justice Brandeis, in Olmstead v. United States, elevated the right to be let alone to constitutional status. See Olmstead v. United States, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting) Justice Brandeis was deeply troubled by the use of wiretaps by police to gather evidence against individuals who sought to profit during Prohibition by importing liquor from British Columbia, Canada. See id. He believed citizens had a constitutional right to privacy from the prying surveillance techniques of the government, declaring:

   The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Id. (emphasis added).


   The First Amendment is couched in absolute terms -- freedom of speech shall not be abridged. Speech has therefore a preferred position as contrasted to some other civil rights. For example, privacy, equally sacred to some, is protected by the Fourth Amendment only against unreasonable searches and seizures. There is room for regulation of the ways and means of invading privacy. No such leeway is granted the invasion of the right of free speech guaranteed by the First Amendment.”

Id.

9. In this essay, democracy is not defined as simple majority rule, but includes a society where collective decisions are made by political institutions whose structure, composition and practices treat all members of the community as individuals, with equal concern and respect. Essential to this concept of democracy is “[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . .” STROMBERG v. CALIFORNIA, 283 U.S. 359, 369 (1931).

10. U.S. CONST. amend. I.
Invoking the right to be let alone has choked the right of the citizen from engaging in the core value of debating on a personal and intimate level the moral choice of women whether or not to kill their own unborn sons and daughters. However, since 1973, the Supreme Court has repeatedly resorted to a "whatever-it-takes" approach to stifle the flow of information to a pregnant woman, whether as part of a legislative scheme to ensure informed consent, or from private citizens, compelled by their conscience and moral convictions to save the lives of unborn children. No legal rule or doctrine has been safe from "ad hoc nullification" in defense of the "sacred cow" of abortion. The most recent example of this has been the case of *Hill v. Colorado*.

A new form of Iron Curtain called a "bubble zone" has invaded the traditional public forum of city sidewalks, insulating any unwilling listener from any speaker who might prick another's conscience by saying in ordinary civil conversation that abortion is a moral evil and the unjust killing of innocent human life. According to Justice Scalia, "There is apparently no end to the distortion of our First Amendment law that the Court is willing to endure in order to sustain this restriction upon the free speech of abortion opponents." The suppression of one-to-one conversations on the topic of persuading women contemplating abortion that killing unborn babies is wrong is the core speech made illegal by a Supreme Court bent on preserving the "sacred cow" of abortion, even if the Court's reasoning flies in the face of traditional First Amendment principles and values.

The right to be let alone is meaningless unless put into context. There are different species of the right to be let alone. In this essay,

13. See *Schenck v. Pro-Choice Network*, 519 U.S. 357, 380 (1997) (upholding the provisions of the district court's injunction imposing 15-foot "fixed buffer zones around the doorways, driveways, and driveway entrances" of abortion facilities); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 757 (1994) (holding "that the establishment of a 36-foot buffer zone on a public street from which demonstrators are excluded passes muster under the First Amendment").
14. *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting) ("Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion."); see also *Madsen*, 512 U.S. at 785 (Scalia, J., dissenting) (citing *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting)).
16. Also known as buffer zones. See *Schenck*, 519 U.S. at 361.
17. *Hill*, 530 U.S. at 753 (Scalia, J., dissenting).

Gormley summarized the types of privacy as follows:

Species #1: The right to be let alone, with respect to the acquisition and dissemination of information concerning the person, particularly through unauthorized publication, photography or other media. (Warren & Brandeis's original privacy tort).
freedom from speech is assumed to be the value cherished by the unwill- ing listener. Silence is golden. What the unwilling listener wants to be free from is hearing moral messages when walking on a public sidewalk on the way into a place where abortions take place.

Since there is a legal right to an abortion, I assume a woman who plans to exercise this option may feel entitled to a portable zone of personal autonomy and a sealed conscience that may not be disturbed. Such an island of tranquility is vital to any woman who is unwilling to venture into the hurricane of controversy swirling about her decision to abort. Being in the eye of the hurricane brings only temporary respite, as the societal issue of abortion is bigger than any one individual, and eventually engulfs any woman who is contemplating or has undergone an abortion.

Another underlying premise in the right to be let alone is the “me” generation’s freedom to choose to “tune in” or to “tune out.” The desire to control one’s environment from incoming communications requires the suppression of unwelcome communications that make one feel uncomfortable or annoyed. The solution is an invisible portable cone of silence, similar in theory to the silly visible one Secret Agent Maxwell Smart put over his head to isolate himself in conversations with “Chief.”

Another benefit from the right to be let alone is freedom from inconvenient interruptions of planned activities. People are in a hurry, and taking the time to talk is an old fashioned practice from an earlier time known to the generation of old timers who used to watch on black and

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Species #2: The right to be let alone, with respect to governmental searches and seizures which invade a sphere of individual solitude deemed reasonable by society. (Fourth Amendment privacy).
Species #3: The right to be let alone, when one individual’s freedom of speech threatens to disrupt another citizen’s liberty of thought and repose. (First Amendment privacy).
Species #4: The right to be let alone, with respect to fundamental (often unanticipated) decisions concerning the individual’s own person, which are explicitly or implicitly reserved to the citizen (rather than ceded to the government) by the terms of the social contract. (Fourteenth Amendment privacy).
Species #5: The right to be let alone, with respect to a variety of private and governmental intrusions generally overlapping with species number one through number four above, yet often extending greater protections to the citizen by virtue of independent state constitutional provisions. (State constitutional privacy).

Id.

19. “Tune in, tune out,” were typical attitudes adopted by the Hippies of the 1960’s, who advocated casual promiscuous sex outside of marriage.

20. The name of this comedy TV series was Get Smart (NBC 1965-69, CBS 1969-70).

21. I have “miles to go before I sleep,” writes poet Robert Frost. ROBERT FROST, Stopping by Woods on a Snowy Evening, in SELECTED POEMS OF ROBERT FROST 140, 140 (1963). The last thing some people want is to be interrupted with a message they do not want to receive.
white televisions, Andy, Opie, Aunt Bee and Barney - those lovable characters who inhabited the make-believe Southern town of Mayberry.  

I further assume that freedom from ideas that deeply offend fixed positions on moral and spiritual issues influencing personal choice is yet another reason why the content of a message disapproving of abortion is so vigorously resisted.

Fear and insecurity is at the heart of the unwilling listener, whose hardened resolve to go through with an abortion may melt in response to a message of love, support and concern from a stranger who has nothing to gain. The easiest way to overcome vulnerability is to hear only messages that say what you want to hear, and to block those messages that you fear will change your mind. When a prominent leader of the abortion cause like Dr. Bernard Nathanson and a poster-child, like Norma McCorvey, the Jane Roe of Roe v. Wade fame, repent of their pro-choice actions and beliefs, and become ardent pro-lifers, there is good reason to fear the "sacred cow" of abortion will soon be slaughtered.

This essay will examine the tension between the law of privacy and First Amendment jurisprudence. The public forum will be defined. What Hill decided will be discussed. The question of freedom from speech and the legal limits to free speech will be examined. I will then discuss the principles and values at the core of the First Amendment and the essential role it serves to make democracy function. Next, the impact of Hill on the First Amendment will be discussed. I will then review the rise of the right to be let alone in First Amendment jurisprudence. The law establishing that there is no right to be let alone in the public forum will be reviewed. The question of protected and unprotected speech, and the content of those messages, will be discussed. I will then evaluate whether there is a constitutional right to be let alone. The First Amendment abortion line of cases will then be evaluated to see if there is indeed a “distortion” in the constitutional jurisprudence that requires fixing, and what damage, if any, was done to the First Amendment by those cases. The

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22. The Andy Griffith Show (CBS 1960-68), is known for the moral values it imparted to viewers.

23. Co-founder in 1969 of the organization that became known as the National Abortion and Reproductive Rights Action League (NARRAL), and a physician who personally presided over 60,000 abortions, Dr. Nathanson converted from Judaism to Roman Catholicism. BERNARD NATHANSON, M.D., THE HAND OF GOD: A JOURNEY FROM DEATH TO LIFE BY THE ABORTION DOCTOR WHO CHANGED HIS MIND (1996) (describing his journey from abortion provider to pro-life advocate).

24. McCorvey, who had been a hard-core supporter of abortion rights, worked at a Dallas abortion clinic and engaged in personal conversations with Rev. Phillip Benson, leader of the Operation Rescue office next door to the clinic. Eventually she accepted an invitation to attend church and was later baptized by Benson. She is now a pro-life activist and has started her own ministry called “Roe No More.” She now prays for pro-choice leaders to repent. Her story is available at http://www.cnn.com/SPECIALS/1998/roe.wade/stories/roe.profile.

25. See cases cited supra notes 4-5.
issue of supremacy between privacy and free speech will be then assessed in my conclusion.

I conclude that more free speech is the answer, not less, on the issue of abortion. I agree with Justices Scalia and Thomas that there is no constitutional principle shielding an unwilling listener from moral or other messages in the public forum.26 I further agree with Professor Haiman that the law should not protect the unwilling listener from the initial impact of any kind of communication in the public forum.27 I also conclude that Roe v. Wade28 is bad constitutional law, and must be overruled to prevent further injury to First Amendment jurisprudence.29 If the Court remains faithful to current abortion law precedents, the ripple effect from cases like Hill will turn into a tidal wave, destroying the free speech rights of unionists, environmentalists, political activists, conscientious objectors and evangelists.

The solution is to place the burden of tolerating free speech in the public forum upon the listener as a reasonable price to pay to live in a free and democratic society. There are enough civil and criminal sanctions already in the law to deal with zealots who refuse to cease and desist. Creating the law of the “sacred cow” was unnecessary and a huge mistake. A legal system that worked was already in place. Perpetuating the law of the “sacred cow” will aggravate the errors of Roe and make a bad case like Lochner v. New York30 look good to future law students.

II. THE PUBLIC FORUM

The focus of this discussion is the collision between the constitutional right to freedom of speech and the desire to be left alone in the

27. See Franklyn Haiman, Speech v. Privacy: Is There A Right Not To Be Spoken To? 67 Nw. U. L. Rev. 153, 193 (1972) (theorizing that “the law should not attempt to insulate any persons in our society, no matter how willing or unwilling an audience they may be, from the initial impact of any kind of communication, but that the law should protect their right to escape from a continued bombardment by that communication if they wish to be free from it.”); but see Alan Brownstein, Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests, 29 U.C. Davis L. Rev. 1163, 1172-73 (1996) (arguing that speech targeted at the unwilling listener is blatant harassment).
29. See Thornburgh v. Am. College of Obstetricians and Gynecologists, 476 U.S. 45, 793-94 (1986) (White, J., and Rehnquist, J., dissenting) (arguing that “the values animating the Constitution do not compel recognition of the abortion liberty as fundamental. In so denominating that liberty, the Court engages not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences.”); see also Hill, 530 U.S. at 787-89 (Kennedy, J., dissenting) (linking the destruction of free speech to the Court’s self-serving defense of illegitimate abortion rights: “Laws punishing speech which protests the lawfulness or the morality of the government’s own policy are the essence of the tyrannical power the First Amendment guards against . . . Absent the ability to ask the government to intervene, citizens who oppose abortion must seek to convince their fellow citizens of the moral imperative of their cause . . . What the statute restricts is one person trying to communicate to another, which ought to be the heart of civilized discourse.”).
30. 198 U.S. 45 (1905).
traditional public forum. The specific public forums discussed in this essay are public streets and sidewalks. "Streets" were referred to by Justice Roberts in Hague v. Committee for Industrial Organization:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

In Amalgamated Food Employees Union v. Logan Valley Plaza, Justice Marshall included "sidewalks" when he referred to Hague and other cases in support of the general proposition that "streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." It is beyond dispute that a public sidewalk, even in front of the Supreme Court building itself, is a public forum where any person has a general First Amendment right to speak.

III. WHAT HILL DECIDED

Abortion is unquestionably a public issue debated with vigor and passion between individuals who hold differing views. It is the classic exercise of freedom of speech. Communicating thoughts by opening conversations with strangers on the public sidewalks heading toward entrances to abortion clinics has now been outlawed by Hill unless the intended recipient is willing to listen. Without deciding that there exists a constitutional right to be free from unpopular speech in a public forum, Justice Stevens balanced the interests of unwilling listeners against the constitutional right of free speech, and upheld the legality of an eight-

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32. 307 U.S. 496 (1939).
34. 391 U.S. 308 (1968).
35. Amalgamated Food 391 U.S. at 315.
foot bubble zone. In so doing, he severed personal speech from detached speech.

As a result, some types of personal conduct, such as the arm’s length handing out of pamphlets, were eliminated. Equally devastating was the end of personal speech and the loss of meaningful opportunities for quiet interpersonal conversations that once facilitated the creation of rapport between the sidewalk counselor (the initiator of the conversation), and the pregnant mother, the recipient.

What Justice Stevens left intact was detached speech, conducted outside the bubble zone, in the form of picket signs and bullhorns. Detached speech functions well as a demonstration of belief, but it is an ineffective and counterproductive means of persuading individuals that abortion is a moral evil for which viable alternatives exist. Shouts of “baby killer” from outside a bubble zone will only relieve the frustration of insensitive fanatics, who might otherwise use a gun or bomb against abortionists. Unfortunately, these remarks only increase the desire of pregnant women to be left alone from such idiotic (and counterproductive) behavior.

Predictably, the next legal weapon against anti-abortion demonstrators will be a law against excessive noise originating outside the perimeter of a bubble zone. Patients at medical facilities are entitled to peace and quiet, to alleviate health risks and promote psychological health. However, a prior restraint on First Amendment rights, which attempts to lessen the psychological harm that might be inflicted on an intended class of persons, may be unlawful, especially where a means of escaping the anticipated harm is available by notice and location.

IV. REASONABLE LIMITS TO FREE SPEECH IN THE PUBLIC FORUM

The Supreme Court has been willing to sanction state and municipal laws creating reasonable time, place and manner regulations that limit free speech irrespective of content. The Court has prohibited blaring


Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day’s activity, and where the patient and his family — irrespective of whether that patient and that family are labor or management oriented — need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sickbed.
41. *See* Collin v. Smith, *578 F.2d* 1197 (7th Cir. 1978).
sound from loudspeakers mounted on trucks roaming city streets at night,\textsuperscript{43} upheld an anti-noise ordinance silencing civil rights demonstrations on a public sidewalk outside a senior high school,\textsuperscript{44} and affirmed the right of the City of New York to control the amplified volume of raucous rock concerts in Central Park.\textsuperscript{45} When the Court in \textit{Public Utilities Commission v. Pollak}\textsuperscript{46} permitted a street railroad company to broadcast music and commercials from radio programs, which enhanced the public transit experience for a majority of its riders,\textsuperscript{47} Justice Black drew the line at the broadcasting of news, public speeches, views, or propaganda of any kind.\textsuperscript{48} Justice Douglas delivered a powerful dissent, basing his opinion on the right to be let alone. He stated:

The case comes down to the meaning of "liberty" as used in the Fifth Amendment. Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom. Part of our claim to privacy is in the prohibition of the Fourth Amendment against unreasonable searches and seizures. It gives the guarantee that a man's home is his castle beyond invasion either by inquisitive or by officious people. A man loses that privacy of course when he goes upon the streets or enters public places. But even in his activities outside the home he has immunities from controls bearing on privacy. He may not be compelled against his will to attend a religious service; he may not be forced to make an affirmation or observe a ritual that violates his scruples; he may not be made to accept one religious, political, or philosophical creed as against another. Freedom of religion and freedom of speech guaranteed by the First Amendment give more than the privilege to worship, to write, to speak as one chooses; they give freedom not to do nor to act as the government chooses. The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone. If we remembered this lesson taught by the First Amendment, I do not believe we would construe "liberty" within the meaning of the Fifth Amendment as narrowly as the Court does. The present case involves a form of coercion to make people listen. The listeners are of course in a public place; they are on streetcars traveling to and from home. In one sense it can be said that those who ride the streetcars do so voluntarily. Yet in a practical sense they are forced to ride, since this mode of transportation is today essential for many thousands. Compulsion which comes from circumstances can be as real as compulsion which comes from a command. The streetcar audience is a captive audience. It is there as a matter of necessity, not

\textsuperscript{43} See Kovacs v. Cooper, 336 U.S. 77, 87-89 (1949).
\textsuperscript{44} See Grayned v. City of Rockford, 408 U.S. 104, 121 (1972).
\textsuperscript{46} 343 U.S. 451 (1952).
\textsuperscript{48} See id. at 469 (Black, J., dissenting).
of choice. One who is in a public vehicle may not of course complain of the noise of the crowd and the babble of tongues. One who enters any public place sacrifices some of his privacy. My protest is against the invasion of his privacy over and beyond the risks of travel. One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen, or perhaps to sit and try not to listen. When we force people to listen to another's ideas, we give the propagandist a powerful weapon. Today it is a business enterprise working out a radio program under the auspices of government. Tomorrow it may be a dominant political or religious group. Today the purpose is benign; there is no invidious cast to the programs. But the vice is inherent in the system. Once privacy is invaded, privacy is gone. Once a man is forced to submit to one type of radio program, he can be forced to submit to another. It may be but a short step from a cultural program to a political program. If liberty is to flourish, government should never be allowed to force people to listen to any radio program. The right of privacy should include the right to pick and choose from competing entertainments, competing propaganda, competing political philosophies. If people are let alone in those choices, the right of privacy will pay dividends in character and integrity. The strength of our system is in the dignity, the resourcefulness, and the independence of our people. Our confidence is in their ability as individuals to make the wisest choice. That system cannot flourish if regimentation takes hold. The right of privacy, today violated, is a powerful deterrent to anyone who would control men's minds.⁴⁹

Justice Douglas' ideas of captivity and the right to be let alone have taken root, and on the surface, lend themselves well to the bubble zone issue, as pregnant women seeking an abortion may have to travel on a public sidewalk to enter a clinic and inevitably face the prospect of confrontation with shouting pro-lifers exercising their lungs and their constitutional free speech rights. During the height of the Operation Rescue movement in the early 1990's,⁵⁰ getting into an abortion clinic was the

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⁴⁹. Id. at 467-69 (emphasis added).
⁵⁰. See http://www.altculture.com/index/aentries/o/operationx.html. (describing the rise and fall of Operation Rescue):
Antiabortion group that radicalized the pro-life movement of the late '80s and early '90s through mammoth clinic blockades and rhetoric equating abortion with murder and the Holocaust. Randall Terry (b. 1959), who founded OR [Operation Rescue] in 1987 while working as a used-car salesman in upstate New York, is credited with originating anti-abortion civil disobedience and militancy. The group's protests first came to the country's attention at the 1988 Democratic National Convention in Atlanta and peaked with the 46-day shutdown of Wichita, Kansas, in 1991. Three years later, OR was in splinters. In a single month (May 1994), RU-486 was licensed for U.S. production, the Freedom of Access to Clinic Entrances Act was signed into law, and a Houston jury ordered OR members to pay $1 million in punitive damages for a 1992 blockade of a local Planned Parenthood clinic. The Catholic Church also began to grow wary of the sidewalk counseling, surveillance, blockade, and harassment tactics taught at the group's Melbourne, Florida, training center. After
modern day equivalent of running the gauntlet in medieval times. However, those days are long over, and the faithful few who continue to maintain lonely vigils outside abortion clinics typically have different credentials. Leila Hill, the petitioner in *Hill*, is one of these faithful few. Ms. Hill, a paralegal and former obstetrics nurse, joined with others to form a group which provided education about the risks of abortion to pregnant women. They called themselves “Sidewalk Counselors For Life.” Their behavior was impeccable, leading Justice Stevens to conclude that the sidewalk counseling conducted by Leila Hill and her fellow petitioners was neither abusive nor confrontational.

