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SEVENTH CIRCUIT REVIEW

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ABOUT THE SEVENTH CIRCUIT REVIEW

Purpose

The SEVENTH CIRCUIT REVIEW is a semiannual, online journal dedicated to the analysis of recent opinions published by the United States Court of Appeals for the Seventh Circuit. The SEVENTH CIRCUIT REVIEW seeks to keep the legal community abreast of developments and trends within the Seventh Circuit and their impact on contemporary jurisprudence. The articles appearing within the SEVENTH CIRCUIT REVIEW are written and edited by Chicago-Kent College of Law students enrolled in the SEVENTH CIRCUIT REVIEW Honors Seminar.

The SEVENTH CIRCUIT REVIEW Honors Seminar

In this seminar, students author, edit, and publish the SEVENTH CIRCUIT REVIEW. The REVIEW is entirely student written and edited. During each semester, students identify cases recently decided by the Seventh Circuit to be included in the REVIEW, prepare initial drafts of case comments or case notes based on in-depth analysis of the identified cases and background research, edit these drafts, prepare final, publishable articles, integrate the individual articles into the online journal, and “defend” their case analysis at a semester-end roundtable. Each seminar student is an editor of the REVIEW and responsible for extensive editing of other articles. Substantial assistance is provided by the seminar teaching assistant, who acts as the executive editor.
The areas of case law that will be covered in each journal issue will vary, depending on those areas of law represented in the court’s recently published opinions, and may include:

- Americans with Disabilities Act
- antitrust
- bankruptcy
- civil procedure
- civil rights
- constitutional law
- copyright
- corporations
- criminal law and procedure
- environmental
- ERISA
- employment law
- evidence
- immigration
- insurance
- products liability
- public welfare
- securities

This is an honors seminar. To enroll, students must meet one of the following criteria: (1) cumulative GPA in previous legal writing courses of 3.5 and class rank at the time of registration within top 50% of class, (2) recommendation of Legal Writing 1 and 2 professor and/or Legal Writing 4 professor, (3) Law Review membership, (4) Moot Court Honor Society membership, or (5) approval of the course instructor.
PREFACE

I had the honor of serving as the Executive Editor of the SEVENTH CIRCUIT REVIEW during the 2014–2015 academic year. I would like to thank Professor Morris and the seminar students for making my experience a memorable one.

The SEVENTH CIRCUIT REVIEW is a semiannual, online journal dedicated to the analysis of recent opinions published by the U.S. Court of Appeals for the Seventh Circuit. The SEVENTH CIRCUIT REVIEW seeks to keep the legal community abreast of developments and trends within the Seventh Circuit and their impact on contemporary jurisprudence. The articles appearing within the SEVENTH CIRCUIT REVIEW are written and edited by Chicago-Kent students enrolled in the SEVENTH CIRCUIT REVIEW Honors Seminar.

The articles appearing in this issue are as diverse as their authors. Topics include same-sex marriage, appropriating a star athlete’s image, and leave for travel under the Family and Medical Leave Act. Each author’s hard work and willingness to collaborate produced not only publishable articles, but also a legal reference for those who wish to learn the current state of Seventh Circuit law. It was a privilege to work with the authors at every stage of the writing process, and I thank them for their dedication.

Matthew Smart will serve as the Executive Editor of the SEVENTH CIRCUIT REVIEW for the 2015–2016 academic year. Matthew externed for the Honorable Ann Claire Williams of the Seventh Circuit Court of Appeals. In addition, he is the Executive Community Outreach Manager for the CHICAGO-KENT LAW REVIEW, a member of the Moot Court Honor Society, the Corporate Law Society, and the
Chicago-Kent Lambdas. I played an active role in selecting Matthew for this position, and I know that under his leadership the next volume of the REVIEW is sure to be one of the finest.

Very Respectfully,
McKenna Prohov
Executive Editor, SEVENTH CIRCUIT REVIEW
THE TWENTY-FIVE-YEAR STRUGGLE FOR MARRIAGE EQUALITY: WHAT IMPACT DOES THE SEVENTH CIRCUIT’S JURISPRUDENCE HAVE ON LGBT CIVIL LIBERTIES?

ELLY DRAKE*


INTRODUCTION

On June 28, 1969, police raided the Stonewall Inn1, a gay bar in New York’s Greenwich Village, sparking riots that are widely seen as giving birth to the modern gay rights movement.2 But the gay rights movement did not immediately take root within the law or the courts.


1 With very few public gathering places for gays and lesbians at the time, the unwarranted police riots showcased the dislike, hate, and negative sentiments towards gays and lesbians. The riots proved the need for activism, for mutual coexistence, and for the fight to eradicate homophobia.

The 1970s were filled with unsuccessful same-sex marriage cases, despite the fact that in 1967 the Supreme Court, in *Loving v. Virginia*, redefined marriage as an important individual right by striking down the ban on interracial marriage. In *Loving*, the Court held that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men” and described marriage as “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” However, for more than thirty-five years after *Loving*, not a single state permitted partners of the same-sex to exercise the “vital personal right” and “basic civil right” to marry until 2003.

The issue of whether to allow same-sex marriage has many different facets and has created a very important cultural debate throughout the country. Public opinion has been shaped by two polarizing views. One view sees what some state courts have done in striking down same-sex marriage bans as correcting yet another vestige of entrenched discrimination against a politically unpopular and relatively powerless group in society. Yet, the opposing view

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5 *Id.*
7 *Id.* at 39; see Baehr v. Lewin, 74 Haw. 530 (1993). The Supreme Court of Hawaii struck down same-sex marriage bans because they discriminate against individuals on the basis of their sex. Unfortunately, through voter initiative, same-sex marriages were subsequently banned.
9 *Id.* at 783.
10 *Id.* (citing Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004)).
finds such bans necessary to defend marriage as a relationship between one man and one woman from a pernicious and immoral attack from outside the institution.\textsuperscript{11} For these individuals, marriage is a religious institution that informs their notions of family and intimacy.\textsuperscript{12} With contrasting perspectives on marriage, it has been difficult to recognize same-sex marriage.\textsuperscript{13} For years, the courts had fallen into step with the cultural and social expectations of the American public, and had upheld these normative perspectives on marriage.

Questions of the permissibility, legality, and the constitutionality of same-sex marriage is still being determined today in this country, and only recently has the jurisprudence on the topic begun taking note of its inadequacy. In the last fifteen years, courts and legislatures have responded more actively to the challenges, but the results have been inconsistent. Same-sex marriage has been permitted, overturned, and flat out banned across the country. Needless to say, the path to same-sex marriage has been long, rocky, and neither easy nor inevitable.\textsuperscript{14}

Since the United States Supreme Court, in \textit{United States v. Windsor}, struck down the core provision of the Defense of Marriage Act (DOMA) on June 26, 2013\textsuperscript{15} it has become clear that there has been a significant shift in the acceptance of same-sex marriage across the nation. To date, there have been sixty-five same-sex marriage victories across the country.\textsuperscript{16} Of the twelve federal circuits, the Tenth, Fourth, Ninth, and Seventh Circuits have affirmed district court

\begin{footnotesize}
\begin{enumerate}
\item Id. at 784.
\item Id. (citing Michael Massing, \textit{Bishop Lee's Choice}, N.Y. TIMES, Jan. 4, 2004, § 6, at 34 (discussing the uproar within the Episcopal Church over the decision to confirm as bishop an openly gay man, who is in a committed same-sex relationship)).
\item Id.
\item Gulino, supra note 8, at 38.
\item 28 U.S.C. § 7 (1996). Section 3 of DOMA defined marriage as between one man and one woman.
\end{enumerate}
\end{footnotesize}
decisions in favor of successful challenges against state constitutional amendments or statutes barring recognition of same-sex marriage. Winning arguments against same-sex marriage bans have successfully argued that the bans violate the federal constitutional guarantees of Equal Protection and Due Process, or both. Despite these successes, the Sixth Circuit recently upheld the constitutionality of same-sex marriage bans in Kentucky, Michigan, Ohio, and Tennessee, causing a circuit split. As of the date of publication there are thirteen states in the United States, including Puerto Rico, that have not recognized same-sex marriage.

On September 4, 2014, in the consolidated federal district cases of Wolf v. Walker and Baskin v. Bogan, the United States Court of Appeals for the Seventh Circuit weighed in on the constitutionality of same-sex marriage bans and the failure to recognize valid, out-of-state same-sex marriages. In a scathing, unanimous opinion from Judge Richard Posner, the court struck down discriminatory same-sex marriage bans in Indiana and Wisconsin. The court found that “the grounds advanced by Indiana and Wisconsin for their discriminatory policies are not only conjectural; [but] . . . totally implausible.”

This Comment analyzes the legal rationale for the Court’s decision. Given the Seventh Circuit’s decision, it signals that the nation is ready for marriage equality for gays and lesbians. While the Seventh Circuit’s decision achieves marriage equality, it also is the first step in shaping the arena for additional legal battles over what legal status sexual orientation should have in constitutional law and whether the fundamental right to marry should be available to all.

18 Freedom to Marry, supra note 19.
20 Freedom to Marry, supra note 19.
21 Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014).
22 Id. at 672.
23 Id.
The deferential rational basis standard of constitutional review that the Seventh Circuit used does not explicitly set forth sexual orientation as a protected status deserving of strict or heightened scrutiny under the equal protection guarantees. This failure stunts the development of increased protections for LGBT individuals in these future challenges because rational basis review is highly deferential to the state, as long as the state has any rational reason for the discriminatory statute. On the other hand, despite the reliance on rational basis review, Judge Posner’s detailed analysis of a framework using heightened scrutiny leaves the door open for expansion in this area of law. In effect, proponents can use the decision to argue for a broader interpretation of what constitutional standard applies, just as proponents have done with the elusive Windsor case.

Further, the Seventh Circuit completely dismissed an analysis of whether the right to marry is a fundamental right protected by the due process prong of the Fourteenth Amendment. The Seventh Circuit found it irrelevant, or a conversation for another time. This is most likely due to the fact that the implications of creating fundamental rights are heavier than retroactively deciding that statutes are discriminatory or contrary to public policy, as they would be determined, using equal protection principles. As will be seen infra, the development of whether marriage is a fundamental right has effectively been halted.

Lastly, the Seventh Circuit determined that the sex discrimination argument in the context of same-sex marriage is untenable. The legal basis and justifications for these decisions are fully analyzed infra along with the ramifications on the development of LGBT civil liberties.

One thing is clear, that without expanding protections to include sexual orientation as a suspect or quasi-suspect class, the right to marry as a fundamental right equally applicable to all, or even, sex discrimination to apply in cases challenging statutes against gays and lesbians, the law leaves large loopholes for discrimination in the future.

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24 See discussion in this Comment in Section II, A.
25 See discussion in this Comment in Section V.C.
against the LGBT community. Take for example the most recent dispute brewing within the Seventh Circuit—in Indiana. After the Seventh Circuit struck down marriage bans, disagreements between religious advocates and LGBT civil activists have grown. The groups are fighting over questions of whether stronger protections for the free exercise of religion could have an effect on eradicating or extinguishing some of the recent gains in protections for the LGBT community. For reasons more fully explored infra26, these disagreements highlight the balancing that courts will have to do when resolving conflicts between constitutionally protected religious expression deserving of strict scrutiny and the burgeoning constitutional protections for the LGBT community, primary protection under the guise of “heightened” scrutiny for sexual orientation discrimination.

In summation, the Comment explores the development of the law from the day the police officers stormed into Stonewall Inn, to the most recent implications of the Seventh Circuit’s holding in Baskin v. Bogan. The first part of the Comment gives a comprehensive analysis of the right to marry as a constitutionally protected liberty and privacy right under the Fourteenth Amendment. Then, the Comment connects these legal principles with the developed case law over the last twenty-five years. The Comment offers the same analysis considering the equal protection arguments, what they are, and how they have developed in the law. The third part will interpret the recent same-sex marriage case as it rose up from the Indiana and Wisconsin District Courts to the United States Circuit Court of Appeals for the Seventh Circuit and its legal ramifications and impact on future developments for LGBT civil rights. Lastly, the Comment concludes with an optimistic view of the future development of LGBT civil rights, but leaves the reader with a stern warning of the work that remains ahead.

26 See the Conclusion in this Comment.
I. WHAT IS MARRIAGE?

A. Societal and Normative Perspectives

“[Marriage] is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution and the decision whether and who to marry is among life’s momentous acts of self-definition.”

Legally speaking, the justifications for marriage have always centered on the “preservation of property, rearing of children,” and “financial stability.” Marriage affords its participants certain civil privileges and a status rich in entitlements that, generally speaking, are not afforded to individuals who remain outside the institution. Irrespective of these important civil privileges individuals tend to enter the institution of marriage as a reflection of the partners’ mutual love, in spite of the legal benefits.

Outside of its legal purpose and meaning, marriage can be conceived as a practice where the individual participants engage in an obviously complex form of socially cooperative human activities where the aim is to make possible for both spouses, opportunities to enhance each other, their mutual benefits and psychological well being. This occurs through the joint cooperation married partners put towards achieving certain family, economic, or social goals—like

29 Id.
whether to raise children, what employment opportunities to pursue, and how to aid each other’s efforts to achieve individual goals.32

Further, when partners enter into marriage, the relationship creates both intimacy and identity for the partners.33 Partners assume a new ontological identity.34 They see themselves as “us” rather than “me,” just as they see property as “ours” rather than “mine”.35 For partners, it creates a collective unit operating for their mutual benefit, and it binds them to the shared larger institution of marriage, where other married partners also belong.36

Because of what results from this special marital relationship,37 “the institution of marriage has the effect of enhancing each partner’s . . . individual freedom in the ultimate pursuit of happiness and liberty.”38 In a sense, the “marital relationship becomes more than just . . . rights and benefits . . . for the relationship itself is . . . an end of worthy pursuit.”39 It creates a sense of permanency by embodying a socially recognized set of commitments and a public attestation to the significance of these commitments. The partners affirm their mutual commitment to benefit each other, and “the public, in turn, see[s] that act as a positive good . . . which was not entered into lightly.”40 That is the intangible social meaning of marriage generally makes the “value of a committed partner . . . incalculable.”41

The marital relationship is a publicly recognized expression of mutual love and is an integral part of each individual’s dignity and

32 Id. at 353.
33 Id. at 344.
34 Id. at 344.
35 Id. at 345.
36 Samar, supra note 28, at 792.
37 Id.
38 Id.
39 Id.
40 Id.
41 Id. (citing William Eskridge, The Case For Same-Sex Marriage: From Sexual Liberty to Civilized Commitment 74 (1996)(discussing the value of committed partnerships when one partner has AIDS)).
self-worth.\textsuperscript{42} Marriage means providing for each other in a sense that each is not alone in confronting life’s joys and difficulties on an ongoing, semi-permanent basis.\textsuperscript{43}

Marriage, from this perspective, is a unique human right fulfilling a significant route to human self-fulfillment by allowing the parties to a marriage to achieve an identity that significantly adds to their own individual human dignity.\textsuperscript{44} Thus, to not recognize that right, even in the context of same-sex couples, is to deny an important avenue of human self-fulfillment that is a foundation of human rights in general.\textsuperscript{45}

Society tends to agree, and the law tends to support, that marriage is a positive good to the individuals who participate in it.\textsuperscript{46} “If the marital relationship bestows so many benefits not only to society, but to individuals, then the denial of the right to legally marry a same-sex partner, represents a detriment to all those who would be served by marriage but because of their sexual orientation, over which they have no choice, and law . . . cannot participate.”\textsuperscript{47}

\textbf{B. Legal Marriage—What Type of Right?}

Marriage has historically been an institution recognized and regulated at the state level.\textsuperscript{48} States have generally regulated marriage as a way to protect the public interest, protect the nuclear family and ensure that children are not wardens of the state.

For this reason, the development of same-sex marriage jurisprudence first took root at the state level, starting with the 1993

\begin{flushright}
\textsuperscript{42} Samar, supra note 29 at 353.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 347. Human rights like liberty, privacy, freedom of association, pursuit of happiness, etc.
\textsuperscript{46} Id. at 355.
\textsuperscript{47} Id.
\end{flushright}
case of *Baehr v. Lewin* in Hawaii. There, the court held that same-sex marriage bans constituted sex discrimination under the law.49 But *Baehr* created controversy as opposition to same-sex marriage rose, and through legislative acts and a ballot initiative, same-sex marriage was banned yet again. At the same time, Congress enacted the Defense of Marriage Act, or better known as, DOMA.50 These events lead thirty states to amend their constitutions to create “mini-Domas” in order to prohibit same-sex marriage and the recognition of such marriages.51 From this point on, the case law is replete with state courts and legislatures grappling with whether to extend marital rights to same-sex couples and under what legal theory to recognize such a right.52

However, marriage has also been understood to implicate rights and freedoms enshrined at the federal level in the United States Constitution.53 Hence, proponents of same-sex marriage have crafted legal arguments claiming primarily that prohibitions on same-sex marriage violate protected constitutional due process, privacy, and equal protection guarantees under the Fourteenth Amendment.54 The Fourteenth Amendment of the United States Constitution guarantees that no state shall “deprive any person of life, liberty, or property without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”55 The concepts of “due process” and “equal protection guarantees” are two separate constitutional protections afforded by the Fourteenth Amendment.56 These constitutional provisions are applicable at the state level through

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49 *Baehr v. Lewin*, 74 Haw. 530, 530 (1993). Supreme Court of Hawaii held that denying marriage licenses to same-sex couples was sex discrimination under the state constitution. Before the law could change, voters amended the constitution to permit the legislature to limit marriage to opposite-sex couples only.


52 *Id.*


54 Reinheimer, *supra* note 45, at 216.

55 *U.S. CONST.* amend. XIV § 1.

56 *Id.*
the Fifth Amendment. Due process references the first clause and equal protection references the second clause of the Fourteenth Amendment. Due process is intended to safeguard certain critical or fundamental rights for everyone, while equal protection shields a particular set of social groups from discrimination. Put more succinctly, due process protects the “whats” and equal protection the “whos”.

In the context of same-sex marriage litigation, proponents of marriage equality set forth due process arguments alleging that there is a constitutionally protected, fundamental right to marry the person of one’s choosing, regardless of the sex of that person. The argument seeks to include same-sex marriage in an inviolable sphere of safety in which everyone can make choices about their lives and identities without state intrusion, punishment, or constraint. Equal protection challenges, on the other hand, object to the sex-based classifications employed by same-sex marriage prohibitions, i.e., men cannot marry men because they are men, and women cannot marry women because they are women. A second equal protection argument alleges that the same-sex marriage bans discriminate on the basis of one’s sexual orientation, specifically targeting gays and lesbians because of their sexual preferences.

Despite the constitutional protections afforded to fundamental rights or protected groups, these protections can be restricted or limited in scope by the state because at times an individual’s constitutionally protected rights might come in direct conflict with the state’s interest in protecting the public interest. For example, the state is tasked with ensuring safety and education, protecting offspring and

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57 U.S. CONST. amend. X.
59 Id.
60 Reinheimer, supra note 45, at 217.
61 Id.
62 Id.
property rights, and the enforcement of marital responsibilities. Since the state has these interests, the state is authorized to pass legislation or laws in order to regulate these and various areas, but occasionally, questions arise on whether the state has overstepped its bounds and has infringed too much upon the constitutionally protected rights of a group or individual. In those cases, the courts are called upon to determine whether a statute or law as construed and applied, constitutes proper exercise of police power or whether it has unconstitutionally violated one of the liberty rights protected by the Fourteenth Amendment. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action that is arbitrary or without reasonable relation to some purpose within competency of the state to effect.

Therefore, depending on the right at stake, or the group of individuals it affects, the judiciary will apply a corresponding level of constitutional scrutiny to determine if a statute has gone too far. The three traditional tiers of constitutional scrutiny include: strict scrutiny, intermediate or heightened scrutiny, and rational basis review. Strict scrutiny is applied to any deprivation of constitutional rights, including fundamental rights, and classifications based on race, alienage, or national origin. This requires the law in question to be “narrowly tailored to further a compelling governmental interest.” Under intermediate scrutiny, applicable to classifications based on sex or being born out-of-wedlock, the challenged law must be “substantially related to an important government purpose.” Both strict and intermediate scrutiny require the government or state to defend the law

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63 Meyer v. Nebraska, 43 S. Ct. 625, 626 (1923).
64 Id. at 626.
65 Id.
66 Bartschi, supra note 2, at 477.
67 Id.
68 Id. (citing Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2419 (2013)).
69 Id. (citing City of Cleburne Tex. v. Cleburne Living Ctr., 473 U.S. 432, 444 (1985)).
and forces the state to limit the law’s reach to the actual justifications for why the law was enacted.\footnote{Id. (citing United States v. Virginia, 518 U.S. 515, 533 (1996)) (“The burden of justification is demanding and it rests entirely on the State . . . . The justification must be genuine, not hypothesized or invented \textit{post hoc} in response to litigation.”)}

With traditional rational basis review, the most deferential standard to the state, “legislation is presumed to be valid and will be sustained if the classification drawn by the statute is \textit{rationally} related to a legitimate state interest.”\footnote{Id. (citing City of Cleburne Tex., 473 U.S. at 440).} The state need not articulate its reasons or provide empirical evidence, leaving the challengers with the burden “to negative any reasonably conceivable state of facts that could provide a rational basis for the classification.”\footnote{Id. (citing Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001)).}

Therefore, the framing of the legal issue is integral to how much power the state has in issuing same-sex marriage bans and the probability of marriage equality proponents of achieving a favorable decision. If one is to assume that same-sex marriage bans do not infringe upon any constitutionally protected rights or discriminate against any protected group of people, then the state only has to provide a rational reason for why same-sex marriage is banned—\textit{i.e.}, the preservation of traditional marriage. On the contrary, if same-sex marriage bans are believed to infringe upon constitutionally protected rights or a protected class, then the justification for the state’s same-sex marriage ban has to meet a tougher constitutional standard of review. Under heightened or strict scrutiny same-sex marriage bans must further an important state interest by means that are \textit{substantially} related to that interest or that same-sex marriage bans must serve a \textit{compelling} state interest and the bans are \textit{narrowly tailored} in achieving that stated goal under strict scrutiny.
II. The Development of the Law Surrounding Same-Sex Marriage Litigation

A. Marriage as a Fundamental Right

To reiterate, the Due Process Clause of the Fourteenth Amendment guarantees that no state shall “deprive any person of life, liberty, or property without the due process of law.” At first glance, “life, liberty and property” seem like concrete ideas. Delving a little deeper, it becomes apparent that they are rather abstract concepts. Take for example, “liberty”. Other than its plain, literal meaning of freedom from physical restraint, the law had to develop and define “liberty”. Liberty as a definable right first began to take shape in scholarly writing and through the judicial process. As courts began defining liberty, they began to understand that liberty encompasses necessary fundamental rights that must be constitutionally protected, but with this declaration a second question arises, “what rights are fundamental?” or “what makes a right fundamental?”

Adding to the discussion, courts determined, that the purpose of the Due Process Clause is to “protect[] those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty . . . .” Because such rights are so important, “an individual's fundamental rights may not be submitted to vote.” In simpler terms, the Due Process Clause provides substantial protections to the individual from state intervention and infringement on those rights perceived to be inalienable or integral to fairness, justice, and liberty.

As abstract as the concept of liberty is, a list of enumerated fundamental rights is just as elusive from the Constitution. But how did the courts determine what rights should rise to the level of a fundamental right? In order to answer that question, the courts first sought to understand what is implicit in liberty and how do you

73 U.S. CONST. amend. XIV, § 1.
achieve or protect it? To that end, courts have answered that in order for man to have liberty, as a necessary corollary, he also must have privacy. The conceptualization that liberty is intrinsically tied to the right of privacy is a very important realization for the development of fundamental rights, especially in the context of same-sex marriage.

Already strongly rooted in the Fourth Amendment and in tort law, privacy as a unique fundamental right was finally articulated by the Supreme Court in 1965 in the case of Griswold v. Connecticut. Thus, liberty embraces a fundamental right to privacy. This privacy right is “without government intrusion or intervention without adequate purpose,” and includes a “right to personal privacy, or a guarantee of certain areas or zones of privacy.” Courts have articulated what these zones of privacy are and has thus extended constitutional protections to the following fundamental rights: personal decisions relating to marriage, procreation, contraception, familial relationships, child rearing, and education. In 2003, the United States Supreme Court took a large leap, in Lawrence v. Texas, in determining that private consensual sexual conduct is also a protected liberty interest of the due process clause of the Fourteenth Amendment.

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76 U.S. CONST. amend. XIV.
79 Privacy entails freedom to protect your person, information, and place from unreasonable searches and seizures by the government while also providing protection from governmental intrusion in one’s personal affairs. Taken together, a conceptualization is created that liberty is intrinsically tied to the right to privacy in that an individual is free to control his personal realm free from governmental intrusion and scrutiny.
80 Griswold, 381 U.S. at 483.
83 Id.
1) The Legal Framework of a Fundamental Right to Marry

A cursory glance at American case law will show that most lower courts can hardly dispute that the right to marry is a fundamental right—countless courts have explicitly found it.\textsuperscript{84} The Supreme Court has referenced such a right fourteen times in its decisions over the years, and yet the highest court of the nation has failed to explicitly articulate the right to marry as a fundamental right.\textsuperscript{85}

The landmark case that frames the analysis of privacy and marriage as a fundamental right is \textit{Loving v. Virginia}. There the Supreme Court held that Virginia’s ban on interracial marriage violated Richard and Mildred’s rights under the Due Process Clause.\textsuperscript{86} The \textit{Loving} Court stated that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,” and further recognized that, “marriage is one of the ‘basic civil rights of man.’”\textsuperscript{87} Had the Supreme Court relied on the traditions of the 1960s, the Court would not have recognized that there was a fundamental right for Mildred and Richard Loving to be married because the nation’s history was replete with statutes banning interracial marriages between Caucasians and African Americans.

Using the same logic, Judge Richard Posner, in \textit{Baskin v. Bogan}, dismissed the defendants’ arguments that the traditional conception of marriage never anticipated same-sex marriage. Judge Posner pointed out that allowing tradition to define the confines of the law would have never allowed a decision like \textit{Loving} to be made. In effect, following tradition would have continued our history of invidious discrimination by allowing a statute to promulgate white

\textsuperscript{84} Maynard v. Hill, 125 U.S. 190, 205, 211 (1888); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942).

\textsuperscript{85} Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

\textsuperscript{86} Loving v. Virginia, 388 U.S. 1, 12 (1967).

\textsuperscript{87} Id.
supremacy.\textsuperscript{88} In the eyes of Judge Posner, tradition cannot be a legitimate argument for why same-sex marriages should be banned. \textsuperscript{89} Since marriage “[i]s the most important relation in life,” one can infer from the \textit{Loving} Court that as a corollary the right to marry necessarily entails the right to marry the person of one’s choice.\textsuperscript{90}

Unfortunately, the law did not naturally evolve in this manner, and it was years before courts would consider the \textit{Loving} holding, as Judge Posner did in \textit{Baskin v. Bogan}, in cases of same-sex marriage. The explanation rests in part with the reluctance of the Court in creating new fundamental rights. Once a fundamental right is created, that right cannot be denied to particular groups on grounds that those groups have been historically denied that rights.\textsuperscript{91} Further, the Supreme Court has consistently refused to narrow the scope of fundamental rights once articulated, and in this case, the Court has never framed the right to marry as a more limited right centered on the characteristics of the couple seeking marriage. For example, the Court consistently describes a general “right to marry” rather than “‘the right to interracial marriage,’ ‘the right to inmate marriage’ or the ‘right of people owing child support to marry.’”\textsuperscript{92} The Court has also not specified the fundamental right to same-sex marriage. Although the Court has referenced the fundamental right to marry many times, it has never explicitly qualified whom, specifically or generally, is entitled to the right; the question of whether the fundamental right to marry applies to same-sex couples is still an unanswered question.

Under the guidance of the Supreme Court, the development of fundamental rights is typically a slow progression, and the Court will attempt to frame legal issues as narrowly as possible to halt any decision-making that seems to be too much like “legislating from the

\begin{thebibliography}{99}
\bibitem{88} Id. at 11-12.
\bibitem{89} Baskin v. Bogan, 766 F.3d 648, 666 (7th Cir. 2014).
\bibitem{90} Id.
\bibitem{91} Id.
\bibitem{92} In re Marriage Cases, 183 P.3d 384, 430 (2008), \textit{superseded by constitutional amendment} U.S. CONST. amend.
\end{thebibliography}
bench.”  

For example, in *Bowers v. Hardwick* in 1986, the Court framed the legal issue as “whether the Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . .” The Court, not surprisingly, found that no such fundamental right existed. Despite all precedent that might have suggested to the contrary, the *Bowers* Court refused to find constitutional privacy protection for two consenting adults engaging in same-sex sodomy in the home. This case confronts us with the fact that the categories in which legal cases fall into are as much a product of political philosophy as they are about principles and the rules. The irony of *Bowers* lies in the fact that the 1970’s marked a significant period in the jurisprudence of the law, where the Supreme Court expanded the categories of rights that intrinsically fall under the fundamental right of privacy. Cases such as *Eisenstadt v. Baird*, *Carey v. Population Services International*, *Roe v. Wade*, as a whole, laid out the predicate for protection of non-procreative sex among unmarried persons. Following its own precedent, the Supreme Court in *Bowers* should have found that prohibitory sodomy laws violate the constitution because they infringe on the privacy of adults to make decisions about their sexual relationships in their own homes without governmental prosecution. The *Bowers* court should have framed the question as

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95 *Id.*
97 *Id.* at 89.
98 *Id.* at 94.
102 Samar, *supra* note 93, at 96.
whether consensual, sexual acts between adults, whether same-gender or opposite-gender, are protected as a fundamental right rooted in privacy—not the more narrow question of whether homosexual sodomy is a fundamental right.

Sixteen years later, in 2003, the Court finally overruled itself in Lawrence v. Texas.\textsuperscript{103} There the Court found that its narrow reading of the legal issue in Bowers “disclosed the Court from appreciating the extent of the liberty issue at stake.”\textsuperscript{104} Moreover, the Court found that the law prohibiting sodomy violated plaintiff’s due process rights to engage in consensual sexual conduct and intruded into “the personal and private life of the individual.”\textsuperscript{105} The Court interpreted the “privacy” prong of the Due Process Clause to protect individuals from government intrusion into a dwelling or private place and that sodomy statutes “touch[] upon the most private human conduct, sexual behavior, and in the most private of places, the home.”\textsuperscript{106}

In the majority opinion of Lawrence, Justice Anthony Kennedy took care to distinguish between the ability of the state, consistent with the Constitution, to criminalize same-gender sexual conduct and the obligation of the state to recognize same-sex relationships.\textsuperscript{107} Although Justice Sandra Day O’Connor joined in her concurring opinion that the Lawrence case does not imply the legitimacy of same-sex relationships, Justice Antonin Scalia argued the opposite.\textsuperscript{108} Justice Scalia warned that once the Court prohibited the state from criminalizing same-gender sexual conduct, the next “logical conclusion” is that the state should also be prohibited from barring same-sex marriage.\textsuperscript{109} This warning from Justice Scalia is what

\textsuperscript{103} Lawrence v. Texas, 539 U.S. 558, 567 (2003).
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 578.
\textsuperscript{107} Id. at 1184.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
influenced the Court in the earlier *Bowers* decision. Fearing that the Court would tread into uncharted waters by more broadly defining the fundamental right invoked in *Bowers*, the Court narrowly defined the legal issue and avoided the discussion entirely. The Court felt that it was not its job to change the law based on societal views on same-sex relations at that time.

Regardless of what the Court said it was and was not doing in *Lawrence*, the end result was that in striking down Texas’s anti-sodomy statute, it concluded that lesbians and gay men have liberty interests rooted in privacy. This liberty interest in privacy extends from making decisions regarding one’s sexual conduct in one’s personal relationships to having the state respect their dignity and their lives in those choices.\(^\text{110}\) The right to liberty under the Due Process Clause gives them the full right to engage in sexual conduct without intervention from the government.\(^\text{111}\)

This holding leads to the conclusion that even if the *Lawrence* Court is not endorsing same-sex relationships as valid, the mere fact that the Court outright prohibits the state from criminalizing same-gender sexual relations allows for an inference that the ability to refuse to recognize same-gender relationships, that often accompany same-gender sexual relations, becomes harder to do.\(^\text{112}\)

Hence, the first necessary step was taken in order to firmly change the legal and political discourse across the nation. *Lawrence* was the first case to bring sexual orientation to the forefront and removed a major obstacle from the development of sexual orientation-based equal protection law. As such, many of the lower courts used this rationale to strike down sodomy laws and over time, allow for same-sex marriage in their states.

While many courts took advantage of the power within the *Lawrence* decision, many grappled with how to apply it because the Court had failed to clearly define a standard, test, or rule. Although the *Lawrence* Court explored the substantive due process prong at length,

\(^{110}\) *Id.* at 1207-08.
\(^{111}\) *Id.* at 1210-11.
\(^{112}\) *Id.* at 1185-86.
while evoking theories of liberty and privacy as fundamental rights, the Court never clearly articulated whether the liberty interest at stake was fundamental, requiring strict scrutiny, or whether sexual orientation is a protected status under equal protection grounds.

Using rational basis as the standard of review, the Court was able to justify that prohibitory sodomy laws were unconstitutional because they infringed on privacy and liberty, but they did it without carving new law or naming and identifying a new fundamental right. To further complicate matters, Justice O’Connor’s concurrence disagreed with the majority’s invocation of the due process clause of liberty. Justice O’Connor found that the sodomy statute was unconstitutional not because it violated the right to privacy, but because it violated equal protection in that it discriminated against male to male sodomy but permitted male to female sodomy.113 The Court also did not raise the issue of whether sexual orientation is a suspect class subject to a higher standard of review than the simple, deferential rational basis standard.

Even though Lawrence is heralded as the first pro-gay civil rights case, since that time, there has been no definitive statement on whether same-sex marriage is encompassed in the meaning of a fundamental right to marry.114 While not dispositive, advocates will have additional work to persuade the Supreme Court and the many state and federal courts to see same-sex marriage bans as violating the fundamental right to marry.115 The Seventh Circuit, discussed infra116, chose not even address the issue in Baskin v. Bogan.

B) Marriage and the Equal Protection Clause

In addition to the substantive due process argument—that marriage is a fundamental right—there are two more legal arguments

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114 Bartschi, supra note 2, at 447.
115 Id. (citing Love v. Beshear, 989 F. Supp. 2d 536 (W.D. Ky. 2014) rev’d sub nom; DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014)).
116 Section V, Paragraph B, in this Comment.
challenging the constitutionality of same-sex marriage bans based on the equal protection prong of the Due Process Clause, namely, that excluding same-sex couples from marriage constitutes impermissible sex discrimination, and that sexual orientation is, or should be, a suspect or quasi-suspect class within the meaning of the Constitution. 117

The Equal Protection Clause requires that a law cannot “deny to any person within its jurisdiction the equal protection of the laws.” 118  To that effect, it was developed to avoid past practices that may turn out, in retrospect, to be unjust, and must therefore be corrected for the future. This means that courts use the equal protection guarantees “to invalidate practices that were widespread at the time but no longer applicable because they embody certain background prejudices that have a discriminating effect, even if not intentional.” 119 The equal protection guarantee is more suited to protect novel rights for groups than the substantive due process doctrine because substantive due process protects values that are rooted in tradition, while equal protection law can protect against those same traditions. 120

By comparison, the Due Process Clause looks backward and considers whether an existing convention is violated by a current practice. 121 However, equal protection looks forward, serving to invalidate practices that were widespread at the time of the law’s ratification but cannot justifiably be allowed to continue. 122 Equal protection’s nature makes it more congenial to recognizing inequality where none was thought to exist before. 123 “The two clauses there

117 Id. at 478.
118 U.S. CONST. amend XIV.
119 Reinheimer, supra note 45, at 227.
120 Id. (citing Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. CHI. L. REV. 1161, 1163-74 (1988)).
121 Id. at 227-28.
122 Id. at 228.
123 Id.
operate along different tracks . . . [the Equal Protection Clause] does not safeguard traditions; it protects against traditions, however long-standing and deeply rooted.”