It may be helpful to put Justice Douglas’ dissent in *Pollak* into perspective. Justice Douglas wrote this dissent during the Cold War when the threat of communism spawned McCarthyism. Americans were wary of mind control, and movies such as The Manchurian Candidate exemplified the paranoia of the day. Radio broadcasts from Moscow and from the Voice of America fought ideological warfare on the short-wave band. To import Justice Douglas’ reasoning now into the abortion debate takes it out of the context for which it was authored.

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52. *Id.*
55. Roger Ebert wrote a glowing review of the movie, giving it the maximum rating of four stars. Here is part of the review:

Here is a movie that was made in 1962, and it feels as if it were made yesterday. Not a moment of THE MANCHURIAN CANDIDATE lacks edge and tension and a cynical spin—and what’s even more surprising is how the film now plays as a political comedy, as well as a thriller. After being suppressed for a quarter of a century, after becoming an unseen legend that never turned up on TV or on home video, John Frankenheimer’s 1962 masterpiece now re-emerges as one of the best and brightest of modern American films. The story is a matter of many levels, some of them frightening, some pointed with satirical barbs. In a riveting opening sequence, a group of American combat infantrymen are shown being brainwashed by a confident Chinese communist hypnotist, who has them so surely under his control that one man is ordered to strangle one of his buddies and shoot another in the head, and cheerfully complies. Two members of the group get our special attention: the characters played by Frank Sinatra and Laurence Harvey. Harvey seems to be the main target of the Chinese scheme, which is to return him to American society as a war hero, and then allow him to lead a normal life until he is triggered by a buried hypnotic suggestion, and turned into an assassin completely brainwashed to take orders from his enemy controller.

Justice Black observed the need for limits to free speech to combat noisy demonstrations in his opinion in *Gregory v. Chicago*:

No mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes, wherein they can escape the hurly-burly of the outside business and political world, or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals.

The alternative to control, feared Justice Black, was to sow the seeds of anarchy:

Were the authority of government so trifling as to permit anyone with a complaint to have the vast power to do anything he pleased, wherever he pleased, and whenever he pleased, our customs and our habits of conduct, social, political, economic, ethical, and religious, would all be wiped out, and become no more than relics of a gone but not forgotten past. Churches would be compelled to welcome into their buildings invaders who came but to scoff and jeer; streets and highways and public buildings would cease to be available for the purposes for which they were constructed and dedicated whenever demonstrators and picketers wanted to use them for their own purposes. And perhaps worse than all other changes, homes, the sacred retreat to which families repair for their privacy and their daily way of living, would have to have their doors thrown open to all who desired to convert the occupants to new views, new morals, and a new way of life. Men and women who hold public office would be compelled, simply because they did hold public office, to lose the comforts and privacy of an unpicketed home. I believe that our Constitution, written for the ages, to endure except as changed in the manner it provides, did not create a government with such monumental weaknesses. Speech and press are, of course, to be free, so that public matters can be discussed with impunity. But picketing and demonstrating can be regulated like other conduct of men. I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown.

It is a small incremental step to arrest anti-abortionists clamoring too loudly outside of a bubble zone. For example, in the first six months after its enactment, Baptist evangelists in Beaufort, South Carolina, were the only persons prosecuted for violating a local anti-noise ordinance for

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57. *Gregory*, 394 U.S. at 118 (emphasis added).
58. *Id.* at 125 (emphasis added).
raising their voices above the ordinary din of road and sidewalk traffic. Dozens of seminary students have been arrested for the crime of preaching the gospel too loudly with their unaided voices outside the businesses of local merchants. The content of the offending speech expressed moral views against abortion, immorality, homosexuality, and alcohol abuse. Such restrictions on sidewalk and street corner preaching are not isolated events.

The right to be let alone from detached speech will thus be easily accomplished by the application of existing jurisprudence.

All of this may be a pyrrhic victory, now that the availability of the abortion pill RU-486 has potentially changed the location of most abortions from the clinic to the privacy of the home.

The price for all this is has been the evisceration of the First Amendment. It is worth re-visiting the basic values and principles of First Amendment jurisprudence just to see how high that price has been.

V. THE VALUES AND PRINCIPLES AT THE CORE OF THE FIRST AMENDMENT

Debate on public issues as a matter of general principle should be "uninhibited, robust and wide-open." In public debate, people "must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment." The idea is that the "best test of truth is the power of the
thought to get itself accepted in the competition of the market... Further, "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government." The Supreme Court has stated, "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." The Court has also added, "[s]peech does not lose its protected character, however, simply because it may embarrass others or coerce them into action." Unpopular views peacefully communicated in a public forum may not be criminalized. Provided the means of communication are peaceful, the message itself need not meet standards of public acceptability. Democracy requires the personal communication of diverse ideas without fear of repression and criminal sanctions:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech ... is ... protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. ... There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

A total ban on conversational speech on a public sidewalk within a bubble zone on the perimeter of an abortion clinic is outright unconstitutional censorship discriminating against opponents of abortion. This kind of suppression is not just a facial violation of the First Amendment; it cuts out the core of what it means to be an American. Justices Brandeis and Holmes, concurring in Whitney v. California, believed that free speech was the foundation of liberty:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its

72. Terminello v. Chicago, 337 U.S. 1, 4-5 (1949).
73. See Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black, J. concurring) (stating that picking and choosing which views may be discussed in a public forum is "censorship of the most odious form.").
74. 274 U.S. 357 (1927).
government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed. 7

Suppression of freedom of speech inevitably sets off a chain reaction of events that culminates in growing social unrest until violence erupts. Sidewalk counselors view their moral imperative as a mission to expose the fallacies and falsehoods of abortion and to overcome its evil by education and compassion through intimate personal conversation. More speech is the answer, not enforced silence. Laws that silence the voices of quiet conversationalists is evidence of the cowardice of those who fear judicial reversal of Roe and the influence of the sidewalk counselors. Repression of sidewalk counselors can never be justified in a truly democratic society:

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to

75. Whitney, 274 U.S. at 375-76 (emphasis added).
be reconciled with freedom. Such, in my opinion, is the command of the Constitution. 76

Whether or not bubble zone laws purport to be neutral, in reality these laws impact only pro-life advocates. The net result is that judges and governments control what ideas can be publicly debated, where, when, how, and by what means. This practice offends not only the First Amendment, but the Fourteenth as well:

...under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. 77

Bubble zone laws, created by judicial injunction or by legislative ordinance are the latest tools to take away the constitutional right of a person to approach another in the public forum and offer an idea that may or may not be welcomed. This is an attack on democracy itself:

The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. 78

VI. IMPACT OF HILL ON ESTABLISHED FIRST AMENDMENT VALUES AND FREEDOMS

If Hill was correctly decided, then Martin v. Struthers 79 is in grave jeopardy. In Martin, the Supreme Court weighed the competing interests between members of the Jehovah Witnesses’ faith who exercised their faith by residential door-to-door canvassing, and the privacy rights of the occupants of residential dwellings to be left alone from the nuisance of the moral message.

The relevance of Martin is immediately apparent. It is trite to say that until the door was opened to the visitor, it was generally impossible to know in advance whether the offer to engage in conversation about

76. Id. at 377 (emphasis added).
77. Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (emphasis added).
79. 319 U.S. 141 (1943).
religion would result in a willing listener, who might accept a leaflet or an invitation to attend church. This situation is no different in principle from the dilemma faced by the sidewalk counselor, who has no idea how to identify a willing listener, without first risking a violation of a bubble zone law which prohibits the approach of an offer to talk to an unwilling listener.

In *Martin*, a divided Court struck down the municipal ordinance that protected residents from religious proselytizing. Justice Frankfurter dissented, recognizing that homes are sanctuaries from intrusions upon privacy and a place of rest from the stress of modern urban life.80 Justices Roberts and Jackson joined Justice Reed in his dissent. He stated:

> No ideas are being suppressed. No censorship is involved. The freedom to teach or preach by word or book is unabridged, save only the right to call a householder to the door of his house to receive the summoner's message. I cannot expand this regulation to a violation of the First Amendment.81

This argument is hauntingly familiar to that of the majority in *Hill*.

Justice Reed further suggested that the mere passage of time can result in the loss of a constitutional freedom that has fallen into disuse:

> The antiquity and prevalence of colportage are relied on to support the Court's decision. But the practice has persisted because the householder was acquiescent. *It can hardly be thought, however, that long indulgence of a practice which many or all citizens have welcomed or tolerated creates a constitutional right to its continuance.* Changing conditions have begotten modification by law of many practices once deemed a part of the individual's liberty.82

Assuming that the householder no longer was acquiescent to colportage, Justice Reed thought it was appropriate for the municipality to regulate its practice.

Of significance is a line in the dissent that refutes any attempt by Justice Stevens in *Hill* to characterize the unwilling recipient of communication as a "captive audience." Justice Reed wrote, "*[t]he First Amendment does not compel a pedestrian to pause on the street to listen to the argument supporting another's views of religion or politics.*"83 In other words, the pregnant woman who is unwilling to listen can simply walk away. It's as simple as that. The burden is light on the unwilling listener, who in *Martin*, had only to shut the door or refuse to open it, and the pedestrian in *Hill*, who could just keep on walking without a response and be in the clinic in a matter of seconds.

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81. *Id.* at 154-55.
82. *Id.* (emphasis added).
83. *Id.* at 157.
What *Martin* represents is that freedom and democracy demands nothing less than the right to exercise freedom of speech and the free exercise of religion. In a collision between the notion that a man's home is his castle, and religious freedom, there must be an accommodation of both privacy and freedom of speech. A blanket law forbidding all attempts to initiate a conversation will affect both the willing and the unwilling listener. It is not for the Court or for the legislature or city hall to decide this issue on a uniform basis. It is the province of the person who receives the invitation to converse to decide for himself or herself whether or not to be a willing listener. In *Martin*, Justice Black framed the issue in the same manner:

We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens, whether particular citizens want that protection or not. The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder. It submits the distributor to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it.

The First Amendment is rooted in the dissemination of ideas. Taking away the choice of the potential listener by silencing the potential speaker is the aborting of free speech. A free society cannot tolerate a bubble zone muzzling conversations, just as it would not take away the right of homeowners in *Martin* of their responsibility to think for themselves and to make their own decision to communicate with the visitor at their door. The *Martin* Court stated:

Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

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84. See id. at 150.
85. See id. at 143-44 (emphasis added).
86. See id. at 146-47.
87. Id.
In the aftermath of *Hill*, an inevitable challenge will be mounted at some point to reverse *Martin*. When that happens, there will be a great outcry from angry civil libertarians who will regret the judgment in *Hill*.

The future validity of *Marsh v. Alabama*\(^8\) is also in doubt. In *Hill*, the Court used property law zoning as a model to create a bubble zone in a public forum, in essence forbidding trespassing into a zoned territory to offer a moral message. A property rights approach\(^9\) not only elevates an abortion clinic, a commercial business, to the status of a private residence, it intrudes into the public forum. An apt comparison is the company town that was the subject of First Amendment litigation in *Marsh* by a member of the Jehovah Witnesses, who was convicted of distributing religious literature without company permission on the public sidewalk near the post office.\(^9^0\) When a legal permit to distribute religious literature had been sought earlier, the company rejected the request.\(^9^1\)

Justice Black's view of freedom prevailed, reversing the conviction. The right to freedom of religion outweighed the property rights at issue.\(^9^2\) To be good citizens, people needed to be informed. To be properly informed, the information must be uncensored.\(^9^3\)

The analogy to sidewalk counseling is obvious. The choice to abort requires full and informed consent. Censorship of views against abortion eliminate the possibility of making a fully informed decision. Abortion clinic owners are hostile to the message of pro-life supporters, and it would be bad for business to allow clients of a clinic to receive this message prior to an abortion. The absence of pro-life counselors invited inside abortion clinics for the purpose of dissuading pregnant mothers from having an abortion makes the point.

In his dissent in *Marsh*, Justice Reed suggested the proper course was to remove the speaker off the sidewalk freely used by the public, which was on company "property" and onto the public highway,\(^4\) which was 30 feet away\(^9^5\) from the contested location. The effect of this form of a "bubble zone" is to prohibit a close encounter with anyone entering or exiting the post office. The parallel with Justice Souter's reasoning in *Hill* is remarkable.\(^9^6\)

The Court's historical defense of the communication of moral messages on public sidewalks was a result of the First Amendment being

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90. See *Marsh*, 326 U.S. at 503.
91. See id. at 503.
92. See id. at 509.
93. See id. at 508.
94. Id. at 517.
95. Id. at 514.
regarded as a preferred constitutional right. Religious freedom and free speech were presumed to have a superior position over privacy, which at that time was not granted the present constitutional status it now enjoys.

VII. THE RISE OF THE RIGHT TO BE LET ALONE

Things began to change in a series of First Amendment cases in which the Court ruled against door-to-door magazine salesmen, the advertisement of tobacco products, the advertisement of election campaign propaganda on a public transit system, the broadcasting of a vulgar social satire on commercial radio, the delivery to private homes of junk mail tending to corrupt public morals, the curtailment of the actions of members of a religious cult which aggressively solicited money and converts at limited public forums, and a state fair. This line of cases is distinguishable from Martin and Marsh, insofar as these other cases did not involve the communication of a moral message in a traditional public forum.

In Rowan v. United States Post Office, the right of every person to be let alone from unwanted mail was placed on the scales with the right of others to communicate. Every advertiser had the opportunity to communicate once with a homeowner, but thereafter the recipient could ask the Post Office to block further unwanted communications. The Court upheld this freedom to be let alone, holding that "no one has a right to press even 'good' ideas on an unwilling recipient." A person was permitted to erect a wall on the outer boundary of his residential domain so that no repeat advertiser might further penetrate without the prior consent of the intended recipient.