For example, consider the bleak history of racism in the United States: the development of the equal protection guarantee played an integral role in turning around the deeply rooted practices and laws that had long served to categorize African Americans as separate from white Americans. Over time, the equal protection guarantees confronted racism and helped eradicate notions such as “separate but equal” and helped create substantial protections against race discrimination. For classifications made based on race, a protected group, strict scrutiny applies. Any classification based on sex or gender is considered quasi-suspect and subject to some form of heightened scrutiny. Further, the equal protection guarantees not only protects specific groups or individuals from laws that are plainly discriminatory on their face, but it also protects from seemingly neutral laws that have a disparate impact in the way they affect the protected group.

1. The Legal Framework of the Equal Protection Clause in Same-Sex Marriage

Despite the challenges facing arguments grounded in the substantive due process clause of the Fourteenth Amendment, state

124 Id.
126 Id. (citing Reed v. Reed, 404 U.S. 71 (1971)) (holding that “[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”); Craig v. Boren, 429 U.S. 190, 197 (1976).
127 Craig, 429 U.S. at 197.
128 Griggs v. Duke Power Co., 401 U.S. 424 (1970). While aptitude tests and high school diplomas used as necessary criteria in hiring practices, were not discriminatory in intent or on its face, in practice they were discriminatory against minority employees because past practices had prevented minorities from an equal opportunity to become educated or receive a diploma; therefore the practice had a disparate effect on that particular subset of the population.
level equal protection arguments have been a central part of every successful legal case for same-sex marriage.\textsuperscript{129} In fact, many of the district courts and the federal circuit courts have been striking down marriage bans on the basis of equal protection. For example, the Seventh Circuit in Baskin v. Bogan relied on an equal protection argument. Further, many states have expanded constitutional protections to include not only race, sex, national origin, and religion, but have also added sexual orientation as well as gender identity as a protected class. Within the Seventh Circuit, both Illinois and Wisconsin have included sexual orientation as a protected class, while Indiana has not extended such protections.\textsuperscript{130} At the federal level, sexual orientation is not a protected class.

As mentioned above, typically two different arguments have been made against same-sex marriage bans as violating equal protection because they discriminate on the basis of sex and sexual orientation.

\textit{A. Sex-Discrimination}

The argument is that same-sex marriage bans are discriminatory because they discriminate against individuals on the basis of their sex—\textit{i.e.}, a man can only marry a woman because he is a man, and a woman can only marry a man because she is a woman. Although sex is presumed to be a protected status under the law, like race, national origin, religion, \emph{etc.}, any challenge to a statutory


provision classifying on the basis of sex does not receive strict scrutiny under the law.\textsuperscript{131} Supreme Court cases like \textit{Craig v. Boren}\textsuperscript{132} and \textit{United States v. Virginia}\textsuperscript{133} set forth the precedent that sex-based statutory classifications are deserving of only intermediate scrutiny, meaning that the challenged law must be “\textit{substantially} related to an important governmental purpose.”\textsuperscript{134} Finding that there could be legitimate purposes for having sex-based classifications, the Court did not apply strict scrutiny.\textsuperscript{135} Yet the Court agreed that statutory classifications that distinguish between men and women imply that there is a discernable difference between the sexes’ capabilities, which have the effect of reinforcing sex-based stereotypes that have been used to disadvantage women over men.\textsuperscript{136}

Although the sex discrimination argument is so clearly right to its proponents, it turns out to be either wrong or unworthy of engagement in the view of the nearly every other judge to whom it has been presented.\textsuperscript{137} Sex discrimination tends to be a “risky argument” for striking marriage bans down, for both judges who reject same-sex couples’ claims as well as judges who favor marriage equality.\textsuperscript{138} Out of all the cases that have used a sex-discrimination argument for why same-sex marriage bans are unconstitutional, only six courts engaged in any analysis of it and only two accepted it.\textsuperscript{139}

\begin{footnotesize}
\begin{enumerate}
  \item Title VII of the Civil Rights Act. 78 Stat. 271 (1964).
  \item \textit{See Craig}, 429 U.S. at 197. Different minimum drinking age for males and females.
  \item \textit{See United States v. Virginia}, 518 U.S. 515 (1996). The availability of a separate military academy for women was an inadequate substitute for the fact that women were barred from being admitted into an all-male military academy.
  \item \textit{Id.}
  \item \textit{See Craig}, 429 U.S. at 197.
  \item \textit{Id.}
  \item \textit{Id.} at 2111-12.
\end{enumerate}
\end{footnotesize}
Courts have rejected the argument following two basic lines of reasoning. First, many dismiss the argument on the grounds that same-sex marriage bans apply equally to both men and women. Second, many reject the stereotyping theory on the ground that exclusion of same-sex couples from marriage was not intended to perpetuate sex stereotypes or the subordination of women to men. The courts have found that sex discrimination is distinguishable from other types of discrimination.\(^{140}\) For example, the “equal application”\(^{141}\) anti-miscegenation law in *Loving* was “designed to maintain White Supremacy.”\(^ {142}\) Courts argue, “sex discrimination is not the kind of sham equality that the Supreme Court confronted in *Loving*.”\(^ {143}\) Arguably, the *Loving* Court stressed equal application of a law and not the equality of the law. In order to better understand the sex discrimination argument, consider the following example:

“Dr. A and Dr. B both want to marry Ms. C. Dr. A may do so because Dr. A is a man. Dr. B may not because Dr. B is a woman. Dr. A and Dr. B are people of opposite-sexes who are similarly situated in the sense that they both want to marry a person of their choice. The statute disqualifies Dr. B from marriage solely on the basis of her sex and treats her differently from Dr. A, a man. That is sex discrimination.”\(^ {144}\)

But courts argue that even if the same-sex marriage bans are discriminatory, they are not discriminatory because of sexism, but rather, because of homophobia.\(^ {145}\) Therefore, the sex discrimination argument does not receive enough traction because the discrimination

\(^{140}\) *Id*.

\(^{141}\) According to defendants in *Loving*, whites were not allowed to marry blacks, and blacks were not allowed to marry whites, therefore, the law was equally applied against both races.

\(^{142}\) *Id.* (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967)).


\(^{144}\) *Id.* at 2106 (citing *Baker v. State*, 744 A.2d 864, 906 (Vt. 1999)).

\(^{145}\) *Id.* at 2119.
suffered by gays and lesbians has no connection to their sex but rather their sexual orientation.

To the contrary, it seems that same-sex bans perpetuate sex-stereotyping—a very important subset of sex discrimination. In restricting marriage to opposite-sex individuals, the state is presuming or insisting that men and women perform different roles within the marital relationship and that the different roles are rooted in their maleness and femaleness. 146 This idea objects to the notion that a man and woman can both fulfill the roles traditionally applied to the opposite-sex; for example, that women can be breadwinners and that men can be nurturers and caregivers.

The difficulty of these arguments could be that the law and our societal norms are not yet adequately developed to support these claims. From a doctrinal perspective, few cases have addressed sex stereotyping, and the circuits are split on its application. 147 Sex discrimination claims have typically been made in employment litigation arising under Title VII violations, typically challenging grooming, dress codes, and military distinctions, rather than equal protection grounds. 148 Courts overwhelming find that sex-based distinctions or “sex-based distinctions” could be necessary and therefore, sparingly used as a legal justification by courts to strike down discrimination. 149 Courts fear that expanding sex discrimination to encompass arguments against same-sex marriage bans could

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146 Id. at 2100.
149 Id.
muddle the typical sex discrimination arguments. \textsuperscript{150} Therefore, questions regarding its applicability in same-sex marriage claims remain. \textsuperscript{151}

There are costs associated with sex discrimination being regarded as an untenable legal argument in favor of striking down same-sex marriages. For example, a successful sex discrimination precedent would further help dismantle the usual justifications of allowing same-sex marriage bans to stand for the “interests of the child in having a father and a mother” and in the state’s interest in privileging “natural or unintended procreation.” \textsuperscript{152} It would also have the effect of eroding stereotypes about what the roles are played by a father and a mother in the marital and parental relationship. Lastly, a recognition of sex-discrimination as a legitimate argument—deserving of strict scrutiny like race, national origin, religion, \textit{etc.}—would make it understood that statutes treating straight and gay people differently could not pass for anything but invidious discrimination. \textsuperscript{153}

\textit{b. Sexual Orientation Discrimination}

Notwithstanding the discussion of sex discrimination \textit{infra} \textsuperscript{154}, courts across the country have found it easier to frame the legal question of whether same-sex marriage bans are discriminatory on the basis of an individuals’ sexual orientation. Although excluding same-sex couples from marrying does not physically prevent gays and lesbians from marriage because they are free to marry members of the opposite-sex. Yet, courts have concluded that limiting marriage to opposite-sex couples prevents gays and lesbians from marrying a

\begin{itemize}
\item \textsuperscript{150} \textit{Id.} at 2126-27.
\item \textsuperscript{151} See \textit{id}.
\item \textsuperscript{152} \textit{Id.} at 2126-27.
\item \textsuperscript{153} \textit{Id.} at 2139.
\item \textsuperscript{154} See discussion \textit{infra} Section II.B.1.A.
\end{itemize}
person of the gender to which they are attracted to and effectively targets and excludes them from marriage as a class.\textsuperscript{155}

Even in cases where courts held in favor of same-sex marriage bans, nonetheless courts acknowledged “the legislation does confer advantages on the basis of sexual preference. Those who prefer relationships with people of the opposite-sex and those who prefer relationships with people of the same-sex are not treated alike, since only opposite-sex relationships may gain the status and benefits associated with marriage.”\textsuperscript{156}

In 1996, after the \textit{Bowers} decision, the Supreme Court first considered sexual orientation as a status or special class within the context of the equal protection guarantee as violating the Fourteenth Amendment, by invalidating a law that discriminated because of the sexual orientation of gays and lesbians.\textsuperscript{157} \textit{Romer v. Evans} concerned an amendment to the Colorado Constitution that prohibited state and local government entities from taking any action to shield gays, lesbians, or bisexuals from discrimination.\textsuperscript{158}

The Court held that the amendment was unconstitutional because it abrogated the government’s power to protect a particular group from discrimination\textsuperscript{159} and that the amendment was so broad that it had no rational relation to Colorado’s stated goals,\textsuperscript{160} that a moral objection to the lifestyle of gays and lesbians was an insufficient

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\item \textsuperscript{155} Bartschi, \textit{supra} note 2, at 479 (citing \textit{In re Marriage Cases}, 183 P.3d 384, 451 (2008)).
\item \textsuperscript{156} \textit{Hernandez v. Robles}, 7 N.Y.3d 338, 362 (2006); \textit{see also Andersen v. King County}, 158 Wash. 2d 1, 19 (2006). Court upheld marriage ban but found that the law discriminated against lesbians and gay men.
\item \textsuperscript{157} Franklin, \textit{supra} note 53, at 857.
\item \textsuperscript{158} \textit{Id.}
\item \textsuperscript{159} \textit{Id.} at 858.
\item \textsuperscript{160} \textit{Romer v. Evans}, 517 U.S. 620, 653 (1996). In \textit{Romer}, the state argued that this amendment was necessary to “protect the physical and psychological well-being of . . . children”, by promoting “heterosexual marriage as the foundation of a stable family unit” and “to avert unnecessary suffering of . . . [young people] who may be influenced relative to their sexual preference’ if the government failed to sufficiently convey its disapprobation of homosexuality”.
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reason to justify the law.\textsuperscript{161} The Court added, “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”\textsuperscript{162} Although the Court said it was using a rational basis review standard, \textit{Romer}’s legal analysis perfectly fits in the heightened scrutiny rubric. For example, the Court found animus towards a historically targeted group because the state passed an amendment that specifically discriminated against gays and lesbians. Further, the Court found that the amendment was overly broad, and had the effect of erasing the group’s political power.\textsuperscript{163} Many call the Court’s “new” constitutional standard “rational basis with a bite.”\textsuperscript{164}

There are many parallel conclusions to be drawn between the similarities of \textit{Romer}, decided in 1996, and \textit{Lawrence}, decided in 2006.\textsuperscript{165} In both decisions the Court was clear in using explicit language that set forth a standard that in application it failed to use.\textsuperscript{166} It appears that the Court showed restraint in not explicitly setting forth sweeping precedent, but the legal rhetoric used in its analysis shows that the Court was articulating a stricter standard than rational basis.

Legal scholars argue that the meaning of \textit{Lawrence} and \textit{Romer} is read between the lines, and the power of \textit{Romer} is in what was left unsaid. \textit{Romer} struck down an amendment that discriminated on the basis of sexual orientation, and even though the Court argued that it was using rational basis review, it did not classify sexual orientation as a protected status under the law.\textsuperscript{167} Yet, the Court’s legal reasoning squarely analyzed the Colorado amendment within the framework of

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\item \textsuperscript{161} Id. at 621.
\item \textsuperscript{162} Id. at 635.
\item \textsuperscript{163} Id. at 632.
\item \textsuperscript{165} Samar, \textit{supra} note 93, at 100-03.
\item \textsuperscript{166} Bartschi, \textit{supra} note 2, at 487.
\item \textsuperscript{167} Id.
\end{itemize}
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heightened scrutiny. Perhaps, one reasons for why the *Romer* Court may have been hesitant to carve sexual orientation as a protected status deserving of heightened scrutiny explicitly, in part, was to prevent invalidating vast amounts of legislation that was being created at the time, namely, DOMA and the “mini DOMAs” of the states.

Given the “limited” holding of *Romer* within the political climate at the time, *Romer* was one of the first cases that initiated the conversation with the public and helped frame the legal issue with respect to certain ways of regulating gays and lesbians that might violate constitutional equality norms. The decision played an integral role in developing how the courts understand the legal issues surrounding gays and lesbians, especially by addressing what egregious discrimination against gays and lesbians looks like. In hindsight, it is easier to discern that *Romer* created the outlines of a new constitutional principle that would later come to play a central role in cases involving sexual orientation discrimination, but for many years its precedential value lay dormant until *United States v. Windsor*. By the time the Court decided *Windsor*, the Court was able to use *Romer* in order to respond to, rather than dictate a view that sexual orientation discrimination violates constitutional equality principles.

As mentioned above, since the time of *Romer*, courts have begun seeing sexual orientation as a suspect or quasi-suspect class. “Laws signaling out [gay persons] for disparate treatment are subject to heightened judicial scrutiny to ensure those laws are not the product of such historical prejudice and stereotyping.” California’s Supreme Court held that “there is no persuasive basis for applying to statutes that classify persons on the basis of the suspect classification of sexual orientation a standard less rigorous that applied to statutes that classify

168 *Id.*
169 Franklin, *supra* note 53, at 858.
170 *Id.*
171 *Id.* at 870.
on the basis of suspect classifications of gender, race, or religion.”

The Supreme Court of New Mexico held that “intermediate scrutiny must be applied in this case because the LGBT community is a discrete group that has been subjected to a history of purposeful discrimination, and it has not had sufficient political strength to protect itself from such discrimination.”

Yet there is no clear consensus on whether sexual orientation is a protected status under the Fourteenth Amendment. Many courts have refused to address whether sexual orientation is a suspect or quasi-suspect class. For example, the Vermont and Massachusetts judiciary avoided the question by invalidating marriage bans on rational basis review and circumvented the discussion on sexual orientation. On the other hand, the New York Court of Appeals held that sexual preference could get heightened scrutiny, but not in the cases of marriage and family relationships. The Washington Supreme Court and the high court in Maryland found that sexual orientation is not subject to heightened scrutiny because there is no conclusive evidence that sexual orientation is an immutable characteristic. Further, in *Hernandez v. Robles*, the Court of Appeals of New York found that gays and lesbians do not constitute a politically powerless group, because they have adequate representation within the legislature and therefore do not require additional protection through the judiciary.

In spite of the judiciary, through legislative action, states like Maryland and Massachusetts now classify sexual orientation as a protected class. To date, eighteen states and the District of Columbia have added sexual orientation and gender identity as a

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174 *Griego v. Oliver*, 316 P.3d 865, 884 (N.M. 2013).
177 *Goldberg*, *supra* note 122, at 2116-18.
178 *Hernandez*, 7 N.Y. 3d at 388.
179 American Civil Liberties Website map, *supra* note 115.
protected class to their state constitutions. Additionally, New York, New Hampshire, and Wisconsin only classify sexual orientation as a protect class but not gender identity. Illinois amended the Human Rights Act in 2005 in order to add sexual orientation as a protected suspect class. However, Indiana has no such protections.

On June 26, 2013, in United States v. Windsor, the Supreme Court struck down Section 3 of DOMA—which had defined “marriage” and “spouse” to include only unions of persons of the opposite-sex—because it violated the equal protection and due process clauses of the Fifth Amendment. In Windsor, two women were legally married in Canada and were residing in New York where the marriage was recognized. Unfortunately, when one of the spouses died, the IRS denied a marital deduction for property the other inherited from her late wife on the grounds of DOMA—i.e., that she was not a “spouse” under Section 3 of the act. Overturning DOMA had the immediate consequences of restructuring how the federal law recognizes and treats same-sex marriage for the purposes of federal rights, including Social Security, federal tax benefits, gift giving, estate planning and inheritance, employee benefits, IRA accounts, etc. The Windsor decision heralded consistency between the federal and state government and struck down the biggest legal rationale in support for same-sex marriage bans.

However, just as in Lawrence and Romer, the Windsor Court inexplicably left out an analysis of what level of scrutiny it used to determine that DOMA is unconstitutional, leaving out any discussion

\[180\] Id.  
\[181\] Id.  
\[183\] American Civil Liberties Website map, supra note 115.  
\[184\] DOMA, supra note 18.  
\[186\] Id.
of its professed justifications. The Windsor Court “addressed federalism, paraded liberty, hinted at equal protection, and nodded at due process, but never articulated a defined legal construct within which to proceed.” As a result, “litigants on both sides of the [same-sex marriage] issue [thought they could] rely on Windsor to support [their] position.” Even Justice Scalia in his dissenting opinion argued that Windsor’s real rationale was a “disappearing trail of . . . legalistic argle bargle.” But the majority comprehensively discussed almost every legal argument and topic ever discussed in the context of same-sex marriage law.

Although Windsor did not resolve the issue of what level of scrutiny must be afforded to challenges alleging sexual orientation discrimination, the issue was raised by an unexpected source. The Department of Justice (DOJ) issued an unprecedented 28 U.S.C. § 530D letter expressing both its decision not to defend DOMA’s constitutionality and the Department’s position that legislative classifications based on sexual orientation should be accorded heightened scrutiny. The Department of Justice cited to Lawrence, Romer, and City of Cleburne v. Cleburne Living Center as support for its decision. The letter stated that heightened scrutiny should apply to sexual orientation because it satisfies the four heightened scrutiny factors: (1) there is “a significant history of purposeful discrimination against gays and lesbians . . . based on prejudice and stereotypes that

188 Id.
189 Id.
190 Windsor, 133 S. Ct. at 2696.
191 Id.
194 Id.
have ramifications today,” (2) sexual orientation is an immutable characteristic, (3) LGBT individuals have “limited political power,” and (4) sexual orientation has no bearing on ability to perform or contribute to society.\(^{195}\) The letter went on to state that “[t]he President has concluded that given [these] factors . . . sexual orientation should be subject to a heightened standard of scrutiny.”\(^{196}\) Effectively, the letter from the Department of Justice indicated that DOMA did not even have support from the governmental body tasked with the responsibility of defending the law. The gesture struck DOMA as void and null.

Together, the statement from the DOJ and *Windsor* created a whirlwind of legislation spanning the country aimed at dismantling same-sex marriage bans. Pundits trying to analyze the consequences of *Windsor* have stated that the case is a “equal liberty” case in that it has fused together the two separate tracks of same-sex marriage jurisprudence, that of due process and equal protection.\(^{197}\) They argue that the decision has created a bridge from the past cases that embraced equal protection and liberty principles and has laid a precedential path for future cases.\(^{198}\) These attestations of the meaning and effect of *Windsor* have all been made without the Court expressing a clear and explicit standard of review. A debate centers on whether the Court used rational basis review, or perhaps the “more searching form of rational review,” known colloquially as “rational basis with a bite.”\(^{199}\) Regardless, lower courts have broadly applied *Windsor* in striking same-sex marriage bans nationwide.\(^{200}\) A broad understanding of Windsor stands for the premise that gays and lesbians deserve the same legal rights and protections as everyone

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195 Id.


197 Marcus, supra note 193, at 19.

198 Id. at 32-33.

199 Id. (citing SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 481 (9th Cir. 2014)).

200 Marcus, supra note 193, at 22.
else. At the very least, the Windsor case means that judges do not have to start from scratch in determining if a right exists, or if gays and lesbians should be constitutionally protected.

V. THE LITIGATION

A. Wolf v. Walker, U.S. District Court for the Western District of Wisconsin

On February 3, 2014, the American Civil Liberties Union (ACLU) and the law firm of Mayer Brown filed a lawsuit in the U.S. District Court for the Western District of Wisconsin on behalf of four same-sex couples, challenging Article XIII, § 12 of the Wisconsin Constitution which states, in relevant part, that: “[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.”

In addition, various provisions in the Wisconsin Statutes, primarily in chapter 765, limit marriage to a “husband” and a “wife.”

Petitioners filed a motion for summary judgment while defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted. Judge Barbara Crabb denied defendant’s motion and granted plaintiff’s motion, holding that: (1) there is a fundamental right to marry under Due Process Clause encompassing the right to marry someone of the same-sex, (2) Wisconsin’s marriage amendment and relevant statutes were subject to heightened scrutiny, (3) heightened scrutiny applies to equal protection claims involving sexual orientation, and (4) that Wisconsin’s marriage amendment did not further any legitimate state interest.

202 Id.
203 Id.
204 Id.
During oral arguments, defendants argued that: (1) *Baker v. Nelson*\(^{205}\) was controlling law\(^{206}\); (2) that the right to marriage was a “positive right” that the state had no duty to grant the right to everyone; and (3) the state had a legitimate interest in “preserving tradition, encouraging procreation and ‘responsible’ procreation, providing an environment for ‘optimal child rearing’, protecting the institution of marriage, proceeding with caution and helping to maintain other legal restrictions on marriage.”\(^{207}\)

Judge Crabb concluded that *Baker* was not valid law given the developments in the jurisprudence of the law in same-sex marriage cases. When *Baker* was first decided in 1972, the law had just recognized a protected right in marriage under the *Loving* framework, and it had not contemplated sexual orientation as a suspect class. In fact, at the time, *Bowers* had not even been decided and sodomy laws were still widely applicable and valid across the United States. Further, Judge Crabb cited *Romer* and *Lawrence* that have since reframed the legal issues first introduced in *Baker*, Judge Crabb commented that if defendants were still not convinced that *Baker* was dead, then the most recent Supreme Court case, *Windsor* made it clear that *Baker*’s precedential value has deteriorated.\(^{208}\)

\(^{205}\) See *Baker v. Nelson*, 291 Minn. 310 (1971). The Minnesota Supreme Court held that same-sex couples do not have a right to marry under the due process clause or the equal protection clause of the United States Constitution. When the plaintiffs appealed, the United States Supreme Court had “no discretion to refuse adjudication of the case on its merits” because the version of 28 U.S.C. § 1257 in effect at the time required the Court to accept any case from a state supreme court that raised a constitutional challenge to a state statute. The United States Supreme Court dismissed an appeal from the Supreme Court of Minnesota for want of a substantial federal question. The Supreme Court of MN has held that: (1) the absence of an express statutory prohibition against same-sex marriages did not mean same-sex marriages are authorized; and (2) state authorization of same-sex marriages is not required by the Unites States Constitution.

\(^{206}\) *Wolf*, 986 F.Supp. 2d at 982.

\(^{207}\) *Id.*

\(^{208}\) *Id.* at 987-88 (citing *Windsor v. United States*, 699 F.3d 169, 178-79 (2d Cir. 2012)). “Even if Baker might have had resonance for Windsor's case in 1971, it does not today.”
Then, the court turned to defendants’ second argument that marriage was a right granted by the State of Wisconsin and as a “positive right” it need not include all individuals. Judge Crabb quickly dismissed that as a tenable argument, citing that case law is replete with evidence and precedent that marriage is not a “positive right” but a fundamental right protected by the constitution.\footnote{Id. at 991; E.g., Turner v. Safley, 482 U.S. 78, 95 (1987); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–640 (1974); Loving v. Virginia, 388 U.S. 1, 12 (1967). The “liberty” protected by the due process clause in the Fourteenth Amendment includes the “fundamental right” to marry, a conclusion that the Supreme Court has reaffirmed many times. Zablocki v. Redhail, 434 U.S. 374, 384 (1977) ("[The] right to marry is of fundamental importance for all individuals."); Cleveland Bd. of Educ., 414 U.S. at 639-640 ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").} As such, any state action infringing upon that right must be subject to strict scrutiny.\footnote{Wolf, 986 F.Supp. 2d at 991.} At debate was not the whether marriage was a positive right, but whether restricting marriage to same-sex couples was discriminatory on its face. Once the state extends that benefit to some of its citizens, it is not free to deny the benefit to other citizens for any or no reason on the ground that a “positive right” is at issue.\footnote{Id. at 992.} Therefore, “[t]he State may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.”\footnote{Id. (citing DeShaney v. Winnebago Cnty. Dep’t of Serv., 489 U.S. 109 (1989)).}

Next, defendants argued that they did not want to “endorse” same-sex marriage and for that reason have acted to restrict it.\footnote{Id.} Pointing to Romer and Bowers, Judge Crabb found that the defendants’ argument had been used before, and these arguments had failed then, and would fail here, too. Allowing citizens the right to same-sex marriage is not an endorsement by the state; rather it...
represents “a commitment to the law’s neutrality where the rights of persons are at stake.”

Lastly, the defendants also relied on Windsor to set forth their argument that marriage falls exclusively under the purview of the state. The state is free to regulate marriage according to its state interests. However, Judge Crabb found defendants’ and amici’s reliance on Windsor misplaced for three reasons. First, although Windsor devoted seven pages to develop an analysis of state rights vis-à-vis constitutional rights, Windsor explicitly stated that “no one questions the power of the States to define marriage.” Yet, the Court was not articulating a new, heightened level of deference to marriage regulation by the states. Second, Windsor strictly relied on federalism grounds for concluding that DOMA was unconstitutional. Third, and most important, the Court discussed DOMA’s encroachment on state authority as evidence that the law was unconstitutional, not as a reason to preserve a law that otherwise would be invalid. In fact, the Court was careful to point out multiple times the well-established principle that an interest in federalism

214 Romer v. Evans, 517 U.S. 620, 623 (1996); see also Bowers v. Hardick, 478 U.S. 186, 205-06 (1986) (Blackmun, J., dissenting) (“[A] necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices.”).


216 U.S. v. Windsor, 133 S. Ct. 2675, 2705 (2006) (Scalia, J., dissenting) (“But no one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is?”).

217 Wolf, 986 F.Supp. 2d at 995.

218 Windsor, 133 S. Ct. at 2692 (majority opinion) (“[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.”); see also id. at 2705 (Scalia, J., dissenting) (“[T]he opinion has formally disclaimed reliance upon principles of federalism.”); but see id. at 2697 (Roberts, C.J., dissenting) (“[I]t is undeniable that its judgment is based on federalism.”).

219 Wolf, 986 F. Supp. 2d at 997.
cannot trump constitutional rights. Windsor’s less than clear cut analysis allows for both proponents and opponents to same-sex marriage find arguments supportive of their position. But, in Judge Crabb’s opinion, she refutes any argument to the contrary about Windsor’s relevance as a case expanding protections and rights for the LGBT. Turning to the equal protection claims, Judge Crabb immediately dismissed the sex discrimination claim, finding that it is not analogous to the reasoning in Loving, as articulated infra, and that courts found this argument as “counterintuitive and legalistic, and an attempt to ‘bootstrap’ sexual orientation discrimination to sex discrimination.” Since the Seventh Circuit Court of Appeals had also failed to embrace the theory of sex discrimination, Judge Crabb sought to decide the case on other grounds and chose to overlook the entire argument.

While analyzing Romer and Windsor, Judge Crabb found that although Court in those cases was claiming to use rational basis review, she argued that they were using “something more”. Judge Crabb takes this to indicate that perhaps the Supreme Court is on the verge of finding sexual orientation as a suspect or quasi-suspect class. The district court here also determined that the Seventh

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220 Windsor, 133 S. Ct. at 2691 (majority opinion) (“State laws defining and regulating marriage, of course, must respect the constitutional rights of persons.”); id. at 2692 (“[T]he incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next.”); id at 2691 (“The States' interest in defining and regulating the marital relation [is] subject to constitutional guarantees.”); id.

221 See generally, Marcus, supra note 193.

222 Wolf, 986 F. Supp. 2d at 996.

223 For a developed discussion, please see my section, located supra, entitled “The Legal Framework of the Equal Protection Clause in Same-Sex Marriage.”

224 Wolf, 986 F. Supp. 2d at 1008.

225 Id. at 1009.

226 Id. at 1010.

227 Id.
Circuit had not engaged in any analysis of whether heightened scrutiny applies to sexual orientation challenges,\(^{228}\) therefore, leaving her free to consider the factors relevant to determining if heightened scrutiny should apply.\(^{229}\) She concluded that gays and lesbians: (1) have faced a history of discrimination; (2) sexual orientation has no bearing on their ability to contribute to society; (3) sexual orientation is immutable, it is fundamental to a person’s identity; and (4) are politically powerless in the sense of an “inherent vulnerab[ility] in the context of the ordinary political process, either because of . . . size or history of disenfranchisement.\(^{230}\) Given that the District Court found that sexual orientation is subject to heightened scrutiny, Judge Crabb found that Wisconsin must show that their prohibition on same-sex marriage is substantially related to an important governmental objective to survive heightened scrutiny.\(^{231}\)

Here, Judge Crabb was not impressed with the arguments made by Wisconsin. Starting with tradition, Judge Crabb argues that not all traditions are good traditions and following them blindly can have bad results.\(^{232}\) Traditions such as coverture, the fusing of a woman’s legal identity into her husband’s after marriage, had the effect of dismissing her political being out of existence.\(^{233}\) Women did not always have the right to vote and at a time were not considered equals to men.\(^{234}\)

\(^{228}\) Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (applying rational basis review to a law banning gays in the military); \textit{but see} Nabozny v. Podlesny, 92 F.3d 446, 457-58 (1996) (stating that Ben-Shalom’s holding was limited to the military context).

\(^{229}\) \textit{Id.} at 1011.

\(^{230}\) \textit{Wolf}, 986 F. Supp. 2d at 1011.

\(^{231}\) \textit{Id.} at 1014.

\(^{232}\) \textit{Id.} at 1019.

\(^{233}\) \textit{Id.} at 1018. Similarly, women were deprived of many opportunities, including the right to vote, for much of this country’s history, often because of “traditional” beliefs about women’s abilities. \textit{E.g.}, Bradwell v. People of State of Illinois, 83 U.S. 130, 141-42 (1872) (Bradley, J., concurring in the judgment) (‘‘[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and
Following tradition can also mean “the [r]ote reliance on [an] historical exclusion as justification . . . serv[ing] to justify slavery, anti-miscegenation laws and segregation.”  

Wisconsin argued that their restriction on same-sex marriage bans are needed to channel opposite-sex couples into marriage in order to ensure that they will stay together after procreation and that same-sex couples do not need this protection because they are not at risk of accidentally procreating.  

As other courts have noted, an argument relying on procreation raises an obvious question: if the reason same-sex couples cannot marry is that they cannot procreate, then why are opposite-sex couples who cannot or will not procreate allowed to marry? Judge Crabb found Wisconsin’s arguments inconsistent.  

On one-hand defendants argued that same-sex couples do not need marriage because they can raise children responsibly without it. On the other hand, defendants argued that same-sex couples should not be raising children at all. Defendants argued that opposite-sex marriage promotes “optimal child rearing” but provided no justification for how or why same-sex couples could not raise children well, nor did defendants show that Wisconsin asked each marriage applicant to make any showing that they are good parents or have financial means to support child rearing.  

In fact, felons, alcoholics, or a person with a history of child abuse may obtain a marriage license in Wisconsin. Again, the state’s argument that banning same-sex marriage is a mother. This is the law of the Creator.”). With respect to marriage in particular, there was a time when “the very being or legal existence of [a] woman [was] suspended” when she married. William Blackstone, Commentaries, Vol. I, 442-45 (1765).
method of promoting good parenting calls into question the sincerity of this asserted state interest. Judge Crabb also found that the “optimal child rearing” argument is an insincere one considering that the state of Wisconsin has allowed same-sex couples to adopt and raise children together for many years. What the same-sex marriage ban does is foster less than optimal results of the children of same-sex couples who are stigmatized and deprived of the benefits of marriage.

Lastly, Judge Crabb pointed out that if the state will deprive an entire group of people the fundamental right to marry, then, the state needs to offer a stronger justification than “this is the way it has always been” or “we’re not ready yet.” At the very least the state had to make a showing that the restriction on same-sex marriage furthers a legitimate state interest separate from a wish to maintain the status quo.

Relying on Loving, Romer, Lawrence and Windsor, the district court held that same-sex marriage bans are unconstitutional and therefore, struck them down. Immediately, county clerks started issuing marriage licenses to same-sex couples. Wisconsin state officials attempted to thwart the issuance of licenses by asking Judge Crabb to grant an injunction, despite that the defendants had failed to include that request in their initial pleadings. Judge Crabb did not consider their plea. An appeal was subsequently filed by the Wisconsin defendants to the Seventh Circuit Court.

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242 *Id.* (citing Romer v. Evans, 517 U.S. 620, 635 (1996)).
243 *Id.*
244 *Id.*
245 *Id.* at 988.
246 *Id.* at 987-88.

On March 12, 2014, Lambda Legal filed *Baskin v. Bogan* in the United States District Court for the Southern District of Indiana on behalf of five same-sex couples. The complaint charged that Section 31-11-1-1 and Section 31-11-1-1(b) of the Indiana Code, which banned same-sex marriage and the recognition of these marriages, violated their rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution. Plaintiffs sought declarative and injunctive relief.

First the Court addressed a number of preliminary matters, related to who had proper standing as a defendant in the case. Then, in an almost parallel fashion to the holding of *Wolf v. Walker*, the Court in *Baskin* held that the Indiana statute banning same-sex marriage violated same-sex couples’ fundamental right to marry; that

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248 Initially there were three same-sex couples to the complaint, but the complaint was later amended to add two more couples; one of which was a married couple from Massachusetts, living in Indiana. One spouse was terminally ill and the couple sought an emergency order for a preliminary injunction from the court, in order for their valid marriage to be recognized in Indiana.