In Frisby v. Schultz, the home of an abortion provider was given protection from anti-abortion demonstrators. To Justice O'Connor, the

98. See Packer Corp. v. Utah, 285 U.S. 105 (1932). Justice Brandeis did his best to use his position on the Supreme Court to push his concept of the right to be let alone. In 1932, a Utah statute banning tobacco ads from billboards throughout the state was upheld as a legitimate limitation on commercial free speech. The unwilling observer, claimed Brandeis, was unable to avert his eyes from unwelcome ads on public signs, which, unlike a radio, could not be turned off. See id.
105. See Rowan, 397 U.S. at 736.
106. See id. at 729.
107. Id. at 738.
108. See id.
110. See Frisby, 487 U.S. 474.
home was a refuge from intrusive offensive speech.\textsuperscript{111} The privacy of the unwilling residential listener who was trapped or was hiding in his or her home prevailed over the constitutional free speech rights of demonstrators on the public sidewalks and streets in front of private residences.\textsuperscript{112} Justice Brennan dissented in \textit{Frisby}, noting that as long as the speech remained outside the home and did not unduly coerce the occupant, the government's interest in protecting residential privacy was not implicated.\textsuperscript{113}

\textbf{VIII. NO RIGHT TO BE LET ALONE IN THE PUBLIC FORUM}

Going outside the home was another matter, for then the individual was subject to whatever assaulted his or her senses. "[W]e are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound . . . "\textsuperscript{114} In a free society, "one man's vulgarity is another's lyric."\textsuperscript{115} Where a political message is communicated, even its vulgar character is to be tolerated as the price for living in a free society.\textsuperscript{116} Justice Harlan held:

While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections. In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. \textit{Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes.}\textsuperscript{117}

Anticipating criticism of his opinion, Justice Harlan added:

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open de-

\footnotesize{\textsuperscript{111} See id. at 484-85.}
\footnotesize{\textsuperscript{112} See Carey v. Brown, 447 U.S. 455, 470-71 (1980).}
\footnotesize{\textsuperscript{113} See Frisby, 487 U.S. at 492-93 (Brennan, J. dissenting).}
\footnotesize{\textsuperscript{114} Rowan v. U.S. Post Office, 397 U.S. 728, 738 (1970).}
\footnotesize{\textsuperscript{115} Cohen v. California, 403 U.S. 15, 25 (1971).}
\footnotesize{\textsuperscript{116} See Cohen, 403 U.S. at 25 (discussing that Paul Cohen's jacket displayed the words, "Fuck the Draft," to express his feelings about conscription and the Vietnam War. While he wore the garment in the presence of the public in the corridor outside a courtroom, he respectfully removed it during the time he sat in the courtroom).}
\footnotesize{\textsuperscript{117} Id. at 21 (emphasis added).}
bate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.118

The constitutional principle at the root of not just Paul Cohen’s freedom of speech, but of our freedom of speech, was the right to be let alone from government control so that democracy could function as it was intended. There was no alternative if we hoped to live in a free society:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.119

The right to be let alone, assuming it exists, is from the reach of government, not the reach of our fellow citizens who desire to impart an idea for us to consider and debate. We are not to fear new ideas that may actually benefit us, but fear the evil of government censorship that suppresses independent thought in favor of conformity to the party line.

In venturing outside the home onto a city sidewalk, the burden is on the unwilling viewer to avert his or her eyes, to say “no” and refuse the offering of unwanted handbills and leaflets, or to physically remove himself or herself from the earshot of unwelcome verbal messages.120

Until Hill v. Colorado,121 the leading case on the tension between the First Amendment rights of speakers against the privacy rights of the unwilling recipient who wished to be let alone, was generally thought to be Erznoznik v. Jacksonville.122 An “R” rated movie, the “Class of ’74,” was shown at a drive-in theater, where scenes of female nudity were exposed to any member of the public who might chance or desire to catch a scene of the movie from adjacent property which included two public streets and a church parking lot.123 This resulted in a prosecution under a municipal ordinance prohibiting a drive-in theater from showing a movie

118. Id. at 24-25 (emphasis added).
119. Id. at 24 (emphasis added).
120. See Laurence H. Tribe, Ralph S. Tyler, Jr., American Constitutional Law 948 (2d ed. 1988).
121. 530 U.S. 703 (2000).
122. 422 U.S. 205 (1975).
123. See Erznoznik, 422 U.S. at 207.
with scenes of nudity that was visible from a public place or street. The underlying assumption behind the ordinance was the right of people to be let alone in the public forum. Churchgoers might be offended by becoming unwilling viewers of an "R" rated movie. It was solely the content of the movie’s message that triggered prosecution under the law. In striking down the ordinance, the Supreme Court concluded “the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content.” The burden was on the unwilling viewer to avert his or her eyes. It was still open to a municipality to enact reasonable time, place and manner regulations applicable to all speech regardless of content. In a pluralistic society, outside of the home, people will encounter politically and morally offensive forms of free speech. This results in inescapable captivity in many circumstances. It is the First Amendment that gives priority to the speaker, leaving the recipient of the communication with the choice to respond. “The Constitution does not permit [the] government to decide which types of otherwise protected speech is sufficiently offensive to require protection for the unwilling listener or viewer.” The Court was careful to note there was no issue about the privacy of persons in their homes who needed protection from visual or audible intrusions from movies shown at drive-in theaters.

IX. CONTENT OF THE MESSAGE: PROTECTED OR UNPROTECTED?

The distinction between protected and unprotected speech is important to understand. Those who support the Hill decision of silencing sidewalk counselors applaud the banning of what they consider unprotected speech. Their argument is that sidewalk counselors fall outside of First Amendment protection because they utter “fighting words,” provoke violence or make defamatory statements, such as labeling those who are a party to abortions as “murderers,” resulting in psychological

124. See id. at 206.
125. See id.
126. See id. at 212.
127. Id.
128. See id. at 210-11.
129. See id. at 209.
130. See id. at 210.
131. See id.
132. Id.
133. See id. at 212.
trauma to pregnant mothers who are about to fatally harm their fetuses. Pamphlets containing photos of dismembered fetuses and/or normal fetuses handed out to pregnant mothers are no doubt considered obscene and emotionally upsetting by some recipients. The Constitution permits restrictions on the content of speech that is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." There is, as a result, a class of speech that can be regulated because of its "constitutionally proscribable content." Yet, even vulgar words may be protected speech when the words have mixed characteristics, for example, where the form of the message is offensive but the content has social value, however slight.

"The First Amendment imposes . . . a "content discrimination" limitation upon [the government's] prohibition of proscribable speech." The government may not regulate [free speech] based on hostility--or favoritism--toward the underlying message expressed. Content-based restrictions presumptively violate the First Amendment and courts will not find them constitutionally valid unless the restrictions meet the strict scrutiny test. This means that in a public forum, any restrictions on free speech must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." Otherwise, the government may "effectively drive certain ideas or viewpoints from the marketplace."

Let us assume that outside the home, an individual might encounter on the public sidewalk another person who may approach and hand out religious or anti-abortion literature. If done within a bubble zone without prior consent, this would be a crime. This is the effect of Hill. Yet in Lovell v. City of Griffin, the Supreme Court invalidated a municipal ordinance requiring prior permission to hand out literature. The Court declared street literature in the form of pamphlets and leaflets handed out

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139. Chaplinsky, 315 U.S. at 572.
142. R.A.V., 505 U.S. at 387.
143. Id. at 386.
148. 303 U.S. 444 (1938).
149. See Lovell, 303 U.S. at 449.
by activists constituted "historic weapons in the defense of liberty." In *Schneider v. New Jersey*, the Court affirmed that while the intended recipient had a right to refuse the offered literature, the person offering the literature had a constitutional right to tender it. The Court rejected the argument people had a right to be let alone on a public street based on the rationale that the person seeking to communicate an idea could just go elsewhere.

In the abortion context, the last clear chance to persuade a pregnant mother not to have a planned abortion is on the sidewalk leading to the doors of the abortion clinic. So why did the Court in *Hill* go against its own First Amendment values and principles, and ban an entire category of free speech, namely the peaceful and respectful handing out of literature and conversational speech within eight feet of another person on a public sidewalk without the prior consent of the intended recipient? Is it a question of the content of the message? Has the Court created an exception to the communication of a moral message about a moral choice?

**X. A CONSTITUTIONAL RIGHT TO BE LET ALONE?**

To understand the answers to these questions, it is necessary to appreciate the judicial reasoning that led to the elevation of privacy to constitutional status in *Griswold v. Connecticut*. In the private sanctity of the bedroom, people found it repulsive that the government could police the use of the birth control pill. It was the decade of the 1960s—the height of the sexual revolution—when, unlike any prior time in American history, the birth control pill invited sexual promiscuity without the responsibility of parenthood.

Justice Douglas, writing for the majority in *Griswold*, elevated sexual privacy between married heterosexual couples to constitutional status, without anchoring privacy to any one particular enumerated constitutional right. He cited academic literature and case law to sup-

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150. *Id.* at 452.
151. 308 U.S. 147 (1939).
152. *See Schneider*, 308 U.S. at 162.
153. *See id.* at 163.
154. 381 U.S. 479 (1965).
155. *See id.* at 163.
156. *See Griswold*, 381 U.S. at 485-86.
158. *E.g.*, Boyd v. United States, 116 U.S. 616, 630 (1886) (the Constitution applies to invasions of the "sanctity of a man's home and the privacies of life"); Mapp v. Ohio, 367 U.S. 643, 656 (1961) (the Fourth Amendment creates a right to privacy that is of equal importance as compared with all other basic rights in a free society).
support his theory that privacy was a constitutional right.¹⁵⁹ To get around the lack of specific text to anchor the constitutional right of privacy, he used the word picture of a “penumbra”¹⁶⁰ to stretch the scope of the Constitution to include on its fringe the right to privacy: “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”¹⁶¹

In developing his position, Justice Douglas referred to *NAACP v. Alabama*¹⁶² as authority for the idea that freedom of association was a constitutional right contained within the First Amendment, even if the text did not make this right apparent.¹⁶³ He stated, “the First Amendment has a penumbra where privacy is protected from *governmental intrusion.*"¹⁶⁴ It is worth noting that Justice Douglas limited the right to privacy under the First Amendment to protection from the government and not from the private individual.¹⁶⁵ Justice Douglas made this perfectly clear in his dissent in *Poe v. Ullman,*¹⁶⁶ by explaining that his dissent in *Pollak v. Public Utilities Commission of District of Columbia*¹⁶⁷ arose out of his opposition to government-sponsored radio programs.¹⁶⁸ The significance of this was not lost on Justice Scalia in his *Hill* dissent when he emphasized that the “right to be let alone,” assuming it existed, was

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¹⁵⁹. See *Griswold,* 381 U.S. at 484-85.

¹⁶⁰. The definition of “penumbra” includes: “a shadow cast (as in an eclipse) where the light is partially but not wholly cut off by the intervening body” and “a surrounding or adjoining region in which something exists in a lesser degree.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1673 (1986). Critics of this new constitutional right of privacy, upon which was founded the constitutional right to an abortion, claimed it was created “out of nothing.” Justices White and Rehnquist, dissenting in *Thornburgh v. American College of Obstetricians & Gynecologists,* 476 U.S. 747, 785 (1986), overruled by Planned Parenthood of S.E. Penn. v. Casey, 505 U.S. 833 (1992), might well have viewed the Justice Douglas’ “Penumbra” as the “Twilight Zone.”

There is a fifth dimension beyond which is known to man. It is a dimension as vast as space and as timeless as infinity. It is the middle ground between light and shadow, between science and superstition, and it lies between the pit of man’s fears, and the summit of his knowledge. This is the dimension of imagination. It is an area which we call...THE TWILIGHT ZONE.


¹⁶¹. See *Griswold,* 381 U.S. at 484.


¹⁶³. See *NAACP,* 357 U.S. at 462; *Griswold,* 381 U.S. at 483.

¹⁶⁴. *Griswold,* 381 U.S. at 483 (emphasis added).

¹⁶⁵. See *id.* at 485.


¹⁶⁸. See *Poe,* 367 U.S. at 517. Justice Douglas, dissenting in *Pollak,* defined “liberty,” within the purview of the Fifth Amendment, to include the right of “privacy,” a right he thought was infringed because a member of a “captive audience” was forced to listen to a government-sponsored radio program. See *Pollak,* 343 U.S. at 467-69 (Douglas, J., dissenting).
“conferred, as against the government”. 169 “it is the right of the speaker in the public forum to be free from government interference.”

Justice Douglas concluded that penumbras surrounding the First, Third, Fourth, Fifth, and Ninth Amendments impliedly created constitutionally guaranteed zones of privacy as against the government. 171 In his earlier dissent in Poe v. Ullman, Justice Douglas sought to graft the right to privacy onto the branch of liberty in the Fourteenth Amendment, 172 but did not pursue that idea in Griswold. 173

Earlier cases involving “privacy and repose” lent legitimacy to the recognition of a constitutional right to privacy. 174 However, the cases cited by Justice Douglas all dealt with protecting the individual’s right to be let alone from the government, the solitary exception being Breard v. City of Alexandria. 175 In Breard, the Court approved the municipal government’s regulation of commercial speech at private residences. 176 Not one of the cases cited by Justice Douglas in Griswold stood for the proposition that, as between citizens in the public forum, there existed a right to be let alone. The constitutional elevation of the right to be let alone must, therefore, be restricted solely to freedom from government and arguably also to freedom from commercial peddlers calling at one’s private residence.

The concurring opinion of Justice Goldberg agreed that marital privacy concerning the use of contraceptives was beyond the reach of government. 177 He rested his argument primarily upon the Ninth Amendment: “In sum, the Ninth Amendment simply lends strong support to the view that the ‘liberty’ protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.” 178 Again, the right to be let alone applied against the government. Concluding “the right of privacy is a fundamental personal right,” 179 Justice

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170. Hill, 530 U.S. at 751 (Scalia, J., dissenting) (alteration in original).
172. See Poe, 367 U.S. at 515-17 (Douglas, J., dissenting).
173. Justice Harlan’s concurrence set forth the view that Connecticut’s law violated the “ordered liberty” guaranteed in the Fourteenth Amendment. See Griswold, 381 U.S. at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Justice White also would have relied on the Fourteenth Amendment. See Griswold, 381 U.S. at 502 (White, J., concurring).
174. See Griswold, 381 U.S. at 485.
175. 341 U.S. 622 (1951).
176. See Breard, 341 U.S. at 644-45.
177. See Griswold, 381 U.S. at 486 (Goldberg, J., concurring).
178. Id. at 493.
179. Id. at 494.
Goldberg cited with approval this passage from Justice Brandeis' dissent in *Olmstead v. United States*:\(^{180}\):

The protection guaranteed by the [Fourth and Fifth Amendments] is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, *as against the government, the right to be let alone*—the most comprehensive of rights and the right most valued by civilized men.\(^{181}\)

None of the Justices in the *Griswold* majority appeared to contemplate a constitutional right to be let alone from fellow citizens in the public forum. Justice Black, joined by Justice Stewart, dissented in *Griswold*:\(^{182}\) They argued that no constitutional right to privacy existed and that the use of the word "privacy" had the potential to both expand and dilute constitutional freedoms:

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. *But there is not.* There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

One of the most effective ways of *diluting or expanding* a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and sei-
"Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used.\footnote{Id. at 508-09 (Black, J., dissenting) (emphases added).}

In a footnote, Justice Black observed the Court had no jurisdiction to elevate the right of privacy to constitutional status:

Observing that "the right of privacy . . . presses for recognition here," today this Court, which I did not understand to have power to sit as a court of common law, now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule which prevents state legislatures from passing any law deemed by this Court to interfere with "privacy."\footnote{Id. at 510 n.1 (alteration in original) (emphasis added) (quoting majority opinion, id. at 485). See generally David W. Leebron, The Right to Privacy's Place in the Intellectual History of Tort Law, 41 CASE W. RES. L. REV. 769 (1991) (discussing the origin and evolution of the right to privacy).}

Justice Black warned of the potential adverse consequences of shifting power to the judiciary implicit in the elevation of the right to be let alone to constitutional status:

I repeat so as not to be misunderstood that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.\footnote{Griswold, 381 U.S. at 520-21 (Black, J., dissenting) (emphases added) (footnote omitted).}

Substantive due process loomed once again on the horizon, and Justice Black pleaded in vain with his colleagues on the Court to let the
Lochner doctrine\textsuperscript{186} sleep forever in peace.\textsuperscript{187} The Court's own subjective viewpoint and personal predilections concerning personal rights affecting privacy were "no less dangerous" than earlier reasoning by the Lochner Court about economic theories.\textsuperscript{188}

\textit{Eisenstadt v. Baird}\textsuperscript{189} represented a turning point in the evolution of the constitutional right to personal privacy. Justice Brennan constitutionalized individual autonomy pertaining to reproductive freedom when he extended the constitutional elevation of marital privacy in \textit{Griswold} to the distribution of contraceptives to unmarried sexual partners in \textit{Eisenstadt}.\textsuperscript{190} He wrote, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." The significance of this passage is that it extended privacy from its confines of the marital bedroom to fundamental, decisional, personal reproductive autonomy outside the vows of marriage and the privacy of one's own home.\textsuperscript{192}

Justice Brennan rested his opinion on previous opinions of the Court establishing the fundamental principle that the government may not intrude into an individual's privacy except in very limited circumstances.\textsuperscript{193}

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\textsuperscript{186} See Lochner v. New York, 198 U.S. 45 (1905).
\textsuperscript{187} See \textit{Griswold}, 381 U.S. at 522-23 (Black, J., dissenting).
\textsuperscript{188} \textit{Id.} at 522 (Black, J., dissenting).
\textsuperscript{189} 405 U.S. 438 (1972).
\textsuperscript{190} See \textit{Eisenstadt}, 405 U.S. at 453-54.
\textsuperscript{191} \textit{Id.} at 453.
\textsuperscript{192} See Nan Hunter et al., \textit{Contemporary Challenges to Privacy Rights}, 43 N.Y.L. SCH. L. REV. 195, 212 (1999).
\textsuperscript{193} See \textit{Eisenstadt}, 405 U.S. at 453-54. Brennan likely found the following excerpts from the referenced previous opinions to be the most helpful:
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\begin{itemize}
\item It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth, is fundamental to our free society. . . . [I]n the privacy of a person's own home--that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy. . . .
\item . . . Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.
\item "There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority--even those who have been guilty of what the majority define as crimes."
\end{itemize}

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As in *Griswold*, the majority did not attempt to establish a right to be let alone from fellow citizens in the public forum.

*Griswold* inevitably linked the constitutional right to bear or beget children to the constitutional decision of whether or not to terminate the life of one's own unborn child through abortion. This set the stage for *Roe v. Wade*, which followed a year later.