249 Ind. Code § 31-11-1-1 states:

(a) Only a female may marry a male. Only a male may marry a female.

(b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.

250 *Baskin*, 12 F. Supp. 3d. at 1150.

251 *Id.*

252 On April 10, 2014 the court granted a temporary restraining order prohibiting Indiana from enforcing section b of Ind. Code § 31-11-1-1. Both parties moved for summary judgment, as there were no issues of material fact. On May 2, 2014, when motions for summary judgment were being heard, the court granted a preliminary injunction extending the temporary restraining order.

A second issue the Court had to address was which defendants had proper standing. The Court found that the IN Dept. of Rev. and Attorney General Zoeller had standing because they were tasked with enforcing the law and regulating its consequences, while Governor Mike Pence was found to lack standing and was dismissed as a party.
the statute did not discriminate against same-sex couples on the basis of their sex, but it did discriminate on the basis of their sexual orientation and finally, that there was no rational basis for treating same-sex couples differently by excluding them from marriage.\textsuperscript{253}

Just like Wisconsin in \textit{Wolf}, Indiana in \textit{Baskin} argued that Indiana’s statute was constitutional and based on the legal precedent and applicability of \textit{Baker v. Nelson}\textsuperscript{254} arguing that “lower courts are bound . . . until such time as the [Supreme] Court tells them that they are not.”\textsuperscript{255} Chief Judge Robert L. Young countered by stating that “‘when doctrinal developments indicate,’ lower courts need not adhere to the summary disposition.”\textsuperscript{256} “In the forty years after \textit{Baker}, there have been manifold changes to the Supreme Court’s equal protection jurisprudence” and that “[e]ven if \textit{Baker} might have had resonance . . . in 1971, it does not today.”\textsuperscript{257}

After determining that \textit{Baker} had no precedential value, the court considered whether there was a fundamental right to marry, what level of scrutiny to apply, and whether the bans discriminate against gays and lesbians because of their sex and sexual orientation. Relying on \textit{Loving, Romer, Lawrence,} and \textit{Windsor}, Judge Young found ample evidence in the case law to support that there is an undisputed fundamental right to marry,\textsuperscript{258} and the Judge reiterated that once a “fundamental right [is] recognized, [it] cannot be denied to particular groups on grounds that these groups have historically been denied those rights.”\textsuperscript{259} Judge Young used \textit{Loving} to best illustrate this concept.\textsuperscript{260} Had the court considered that a fundamental right only

\begin{itemize}
  \item \textsuperscript{253} \textit{Baskin}, 12 F. Supp. 3d at 1144.
  \item \textsuperscript{254} \textit{Id.} at 1153.
  \item \textsuperscript{255} Hicks v. Miranda, 422 U.S. 332, 344-45 (1975).
  \item \textsuperscript{256} \textit{Id.}
  \item \textsuperscript{257} \textit{Windsor}, 699 F.2d at 178.
  \item \textsuperscript{258} For a detailed discussion, see supra note 177; \textit{see} Lawrence v. Texas, 539 U.S. 558, 574 (2003) (“Our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”).
  \item \textsuperscript{259} Samar, supra note 86 at 94.
  \item \textsuperscript{260} \textit{Baskin} v. \textit{Bogan}, 12 F. Supp. 3d 1137, 1158 (S.D. Ind. 2014).
\end{itemize}
encompasses what it had traditionally, then Mildred and Richard Loving would have never been able to get married, since bans on interracial marriage were longstanding since colonial times. Judge Young argued that the same logic applied to same-sex marriage; defendants cannot argue that because same-sex couples traditionally have not been allowed to marry and therefore, they do not have a fundamental right to do so.

Finally, the court found that Indiana’s statute significantly interferes with the fundamental right to marry because it completely banned the plaintiffs from marrying the person of their choosing. Indiana argued that the same-sex marriage bans served the legitimate state’s interest in ensuring that one man and one woman stay together for the sake of unintended children that their sexual relation may bring. But, the court failed to find how the Indiana’s proffered justification is narrowly tailored to the state’s interest, i.e., how can a concern affecting opposite-sex couples relate to whether same-sex couples should be permitted to marry? Indiana’s restriction is both under-inclusive as well as over-inclusive. It is under-inclusive because it only prevents one subset of couples, those who cannot naturally conceive children, from marrying, while post-menopausal woman, infertile couples, or couples who do not want children are not prevented from marrying. The statute is over-inclusive because the statute prohibits some opposite-sex couples who can naturally and unintentionally procreate from marrying, like close relatives or cousins from marrying. Ultimately, excluding same-sex couples from marriage has no effect on opposite-sex couples and on the choices they make relating to procreation or staying together. Given these factors, the court said that Indiana’s restriction on same-sex marriage

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262 Baskin, 12 F. Supp. 3d at 1155-57.
263 Id. at 1158.
264 Id.
265 Id.
266 Id.
267 Id.
was not narrowly tailored and the defendants have failed to prove their burden. Judge Young used strict scrutiny to frame his analysis.

Then, the court addressed the equal protection arguments, asking whether Section 31-11-1-1 and 21-11-1-1(b) of the Indiana Code violate the Fourteenth Amendment because it discriminates against gays and lesbians because of their sex as well as sexual orientation. Yet again, like many other courts before it, including the Wolf Court, the Baskin court found that there is no evidence of invidious sex-based discrimination. The court argued that Loving is not an analogous metaphor and the law’s purpose is not to reinforce a sex stereotype about the abilities of men and woman or to impose traditional gender roles on individuals.

On the other hand, the court found that there is discrimination on the basis of sexual orientation even while using rational basis review. While Indiana argued that gays and lesbians are not prevented from marrying an individual of the opposite-sex, the Court found that the law was specifically created to prevent gays and lesbians from marrying the individual of their choice. Following the Seventh Circuit’s lead, the Baskin Court also chose to use rational basis review.

To Judge Young, it is clear that the issue is whether excluding same-sex couples has a rational connection to the purported interest of dealing with unintentional and natural conception by opposite-sex

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268 Id.
269 Id.
270 Id. at 1159.
271 Id.
272 Id.
273 The Wolf Court disagreed. The Wolf Court analyzed the Seventh Circuit’s Schroeder v. Hamilton differently. The Wolf Court found that the Seventh Circuit only referenced in dicta the required constitutional scrutiny that should be used for sexual orientation discrimination cases. Therefore, the Wolf Court found that since the question was not definitively answered by the Seventh Circuit, they opted to use a heightened level of scrutiny. See Schroeder v. Hamilton Sch. Dist., 282 F.3d 946 (7th Cir. 2002) (Homosexuals are not entitled to any heightened protection under the Constitution).
couples in enforcing the ban. \footnote{Baskin, 12 F. Supp. 3d at 1159.} He found that the only rationale for the ban is to exclude same-sex couples on the basis of their sexual orientation. \footnote{Id.}

Therefore, the District Court of Indiana struck down the marriage bans because they are unconstitutional. Judge Young granted summary judgment for the plaintiffs and issued a preliminary injunction.

\textit{C. Baskin v. Bogan, the United States Court of Appeals for the Seventh Circuit}

Displeased with the rulings of the District Courts, state officials in Indiana and Wisconsin brought forth separate appeals to the United States Court of Appeals for the Seventh Circuit. On motion from the plaintiffs, the Seventh Circuit consolidated \textit{Baskin v. Bogan} \footnote{Id.} with \textit{Wolf v. Walker}. The court also expedited the legal proceedings by ordering completion of briefings by August 5, 2014. The Seventh Circuit scheduled oral arguments before a three-judge panel, including Judges Richard Posner, David Hamilton, and Ann Claire Williams for August 26, 2014.

On September 4, 2014, the Seventh Circuit in a unanimous opinion, authored by Judge Posner, upheld the district courts’ decisions. \footnote{Id.} Immediately, on September 15, the Seventh Circuit granted a motion for a stay of the ruling to be in effect until this case or one like it was resolved at the Supreme Court. \footnote{Id.} But, on October 6, 2014, the Supreme Court denied a \textit{writ of certiorari}, letting the Circuit court decision stand. \footnote{Id.}

\footnote{Baskin, 12 F. Supp. 3d at 1159.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
The Seventh Circuit was the third circuit court to issue an opinion on same-sex marriage and it was the first unanimous circuit court opinion overturning a state marriage ban.\textsuperscript{280} The opinion was authored by Judge Posner, who based on his questions during oral argument and his written opinion, established himself as one of the most indignant judges to approach the issue\textsuperscript{281}. Judge Posner’s position on same-sex marriage has shifted over the last two decades; he used to oppose increased protections and rights for the LGBT community.\textsuperscript{282} Since then, it is clear his opinion has greatly shifted.

Judge Posner opened his opinion and announced that, “[f]ormaly these cases are about discrimination against the small homosexual minority in the United States. But at a deeper level . . . they are about the welfare of American children . . . [c]hildren [that] would be better off both emotionally and economically if their adoptive parents were married.”\textsuperscript{283} He framed the legal issue as beyond an evaluation of the bans from rational basis.\textsuperscript{284} Instead, he immediately implicated heightened scrutiny that assesses the harm caused by the restriction as one of its four prongs.\textsuperscript{285}

Judge Posner reiterated that although marriage falls under the purview of state regulation and courts must be weary of legislating from the bench, same-sex marriage bans statutorily create a classification that “proceed[s] along suspect lines,” and therefore, it falls to the Seventh Circuit to assess the statutory bans legitimacy under the framework of the Fourteenth Amendment.\textsuperscript{286} Without any undue delay, Judge Posner then outlined that even under rational basis review, Indiana and Wisconsin, have failed to provide the requisite

\begin{footnotesize}
\textsuperscript{280} Id.
\textsuperscript{281} Wallace, supra note 161, at 343.
\textsuperscript{283} Baskin v. Bogan, 766 F.3d 648, 654 (7th Cir. 2014).
\textsuperscript{284} Id.
\textsuperscript{285} Id.
\textsuperscript{286} Id.
\end{footnotesize}
justifications that the ban serves “reasonably conceivable state of facts” or that a “‘reasonable basis’ for forbidding same-sex marriage” exists.” 287 For the court, “the only rationale that [Indiana and Wisconsin] have put [forward] with any conviction [is] that same-sex couples and their children do [not] need marriage because same-sex couples can [not] produce children, intended or unintended.” Judge Posner finds that this legal argument “is so full of holes that it cannot be taken seriously.” 288 Because the discrimination is “irrational and because the [statutory bans] failed under an equal protection analysis, the court [does not] discuss the plaintiffs' due process claims, or determine whether the right to choose whom to marry is a fundamental right.” 289

Judge Posner added that although the case is easily won in favor of the plaintiffs using rational basis review, he nevertheless outlined in detail a heightened scrutiny analysis because sexual orientation typically falls “along suspect lines”. Judge Posner first asked whether the challenged practice involves discrimination, rooted in a history of prejudice, against some identifiable group of persons, resulting in unequal treatment harmful to them. 290 He answered that without a doubt “homosexuals are among the most stigmatized, misunderstood, and discriminated against minorities in the history of the world.” 291 Secondly, he asked if there is unequal treatment based on “some immutable . . . characteristic of the people discriminated against,” and is the characteristic irrelevant to that person's ability to participate in society? 292 Judge Posner found that “there is little doubt that sexual orientation . . . is an immutable . . . characteristic rather than a choice.” 293 The court proceeded to cite to the American Psychological Association as well as various scientific journals that set

287 Id.
288 Id. at 656.
289 Id. at 657.
290 Id. at 655.
291 Id. at 658.
292 Wallace, supra note 161, at 345.
293 Id.
forth leading scientific theories that the causes of homosexuality are genetic. The court then spent the rest of the forty-paged decision analyzing the following two questions: “does the discrimination, even if based on an immutable characteristic, nevertheless confer an important offsetting benefit on society as a whole? . . . . [and,] [even if the policy] confer[s] an offsetting benefit, is [i]t discriminatory . . . [because the government could achieve its goal in a less-harmful manner to the discriminated-against group?]”.

Judge Posner, under a regime focused on rational basis, questioned whether the sum of the benefits provided by allowing only opposite-sex marriage equate to an offsetting governmental interest to justify the denial to same-sex couples. Before he dived into the question, he quickly dispelled the notion that Baker v. Nelson has applicable precedential value using the same logic and arguments as District Court Judges Crabb and Young.

Indiana defended the same-sex marriage ban on a single ground, namely, that their sole purpose in sanctioning marriage is to enhance child welfare. Indiana tried to “channel unintentionally procreative sex into a legal regime in which the biological father is required to assume parental responsibility”. Even if gays and lesbians want to enter into the regime, Indiana argued that various individuals, like friends and siblings could want to as well, but the state still has the right to refuse sanctioning those relations. Indiana argued that offering state benefits to opposite-sex couples is the “carrot” to induce them to enter into the marital regime. Indiana further argued that gays and lesbians do not need to be induced into the marital regime because they do not naturally or unintentionally

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294 Baskin, 766 F.3d at 657.
295 Id. at 655.
296 Id. at 659.
297 Id.
298 Id.
299 Id. at 660.
300 Id.
301 Id.
procreate and therefore, do not need to be allowed to enter the
institution of marriage. Judge Posner found these legal arguments
untenable, and that the mechanisms used to induce unwilling fathers to
own up to their parental responsibility already exists within the court
system, like paternity testing, and child support. Further, Judge
Posner found that since Indiana allows infertile couples to marry, their
reason that the law channels procreative sex, would logically conclude
that there is no reason to allow infertile couples to marry. Judge
Posner found that Indiana’s justifications for the ban have resulted in
an insidious form of discrimination, one that favors first cousins over
homosexuals. As a matter of comity, Indiana recognizes the marriage
of first cousins from other states, like Tennessee, where no restriction
is enforced. Elderly first cousins are permitted to marry because
they cannot produce children; homosexuals are forbidden to marry
because they cannot produce children. Indiana’s argument is that the
marriage of first cousins who are past child-bearing age provides a
“model [of] family life for younger, potentially procreative men and
women.” Judge Posner finds this argument “impossible to take
seriously.”

The bottom line of Judge Posner’s argument is that the
classification is over-inclusive and under-inclusive at the same time. Indiana’s law is punishing responsible same-sex couples who wish to
enter into the institution of marriage, who possibly have adopted or
plan to adopt children, while rewarding irresponsible opposite-sex
couples who procreate without forethought by allowing them into the
institution of marriage. Judge Posner is less convinced by Indiana’s
arguments when he asks the defendants’ attorney, about same-sex

\[302\] Id.
\[303\] Id.
\[304\] Id. at 661.
\[305\] Id. at 667.
\[306\] Id. at 662.
\[307\] See Wolf v. Walker analysis on same issue supra n. 191.
adoption, which is a legal and widely accepted practice in Indiana. Judge Posner found that adopting unwanted children is a positive societal goal that should not be qualified by whether the parents are same-sex or opposite-sex. It is undisputed that it is better for children to be raised in a stable household, where they can enjoy the recognition, stability, state and federal benefits of such a legally recognized union regardless of the sex and sexual orientation of the parents. Judge Posner illustrated a hypothetical situation where a child comes some from school and asks why his same-sex parents are not married and the answer is that the law does not allow them to do so. Judge Posner argues that this realization is unsettling to the young child, because it takes away from his security, making the child feel different than his peers. Lastly, Judge Posner argued that Indiana’s law has not been very successful at encouraging people to get married because the rate of single mothers has been increasing over the years. The state’s alleged interest has failed, proving that the ban on same-sex marriage has done very little, if anything, to channel opposite-sex couples into marriage due to their unintentional procreation.


309 Id.

310 Id.

311 Baskin, 766 F.3d at 663.

312 Id. at 663-64.

313 Id.
The court's disdain for the defendants’ arguments extended to Wisconsin as the court analyzed the constitutionality of Article XIII, § 13. Wisconsin argued that: (1) same-sex marriage bans are valid because per tradition, same-sex couples have not been allowed to marry; (2) the consequences of same-sex marriage cannot be foreseen; (3) the right to same-sex marriage should be left to the democratic process; and (4) same-sex marriage makes marriage fragile and unreliable.

Judge Posner found that tradition “cannot be a lawful ground for discrimination—regardless of the age of the tradition.” Judge Posner paralleled Judge Crabb’s opinion in Wolf. Further, Judge Posner found that had the Supreme Court in Loving decided to rely on the tradition of forbidding black-white marriage, which dated back to colonial times, then the case would have never been resolved the way it was. Although some traditions are harmless, like the president pardoning a Thanksgiving turkey, or like men shaking hands, “[i]f no social benefit is conferred by a tradition and it is written into law and it discriminates against a number of people and does them

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314 Wallace, supra note 161, at 347.
315 Baskin, 766 F.3d at 666.
316 Id.
317 Id.
318 Id. at 666-67 (citing Loving v. Virginia, 388 U.S. 1, 8-12 (1967)).

Wisconsin's argument that its civil union statute remedies the problem met a similar fate, as the court analogized such a system to interracial marriage: “So look what the state has done: it has thrown a crumb to same-sex couples, denying them not only many of the rights and many of the benefits of marriage but also of course the name. Imagine if in the 1960s the states that forbade interracial marriage had said to interracial couples: ‘you can have domestic partnerships that create the identical rights and obligations of marriage, but you can call them only ‘civil unions' or ‘domestic partnerships.' The term ‘marriage’ is reserved for same-race unions.’ This would give interracial couples much more than Wisconsin's domestic partnership statute gives same-sex couples. Yet withholding the term ‘marriage’ would be considered deeply offensive, and, having no justification other than bigotry, would be invalidated as a denial of equal protection.” Id. at 670.
harm beyond just offending them, it is not just a harmless anachronism; it is a violation of the equal protection clause.”

While Wisconsin argued that the judiciary, as well as the state, should proceed with caution and “go slow” before “transforming this cornerstone of civilization and society,” Judge Posner found no reason or evidence that allowing same-sex marriage would transform marriage. Judge Posner found that states have allowed for same-sex marriage for over a decade now, and there have been no discernable consequences of “transforming” marriage. Further, no studies seem to indicate that allowing same-sex marriage has any effect on opposite-sex marriage, and although no one knows for sure how many Americans identify as LGBT, most estimates vary from one and a half to four percent of the population—hardly statistically important, enough to transform marriage. Judge Posner also reasoned that that every court decision is speculative in that no judge has the ability to determine with certainty the effect a decision will have on the future but that is what the democratic process protects against.

Judge Posner found civil unions as a “slap to the face” to gays and lesbians across Wisconsin, The “Wisconsin legislature . . . finds that the legal status of domestic partnership as established in this chapter is not substantially similar to that of marriage.” In Judge Posner’s view, not only is same-sex marriage not allowed, but Wisconsin explicitly states that civil unions are not adequate substitutes or comparables to marriage. To Judge Posner, that is the equivalent of “separate but not equal” and finds this reasoning to be completely arbitrary considering that Wisconsin does not even permit couples in domestic partnerships to adopt as one unit. Crating a

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318 Id.
320 Id. at 668.
321 Id.
322 Id.
323 Id.
324 Id. at 670.
325 Id.
326 Id. at 671.
second-class marriage treats the citizens who participate in it as second-class citizens. These differences cause substantial harm by invalidating the union of a same-sex couple while also hurting them and their children financially by refusing them the various state and federal benefits.

Wisconsin argued that it is dependent upon the democratic process to determine whether same-sex marriage should be allowed—not the judiciary. Judge Posner struck that argument down by stating that homosexuals make up a small percentage of the population, and thus they are unable to vote strongly enough to enact change in the issues that they care for. As an important corollary to minority groups with the inability to influence the democratic process, their recourse has always been in the courts—“the recourse is called constitutional law.”

Judge Posner sets forth that the legal standard is explicitly found in the Supreme Court’s decision in Windsor; “[t]he federal statute is invalid [referring to DOMA], for no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.” The standard of constitutional review is certainly something more than rational basis review, although Judge Posner did not feel the need to name the standard as such. Instead, Judge Posner left us with what he calls “rational basis.” He argued that although he gave us a “sneak peak” of how heightened scrutiny could be applied but this case was easier to analyze because Indiana and Wisconsin’s arguments were so tenuous and unsubstantiated, that they failed even with the more deferential standard, rational basis review.

327 Id.
328 Id. at 670.
329 Id. at 671.
330 Id.
331 Id. at 671.
332 Id. (citing U.S. v. Windsor, 133 S. Ct. 2675, 2696 (2006)) (emphasis added).
333 Id. at 672.
Considered as a whole, Indiana and Wisconsin’s justifications for the marriage bans have no “fit” and no resemblance to the arguments they set forth for why marriage should only be limited to opposite-sex couples. Therefore, the Seventh Circuit upheld the decisions of the district courts and allows for marriage equality in Indiana and Wisconsin.

**CONCLUSION**

The Seventh Circuit’s decision definitively answered that same-sex marriage bans are impermissible under the law because they discriminate on the basis of sexual orientation. Although the court addressed the case under a rubric of rational basis review, built into the decision is extensive development and discussion about heightened scrutiny as a standard of constitutional review for sexual orientation. Judge Posner called it “rational basis review” but analyzed it as if it was heightened scrutiny. His actions are akin to what the Supreme Court has done so many times before, as in the cases of Romer, Lawrence, and Windsor. It appears that by leaving the test undefined, the courts might purposefully be leaving the possibility for broad legal arguments and understandings in subsequent litigation in the future. Even when the courts have failed define the standard, lower courts have swiftly reacted by using the “spirit” of the decision, to extend more civil liberties for the LGBT community, even if the explicitly articulated legal rationale was lacking.

Arguably, the Seventh Circuit was more flagrant by explicitly stating that under a regime of rational basis the Indiana and Wisconsin claims would fail. But at the same time, the Seventh Circuit counter argued itself and struck down arguments within the context of heightened scrutiny. Judge Posner clearly laid the foundational arguments as if hypothetically addressing the problem under

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334 *Id.*
335 *Id.* at 655.
336 *Id.*
Looking forward, in situations where the challenged action discriminates on the basis of sexual orientation, the Seventh Circuit provided fodder that state restrictions will need more than a deferential, rational basis to overcome when called into question. In many respects, this also mirrors the fact that Illinois has sexual orientation as a suspect class, while Indiana and Wisconsin do not. The Seventh Circuit’s decision allows for Illinois to continue having a higher standard of review, while also forcing Wisconsin and Indiana to recognize that sexual orientation, although not protected by statute, is protected judicially.

Outside the context of challenges that fall within the realm of same-sex marriage, this continued weak application of sexual orientation not explicitly being a constitutionally protected class deserving of heightened scrutiny could prove problematic. Depending on where the challenges arise, Indiana, Illinois, or Wisconsin, and what the area of the law the challenge touches upon can mean that inconsistent rulings could result. For example, how will lower courts or the Seventh Circuit court decide cases involving discrimination on the basis of sexual orientation in the work place? Although Illinois protects sexual orientation, Indiana does not. A defendant-employer could argue that there was no discrimination based on his employee’s sexual orientation and use *Windsor* or *Baskin* to support that there is a limited finding that sexual orientation deserves more protection, but only in same-sex marriage cases, not employment cases. Along the same lines, employers could argue that rational basis review is the standard that the courts explicitly used, and that is the standard that should be applied in the employment situation. A plaintiff-employee would not even be able to rely on a sex discrimination argument because the courts have explicitly rejected that claim. Despite how groundbreaking and progressive the Seventh Circuit’s decision was it does not take long before loopholes can be discovered.

Consider another rising issue that can prove problematic for the continued development of LGBT civil liberties. As soon as the Seventh Circuit struck down the same-sex marriage bans in Indiana,
many within the public became outraged, feeling that their religious views have been accosted.

Backtracking a little bit, the Religious Freedom Restoration Act\textsuperscript{338} (RFRA) was passed by Congress and signed by President Bill Clinton in 1993. The Act was passed directly in response to the Supreme Court case of \textit{Emp’t Div., Dep’t of Human Res. of the State of Or. v. Smith}.\textsuperscript{339} There, the Court held that the state could infringe upon religious expression without violating the First Amendment, so long as the state’s restriction or regulation was a neutral law of general applicability.\textsuperscript{340} Finding this an assault of the state on one of the most important constitutional right, RFRA was passed to ensure that religious exercise protections were viable and strong by requiring challenges to be analyzed using strict scrutiny.\textsuperscript{341} RFRA was then declared unconstitutional by \textit{City of Boerne v. Flores}\textsuperscript{342} and inapplicable against the states.\textsuperscript{343} Regardless, states responded to \textit{Boerne}, by passing their own state Religious Freedom Restoration Acts. Most recently, the Supreme Court in \textit{Burnwell v. Hobby Lobby}\textsuperscript{344}, decided a few days after \textit{Baskin}, held that closely held corporations can be exempted from following a challenged statute, if in doing so, would substantially infringe upon the corporation’s religious exercise.\textsuperscript{345}

Many believe that the effect of cases like \textit{Hobby Lobby}, legislation like RFRA, the “mini-RFRA’s” and with states like Indiana passing even stronger “mini-RFRAs”, will eradicate the achievements

\textsuperscript{339} Emp’t Div., Dep’t of Human Res. of the State of Or. v. Smith, 110 S. Ct. 1595 (1990).
\textsuperscript{340} Smith, 110 S. Ct. at 879.
\textsuperscript{342} City of Boerne v. Flores, 117 S. Ct. 2157 (1997).
\textsuperscript{343} Drinan, \textit{supra} note 340, at 543.
\textsuperscript{345} \textit{Id.} at 2752.
of marriage equality because it will continue discrimination against the LGBT community.

On its face, what this type of legislation does is that it provides stronger precedent for more constitutional protections for the free exercise of religion. It simply sets the standard that courts must use when analyzing whether certain statutes infringe upon religious exercise under strict scrutiny. The correlation with LGBT civil liberties is this: hypothetically speaking, in a situation where a challenged action asks the court to balance the right to the free exercise of religious against the right to be free of sexual orientation discrimination, courts would have to work harder to find for the gay individual because there is less precedent and law in protecting discrimination than there is for religious exercise. Said another way, if religious exercise must be evaluated using strict scrutiny, while on the other hand, sexual orientation must be evaluated under rational basis review, arguably heightened scrutiny, it becomes very hard to determine what the balance is between the two and who ultimately prevails.

Of course there are certainly serious concerns for what the future may hold in terms of the development of LGBT rights. But what we have seen in the last twenty-five years is a nation that has completely flipped its position from anti-gay to being an ally. What we are approaching is a definitive end to the debate of whether same-sex marriage will destroy the institution of marriage. The nation has accepted that same-sex marriage will only enrich the lives of those who enter the institution but it will also create a more stable future for their children. The stage is set for courts and the legislatures to fill in the gaps, to set and define the applicable legal standards. Courts and the legislatures need to fill in the gaps of the constitutional meaning and precedential significance of all that the last twenty-five years of jurisprudence has created. Marriage equality is a wonderful first step in achieving a more inclusive and accepting society, but there is still work that needs to be done in determining where gays and lesbians fit on the legal spectrum outside of the context of same-sex marriage.
PROCEDURAL ERROR? SEVENTH CIRCUIT FAILS TO RECOGNIZE “NO PROCEDURE” IS NOT “ADEQUATE PROCEDURE”

LYAL L. FOX III*


INTRODUCTION

The screech of a siren disrupts a calm suburban neighborhood air as a police cruiser pulls up along the sidewalk. Two young men, unremarkable in most ways, freeze. An officer jumps out of the passenger side of the vehicle. Residents of the nearby apartment complex peer out their windows as the officer directs the men to place their hands above their heads. The officer recites the Miranda warning as he handcuffs the suspects. His partner opens the back door of the vehicle and they place the young men inside.

The preceding paragraph details an arrest and nothing more. An inquisitive observer may ask themselves why these men were placed under arrest. Are they suspected of committing a crime? Are they guilty? Perhaps they just have the unfortunate luck of matching the wrong description? But the answers to these questions are not included in the paragraph above. The answers to these questions are irrelevant. Regardless of what the young men did or did not do, regardless of their eventual guilt or innocence, the two young men in the above

scenario were placed under arrest. Had this arrest of taken place in the Village of Woodridge in early 2011, these young men would have been required to pay a $30.00 booking fee. They would have been required to pay this fee without any form of a pre-deprivation hearing, and without any opportunity to challenge the fee or seek reimbursement.

In *Markadonatos v. Village of Woodridge*, the Seventh Circuit looked at whether this required booking fee was a violation of either procedural or substantive due process. The procedural claim hinged on opposing arguments regarding the risk of erroneous deprivation under the ordinance. The substantive claim turned on whether, and to what degree, the petitioner had standing. Judge Hamilton decried the “substantive due process detour,” stating that under the procedural issue the deprivation was always erroneous due to inability of the arrestee to contest the fee. In determining the question of standing for the substantive claim, the courts relied heavily on the issues of probable cause for the arrest and the petitioner’s eventual criminal proceedings. Judge Hamilton faulted his co-judges for their reliance of these facts as those matters remained irrelevant in the accessing of the booking fee.

Judge Hamilton’s opinion that the booking fee was a violation of due process was correct and should have been adopted by the court. Requiring the payment of a booking fee upon arrest in the absence of any procedural process is a violation of procedural due process.

The Seventh Circuit granted a rehearing en banc vacating the panel opinion, however, because no position by the en banc court commanded a majority, the judgment of the district court to grant Woodridge’s Motion to Dismiss was affirmed.

Part I discusses the factual and procedural background of the *Markandonatos* cases, and will provide a brief history of procedural and substantive due process jurisprudence. Part II reviews the two district court opinions, the two Seventh Circuit opinions, and their

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1 *Markadonatos v. Vill. of Woodridge* (*Markadonatos III*), 739 F.3d 984 (7th Cir. 2014).
2 *Id.* at 995.
3 *Markadonatos v. Vill. of Woodridge* (*Markadonatos IV*), 760 F.3d 545 (7th Cir. 2014).
corresponding concurrences and dissents relating to this matter. Finally, part III analyzes why Judge Hamilton was correct and why the Seventh Circuit should have adopted his analysis.

I. BACKGROUND

A. Factual Background

On January 8, 2011, the petitioner, Jerry Markadonatos was arrested for shoplifting, an Illinois Class A misdemeanor, in the Village of Woodridge, Illinois. At the time, Woodridge had enacted Municipal Code 5-1-12(A), which imposed a $30.00 booking fee on any person subject to a custodial arrest. The Woodridge, Illinois, Municipal Code 5-1-12 provided in pertinent part:

“"The fees for the following activities and purposes shall be as follows:

A. Booking Fee: When posting bail or bond on any legal process, civil or criminal, or any custodial arrest including warrant $30.00.""

Woodridge collected this booking fee without any hearings, and did not offer arrestees any opportunity to challenge the deprivation or seek reimbursement. When Mr. Markadonatos arrived at the police station, he paid the booking fee, posted bond, and was released without being jailed.

Eventually, Mr. Markadonatos was ordered to undergo 12 months of court supervision and to pay fees and fines totaling $785 (not

4 Markadonatos IV, 760 F.3d at 545.
5 Markadonatos III, 739 F.3d at 986.
7 Id.
8 Markadonatos IV, 760 F.3d at 545.
including the $30 booking fee).\footnote{Id. at 546.} Upon successful completion of his supervision, Mr. Markadonatos charges were to be dismissed “without adjudication of guilt,” pursuant to 730 ILCS 5/5-6-3.1(f).\footnote{“Discharge and dismissal upon a successful conclusion of a disposition of supervision shall be deemed without adjudication of guilt and shall not be termed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime . . . .” 730 ILCS 5/5-6-3.1(f).} Despite the favorable adjudication, Mr. Markadonatos was never given an opportunity to contest the booking fee and Woodridge’s policy provided no means for a refund regardless of the outcome of the arrestee’s case.\footnote{Markadonatos v. Vill. of Woodridge (Markadonatos II), No. 11 C 7006, 2012 U.S. Dist. LEXIS 83128, at *3 (N.D. Ill. June 11, 2012).}

\textit{B. Procedural Background}\footnote{This section is meant to provide a brief overview of the procedural history of this matter. A more in depth look at the opinions and holdings in each case can be found in part II of this article.}

On October 4, 2011, Mr. Markadonatos filed a suit on behalf of himself and all of the arrestees who had been charged the booking fee, pursuant to 42 U.S.C. § 1983,\footnote{“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.” 42 U.S.C. § 1983} arguing that Woodridge violated their right to procedural due process.\footnote{Markadonatos II, No. 11 C 7006, 2012 U.S. Dist. LEXIS 83128, at *1.} On January 6, 2012, the district court granted Woodridge’s Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.\footnote{Id. at *1-2.}
Mr. Markadonatos was granted leave and filed his First Amended Complaint raising both procedural due process and substantive due process challenges. On June 11, 2012, that district court again granted Woodridge’s Motion to Dismiss. Mr. Markadonatos appealed to the Seventh Circuit arguing that the district court erred in dismissing his amended complaint. On January 8, 2014, the Seventh Circuit affirmed the ruling to the district court granting Woodridge’s Motion to Dismiss. Mr. Markadonatos petitioned for and was granted a rehearing en banc.

On July 21, 2014, the Seventh Circuit issued a divided opinion. Judges Posner, Flaum, and Kanne interpreted Woodridge’s ordinance to apply only to individuals posting bail or bond and voted to affirm the judgment of the district court. Judges Easterbrook and Tinder also voted to affirm and opined that Mr. Markadonatos’ claim should be categorized as a substantive due process claim and that Mr. Markadonatos only had standing to contest the application of the ordinance to persons arrested with probable cause.

Judge Sykes voted to remand with instruction to dismiss the case for want of standing to sue. She opined that Mr. Markadonatos lacked standing to contest the application of the ordinance under either procedural or substantive due process claims since he was lawfully arrested with probable cause. The final four judges, Judges Hamilton, Wood, Rovner, and Williams, opined that Mr. Markadonatos had standing and voted to reverse the judgment of the district court.

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16 *Id.* at *2.
17 *Id.*
18 *Markadonatos v. Vill. of Woodridge (Markadonatos III)*, 739 F.3d 984, 987 (7th Cir. 2014).
19 *Id.*
20 *Markadonatos v. Vill. of Woodridge (Markadonatos IV)*, 760 F.3d 545, 546 (7th Cir. 2014).
21 *Id.* at 545.
22 *Id.* at 551.
23 *Id.* at 554-55.
24 *Id.* at 562.
25 *Id.* at 556.
26 *Id.* at 545.
Since no group constituted a majority, the district court’s judgment was affirmed.  

C. Due Process

The origin of due process dates back to the drafting of Magna Carta in 1215 in which clause 39 stated, “No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.” As early as 1354, the words “due process of law” were used in English statutes interpreting the Magna Carta.  

By the end of the 14th century “due process of law” and “law of the land” were interchangeable. This basic principle was incorporated into early state constitutions and eventually it was included in the Fifth Amendment of the United States Constitution which states that “No person shall…be deprived of life, liberty, or property, without due process of law…” The Fourteenth Amendment further extended this principle to the states.  

1. Procedural Due Process

The Supreme Court has held that there are two steps when examining a procedural due process claim. First, the court must determine if there is a liberty or property interest within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment that has been interfered with by the state. Second, the court must

27 Id.
29 Id. (citing 28 Edw. 3, c. 3 (1354)).
30 Id.
32 U.S. CONST. amend. V.
33 U.S. CONST. amend. XIV, § 1.
35 Id. at 332.
determine if the administrative procedures leading to the deprivation of the interest are constitutionally sufficient.\textsuperscript{36}

In determining if the administrative procedures are constitutionally sufficient, the court considers three factors: first, the private interest that is affected; second, the risk of erroneous deprivation of the interest through the procedures used and any value of additional or substitute procedural safeguards; and finally, the government’s interest.\textsuperscript{37}

In \textit{Eldridge}, the Court looked at whether the due process required the recipient be afforded an opportunity for an evidentiary hearing prior to the termination of Social Security disability benefit payments.\textsuperscript{38} A recipient whose benefits are terminated is allowed to seek reconsideration from the state agency after termination.\textsuperscript{39} Since a recipient is awarded full retroactive relief if they ultimately prevail, the private interest affected is only in the uninterrupted receipt of Social Security disability benefit payments.\textsuperscript{40} The Court noted that while the hardship imposed upon the erroneously terminated disability recipient may be significant, Social Security is not based on financial need and recipients still have access to private resources or other forms of government assistance should the termination of benefits place the recipient’s family below the subsistence level.\textsuperscript{41} Therefore, a brief interruption of benefits due to erroneous deprivation would not be so significant as to depart from the Court’s ordinary principle that something less than an evidentiary hearing is sufficient prior to adverse administrative action.\textsuperscript{42}

In determining the risk of erroneous deprivation, the Court noted that the decision to discontinue disability benefits is determined by a medical assessment based on routine, standard, and unbiased medical

\textsuperscript{36} \textit{Id.} at 334.
\textsuperscript{37} \textit{Id.} at 335.
\textsuperscript{38} \textit{Id.} at 323.
\textsuperscript{39} \textit{Id.} at 324.
\textsuperscript{40} \textit{Id.} at 340.
\textsuperscript{41} \textit{Id.} at 342.
\textsuperscript{42} \textit{Id.}
reports by physician specialists.\textsuperscript{43} Since the procedural due process rules are shaped by the risk of error inherent in the truth finding process of the procedures provided, the Court held that the potential value of an evidentiary hearing in this context would be minimal.\textsuperscript{44}

Finally, the Court looked at the government’s interest, which was the burden of the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decisions.\textsuperscript{45} Since the resources available for social welfare programs are not unlimited and since it is unlikely that undeserved benefits would be recoverable by the Social Security Administration, the Court opined that the government interest would not be insubstantial.\textsuperscript{46}

The Court held that balancing these three factors an evidentiary hearing was not required prior to the termination of disability benefits and that the present administrative procedures, including procedures that provide recipients with an effective process for asserting their claim prior to administrative action, the right to an evidentiary hearing, and subsequent judicial review before the denial becomes final, fully comported with due process.\textsuperscript{47} In doing so, the Court noted that the essence of due process is the requirement that an individual in jeopardy of serious loss be given notice of the case against him and the opportunity to meet it.\textsuperscript{48}

\section*{2. Substantive Due Process}

The Supreme Court has held that substantive due process protects fundamental rights and liberties which are so “deeply rooted in this Nation’s history and tradition,”\textsuperscript{49} that “neither liberty nor justice would

\begin{footnotes}
\footnote{43} Id. at 343-344.
\footnote{44} Id. at 344.
\footnote{45} Id. at 347.
\footnote{46} Id. at 347-48.
\footnote{47} Id. at 348-49.
\footnote{48} Id. at 348.
\end{footnotes}
exist if they were sacrificed.\textsuperscript{50} If the governmental practice does not encroach upon a fundamental right, the Constitution only requires that the practice be rationally related to a legitimate government interest.\textsuperscript{51} Essentially, the governmental practice cannot be arbitrary or irrational.\textsuperscript{52}

II. MARKADONATOS V. VILLAGE OF WOODRIDGE

\textit{A. District Court’s Original Holding}

The original complaint alleged only that Woodridge violated procedural due process by imposing the $30 booking fee without applying appropriate procedures.\textsuperscript{53} Woodridge moved to dismiss for failure to state a claim.\textsuperscript{54} Under the legal standard developed in \textit{Bell Atlantic Corp. v. Twombly} and \textit{Ashcroft v. Iqbal}, a complaint must include sufficient facts to state a claim for relief that is plausible on its face. A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.\textsuperscript{57} Thus, the district court applied the test set out in \textit{Eldridge} to determine if Markadonatos’ claims, if true, made out a plausible procedural due process violation.\textsuperscript{58}

Since the parties agreed that Mr. Markadonatos had a property interest in his money the court moved on to the second step of the \textit{Eldridge} test, determining whether the procedures regarding the deprivation of Mr. Markadonatos’ property interest were

\textsuperscript{51} Id. at 728.
\textsuperscript{52} Lee v. City of Chicago, 330 F.3d 456, 467 (7th Cir. 2003).
\textsuperscript{54} Id. at *1.
\textsuperscript{55} 550 U.S. 544 (2007).
\textsuperscript{56} 556 U.S. 662 (2009).
\textsuperscript{57} Id. at 678.
\textsuperscript{58} Markadonatos I, No. 11 C 7006, 2012 U.S. Dist. LEXIS 3115, at *3-4.
constitutionally sufficient. The court considered the three factors enumerated in *Eldridge*.

First, the court looked at Mr. Markadonatos’ private interest in the $30. The court concluded that the amount was small when compared to the types of interests that typically require a pre-deprivation hearing. Specifically, the judge pointed to *Sickles v. Campbell County* and *Eldridge* in concluding that any monetary interest short of income constituting the sole means of an individual’s subsistence should only be given minimal weight.

Second, the court looked at the risk of erroneous deprivation and the potential value of additional or substitute procedures. Mr. Markadonatos argued that since an arrestee who paid the fee could later be found innocent or released without facing charges that erroneous deprivation is certain in at least some cases. The district court disagreed. Since the fee applied to all arrestees regardless of guilt, the court noted that the only risk of erroneous deprivation would be if someone who was not arrested was charged the fee. Since Woodridge administration made the determination that an individual was arrested, and thus owed the fee, at the time the individual was booked into jail, the chances of charging someone with the fee who was not arrested was zero. Further, the court noted that substitute procedures would not provide additional safeguards or decrease the already negligible risk of erroneous deprivation.

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59 Id. at *5.
60 Id. at *5-6.
61 Id. at *6.
62 Id.
63 501 F.3d 726 (6th Cir. 2007) (evaluating the private interest in room and board fees deducted from incarcerated individuals canteen accounts).
65 Id. at *8.
66 Id.
67 Id.
68 Id.
69 Id.
Finally, the court looked to the government interest in defraying administrative costs in processing arrestees.\textsuperscript{70} The court held that Woodridge’s interest was legitimate.\textsuperscript{71} However, like Mr. Markadonatos’ private interest in the money, Woodridge’s interest in such a small amount of money was also minimal.\textsuperscript{72}

Upon balancing these factors, the court determined that the dispositive factor was the nonexistent risk of erroneous deprivation.\textsuperscript{73} The court held that since there was no risk that Woodridge would charge the fee to an individual who was not arrested, and since no alternative procedures would significantly decrease that risk, Woodridge’s current procedures were constitutional.\textsuperscript{74} Thus, the district court held that Mr. Markadonatos failed to state a claim that Woodridge violated his procedural due process rights.\textsuperscript{75}

**B. District Court’s Holding on First Amended Complaint**

Concurrently with his first dismissal, the district court granted Mr. Markadonatos leave to amend his complaint.\textsuperscript{76} The factual allegations in the complaint remained unchanged but Mr. Markadonatos now brought both procedural and substantive due process claims.\textsuperscript{77}

Since Mr. Markadonatos did not add any additional factual allegations the court held that his procedural due process claim was barred by the law of the case doctrine.\textsuperscript{78} However, the court noted that even upon reconsideration, Mr. Markadonatos’ procedural claim

\textsuperscript{70} Id. at *10
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at *11.
\textsuperscript{75} Id.
\textsuperscript{76} Markadonatos v. Vill. of Woodridge (Markadonatos II), No. 11 C 7006, 2012 U.S. Dist. LEXIS 83128, at *2 (N.D. Ill. June 11, 2012).
\textsuperscript{77} Id.
\textsuperscript{78} The law of the case doctrine “expresses the practice of courts generally to refuse to reopen what has been decided.” Id. at *4. (quoting Messenger v. Anderson, 225 U.S. 436, 444 (1912)).
would still fail. Mr. Markadonatos attempted to clarify his procedural due process claim by pointing out that the *Eldridge* test was meant to determine what procedures are required prior to deprivation, and should not be applied in a way that indicates the absence of any procedure at all is acceptable. The court pointed out that Woodridge did provide minimal process before charging the fee. Specifically, the court noted that the fee was applied at the time of booking and any individual would be able to point out any error at that time. The court noted that a person who was not actually under arrest would simply have to convey that information to avoid erroneous deprivation.

Next, the court examined Mr. Markadonatos’ substantive due process claim. The court noted that property interest in a $30 booking fee was not a fundamental right, and thus the proper analysis under substantive due process for this case was the rational basis test. The court noted that under the rational basis test, the court must ask if Woodridge’s practice of charging a booking fee to all arrestees, regardless of legality of the arrest or the disposition of the arrestee’s case, is arbitrary or irrational.

The court held that Mr. Markadonatos lacked the standing to challenge the rationality of Woodridge’s policy under the substantive due process claim for individuals who may have been arrested without probable cause or released without being charged because Mr.

79 *Id.* at *7-8.
80 *Id.* at *8. “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).
82 *Id.*
83 *Id.* at *9-10.
84 *Id.* at *10.
85 *Id.* at *12-13. “[T]he Supreme Court has never held that a property interest so modest is a fundamental right.” *Idris v. City of Chicago*, 552 F.3d 564, 566 (7th Cir. 2009). (explaining there is no fundamental right involved in a small sum such as a $90 traffic fine).
Markadonatos was arrested with probable cause and was charged.\textsuperscript{87} Instead, the court noted that Mr. Markadonatos could only challenge the rationality of the policy as it applied to individuals arrested with probable cause, charged with crimes, and subjected to conviction.\textsuperscript{88} The court held that charging booking fees to such arrestees was rational since Woodridge had a legitimate interest in defraying the cost of such arrests, and it was rational for Woodridge to share the cost of incarceration with the individuals who, through their actions, necessitated those costs.\textsuperscript{89} Since Woodridge’s fees were rational as applied to Mr. Markadonatos, the court granted Woodridge’s motion to dismiss for failure to state a claim.\textsuperscript{90}

\textit{C. Seventh Circuit’s Panel Opinion}

1. Opinion of the Court

After his second dismissal, Mr. Markadonatos appealed to the Seventh Circuit arguing that the district court erred in dismissing his amended complaint.\textsuperscript{91} First, the Seventh Circuit Court looked to the issue of standing.\textsuperscript{92} The court noted there are essentially three elements for standing.\textsuperscript{93} First, the plaintiff must have suffered an “injury in fact,” requiring an invasion of the plaintiff’s legally protected interest that is both concrete and particularized and actual or imminent.\textsuperscript{94} Second, the injury must have been caused by the conduct complained of.\textsuperscript{95} Third, it must be likely that a decision in the plaintiff’s favor would redress his injury.\textsuperscript{96}

\textsuperscript{87} Id. at *13-14.

\textsuperscript{88} Id. at *14.

\textsuperscript{89} Id. at *14-15.

\textsuperscript{90} Id. at *15.

\textsuperscript{91} Markadonatos v. Vill. of Woodridge (\textit{Markadonatos III}), 739 F.3d 984, 987 (7th Cir. 2014).

\textsuperscript{92} Id. at 988.

\textsuperscript{93} Id.

\textsuperscript{94} Id.

\textsuperscript{95} Id.

\textsuperscript{96} Id.
The court held that Mr. Markadonatos had standing to bring a procedural due process claim because he had pled that he was deprived of $30 without a legally adequate opportunity to challenge that deprivation. 97 Next the court looked to Mr. Markadonatos’ standing to bring a substantive due process claim. 98 Unlike the district court, the Seventh Circuit opinion recognized that Mr. Markadonatos eventual conviction and adjudication were irrelevant as the fee was collected on the basis of arrest and not on subsequent guilt. 99 However, the court held that the fact Mr. Markadonatos was a for-cause arrestee was relevant, and thus Mr. Markadonatos only had standing as an individual arrested with probable cause. 100

The court then analyzed Mr. Markadonatos’ procedural due process claim using the Eldridge test. 101 The Seventh Circuit agreed with the district court that Mr. Markadonatos had some interest in his money, even if that interest need only be given minimum weight. 102

The Seventh Circuit also agreed with the district court that the risk of erroneous deprivation was practically non-existent since the fee was charged to all arrestees regardless of probable cause. 103 The court opined that a Woodridge employee determining whether to charge a booking fee is presented with a binary choice, if the person was arrested charge the fee, and if the person was not arrested do not charge the fee. 104 Since the collection of the fee occurred as the arrestee was being booked, the court said it could not envision any situation in which a person who was not arrested would be charged the booking fee. 105 Thus, the potential for erroneous deprivation was practically non-existent. 106 The court also noted that any additional procedures would not reduce the risk of erroneous deprivation and

97 Id.
98 Id.
99 Id. at 989.
100 Id.
101 Id.
102 Id.
103 Id. at 989-90.
104 Id. at 990.
105 Id.
106 Id.
would be largely meaningless since such a hearing would only need to establish that the arrestee was arrested and booked. \(^{107}\)

Finally, the Seventh Circuit agreed with the district court that Woodridge had an interest in offsetting costs associated with detaining arrestees. \(^{108}\) Further, the court noted Woodridge had an interest in avoiding additional hearings before or after taking the fee because such administrative procedure would entail substantial additional costs. \(^{109}\)

Upon balancing the *Eldridge* factors, the court held that Woodridge’s interest in covering booking costs outweighed Mr. Markadonatos’ interest in his $30, especially when considering the low likelihood of erroneous deprivation. \(^{110}\) The court noted that this holding was consistent with the opinions of other circuits which have determined that routine accounting and deduction of fees from detainees is not constitutionally problematic due to the low amount of discretion and minimal risk of error. \(^{111}\) Additionally, although the ordinance didn’t formally provide an opportunity to challenge the fee or seek reimbursement, the court opined that an arrestee could argue to the arresting officer or later to a judge that the fee should not be charged to them or should be returned. \(^{112}\) Finally, the court noted that even if there was some potential for erroneous deprivation, for example in instances of false arrest, other state remedies were available to address such wrongs under which arrestees would be entitled to the return of their booking fee. \(^{113}\)

\(^{107}\) *Id.*

\(^{108}\) *Id.*

\(^{109}\) *Id.*

\(^{110}\) *Id.* at 991.

\(^{111}\) *Id.* (citing *Sickles* v. Campbell Cnty, 501 F.3d 726 (6th Cir. 2007); *Slade* v. Hampton Rds. Reg’l Jail, 407 F.3d 243 (4th Cir. 2005); *Tillman* v. Lebanon City Corr. Facility, 221 F.3d 410 (3d Cir. 2000)). However, the court failed to mention that *Sickles* and *Tillman* dealt with inmates who had already been convicted and thus had already received adequate procedural due process, and *Slade* dealt with pretrial detainees who were entitled to a refund if acquitted of charges.

\(^{112}\) *Id.*

\(^{113}\) *Id.* (citing *Hudson* v. Palmer, 468 U.S. 517 (1984); *Doherty* v. City of Chicago, 75 F.3d 318 (7th Cir. 1996)). Here the court failed to note that these cases
Moving on to the substantive due process claim, the court reiterated that Mr. Markadonatos only had standing to the extent Woodridge’s fee applied to him, as a for-cause arrestee. The Seventh Circuit agreed with the district court that a $30 fee was extremely modest and did not rise to the level of a fundamental right. Therefore, the court needed only to determine if Woodridge’s booking fee was rational and not arbitrary.

The court held that Woodridge’s fee passed the rational basis test. First, offsetting costs of booking arrestees was a legitimate state interest. Second, collecting fees from for-cause arrestees was rationally related to that goal as it took the fee from the individuals whose actions created the cost.

Therefore, the court held that Woodridge’s booking fee did not violate procedural or substantive due process and affirmed the district court’s decision.

2. Judge Sykes’ Concurring Opinion

Judge Sykes’ concurring opinion specifically pointed out that the crux of Mr. Markadonatos’ substantive due process claim was that it applied to everyone arrested regardless of whether the arrest was lawful or resulted in criminal prosecution. Judge Sykes agreed with the district court that Mr. Markadonatos lacked standing to claim the booking fee was substantively unconstitutional because it applied to

dealt with deprivation caused by a state employee’s random, unauthorized conduct. “Hudson represent[s] a special case of the general Mathews v. Eldridge analysis, in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide.” Zinermon v. Burch, 494 U.S. 113, 128 (1990).

114 Id.
115 Id.
116 Id. at 992.
117 Id.
118 Id.
119 Id.
120 Id.
121 Id.
all arrested persons, whether or not the arrest was lawful, since Mr. Markadonatos admitted he was lawfully arrested.\textsuperscript{122}

Judge Sykes characterized Judge Hamilton’s dissent as believing that the booking fee was a criminal fine that required some sort of criminal prosecution before being applied.\textsuperscript{123} Judge Sykes believed that this argument was about the content of Woodridge’s ordinance and thus was a substantive challenge to the village’s policy.\textsuperscript{124} While she agreed such a claim would be valid, she maintained that Mr. Markadonatos lacked the standing to bring such a claim due to his arrest for-cause.\textsuperscript{125}

3. Judge Hamilton’s Dissenting Opinion

Judge Hamilton’s dissent argued splitting the claim into both procedural and substantive due process claims had unnecessarily complicated the case.\textsuperscript{126} Judge Hamilton also opined that the majority was confusing standing with the merits.\textsuperscript{127} He argued that making the fee payable upon conviction, after the full procedural protections of the criminal justice system, did not indicate a substantive issue as Judge Sykes believed, but was simply a correction to a facially unconstitutional law.\textsuperscript{128}

Judge Hamilton opined that the \textit{Eldridge} framework requires any booking fee to await the outcome of a criminal prosecution.\textsuperscript{129} Under Woodridge’s ordinance, the final deprivation of property was based on the decision of a single police officer.\textsuperscript{130} Thus, the fundamental due process violation inherent in Woodridge’s ordinance giving one police officer the power to inflict property deprivation could not be explained

\textsuperscript{122} Id. at 993.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 994.
\textsuperscript{130} Id.
away by using the *Eldridge* balancing test. The majority’s application of the *Eldridge* test provided circular logic: because the fee is imposed on all arrestees, there is no need for procedure because there is essentially no risk of error. The majority’s analysis erred because they failed to appreciate that the booking fee was in essence a criminal fine.

Judge Hamilton opined that the *Eldridge* framework required any booking fee await the outcome of a criminal prosecution. Applying the *Eldridge* test, first, Judge Hamilton stated a person’s interest in their property is protected regardless of the amount. Second, the risk of erroneous deprivation is substantial because the pivotal decision that imposes the deprivation of property is a lone police officer’s decision to arrest. Judge Hamilton pointed out that in no other context, even a minor speeding ticket, is a police officer able to impose a fine without judicial review. Finally, Woodridge’s interest can only be in charging the booking fee to individuals convicted of a crime. Since the fee is charged at the time of arrest regardless of conviction, Woodridge’s interest evaporates. Additionally, the cost for Woodridge to await the outcome of criminal charges before imposing the fee would be marginal.

Judge Hamilton then addressed Judge Sykes opinion that Mr. Markadonatos’ claim is correctly categorized as a substantive due process claim. Substantive due process does not prevent the government from imposing a fine or fee, including a booking fee, as part of a punishment for a crime. However, as Judge Hamilton

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131 Id.  
132 Id.  
133 Id.  
134 Id.  
135 Id.  
136 Id.  
137 Id.  
138 Id. at 995.  
139 Id.  
140 Id.  
141 Id. at 995-96.  
142 Id. at 995.
pointed out, the issue in this case is the lack of procedure in imposing that fine.\textsuperscript{143} Judge Hamilton’s objection was not with the content of Woodridge’s ordinance because it imposed a fee, but with the content of the ordinance because it denied procedural protection.\textsuperscript{144}

The basic principle of due process is that a person may not be punished for a crime until a neutral fact-finder determines that the elements of the crime have been proven beyond a reasonable doubt.\textsuperscript{145} The proof happens through the processes of the criminal justice system, and not when a police officer makes an arrest.\textsuperscript{146} An officer is not entitled to impose judgment and punishment.\textsuperscript{147} However, Woodridge’s booking fee allows an officer to impose just such a punishment.\textsuperscript{148} As the district court and majority opinion noted, the governmental interest is in recovering administrative costs of booking from the individuals whose actions caused the costs.\textsuperscript{149} By assuming that the arrestee’s actions caused the cost, the majority essentially assumes that the arrestee is guilty of the crime, bypassing the question to be decided in the criminal justice process.\textsuperscript{150}

As Judge Hamilton pointed out, the majority failed to explain why Mr. Markadonatos’ for-cause arrest was relevant when such circumstances do not matter under Woodridge’s ordinance.\textsuperscript{151} Since every arrestee is deprived of their property at the moment of booking, and since there is no provision in the law for further process or post-deprivation remedy, every arrestee’s right not to be deprived of property without due process is violated at the moment of booking, regardless of whether the arrest was with or without probable cause.\textsuperscript{152} Although probable cause is a complete defense to a federal

\textsuperscript{143} Id.
\textsuperscript{144} Id. at 996.
\textsuperscript{145} Id. (citing \textit{In re Winship}, 397 U.S. 358 (1970); \textit{Sullivan v. Louisiana}, 508 U.S. 275 (1993)).
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 997.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
constitutional claim for wrongful seizure of a person and a state law claim for false arrest, courts have never suggested that probable cause is a sufficient basis for imposing a criminal fine without the further procedural protections of the criminal justice system.¹⁵³

Additionally, Judge Hamilton disagreed with the majority that other state post-deprivation remedies may be sufficient to satisfy due process.¹⁵⁴ Judge Hamilton pointed to *Logan v. Zimmerman Brush Co.*¹⁵⁵, which held that a post-deprivation remedy did not satisfy due process where the property deprivation was effected pursuant to established government procedures.¹⁵⁶ Judge Hamilton also noted that the amount of property taken was too modest for any other remedy to be meaningful without the help of a class action.¹⁵⁷ The filing fee alone for a modest civil claim in the DuPage County courts is $150.¹⁵⁸

Thus, Judge Hamilton explained that when properly understood Woodridge’s booking fee violated the due process rights of all arrestees, and he voted to reverse the judgment of the district court and remand for further proceedings.¹⁵⁹

**D. Seventh Circuit’s Rehearing en Banc**

After losing on appeal, Mr. Markadonatos petitioned for rehearing en banc and his petition was granted.¹⁶⁰ Five judges voted to affirm the judgment of the district court.¹⁶¹ Judge Sykes voted to remand with instructions to dismiss for want of standing to sue.¹⁶² The remaining four judges voted to reverse.¹⁶³ Since no position commanded a

¹⁵³ Id.
¹⁵⁴ Id.
¹⁵⁶ Markadonatos III, 739 F.3d at 998.
¹⁵⁷ Id.
¹⁵⁸ Id.
¹⁵⁹ Id. at 1001.
¹⁶⁰ Markadonatos v. Vill. of Woodridge (*Markadonatos IV*), 760 F.3d 545, 546 (7th Cir. 2014).
¹⁶¹ Id. at 545.
¹⁶² Id.
¹⁶³ Id.
majority, the judgment of the district court was affirmed by the divided court.164

1. Judge Posner’s Concurring Opinion

Judge Posner, joined by Judges Flaum and Kanne, voted to affirm the judgment of the district court.165 Although both Mr. Markadonatos and Woodridge interpreted the ordinance to mean that a person must pay a $30 fee if they are arrested or, alternatively, if they post bail or bond in respect of some other form of legal process, Judge Posner argued that this was not the correct interpretation of the ordinance.166 The language of the ordinance read that a person must pay the fee “when posting bail or bond on any legal process, civil or criminal, or any custodial arrest including warrant.”167 Judge Posner argued this to mean that an individual must only pay when posting bail or bond in connection with any legal process, including a custodial arrest.168 Judge Posner admitted that this interpretation makes the “custodial arrest” clause of the ordinance redundant, but he attributed this to poor draftsmanship.169

In reaching this opinion, Judge Posner pointed to Supreme Court precedent decisions regarding avoidance of statutory interpretations that raise serious constitutional issues.170 In the words of Justice Holmes, “the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.”171

164 Id.
165 Id.
166 Id. at 548.
167 Id.
168 Id.
169 Id.
171 Blodgett, 275 U.S. at 148 (Holmes, J., concurring).
Judge Posner argued that the fee was not a booking fee for individuals who were arrested, but instead was a governmental service fee for the benefit bestowed upon an individual who used the bail or bond system to avoid spending time in jail.\(^{172}\) Judge Posner noted that it was too late to save the ordinance by invoking the doctrine of constitutional avoidance since Woodridge had already repealed it.\(^{173}\)

Judge Posner also admitted that using this interpretation may raise serious questions concerning the conduct of the Woodridge police if they were indeed charging the $30 fee to individuals who were arrested and did not post bail or bond, and that such individuals may have state or federal remedies available.\(^{174}\) However, Judge Posner pointed out that Mr. Markadonatos posted bond and was released, and therefore, he was not a victim of Woodridge’s policy outside of the ordinance.\(^{175}\) Additionally, Mr. Markadonatos only challenged the ordinance and not the policy that existed apart from it.\(^{176}\)

Since Judge Posner’s interpretation rendered the ordinance constitutional, it left no basis for Mr. Markadonatos’ claim.\(^{177}\) Judge Posner admitted the Seventh Circuit had no authority to give a state statute or local ordinance a definitive interpretation, but it remained the court’s duty to foresee as best they could the interpretation that the state courts would adopt.\(^{178}\)

Thus, Judge Posner opined that the case was properly dismissed on the pleadings, because the ground for the dismissal was the answer to a question of law.\(^{179}\)

\(^{172}\) *Markadonatos IV*, 760 F.3d at 547.
\(^{173}\) Id. at 550.
\(^{174}\) Id. at 551.
\(^{175}\) Id.
\(^{176}\) Id.
\(^{177}\) Id. at 551-52.
\(^{178}\) Id. at 552.
\(^{179}\) Id.
2. Judge Easterbrook’s Concurring Opinion

Judge Easterbrook, joined by Judge Tinder, concurred in the judgment to affirm the judgment of the district court. Judge Easterbrook agreed with Judge Sykes that Mr. Markadonatos lacked standing to contest the application of the ordinance to persons arrested without probable cause. However, Judge Easterbrook declined to join Judge Sykes’ opinion, which voted to dismiss the entire suit for want of justiciable controversy, because Mr. Markadonatos had standing to contest the ordinance’s application to a person arrested with probable cause.

First, Judge Easterbrook acknowledged that if forced to make an independent assessment of the ordinance’s meaning, he would agree with Judge Posner. However, Judge Easterbrook pointed out that only a state court can give an authoritative limiting construction to a local ordinance, and the Seventh Circuit’s task is to resolve the dispute brought before them. Since both parties agree that the ordinance imposed a fee on all arrests, the only justiciable subject is whether the Constitution allows the ordinance’s application to someone arrested with probable cause.

Next, Judge Easterbrook noted that probable cause justifies substantial burdens. Thus, a $30 fee is not constitutionally excessive

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180 Id.
181 Id. at 553. (citing New York v. Ferber, 458 U.S. 747, 767 (1982) (“[A] person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivable be applied unconstitutionally to others in situations not before the Court.”)).
182 Id.
183 Id.
184 Id.
185 Id.
186 Id. (citing Atwater v. Lago Vista, 532 U.S. 318 (2001) (Someone arrested with probable cause can be taken to the stationhouse, booked, and held pending bail, even if the offense is punishable only by fine); Riverside v. McLaughlin, 500 U.S. 44 (1991) (A person arrested with probable cause can be held as long as 48 hours before seeing a magistrate); Costello v. United States, 350 U.S. 359 (1956) (Probable cause reflected in a grand jury’s indictment justifies holding a defendant in custody pending trial); Kaley v. United States, 134 S. Ct. 1090 (2014) (Probable cause can
in light of deprivations of liberty allowable under arrests with probable cause. Although the Due Process Clause applies to both liberty and property, when there is a distinction, property receives less protection.

Judge Easterbrook failed to recognize any procedural due process claim, noting that Mr. Markadonatos may have been entitled to a hearing (or other informal process) adequate to separate persons arrested with probable cause from persons arrested without. However, since Mr. Markadonatos maintained that the ordinance imposes a fee on every arrest, making probable cause irrelevant, and Mr. Markadonatos concedes his arrest, there is nothing to hold a hearing about. Thus, Judge Easterbrook opined that Mr. Markadonatos’ argument is correctly identified as a substantive due process issue.

Judge Easterbrook went on to note that Mr. Markadonatos does not have a fundamental right in his $30. Judge Easterbrook states that Washington v. Glucksberg separates the domains of equal protection and substantive due process. Since Mr. Markadonatos does not have a fundamental right in his $30, the equal protection question in this matter is whether it is possible to imagine a rational basis for the ordinance. Judge Easterbrook notes that arrestees may justify the seizure of the suspect’s assets pending forfeiture, thus making it impossible for the suspect to hire his preferred lawyer and might lead to a conviction, when a better defense could have produced an acquittal).

187 Id. at 553-54.
188 Id. at 554. (Criminal trials require a burden of “beyond a reasonable doubt,” whereas civil trials require only a “preponderance of the evidence,” and defendants are entitled to counsel at public expense in a criminal trial if they cannot afford a lawyer, whereas a defendant in a civil trial must represent themselves.)
189 Id.
190 Id.
191 Id.
192 Id.
194 Markadonatos IV, 760 F.3d at 555.
195 Id. at 554.
be released without charge, released on bail, or incarcerated, but any of those options would similarly cost Woodridge at least $30 in terms of paperwork and compensation for police officers. Judge Easterbrook states that requiring individuals to reimburse others for the costs they impose is rational.

Judge Easterbrook concluded that Mr. Markadonatos had standing to challenge the collection of a fee from a person arrested with probable cause, but that his argument failed on the merits. Therefore, Judge Easterbrook concurred in the judgment to affirm the judgment of the district court.

3. Judge Sykes’ Dissenting Opinion

Judge Sykes summarized the different opinions of the en banc court by noting that they could not agree on what questions this case raised, whether Mr. Markadonatos was the right person to raise them, whether they had been properly preserved, or what doctrinal framework applied. Judge Sykes maintained that Mr. Markadonatos lacked standing on the key substantive aspect of his due process claim, that it is irrational to impose the fee on individuals wrongly arrested, since Mr. Markadonatos was not wrongly arrested. Additionally,

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196 *Id.* at 555.
197 *Id.* Judge Easterbrook notes that when a person is arrested with probable cause their own misconduct is the cause of the costs incurred by Woodridge. However, this conclusion is wholly untrue and unsupported. Take for example an individual who is arrested for matching the description of a known burglar, however soon after his arrest the actual burglar is caught and the originally arrestee is released. Such an arrest would still fall under probable cause. But what misconduct has the arrestee done to cause the costs incurred in his arrest? Is it now misconduct simply to look too much like someone else? Judge Easterbrook fails to answer, or even acknowledge these questions.
198 *Id.*
199 *Id.*
200 *Id.* at 556.
201 *Id.*
Judge Sykes now believed that Mr. Markadonatos lacked standing on the procedural due process claim as well.\textsuperscript{202}

Judge Sykes stated that Mr. Markadonatos conflated the procedural and substantive aspects of his due process claim in his initial brief on appeal.\textsuperscript{203} Mr. Markadonatos argued the fee was procedurally unconstitutional because it was collected without a pre-deprivation hearing to test the validity of the arrest or a post-deprivation process by which individuals wrongfully arrested, never charged, or found not guilty could obtain a refund.\textsuperscript{204} Judge Sykes opined that the way Mr. Markadonatos framed his procedural claim required a prior conclusion about the substance of the ordinance.\textsuperscript{205} Judge Sykes explained that because the ordinance did not make the fee contingent on a valid arrest or successful prosecution, in order to resolve the argument about inadequate procedural process the court had to first conclude that the booking fee was substantively unconstitutional as applied to people who are wrongfully arrested, never charged, or found not guilty.\textsuperscript{206} However, Mr. Markadonatos isn’t in any of those groups, as he was arrested with probable cause, was charged with retail theft, and pleaded guilty as charged.\textsuperscript{207}

Judge Sykes noted that Mr. Markadonatos’ arguments had evolved during the course of the appeal, but essentially he maintained three possible reasons why the booking fee ordinance should be found unconstitutional: first, the fee was collected without a pre-deprivation hearing or post-deprivation process to obtain a refund; second, the fee was arbitrary and irrational as applied to individuals unlawfully arrested; and third, the fee was arbitrary and irrational as applied to individuals who were never charged or were found not guilty.\textsuperscript{208} The

\textsuperscript{202} \textit{Id.}

\textsuperscript{203} \textit{Id.} at 557.

\textsuperscript{204} \textit{Id.}

\textsuperscript{205} \textit{Id.}

\textsuperscript{206} \textit{Id.}

\textsuperscript{207} \textit{Id.}

\textsuperscript{208} \textit{Id.} at 559.
first argument is about procedure, and the other two arguments address the substantive terms of the ordinance. \footnote{209}{Id.}

Judge Sykes opined since Mr. Markadonatos conceded probable cause to arrest and admitted his guilt in court, he lacks standing to bring the substantive due process claim as it pressed an argument that the fee was irrational as applied to innocent or wrongfully arrested individuals. \footnote{210}{Id.}

Additionally, Judge Sykes summarized Mr. Markadonatos’ procedural claim as arguing that because the fee was not rational as applied to those who are wrongfully arrested, never charged, or found not guilty, a hearing is needed to prevent erroneous application to individuals in those groups. \footnote{211}{Id.} Judge Sykes opined that since Mr. Markadonatos was not a member of any of these groups, he had failed to prove the second element of standing because he had not suffered a harm that was fairly traceable to the alleged deprivation of procedure about which he complained. \footnote{212}{Id.}

Judge Sykes disagreed with Judge Easterbrook’s opinion that Mr. Markadonatos had standing to contest the ordinance’s application to a person arrested with probable cause under substantive due process because Mr. Markadonatos had never argued that the booking fee was arbitrary and irrational in all circumstances, but instead, he had only argued that the fee could not be rationally applied to persons wrongfully arrested or innocent. \footnote{213}{Id.}

\footnote{209}{Id.}
\footnote{210}{Id.}
\footnote{211}{Id.} Assuming this is an accurate summarization of Mr. Markadonatos’ procedural due process argument, Judge Sykes opinion had some merit to the extent that Mr. Markadonatos’ counsel poorly constructed the procedural argument and caused it to become unnecessarily entangled with the substantive argument. The proper issue under a procedural argument does not depend on whether the fee is rational. A perfectly rational fee could still violate procedural due process if the procedures in place in obtaining the fee failed the Eldridge test. Of course, since each opinion presented by the Seventh Circuit in this matter interprets Mr. Markadonatos’ argument differently it is hard to rely on any one interpretation or summarization of his argument.