Writing for the majority in *Roe*, Justice Blackmun concluded, "the right of personal privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation." The Court candidly acknowledged, "[t]he Constitution does not explicitly mention any right of privacy." Citing a line of authority to justify creating a constitutional right of privacy from the government, the *Roe* Court included *Katz v. United States*, which explicitly rejected a general constitutional right to be let alone from other people:

The petitioner had phrased those questions as follows:

Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.

We decline to adopt this formulation of the issues. In the first place the correct solution of Fourth Amendment problems is not necessarily

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the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.

*Skinner*, 316 U.S. at 541 (Douglas, J.).

There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. An American citizen, arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared.


194. See *Hunter*, *supra* note 192 at 212-14.


197. *Id.* at 152.

198. *Id.*

promoted by incantation of the phrase "constitutionally protected area." Secondly, the Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy--his right to be let alone by other people--is, like the protection of his property and of his very life, left largely to the law of the individual States.200

Similarly, the First Amendment cannot be translated into a general constitutional right to be let alone from the free speech of other people. Constitutionally protected areas, like bubble zones, have no place in protecting individual privacy from governmental intrusions, as their function has nothing to do with preventing the intrusion of the government but with silencing the free speech rights of other people. Just as "the Fourth Amendment protects people, not places,"201 so must the First Amendment protect people who exercise freedom of speech, and not the place (whether bubble zone or not) where that speech is tendered.

Justice Blackmun felt that the "concept of personal liberty and restrictions upon state action" in the Fourteenth Amendment served as the constitutional home of a pregnant mother's right to decide "whether or not to terminate her pregnancy."202 The right to be let alone from government had now been reconstituted as a "new form of privacy" termed "liberty of choice."203

In dissent, Justice Rehnquist concluded there existed a limited right of privacy to be free from government intrusion, that Roe marked a return to substantive due process and a revival of Lochner, and that no constitutional right to personal privacy existed in the Fourteenth Amendment:

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. . . .

While the Court's opinion quotes from the dissent of Mr. Justice Holmes in Lochner v. New York, the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in Lochner and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compel-

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201. Id. at 351.
ling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment. To reach its result, the Court necessarily has had to find within the Scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment.  

In Doe v. Bolton, the companion case to Roe, Justice White also strongly opposed the newly minted constitutional right to an abortion, finding "nothing in the language or history of the Constitution to support the Court's judgment." Prominent scholars, including John Hart Ely, soon chastised the Court for its decision in Roe.

Freedom of choice to terminate a pregnancy soon became entrenched in American feminist culture as intrinsic to a woman's individual dignity and personal autonomy. The Supreme Court struck down various legislative attempts by different states to confine, restrict, or create an informed choice. The law endowed a woman with the choice of abortion on demand, and the government had no power to influence that choice by raising "moral and spiritual questions."

Chief Justice Burger, who had earlier concurred in Roe and Doe, expressed in Thornburgh his sense of betrayal and astonishment in ad-

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204. Roe, 410 U.S. at 172-74 (Rehnquist, J., dissenting) (citation omitted).
206. Doe, 410 U.S. at 221 (White, J., dissenting).
207. See, e.g., ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 27-28 (Yale University Press, Ltd. 1975) (questioning the Roe Court's justification for imposing its own model statute regulating abortion); John H. Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 947-49 (1973) (concluding Roe is "bad constitutional law" because it is not connected to "any value the Constitution marks as special"); Harry H. Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 YALE L.J. 221, 311 (1973) (concluding the Roe Court exceeded its legitimate authority by going beyond the bounds of "conventional morality").
208. See, e.g., the web site for the National Abortion and Reproductive Rights Action League at http://www.naral.org/about/index.html (last visited Sept. 21, 2001) ("a right to privacy includes having access to safe and legal abortion, effective contraceptive options, and quality reproductive health care").
mitting the concerns predicted by the dissenters in Roe and Doe had been right all along:

Yet today the Court astonishingly goes so far as to say that the State may not even require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure which she is about to undergo and the availability of state-funded alternatives if she elects not to run those risks. Can anyone doubt that the State could impose a similar requirement with respect to other medical procedures? Can anyone doubt that doctors routinely give similar information concerning risks in countless procedures having far less impact on life and health, both physical and emotional than an abortion, and risk a malpractice lawsuit if they fail to do so?

Yet the Court concludes that the State cannot impose this simple information-dispensing requirement in the abortion context where the decision is fraught with serious physical, psychological, and moral concerns of the highest order. Can it possibly be that the Court is saying that the Constitution forbids the communication of such critical information to a woman? We have apparently already passed the point at which abortion is available merely on demand. If the statute at issue here is to be invalidated, the "demand" will not even have to be the result of an informed choice.211

Into this legislative void identified by Chief Justice Burger stepped Christian activists who assumed the role of sidewalk counselors,212 free of any tie to government authority. "The constitutional right to an abortion" was, after all, "a right against the state, not private individuals."213 Many people had assumed that private influence to provide educational informational and alternative choices to abortion that might dissuade a woman from choosing an abortion would not violate any constitutional right to an abortion.214 Activists did not confine this activism to sidewalk counseling, but often accompanied it with blockades of clinic entrances and large-scale demonstrations.215 Courts issued injunctions to quell the anti-abortion protests,216 and state ordinances followed.217 The creation of bub-
ble zones provided a zone of privacy for those unwilling to hear the anti-aborti\textsuperscript{on} message.\textsuperscript{218} Violent acts ensued.\textsuperscript{219}

Does the government have the legal right to prevent private individuals, like sidewalk counselors, from talking women out of exercising their constitutional right to an abortion, by exercising their constitutional right to free speech? In the court battles that resulted, judges had the opportunity to insert their viewpoints into the abortion controversy.\textsuperscript{220}

XI. ASSESSING THE DAMAGE TO THE FIRST AMENDMENT

Now that \textit{Hill} has settled the lawfulness of the bubble zone, the sidewalk counselor has the burden to identify and retreat from the unwilling listener. Practically, this task is impossible and puts an end not only to a class of free speech, sidewalk counseling, but also to the substance of that speech. Of greater significance has been the damage done to the First Amendment. The casualty list begins with \textit{Madsen}, continues with \textit{Schenck}, and concludes for now with \textit{Hill}.

In \textit{Madsen}, the Supreme Court upheld the constitutional validity of an injunction and its establishment of a thirty-six-foot bubble zone on a public street outside of an abortion clinic in Melbourne, Florida.\textsuperscript{221} In doing so, the Court prohibited numerous individuals, united by their opposition to abortion, and who had broken no law, from exercising their constitutional rights of assembly, free speech, and association within the judicially created bubble zone.\textsuperscript{222} The evidence did not include a hint of violence, and visitors freely entered and exited the abortion clinic.\textsuperscript{223} The Court relaxed the strict scrutiny standard established by precedent, which courts had to apply whenever they imposed a content-based or viewpoint-based limitation on First Amendment rights in a public forum.\textsuperscript{224} Instead, the Court created for the law of the sacred cow, the new right of abortion, a lesser standard, which falls between strict scrutiny and intermediate scrutiny.\textsuperscript{225} This new "intermediate-intermediate" scrutiny test is as follows: "Whereas intermediate scrutiny requires that the restriction be 'narrowly tailored to serve a significant government interest,' the new standard requires that the restriction 'burden no more speech than necessary to serve a significant government interest.'"\textsuperscript{226}

\begin{itemize}
\item \textsuperscript{217} See, e.g., \textit{Hill}, 530 U.S. at 707 (upholding a Colorado statute banning sidewalk counseling within an eight-foot bubble zone with respect to an unwilling listener).
\item \textsuperscript{218} See \textit{Weinstein}, supra note 213, at 472.
\item \textsuperscript{219} See, e.g., \textit{A Brief History of Anti-Abortion Violence Patterns}, at http://www.feministcampus.org/sam3_historysub.asp (last visited Sept. 13, 2001).
\item \textsuperscript{220} See \textit{Weinstein}, supra note 213, at 506.
\item \textsuperscript{221} See \textit{Madsen}, 512 U.S. at 757-58.
\item \textsuperscript{222} See \textit{id.} at 785 (Stevens, J., dissenting).
\item \textsuperscript{223} See \textit{id.} at 790 (Scalia, J., dissenting).
\item \textsuperscript{224} See \textit{id.} at 790-91 (Scalia, J., dissenting).
\item \textsuperscript{225} See \textit{id.} at 791 (Scalia, J., dissenting).
\item \textsuperscript{226} \textit{id.} (Scalia, J., dissenting) (quoting majority opinion, \textit{id.} at 765).
\end{itemize}
The second attack on the First Amendment was the nature of the injunction itself. By definition, the injunction constituted a prior restraint of free speech, and as such, presented the "greatest threat" to First Amendment values. To allow the injunction to continue directly conflicted with a long history of striking down speech-restricting injunctions that had, by their nature, a heavy presumption against constitutional validity. The majority's reliance on NAACP v. Claiborne Hardwar...
clause facilitated a recipient's escape from hearing any moral message.\footnote{238} It was triggered just by saying "no" to the communication offered by the counselor, or "don't talk to me," before the counselor initiated any conversation.\footnote{239} The constitutionality of the cease and desist clause was appealed and held by the Court to be a proper restriction of the appellant's First Amendment rights.\footnote{240}

Unlike the facts in \textit{Madsen}, which emphasized the need of abortion clinic patients for peace and quiet conducive to rest and repose,\footnote{241} the facts in \textit{Schenck} did not turn on noise but on a history of "peaceful conversations . . . devolv[ing] into aggressive and sometimes violent conduct."\footnote{242} In these circumstances, the Court decided, "a record of abusive conduct makes a prohibition on classic speech in limited parts of a public sidewalk permissible."\footnote{243}

Chief Justice Rehnquist considered and rejected a "right" to be let alone in the public forum:

Petitioners also contend that the "cease and desist" provision which limits the exception for sidewalk counselors in connection with the fixed buffer zone is contrary to the First Amendment. We doubt that the District Court's reason for including that provision--"to protect the right of the people approaching and entering the facilities to be left alone"--accurately reflects our First Amendment jurisprudence in this area. \textit{Madsen} sustained an injunction designed to secure physical access to the clinic, \textit{but not on the basis of any generalized right "to be left alone" on a public street or sidewalk."\footnote{244}

In dissent, Justice Scalia deplored the Court's unwillingness to strike down the fixed bubble zone since the court created the zone based on the invalid theory of a "right to be let alone" in the public forum and not on the right of unobstructed access to the abortion clinic.\footnote{245} Justice Scalia was appalled at the gratuitous language chosen by the majority to accommodate free speech rights, when the Court could have adopted a more assertive protective stance to enhance free speech rights.\footnote{246} He was further alarmed by the Court's unprecedented expansion of jurisdiction and power on its own motion to protect the public interest.\footnote{247} This move, feared Justice Scalia, intruded the function of the

\footnotesize{\begin{tabular}{l}
238. \textit{See id.} \\
239. \textit{See id. at 369.} \\
240. \textit{See id. at 384-85.} \\
242. \textit{Schenck,} 519 U.S. at 377. \\
243. \textit{Id.} \\
244. \textit{Id.} at 383 (emphases added). \\
245. \textit{Id. at 387-88} (Scalia, J., concurring in part and dissenting in part). \\
246. \textit{See id. at 390-91} (Scalia, J., concurring in part and dissenting in part). \\
247. Specifically, Scalia stated:
\end{tabular}}
executive branch of government, thereby upsetting the constitutional balance of powers.248

Also disturbing was the Court’s departure from settled practice in the way in which the Court approached its review of lower court injunctions. Instead of validating the Schenck injunction on the basis of the facts actually found by the District Court, the Supreme Court reviewed the injunction based on what the court below “might have” found.249

These aberrations from established general legal doctrines amounted to more evidence that the law of the sacred cow was making a “destructive inroad upon First Amendment law.”250

Left undecided in Schenck was “whether the governmental interests involved would ever justify some sort of zone of separation between individuals entering the clinics and protesters, measured by the distance between the two.”251 The affirmative answer to this question came in Hill.252

In 1993, the Colorado state legislature enacted a law making it illegal to “knowingly approach” within eight feet of another person, without that person’s consent, “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling

The Court proceeds from there to make a much more significant point: An injunction on speech may be upheld even if not justified on the basis of the interests asserted by the plaintiff, as long as it serves “public safety.” “[I]n assessing a First Amendment challenge, a court... inquires into the governmental interests that are protected by the injunction, which may include an interest in public safety and order,... Here, the District Court cited public safety as one of the interests justifying the injunction.... [T]he fact that ‘threat to public safety’ is not listed anywhere in respondents’ complaint as a claim does not preclude a court from relying on the significant governmental interest in public safety in assessing petitioners’ First Amendment argument.”

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This is a wonderful expansion of judicial power. Rather than courts’ being limited to according relief justified by the complaints brought before them, the Court today announces that a complaint gives them, in addition, ancillary power to decree what may be necessary to protect—not the plaintiff, but the public interest! Every private suit makes the district judge a sort of one-man Committee of Public Safety. There is no precedent for this novel and dangerous proposition.

Id. at 392-93 (Scalia, J., concurring in part and dissenting in part) (alterations in original) (citation omitted).

248. See id. at 393-94 (Scalia, J., concurring in part and dissenting in part).

249. Scalia expressed disagreement with the majority’s departure from established practice: We are not in the business (or never used to be) of making up conclusions that the trial court could permissibly have reached on questions involving assessments of fact, credibility, and future conduct—and then affirming on the basis of those posited conclusions, whether the trial court in fact arrived at them or not. That is so even in ordinary cases, but it is doubly true when we review a trial court’s order imposing a prior restraint upon speech.

Id. at 389 (Scalia, J., concurring in part and dissenting in part) (alterations in original) (footnote omitted).

250. Id. at 394 (Scalia, J., concurring in part and dissenting in part).

251. Id. at 377.

with such other person." This law had the effect of banning sidewalk counseling on public sidewalks within 100 feet of abortion clinic entrances. The state’s declared purpose in creating this law was to enable women to have unimpeded access to abortion clinics. In Hill, opponents unsuccessfully challenged the constitutionality of this eight-foot bubble zone.

Justice Stevens, writing for the majority, held that the First Amendment rights of the speaker were subordinate to the privacy rights of the unwilling listener. This was so even though, unlike in Schenck, the sidewalk counselors acted politely and respectfully. It made no difference that speech occurred in a public forum. This result was unprecedented and contrary to the Court’s First Amendment teachings. Despite all this, the Court’s decision was predictable due to the necessity to distort the law to shield the law of the sacred cow – abortion. The decision constituted a simian response of: “[h]ear no evil, see no evil, speak no evil.”

To save the Colorado law, the Court elevated a common law right of privacy to a constitutional “interest” that outweighed, on the scales of justice, the preferred constitutional right of free speech. The Court ruled in a bold and unabashed manner that revived old case law suppressing the free speech rights of trade unionists. In championing the

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253. Hill, 530 U.S. at 707 (quoting COLO. REV. STAT. § 18-9-122(3) (1999)).
254. See id. at 708-09.
255. See id at 708 n.1 (quoting COLO. REV. STAT. § 18-9-122(1) (1999)).
256. See id. at 707, 712, 735.
257. See id. at 718 (quoting Rowan v. United States Post Office Dep’t, 397 U.S. 728, 736 (1970)).
258. See Hill, 530 U.S. at 710.
259. See id. at 718.
260. See id. at 741-42 (Scalia, J., dissenting).
262. See Hill, 530 U.S. at 718.
263. See id. at 717 (quoting Ann. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 204 (1921)). Not referred to in Hill was another passage from American Steel Foundries that the court could have used to justify its categorization of sidewalk counselors located inside the bubble zone as “missionaries”:

Each case must turn on its own circumstances. It is a case for the flexible remedial power of a court of equity which may try one mode of restraint, and if it fails or proves to be too drastic, may change it. We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business and that all others be enjoined from congregateing or loitering at the plant or in the neighboring streets by which access is had to the plant, that such representatives should have the right of observation, communication and persuasion but with special admonition that their communication, arguments and appeals shall not be abusive, libelous or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion, obstruct an unwilling listener by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence and which may be varied in other cases. It
right of the unwilling recipient to be let alone, the Court offered no guidance on how a sidewalk counselor, intending to exercise his or her free speech rights, could possibly know in advance of tendering a communication, whether the intended recipient was willing or unwilling to hear a moral message about abortion. A wrong guess would result in a violation of the criminal law.  

Justice Scalia did not disappoint in delivering a scathing analysis of the damage caused by *Hill* to the First Amendment. If the subject matter were not abortion, Justice Scalia predicted the Court would have instantly found Colorado’s law to be content-based and viewpoint discriminatory. Justice Scalia viewed the abandonment of the strict scrutiny standard as a contrived fabrication intended to permit the survival of the bubble zone under the less onerous standard for content-neutral speech regulations.

The Court’s characterization of the law as one that regulated places, not speech, was just as convincing to Justice Scalia, as the Emperor was to the child who could not be fooled in Hans Christian Andersen’s children’s fable, *The Emperor’s New Clothes*. To Justice Scalia, the

becomes a question for the judgment of the chancellor who has heard the witnesses, familiarized himself with the locus in quo and observed the tendencies to disturbance and conflict. *The purpose should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries.*

Am. Steel Foundries, 257 U.S. at 206-07 (emphases added).

264. See COLO. REV. STAT. § 18-9-122(3).


266. See *Hill*, 530 U.S. at 742 (Scalia, J., dissenting).

267. See id. (Scalia, J., dissenting).

268. See id. at 748-49 (Scalia, J., dissenting).

269. See id. at 741 (Scalia, J., dissenting) (quoting the majority opinion, id. at 719).

270. The fable reads, in part:

Everyone said, loud enough for the others to hear: “Look at the Emperor’s new clothes. They’re beautiful!”