\footnote{212}{Id.}
\footnote{213}{Id. at 562.}
Judge Sykes turned next to Judge Hamilton’s analysis on standing.\textsuperscript{214} Judge Hamilton argued that Mr. Markadonatos, and everyone else who paid the booking fee, may challenge it simply by virtue of having paid it and that the arrestee’s personal circumstances do not matter.\textsuperscript{215} Judge Sykes admitted that Judge Hamilton’s analysis would be true for a facial constitutional challenge.\textsuperscript{216} However, Judge Sykes failed to recognize Mr. Markadonatos’ facial challenge to the ordinance under procedural due process, and instead believed both dimensions of Mr. Markadonatos’ due process claim rest on the substantive premise that the fee is irrational as applied to individuals wrongfully arrested or innocent.\textsuperscript{217}

Judge Sykes voted to vacate and remand with instructions to dismiss the case for lack of jurisdiction because Mr. Markadonatos lacked standing to bring the claims actually raised.\textsuperscript{218}

4. Judge Hamilton’s Dissenting Opinion

Judge Hamilton pointed out that his opinion shares common ground with Judge Posner’s in that both agreed, and thus a majority of the court agreed, that Mr. Markadonatos had standing to challenge the booking fee.\textsuperscript{219} Their disagreement lied in Judge Posner’s decision not to decide the case presented.\textsuperscript{220} Judge Hamilton states that Mr. Markadonatos alleged in his complaint that his rights were violated by Woodridge’s actual policy, whether or not that policy complied with the ordinance.\textsuperscript{221} Further, there was no dispute between the parties that Woodridge imposed the booking fee on everyone arrested, and that the

\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} Id. (citing Ezell v. City of Chicago, 651 F. 3d 684 (7th Cir. 2011).
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} Id. at 563.
\textsuperscript{220} Id.
\textsuperscript{221} Id. This is in direct conflict with Judge Posner’s argument that Mr. Markadonatos challenged only the ordinance and not the policy.
fee was not related to the bail process. Judge Hamilton pointed out that Judge Posner had transformed an unconstitutional fee for going into jail into an administrative fee for getting out of jail. Judge Hamilton opined that the court should decide the case the parties actually presented.

Judge Hamilton noted that Judge Posner’s transformation of the case ignores the most basic constraint in deciding a motion to dismiss for failure to state a claim, to treat as true the factual allegations in the plaintiff’s complaint. Mr. Markadonatos’ complaint alleged a policy and practice of imposing the fee based solely on the fact of arrest in violation of the Constitution. Judge Hamilton pointed to the direct language of Mr. Markadonatos’ complaint, Mr. Markadonatos’ counsel’s oral argument stating the money paid for release on bond was different from the booking fee, and a receipt attached to the complaint as facts showing that the fee imposed was for arrest and not for release on bail. Additionally, Woodridge never disputed that the booking fee was triggered by arrest. Judge Hamilton opined that Mr. Markadonatos alleged a set of facts that present a viable claim for damages for violation of his federal constitutional rights by reason of municipal policy and that the viability of the claim does not depend on

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222 *Id.*
223 *Id.*
224 *Id.*
225 *Id.* at564.
226 *Id.*
227 “The booking fee *policy* is procedurally and substantively unconstitutional.” *Id.* (quoting Plaintiff’s First Amended Complaint ¶ 1) (emphasis added).
228 “You are hereby notified that under Village Ordinance #5-1-12, an administrative fee of $30.00 is required upon completion of any custodial arrest/booking procedure. The Complainant named above by its Police Officer, on oath states that you were arrested on: [date of arrest, name, date of birth, and address].” *Id.* (quoting the text of the receipt).
229 *Id.*
230 *Id.* at 565.
whether the court can interpret the ordinance better than Woodridge administered it.\footnote{Id.}

Judge Hamilton further noted that constitutional avoidance was incorrectly applied by Judge Posner because Mr. Markadonatos was not seeking injunctive or declaratory relief about how Woodridge should administer the ordinance going forward, but he was seeking damages for an unconstitutional policy practiced in the past.\footnote{Id. at 566.} Further, Judge Hamilton noted that Judge Posner failed to cite any cases using the doctrine of constitutional avoidance in this context, and properly understood, constitutional avoidance is a mechanism for saving legislation for the future, not a device for wishing away past violations of constitutional rights.\footnote{Id.}

Judge Hamilton looked next at the merits of Woodridge’s policy.\footnote{Id. at 567.} Judge Hamilton noted the deprivations occurred at the time of arrest.\footnote{Id.} The ordinance allowed no room for dispute or review.\footnote{Id.} The deprivation occurred based on only the say-so, and perhaps even the whim, of one arresting officer regardless of whether the arrestee was ever prosecuted or convicted, and regardless of whether the arrest was lawful.\footnote{Id.}

Judge Hamilton opined that the due process violation in this case was more fundamental than even procedural or substantive.\footnote{Id.} The booking fee denies due process because it imposes a permanent deprivation of property based on the unreviewable decision of one police office.\footnote{Id.} Even parking tickets are subject to administrative and judicial review.\footnote{Id.} However, Woodridge’s booking fee provided neither
process nor law in any recognizable form. Judge Hamilton compared the booking fee to a fee a police officer might charge merely for subjecting an individual to a traffic stop, a breathalyzer test, or a Terry stop and frisk. All of these types of fees would be unacceptable because they impose the will of the government on the people arbitrarily. Supreme Court due process jurisprudence has long reflected that the Due Process Clause was “intended to secure the individual from the arbitrary exercise of the powers of government.” A fee based on the unreviewable say-so of one police officer is an arbitrary deprivation of property. Judge Hamilton opined that if the theory is that the arrestee has done something criminal to justify the arrest, and therefore the fee, then that question must be answered through the due process provided by the criminal justice system.

Finally, in regards to standing, Judge Hamilton points out that Judge Sykes’ opinion confuses the merits of the plaintiff’s claim with his standing to bring it. Standing is an inquiry separate from the merits and is not a difficult hurdle to clear. All that must be alleged is an injury, personal to the person seeking judicial relief, which the court can redress. In the present matter, Mr. Markadonatos suffered an injury when Woodridge took his $30. Mr. Markadonatos alleged the money was taken pursuant to Woodridge’s unconstitutional policy of collecting the money from all arrestees. And a court could redress Mr. Markadonatos’ injury by finding the policy unconstitutional and

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241 Id.
242 Id.
243 Id. at 568.
244 Id. (quoting Daniels v. Williams, 474 U.S. 327, 331-32 (1986)).
245 Id.
246 Id.
247 Id. at 569.
248 Id.
249 Id. (citing United States v. Funds in the Amount of $574,840, 719 F.3d 648 (7th Cir. 2013)).
250 Id.
251 Id.
awarding damages. This is all that is needed to require standing. Standing does not depend on whether Mr. Markadonatos will ultimately prevail on the constitutional claim nor does it depend on whether Woodridge could have justified the fee under a different policy or ordinance that has not been alleged by Mr. Markadonatos or supported by the pleadings.

Judge Hamilton opined that Judge Sykes, like Judge Posner, attempted to resolve the case by hypothesizing a different municipal practice or ordinance than the one alleged. Judge Hamilton summarized Judge Sykes reasoning as believing that since Woodridge could have charged the fee upon conviction Mr. Markadonatos lost standing to challenge Woodridge’s actual policy of charging all arrestees at the time of arrest the moment he entered a guilty plea. Judge Sykes’ attempt to rewrite Woodridge’s policy using standing is no more appropriate than rewriting the policy using constitutional avoidance.

Under Woodridge’s policy, the due process violation occurred at the moment the arrestee was brought to jail and paid the fee for no other reason than his or her arrest. At that moment, Mr. Markadonatos, or any other arrestee, had a ripe due process claim. Anything that happened after that moment is irrelevant to the constitutional question.

252 Id.
253 Id.
254 Id. at 570.
255 Id.
256 Id.
257 Id.
258 Id.
259 Id.
260 Id.
III. THE COURT SHOULD HAVE ADOPTED JUDGE HAMILTON’S ANALYSIS

A. Procedural or Substantive Issue

A substantial amount of discussion in this case revolved around the issue of whether Mr. Markadonatos’ claim is properly categorized as a procedural due process claim or a substantive due process claim. Woodridge attempted to use this to their advantage by adopting a strategy of divide-and-conquer. If the claim was limited to a procedural due process theory, Woodridge defended its lack of procedural process on the theory that there was no serious chance of erroneous deprivation. If the claim was limited to a substantive due process theory, Woodridge argued that Mr. Markadonatos had no fundamental right in such a modest amount of money.

In Judge Hamilton’s dissent to the en banc opinion, he argued that since the policy surrounding the booking fee lacked any procedure whatsoever, other than the unreviewable say-so of one police officer, that the policy raised a due process issue that was more fundamental than either procedural or substantive due process. At its heart, the Due Process Clause is intended to secure individuals from the arbitrary exercise of the powers of government. If such a fundamental due process violation can potentially slip through the cracks of procedural and substantive due process then perhaps some new test is needed. However, what seems more likely is that the procedural due process analysis was misapplied by the district court, that Mr. Markadonatos caused his claim to become unnecessarily confusing by adding the substantive due process claim, and that the proper analysis under the procedural claim was the one championed by Judge Hamilton in his dissent to the panel opinion.

261 Id. at 567.
262 Id.
263 Id.
264 Id.
Judge Hamilton’s dissent to the panel opinion argued that since the booking fee was charged without any procedure whatsoever, it raised a procedural due process issue by its very nature and that the substantive due process issue was nothing more than a detour to distract from the procedural issue.

B. “No Procedure” is Not “Adequate Procedure” Under the Due Process Clause

As the Supreme Court noted in Eldridge, the purpose of the procedural due process test is to determine if administrative procedures are constitutionally sufficient. The lack of any administrative procedure in the face of the deprivation of property surely cannot be considered constitutionally sufficient or adequate.

In Roehl v. City of Naperville, a similar ordinance in Naperville, requiring a $50 booking fee, was examined. The Naperville ordinance did not establish any pre or post-deprivation procedures. The plaintiff, Mr. Roehl, was arrested and charged for driving under the influence of alcohol, was charged the booking fee, and later, was found not guilty and released from jail. Mr. Roehl filed a complaint alleging the ordinance violated his procedural due process rights and Naperville filed a motion to dismiss.

In applying the first factor of the Eldridge test, the court noted that Mr. Roehl’s property interest in $50 was minimal for substantially similar reasons to those alluded to in Markadonatos I.

268 Id. at 709.
269 Id.
270 Id.
271 Id.
272 Id. at 713.
The court then moved to the third *Eldridge* factor, the governmental interest, noting that the analysis of the government’s interest would inform the discussion on the second *Eldridge* factor, the risk of erroneous deprivation.\(^{273}\)

The *Roehl*, court realized that the governmental interest varies based on the arrestee.\(^{274}\) On one end of the spectrum the government has a strong interest in recovering costs from individuals ultimately found guilty, because the governmental costs are incurred due to their illegal conduct.\(^{275}\) However, on the other end of the spectrum the government has a weak interest, and possibly no interest, in charging booking fees to arrestees who are arrested on invalid warrants (warrants that had been quashed but not yet removed from the system), individuals wrongly arrested because they were incorrectly identified as a person sought on a valid warrant, and individuals ultimately dismissed because there was an absence of probable cause for the arrest.\(^{276}\)

Finally, the *Roehl* court looked at the second *Eldridge* factor, the risk of erroneous deprivation and probable value of substitute procedural safeguards.\(^{277}\) The court admitted that since the fee was charged to all arrestees the likelihood of erroneous deprivation to a non-arrestee is virtually zero.\(^{278}\) However, since the ordinance provided no procedural safeguards to permit arrestees to challenge the fee, there is a one hundred percent chance that someone who should not have been arrested but was will be erroneously deprived.\(^{279}\) The court then determined the probable value of substitute procedural safeguards.\(^{280}\) The court noted that it was the presence or absence of

\(^{273}\) *Id.*  
\(^{274}\) *Id.* at 714.  
\(^{275}\) *Id.*  
\(^{276}\) *Id.*  
\(^{277}\) *Id.* at 715.  
\(^{278}\) *Id.* at 716.  
\(^{279}\) *Id.*  
\(^{280}\) *Id.*
additional safeguards that is important to the Eldridge analysis.\textsuperscript{281} The court pointed to numerous cases that held that additional safeguards were not needed when adequate procedures were already in place.\textsuperscript{282} The court could not hold, as a matter of law, that Naperville’s ordinance satisfied procedural due process since it failed to provide any procedural mechanism whatsoever.\textsuperscript{283}

This is the correct analysis under the Eldridge test. As noted in Roehl, there are numerous situations where an individual could be arrested when they should not be.\textsuperscript{284} This includes situations where an individual is arrested with probable cause but due to no fault of their own.\textsuperscript{285}

The holding by the district court in Markadonatos I implied that since the fee was charged to all arrestees regardless of probable cause or eventual guilt, the action of charging the fee to an individual who was wrongfully arrested or innocent of any crime would not be erroneous deprivation.\textsuperscript{286} However, that line of reasoning is incorrect because it fails to recognize that Woodridge’s interest could not apply to all arrestees equally. This is what Judge Hamilton meant when he opined that Woodridge’s interest could only be in charging the booking

\textsuperscript{281} Id.
\textsuperscript{282} Id. at 716-17. (citing Mathews v. Eldridge, 424 U.S. 319, 339-40 (1976) (No additional or substitute procedural safeguards were necessary when the plaintiff had access to detailed post-deprivation administrative procedures which would provide full retroactive relief); Payton v. Cnty of Carroll, 473 F.3d 845, 851-52 (7th Cir. 2007) (Extra procedural safeguards not necessary when bail system contained a number of safeguards for people who could not afford the fee at issue); Slade v. Hampton Rds. Reg’l Jail, 407 F.3d 243, 253-54 (4th Cir. 2005) (No additional procedural due process safeguards necessary for pre-trial detainees who had access to grievance procedures within the jail to contest the fees at issue); Sickles v. Campbell Cnty, 501 F.3d 726, 730-31 (6th Cir. 2007) (Extra procedural safeguards were not necessary for the plaintiff-detainees, where they had notice of and access to internal grievance and post-deprivation administrative procedures)).
\textsuperscript{283} Id. at 717.
\textsuperscript{284} Id. at 714.
\textsuperscript{285} Id.
\textsuperscript{286} Markadonatos v. Vill. of Woodridge (Markadonatos I), No. 11 C 7006, 2012 U.S. Dist. LEXIS 3115, at *8 (N.D. Ill. Jan. 6, 2012).
fee to individuals convicted of a crime or else its interest would evaporate. Since Woodridge cannot have any governmental interest in charging booking fees to individuals that it wrongfully arrested, any deprivation from such individuals would be erroneous. Thus, just as Naperville’s ordinance could not be held to satisfy procedural due process because it failed to provide any procedural mechanism whatsoever, Woodridge’s policy which similarly fails to provide any procedural mechanism whatsoever should not have been held to satisfy procedural due process.

This is where Judge Sykes attempted to argue that Mr. Markadonatos lacked standing because he was not an individual who was wrongfully arrested or innocent. However, having removed the unnecessary substantive due process claim, this procedural claim is now clearly a facial constitutional challenge and individual application facts do not matter.

CONCLUSION

No Supreme Court opinion has ever held that government deprivation of a private interest in the absence of any pre or post-deprivation procedures, or other safeguards, is acceptable procedural due process. Woodridge’s ordinance and corresponding policy failed to provide any procedural mechanism whatsoever, and thus, the Seventh Circuit should have held that there was an adequate claim against Woodridge for violating Mr. Markadonatos’ procedural due process rights.

\[^{287}\text{Markadonatos v. Vill. of Woodridge (Markadonatos III), 739 F.3d 984, 995 (7th Cir. 2014).}\]
\[^{288}\text{Markadonatos v. Vill. of Woodridge (Markadonatos IV), 760 F.3d 545, 562 (7th Cir. 2014).}\]
\[^{289}\text{Id.}\]
GAMBLING ON COURT INTERPRETATIONS OF CARE: APPROVING LEAVE FOR TRAVEL UNDER THE FMLA

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Cite as: Heather N Collinet, Gambling on Court Interpretations of Care: Approving Leave for Travel Under the FMLA, 10 SEVENTH CIRCUIT REV. 345 (2015), at http://www.kentlaw.iit.edu/Documents/Academic Programs/7CR/v10-2/collinet.pdf.

INTRODUCTION

Tom’s lifelong dream is to travel through France and Italy, participating in perfumery workshops to create his own unique scents and enjoying the company of his family. However, at 59 years old, he is unable to complete most everyday activities, relying on his wife as his primary caregiver. Approximately four years ago, Tom was diagnosed with Nonalcoholic Steatohepatitis (NASH). Because of his extreme fatigue, constant pain, unexpected attacks of encephalopathy, and various other health complications, he is unable to work, drive, and otherwise live unassisted. Without a liver transplant, his quality of life will continue to diminish while his risk of infection and death climbs.¹

As one of his final wishes, Tom wants to travel internationally with his wife of 31 years, Lorna. But as a registered nurse, Lorna has

¹ This hypothetical is loosely based around the author’s personal experiences and watching her father struggle with the symptoms of NASH.
maxed out her annual vacation days to care for Tom during his encephalopathic episodes. She decides to take advantage of unpaid leave under the Family and Medical Leave Act (FMLA). She has already used some of her FMLA leave without an issue. Given the severity of Tom’s condition, and the short notice of the trip, Lorna requests three weeks of FMLA leave to take care of Tom while he travels.

Immediately after submitting the leave request, Tom and Lorna set off for France and Italy. Lorna spends most of her time bathing and dressing Tom, helping feed him, ensuring he remembers to hydrate and take his handfuls of medication, wheeling him through the city in a wheelchair, and overall providing for his every comfort. However, she also spends a good portion of the trip visiting the Louvre, shopping, and eating gelato with Tom.

Following a whirlwind trip, Lorna returns to work on a Monday morning only to be contacted by Human Resources (HR) and terminated for unexcused absences. HR stated that since she accompanied Tom on a vacation, her leave was not protected under the FMLA. If Lorna decides to sue her employer in the U.S. District Court for the Northern District of Illinois, the district court and Seventh Circuit will likely rule in her favor. However, if Lorna lives in California and files a federal suit, her employer is more likely to prevail on appeal to the Ninth Circuit.

Circuit courts are currently split on defining “care” under the FMLA, especially if an employee accompanies a seriously ill family member on a trip that appears recreational in nature. Circuit splits like this are not unusual. However, the inequitable results are undeniable.

The FMLA is a federal law passed in 1993 to improve work-life balance for employees, which in turn improves business productivity because employees are happier and more loyal. The Act protects both men and women should they decide to request unpaid leave from work for the birth of a child, adoption or fostering a child, or the care of the

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employee or an employee’s family member for a “serious health condition.” An eligible employee is permitted to take up to twelve weeks of unpaid leave each year as long as he or she has been employed by a covered employer for at least twelve months and has worked at least 1,250 hours during that twelve-month period.

Litigation arises in determining the legislature’s intent when using the phrase “to care for” when an employee requests leave “to care for” a family member. The Act does not define “care,” though Department of Labor (DOL) regulations attempt to provide interpretations that remain broad in nature. Because the regulations are broad in scope and only provide a few examples of what care is, courts have interpreted care differently, leading to a circuit split. Interpretations become even more disjointed when an employee requests leave to accompany a seriously ill family member on a trip that is unrelated to the family member’s medical care.

Given these splits, a bright line rule should be utilized that takes into account the facts of each case relating to travel under the FMLA. A bright line rule would provide guidelines for employees and employers in determining whether accompanying a family member on a trip is protected by the FMLA. This in turn would decrease employee abuse and reduce litigation for both parties. Finally, a bright line rule would still observe the FMLA’s intent to improve employee work-life balance. However, it would return the FMLA to its secondary intent—to reduce unnecessary costs for employers.

Part I will discuss the FMLA, including its history and the values that shaped the Act into what it is today. Part II analyzes the current circuit split relating to FMLA leave “to care for” family members while traveling for non-medical reasons. Part III analyzes and distinguishes these circuit splits. In Part III, this Article also argues for

3 29 U.S.C.A. § 2612 (2009). There are also provisions for military leave, though these are not the focus of this article.
5 29 C.F.R. § 825.124(a) (2013) (explaining that care covered under the provision includes both physical and psychological care, comfort, and reassurance).
6 The current circuit splits will be discussed in depth infra Part II.
a bright line rule on approved travel under the FMLA and provides a draft of a suitable rule.

I. THE FAMILY MEDICAL LEAVE ACT

The FMLA was signed into law by President Bill Clinton in 1993 as a response to the work-family conflicts that had arisen with the influx of women into the workforce.\(^7\) However, the fight for FMLA legislation started nearly a decade earlier.

A. History of the FMLA

When Congress passed the Pregnancy Discrimination amendments in 1978, feminist groups were already aware that maternity-leave programs were inadequate.\(^8\) There was no national policy on maternity leave, and existing programs did not address family needs beyond periods of child birth.\(^9\) The turning point came in 1984 when a federal district court determined that California’s maternity leave law discriminated against men.\(^10\)

In California Federal Savings & Loan Association v. Guerra, Lillian Garland took four months of maternity leave from her job as a receptionist at the California Federal and Loan Association (Cal Fed).\(^11\) However, when Garland attempted to go back to work, she was told her job had been filled.\(^12\) Garland filed a complaint with California’s Department of Fair Employment and Housing, charging


\(^8\) Id. at 3.

\(^9\) Id at 3-4.


\(^11\) Cal Fed, 758 F.2d at 392.

\(^12\) Cal Fed, 479 U.S. at 278.
that Cal Fed had violated California’s maternity leave law, which entitled every woman to up to four months unpaid leave for pregnancy and reinstatement to the same or similar job.\textsuperscript{13} However, before a hearing was held, Cal Fed brought an action in federal district court stating that California’s maternity law was inconsistent and was preempted by Title VII.\textsuperscript{14} Cal Fed argued that the California law was a form of sex discrimination that provided preferential treatment to women as pregnancy was treated as a form of temporary disability.\textsuperscript{15} Employers were required to reinstate women to their jobs following maternity leave, but disabled men were not provided this same treatment.\textsuperscript{16}

The district court found that the California law was void because it was preempted by Title VII.\textsuperscript{17} The Ninth Circuit subsequently reversed the lower court’s holding, and the Supreme Court affirmed the Ninth Circuit’s decision on appeal.\textsuperscript{18} However, the district court’s decision precipitated a meeting between various representatives of the organized women’s movement, California Congressman Howard Berman, and California state legislator Maxine Waters.\textsuperscript{19} Following the meeting, a legislative proposal was outlined which became the basis of the FMLA.\textsuperscript{20}

The FMLA was drafted as a “way of ensuring that women would not lose their jobs when newborns’ care or other family caregiving responsibilities took them out of the workforce temporarily, and as a way to establish protections that would apply equally to women and men dealing with certain family circumstances or serious personal

\textsuperscript{13} Id. at 272.
\textsuperscript{14} Id. at 278.
\textsuperscript{15} Id. at 279.
\textsuperscript{17} Cal Fed, 479 U.S. 272.
\textsuperscript{18} Id.
\textsuperscript{19} Lenhoff & Bell, supra note 7, at 4.
\textsuperscript{20} Id.
health conditions.”\textsuperscript{21} Drafters of the Act built in gender neutrality to ensure legality.\textsuperscript{22} Women would not be the only ones taking time off from work to care for new children or ill relatives, and employers would not be able to use women’s rights “as an excuse not to hire or promote them.”\textsuperscript{23}

The initial wording of the FMLA was drafted the same year as \textit{Cal Fed}, but there was little chance that the FMLA would be approved. At the time, Republicans were opposed to the FMLA, and the Senate was under Republican control.\textsuperscript{24} Therefore, in order to gain support, proponents of the Bill educated members of Congress and the public by holding House committee hearings because the House of Representatives was under Democratic control.\textsuperscript{25} However, to hold hearings, the FMLA required union support. Union support slowly increased through the organized efforts of women within unions.\textsuperscript{26} Eventually, unions “began to understand work-family issues as potent organizing tools as well as a political issue[] . . . . By 1991, the FMLA had become one of the top two or three demands that the labor movement presented to Congress.”\textsuperscript{27}

Despite outreach programs, public education, fundraising, and media advertising focused on emphasizing the multifaceted needs of employees, the FMLA Bill could not garner enough support as long as either house of Congress was under Republican control.\textsuperscript{28} Senator Chris Dodd introduced the Bill in the Senate in 1986, but no Senate

\begin{itemize}
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} Republicans opposed the FMLA stating it was “nothing short of Europeanization—a polite term for socialism” and that FMLA legislation would “be the demise of some [businesses],” dimming the light of freedom. Donald Cohen, \textit{Cry Wolf: Why the Right Was Wrong about the Family Medical Leave Act}, PRWATCH.ORG (Feb. 7, 2013), http://www.prwatch.org/news/2013/02/11973/cry-wolf-why-right-was-wrong-about-family-medical-leave-act#sthash.OA6ciFF8.dpuf.
\item \textsuperscript{25} LENHOFF & BELL, \textit{supra} note 7, at 4.
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Id.} at 8.
\end{itemize}
hearings, markups, or other votes were scheduled until 1987 when the Democrats regained control of the Senate and Dodd became the Chairman of the Children and Families Subcommittee.\(^{29}\) Dodd then held a series of hearings around the country on the FMLA where he included views of both proponents and opponents of the Bill.\(^{30}\) However, it was still impossible to enact the FMLA until the Democrats held both houses and the presidency.\(^{31}\) Even with house hearings in 1985 and 1986, the FMLA did not have enough support to be brought to the House floor until 1990 or have any significant influence on elections until the 1992 presidential election.\(^{32}\)

### B. Shaping the FMLA

Party affiliation was a large factor in shaping and passing the FMLA. In September 1992, the FMLA Bill passed both houses of Congress but was vetoed by President George H.W. Bush.\(^{33}\) The Senate overrode the veto but only sixty percent of House representatives voted to override, a few votes short of the two-thirds required to override a veto.\(^{34}\) Of the sixty percent, eighty-two percent of Democrats voted to override, while only twenty-three percent of Republicans voted to override.\(^{35}\)

The opposition’s response to the vote was also a key factor in the FMLA’s lengthy consideration process.\(^ {36} \) This opposition came from primarily business lobbyists including the U.S. Chamber of Commerce, the Society for Human Resource Management, and the National Federation of Independent Businesses.\(^ {37} \) These groups, as

\(^{29}\) *Id.*  
\(^{30}\) *Id.*  
\(^{31}\) *Id.* at 8-9.  
\(^{32}\) *Id.* at 9.  
\(^{33}\) *Id.* at 9.  
\(^{34}\) *Id.*  
\(^{35}\) *Id.*  
\(^{36}\) *Id.* at 9.  
\(^{37}\) *Id.*
well as various trade associations, formed an alliance to quash the FMLA. Their primary strategy was to oppose the FMLA “on principle as a government mandate—regardless of its shape, cost, or limitations.” While compromises were made in the course of the FMLA’s path, these compromises were predominantly made by congressional sponsors to:

woo . . . more conservative colleagues, not to achieve business support. Several of these compromises were significant—notably, the increase in the threshold for coverage to fifty employees, the reduction of the number of weeks of leave to twelve for all family and medical reasons in a year, and the contraction in the family members covered to only children, parents, and spouses. These compromises led to significant new support from Republicans; however, they did not change the opposition from business lobbies.

Individual lawmakers’ motivations and experiences also shaped the FMLA process. Many highly committed politicians, including Senators Dodd and Kit Bond and Representative Marge Roukema, cosponsored the FMLA. Their efforts illustrate the factors that affected legislators’ different responses to the FMLA, “including personal ideology, personal experience, electoral politics, and gender.” For example, Senator Dodd was not married at the time nor did he have any children; however, he believed in the importance of supporting children and families. Senator Bond became a supporter of the FMLA in 1991 for several reasons. First, he wanted to please those of his constituents most interested in the Bill, Missouri’s aging

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38 Id.
39 Id.
40 Id.
41 Id.
42 Id. at 10.
43 Id.
44 Id.
45 Id.
population.\textsuperscript{46} Second, he wanted to demonstrate his sensitivity to women’s issues in the face of his potential reelection in 1992.\textsuperscript{47}

In addition, Representative Roukema’s personal experience was a main motivator for his support of the bill. Before being elected to Congress, she was a stay-at-home mother and took care of her ailing mother-in-law. She empathized with those who had to choose between caring for a family member and leading a successful career.\textsuperscript{48} Her experiences led her to cosponsor the FLMA and “to add the provisions covering workers who must take leave temporarily to care for an aging parent (spouses were added later).”\textsuperscript{49} Roukema’s support was paramount because she was the “ranking Republican on the Labor-Management Subcommittee, which had jurisdiction over the main portions of the FMLA in the House.”\textsuperscript{50}

Other variables affecting the FMLA’s progress and structure included changing societal beliefs on gender roles and individual states experimenting and implementing their own family and medical leave acts.\textsuperscript{51} Essentially though, these variables were the result of a demographic revolution taking place over several decades.\textsuperscript{52} Over a forty-year period, the female civilian labor force had increased by about a million workers each year.\textsuperscript{53} Nineteen percent of women worked in 1900 compared to seventy-four percent in 1993.\textsuperscript{54} In addition, in 1993, fifty-six percent of mothers with children under age six were actively working.\textsuperscript{55} Single-parent households more than doubled between 1970 and 1988 leaving “millions of women to

\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 7-8.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 6.
\textsuperscript{55} Id.
struggle as single heads of households to support themselves and their children."\textsuperscript{56}

Another dramatic increase in 1993 included the aging American population with twelve percent of the population comprised of Americans aged 65 and over.\textsuperscript{57} “Between 1980 and 1990, the number of people aged 75 or older grew by nearly one third.”\textsuperscript{58} In 1993, the National Council on Aging estimated that “20 to 25 percent of the more than 100 million American workers have some caregiving responsibility for an older relative.”\textsuperscript{59} In addition, a trend away from institutionalization led to an increase in disabled or elderly adults being cared for primarily by their working children or parents.\textsuperscript{60}

These demands caused enormous strains on individuals and damaged national productivity, but the “need for job protected medical leave arose long before the dramatic new changes in the workforce.”\textsuperscript{61} Workers and their families had always dealt with devastating results when a family member lost a job for medical reasons.\textsuperscript{62} Jobs lost for medical reasons, coupled with the demographic changes in United States’ society, left single heads of households unable to provide for their families.\textsuperscript{63}

All of these factors, in combination with various others, led to an extensive legislative history prior to the FMLA being signed into law by President Bill Clinton in 1993.\textsuperscript{64} The current version of the FMLA,

\textsuperscript{56} Id.
\textsuperscript{57} Id. at 8.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 9.
\textsuperscript{60} Id. at 8–9.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
including amendments signed by President Barack Obama in 2009, is intended to:

balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

The Act was ultimately created to balance two fundamental interests: the needs of the American workforce and the development of businesses. It balances these interests by reassuring workers they will not have to choose between themselves or their families and their employment. This reassurance directly correlates with increased worker productivity and organizational success.

C. Provisions of the FMLA

The FMLA applies to all eligible employees employed by covered employers. The Act provides eligible employees with two

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67 Id.
68 Id.
69 Id.; see also S. REP. No. 103-3, at 12.
70 Eligibility is not an issue under the current circuit splits. However, I have included a brief synopsis of the test for eligibility: Eligible employees are those who have been employed by an employer for at least twelve months to whom the leave request is submitted, and has worked for at least 1,250 hours during that twelve-month period. 29 U.S.C.A. § 2611(2)(A) (West 2009). The twelve months of employment does not have to be consecutive. GERALD MAYER, CONG. RESEARCH
types of leave: regular leave and military family leave. Regular leave allows an eligible employee to take up to twelve weeks of unpaid, job-protected leave during any twelve-month period, and requires employers to maintain group health insurance benefits as if employees continued to work instead of taking leave. An employee can request leave for the following reasons:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

71 Whether an employer is considered “covered” is not at issue under the current circuit splits analyzed in this Article. Therefore, a general overview follows: Both private and public sector employers are covered by the FMLA. Mayer, supra note 70, at 4. The Act applies to private employers engaged in commerce and who “employed 50 or more employees for at least 20 weeks in the preceding or current calendar year.” Id. Public agencies, including federal, state and local governments, are covered by the FMLA regardless of the number of employees. Id. While the FMLA covers public employers regardless of the number of employees, public employees must meet the eligibility requirements listed supra note 70.

72 Mayer, supra note 70, at 1. The FMLA was extended to military family leave in 2008. Id. at 5. The National Defense Authorization Act created “two types of military family leave: qualifying exigency leave and military caregiver leave.” Id. at 5–6. This article will only focus on “regular leave.”

73 An employee may elect to substitute accrued paid leave for FMLA leave, 29 U.S.C.A. § 2612(d)(2). An employer may also require an employee to substitute accrued paid leave for unpaid leave. Id.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.  

A “serious health condition” means an illness, injury, or physical or mental condition that involves “inpatient care at a hospital, hospice, or residential medical facility; or continued treatment by a health care provider.”

The FMLA allows employees to take “intermittent” leave or work a part-time schedule to care for their own “serious health condition(s)” or those of an eligible relative. An employee on intermittent or part-time leave is not guaranteed his specific job. Covered employers can temporarily transfer an employee on intermittent or part-time leave to a position for which they are qualified and that better accommodates

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A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition.


MAYER, supra note 70, at 5. Intermittent leave for (A) and (B) is prohibited unless an alternative agreement is reached between employer and employee. §2612(b)(1).

Id. § 2612(b)(2).
their changed hours. However, the new position “must provide the employee with the same pay and benefits.” Once an employee returns to full-time status, the employer must provide the employee with his or her previous position, or an equivalent position.

In order to qualify for FMLA leave, an employee must notify his or her employer if he plans to take leave. If the leave is foreseeable, employees must provide at least 30 days notice before the start of the leave. For planned medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the treatment at a time that is not disruptive to the employer’s operations.

If leave is not foreseeable, an employee must notify his employer “as soon as practicable.” “As soon as practicable” is defined as:

as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

It is relatively easy for most employees to argue that the 30 days notice requirement does not apply to their leave request. As long as they are unaware when leave will be required to begin or there is a change in circumstances, the 30 days notice is not required.

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79 Id.
80 MAYER, supra note 70, at 5.
81 Id.
82 29 U.S.C.A. § 2612(e).
84 29 U.S.C.A. § 2612(e).
85 29 C.F.R. § 825.302(b).
86 29 C.F.R. § 825.302(a).
If leave is for a “serious health condition,” either the employee’s own or an immediate family member’s, the employer may require certification from a health care provider. If a certification is returned incomplete or insufficient, the employer “shall advise [the] employee . . . and shall state in writing what additional information is necessary to make the certification complete and sufficient.” If deficiencies are not cured, the employer may deny the FMLA leave. Failure to return a certification constitutes a failure to provide certification and the employer may also deny the leave.

An employer may request a recertification no more than every thirty days and “only in connection with an absence by the employee.” If the medical certification indicates that the duration of the “serious health condition” is longer than thirty days, then the employer must wait until that duration expires before requesting a recertification. For example, if the certification states that the “employee will be unable to work” for forty days, then the “employer must wait forty days before requesting a recertification.”