“What a marvelous train!”

“And the colors! The colors of that beautiful fabric! I have never seen anything like it in my life.” They all tried to conceal their disappointment at not being able to see the clothes, and since nobody was willing to admit his own stupidity and incompetence, they all behaved as the two scoundrels had predicted...

A child, however, who had no important job and could only see things as his eyes showed them to him, went up to the carriage.

“The Emperor is naked,” he said. “Fool!” his father reprimanded, running after him. “Don’t talk nonsense!” He grabbed his child and took him away. But the boy’s remark,
naked truth was that "if protecting people from unwelcome communications (the governmental interest the Court posits) is a compelling state interest, the First Amendment is a dead letter."

The ultimate irony was that in Hill, the State repudiated any interest in protecting its citizens' rights to be let alone from unwanted speech, and yet the Court fictitiously attributed this purpose to the impugned legislation. The Court flip-flopped from its holding in Schenck, where it had disavowed the right to be let alone. Instead, in Hill, the Court "repackage[d] . . . the 'right'[to be let alone] as an 'interest'" deserving of protection, and created a new right to be let alone, not from the government, where such a principle existed, but from a private individual in the public forum, where no such principle existed.

The opinion elevated the abortion clinic, a commercial business, to the constitutional status of a private residence. No longer did the recipient of an unwanted message have the burden to avert one's eyes or tolerate unwelcome speech. The burden had shifted to the speaker.

In upholding Colorado’s bubble zone, the Court approved the approach of prophylaxis, "the antithesis of narrow tailoring." Speech opposing abortion was unwelcome. The list of wounds to the First Amendment grew: "So one can add to the casualties of our whatever-it-takes pro-abortion jurisprudence the First Amendment doctrine of narrow tailoring and over-breadth. R.I.P."

XII. CONCLUSION

A new era has begun. A corresponding right to be free from speech now matches speech rights. Every individual, in the public forum, now
has a right to veto another individual's First Amendment rights. The inevitable result, silence, will replace the cacophony of a free society engaged in robust debate. The government is our "Father Knows Best," deciding not just what can be said, but where, when, and in what manner. The Commonwealth of Massachusetts has enacted legislation imitating Colorado's buffer zone law and has relied on Hill to justify its restrictions against free speech. Once upon a time, Justice Stevens wrote, "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."

Speech opposing abortion has lost its First Amendment status. Only time will reveal whether the damage caused by the Court to its First Amendment jurisprudence will remain confined to the abortion context or spread like an out-of-control virus throughout the entire body of First Amendment law. The implications for environmentalists, trade unionists, evangelists, politicians, and others are enormous and serious. The Court has opened a Pandora's box that it can only close by killing the sacred cow of abortion.

The root cause of the distortion to First Amendment jurisprudence is the line of reasoning that began in Griswold and flowered in Roe. The true nature of the beast was revealed in Thornburgh and manifested in Stenberg. At a minimum, the Court must reverse Roe to stem the bleeding of the First Amendment before it becomes fatal. How the Court will eventually handle the free speech issues in the Nuremberg Files case will serve as a predictor of the future of the First Amendment.

As long as the law of the sacred cow of abortion exists, courts will suspend general First Amendment principles and values when it comes to the First Amendment rights of those who oppose abortion and wish to persuade others that a moral choice deserves consideration. The right or interest to be let alone in the public forum from moral or other messages is an invention created specifically for the law of the sacred cow. It has no basis in history or precedent, and is an embarrassment to the intellect of those who sit on the Supreme Court. The Court's "imposition of its
own, extraconstitutional value preferences” is obvious, and more than that, is a classic illustration of prescribing what shall be orthodox in matters of opinion. In defending the dubious right to an abortion, the Court has perpetuated the law of the sacred cow.

The right to an abortion has become a cultural and religious symbol to feminists and secular humanists who have figuratively wrapped around this icon of personal autonomy the American flag. Those who would have the temerity to attack this sacred right to an abortion by persuading others there is another choice have been vilified as traitors.

Consider the scorn heaped upon Gregory Lee Johnson, who was convicted of desecrating an American flag in Dallas, Texas. The Supreme Court freed Johnson, holding, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Writing for the majority, Justice Brennan explicitly refused to create “the law of the American flag”:

There is, moreover, no indication--either in the text of the Constitution or in our cases interpreting it--that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole--such as the principle that discrimination on the basis of race is odious and destructive--will go unquestioned in the market-place of ideas. See Brandenburg v. Ohio... We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

Just as the Court would have been gravely mistaken to create the “law of the Stars and Stripes,” it caused a serious and damaging error by creating a separate juridical category for abortion, the law of the sacred cow.

Opponents of abortion do not present a “clear and present danger” to American society. Law must not be used as a means to criminalize the conduct of sidewalk counselors who act on their moral imperative to

290. See W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (“no official, high or petty, can prescribe what shall be orthodox in... matters of opinion).
292. Johnson, 491 U.S. at 414.
293. Id. at 417-18 (emphases added) (citation omitted).
persuade others abortion is wrong. The better approach is to facilitate opportunities for free and fearless reasoning in full discussions.\textsuperscript{295}

"[F]ree speech is the rule, not the exception."\textsuperscript{296} It is unconstitutional to suppress speech just because of "fear, . . . passionate opposition against the speech, . . . [or] a revolted dislike for its contents."\textsuperscript{297} Would immediate injury to society occur if speech by sidewalk counselors were allowed within a bubble zone? The answer is an emphatic "no." Arguably, society would benefit from less abortions, as the state has an interest in the birth of new and potentially useful citizens.\textsuperscript{298} If so, the remedy is "more speech, not enforced silence."\textsuperscript{299}

Justice Jackson's words in \textit{Barnette} ring true today, just as strongly as when he penned these words for the ages:

Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. . . .

. . . [T]he First Amendment . . . was designed to avoid these ends by avoiding these beginnings. . . . Authority here is to be controlled by public opinion, not public opinion by authority. . . .

. . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act there faith therein.\textsuperscript{300}

Not since the issue of slavery tore apart this nation has an issue been more divisive than abortion. Differing on the moral question of abortion touches the heart of the nation. Close-mindedness, bubble zones, and coerced silence in the public forum have no place in a democratic society. "Without open minds there can be no open society. And if society be not open the spirit of man is mutilated and becomes enslaved."\textsuperscript{301} No debate can ever be won "by shutting one's ears or . . . silencing

\textsuperscript{295} See Dennis v. United States, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting).
\textsuperscript{296} Dennis, 341 U.S. at 585.
\textsuperscript{297} Id.
\textsuperscript{301} Dennis, 341 U.S. at 556 (Frankfurter, J., concurring).
opponents. As long as there is personal freedom and the courage to speak out, one thing is known for certain: the truth will go marching on.


303 See Julia Ward Howe, Battle Hymn of the Republic. at www.ukans.edu/carrie/docs/texts/battle/htm (last visited December 3, 2001).
LEGAL SERVICES CORPORATION v. VELAZQUEZ: THE COURT’S MISSED OPPORTUNITY TO CLARIFY THE LEGAL FRAMEWORK FOR EXAMINING THE CONSTITUTIONALITY OF GOVERNMENT PROGRAM RESTRICTIONS

I. INTRODUCTION

The First Amendment’s free speech clause is one of the most widely cherished and debated constitutional rights in America. Today, discussions involving the First Amendment take center stage in our newspapers, on our televisions and over the Internet. Racists and white supremacists join hands with journalists and politicians alike to proclaim the virtues of the right to free speech. One topic of this debate receiving little publicity is the relationship between the legal profession and the First Amendment. Our society rarely rallies around lawyers. Yet, the recent Supreme Court decision of Legal Services Corporation v. Velazquez provides a rare opportunity for free speech supporters to rally around litigators. Legal Services Corporation (“LSC”) supporters achieved a rare victory against staunch conservatives in Congress who continue chipping away at their program. This comment examines the circumstances surrounding the case and its legal issues.

This comment first outlines a factual context of the Legal Services Corporation, and the details that laid the foundation for the instant lawsuit. Second, this comment explores the relevant legal background, and articulates the pertinent legal issues surrounding this case. Third, this comment examines the Supreme Court’s majority and dissenting opinions. Next, this comment analyzes the case from a public policy perspective and attempts to predict the effect the Court’s decision may have on the Legal Services Corporation. Lastly, this comment expresses discontent for the current state of the law in this area, proposes a clearer legal framework for determining the constitutionality of government program restrictions, and challenges the Supreme Court to clarify the befuddled state of the law so lawyers, Congress and judges can more accurately predict the outcome of such constitutional legal disputes.

II. BACKGROUND OF LEGAL SERVICES CORPORATION

The Legal Services Corporation’s roots can be traced back to President Lyndon B. Johnson’s War on Poverty. As part of this program,

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Congress created the Office of Economic Opportunity (OEO) to operate programs to assist with poverty in the United States, including legal services to the poor. Immediately, conservative political opposition strove to eliminate this legal services program. Because of the controversy surrounding the OEO's program, Congress and the Nixon administration "focused on establishing a congressionally funded, but politically independent, legal services program."

In 1974, Congress created the Legal Services Corporation (LSC) as a program that would provide legal services to those who would be "otherwise unable to afford adequate legal counsel." Congress declared that the LSC "must be kept free from the influence of or use by it of political pressures." In accomplishing this goal, LSC attorneys were provided with "full freedom to protect the best interests of their clients."

Since its inception, LSC funds, in the form of grants, have been distributed to recipients who provide legal services to low-income individuals. These grantees generally rely on LSC funding as well as monies from a variety of other private and public sources. LSC funds have been described as "the primary vehicle for insuring that the poor are included in this nation's legal system."

Even with this public interest background, controversy has shrouded the workings of LSC because of the increasing number of restrictions placed on the "permissible uses of federal funds by recipient organizations." In 1996, Congress restricted the allocation of LSC funds to prohibit legal assistance for: lobbying activities, class action suits, aliens, activism, attorney profits, abortion, criminals, and welfare reform. Additionally, LSC legislation prohibited grantees from providing legal assistance for a restricted purpose even when the funds were generated from other sources.

The most controversial restriction (and at issue in the instant case) involved welfare reform litigation. This restriction prohibited "LSC recipients from participating in 'litigation challenging laws or regulations
enacted as part of an effort to reform a Federal or State welfare system." Recipients could provide legal assistance to individuals seeking relief from a welfare agency; however, the restriction barred suits involving "an effort to amend or otherwise challenge existing" welfare laws. Understandably, LSC funded lawyers found this restriction particularly prohibitive.

In response to these heightened restrictions, numerous individuals and organizations filed suit in the United States District Court for the Eastern District of New York against LSC, challenging the constitutionality of certain provisions of the Act by asserting that the restrictions violate the First Amendment. A separate group of plaintiffs filed a similar suit in the federal District Court for the District of Hawaii in response to the same 1996 restrictions.

III. CONSTITUTIONAL FRAMEWORK

A. Government Restriction vis-à-vis First Amendment Rights

To fully understand the recent decision of Legal Services Corporation v. Velazquez, one must understand the paradox between First Amendment rights granted by the Constitution and government subsidies that the Constitution does not require Congress to allocate. The question ultimately becomes: if the government is not obligated by the Constitution to provide certain funding or programs, why should First Amendment rights apply to the restrictions the government chooses to place on the funding program? The government understandably wants to control how budget dollars are spent; yet, in effectively constraining its budget, First Amendment rights may be limited. Therefore, the Supreme Court

20. See Lewis, supra note 15, at 1181; see also Kathleen M. Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1413, 1415 (1989)(explaining the debate in terms of the "government may not do indirectly what it may not do directly" versus "the greater power to deny a benefit includes the lesser power to impose a condition on its receipt").
21. See Lewis, supra note 15 at 1181.
has been charged with determining when those government restrictions have gone so far as to violate the First Amendment.

B. Government Funding Restrictions Constitutional Analysis

In recent Supreme Court opinions, the Court has alluded to numerous legal inquiries courts can use in examining constitutional challenges to government restrictions.\(^2^2\) Two legal issues often discussed in these types of cases include: first, the relationship between the government and the grantee of the government’s subsidy must be characterized, and second, the disputed restriction must be classified as viewpoint neutral or viewpoint discriminatory.

1. Characterizing the relationship between the government and the grantee.

The Supreme Court often discusses the relationship between “the government and the recipient of federal funds upon whom the restrictions are placed.”\(^2^3\) Understanding this relationship can assist in determining the constitutionality of a particular restriction on the government funded program.\(^2^4\) Grantees can either fall under a limited public forum or non-public forum characterization.\(^2^5\)

The Supreme Court has explained that a limited public forum consists of a place or organization that the State “has opened for use” for “expressive activity.”\(^2^6\) In essence, in programs that are intended to give a limited public forum, the government “provides funding to independent actors.”\(^2^7\) Thus, the government retains control over the forum it created through a specific program, yet the government “does not control the independent actors participating in the forum.”\(^2^8\)

On the other hand, the Court has explained that a nonpublic forum consists of a place or organization that the government reserved for an “intended purpose.”\(^2^9\) In this forum, the government funds individuals or grantees to serve as government agents.\(^3^0\) In a nonpublic forum, the government may regulate the “time, place, and manner regulations” and may impose other restrictions reasonably necessary to maintain its intended

\(^2^2\) Often called the unconstitutional conditions doctrine. See Sullivan, supra note 20, at 1415.

\(^2^3\) Yoder, supra note 2, at 849.

\(^2^4\) See id.


\(^2^6\) Perry, 460 U.S. at 45.

\(^2^7\) Yoder, supra note 2, at 849.

\(^2^8\) Id. at 851.

\(^2^9\) Perry, 460 U.S. at 46.

\(^3^0\) See Yoder, supra note 2, at 849.
purposes. Because these grantees are viewed as government agents, the government is able to organize these programs in order to restrict or promote certain policies and goals.

2. Viewpoint discrimination in regards to nonpublic forum and limited public forum classification.

After determining whether the government program is classified as a nonpublic forum or limited public forum program, only then does the concept of viewpoint discrimination become important. Government program restrictions falling under the nonpublic forum classification can be both viewpoint discriminatory and constitutional, while those falling under the limited public forum classification can be deemed unconstitutional if viewpoint discriminatory.

a. Explanation of viewpoint discrimination

While the Supreme Courts’ opinions as a whole have resulted in "uncertainty about the meaning of viewpoint discrimination," some conclusions have been made to assist in articulating the meaning of viewpoint discrimination, and its relationship to claims asserting First Amendment violations. First, it is important to distinguish between viewpoint discrimination and content discrimination. The distinction between viewpoint and content discrimination proves important because, historically, the Court has concluded that viewpoint discrimination may violate the First Amendment, while content discrimination often will not.

Several cases provide examples of this distinction. Both Perry and Rosenberger observe that content discrimination involves discrimination against speech because of its subject matter, while viewpoint discrimination involves discrimination because of the speaker’s specific motivating "ideology, opinion, or perspective."

Several cases examined the distinction in the context of educational facilities. For example, in Lamb's Chapel, the Court held that permit-
ting school property to be used for the presentation of all views about family issues and child rearing except those dealing with the topic from a religious standpoint discriminates on the basis of viewpoint.\textsuperscript{41} Again, in \textit{Rosenberger}, the Court concluded that the University did "not exclude religion as a subject matter" but discriminated against journalistic endeavors with "religious editorial viewpoints."\textsuperscript{42} Both opinions found viewpoint discrimination.

b. Speech within a limited public forum is unconstitutional if viewpoint discriminatory

In most limited public forum cases,\textsuperscript{43} the Court consistently has held any restriction deemed viewpoint discriminatory unconstitutional.\textsuperscript{44} For example, in \textit{Widmar}, a case involving meeting facilities for student groups in a university, the Court held that the First Amendment forbids the government from enforcing exclusions from a limited public forum, like those of a university, even if it was not required "to create the forum in the first place."\textsuperscript{45}

Further cases articulate the importance of viewpoint neutrality in limited public forums.\textsuperscript{46} In \textit{Lamb's Chapel}, the Court held that a school district authorizing public, after-hours use of school facilities for civic, social, and entertainment, but not religious purposes constituted unconstitutional viewpoint discrimination.\textsuperscript{47}

The \textit{Rosenberger} opinion further expanded the limits of this legal issue, concluding that the university's student activity fee fund constituted a "forum more in a metaphysical than in a spatial or geographic sense, but the same principles" regarding limited public forum applied to this program.\textsuperscript{48} This line of cases clarifies that viewpoint discrimination in limited public forums usually violates the First Amendment's free speech clause.

\textsuperscript{41} See \textit{Lamb's Chapel}, 508 U.S. at 393.
\textsuperscript{42} \textit{Rosenberger}, 515 U.S. at 831.
\textsuperscript{44} See \textit{Casarez}, supra note 25, at 522.
\textsuperscript{45} \textit{Widmar}, 454 U.S. at 269. See also \textit{Perry}, 460 U.S. at 45 (discussing public property which the State has determined should be used for expressive activity); \textit{Casarez}, supra note 25, at 524 (discussing the \textit{Widmar} holding).
\textsuperscript{46} See \textit{Lamb's Chapel}, 508 U.S. at 393-94; \textit{Rosenberger}, 515 U.S. at 830; \textit{Perry}, 460 U.S. at 45.
\textsuperscript{47} \textit{Lamb's Chapel}, 508 U.S. at 386.
\textsuperscript{48} \textit{Rosenberger}, 515 U.S. at 830. See \textit{Casarez}, supra note 25, at 526.
c. Speech within a nonpublic forum is constitutional even if viewpoint discriminatory

Speech, however, confined to a nonpublic forum likely will not be held to the same strict standard as speech in a public forum. In one recent case, viewpoint discrimination was allowed because the Court found the government had created a nonpublic forum. The Court, in Rust, upheld the government’s Title X prohibition on abortion-related advice, concluding that the government created a program to convey a particular policy, not to encourage private speech. The Rosenberger decision further clarified Rust, explaining, “when a government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.” Thus, appropriate forum classification becomes important in discussing viewpoint discrimination.