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87 29 C.F.R. § 825.305(a).
88 29 C.F.R. 825.305(c). A certification is considered incomplete if one or more applicable entries have not been completed. A certification is insufficient if the information provided to the employer is vague, ambiguous or non-responsive.
89 Id.
90 Id.
92 Id. A recertification can be requested in less than thirty days if the employee requests an extension of his leave, circumstances have changed significantly and the previous certification no longer applies, or the employer receives information that questions the validity or reason for leave. Unless the employer provides more lax rules than the minimum requirements provided in the Act, the same certification requirements apply to recertification, including timeframes for supplying recertification, the potential denial of FMLA leave protections if recertification is not provided, and who covers the cost for recertification (the employee).
II. CIRCUIT SPLITS REGARDING CARE WHILE TRAVELING UNDER THE FMLA

Another frequently litigated area of the Act is defining “to care for”93 when taking leave to care for a family member with a “serious health condition.”94 Under DOL regulations, the FMLA encompasses both physical and psychological care of a family member with a “serious health condition.”95 The regulation language does not purport to place limitations on this care and includes nonexclusive examples.96 An employee may request leave if a “family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety” or to provide “psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a ‘serious health condition’ who is receiving inpatient or home care.”97 The phrase “to care for” also encompasses situations where an employee may be needed to substitute for others who normally care for the family member, to make arrangements for changes in care, or where care responsibilities are shared with another member or a third party.98

An employee may also “obtain . . . leave . . . to provide ‘indirect care’ in support of such a leave.”99 Courts generally do not believe this category is included in the FMLA.100 Examples of indirect care

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95 29 C.F.R. § 825.124(a).
96 Id. The regulation uses language such as “it includes situations where, for example,” and “[t]he term also includes.” This language does not include exclusive or limiting language.
97 Id.
98 29 C.F.R. § 825.124(b)-(c).
99 Id.
100 Jeff Nowak, Did a Court Just Allow an Employee FMLA Leave to Care for Her Grandchild?, FMLA INSIGHTS (July 11, 2014),
include an employee’s presence at a hospital while a family member undergoes surgery\textsuperscript{101} and physical care that is too far removed from the family member’s illness.\textsuperscript{102}

Drawing a line between direct and indirect care is especially difficult when an employee is traveling with a family member who requires care. This line drawing is something circuit courts have grappled with, and to date, there is no bright line rule from either the DOL or the federal courts. The remainder of this section will review and analyze the current circuit court split regarding travel under the FMLA.

\textbf{A. Ninth Circuit: “To Care for” when Traveling}

In 1999, the Ninth Circuit decided \textit{Marchisheck v. San Mateo County}.\textsuperscript{103} In \textit{Marchisheck}, Plaintiff Fe Castro Marchisheck sued San Mateo County for violating the FMLA when it terminated Marchisheck’s employment after she took a one-month leave from work to move her son to the Philippines.\textsuperscript{104}

Marchisheck was a senior medical technologist at San Mateo County General Hospital who was also raising her fourteen-year-old son, Shaun.\textsuperscript{105} Shaun began undergoing counseling in 1991 after a shoplifting incident, and his doctor found he was mildly depressed and had poor peer relations.\textsuperscript{106} Later, a psychological assistant concluded


\textsuperscript{101} Fioto v. Manhattan Woods Golf Enterprises, L.L.C., 270 F. Supp. 2d 401 (S.D.N.Y. 2003), \textit{aff'd}, 123 F. App’x 26 (2d Cir. 2005) (court ruled against employee who took time off to be at the hospital for his mother’s brain surgery).


\textsuperscript{103} 199 F.3d 1068 (9th Cir. 1999).

\textsuperscript{104} \textit{Id.} at 1070.

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.}
he had a “parent-child relationship problem” but did not believe Shaun suffered from attention deficit disorder or post-traumatic stress disorder.\textsuperscript{107}

In August 1995, Shaun was assaulted by several acquaintances.\textsuperscript{108} “Shaun lost consciousness during the attack and suffered a nasal contusion, two puncture burns on his back, abrasions, erythema on the right side of his neck, and a left lateral subconjunctival hemorrhage.”\textsuperscript{109} Following the assault, Marchisheck decided to move Shaun to the Philippines to live with her brother.\textsuperscript{110} Marchisheck made a written request for approximately five weeks of vacation leave, but the request was denied as it would be impossible for the hospital to cover all of her shifts without authorizing overtime.\textsuperscript{111} The day before the trip, she met with supervisors at the hospital to discuss her vacation request.\textsuperscript{112} Marchisheck submitted a letter written by a psychiatrist from the clinic Shaun visited; however, the vacation request was still denied.\textsuperscript{113} Despite the denial, Marchisheck left the country.\textsuperscript{114} She was terminated in September 1995.\textsuperscript{115}

Marchisheck filed suit and the district court granted the defendant’s motion for summary judgment based on Shaun not having a “serious health condition.”\textsuperscript{116} She appealed to the Ninth Circuit, and the Ninth Circuit affirmed the district court’s decision.\textsuperscript{117} The Ninth Circuit concluded that Shaun’s past medical history did not fall into the defined parameters of a “serious health condition.”\textsuperscript{118} However, the

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\textsuperscript{107} Id. at 1071.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 1072.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 1073.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 1073-74.
\end{flushright}
court went on to explain that even if Shaun had a “serious health condition,” Marchisheck did not have FMLA protection because the leave was not “to care for” Shaun.\(^{119}\)

Regulation 29 C.F.R. § 825.116(a) defines “to care for” as “both physical and psychological care.”\(^{120}\) Marchisheck’s purpose in moving Shaun was to keep him safe from further beatings, not to receive medical or psychological treatment.\(^{121}\) Marchisheck did not have specific plans to seek medical treatment for Shaun when they reached the Philippines, and Shaun did not see a doctor for more than five months following the move.\(^{122}\) The district court concluded that “‘caring for’ a child with a ‘serious health condition’ involves some level of participation in ongoing treatment of that condition.”\(^{123}\) However, participation in ongoing treatment was not present in Marchisheck’s case.

The Ninth Circuit also found an employee must be in “close and continuing proximity” to the ill family member.\(^{124}\) In *Tellis v. Alaska Airlines, Inc.*, the court affirmed summary judgment in favor of the defendant employer because the employee took FMLA leave to care for his wife who was having difficulties with her pregnancy.\(^{125}\) However, his car broke down during leave, and instead of caring for his wife, he flew from Seattle to Atlanta to pick up a car he owned there.\(^{126}\) While he was driving back to Seattle, his wife gave birth to a baby girl.\(^{127}\) Alaska Airlines decided to terminate him for unexcused absences and Tellis filed suit.\(^{128}\) He argued that the care he provided to

\(^{119}\) *Id.* at 1076.

\(^{120}\) *Id.*

\(^{121}\) *Id.*

\(^{122}\) *Id.*

\(^{123}\) *Id.*

\(^{124}\) *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045 (9th Cir. 2005) (citing *Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078, 1087-88 (9th Cir. 2002)).

\(^{125}\) *Id.* at 1046.

\(^{126}\) *Id.*

\(^{127}\) *Id.*

\(^{128}\) *Id.*
his wife was consistent with the FMLA “because his trip to Atlanta and back to retrieve the family car provided psychological reassurance to her that she would soon have reliable transportation, and his phone calls to her while he drove back to Seattle provided moral support and psychological comfort.” The court disagreed stating that providing care to a family member requires actual care, which was not present. An employee must participate at some level in ongoing treatment of the “serious health condition” and be in close and continuing proximity with the ill family member.

The Ninth Circuit outlined what is currently the definition of “close and continuing proximity” in Scamihorn v. General Truck Drivers. In that case, a son moved to his father’s town for a month to help him cope with depression. The son spoke with his father daily, performed household chores, and drove his father to the counselor. The court concluded that the plaintiff “participated in the treatment through both his daily conversations with his father . . . and his constant presence in his father’s life.”

**B. First Circuit: “To Care for” while Traveling**

In Tayag v. Lahey Clinic Hospital, Inc., the First Circuit affirmed summary judgment for an employer following an employee’s unapproved leave. In Tayag, the employee requested seven weeks of leave to accompany her ailing husband on a spiritual healing

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129 *Id.* at 1046-47.
130 *Id.* at 1047.
131 *Id.*
132 *Scamihorn*, 282 F.3d at 1080-81 (9th Cir. 2002).
133 *Id.* at 1081.
135 Tayag v. Lahey Clinic Hosp., Inc., 632 F.3d 788 (1st Cir. 2011).
pilgrimage to the Philippines. Tayag’s husband suffered from “serious medical conditions, including gout, chronic liver and heart disease, rheumatoid arthritis, and kidney problems that led to a transplant in 2000.” These debilitating conditions left Tayag as her husband’s primary care giver. She transported him to medical appointments, helped him with daily activities, and provided psychological comfort.

Tayag worked for Lahey Clinic Hospital (Lahey) as a health management clerk and had her requests for leave consistently approved. Leave requests usually lasted one to two days. In June 2006, Tayag submitted a vacation request form for approximately seven weeks to begin in August. Her supervisor stated this would leave the department with inadequate coverage, but because Tayag indicated her husband would need medical care, her supervisor provided paperwork for an FMLA leave request. She later requested FMLA leave to assist her husband while he traveled, but she did not inform Lahey that the travel was for spiritual pilgrimage.

Tayag’s husband underwent an angioplasty, and Tayag provided a certification from her husband’s primary care physician stating that Tayag would need to receive medical leave “to accompany Mr. Tayag on any trips as he needs physical assistance on a regular basis.” However, her husband’s cardiologist returned a certification the following month “stating that [her husband] was ‘presently . . . not incapacitated’ and that Tayag would not need leave.” Lahey sent
letters to Tayag and left her phone messages to notify her that the leave for the trip was unapproved; however, Tayag did not receive the notifications because she was in the Philippines.\textsuperscript{147} Receiving no response, Lahey then terminated her employment.\textsuperscript{148}

While in the Philippines, the Tayags “went to Mass, prayed, and spoke with the priest and other pilgrims at the Pilgrimage of Healing Ministry at St. Bartholomew’s Parish.”\textsuperscript{149} They also visited other churches as well as friends and family.\textsuperscript{150} Mr. Tayag received no conventional medical treatment and did not see any physicians while in the Philippines.\textsuperscript{151} However, Tayag assisted her husband by “administering medications, helping him walk, carrying his luggage, and being present in case his illnesses incapacitated him.”\textsuperscript{152}

Several months after termination, Tayag filed suit alleging that her termination violated the FMLA.\textsuperscript{153} The district court granted summary judgement in favor of Lahey, determining that the Tayags’ trip was not protected because it was a vacation.\textsuperscript{154} On appeal, the circuit court reviewed the FMLA regulations, noting that regulations do address faith healing, but only faith healing practitioners “capable of providing health care services.”\textsuperscript{155} These include Christian Science practitioners subject to certain conditions.\textsuperscript{156} Tayag did not invoke the Christian Science exception, instead relying on a constitutional claim.\textsuperscript{157} The circuit court concluded that the pilgrimage did not constitute “medical care” and that the FMLA definition of care did not extend to cover the
potential for “psychological comfort and reassurance” on lengthy trips unrelated to medical care.\footnote{Id. at 793.}

\section{Seventh Circuit: “To Care for” while Traveling}

\subsection{Background}

In contrast, the Seventh Circuit case, \textit{Ballard v. Chicago Park District}, suggests that care associated with FMLA leave need not take place at home.\footnote{Ballard v. Chic. Park Distr., 900 F. Supp. 2d 804, 806 (N.D. Ill. 2012), aff’d, 741 F.3d 838 (7th Cir. 2014)} In \textit{Ballard}, Beverly Ballard was a swimming instructor for the Chicago Park District and requested FMLA leave to care for her dying mother who had begun receiving hospice support.\footnote{Ballard, 741 F.3d at 839.} Ballard lived with her mother and acted as her primary caregiver. Ballard’s daily responsibilities included cooking her mother’s meals, administering her insulin and other medication, draining fluids from her heart, and bathing and dressing her.\footnote{Id.} A local charitable organization granted Ballard’s mother’s “make a wish” request to travel to Las Vegas.\footnote{Id. at 839-40.} Ballard requested six days of FMLA leave to care for her mother during the trip but her employer denied the leave.\footnote{Ballard, 900 F. Supp. 2d at 806–07.} Ballard allegedly attempted to contact her supervisor several times by phone and fax to no avail.\footnote{Id. at 807.}

Despite the denial, Ballard went on the trip anyway, taking care of her mother on the trip as well as “playing slots, shopping on the Strip, people-watching, and dining at restaurants.”\footnote{Id. at 839-40.} Ballard acknowledged that her mother was not in Las Vegas for any kind of medical care,
therapy, or other treatment; it was a vacation specifically requested by her mother.¹⁶⁶

Ballard returned to work a day later than requested on her leave form because a fire had broken out at the Las Vegas hotel that Ballard and her mother were staying.¹⁶⁷ The fire prevented her from making her original flight home.¹⁶⁸ Almost two months later, Ballard was terminated for her unexcused absences related to the Las Vegas trip.¹⁶⁹ She then filed suit.¹⁷⁰

2. The District Court’s Findings

The U.S. District Court for the Northern District of Illinois issued an opinion on the employer’s motion for summary judgment. Ballard alleged that “the Park District willfully and intentionally interfered with her rights under the FMLA by denying her request for leave to accompany her sick mother to Las Vegas and then firing her for absences in connection with the trip.”¹⁷¹ The Chicago Park District argued that the FMLA did not protect Ballard’s trip because there were no plans to seek medical treatment in Las Vegas; the care “must have some connection to the family member’s need for treatment itself.”¹⁷²

The district court reviewed two issues, one legal and one factual: whether Ballard was entitled to leave under the FMLA “to care for” her mother while in Las Vegas and whether Ballard provided sufficient notice of her intent to take FMLA leave.¹⁷³ The court analyzed the first issue under two theories: “first, whether [Ballard] ‘cared for’ her

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¹⁶⁶ Id.
¹⁶⁷ Id.
¹⁶⁸ Id.
¹⁶⁹ Id.
¹⁷⁰ Id.
¹⁷¹ Id. at 808.
¹⁷² Id.
¹⁷³ Id.
mother during the trip to Las Vegas; and second, in the alternative, whether the trip itself was part of her mother’s ‘ongoing treatment.’”

In analyzing the issue, the court reviewed the text of the FMLA, which did not set forth the limitation that the care must have a connection to the treatment. The text of the Act entitles an eligible employee to a certain amount of leave “‘[i]n order to care for . . . [a] parent of the employee, if such . . . parent has a serious health condition.’” To be covered by the Act, a family member must have a “serious health condition” and the leave must be used to care for the family member. The FMLA “does not mention the employee's direct participation in medical treatment. Nor does the statute mention limiting the care to when the parent is at a particular location.”

“To care for” is not explicitly defined in the Act; however, the DOL defines the phrase in 29 C.F.R. § 825.116. The phrase is defined as: encompass[ing] both physical and psychological care, and includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a parent with a serious health condition who is receiving inpatient or home care.

Therefore, “caring for” a family member is not dependent on a particular location or participation in medical treatment.

Further, the regulations recognize that a “serious health condition” need only involve continuing treatment under the supervision of a

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174 Id.
175 Id.
176 Id.
177 Id.
178 Id. at 808-09.
179 Id. at 809.
180 Id.
181 Id.
medical provider, not active treatment.\textsuperscript{182} This is especially the case for terminally ill family members who may not be receiving active medical treatment (i.e., Alzheimer's, a severe stroke, or the terminal stages of a disease).\textsuperscript{183}

The court went on to analyze the regulations, stating that the regulations were created based on legislative history of the FMLA. The Senate Report on the FMLA even stated:

An employee could also take leave to care for a parent . . . of any age who is unable to care for his or her own basic hygienic or nutritional needs or safety. Examples include a parent or spouse whose daily living activities are impaired by such conditions as Alzheimer's disease, stroke, or clinical depression, or . . . who is in the final stages of a terminal illness.\textsuperscript{184}

Therefore, the court concluded, based on statutory and regulatory text, that Ballard's mother suffered from a “serious health condition” and was unable to care for her own basic needs.\textsuperscript{185} In addition, the services that Ballard provided her mother constituted physical care within the meaning of the FMLA.\textsuperscript{186} Logically then, Ballard also “cared for” her mother during their trip to Las Vegas as her mother’s physical needs did not change.\textsuperscript{187}

The Park District attempted to persuade the court that there must be an “ongoing treatment” connection by citing to the cases described above, specifically the Ninth Circuit's decision in \textit{Marchisheck}.\textsuperscript{188} The court agreed that the \textit{Marchisheck}’s decision was reasonable: “that ‘caring for’ must involve treatment from a medical provider when the employee is taking FMLA leave, including when the family member is

\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Id. (citing S. REP. No. 103–3, at 24 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 26.)
\textsuperscript{185} Id. at 810.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
traveling away from home.” However, the district court refused to follow the Ninth Circuit’s decision because it was not based on the statutory and regulatory text. Further, the limitation adopted by the Ninth Circuit—some level of participation in ongoing treatment is required for FMLA leave protections—is not grounded in the regulatory text. The regulation gives two examples of “caring for” a family member:

(1) “where . . . the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor”; and (2) “providing psychological comfort and reassurance which would be beneficial to a child, spouse, or parent with a serious health condition who is receiving inpatient or home care.” . . . Nothing in these examples suggest that “care” must itself be part of ongoing medical treatment.

The district court went on to review a case, which the Ninth Circuit analyzed more in depth, Gradilla v. Ruskin Manufacturing. In Gradilla, Gradilla accompanied his wife to Mexico to attend her father’s funeral. He was his wife’s primary care giver, and he was responsible for administering her medication for a serious heart condition as well as ensuring she did not exacerbate her condition under stressful events. Ruskin fired Gradilla, and Gradilla filed suit under the California Family Rights Act (analogous to the FMLA). Citing Marchisheck, the Ninth Circuit:

\[189 \text{Id.}\]
\[190 \text{Id.}\]
\[191 \text{Id.}\]
\[192 \text{Id. at 811.}\]
\[193 \text{Id. The Gradilla case opinion was withdrawn.}\]
\[194 \text{Id. (citing Gradilla v. Ruskin Mfg., 320 F.3d 951 (9th Cir. 2003), withdrawn per stipulation of parties by Gradilla v. Ruskin Mfg., 328 F.3d 1107 (9th Cir. 2003)).}\]
\[195 \text{Id. (citing Gradilla, 320 F.3d at 954).}\]
\[196 \text{Id.}\]
held that under the CFRA, ‘an employee who leaves work to travel with and care for a family member with a serious health condition is not entitled to leave when the family member decides, in spite of her serious medical condition, to travel away from her home for reasons unrelated to her medical treatment.’\footnote{Id. (quoting Gradilla, 320 F.3d at 953) (emphasis omitted).}

The Ninth Circuit’s opinion placed “a geographic restriction on where ‘care’ must be administered, at least when the trip away from home does not have a medical-treatment purpose.”\footnote{Id. at 811.}

Gradilla relied on the same regulation at issue as all the above-stated cases, 29 C.F.R. § 825.116, to create a geographic limitation. However, the rule only provides examples of care that would qualify and does “not purport to limit where ‘care’ can take place.”\footnote{Id. at 811-12.} The District Court concluded that it would be a mistake to use a list of non-exclusive examples within the regulation to place limitations on the broad definition.\footnote{Id. at 812.} As long as the employee provides care to the family member, the location of the care has no bearing on whether the employee receives FMLA protections.\footnote{Id.}

The District Court then reviewed the issue of Ballard’s entitlement to FMLA leave under an alternative theory: whether Ballard provided sufficient evidence for a fact finder to conclude that the trip served a medical purpose.\footnote{Id.} Ballard provided both a letter from Horizon Hospice stating that it had helped to arrange her mother’s end-of-life trip as well as an affidavit from an employee at Horizon Hospice.\footnote{Id. at 812-13.} However, the court concluded that Ballard could not use the letter as evidence because it was a letter written seven months following the trip and was inadmissible hearsay. In addition, the affidavit could not
be used because it did not adequately set forth facts demonstrating the trip was in connection with ongoing treatment at Horizon Hospice.\textsuperscript{204}

Finally, the court analyzed whether Ballard provided sufficient notice of her intent to take leave. The court quickly determined that 30 days notice is only required when the leave is foreseeable.\textsuperscript{205} If Ballard was held to this heavier burden, Ballard alleged sufficient facts to meet the requirement—she stated that she approached her supervisor over a month before the leave was to begin.\textsuperscript{206} The Park District argued that Ballard’s notice was insufficient because it failed to comply with the Park District’s internal procedures for requesting leave.\textsuperscript{207} However, even if true, “failure to follow . . . internal employer procedures will not permit an employer to disallow or delay an employee's taking leave if the employee gives timely verbal or other notice.”\textsuperscript{208}

3. The Seventh Circuit’s Decision

The Park District moved for an interlocutory appeal to the Seventh Circuit. The Seventh Circuit affirmed the district court’s decision, noting that it did not matter \textit{where} Ballard provided the care, as long as she was providing care to her mother.\textsuperscript{209} The Seventh Circuit rejected the Park District’s argument that an employee should only be able to invoke the FMLA protections if an away-from-home trip is for services provided in connection with ongoing medical treatment.\textsuperscript{210} The court based its opinion on a literal reading of the text of the statute.\textsuperscript{211} First, 29 U.S.C. § 2612(a)(1)(C) uses the word “care,” not “treatment” when describing leave to take care of a family member

\textsuperscript{204} \textit{Id.} at 813.
\textsuperscript{205} \textit{Id.}
\textsuperscript{206} \textit{Id.}
\textsuperscript{207} \textit{Id.}
\textsuperscript{208} \textit{Id.} (quoting 29 C.F.R. § 825.302(d) (2013)).
\textsuperscript{209} \textit{Ballard}, 741 F.3d at 843.
\textsuperscript{210} \textit{Id.} at 840.
\textsuperscript{211} \textit{Id.}
with a “serious health condition.” Second, the Park District did not explain why participation in ongoing treatment was required for away-from-home care versus at-home care. The text of the FMLA does not restrict care geographically (i.e., it does not say that “an employee is entitled to time off ‘to care at home for’ a family member”). Its only limitation is that a family member must have a “serious health condition” for an employee to be able to take advantage of FMLA protections.

The court went on to state that the FMLA does not define care, and therefore, it must review DOL regulations. Since there are no regulations interpreting 29 U.S.C. § 2612(a)(1)(C), the court looked to the regulations interpreting 29 U.S.C. § 2613(b)(4)(A) regarding health-care provider certification. The court found nothing in the regulations supporting the Park District’s argument. The regulations define care expansively and without any geographic limitation. The “only part of the regulations suggesting that the location of care might make a difference is the statement that psychological care ‘includes providing psychological comfort and reassurance to [a family member] . . . who is receiving inpatient or home care.’” However, as the district court observed, the examples provided in the regulations are not purported to be exclusive. In addition, the example regarding a potential geographic location only related to psychological care and did not include physical care. Therefore, the court concluded that Ballard’s mother’s basic physical needs did not change while in Las

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212 Id.
213 Id.
214 Id.
215 Id.
216 Id. at 841.
217 Id.
218 Id.
219 Id. (quoting 29 C.F.R. § 825.116(a) (2008)).
220 Id.
Vegas and Ballard’s care was actually quite important when a fire at the hotel made it impossible to reach their room.\textsuperscript{221}

The Park District cited a series of circuit court cases to support its claims; however, the Seventh Circuit rejected these cases because they are not grounded in the text of the statute or regulations.\textsuperscript{222} It did review the \textit{Marchisheck} case, as the district court did, agreeing that the \textit{Marchisheck} court’s conclusion did not make sense.\textsuperscript{223} The Seventh Circuit stated:

\begin{quote}
The relevant rule says that, so long as the employee attends to a family member’s basic medical, hygienic, or nutritional needs, that employee is caring for the family member, even if that care is not part of ongoing treatment of the condition. Furthermore, none of the cases explain why certain services provided to a family member at home should be considered “care,” but those same services provided away from home should not be. Again, we see no basis for that distinction in either the statute or the regulations.\textsuperscript{224}
\end{quote}

Finally, the Park District expressed concern over the court’s decision should it find in favor of Ballard.\textsuperscript{225} If the court ruled in Ballard’s favor, the Park District stated, it would be setting a precedent where employees could help themselves to unpaid FMLA leave in order to take personal vacations by bringing seriously ill family members along.\textsuperscript{226} The court concluded that this concern was unwarranted because this case’s circumstances fell under hospice and palliative care.\textsuperscript{227} In addition, employers concerned about abuse could require certification by the family member’s health care provider, who would certify that the family member needs physical or emotional

\begin{flushright}
\textsuperscript{221} Id.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} Id. at 842-43.
\textsuperscript{225} Id. at 843.
\textsuperscript{226} Id.
\textsuperscript{227} Id.
\end{flushright}
assistance and thus the employer should allow employee leave protected by the FMLA.\textsuperscript{228}

III. CREATING A BRIGHT-LINE RULE ON TRAVELING UNDER THE FMLA

The Seventh Circuit’s decision focused on the absurdity of the Chicago Park District’s, as well as the First and Ninth Circuits’, interpretations of “to care for.” If Ballard had requested leave to care for her mother in Chicago, or if her mother lived in Las Vegas and she was traveling there to care for her, Ballard’s request would have fallen within the scope of the FMLA.\textsuperscript{229} Yet, under the Park District’s contentions, because Ballard traveled \textit{with} her terminally-ill mother, on a trip that did not include ongoing medical treatment, she used her FMLA leave illicitly.\textsuperscript{230}

The only case that is factually similar to Ballard, is Tayag in the First Circuit. Both family members suffered from “serious health conditions”; the employees accompanied the family member on a trip, taking care of their physical and psychological needs; and the trips were not for, and did not include, medical treatment.\textsuperscript{231} However, the defining characteristic between the two court’s decisions is that Ballard’s mother was receiving palliative and hospice care outside of the trip, while Tayag’s husband was not terminally ill.

In contrast, Marchisheck appropriately denied relief because the plaintiff’s trip was to accompany her teenage son in moving him to the Philippines.\textsuperscript{232} He did not have a “serious health condition”; however, what is relevant here is the court’s decision to analyze the case as if plaintiff’s son had a “serious health condition.”\textsuperscript{233} Regulation 29 C.F.R. § 825.116(a) defines “to care for” as “both physical and

\begin{itemize}
\item \textsuperscript{228} \textit{Id.}
\item \textsuperscript{229} \textit{Id.}
\item \textsuperscript{230} \textit{Id.} at 840.
\item \textsuperscript{231} \textit{Compare} Tayag v. Lahey Clinic Hosp., Inc., 632 F.3d 788, 788-89 (1st Cir. 2011), \textit{with} Ballard, 741 F.3d at 839.
\item \textsuperscript{232} Marchisheck v. San Mateo Cty., 199 F.3d 1068, 1070 (9th Cir. 1999).
\item \textsuperscript{233} \textit{Id.} at 1076.
\end{itemize}
psychological care." From a reading of the Marchisheck facts, plaintiff’s physical and psychological care of her adult son, if he had a “serious health condition,” should have been enough under the Seventh Circuit’s analysis. Plaintiff’s purpose in traveling with her minor son was to move him to the Philippines. If her care during the trip included day-to-day care, then this case should have fallen well within the FMLA according to the Seventh Circuit as day-to-day care of as seriously ill family member is sufficient. Yet, the court still concluded that the controlling factor was that care required some level of participation in ongoing treatment.

Similarly, Tellis appropriately denied relief. Allowing a man to travel to pick up a car while his pregnant wife remained home would drastically expand the definition of “to care for.” Psychological reassurance from afar is not the same as actual care while traveling with a family member who has a “serious health condition.”

Despite these distinctions, a circuit split remains—one that may widen as additional circuits are required to interpret the FMLA when an eligible employee travels with a seriously ill family member. A bright line rule, drafted to account for the factual circumstances in each case discussed above, yet preventing too broad of an interpretation as in Ballard, would reduce litigation and further the legislative intent of the FMLA.

A. Drafting Language to Resolve the Circuit Split

When drafting language to resolve the current circuit split, current case law should be taken into consideration, including factual distinctions between Ballard, Tayag, Marchisheck, and Tellis. For example, the proposed language below modifies 29 C.F.R. § 825.116 and takes into consideration the various conclusions of the First, Seventh, and Ninth Circuits:

234 Id.
235 Id.
236 Tellis v. Alaska Airlines, Inc., 414 F.3d 1045, 1047 (9th Cir. 2005).
237 Id.
Needed to care for a family member or covered servicemember while traveling

(A) An employee must provide direct, in-person care for a seriously ill family member when traveling in order for leave to come under the protections of the FMLA.
(B) Traveling with a seriously ill family member or covered servicemember receiving medical care is protected by the Act.
(C) In addition to meeting the requirements of section (A), in order to fall under the protections of the Act, travel for other reasons must meet the following criteria:
   a. Travel must be primarily organized by (1) hospice or palliative care; (2) a social worker or medical professional; (3) a 501(c)(3) or 501(c)(4) organization that specifically organizes trips for seriously ill individuals; and
   b. A physician must provide, to the employer, as detailed in subsection (D), information related to the physical and/or psychological care the employee would be providing to the seriously ill family member or covered servicemember while traveling. Examples of physical and psychological care include:
      i. Providing psychological support when an individual is receiving hospice or palliative care;
      ii. Providing physical help with feeding, bathing, dressing, transportation and other daily activities;
(D) Certification for travel under the FMLA must include the following:
   a. An explanation of the trip and a statement that the employee will be providing physical or psychological care to the seriously ill family member, including attestation that the trip is primarily being organized by a social worker, medical professional, or authorized representative from a hospice or palliative center or not-for-profit organization that specifically organizes trips for seriously
ill individuals, accompanied by the signature and contact information of an authorized person listed under subsection (C)

b. In addition to the requirements of certification under 29 U.S.C.A. § 2613 and 29 C.F.R. § 825.306, a physician must also include the following information in the certification
   i. Location of travel
   ii. Specific examples of physical or psychological care required during travel

Subsection (a) specifically addresses the litigation in Tellis. If in-person care were required for protection under the Act, an employee would not be able to argue that his or her travel is protected by the Act simply by providing psychological care and reassurance over the phone to a seriously ill family member. Subsection (b) understandably falls under “to care for” a family member as it relates to ongoing medical treatment of a serious illness. The circuits have all concluded that ongoing medical treatment is an appropriate reason for traveling under the FMLA.\textsuperscript{238} However, for clarification reasons, it is still included in the proposed rule.

Subsection (c) takes into account the need for direct, in-person care but then provides additional elements that an employee must meet in order to travel under the FMLA. These requirements are incorporated to reduce employee abuse resulting from a broad interpretation under Ballard. For example, an employee’s trip, regardless if it is a vacation, would be protected under the FMLA only if a social worker or organization, like Make-A-Wish, organized the trip on behalf of the employee or seriously ill family member.

\textsuperscript{238} The Ballard court stated that active treatment is not a prerequisite, but this infers that active treatment would in fact fall under the FMLA. 741 F.3d 838, 842 (7th Cir. 2014). See also Tellis, 414 F.3d at 1047 (citing Marchisheck, 199 F.3d at 1076). The Tayag court did not address the concept of ongoing medical care, though Tayag’s employer had consistently approved FMLA leave for medical care in the past. 632 F.3d 788, 789 (1st Cir. 2011).
However, travel to accompany a relatively healthy minor child, like in *Marchisheck*, would not meet the rule’s requirements.

Applying these criteria would have resulted in the same outcome in each of the circuits, though for different reasons than the courts’ initial opinions. *Tayag*, *Marchisheck*, and *Tellis* would have denied relief to the employee because the employee did not organize travel through an appropriate channel. However, the Seventh Circuit opinion would have been proper because the Las Vegas trip was organized through a hospice care program. In addition, as long as Ballard followed the proposed certification procedures, she would have provided sufficient care to her mother to fall under the FMLA’s protection.

B. Preventing Employee Abuse

Despite a potential solution to allowing travel under the FMLA, the argument remains that employees will find some way to defraud the system. The Chicago Park District in *Ballard* used this argument throughout its briefs. If traveling under the FMLA were allowed, employees could potentially take up to twelve weeks of unpaid vacation leave annually by simply bringing a seriously ill family member along on the vacation.

To prevent further abuse, employers must implement their own procedures while maintaining compliance with the Act’s requirements. Employers should also take advantage of all protections that the Act already provides, such as the need for a completed medical certification form. The current FMLA certification provision does not require an employer to request a certification every time before

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239 *Ballard*, 741 F.3d at 843 (“[A]ny worries about opportunistic leave-taking in this case should be tempered by the fact that this dispute arises out of the hospice and palliative care context.”).

240 *Id.* at 839.


242 *Ballard*, 741 F.3d at 843.
granting FMLA leave to an employee. However, an employee should take advantage of this provision and *always* ask for a certification before granting FMLA leave.

In addition, the DOL must revise the current medical certification form to include required information for the proposed new rule. The form should request information related to who is organizing the trip, including contact information and the reason for the trip (i.e., last wishes of the seriously ill family member). The form should also include a section for a physician to comment on travel plans. This section should require very specific information related to how the employee will be providing care, as well as where the care will take place. This is necessary for two reasons: (1) a description of the employee’s responsibilities while traveling with the family member will help the employer determine whether the travel falls under the traveling regulation; and (2) practically speaking, an employer will be able to determine how accessible the employee will be for business purposes should an issue arise and the employer must contact the employee.

Potential employee abuse is inevitable, even with additional regulations. However, the above-proposed rule takes significant guesswork out of whether travel will be protected by the FMLA. It also imposes obstacles, which an employee must overcome before receiving FMLA protection, more obstacles than were previously in place.

**C. Furthering Legislative Intent**

The FMLA was passed to provide emotional and financial security to employees in an ever-changing demographic environment. The Act’s legislative history focused on allowing employees unpaid leave to take care of family members who suffer from a “serious health condition” and concentrated on traditional

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243 29 U.S.C.A. § 2613(a) (2009) (“An employer may require that a request for leave . . . be supported by a certification . . . .

values that make up American life. Families have traditionally cared for their disabled elderly, and marriages are created “in sickness and in health.”

Though the FMLA is employee-focused, the Act attempts to also account for employer needs. Congressional intent behind the FMLA was to not only reduce stress for employees attempting to balance family and career, but also to improve business and national productivity. For example, during congressional hearings, Jeanne Kardos, Director of Employee Benefits for the Southern New England Telephone Co. (SNET), testified that the company’s current leave policies were “considered an asset by management and workers alike.” Specifically, the women hired at SNET were highly trained and had a tremendous amount of job experience. The company invested a lot into their employees, and therefore, the company believed the FMLA would be cost-effective rather than costly. Those highly skilled and trained employees stay at a company that provides flexibility and contribute to business productivity.

Similarly, the 1989 General Accounting Office (GAO) studied legislation similar to the FMLA and concluded that there would be “no measurable net costs to business from replacing workers or lost productivity.” In fact, the cost to employers nationally would be less than $236 million annually, primarily to account for health insurance coverage for employees on leave. A 1992 study by the Families and Work Institute also concluded that providing leave is more cost-effective for employers. The study found that accommodating leave averages 20% of the employee’s annual salary as compared to 150%

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245 Id. at 16, 17.
247 Id. at 13.
248 Id. at 14.
249 Id.
250 Id.
251 Id. at 42.
252 Id.
253 Id. at 17.
of the employee’s salary in locating, training, and permanently replacing an employee.”