C. Litigation is an activity protected by the First Amendment.

In analyzing viewpoint discrimination cases that violate the First Amendment, the court grants certain trades special consideration. In particular, the press historically has been given broad First Amendment protection.

The Supreme Court consistently has held that the government cannot distribute subsidies to the press in a viewpoint discriminatory manner, regardless of the government’s intended purpose of the funding program. For instance, the Court asserted that broadcasters under the First Amendment are entitled to exercise the “widest journalistic freedom consistent with their public duties.” The Court explained that broadcasters are engaged in a “vital and independent form of communicative activity,” and neither the FCC nor Congress can impose restrictions discriminatory in viewpoint.

In subsequent cases, the Court further articulated the press’ special status in First Amendment claims. The Court explained that the “First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming.” Allowing such access
would result in a "further erosion of the journalistic discretion of broadcasters."  

The Supreme Court has also classified litigation as a specially protected First Amendment activity. In fact, the Court has concluded that litigation is entitled to the highest level of protection under the First Amendment. The Court made special note that litigation was one of the few avenues available to minorities seeking redress for their grievances, and full access to the judicial system may be the most effective method of communicating minority groups' "ideas and beliefs of our society."

Numerous decisions since *Button* have reaffirmed and expanded the notion that the First Amendment specially protects litigation. Most recently, in *Polk County v. Dodson*, the Court held that counsel should be "free of state control," and the client should receive "the services of an effective and independent advocate." Thus, like the press, litigation has been deemed a specially protected activity under the First Amendment.

### IV. **LEGAL SERVICES CORPORATION v. VELAZQUEZ**

#### A. Procedural History

The instant case was filed in the District Court, alleging the restrictions on the use of LSC funds violated the First and Fifth Amendments. The court held that the four contentious restrictions were a "permissible construction" of the Act, as well as appropriately "tailored to the government's legitimate interests." Thus, the court denied Plaintiff's request for a preliminary injunction.

On appeal to the Second Circuit, the court upheld three restrictions as constitutional because they all prohibited the LSC grantees' involvement, regardless of the viewpoint. However, the court reversed the de-

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59. *Id.*
65. *Polk County*, 454 U.S. at 312.
68. See *id.* at 327.
70. *See Velazquez*, 164 F.3d at 768-73.
nial of a preliminary injunction with respect to § 504(a)(16),\footnote{The relevant part of § 504(a)(16) states: None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity ... that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law. (emphasis added).} the restriction preventing LSC grantees from challenging existing welfare rules.\footnote{See supra notes 13-16, 66, 71-73 and accompanying text.} The majority opinion held the qualification in the welfare restriction constituted impermissible viewpoint discrimination and, thus, violated the First Amendment.\footnote{See Velazquez, 164 F.3d. at 769. See also Omnibus Consolidated Rescission and Appropriations Act of 1996, § 504(a)(16) (the qualification states that the representation could not "involve an effort to amend or otherwise challenge existing law.").} Thereafter, LSC filed a petition for certiorari challenging the Second Circuit’s opinion, and the Supreme Court granted its request.

**B. Supreme Court Opinion**

The Supreme Court upheld the Second Circuit’s decision, basing their conclusion on several lines of reasoning.\footnote{See Legal Servs. Corp. v. Velazquez, 121 S. Ct. 1043 (2001).}

1. Viewpoint based restrictions are improper when the government program was designed to facilitate private speech.

The Court determined that the LSC program was intended to “facilitate private speech, not promote a government message.”\footnote{Legal Servs. Corp. 121 S. Ct. at 1049 (comparing the LSC program with the student activity fee fund in Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)). \textit{Cf.} Bd. of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 235 (2000) (explaining that viewpoint based funding decisions are allowed when the government itself is the speaker).} The Court contrasted the LSC program with the Title X program in \textit{Rust}, explaining that Title X was intended as an outlet for the government to promote its own policies or advance a particular idea, thereby giving the government a wider latitude to impose restrictions when the "government’s own message is being delivered."\footnote{Id.}

Instead, the Court concluded that the LSC program is more similar to the \textit{Rosenberger} program and falls into the limited public forum classification where viewpoint discrimination is unconstitutional.\footnote{Id.} Notwithstanding, the Court was unable to conclude that the purpose of the LSC was to "encourage a diversity of views," as the Court determined in \textit{Rosenberger}.\footnote{Id.}
Further, the Court looked at the role of the LSC funded lawyer. The Court explained that Congress funded LSC recipients to enable lawyers to “represent the interests of indigent clients.” The Court found that the LSC funded “lawyer is not the government’s speaker,” but is instead one who “speaks on the behalf of his or her private, indigent client.” Therefore, the Court held that LSC funded a limited public forum and that restrictions viewpoint discriminatory in nature should be held unconstitutional.

Next, the Court briefly addressed why this particular restriction was viewpoint discriminatory. The Court explained that the “restriction operates to insulate current welfare laws from constitutional scrutiny and certain other legal challenges, a condition implicating central First Amendment concerns.” Furthermore, the Court asserted that the “Constitution does not permit the Government to confine litigants and their attorneys in this manner.” The Court warned that they “must be vigilant” when our legislature passes laws and restrictions that “insulate its own laws from legitimate judicial” challenges.

2. Mission of judiciary function

The important role lawyers play in society provided a second reason for the Court to conclude that the restriction violated the First Amendment. The Court proclaimed that under the “canons of professional responsibility,” a lawyer is mandated to exercise “independent judgment on behalf of the client,” and the lawyer will be “free of state control.”

The Court also explained that interpretation of the law and of the Constitution is the “primary mission of the judiciary.” Therefore, if the restriction were deemed constitutional, the Court reasoned, cases presented by LSC funded lawyers would be unable to argue before the court “serious questions of statutory validity.”

79. See id.
80. Id.
81. Id.
82. See id. at 1052.
83. Id.
84. Id.
85. Id.
86. See id.
87. Id. (quoting Polk County v. Dodson, 454 U.S. 312, 321-22 (1981)).
88. Id. at 1050 (citing the holding in Marbury v. Madison, I Cranch, 137, 177 (1803)).
89. Id. at 1051.
3. Government must first determine the purpose of a particular medium before attempting to impose restrictions.

Here, the Court found that the legal profession might be analogous to the press, as trades given broad First Amendment protection. The Court paralleled this case with its decisions in two recent broadcasting cases, which held that prohibitions on broadcasts were impermissible viewpoint restrictions. The Court concluded that the First Amendment "forbade" the government from suppressing "speech inherent in the nature" of the broadcast medium.

Similarly, the Court also compared LSC with limited public forum cases addressing student publications, concluding that while certain restrictions may be necessary, those restrictions cannot be viewpoint discriminatory. The Court analogized the broadcast and student publication cases to LSC by reasoning that this LSC restriction "distorts the legal system by altering the traditional role of lawyers in much the same way broadcast systems or student publication networks were changed" when restrictions were imposed.

4. No alternative representation is available to client if counsel is forced to withdraw due to LSC restrictions.

Here, the Court made a public policy argument, claiming that if an attorney is forced to withdraw from a representation due to this LSC restriction, "the client is unlikely to find other counsel." The Court explained that Congress' intended purpose for the LSC was to make available legal assistance "to persons financially 'unable to afford'" the services. Unfortunately, the Court concluded that there exists no "alternative channel for expression of the advocacy Congress seeks to restrict." The Court distinguished this situation from Rust, arguing that a patient

90. See id. at 1050.
92. Id. at 1051 (citing FCC v. League of Women Voters of Cal., 468 U.S. 364, 396-97 (1984)).
95. Legal Servs. Corp., 121 S. Ct. at 1051.
96. Id. (quoting 42 U.S.C. § 2996 (2) (2001)).
97. Id.
could receive abortion counseling through a different organization not funded by Title X.98

5. The argument that restrictions are necessary to define the scope of the LSC program is unconvincing.

Finally, the Court concluded that the restriction was not necessary to define the scope of the LSC program.99 It reasoned, “Congress cannot recast a condition on funding as a mere definition of its program in every case,” otherwise, the First Amendment would be reduced to a “simple semantic exercise.”100

C. Dissenting opinion

Justice Scalia, in his dissenting opinion,101 claimed that Rust is indistinguishable from the instant case, and thus “compels the conclusion that § 504(a)(16) is constitutional.”102 First, Scalia contended that like the Rust program, the LSC Act does not create a limited public forum encouraging a “diversity of views.”103 Additionally, he argued that the LSC restriction does not discriminate on the basis of viewpoint because it funds “neither challenges to nor defenses of existing welfare law.”104 Instead, the prohibition acts to restrict subsidizing one kind of litigation.105

Second, Justice Scalia disagreed with the majority’s assertion that the welfare funding restriction seeks to control a medium of expression traditionally found to be a public forum for free speech.106 He found the analogies to the broadcasting and student newspaper cases unconvincing and misplaced.107

Finally, the majority’s assertion that a welfare recipient will be unlikely to find other counsel troubled the dissenters.108 Justice Scalia concluded that the restriction leaves the welfare recipient in “no worse condition than he would have been in had the LSC program never been en-

98. See id. See also Rust v. Sullivan, 500 U.S. 173, 203 (1991) (discussing that patients can seek out other options for abortion counseling).
100. Id. at 1052.
101. See id. at 1053-60 (Scalia, J., dissenting, joined by Rehnquist, C.J., O’Connor, J., & Thomas, J.).
102. Id. at 1055.
103. Id. Cf. Rust, 500 U.S. at 200 (discussing the similarities between Title X and LSC programs).
105. See id.
106. See id. at 1055–56.
108. See Legal Servs. Corp. at 1057.
He concluded that "the LSC subsidy neither prevents anyone from speaking nor coerces anyone to change speech," and is indistinguishable from Rust. Thus, Justice Scalia concluded, the LSC restriction should be declared constitutional.

V. ANALYSIS

While the outcome of this case should be applauded, the Court's reasoning should have been more forthright. Unfortunately, the Supreme Court once again failed to clarify the framework for courts to use in examining constitutional challenges to restrictions placed on government programs, thereby leaving the door open for lower courts to construe such challenges in a myriad of ways. Instead of skirting around the legal issues, as the majority did in coming to their decision, the Court should have boldly and clearly explained the appropriate classifications and factors to be considered in properly ruling on the constitutionality of each restriction. Given the confusing state in which the law concerning the constitutionality of restrictions on government programs exists today, there are several conclusions that can be drawn from this most recent decision, as well as other Supreme Court cases addressing the issue.

A. Public policy dictates whether a certain restriction is unconstitutional based on viewpoint discrimination.

Over the past few decades, the Justices on both the conservative and liberal sides of the Court, depending on the subject matter, have successfully argued that a particular restriction is unconstitutional when viewpoint discriminatory. Furthermore, these recent opinions have directly created the current confusing state of the law in this area.

For example, in Rust the restriction centered on abortion, a highly controversial topic in our courts today. Since Roe v. Wade, the conservative members of the Court steadily have attempted to limit access to abortion and public information regarding abortion. Rust provided another opportunity to restrict access to information regarding abortions. The majority opinion, written by Chief Justice Rehnquist, a conservative member of the Court, based its conclusion on a viewpoint discrimination

109. Id.
110. Id. at 1058 (concluding that the holding in Rust v. Sullivan, 500 U.S. 173 (1991) is indistinguishable from the present case).
111. See id.
112. See Rust, 500 U.S. at 177-78.
115. See Christina E. Wells, Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey, 95 Colum. L. Rev. 1724, 1725 (1995) (arguing that the Rust decision more clearly articulated the Court's emerging view that abortion is "no longer a fundamental right.").
First Amendment analysis. However, because of the ambiguities present in this line of cases, the Court successfully argued that the program's purpose was to convey government messages, and thus classified the Title X program as a nonpublic forum. In conclusion, the Court held the program’s viewpoint discriminatory abortion restriction constitutional.

Conversely, the Court's conservative members aligned to reach the opposite conclusion of that in Rust in three more recent cases. In Lamb’s Chapel and Milford, religious groups’ access to school facilities was the central issue, another highly controversial topic in the courts today. In contrast to Rust, the Court concluded that a school district opening its facilities creates a limited public forum, rather than a nonpublic forum. By framing the issue in this manner, the Court had predetermined its conclusion. Thus, the Court determined that the restriction excluding religious groups from meeting on school facilities constituted unconstitutional viewpoint discrimination.

In Legal Servs. Corp. v. Velazquez, public policy considerations once again dictated the Court’s decision. This time, however, the liberal side of the Court successfully argued unconstitutional viewpoint discrimination. The legal profession and litigation were the disputed topic. The Court again concluded that the LSC’s intended purpose placed the program into the limited public forum classification. Thus, because the qualification on the welfare restriction discriminated based on viewpoint, the restriction violated the First Amendment’s free speech clause.

Another interesting distinction that the Legal Servs. Corp. opinion pointed out was the supposedly apparent differences between the ethical obligations of the medical and legal professionals. In Rust, the dissenting opinion sensibly argued that the “physician has an ethical obliga-

117. See supra note 25 and accompanying text.
118. See Rust, 500 U.S. at 194.
119. See id.
121. See Milford, 2001 WL 636202, at *1; Lamb’s Chapel, 508 U.S. at 386.
123. See id at *6.
125. See Legal Servs. Corp., 121 S. Ct. at 1043.
126. See id. at 1046.
127. See id. at 1052.
128. See id. at 1050.
129. See id. at 1049-50.
tion to help the patient make choices from among the therapeutic alternatives consistent with good medical practice," yet the majority opinion failed to be swayed by this argument.130

In Legal Servs. Corp., the Court discussed the legal profession's ethical obligations in support of its holding, thereby distinguishing it from Rust.131 The Court stressed the legal profession's "canons of professional responsibility," which mandates the lawyer exercise "independent judgment on behalf of the client," implying a differentiation between legal and medical professions.132

But, in fact, both physicians and lawyers are professionals with similar ethical obligations, including the requirement of making independent judgments. For physicians, courts have held that government restrictions conflict with the obligation to make independent medical judgments because a physician's professional ethics require that he have free and complete exercise of his medical judgment and skill.133 Similarly, courts have held that a lawyer's "professional judgment in rendering" legal services cannot be directed or regulated by the person who recommends, employs, or pays the lawyer.134

It appears that the majority in both cases passed over the ethical responsibilities of the medical profession in order to support their position. The Rust majority was so compelled to further restrict access to abortion counseling, and in Legal Servs. Corp., the majority was so intent on proclaiming the welfare restriction unconstitutional by way of the virtues of litigation, that each time the Court failed to perceive the obvious similarities between the medical and legal professional obligations.

Public policy considerations take center stage in determining whether a restriction violates the First Amendment. The viewpoint discrimination analysis is so wrought with ambiguities that at this juncture, it is foreseeable that nearly every issue presented before the Court could be argued viewpoint discriminatory in nature and therefore unconstitutional.


132. Id. (quoting Polk County v. Dodson, 454 U.S. 312, 321-22 (1981)).


134. Polk County v. Dodson, 454 U.S. 312, 321 (1981). See also Post, supra note 133, at 172-73 (further discussing the ethical and professional responsibilities of a lawyer); supra notes 60-65, 87-89, 131-32 and accompanying text.
B. The Court’s holding in Legal Servs. Corp. likely will have minimal effect on the LSC program.

Originally, the plaintiffs in Legal Servs. Corp. v. Velazquez sought a preliminary injunction against four of the 1996 restrictions. While the Supreme Court holding may appear as a victory at first glance, those plaintiffs brave enough to initially challenge the LSC restrictions likely did not feel properly remedied.

From its inception, LSC proponents have battled with Republican Congressmen and women to keep LSC a viable program. To continue receiving funding, LSC supporters have been forced to compromise with more conservative factions, allowing the implementation of program restrictions. Only a few renegade LSC lawyers have resisted the whitewashing away of the LSC program’s core. Thus, the LSC’s recent success in the Supreme Court does little to return the LSC program back to its 1974 stature.

However, even with this minimal victory, supporters who have hesitated to openly oppose new restrictions may find the courage to challenge the constitutionality of further LSC restrictions. With a Supreme Court opinion serving as precedent backing LSC supporters, conservative Congressmen and women bent on “de-funding” the program may hesitate to impose additional restrictions or may gravitate towards attacking other liberal legislative programs. Once again the Court could have clarified to supporters and opponents of the LSC the possibility that other restrictions violated the Constitution if they had been more forthright in their opinion. However, both sides are now more befuddled than ever about the question of the constitutionality of a certain restriction.