In reality, employees have continued to reap the benefits of the FMLA while employers are left to carry the burden of increased costs. What the GAO estimated to be a $236 million annual cost has magnified to over $21 billion in 2005 according to the Employment Policy Foundation (EPF). Even with these numbers, proponents of a broad rule, like the rule applied in Ballard, may state that providing leave is more cost-effective for employers than permanently replacing employees who need leave, regardless of whether the leave is for home care or travel care.

This argument may ring true but with more employees taking leave, indirect costs outweigh the benefits. The EPF's survey found that FMLA costs primarily consisted of those costs Congress believed would be negligible. The $21 billion consisted primarily of decreased profits from lost productivity, group health care benefits (which Congress originally believed would be the only employer expense), and costs associated with employee replacement, including additional wages of those working additional hours to replace employees on

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254 Id.
255 D. Michael Henthorne, FMLA May Cost Employers $21 Billion, LUCAS COLLEGE & GRADUATE SCH. OF BUSINESS, http://www.cob.sjsu.edu/malos_s/FMLA%20may%20cost%20employers%20Billion%20207-29-05.htm (last visited Apr. 30, 2015). Even more concerning are the various studies demonstrating the negligible or neutral effects that the Act has had on businesses. For example, in 2000, the DOL reported that a majority of businesses found the FMLA had no noticeable effect on their establishments’ productivity, profitability, and growth. Administering Family and Medical Leave by Covered Establishments, U.S. DEP’T OF LABOR (2000), http://www.dol.gov/whd/fmla/chapter6.htm.
256 “Research suggests that direct replacement costs can reach as high as 50%-60% of an employee’s annual salary, with total costs associated with turnover ranging from 90% to 200% of annual salary.” David G. Allen, Retaining Talent, SHRM FOUND. (2008), available at http://www.shrm.org/about/foundation/research/documents/retaining%20talent-%20final.pdf.
leave.\textsuperscript{257} The $21 billion did not include “‘the added administrative burden employers face in tracking and complying with FMLA leave’ or ‘the secondary economic impact of declining profitability on economic activity.’”\textsuperscript{258}

In addition, under the current circuit split, lack of clear guidance on the permissibility of traveling “to care for” a family member under the FMLA encourages employees to explore limits. This requires employers—as a means of minimizing their risk exposure for noncompliance—to adopt policies and processes that in some instances exceed that which Congress had in mind when it passed the FMLA. Regulatory uncertainty, as well as broad interpretations of the Act, provide occasions for employee behavior that may add substantial indirect costs. These costs include worker resentment of coworkers taking unfair, but legal, leave; increased absenteeism; increased administrative and personnel costs; scheduling difficulties; costs of “filling” in for employees on leave; training potential substitutes for employees on leave; and overtime pay.\textsuperscript{259} Further, with the average defense of an FMLA lawsuit estimated at around $78,000, and successful suits awarding $87,500 to $450,000 in damages,\textsuperscript{260} a clearer rule for approving FMLA leave for travel would reduce unnecessary litigation expenses for employers. Providing a rule to guide employers and employees in submitting and approving travel requests may not return the FMLA to its dual intent—improving employee work-life balance while increasing employer productivity—but it will prevent further increased costs to employers.

Should an elderly dependent adult wish to take a vacation but require the assistance of his adult daughter, an employee should be

\textsuperscript{257}Henthorne, \textit{supra} note 255.

\textsuperscript{258}Id.


able to attend to her father’s needs. Caregiving responsibilities are constant, regardless if an employee is at home or thousands of miles away from home. An employee cannot carry out these responsibilities without an employer’s understanding and time off work. However, if the father wishes to travel once per month, then requests for his daughter to accompany him places an inevitable strain on the daughter’s employer. Regardless of the costs to employers, a consistent theme within the Act and its history is a need for emotional and financial support of both the employee and his family. The proposed rule fulfills this support role while enhancing employer protections, thereby reducing costs. As long as the employee meets the rule requirements, she is still able to request FMLA leave to accompany her father on his trip.

CONCLUSION

Under the FMLA, further regulations must be provided defining “to care for” specifically related to traveling with a seriously ill family member. An explicit bright line rule, similar to the one proposed, would reduce ambiguities for employers and employees, prevent broad interpretations of the Act akin to the Seventh Circuit’s decision in Ballard v. Chicago Park District, and reconcile the FMLA with its past legislative intent.
MJ STILL WINNING IN CHICAGO: THE SEVENTH CIRCUIT CORRECTLY HOLDS THAT JEWEL-OSCO’S USE OF MICHAEL JORDAN’S LIKENESS IN ITS ADVERTISEMENT CONSTITUTED COMMERCIAL SPEECH

MICHAEL A. ALBERT

Introduction

The First Amendment to the U.S. Constitution declares that “Congress shall make no law . . . abridging the freedom of speech.”\(^1\) It is widely understood that the First Amendment’s core purpose is to protect political speech from governmental suppression.\(^2\) Yet, the First Amendment’s text does not indicate that its protections apply only to

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\(^{2}\) See, e.g., Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) (“The First Amendment reflects a ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.’”) (internal citations omitted).
certain kinds of speech. Thus, individuals have sought to apply the First Amendment’s protection to other forms of speech, including speech that is commercial in nature.

Initially, the U.S. Supreme Court declined to apply the First Amendment’s protections to commercial speech, but, in 1976, the Court granted commercial speech a limited degree of First Amendment protection. However, since then the Court has struggled to define the distinction between commercial speech and speech that is fully protected by the First Amendment. The Court often avoids the issue, alluding to the “commonsense distinctions” between commercial speech and “other varieties,” without any explanation of what qualifies as a “commonsense distinction.”

In early 2014, the U.S. Court of Appeals for the Seventh Circuit addressed the distinction between commercial speech and noncommercial speech in the context of a private law dispute. In 2012, the U.S. District Court for the Northern District of Illinois held that a supermarket’s one-page tribute to Michael Jordan on his Basketball Hall of Fame induction in a special edition issue of Sports Illustrated was noncommercial speech that was fully protected by the First Amendment. On appeal, the Seventh Circuit unanimously reversed the district court’s decision. The Seventh Circuit considered the entire context surrounding the supermarket’s one-page tribute to Jordan, and the court held that it was a form of image advertising linked to Jordan for the primary purpose of promoting the

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5 See Cincinnati, 507 U.S. at 419 (acknowledging “the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category”).
7 Jordan v. Jewel Food Stores, Inc., 743 F.3d 509 (7th Cir. 2014).
9 Jordan, 743 F.3d at 512.
supermarket’s brand. Thus, the Seventh Circuit held the supermarket’s ad was commercial speech.

Part I of this comment provides a summary of the commercial speech doctrine from its inception to the present. Part II explains the difficulty of applying the commercial speech doctrine in the context of a private-law dispute and examines other court’s differing applications of the commercial speech doctrine in similar cases. Part III reviews the factual and procedural context of *Jordan v. Jewel Food Stores, Inc.*, as well as the district court’s and Seventh Circuit’s holdings. Finally, part IV analyzes the Seventh Circuit’s reasoning, and argues that the Seventh Circuit’s flexible application of the commercial speech doctrine is the best path forward in private-law commercial speech cases.

I. THE EVOLUTION OF THE COMMERCIAL SPEECH DOCTRINE

A. The Old Rule: No Protection for Commercial Speech

Although the First Amendment was ratified in 1792, it was not until 1942 that an individual claimed constitutional protection for a commercial expression. In *Valentine v. Christensen*, the respondent charged customers a fee to view the submarine he displayed in New York City’s State pier. The respondent attempted to distribute handbills advertising the fee to see his submarine in the city streets, but such commercial advertising was prohibited under the city’s sanitary code. However, the city informed respondent that he could distribute his handbills in the streets as long as they concerned “information or a public protest.” In response, respondent created a double-sided handbill; one side contained the original advertisement

10 Id.
11 Id.
12 Valentine v. Christensen, 316 U.S. 52 (1942)
13 Id. at 52-53.
14 Id. at 53.
15 Id.
without reference to the fee, and the other side protested the city’s prohibition on his use of city facilities to display his submarine.\textsuperscript{16} Respondent distributed the double-sided handbill and was cited by the police.\textsuperscript{17} He alleged the city’s restriction of his commercial advertising violated his First Amendment guarantee to free speech.\textsuperscript{18}

The U.S. Supreme Court denied respondent’s challenge, finding it was “clear the Constitution impose[d] no such restraint on government as [it] respects purely commercial advertising.”\textsuperscript{19} The Court determined that respondent’s distribution of his handbill was not an exercise of his First Amendment freedoms because he merely added the protest of the city’s decision to his handbill solely to evade compliance with the ordinance.\textsuperscript{20} Thus, without citing any precedent, the Court held that commercial speech did not receive any First Amendment protection from governmental regulation.\textsuperscript{21} However, the Court quickly began to question its decision’s validity.\textsuperscript{22}

\textit{B. The Valentine Rule’s Erosion}

Over the next several decades the “‘commercial speech’ exception to the First Amendment” created in \textit{Valentine} began to erode.\textsuperscript{23} In 1959, Justice Douglas, a member of the \textit{Valentine} Court’s unanimous decision, stated that the \textit{Valentine} “ruling was casual, almost offhand.

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\begin{itemize}
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} \textit{Id. at 54.}
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} \textit{Id.; see also} Kozinski \& Banner, \textit{supra} note 3, at 628 (stating that the \textit{Valentine} decision “cites no authority”).
\item \textsuperscript{22} \textit{See} Bigelow v. Virginia, 421 U.S. 809, 820 n.6 (1975) (\textit{citing} Lehman v. City of Shaker Heights, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., concurring) (“There is some doubt concerning the ‘commercial speech’ distinction announced in \textit{Valentine} \& \textit{Christensen} . . . retains continuing validity.”).
\item \textsuperscript{23} \textit{Linmark Assoc., Inc. v. Township of Willingboro}, 431 U.S. 85, 91 (1977).
\end{itemize}
And it has not survived reflection.”

Only five years later, the Supreme Court found a newspaper advertisement both criticizing police action and seeking contributions to the civil rights movement was entitled to the “same degree of protection as ordinary speech.”

In the following decade the U.S. Supreme Court again rejected the idea that commercial speech was outside the purview of First Amendment protections. In *Pittsburgh Press Company v. The Pittsburgh Commission on Human Relations*, the Supreme Court noted that newspaper employment advertisements were “classic examples of commercial speech.” However, the Court sustained a governmental regulation prohibiting newspapers from segregating between jobs requesting male and female applicants because the advertisement’s commercial proposals were themselves illegal. Thus, the Court upheld the regulation because the advertisements were illegal, not because commercial speech itself was unworthy of constitutional protection.

Only two years after *Pittsburgh Press*, the U.S. Supreme Court in *Bigelow v. Virginia* reaffirmed that the Valentine Court’s “holding [was] a distinctly limited one.” In *Bigelow*, the appellant was convicted under a state statute that prohibited the publication of information that could encourage abortions. The appellant argued that the state statute violated his First Amendment right to free speech. The Supreme Court distinguished this case from *Valentine*,

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25 *Bigelow*, 421 U.S. at 820 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)).


27 *Id.*


29 *Bigelow*, 421 U.S. at 821 (“The illegality of the activity was particularly stressed.”)

30 *Id.* at 819.

31 *Id.* at 811.

32 *Id.*
noting that the *Valentine* ordinance “was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed.”\(^{33}\) The Court further stated that *Valentine* obviously does not stand “for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge.”\(^{34}\)

Moreover, the *Bigelow* Court stressed that its decision in *Pittsburg Press* reaffirmed the principle “that commercial advertising enjoys a degree of First Amendment Protection.”\(^{35}\) The *Bigelow* Court held that appellant’s advertisement “did more than simply propose a commercial transaction” because it “contained factual material of clear public interest.”\(^{36}\) Thus, the Court concluded that appellant’s advertisement was not “stripped of all First Amendment protection.”\(^{37}\) Consequently, after *Bigelow*, “the notion of unprotected ‘commercial speech’ all but passed from the scene.”\(^{38}\) One year after *Bigelow*, the Supreme Court explicitly overruled its *Valentine* decision.\(^{39}\)

**C. The Birth of Modern Commercial Speech Doctrine**

In 1976, the U.S. Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* established what is now known as modern commercial speech doctrine.\(^{40}\) In *Virginia Pharmacy*, the appellees challenged a Virginia statute that prohibited pharmacists from advertising prescription drug prices.\(^{41}\) The Supreme Court bluntly stated the issue was “whether there [was] a First

\(^{33}\) Id. at 819.

\(^{34}\) Id. at 819-20.

\(^{35}\) Id. at 821.

\(^{36}\) Id. at 822.

\(^{37}\) Id.


\(^{39}\) Id. at 760-61.

\(^{40}\) Id.

\(^{41}\) Id. at 749-50.
Amendment exception for ‘commercial speech.’” The Court held that information conveyed through commercial speech serves the First Amendment goals of smart and informed public decision making. Thus, the *Virginia Pharmacy* Court held that commercial speech was entitled to constitutional protection. However, the Supreme Court noted that commercial speech only received a “degree” of First Amendment protection.

**D. Why The Supreme Court Deemed Commercial Speech Worthy of Constitutional Protection**

In *Virginia Pharmacy*, the Supreme Court held that although commercial speech was entitled to First Amendment protection, it could still be reasonably regulated by the state. The *Virginia Pharmacy* Court offered several policy rationales for its grant of limited First Amendment protection for commercial speech. Since *Virginia Pharmacy* the Supreme Court has on occasion elaborated and expanded on these rationales.

1. Why Grant Commercial Speech First Amendment Protection At All?

The Supreme Court found commercial speech receives First Amendment protection because it contributes to the free flow of information, which is at the heart of the First Amendment. The

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42 Id. at 760-61.
43 Id. at 765.
44 Id. at 771 n.24.
45 Id.
46 Id. at 770.
47 Id. at 771 n.24.
Supreme Court in *Virginia Pharmacy* phrased the question of First Amendment protection for commercial speech in this way: whether a commercial advertisement “is so removed from any ‘exposition of ideas,’ and from ‘truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,’ that it lacks all protection.”\(^{50}\) The Court noted that, to a consumer in need of affordable medication, prescription drug prices might be more important than the “day’s most urgent political debate.”\(^{51}\) Thus, as the Supreme Court stated in *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, “the extension of First Amendment protection to commercial speech is justified principally by the value” of the information it provides to individual consumers.\(^{52}\)

Moreover, in addition to the individual consumer, the *Virginia Pharmacy* Court found that society as a whole also has a strong interest in the free flow of commercial information.\(^{53}\) The Court noted that entirely commercial expressions might be of general public interest, such as advertisements for legal abortion services or advertisements for businesses that produce products in the United States instead of abroad.\(^{54}\) Accordingly, commercial expression receives First Amendment protection because it “furthers the societal interest in the fullest possible dissemination of information.”\(^{55}\)

Finally, the *Virginia Pharmacy* Court observed that because the allocation of resources in a free enterprise economy is made through the aggregate of individual economic decisions, it is a matter of public interest that those decisions be “intelligent and well informed.”\(^{56}\) Thus, the Court determined the free flow of commercial information was

\(^{50}\) *Va. Pharmacy*, 425 U.S. at 762.

\(^{51}\) *Id.* at 763.


\(^{54}\) *Id.*


\(^{56}\) *Va Pharmacy*, 425 U.S. at 765.
indispensable to “the proper allocation of resources in a free enterprise economy.” The Virginia Pharmacy Court further noted that the free flow of commercial speech was indispensable to the formation of intelligent opinions about how the economy “ought to be regulated or altered.” Therefore, the Supreme Court reasoned that the free flow of commercial information indirectly served the First Amendment interest of “enlighten[ing] public decision making.” Thus, commercial speech is entitled to First Amendment protection because it “performs an indispensable role in the allocation of resources in a free enterprise system” by informing the public “of the availability, nature, and prices of products and services.”

2. Why Protect Commercial Speech Less Than Expressive Speech?

While the First Amendment’s protections do apply to commercial speech, those protections are less extensive than those afforded to other forms of expression because governments retain the right to ensure that the flow of commercial information is “truthful and legitimate.” The Supreme Court in Ohralik v. Ohio State Bar Ass’n reasoned that commercial speech content may be regulated because consumer consumption of false or misleading commercial information would actually run counter to “the individual and societal interests . . . in facilitating ‘informed and reliable decision making.’” Thus, “content-based restrictions on commercial speech” are permissible.

57 Id.
58 Id.
59 Id.
because of the “greater potential for deception or confusion” in advertising.  

Specifically, the Virginia Pharmacy Court determined that regulation of commercial speech was constitutionally permissible for two reasons. First, the Supreme Court explained that some content-based regulation of commercial speech to protect consumers was permissible because the truth of commercial speech is “more easily verifiable by its disseminator.” The Court determined that an advertiser’s claims about his own specific product or service are more easily verifiable because the truth of his claims are subject to greater objectivity than, for instance, a politician’s comments on politics or a reporter’s version of the news. Therefore, the Virginia Pharmacy Court reasoned that it is unlikely that a government prohibition on deceptive advertising would chill commercial speech because advertisers possess the requisite information about their products and services to be sure that their claims are truthful. As a result, commercial speech receives a lesser degree of First Amendment protection than “other constitutionally safeguarded forms of expression.”

Second, the Virginia Pharmacy Court further held that commercial speech regulation was appropriate because it is “more durable than other kinds” of speech. The Supreme Court reasoned that because commercial advertising is instrumental to profits “there is little likelihood of its being chilled by proper regulation.” Accordingly, commercial speech receives less constitutional protection than other forms of speech because advertising’s importance to profits makes it less likely “to be inhibited by proper regulation.”

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65 Id.
66 Id.
67 Bolger, 463 U.S. at 64-65.
69 Id.
70 Rogers v. Friedman, 440 U.S. 1, 10 (1979).
Lastly, the Supreme Court granted commercial speech less First Amendment protection than noncommercial speech out of fear that offering commercial speech equal protection will dilute the strength of the First Amendment as a whole.\footnote{Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 456 (1978).} In \textit{Ohralik}, the Supreme Court noted that commercial speech “occurs in an area traditionally subject to government regulation,” and thus warned that a requirement of equal constitutional protection for commercial and noncommercial speech “could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to” noncommercial speech.\footnote{Id.} Accordingly, the Supreme Court determined that because commercial speech weighed less “on the scale of First Amendment values,” it was safer to grant commercial speech a “limited measure” of constitutional protection rather than potentially “subject the First Amendment to such a devitalization.”\footnote{Id.}

\subsection*{E. From \textit{Virginia Pharmacy} to the Present: The U.S. Supreme Court’s Struggle to Define the Distinction Between Commercial Speech and Noncommercial Speech}

The \textit{Virginia Pharmacy} Court’s grant of limited First Amendment protection fostered a new doctrine of free speech jurisprudence; however, that doctrine is chaotic.\footnote{See Kathryn E. Gilbert, \textit{Commercial Speech in Crisis: Crisis Pregnancy Center Regulations and Definitions of Commercial Speech}, 111 Mich. L. Rev. 591, 596 (2013) (“Commercial Speech doctrine is a mess.”)} The U.S. Supreme Court acknowledged that the contours of commercial speech are difficult to delineate, and often the Court avoids the issues and merely assumes the challenged speech is commercial speech.\footnote{City of Cincinnati v. Discovery Network, Inc., et al., 507 U.S. 410, 419, 424 (1993).} In fact, the Supreme Court had an opportunity to clarify the commercial speech doctrine, but punted instead by dismissing a writ of certiorari as improvidently
Not surprisingly, judges and scholars disagree as to the commercial speech doctrine’s proper interpretation and application. Thus, the commercial speech doctrine remains open to interpretation. Nevertheless, the U.S. Supreme Court’s convoluted precedents offer several methods to determine whether an expression constitutes “commercial speech.” These methods outline a spectrum that demonstrates the degree to which an expression is “commercial,” i.e., whether speech is purely commercial, sufficiently commercial, or noncommercial. The Supreme Court created roughly four different methods to distinguish between commercial and noncommercial speech for First Amendment purposes. These methods can be characterized as (1) the “core” or “pure” commercial speech test, (2) the “expanded core” commercial speech test, (3) the “Bolger framework” for mixed speech, and (4) the “inextricably intertwined” exception. These methods build on one another; most courts start with the “core” or “pure” commercial speech test and then, if not satisfied, move on to another. The Supreme Court’s unwillingness to author a uniform commercial speech test makes it difficult to draw the

77 See Gilbert, supra note 72, at 596.
78 Id.
79 See Cincinnati, 507 U.S. at 422-23.
80 See id.; see also Bd. of Tr. v. Fox, 492 U.S. 469, 474-475 (1989).
81 See Cincinnati, 507 U.S. at 422-23; see also Fox, 492 U.S. at 474-475.
83 See, e.g., Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 517-522 (7th Cir. 2014).
bright lines necessary to properly distinguish commercial speech from noncommercial speech.  

1. The “Core” or “Pure” Commercial Speech Test

In Virginia Pharmacy, the U.S. Supreme Court defined commercial speech as “speech which does no more than propose a commercial transaction.” Notably, the Virginia Pharmacy Court first framed the issue generally as whether an advertisement proposing to sell “X prescription drug at the Y price . . . [was] wholly outside” the First Amendment’s protections. However, the Court then refined and restated the issue as “whether speech which does ‘no more than propose a commercial transaction’” receives any First Amendment protection. The Virginia Pharmacy Court held that commercial speech is entitled to a degree of constitutional protection, and thus affirmatively declared that speech “which does no more than propose a commercial transaction” constitutes commercial speech. Yet, the Court left several important questions unanswered.

The Virginia Pharmacy Court did not elaborate on whether it was a necessary or merely sufficient condition of commercial speech that it “do no more than propose a commercial transaction.” In other words, it was unclear whether speech that communicated information unrelated to the proposal of a commercial transaction, but nonetheless indirectly proposed a commercial transaction, could constitute commercial speech for First Amendment purposes. However, while

84 See Gilbert, supra note 72, at 596 (Describing wildly different commercial speech doctrine interpretations and applications because “the Court has never articulated a singular definition, test, or set of tests for what commercial speech is.”).
85 Va. Pharmacy, 425 U.S. at 761.
86 Id. at 762.
87 Id. at 771 n.24; see, e.g., Cincinnati, 507 U.S. at 421 (“We held that even speech that does no more than propose a commercial transaction is protected by the First Amendment.”).
88 Va. Pharmacy, 425 U.S. at 771 n.24
89 See Gilbert, supra note 72, at 598-99 (Describing lower court disagreements over the necessary conditions for classifying expression as commercial speech).
it was unclear if the latter could be characterized as commercial speech, there was no question that the former qualified as commercial speech.\textsuperscript{90}

Moreover, the \textit{Virginia Pharmacy} Court indicated that an advertisement offering “X prescription drug at the Y price,” was a prime example of speech that “did no more than propose a commercial transaction.”\textsuperscript{91} Consequently, courts regards speech that solely and explicitly communicates the fundamental components necessary to a commercial transaction, such as price and product, as “the core notions” of commercial speech, or as “pure” commercial speech.\textsuperscript{92}

In addition to explicit references of product price, the Supreme Court in \textit{Bolger v. Youngs Drug Products. Corp.} held that speech explicitly communicating information regarding a product’s availability, quality, or quantity constitutes core commercial speech.\textsuperscript{93} Similarly, the \textit{Pittsburgh Press} Court described offers to buy and sell employment services as “classic examples of commercial speech.”\textsuperscript{94} Moreover, the \textit{Ohralik} Court held a lawyer’s in-person solicitation of a prospective client was an “[e]xpression concerning [a] purely commercial transaction.”\textsuperscript{95} In all of these aforementioned cases, the Court found the advertisements were “pure” commercial speech because in each case the advertisements conveyed information that “did no more than propose a commercial transaction.”\textsuperscript{96}

While the Supreme Court has identified explicit and direct expressions that communicate only the fundamental components necessary to a commercial transaction as “pure” commercial speech,
the Court has also found implicit and indirect commercial expressions to be “core” commercial speech. The Supreme Court in *Friedman v. Rogers*, held an optometry practice’s use of a trade name was “part of a proposal of a commercial transaction” because the trade name implicitly conveyed information about the prices and services the practice offered.\(^97\) Similarly, in *Linmark Associates, Inc. v. Willingboro Tp.*, the Court held a homeowner’s display of “for sale” and “sold” signs was indirect speech that “did no more than propose a commercial transaction.”\(^98\)

However, in other cases the Supreme Court drew a narrower scope of “pure” commercial speech. In *Village of Schaumburg v. Citizens for a Better Environment*, the Court held that charitable solicitations were not “a variety of purely commercial speech” because they “did more than inform private economic decisions” and were “not primarily concerned with providing information about the . . . costs of goods and services.”\(^99\) Similarly, in *Glickman v. Wileman Bros & Elliot, Inc.*, Justice Souter, in dissent, stated that a California fruit campaign’s use of symbolic and emotional techniques to convey messages far removed from proposals to sell fruit “went well beyond the ideal type of pure commercial speech . . . [that did] ‘no more than propose a commercial transaction.’”\(^100\) Accordingly, speech containing elements beyond those necessary to propose a commercial transaction is not considered “pure” commercial speech.

The “core” or “pure” commercial speech analysis is conducted first because it is the most easily discernible form of commercial expression.\(^101\) Thus, if a court finds the challenged speech falls within

\(^97\) Friedman v. Rogers, 440 U.S. 1, 11-13 (1979).
the boundaries of core commercial speech, the inquiry ends. However, it is generally accepted that speech can be overwhelmingly commercial in nature, but still do more than merely propose a commercial transaction. Thus, the Supreme Court formulated a second commercial speech definition to determine whether an expression is commercial or noncommercial speech.

2. The “Expanded” Commercial Speech Test

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the U.S. Supreme articulated a broader definition of commercial speech. The Court defined it as “expression related solely to the economic interests of the speaker and its audience.” At issue in *Central Hudson* was a state regulation ordering electric utility companies “to cease all advertising” promoting the use of electricity because of a fuel shortage. The regulation allowed informational advertising not clearly intended to promote sales, but it prohibited advertising intended to stimulate utility sales as contrary to national conservation policy. The appellant challenged the regulatory ban on promotional advertising as an unlawful restraint on commercial speech.

The Supreme Court determined that the state’s total ban on any form of promotional advertising restricted only commercial speech

102 *See id.* (“Proper classification” of speech containing commercial and noncommercial elements “presents a closer question.”).
103 *See Kozinski & Banner, supra* note 3, at 639-640 (explaining examples of speech that does more than merely propose a commercial transaction, “but was obviously intended to propose a transaction”).
106 *Central Hudson*, 447 U.S. at 561; *see also Cincinnati*, 507 U.S. at 423.
107 *Central Hudson*, 447 U.S. at 559.
108 *Id.* at 560.
109 *Id.*
because the regulation’s ban specifically “excluded ‘institutional and informational’ messages.”

The *Central Hudson* Court acknowledged that states could create content-based commercial speech regulations, but the Court concluded that the state’s promotional advertising ban violated the First Amendment because the regulation was more extensive than necessary to serve the states conservation interests.

Two of the *Central Hudson* Court’s concurring Justices criticized the majority’s definition of commercial speech. Justice Stevens in his concurrence, joined by Justice Brennan, found the state’s complete ban on promotional advertising extended beyond “mere proposals to engage in certain kinds of commercial transactions.”

Justice Stevens determined the state’s order restricted expression “relating to the production and consumption of electrical energy” which he described as “questions frequently discussed and debated by our political leaders.” Thus, Justice Stevens concluded that the state’s regulation allowed for the suppression of fully protected First Amendment speech “because it would outlaw . . . advertising that promoted electricity consumption by touting [its] environmental benefits.”

As a result, Justice Stevens criticized the *Central Hudson* majority’s definition of commercial speech as “unquestionably too broad.”

In response, the *Central Hudson* majority declared there was “no support” for Justice Stevens’ claims. The majority determined that Justice Stevens’ narrow definition of commercial speech would “grant broad constitutional protection to any advertising that links a product

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110 Id. at 561-562 n.5
111 Id. at 571-72.
112 Id. at 579-81 (Stevens, J., concurring) (arguing that the constitutional definition of commercial speech “should not include the entire range of communication that is embraced within the term ‘promotional advertising’”).
113 Id. at 580.
114 Id. at 581.
115 Id. at 562 n.5 (majority opinion).
116 Id. at 580-81 (Stevens, J., concurring) (“The breadth of the ban thus exceeds the boundaries of the commercial speech concept, however that concept may be defined.”).
117 Id. at 562 n.5 (majority opinion).
to a current public debate,” and they warned that this would “further blur the line” between commercial and noncommercial speech.\textsuperscript{118} Thus, the \textit{Central Hudson} majority held that although advertisers receive full First Amendment protections for “direct comments on public issues,” there was “no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions.”\textsuperscript{119} Accordingly, the \textit{Central Hudson} Court affirmatively determined that speech that did more than merely propose a commercial transaction could, in certain circumstances, constitute commercial speech.\textsuperscript{120} The Court effectively reasoned that appellant’s promotional advertisements only referenced a public issue in order to induce a potential commercial transaction.\textsuperscript{121} Thus, the Court effectively held that an expression’s overarching purpose can factor into a court’s determination of whether that expression constitutes commercial speech.\textsuperscript{122} The Court also effectively held that expression can constitute commercial speech even though it does not reference a product or service’s price, quantity, or availability.\textsuperscript{123} Therefore, the \textit{Central Hudson} Court’s commercial speech definition broadly expands the amount of expression that can qualify as commercial speech.\textsuperscript{124}

\textsuperscript{118} \textit{id.} The \textit{Central Hudson} majority worried that further blurring the commercial/noncommercial speech distinction would lead to the fears the Supreme Court articulated in \textit{Ohralik}; a dilution in the strength of First Amendment protections.

\textsuperscript{119} \textit{id.}

\textsuperscript{120} \textit{id.} at 559-563.

\textsuperscript{121} \textit{id.} at 562 n.5.

\textsuperscript{122} \textit{id.}

\textsuperscript{123} \textit{id.}

\textsuperscript{124} \textit{id.; see also} City of Cincinnati v. Discovery Network, Inc., et al., 507 U.S. 410, 423 (1993) (acknowledging that company’s mailing of informational pamphlets to potential customers would undoubtedly have been considered commercial speech under “the broader definition of commercial speech advanced in \textit{Central Hudson}”).
Central Hudson’s “expanded” commercial speech test is the most encompassing definition of commercial speech.\(^\text{125}\) However, the Supreme Court has not applied this commercial speech definition to any case since Central Hudson because the “expanded” commercial speech test has been heavily criticized for its potential to inadvertently suppress speech that may deserve greater constitutional protection.\(^\text{126}\) Thus, although the “expanded” commercial speech test “has never expressly been disavowed,” it “has largely fallen into disuse.”\(^\text{127}\) The Supreme Court’s apprehension of Central Hudson’s “expanded” commercial speech test led to the creation of a third test to determine the “proper classification” of speech that “presents a closer [constitutional] question.”\(^\text{128}\)

3. The “Bolger” Framework for Mixed Speech

Three years after Central Hudson, the U.S. Supreme Court faced “a closer question” over the commercial/noncommercial speech distinction in Bolger.\(^\text{129}\) In Bolger, the appellee (“Youngs”) manufactured, sold, and distributed contraceptives, and marketed its products through a public “campaign of unsolicited mass mailings.”\(^\text{130}\) Youngs marketed three materials to the public: (1) “multi-page, multi-item flyers promoting a large variety of products available at a drugstore, including prophylactics;” (2) “flyers exclusively or substantially devoted to promoting prophylactics;” and (3) “informational pamphlets discussing the desirability and availability of prophylactics in general or Youngs’ products in particular.”\(^\text{131}\)

The appellant, United States Postal Service (“USPS”), sought to stop Youngs from mailing these materials under a federal statute

\(^{125}\) Cincinnati, 507 U.S. at 423.
\(^{126}\) Central Hudson, 447 U.S. at 579-81; see also Cincinnati, 507 U.S. at 423.
\(^{127}\) Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 516 n.6 (7th Cir. 2014).
\(^{129}\) Id.
\(^{130}\) Id. at 62.
\(^{131}\) Id.
prohibiting “the mailing of unsolicited advertisements for contraceptives.” Youngs argued the federal statute was an “impermissible content-based restriction” on its mailings which Youngs proclaimed was “fully protected’ speech.” Conversely, USPS argued that all of Youngs’ mailings were commercial speech.

The Bolger Court began by acknowledging that it must carefully examine the federal statute’s application to Youngs’ mailings “to ensure that speech deserving of greater constitutional protection [was] not inadvertently suppressed.” The Supreme Court quickly determined that Youngs’ first two mailings constituted core commercial speech because they consisted “primarily of price and quantity information.” However, the Court recognized that Youngs’ third mailing, the informational pamphlets, could not be “characterized merely as proposals to engage in commercial transaction.” As a result, the Court determined that Youngs’ informational pamphlets’ classification “as commercial or noncommercial speech” presented a closer constitutional question.

Youngs’ first informational pamphlet specifically described the advantages of several “Trojan-brand condoms” that Young’s manufactured. The second informational pamphlet, titled “Plain Talk about Venereal Disease,” discussed condoms generally, and only identified Youngs as the distributor of Trojan-brand condoms at the “very bottom of the last page.” Importantly, the Bolger Court noted

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132 Id. at 63. The USPS alleged Youngs’ mailings violated 39 U.S.C. § 3001(e)(2).
133 Id. at 65-66.
134 Id. at 66.
135 Id.
136 Id. at 66 n.12.
137 Id. at 66.
138 Id.
139 Id. at 66 n.13.
140 Id.
that a company’s general references to a product “does not . . . remove it from the realm of commercial speech.”

The Bolger Court identified three factors relevant to the commercial/noncommercial speech classification of Youngs’ informational pamphlets. First, the Court stated that the “mere fact that these pamphlets are conceded as advertisements clearly does not compel the conclusion that they are commercial speech.” Second, the Court indicated that “the reference to a specific product does not by itself render the pamphlets commercial speech.” Third, the Court found that “an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech.” However, the Bolger Court held that the “combination of all these characteristics” strongly indicated that Youngs’ “informational pamphlets are properly characterized as commercial speech.” Yet, the Court noted that it was not necessary for all three characteristics to “be present in order for speech to be commercial” and further stated that it had “no opinion as to whether reference to any particular product or service is a necessary element of commercial speech.”