C. A New Analytical Model for Subsidized Speech & Viewpoint discrimination cases

Based on the recent trend of the Supreme Court to grant certiorari to cases involving viewpoint discrimination and subsidized speech, a similar case likely will be presented before the Court in the near future, providing another opportunity for the Court to clarify the legal framework for constitutional challenges to restrictions on government programs. Such a case would provide an opportunity for the Court to redeem itself

136. See Legal Servs. Corp., 121 S. Ct. 1046 (holding that a clause of one of the 1996 restrictions violated the First Amendment).
137. See Roth, supra note 60, at 108-09.
138. See id. at 108.
139. See id. at 109.
140. See id.
from the criticism discussed earlier, and boldly assert a working model for these types of constitutional challenges. Below outlines a potential framework that the Court should consider asserting in future cases.

Three legal determinations should be made to ascertain the constitutionality of a particular government restriction. First, the Court must characterize the relationship between the government and the grantee of the government’s subsidy. Second, the disputed restriction must be classified as viewpoint neutral or viewpoint discriminatory. Third, additional factors need to be taken into consideration to determine if a certain government program should be specially protected.

1. Classifying the relationship between the government and the grantee of the government’s subsidy.

The relationship between the government and the grantee should be classified as either in the nonpublic forum or limited public forum realm. In the past, the Court has deemed this classification important and has affirmatively used these categories, but it ultimately failed to provide clear guidelines to determine what category a specific subsidy falls under. To assist in determining the appropriate classification, courts should look at the following factors: legislative history, the area being subsidized, and other Constitutional protections for the area being subsidized.\(^{141}\)

First, a court should examine the subsidy’s legislative history to accurately determine the classification, looking specifically for several items. If Congress “conceptualized persons as means to an end rather than as autonomous agents,” or if the “attainment of institutional ends” was deemed an “unquestioned priority,” the subsidy may fall within the nonpublic forum classification.\(^{142}\)

In addition, a court should characterize the area being subsidized to determine the proper classification of the subsidy. For example, subsidies addressing freedom of expression seriously limit the government’s ability to regulate through restrictions.\(^{143}\) The original Constitution and its Amendments decree the utmost deference by Congress. Any subsidy regarding the Constitution, therefore, most likely will fall under the limited public forum classification.

2. Classifying the restriction as viewpoint neutral or viewpoint discriminatory

After determining the proper classification of the government subsidy as either in a nonpublic forum or limited public forum, only then

\(^{141}\) This list should not be seen as exhaustive.

\(^{142}\) See Post, supra note 133, at 171.

\(^{143}\) See id.
does the concept of viewpoint discrimination become important. Government program restrictions falling under the nonpublic forum classification can be both viewpoint discriminatory and constitutional while those falling under the limited public forum classification can be deemed unconstitutional if viewpoint discriminatory. While the Court has occasionally alluded to this differentiation, it also has befuddled the area by forbidding viewpoint discrimination whenever it occurs within subsidies relating to speech, regardless of its classification as either a nonpublic or limited public forum. In the next case the Court decides, the majority must clearly assert that viewpoint discrimination is allowed in nonpublic forum subsidies.

To accurately classify a restriction as viewpoint neutral or viewpoint discriminatory, several factors can be looked at to simplify this characterization. First, a court should determine if the speaker's "ideology, opinion, or perspective," rather than the subject matter of the speech, is being limited by the restriction. If the subsidy restriction involves the discrimination of a particular speaker's perspective, then it constitutes viewpoint discrimination; if the restriction discriminates against the entire spectrum of a particular subject matter, then the discrimination is viewpoint neutral and therefore content discriminatory. Overall, only viewpoint discriminatory restrictions can be held unconstitutional.

3. Addressing additional factors to determine if a certain subsidy should receive special protection.

When a court has completed the first two legal determinations of this framework, it should further explore the subsidy and restriction to decide whether it deserves special protection. Certain industries, trades and professions should be given special consideration in this analysis. The Court has already determined that government subsidies relating to the press deserve special protection. Additionally, the Court, in *Legal Servs. Corp.*, followed a long line of cases that granted lawyers a special degree of protection.

Other industries and professions also deserve this special protection, and case law and the Constitution provide a guide to appropriately determine which industries and professions should receive this protected status. Physicians are the most obvious profession deserving this recog-
nition. Other areas, however, likely deserve special consideration. Therefore, addressing these additional factors to determine a possible protected status must be included in such a legal analysis.

By and large, following this legal framework for constitutional challenges to restrictions on government programs should clarify the current confusing state of First Amendment jurisprudence. While this framework can by no means completely ease the tensions that exist in this area of the law, it should assist the courts in more fairly determining the constitutionality of a particular subsidy restriction.

VI. CONCLUSION

While it is exciting that the Court’s liberal justices and LSC supporters can claim a small victory with their holding in Legal Servs. Corp. v. Velazquez, in reality, mixed results will likely flow from the Court’s decision. With this opinion, the Court has thoroughly complicated the law regarding the constitutionality of viewpoint discriminatory restrictions, and lower courts are now faced with an even more confusing legal framework to work from. This decision demonstrates an even more compelling need for the Court to lay out a comprehensive legal framework for constitutional challenges to restrictions on government programs.

Only after the Court establishes a more comprehensible framework can free speech advocates effectively challenge the constitutionality of other subsidy restrictions. Until that time, no party who brings a constitutional challenge to such restrictions can predict the ultimate ruling. Liberal free speech advocates must contain their excitement with the current decision and join with other First Amendment supporters, whether a racist, a journalist or a politician, and show their dissatisfaction with the majority opinion, thereby encouraging the Supreme Court to hear another case in order to clarify the current state of law. Only then will all First Amendment proponents feel secure that First Amendment rights are protected impartially.

Carrie S. Bernstein

148. See supra notes 129-36 and accompanying text. Although the Court failed to extend this protected status to physicians in Rust, the Court should look for an upcoming case involving the medical profession to remedy this lapse in judgment.

THE SUPREME COURT’S DECISION IN LEGAL SERVICES CORPORATION V. VELAZQUEZ AND THE ANALYSIS UNDER THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

INTRODUCTION

The First Amendment of the United States Constitution guarantees every individual the right to speak freely, meaning that the government cannot impose restrictions on a person’s right to speak unless they have compelling reasons. Often, the government provides financial funding to certain individuals or groups who will then convey a governmental message. Yet, when the government provides subsidies or grants to particular individuals, groups or corporations, First Amendment principles are often at odds. On one hand, the government has the right to delineate the scope of their grant programs and can require grant recipients to abide by certain conditions or restrictions. Yet, these conditions are unconstitutional if they penalize individuals for exercising their constitutional rights.

In Legal Services Corp. v. Velazquez, the United States Supreme Court had to decide whether a federal grant program was unconstitutional because it restricted the legal arguments government-funded attorneys could assert on behalf of their indigent clients. In holding that the restriction was unconstitutional, the Court failed to follow traditional unconstitutional conditions analysis and instead announced a novel theory that the restriction distorted the attorney’s role in the judicial system.

Part I of this paper examines the formation of the Legal Services Corporation (“LSC”) and the restrictions that have been placed on this corporation. Part II discusses the legal precedent in government subsidy.
cases. Part III describes the procedural posture and the Court’s analysis in *Legal Services Corp. v. Velazquez.* Part IV argues that the majority’s opinion did not follow established precedent and that the distortion principle they announced is erroneous. In conclusion, Part V looks to the future of government subsidy cases.

I. HISTORICAL BACKGROUND

A. The History of The Legal Services Corporation

Congress created the private, nonprofit LSC when it enacted the Legal Services Corporation Act of 1974. The LSC’s purpose is to provide “financial support for legal assistance in non-criminal proceedings or matters to persons financially unable to afford legal assistance.” The LSC does not actually represent indigent clients but instead administers grants to qualified local legal aid offices (called “grantees”) rendering free legal assistance to between 1,000,000 and 2,000,000 indigent clients annually.

Congress has placed significant restrictions on the scope of activities in which LSC grantees may participate. While President Carter strengthened the LSC in the late 1970’s, President Reagan’s administration established many restrictions that were “designed to rein in the per-

8. See infra notes 25-58 and accompanying text.
9. See infra notes 59-104 and accompanying text.
10. See infra notes 105-115 and accompanying text.
12. Id. § 2996b(a). Furthermore, the Act states that:

[i]the Congress finds and declares that—
(1) there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances;
(2) there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program;
(3) providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice and assist in improving opportunities for low-income persons consistent with the purposes of this chapter;
(4) for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws;
(5) to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures; and
(6) attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession.

Id. §2996.

13. Velazquez v. Legal Servs. Corp., 164 F.3d 757, 759 (2nd Cir. 1999) (citing Texas Rural Legal Aid v. Legal Servs. Corp., 940 F.2d 685, 688 (D.C. Cir. 1991)). The LSC also ensures that the grantees abide by the restrictions imposed by Congress. Id.

ceived left-wing radicals allegedly in control of legal services programs across the country." 15 When Republicans gained the majority in Congress in 1994, they again tried to dismantle the LSC but were ultimately vetoed by President Clinton. 16 As a compromise, Congress agreed to retain the LSC in exchange for the imposition of new restrictions on grantees. 17 Consequently, Congress passed the Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("OCRAA") 18 which reduced LSC’s funding by thirty percent and established new restrictions on grantees. 19 One such restriction was the so called "suit-for-benefits" exception.

B. The "Suit-for Benefits" Restriction

The "suit-for-benefits" restriction is found in section 504(a)(16) of the OCRAA and prohibits LSC grantees from participating in "litigation ... involving an effort to reform a Federal or State welfare system." 20 Furthermore, LSC-funded attorneys may represent a client "who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law." 21 If an LSC-funded attorney determines that a client seeks to involve her in prohibited litigation, the attorney must advise the client that she will be unable to accept the representation; 22 or if the litigation is underway, the attorney must withdraw. 23 Consequently, this restriction meant that LSC-funded attorneys would continue to receive federal grants as long as they did not challenge the validity of existing welfare law. The plaintiff-respondents in Velazquez argued that this condition infringed their First Amendment free speech rights. 24

II. CONSTITUTIONAL ANALYSIS IN GOVERNMENT SUBSIDY CASES

When challenges are made to the constitutionality of restrictions imposed on recipients of government subsidies, the Supreme Court has traditionally relied on two competing doctrines: the right-privilege dis-

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16. See J. Dwight Yoder, Note: Justice or Injustice for the Poor?: A Look at the Constitutionality of Congressional Restrictions on Legal Services, 6 WM. & MARY BILL RTS. J. 827, 834 (1998).
17. Id.
20. 45 C.F.R. § 1639.3 (2000).
21. Id. § 1639.4.
tinction and the unconstitutional conditions doctrine. The right-privilege distinction focuses on the inherent differences between constitutional rights and privileges granted by the government. The doctrine is based on the principle that because rights are Constitutional guarantees, the government cannot restrict them unless its justification is compelling. Privileges on the other hand are viewed more as a public charity and "may be initially given to recipients on the condition that they surrender or curtail the exercise of constitutional rights that they would otherwise enjoy." However, this doctrine has been severely criticized making the unconstitutional conditions doctrine the primary analytical tool in government subsidy cases.

The unconstitutional conditions doctrine mandates that a government-funded benefit may not obligate the recipient to surrender a constitutional right, even if the government could have withheld that benefit altogether. For example, in Speiser v. Randall, a California law conditioned the receipt of veteran property tax exemptions on the individual’s signing a declaration disavowing a belief in overthrowing the government by force or violence. In holding this law unconstitutional, the Court said: "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.

However, the Court has inconsistently applied the unconstitutional conditions doctrine in government subsidy cases making its understanding and application perplexing. According to one commentator, ana-

27. Id at 845-46.
28. Smolla, supra note 25, at 72 (citing United Pub. Workers v. Mitchell, 330 U.S. 75, 80 (1947)). See also McAuliffe v. New Bedford, 29 N.E. 517, 517 (1892) (“The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”).
29. See Perry v. Sinderman, 408 U.S. 593, 596 (1972) (criticizing the right-privilege distinction and endorsing the unconstitutional conditions doctrine). But see Charles A. Reich, The New Property, 73 YALE L.J. 733, 735 (1964) (criticizing the right-privilege doctrine and arguing that the distinction is an anachronism in an era where people depend on government for so much that is essential to survival); see also Charles A Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1255 (1965) (arguing that government benefits “are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity.”).
30. Sullivan, supra note 3, at 1415.
32. Speiser, 357 U.S. at 514-15.
33. Id. at 518. See also Perry v. Sindermann, 408 U.S. 593, 597 (1972) (explaining that “if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly.”).
34. See e.g., Regan v. Taxation with Representation of Wash., 461 U.S. 540, 546 (1983) (refusing to follow the doctrine and upholding a federal tax law provision that conditioned tax
lyzing the constitutionality of restrictions imposed on government funded grantees is particularly difficult because:

It renders uncertain the status of speakers, forcing us to determine whether speakers should be characterized as independent participants in the formation of public opinion or instead as instrumentalities of the government. And it renders uncertain the status of government action, forcing us to determine whether subsidies should be characterized as government regulations imposed on persons or instead as a form of government participation in the marketplace of ideas.\(^35\)

Accordingly, the analysis must begin by determining the nature of the relationship between the government and the restricted grantee.\(^36\) When the government provides funding to governmental speakers, “the unconstitutional conditions analysis is more deferential to the government because the state is considered a participant in the public discourse and, therefore, has the ability to organize its resources in such a way to achieve its goals.”\(^37\) However, when private speakers are the funding recipients, the analysis is similar to that applied when no governmental subsidies are involved.\(^38\)

The Court’s determination of this relationship has resulted in outcomes that are difficult to reconcile with one another. For example, in Rust v. Sullivan,\(^39\) the government chose to subsidize doctors conducting family planning counseling on the condition that they did not “encourage, promote, or advocate abortion as a method of family planning.”\(^40\) The Court held that the government’s use of private speakers to convey a government message amounted to governmental speech.\(^41\)

exempt status on the prerequisite that the organization not participate in lobbying or partisan political activities and explaining that “Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for [Taxation with Representation’s] lobbying.”); Rust v. Sullivan, 500 U.S. 173, 193 (1991) (refusing to apply the doctrine explaining that

\[\text{[the] Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.]}\]

For discussions and analysis explaining why the doctrine is confusing, see Yoder, supra note 16, at 854-60; Sullivan, supra note 3, at 1417-20; Lewis, supra note 19, at 1182-91; Cole, supra note 3, at 682-702.

36. Id. at 155 (explaining that understanding this relationship is critical because “substantive First Amendment analysis will depend on whether the citizen who speaks is characterized as a public functionary or as an independent participant in public discourse.”).
38. See Post supra note 35, at 152-54 (explaining that the analysis is similar to that described in the text accompanying notes 48-57 infra).
40. Rust, 500 U.S. at 180.
41. Id. at 193.
Similarly, in *Rosenberger v. Rector of the University of Virginia*, the state made a choice regarding what student organizations would receive government funding. Yet, in *Rosenberger* the choice was held to be unconstitutional because:

[In *Rust*], the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. It does not follow, however, . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage diversity of views from private speakers.

Consequently, in both *Rust* and *Rosenberger*, the state “selectively fund[ed] a program to encourage certain activities it believe[d] to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.” Yet, in *Rust* the speaker was considered a government actor, whereas in *Rosenberger* the speakers were private. Because both of these cases involve governmental decisions concerning the allocation of federal subsidies, the decisions are difficult to reconcile and have therefore caused confusion regarding the proper analysis for determining the government-recipient relationship.

Once this relationship is determined, the analysis follows traditional free speech principles. Consequently, courts must examine the forum where the speech occurs as well as the condition’s neutrality and precision.

When the funding recipient is a private actor and not an agent of the government, the government has created a limited public forum. When the government establishes a limited public forum, it is not required to allow persons to engage in all types of speech. However, restrictions on speech must be content-neutral - meaning it cannot discriminate on the

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44. *Id.* at 833-34 (citations omitted).
47. *Id.*
basis of viewpoint\textsuperscript{50} and the restriction must be reasonable in light of the purpose served by the forum.\textsuperscript{51}

On the other hand, where the funding recipient is an agent of the government, no public forum is created and the government can impose content-based restrictions on the recipient so long as the restrictions are proportional to the government’s funding\textsuperscript{52} and are related to the government’s message.\textsuperscript{53}

Finally, under “precision” analysis, the court will ensure that the restrictions are not overbroad or vague.\textsuperscript{54} A restriction is unconstitutionally vague if a reasonable person cannot determine what speech is prohibited and what is permitted.\textsuperscript{55} Furthermore, a restriction is overbroad if it restricts speech that is otherwise protected.\textsuperscript{56} Accordingly, restrictions must be narrowly tailored so as to ensure clarity in what speech is prohibited and limit the types of speech that are covered by the restriction to only those that are absolutely necessary to achieve the government’s purpose.

As the above discussion shows, the unconstitutional conditions doctrine is confusing because of the Court’s inconsistent application. The decisions seem to indicate that if the Court wants to uphold a restriction, it determines that the government is making a legitimate choice to fund one activity and not others.\textsuperscript{57} On the other hand, if the Court wants to strike down a restriction, it determines that the speaker is a private actor and the government is unconstitutionally conditioning their free speech rights.\textsuperscript{58} In Velazquez, the Court had the opportunity to define the parameters of the doctrine thereby clarifying its meaning. However, as discussed in Part IV, the Court utterly failed to take advantage of this opportunity and instead announced a novel rationale for its decision.

\textsuperscript{50}See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 55 (1983); Nicole B. Casarez, Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination, 64 ALB. L. REV. 501, 512 (2000) (defining “viewpoint” to mean “expression representing a particular perspective by a speaker or class of speakers.”).

\textsuperscript{51}Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 829 (1995).

\textsuperscript{52}In other words, “the government must allow for adequate alternative channels for engaging in restricted speech or activities using nongovernment funds.” Yoder, supra note 16, at 854.


\textsuperscript{54}See Yoder, supra note 16, at 851.


\textsuperscript{57}See, e.g., Rust, 500 U.S. at 193.

III. THE VELAZQUEZ DECISION

A. Procedural Posture

LSC-funded attorneys from New York City, along with private LSC contributors, and state and local officials who donated to LSC grantees ("respondents") filed suit against the LSC9 (“petitioners”) in the United States District Court for the Eastern District of New York. The respondents sought a preliminary injunction alleging that the “suit-for-benefits” restriction violated their rights under the First Amendment to the United States Constitution.60 The district court denied the respondents’ motion holding that the regulation was appropriately tailored to the government’s legitimate interests and it permitted adequate channels for respondents to conduct restricted activities.61 On appeal, the Second Circuit reversed stating that because the “suit-for-benefits” restriction allows the distribution of funds to those who represent clients who will not challenge the existing rules of law, but denies funding to those who will challenge existing rules, the provision “clearly seeks to discourage challenges to the status quo,” and is therefore an impermissible viewpoint-based restriction on expression.62 The LSC, challenging the Court of Appeals’ conclusion that the restriction was unconstitutional, filed a petition for certiorari with the United States Supreme Court, which the Court granted.63

B. The Majority Opinion

Justice Kennedy, joined by four other Justices,64 delivered the opinion of the Court which affirmed the Second Circuit’s decision.65 The Court’s analysis began by examining the government-recipient relationship.66 It recognized that the rationale for allowing the government latitude to restrict speech when the speech delivers the government’s message is based on the fact that the government is accountable to the electorate and if the restriction is unpopular, newly elected government officials can promote a different message.67 However, this rationale does not

60. Velazquez v. Legal Servs. Corp., 985 F.Supp. 323, 326 (E.D.N.Y. 1997). The plaintiffs also challenged several other restrictions enumerated in the 1996 Act, but since the issue before the Supreme Court only dealt with the “suit-for-benefits” restriction, the challenges to these other restrictions are beyond the scope of this paper.
64. Legal Servs. Corp. v. Velazquez, 121 S. Ct. 1043 (Justices Stevens, Souter, Ginsburg and Breyer joined the majority opinion).
65. Legal Servs. Corp., 121 S. Ct. at 1053.
66. See supra notes 35-45 and accompanying text.
apply when the speech is private. Here, like the program at issue in Rosenberger, the LSC program promoted private speech rather than governmental speech, when a lawyer argues on behalf of his client, this cannot be considered government speech.

With the government-recipient relationship established, the Court then discussed forum. Because this case involved a subsidy, limited forum cases were not controlling but did provide guidance. Here, the limitation foreclosed alternative forums of expression because LSC lawyers could not undertake representation of a particular client if the client’s case would question the validity of current welfare laws. The premise behind the LSC program is to provide legal representation “to persons financially unable to afford legal assistance.” Therefore, in cases where the LSC attorney must withdraw, the indigent client will be unlikely to find another attorney, and will therefore not have another source from which they can receive legal assistance pertaining to their constitutional challenge to welfare laws.

Consequently, by not allowing LSC attorneys to advise or advocate for their clients concerning the validity of a particular welfare statute, the “suit-for-benefits” restriction altered the traditional role these attorneys play in the legal system. As Justice Kennedy explained, “[b]y seeking to prohibit the [federally funded] analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper performance of their duties and responsibilities.”

68. Id. at 1049 (citing Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 834 (1995)).
70. Legal Servs. Corp., 121 S. Ct. at 1049. According to the majority, this was the critical distinction between this case and Rust. The Rust Court held that the speech at issue there was governmental speech because the government was using private speakers to promote a governmental message. Here, however, the advice an attorney gives to her client and the arguments the attorney makes to the court cannot be classified as governmental speech. Id.
71. Id.
72. See supra notes 48-53 and accompanying text.
73. See Perry Ed. Assn. v. Perry Local Educator's Assn., 460 U.S. 37, 45-46 (1983) (establishing three types of government property: public forums, limited public forums, and non-public forums); see also, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 391-394 (1993) (holding that once the school district chose to open its facilities to community groups it could not discriminate against those engaging in religious speech unless strict scrutiny was met).
74. These cases are not controlling because by granting a subsidy, the government has merely made choices about how to spend its money; it has not created a forum in the true sense of the word. See generally Yoder, supra note 16.
75. Legal Servs. Corp., 121 S. Ct. at 1050.
76. Id. at 1051. (quoting 42 U.S.C. § 2996(a)(3)).
77. Id.
78. Id. at 1050. The Court stated “[b]y providing subsidies to LSC, the Government seeks to facilitate suits for benefits by using the State and Federal courts and the independent bar on which those courts depend for the proper performance of their duties and responsibilities.” Therefore, by restricting the arguments LSC-funded attorneys can make, the program distorts this critical relationship. Id.
exercise of the judicial power." In other words, because the LSC attorneys are unable to represent their clients zealously, there may be incomplete analysis in certain cases that will cause the public to question the sufficiency and integrity of the judicial system.

This, in turn, raises separation of powers concerns because Congress has tried to insulate Congressional welfare legislation from judicial review. Justice Kennedy explained, "[t]he statute is an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider." However, as was established in Marbury v. Madison, "[i]t is emphatically the province and the duty of the judicial department to say what the law is."

Finally, Justice Kennedy rejected the petitioners' argument that the "suit-for-benefits" restriction was necessary to define the scope of the federal program. Since the effect of the restriction was to insulate welfare laws from constitutional attack, the condition endangered the basic principle that the First Amendment "'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" Accordingly, the Constitution does not allow Congress to suppress ideas that are thought to be adverse to the best interests of the government, which is what Congress had done here.

C. The Dissent

Justice Scalia, joined by three other Justices, dissented. The dissent initially pointed out that despite the majority's agreement that the "suit-for-benefits" restriction did not directly regulate speech, did not create a public forum, and did not discriminate on the basis of viewpoint, the Court refused to apply traditional government subsidy analysis and instead "applie[d] a novel and unsupportable interpretation of [the Court's] public-forum precedents." The dissent argued that Rust was controlling and that the majority's attempts to distinguish that case were misguided.

79. Id. at 1051.
80. Id.
81. Id. at 1052.
82. Id. at 1051.
83. Id. at 1050 (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803)).
84. Id. at 1051.
85. Id. at 1052 (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 269 (1964)).
87. Id. at 1053 (Scalia, J., dissenting). Justice Scalia was joined by Chief Justice Rehnquist, Justice O'Connor and Justice Thomas.
88. Id.
89. Id. at 1058.
Applying Rust's traditional government subsidy analysis, the dissent argued the restriction was viewpoint neutral because LSC attorneys cannot represent clients who seek to challenge welfare laws or clients who seek to defend welfare laws. Furthermore, the restriction does not foreclose alternative sources of legal assistance because LSC lawyers can express their opinions concerning the constitutional validity of a welfare law and may refer the client to another non-LSC attorney who can pursue the matter.

Moreover, because the LSC Act is a federal subsidy program rather than a federal regulatory program, it does not directly restrict speech and will only indirectly restrict speech if the program is "manipulated to have a coercive effect on those who do not hold the subsidized position." Proving coercion in a limited spending program that does not create a public forum (like the LSC Act) "is virtually impossible, because simply denying a subsidy does not coerce belief." Furthermore, the test for unconstitutionality is "whether denial of the subsidy threatens to drive certain ideas or viewpoints from the marketplace." If this threat does not exist, "the Government may allocate . . . funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."

Justice Scalia then attacked the majority's contention that the restriction distorts the usual functioning of an existing medium of expression. He argued that this assertion was wrong on the law because there was no precedent to support it; the three cases the majority cited never mentioned this new principle. He argued it was also wrong on the facts

90. Id. at 1053-54.
91. Id. at 1054.
92. Id. (internal quotations omitted).
93. Id. (quoting Lyng v. Automobile Workers, 485 U.S. 360, 369 (1988)).
94. Id. (quoting Nat'1 Endowment for Arts v. Finley, 524 U.S. 569, 587 (1998)).
95. Id. (quoting Nat'1 Endowment, 524 U.S. at 587, 588).
96. Id. at 1055.
97. Id. at 1056. One case the Court cited was Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995). According to Justice Scalia, this case did not stand for the principle that the usual functioning of student newspapers is to express many different points of view, "but rather that the spending program itself had been created 'to encourage a diversity of views from private speakers.' What could not be distorted was the public forum that the spending program had created." Id. (quoting Rosenberger, 515 U.S. at 834) (emphasis in original). Additionally, Justice Scalia argued that Arkansas Ed. Television Comm'n v. Forbes, 523 U.S. 666 (1998), "discussed the nature of television broadcasting, not to determine whether government regulation would alter its usual functioning and thus violate the First Amendment[. . . ] but rather to determine whether state-owned television is a 'public forum' under our First Amendment jurisprudence." Id. (quoting Forbes, 523 U.S. at 673-74). Finally, in FCC v. League of Women Voters of Cal. 468 U.S. 364 (1984), the Court stated that "of course, the restriction on editorializing would plainly be valid if Congress were to adopt a revised version of [the statute] that permitted [public radio] stations to establish affiliate organizations which could then use the station's facilities to editorialize with nonfederal funds." Id. (quoting FCC, 468 U.S. at 400). Justice Scalia asserted that this is what occurred under the LSC Act since the regulations allow grantees to establish affiliate organizations to represent clients on matters that fall outside the scope of the LSC Act. Id.
because there was no foundation for the assertion that because LSC attorneys cannot advise or argue concerning the validity of welfare laws, this restriction distorts the function of the judicial system. Justice Scalia stated that it is not the function of the courts to inquire into the validity of statutes in all cases. The courts must only focus on the issues presented and argued by the parties, "and if the Government chooses not to subsidize the presentation of [questions concerning the validity of statutes], that in no way ‘distorts’ the courts’ role."

Finally, the dissent rejected the majority’s irrelevant concern that in cases in which an LSC attorney must withdraw, the client will unlikely obtain other counsel. This fact is irrelevant to Justice Scalia because the client will be in “no worse condition than he would have been in had the LSC program never been enacted.” Justice Scalia emphasized that the Government is not required to provide welfare recipients with free legal representation. In other words, the LSC program is a government benefit, not a Constitutional right. Therefore, “[i]t is hard to see how providing free legal services to some welfare claimants (those whose claims do not challenge the applicable statutes) while not providing it to others is beyond the range of legitimate legislative choice.” Accordingly, the dissent would have found the “suit-for-benefits” restriction constitutional.

IV. ANALYSIS

As previously mentioned, the Court’s Velazquez analysis could have gone a long way towards clarifying the analytical framework courts should apply under the unconstitutional conditions doctrine. For example, the Court could have elaborated on the characteristics that make a recipient of federal funds a government speaker rather than a private speaker. Instead, without clearly explaining its rationale, the Court applied a fact specific analysis and simply carved out a niche of non-governmental speech for advice and advocacy given to a client by an attorney. This means that courts will continue to guess regarding the appropriate nexus needed to make speech governmental – ultimately resulting in inconsistent decisions.

98. Id.
99. Id.
100. Id.
101. Id. at 1057.
102. Id. (emphasis in original).
103. Id. The majority also conceded this point but argued that the scope of the restriction was unconstitutional because it insulated welfare laws from judicial review. See id. at 1052.
104. Id. The dissent also focused on the issue of severability which was decided by the Second Circuit but which was not argued or briefed before the Supreme Court. See id. at 1058-60. This issue is beyond the scope of this paper.
105. Id. at 1049.
The Court's opinion was also erroneous in that it did not discuss viewpoint discrimination. As the dissent emphasized, the "suit-for-benefits" restriction is not viewpoint based because the restriction prohibits litigation that either challenges or defends welfare laws. At most the restriction is content-based discrimination because it prohibits all forms of litigation dealing with the validity of the welfare system; in other words, Congress was merely defining the scope of the LSC program. As the Court stated in Rosenberger, "in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between . . . content discrimination, which may be permissible if it preserves the purpose of that limited forum, and . . . viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." Here, the purpose of the program is to provide "financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." The purpose is not to create a forum for litigants to challenge the validity of welfare laws. Therefore, because the restriction prohibits all litigation concerning welfare reform – pro or con – the restriction is not viewpoint based.

Nonetheless, instead of following this traditional analytical framework, the majority relied on the imprecise theory that the "suit-for-benefits" restriction distorted the role of attorneys in the judicial system. Yet, the majority did not point to any proof that the restriction had in fact distorted the attorney's role in any actual case. The Court simply hypothesized that in cases where the LSC funded attorney must withdraw from representation, "the client is unlikely to find other counsel." However, this is simply wrong because as the dissent emphasized, LSC-funded attorneys who must withdraw "are also free to express their views of the legality of the welfare law to the client, and they may refer the client to another attorney who can accept the representation." Moreover, as LSC explained in its brief:

the regulations do not prohibit part-time employees of LSC grantees - - including lawyers -- from participating in the restricted activities as employees of non-LSC funded organizations. . . . [Additionally], full-time employees of LSC-funded organizations are free to engage in the restricted "advocacy" activities in their individual capacity, on their own behalf, and on their own time. As a result, LSC-funded attorneys can express their personal opposition to existing welfare laws,
and their personal views on welfare reform, as long as these unsubsidized activities occur outside the LSC program.\textsuperscript{112}

Therefore, if LSC-funded attorneys are unable to represent a client on their own time, they are free to refer the client to an attorney who can represent him. This referral should be effective since attorney ethical rules encouraged at least fifty hours of pro-bono work per year.\textsuperscript{113} Therefore, contrary to the majority's contention that the restriction leaves "no alternative channel for expression,"\textsuperscript{114} there are ample alternative outlets for those who seek to challenge the validity of welfare laws – either through LSC attorneys when they are working on their own time, or private attorneys who accept the client's case pro-bono. Accordingly, "[t]he [restriction] did not distort the traditional adversarial role of the lawyer; it simply insisted that constitutional challenges or defenses of welfare rules be undertaken by non-subsidized attorneys to leave more resources for more routine non-constitutional welfare litigation in which courts would still enjoy the final word."\textsuperscript{115}

Finally, the "suit-for-benefit" restriction was one of many restrictions intended to define the scope of the LSC program. Because the government is providing a subsidy that it does not have to grant, it should be able to define the scope of that program by prohibiting activities that are designed to defeat the welfare system that it is trying to promote. The program was designed to provide equal access to the legal system for those with insufficient means. The program was not designed to use tax dollars to promote welfare litigation aimed at welfare reform. This type


\begin{quote}
A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should: (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means.
\end{quote}

Furthermore, the issue of pro bono legal service has been the subject of considerable scholarly discussion. See, e.g., Thomas Bradley, \textit{The Private Bar and the Public Lawyer: An Essential Partnership}, 4 NOVA L.J. 357 (1980) (advocates partnership of private bar and public lawyers to help provide legal services to poor); The Honourable Mr. Justice Brian Dickson, \textit{The Public Responsibilities of Lawyers}, 13 MANITOBA L.J. 175 (1983) (discussion of pro bono responsibilities); Stephen T. Maher, \textit{No Bono: The Efforts of the Supreme Court of Florida to Promote the Full Availability of Legal Services}, 41 U. MIAMI L. REV. 973 (1987) (studies responsibility to make legal aid available to poor in Florida); B. George Ballman, Jr., Note, \textit{Amended Rule 6.1: Another Move towards Mandatory Pro Bono? Is That What We Want?}, 7 GEO.J. LEGAL ETHICS 1139 (Spring 1994) (traces history of pro bono and suggests that mandatory pro bono equates to involuntary servitude, which courts choose to ignore in preference to benefits of mandatory pro bono).

\textsuperscript{114} Legal Servs. Corp., 121 S. Ct. at 1051.

\textsuperscript{115} Bruce Fein, \textit{Free Speech Don Quixote}, WASHINGTON TIMES, Mar. 6, 2001, at A16 (Mr. Fein is general counsel for the Center for Law and Accountability, a public interest law group headquartered in Virginia).
of activity should be left for the legislative branch because it is accountable to the electorate.

V. CONCLUSION

The Supreme Court’s government subsidy cases have created tremendous confusion and uncertainty. In Velazquez, the Court had the opportunity to clarify the appropriate analysis under the unconstitutional conditions doctrine. Instead of following traditional unconstitutional conditions analysis, the Court announced the faulty distortion principle. Because the government provides millions of dollars each year towards subsidies and grants, the boundaries of what the government can and cannot do need to be better defined.

Furthermore, as the Court correctly explained, the legislative branch cannot pass laws and then forbid the judicial branch from examining those laws because this would create a separation of powers problem. However, as explained above, this problem does not exist under the LSC program because there are several alternate forums from which challenges to welfare laws can originate.

In practice, the unconstitutional conditions doctrine is superior to the right-privilege distinction because the right-privilege distinction gives the government too much power. The unconstitutional conditions doctrine is a check on the government ensuring that it does not unjustifiably infringe the constitutional rights of individuals. Nonetheless, the doctrine needs to be examined and explained so courts across the country can understand what is prohibited and what is not. For the most part, the Court avoided this task in the Velazquez case and instead applied an erroneous distortion doctrine. One can only hope that the next time the Court has the opportunity to expound on the unconstitutional conditions doctrine, it will not dodge its responsibility.

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