Ultimately, the Bolger Court concluded that Youngs’ informational pamphlets constituted commercial speech despite containing valuable information on important public issues. The Court held that Youngs’ informational pamphlets did not receive full First Amendment protection simply by “link[ing] a product to a current public debate.” The Court reiterated that a company only

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141 Id. at 66-67.
142 Id. at 66.
143 Id. at 66.
144 Id. at 67.
145 Id. at 67.
146 Id.
147 Id. at 67-67 n.14.
148 Id. at 68.
receives full First Amendment protection for its direct comments on public issues, and it does not receive “similar constitutional protection when such statements are made in the context of commercial transactions.”\textsuperscript{150} Thus, the Court reasoned that advertisers attempting to mislead the public should not be able to evade lawful regulation “simply by including references to public issues.”\textsuperscript{151}

Since Bolger, the U.S. Supreme Court has not had an opportunity to expand upon the three factor test. However, scholars and lower courts have reasoned that Bolger’s framework applies when speech is mixed with both commercial and noncommercial elements.\textsuperscript{152} The Bolger framework is generally applied according to this three-question inquiry: (1) was the speech an advertisement, (2) did the speech reference a specific product, and (3) was there an economic motivation for the speech?\textsuperscript{153} Like the Bolger Court determined, an affirmative answer to all three questions provides strong support for labeling the speech as commercial speech, but an affirmative to answer to all three questions is not a necessary condition of commercial speech.\textsuperscript{154} Thus, a “court must examine the ‘content, form, and context,’ of the speech ‘as revealed by the whole record’ to determine whether the speech is commercial speech.”\textsuperscript{155}

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\footnotesize
150 \textit{Id.} \\
151 \textit{Id.} \\
152 \textit{See, e.g.,} Bad Frog Brewery v. N.Y. State Liquor Auth., 134 F.3d 87, 97 (1998). \\
153 \textit{See, e.g.,} Pourous Media Corp. v. Pall Corp., 173 F.3d 1109, 1120 (1999). \\
154 \textit{Bolger,} 463 U.S. at 67-67 n.13. \\
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a. Is the Speech an Advertisement?

The Bolger framework’s first factor centers on whether the challenged speech is an advertisement.\(^\text{156}\) Courts have considered speech an advertisement in a variety of circumstances. First, courts have classified speech as an advertisement when there is a concession that the speech is an advertisement.\(^\text{157}\) The Bolger Court stated that the fact that a challenged expression \textit{is conceded} to be an advertisement does not by itself compel an expression’s classification as commercial speech.\(^\text{158}\) It follows then that a “company’s admission that the speech in question is advertising may strongly indicate that it is commercial.”\(^\text{159}\)

Second, courts consider speech that conveys an overwhelmingly positive tone to promote a brand or product to be advertisements.\(^\text{160}\) In \textit{Facenda v. National Football League Films, Inc.}, the Third Circuit determined that that N.F.L. Films, Inc.’s (“NFL”) video program, “The Making of Madden NFL 06,” constituted an advertisement because the program explained the product with only “a positive tone.”\(^\text{161}\) Notably, the Third Circuit reasoned that the fact that “‘no one in The Making of Madden had a negative thing to say about the game’ rebutted any ‘argument that the program ha[d] a documentary purpose.’”\(^\text{162}\)

Moreover, in some cases a company’s use of its slogan or logo can help qualify speech as an advertisement.\(^\text{163}\) In \textit{Bad Frog Brewery v.
New York State Liquor Authority, the Second Circuit found that Bad Frog Brewery’s (“Bad Frog”) use of its logo on a beer label helped consumers identify the product’s source.164 The Second Circuit held this minimal information served to propose a commercial transaction and thus, constituted “a form of advertising.”165

b. Does the Speech Reference a Specific Product?

The Bolger framework’s second factor is satisfied when speech refers to a specific product or service.166 The Bolger Court held that Youngs identification of itself as the distributor of Trojan-brand prophylactics “at the very bottom of the last page” constituted a reference to a specific product.167 Similarly, the Third Circuit in Facenda held that Bolger’s second factor was “easily satisfied because the program’s sole subject [was] Madden NFL 06.”168 Furthermore, speech can refer to a specific product without reference to the product’s brand name.169 The Bolger Court explained that “a company with sufficient control of the market place for a product may be able to promote the product without reference to its own brand names.”170 Additionally, the D.C. Circuit in United States v. Phillip Morris USA, Inc., held that the fact that cigarette producers advertised “cigarettes generically without specific brand names . . . [did] not change the commercial nature of the speech.”171 Finally, a

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164 Id. at 96.
165 Id. at 96-97.
166 See, e.g., Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 519-520 (7th Cir. 2014).
170 Bolger, 463 U.S. at 66 n.13.
171 Phillip Morris USA, 566 F.3d at 1144 (citing Nat’l Comm’n on Egg Nutrition v. Federal Trade Comm’n, 570 F.2d 157, 163 (7th Cir. 1977)).
district court found it plausible that a reference to a brand itself could constitute a reference to a specific product. 172

c. Does the Speaker Have an Economic Motivation for the Speech?

The final Bolger factor asks whether the speaker has an economic purpose for the speech. 173 The U.S. Supreme Court has noted that “all advertising is at least implicitly a plea for its audience’s custom,” and most courts acknowledge that almost every company has an economic motivation for their advertisements. 174 Therefore, speech delivered in the context of a commercial transaction strongly indicates an economic motivation for the speech. 175

For example, in the Seventh Circuit Court of Appeals case of Briggs & Stratton Corp. v. Baldridge, the appellants were a corporation doing business in Arab states. 176 Many Arab countries enforced a trade boycott of Israel and sent questionnaires to companies doing business in Arab states inquiring about those companies’ relationships with Israel. 177 Companies that did not answer the questionnaire were blacklisted from doing business in Arab states. 178 Federal law prohibited appellants from responding to the questionnaire, so they alleged the federal law violated their First Amendment rights. 179

The appellants conceded they had an economic motivation for the speech, but they argued that their dominant motivation for answering

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174 Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 639 (1985); see, e.g., Dryer, 689 F. Supp. 2d at 1119 (“no serious dispute that NFL has an economic motivation” for its speech).
175 E.g Bolger, 463 U.S. at 68.
176 Briggs & Stratton Corp. v. Baldridge, 728 F.2d 915, 916 (7th Cir. 1984).
177 Id.
178 Id.
179 Id.
the questionnaire was to make a political statement. However, the Seventh Circuit disagreed, reasoning that appellants “proposed answers to [the] boycott questionnaires” only served to allow appellants “to maintain commercial dealings with the Arab world.” Thus, the Seventh Circuit held that appellants had a substantial economic motivation for their proposed speech because it was delivered in the context of a commercial transaction.

Additionally, speech is economically motivated when its overarching purpose is to promote a company’s brand or product. The Bolger Court found that Youngs had an economic motivation for distributing informational pamphlets to potential customers because the action served to promote Youngs’ products generally. Likewise, the Third Circuit in Facenda stated that Bolger’s third factor was satisfied because the program’s “general promotion of NFL-branded football provide[d] . . . indirect financial motivation.”

4. The “Inextricably Intertwined” Exception

Before a court concludes that an expression containing both commercial and noncommercial elements is commercial speech, a court must determine whether the speech “merely links” the product or brand to a public issue or whether the commercial elements of the challenged speech are “inextricably intertwined” with the expression’s noncommercial elements such that the entire expression receives full

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180 Id. at 917.
181 Id. at 918.
182 Id.
183 See, e.g., Yeager v. Cingular Wireless LLC, 673 F. Supp. 2d 1089, 1097 (E.D. Cal., 2009).
First Amendment protection. This is known as the “inextricably intertwined” exception to commercial speech.

In 1980, the Supreme Court first explained the “inextricably intertwined” exception in *Village of Schaumburg v. Citizens for a Better Environment*. In *Citizens for a Better Environment*, a village ordinance prohibited door-to-door solicitation “of contributions by charitable organizations that do not use at least 75 percent of their receipts for ‘charitable purposes.’” The respondent, a charitable organization promoting environmental protection, applied for a permit “to solicit contributions in the Village.” However, the village denied the request because respondent “could not demonstrate that 75 percent of its receipts would be used for ‘charitable purposes.’” Respondent sued the village, arguing the ordinance violated the First Amendment.

The *Citizens for a Better Environment* Court noted that charitable fundraising involves First Amendment protected speech, including the “propagation of views and ideas, and the advocacy of causes.” The Court recognized that regulations regarding the solicitation of funds must account “for the reality that solicitation is characteristically intertwined with . . . speech seeking support for particular causes” regarding important public issues. The Court further reasoned “that without solicitation the flow of such information and advocacy would likely cease.” Therefore, the Court concluded that charitable solicitations are not “a variety of purely commercial speech,” and that respondent’s charitable solicitations were entitled to full First

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187 *Id.*
189 *Id.* at 622.
190 *Id.* at 624.
191 *Id.* at 625.
192 *Id.*
193 *Id.* at 632.
194 *Id.*
195 *Id.*
Amendment protection.\textsuperscript{196} Thus, the \textit{Citizens for a Better Environment} Court held that speech combining commercial and noncommercial elements receives full First Amendment protection when elimination of an expression’s commercial elements would essentially eliminate the speaker’s opportunity to disseminate the expression’s noncommercial elements.\textsuperscript{197}

Eight years later, The Supreme addressed the “inextricably intertwined” exception again in \textit{Riley v. National Federation of the Blind of North Carolina}.\textsuperscript{198} In \textit{Riley}, a North Carolina law required charitable fundraisers “to disclose to potential donors . . . the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity.”\textsuperscript{199} A coalition of charitable organizations brought suit against North Carolina alleging this law violated their First Amendment rights.\textsuperscript{200} North Carolina countered that this law only regulated “commercial speech because it relat[ed] only to the professional fundraiser’s profit from the solicited contribution.”\textsuperscript{201}

The \textit{Riley} Court held that speech does not “retain its commercial character when it is inextricably intertwined with otherwise fully protected speech.”\textsuperscript{202} In a later case, the Supreme Court explained that the charitable organization’s commercial speech in \textit{Riley} was inextricably intertwined “because state law required it to be included” with the noncommercial speech.\textsuperscript{203} Accordingly, the \textit{Riley} Court determined that commercial speech is “inextricably intertwined” with noncommercial speech when their combination is required by law.\textsuperscript{204}

\textsuperscript{196} \textit{Id.} at 632-633.
\textsuperscript{197} \textit{Id.} at 632.
\textsuperscript{199} \textit{Id.} at 786.
\textsuperscript{200} \textit{Id.} at 787.
\textsuperscript{201} \textit{Id.} at 795.
\textsuperscript{202} \textit{Id.} at 796.
\textsuperscript{203} \textit{Bd. of Tr. v. Fox}, 492 U.S. 469, 474 (1989) (citing \textit{Riley}, 487 U.S. at 796).
\textsuperscript{204} \textit{Id.} (citing \textit{Riley}, 487 U.S. at 796).
In 1989, the Supreme Court in *Board of Trustees. v. Fox* combined the *Citizens for a Better Environment* and *Riley* holdings into one uniform rule. In *Fox*, a state university regulation prevented “private commercial enterprises” from operating on state university campus facilities. However, a company marketed houseware products to college students by “demonstrating and offering products for sale to groups of 10 or more prospective buyers at gatherings” hosted in college dormitories. During these gatherings, the company also distributed information on other subjects such as financial responsibility and home economics. A company representative hosted a gathering “in a student’s dormitory room” and the campus police charged her with violating the university’s regulation. The students brought suit against the university alleging the regulation violated their First Amendment rights.

The *Fox* Court held there was “no doubt” that the company’s gatherings constituted commercial speech. Nevertheless, the students argued that the company’s “pure speech and commercial speech [were] ‘inextricably intertwined’” such that the entire speech must be considered noncommercial. The Supreme Court disagreed and stated that commercial speech is “inextricably intertwined” when the law requires it to be included with noncommercial speech. The *Fox* Court elaborated on the boundaries of the “inextricably intertwined” exception, declaring:

> By contrast, there is nothing whatever ‘inextricable’ about the noncommercial aspects of these presentations. No law of man

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205 *Fox*, 492 U.S. at 474-475.
206 *Id.* at 471-472.
207 *Id.* at 472.
208 *Id.* at 474.
209 *Id.* at 474.
210 *Id.*
211 *Id.* at 473.
212 *Id.* at 474.
213 *Id.* at 474-475.
or nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.\footnote{Id. at 474.}

Therefore, the Fox Court determined that because “no law of man or nature” required the company to combine the “teaching of home economics” with “selling housewares,” the company’s commercial and noncommercial speech were not “inextricably intertwined.”\footnote{Id.} Thus, the Fox Court combined the Citizens for a Better Environment and Riley holdings into one succinct rule: commercial speech is “inextricably intertwined” with noncommercial speech, such that the entire speech receives full First Amendment protection, when a “law of man or nature” requires the combination of the speech’s commercial and noncommercial elements.\footnote{Id. at 474-475.}

\textbf{F. The Current Interpretation and Application of Commercial Speech Doctrine}

In addition to defining the “inextricably intertwined” exception, the Fox Court also affirmatively defined commercial speech as speech that seeks to “propose a commercial transaction,” noting that it “is the test for identifying commercial speech.”\footnote{Id. at 473-474 (1989) (stating that it was “clear about the difference between commercial and noncommercial speech”).} The phrase “propose a commercial transaction” is not as limiting as the phrase “no more than propose a commercial transaction.”\footnote{See Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 516-517 (7th Cir. 2014) (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-68 (1983)).} Thus, the implication is that
speech need not be “purely commercial” to constitute commercial speech.\textsuperscript{219} As a result, the Bolger framework essentially functions to determine whether an expression is “part and parcel” of a proposal for a commercial transaction.\textsuperscript{220} While some ambiguity exists at the commercial speech doctrine’s margins, the hallmark of commercial speech is that it in some capacity seeks to propose a commercial transaction.\textsuperscript{221} What the lower courts cannot agree on is whether the phrase “propose a commercial transaction” applies in a narrow or broad context.

II. PRIVATE-RIGHT DISPUTES INVOLVING IMAGE ADVERTISEMENTS PRIOR TO JORDAN V. JEWEL FOOD STORES, INC.

The commercial speech doctrine is difficult to apply in cases involving advertisements incorporating celebrity identities because the crux of the Supreme Court’s commercial speech cases centered on whether a government’s regulation of commercial speech violated the First Amendment.\textsuperscript{222} However, in the case at issue, Jordan’s claims are

\textsuperscript{219} See id. (citing Bolger, 463 U.S. at 66-68); see also Fox, 492 U.S. at 473-474 (defining commercial speech as speech that proposes a commercial transaction, not speech that “does no more than propose a commercial transaction”); see also Am. Future Sys., Inc., v. Pa. State Univ., 752 F.2d 854, 862 (1984) (holding that expressions “were not ‘within the core notions of commercial speech’ because they did more than simply propose a commercial transaction”); but see Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 906 (9th Cir. 2002) (“If speech is not ‘purely commercial’ – that is, it does no more than propose a commercial transaction—then it is entitled to full First Amendment protection.”).

\textsuperscript{220} Am. Future Sys., 752 F.2d at 862.

\textsuperscript{221} See Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 637 (1985) (Stating that “precise bounds of the category of expression that may be termed commercial speech” are “subject to doubt”); see also Briggs & Stratton Corp. v. Baldridge, 728 F.2d 915, 917-18 (7th Cir. 1984).

\textsuperscript{222} See Jordan, 743 F.3d at 514 (“In the public-law context, the commercial/noncommercial classification determines the proper standard of scrutiny to apply to the law or regulation under review.”).
not based on a government regulation, but instead, they are against a private company.\footnote{223} The Supreme Court has never addressed the commercial/noncommercial speech distinction from an “intellectual-property rights” versus “free-speech rights” context.\footnote{224} Thus, attempting to apply the Supreme Court’s commercial speech doctrine in a “private rights” context is like trying to fit square pegs into round holes.\footnote{225} As the Seventh Circuit acknowledged, appellate court decisions addressing commercial speech in a private rights context “are a conflicting mix of balancing tests and frameworks” resulting in conflicting applications of the commercial speech doctrine.\footnote{226}

Few cases have addressed the commercial/noncommercial distinction in a private rights context prior to \textit{Jordan v. Jewel Food Stores, Inc.} In 1996, the Tenth Circuit heard a challenge by the Major League Baseball Players Association (“MLBPA”) against an Oklahoma printing company in \textit{Cardtoons, L.C. v. Major League Baseball Players Ass’n}.\footnote{227} The MLBPA threatened legal action against Cardtoons for their intention to sell baseball “parody” trading cards that included player caricatures and “humorous commentary about their careers.”\footnote{228} The MLBPA argued that Cardtoons’ parody trading cards were commercial speech and therefore, received less First Amendment protection.\footnote{229}

The Tenth Circuit held that Cardtoons’ parody trading cards were not commercial speech because they did not “merely advertise another

\begin{footnotes}
\item[223] Id.
\item[224] Id. ("The Supreme Court has not addressed the question").
\item[225] See Gilbert, supra note 72, at 597 (noting that the Supreme Court never set out to define commercial speech, but instead address the constitutionality of a regulation).
\item[226] Jordan, 743 F.3d at 514.
\item[228] Id.
\item[229] Id. at 970.
\end{footnotes}
unrelated product.”

The Court determined that the cards provided “social commentary on public figures, major league baseball players, who are involved in a significant commercial enterprise.” Thus, the Tenth Circuit concluded that Cardtoons’ parody trading cards received full First Amendment protection.

In 2001, the Ninth Circuit heard Hoffman v. Capital Cities/ABC, Inc. In Hoffman, actor Dustin Hoffman starred in the 1982 movie “Tootsie, playing a male actor” dressed as a woman to get a part on a television show. A “still photograph” from “Tootsie” displayed Hoffman “in a red long-sleeved sequined evening dress and high heels, posing in front of an American Flag.” A magazine published, without Hoffman’s permission, an article altering the “Tootsie” still to make Hoffman appear to be wearing “Spring 1997 fashions.” Hoffman sued the publisher for the misappropriation of his name and likeness, and argued that the publisher’s use of the photograph was commercial speech.

The Ninth Circuit held that the publisher’s use of the “Tootsie” photograph was not pure commercial speech because the publisher “did not use Hoffman’s image in a traditional advertisement printed merely for the purpose of selling a particular product.” The Court reasoned that “in context, the article as whole [was] a combination of fashion photography, humor, visual and verbal editorial comment on

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230 Id. (The Tenth Circuit, without explanation, did not analyze the issue under the Bolger framework or the “inextricably intertwined” exception).
231 Id. at 969.
232 Id.
234 Id. at 1182.
235 Id.
236 Id. at 1183.
237 Id. at 1183-1184.
238 Id. at 1185. (The Ninth Circuit identified “the ‘core notion of commercial speech’” as speech that “‘does no more than propose a commercial transaction.’” However, the Court made no mention of the Bolger framework).
classic films and famous actors." As a result, the Court reasoned that any commercial aspects of the publisher’s article were “‘inextricably intertwined’ with expressive elements,” and could not be separated “from the fully protected whole.” Thus, the Ninth Circuit concluded that the publisher’s article was not “a purely ‘commercial’ form of expression,” and therefore, it did not constitute commercial speech.

In 2008, the Third Circuit decided *Facenda*. There, N.F.L Films Inc. (“NFL Films”) used portions of broadcaster John Facenda’s “voice-over work” in their “television production about the video game ‘Madden NFL 06.’” Facenda’s estate sued NFL films for false endorsement under the federal Lanham Act. NFL Films argued that its production constituted informational and artistic expression protected by the First Amendment. Facenda’s estate countered that the production was commercial speech entitled to lesser protection.

The Third Circuit applied the *Bolger* framework and found that NFL Films’ production was an advertisement because it was released in the days immediately before the game went on sale in retail stores, “much like an advertisement for an upcoming film.” The Court noted that the production did not refer to any other products and that “the video game’s general promotion of NFL-branded football provide[d] an additional indirect financial motivation.” Accordingly, the Third Circuit held that NFL Films’ production was commercial

239 *Id.* (Notably, the Court determined that the publisher’s use of the “still” did not solely advance a commercial message, but instead was “a compliment to” the magazine’s overarching theme on “Hollywood.”).

240 *Id.*

241 *Id.* at 1186.


243 *Id.* at 1011.

244 *Id.*

245 *Id.* at 1015.

246 *Id.* at 1016.

247 *Id.* at 1017.

248 *Id.*
speech, and it was not close to the boundary “dividing commercial and noncommercial speech.”

In sum, the circuits are split on the interpretation and application of the commercial speech doctrine in the context of private right disputes. Some courts employ a narrow construction of commercial speech while others find that the commercial speech doctrine should apply in a broad context. Courts also give varying weights to the three Bolger factors. Finally, the courts diverge on the scope of the inextricably intertwined exception; some courts, like the Seventh Circuit in Jordan, apply a narrow scope, while others like the Ninth Circuit in Hoffman, apply a broad scope.

III. A SUMMARY OF JORDAN v. JEWEL FOOD STORES, INC.

A. Factual Background

Jordan v. Jewel Food Stores, Inc. began as a “right-of-publicity dispute” pitting basketball hall of famer Michael Jordan (“Jordan”) against Jewel Food Stores, Inc. (“Jewel”). Jewel, commonly known as “Jewel-Osco,” operates approximately 175 grocery stores in the Chicago-land area. While many outside the Midwest may be unfamiliar with Jewel-Osco supermarkets, most people know of Michael Jordan, the former superstar Chicago bulls’ basketball

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249 Id. at 1017-1018.
252 See Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 519-520 (7th Cir. 2014); see Hoffman, 255 F.3d 1185-1186.
253 Jordan, 743 F.3d at 511.
254 Id.; Jewel was Founded in 1899. Today Jewel is owned by New Albertson’s Inc., a privately held grocery company. In addition to operating supermarkets across the Midwest, Jewel Food Stores, Inc. actively supports local charitable and not-for-profit organizations. See Jewel-Osco, http://www.jewelosco.com/our-company/traditions-history/ (last visited Apr. 30, 2015).
player.255 During his career Jordan won numerous championships and awards, and the N.B.A.’s official website refers to Jordan as “the greatest basketball player of all time.”256

Upon Jordan’s induction into the Basketball Hall of Fame on September 11, 2009, Sports Illustrated, published by Time, Inc. (“Time”), developed “a special edition of Sports Illustrated Presents” to celebrate Jordan’s career.257 The commemorative issue was titled “Jordan: Celebrating a Hall of Fame Career” and was only available for purchase in select stores.258 The special issue’s cover page was a picture of Jordan flying through the air appearing likely to throw down a slam-dunk.259

Prior to publication, Time offered Jewel free advertising space inside this special issue in exchange for Jewel’s promise “to stock and sell the magazine in its stores.”260 Jewel accepted Time’s offer and designed a “full page” advertisement (“ad”) for the magazine.261 Jewel’s ad combined “textual, photographic, and graphic elements,” and it included Jewel’s logo and slogan in the ad’s center.262 Jewel’s logo and slogan “are both registered trademarks” and were located in

255 Jordan, 743 F.3d at 512 n.1.
256 Jordan is most well-known for leading the Bulls to three consecutive NBA championships from 1991-1993, and after a brief retirement, leading the Bulls to three more consecutive championships from 1996-1998. See Legends Profile: Michael Jordan, NBA History, http://www.nba.com/history/legends/michael-jordan/index.html (last visited Apr. 30, 2015); see also, Jordan, 743 F.3d at 513 (“Jordan is a sports icon whose name and image are deeply embedded in the popular culture and easily recognized around the globe.”).
258 Jordan, 743 F.3d at 512.
259 See Jordan, 851 F. Supp. 2d at 1113.
260 Jordan, 743 F.3d at 512.
261 Id.
262 Id.
the ad “above a photo of a pair of basketball shoes.” The number that Jordan wore for most of his time with the Chicago Bulls, 23, features prominently on “the tongue of each shoe.” The text in Jewel’s ad is positioned above the shoes, logo, and slogan, and it reads:

A Shoe In!

After six NBA championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan’s elevation in the Basketball Hall of Fame was never in doubt! Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was “just around the corner” for so many years.

The following is a copy of Jewel’s entire “full-page” ad:

Time accepted Jewel’s ad, and placed it in the commemorative issues’ inside back cover.

263 *Id.*
264 *Jordan*, 851 F. Supp. 2d at 1104.
265 *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 512 (7th Cir. 2014).
266 *Id.* at 523.
B. Procedural Background

After Sports Illustrated released this commemorative issue, Jordan filed suit against Jewel in the Circuit Court of Cook County alleging that Jewel “improperly used his identity without authorization” and sought “$5 million in damages.” Jewel removed the case to federal court and “moved for summary judgment.” Jewel argued that “its ad qualified as ‘noncommercial’ speech,” and therefore, it received full First Amendment protection. Jordan filed a cross-motion for summary judgment, arguing that Jewel’s “ad was a commercial use of his identity” and qualified as commercial speech. Both Jewel and Jordan agreed that a holding that Jewel’s ad was noncommercial speech defeated Jordan’s claims and vice-a-versa. The district court ruled in favor of Jewel, and Jordan appealed.

C. The District Court’s Decision

The District Court for the Northern District of Illinois used the “core” commercial speech test as well as the Bolger framework, and it found Jewel’s ad was “noncommercial speech entitled to full First Amendment protection.” The district court also noted that even if Jewel’s ad contained commercial elements, those elements were

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267 Id. (The commemorative issue also included a congratulatory ad from a “rival Chicago-area grocery chain.”).
268 Id. at 513 (Jordan alleged Jewel’s ad violated the Illinois Right of Publicity Act, the Illinois Consumer Fraud and Deceptive Business Practices Act, the Illinois common law of unfair competition, and the federal Lanham Act).
269 Id. at 513.
270 Id.
271 Id.
272 Id. Jewel and Jordan agreed that the classification of Jewel’s ad as commercial or noncommercial speech was dispositive to the outcome of the case.
273 Id.
274 Jordan, 851 F. Supp. 2d at 1106-1111. The District Court made no mention of the Central Hudson’s expanded commercial speech inquiry.
inextricably intertwined with the noncommercial elements, “rendering the page noncommercial as a whole.”

Regarding the commercial speech distinction, the district court employed a narrow interpretation of commercial speech and held that Jewel’s ad was noncommercial speech because it did not directly propose a commercial transaction. The district court found that Jewel’s ad did not propose a commercial transaction because “readers would be at a loss to explain what they have been invited to buy.”

Furthermore, the district court reasoned that Jordan’s assertion that Jewel’s use of its logo and slogan in the congratulatory text invited “readers to enter into a commercial transaction” “utterly fail[ed] to account for context.” The district court held that Jewel’s ad did not propose a commercial transaction because the ad focused on Jordan, not on Jewel and its products and services. Thus, the district court concluded that a “reasonable reader” would agree that Jewel touted Jordan’s accomplishments “as a means to congratulate him” on his hall of fame induction and not as means of proposing a commercial transaction.

Moreover, the district court declared its holding was confirmed by an application of the Bolger framework. With regards to Bolger’s first factor, the district court determined “Jewel’s page” did not constitute an advertisement for several reasons. First, although Jewel even referred to its page as an “ad,” the district court determined that Jewel’s use of “the word ‘ad’ clearly was used as convenient shorthand” because there was no equally precise term for the page that

275 Id. at 1108.
276 Id. at 1106-1108.
277 Id. at 1107.
278 Id.
279 Id. The District Court also noted that Jewel’s use of the logo and slogan ensured that the reader understood the congratulatory message came from Jewel.
280 Id. at 1108.
281 Id. at 1108-1109. The District Court viewed the Bolger Framework as an alternative method for determining whether speech “proposes a commercial transaction.”
282 Id. at 1109-1110.
Jewel placed in the issue.\textsuperscript{283} Notably, the district court emphasized the presence of a rival grocery store chain’s page in the commemorative issue, that also congratulated Jordan, strongly weighed against finding Jewel’s page was an advertisement.\textsuperscript{284} The district court reasoned that a reasonable reader could not conclude that Jordan endorsed Jewel while also endorsing a rival supermarket, and thus, they would know that “Jewel’s page was not an advertisement.”\textsuperscript{285}

With respect to \textit{Bolger}’s remaining factors, the district court held that Jewel’s ad did not satisfy either the second or third factor.\textsuperscript{286} The district court determined that Jewel’s use of its logo and slogan only evoked Jewel’s products and services in general, and did not qualify as a reference to a specific product or service.\textsuperscript{287} The district court noted that “of course” Jewel had an economic motivation to place the page but ultimately held that Jewel’s economic motivation to place the page did not overcome the missing \textit{Bolger} elements.\textsuperscript{288}

As a result, the district court held it would be “highly unlikely” that a reasonable reader would “conclude that Jewel was linking itself to Jordan in order to propose a commercial transaction.”\textsuperscript{289} Further, the court declared, without any explanation, that even if Jewel’s page contained minimal commercial elements, those elements were inextricably intertwined with the page’s noncommercial elements.\textsuperscript{290} Accordingly, the district court concluded that Jewel’s page “was noncommercial speech entitled to full First Amendment protection.”\textsuperscript{291}

\begin{footnotes}
\item[283] Id. at 1109. Also, the District Court noted that Jewel did not pay money to place its page in the magazine.
\item[284] Id. at 1110.
\item[285] Id.
\item[286] Id. at 1110-1111.
\item[287] Id. at 1110.
\item[288] Id. at 1111.
\item[289] Id. at 1108.
\item[290] Id.
\item[291] Id. at 1111.
\end{footnotes}
D. The Seventh Circuit’s Decision

Jordan appealed the district court’s ruling to the Seventh Circuit. The appeal was heard by a three-judge panel consisting of Judge Flaum, Judge Sykes, and Judge Randa of the United States District Court for the Eastern District of Wisconsin, sitting by designation. Judge Sykes, writing for a unanimous panel, reversed the District Court’s ruling and remanded the case for further proceedings.

Before applying the commercial speech doctrine to Jewel’s ad, the Seventh Circuit first outlined its definition of commercial speech. The Court defined commercial speech as “speech that proposes a commercial transaction,” but noted that “this definition was just a starting point.” Further, the Court reasoned that while speech “that does no more than propose a commercial transaction ‘falls within the core notion of commercial speech,’ other communications” outside of this core notion “may also ‘constitute commercial speech.’” Thus, the Seventh Circuit declared that it was “a mistake to assume that the boundaries of the commercial-speech category are marked exclusively by this ‘core’ definition.”

The Seventh Circuit elaborated on its commercial speech doctrine interpretation, and reasoned that the “notion that an advertisement counts as ‘commercial’ only if it makes an appeal to purchase a

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292 Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 513 (7th Cir. 2014).
293 Id. at 510.
294 Id. at 512.
295 Id. at 515-517.
296 Id. at 516. The Seventh Circuit acknowledged that the U.S. Supreme Court has “also defined commercial speech as ’expression related solely to the economic interests of the speaker and its audience.’” (internal citations omitted). However, the Seventh Circuit recognized that this definition “has largely fallen into disuse.” Id. at 516 n.6.
297 Id. at 516.
298 Id. The Court reiterated this sentiment, stating that “the commercial-speech category is not limited to speech that directly or indirectly proposes a commercial transaction.”). Id. at 517.
particular product makes no sense today” because modern commercial advertising is creative, “abstract, and frequently relies on subtle cues.” Therefore, the court determined that an “advertisement is no less ‘commercial’ because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service” because “often the commercial message is general and implicit rather than specific and explicit.”

Under this doctrinal premise, the Seventh Circuit found that Jewel’s ad served the dual functions of congratulating Jordan and promoting Jewel’s supermarkets. The Court stated that Jewel’s tribute to Jordan was “explicit and readily apparent,” but, when considered in context, Jewel’s ad had the “unmistakable commercial function [of] enhancing the Jewel-Osco brand in the minds of consumers.” Thus, the Court determined that Jewel’s promotion of its own brand in its ad was “implicit but easily inferred” and was the ad’s “dominant” purpose. Notably, the Court scrutinized Jewel’s use of its slogan and logo, finding that the slogan and logo’s size, style, color, and location in the ad indicated that the ad “plainly aimed at fostering goodwill for the Jewel brand” and was “for the purpose of increasing patronage of Jewel-Osco stores.”

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299 Id. at 518. The Court further reasoned that “[a]pplying the ‘core’ definition too rigidly ignores this reality.”

300 Id.

301 Id.

302 Id. The ad’s “textual focus” was a “congratulatory salute to Jordan.” Id. at 517. However, the Court determined that “evaluating the text requires consideration of its context, and this truism has special force when applying the commercial speech doctrine.”

303 Id. at 518. Jewel argued that its salute to Jordan was a public-service announcement similar to its “practice of commending local community groups on notable achievements.” Id. However, the Court dismissed this argument, noting that there is a “world of difference between an ad congratulating a local community group, and an ad congratulating a famous athlete.”

304 Id. The Court noted that Jewel’s logo and slogan “prominently featured in the center of the ad and in a font size larger than any other on the page” and that this “set them off from the congratulatory text, drawing attention to Jewel-Osco’s sponsorship of the tribute.”

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Furthermore, the Seventh Circuit conceded that while Jewel’s ad did not reference a specific product or service, the court reasoned that Jewel’s ad invited readers to buy products generally from Jewel, such as “a loaf of bread [or] a gallon of milk.” The court held that simply because Jewel’s ad “promote[d] brand loyalty rather than a specific product” did not mean that Jewel’s ad was ‘noncommercial.’” Thus, the court reasoned that although the ad’s commercial message was “generic and implicit,” the ad clearly served as “a form of image advertising aimed at promoting goodwill for the Jewel-Osco brand by exploiting public affection for Jordan at an auspicious moment in his career.” Accordingly, the Seventh Circuit held that Jewel’s ad proposed a commercial transaction and constituted commercial speech.

Additionally, like the district court confirmed its decision through application of the Bolger framework, here the Seventh Circuit also determined its conclusion was confirmed “by application of the Bolger framework.” With regard to Bolger’s first factor, the court held that “Jewel’s ad certainly qualifie[d] as an advertisement in form” because the ad promoted Jewel-Osco supermarkets to potential buyers. The court also found that Jewel’s ad constituted an advertisement because it was “easily distinguishable” from the magazine’s “editorial coverage of Jordan’s career.” Finally, the Seventh Circuit determined that Jewel’s ad was an advertisement because, in context, it looked like an advertisement.

305 Id. Jewel’s ad invites readers to buy “[w]hatever they need from a grocery store”).
306 Id.
307 Id.
308 Id. at 519-520.
309 Id. at 519. The Seventh Circuit found that the Bolger framework applies when speech “contains both commercial and noncommercial elements.” Id.
310 Id.
311 Id.
312 Id.
Upon analyzing *Bolger’s* second factor, the court determined that although that ad did not offer a “specific product or service . . . the ad promote[d] patronage at Jewel-Osco stores more generally.”\(^{313}\) Notably, the court stated that an ad’s failure to reference a specific product “is far from dispositive, especially where ‘image’ or brand advertising rather than product advertising is concerned.”\(^{314}\) In fact, the Seventh Circuit reasoned that “[t]o say that the ad is noncommercial because it lacks an outright sales pitch is to artificially distinguish between product advertising and image advertising.”\(^{315}\)

Finally, the Seventh Circuit held that Jewel’s ad satisfied *Bolger’s* third factor by declaring that there was “no question that the ad served an economic purpose.”\(^{316}\) The court found it obvious that “Jewel had something to gain by conspicuously joining the chorus of congratulations on the much-anticipated occasion of Jordan’s induction into the Basketball Hall of Fame.”\(^{317}\) Moreover, the Seventh Circuit addressed the negative policy implications of the district court’s holding, reasoning that “[c]lassifying this kind of advertising as constitutionally immune noncommercial speech would permit advertisers to misappropriate” athlete and celebrity identities “with impunity.”\(^{318}\) Thus, the court concluded that Jewel’s ad satisfied the *Bolger* framework and constituted “commercial speech.”\(^{319}\)

Before concluding, the Seventh Circuit addressed the “proper use” of the inextricably intertwined doctrine.\(^{320}\) The Seventh Circuit determined that the inextricably intertwined exception’s “central inquiry is not whether the speech in question combines commercial and noncommercial elements, but whether it was legally or practically
impossible for the speaker to separate them.” Thus, the Seventh Circuit held that the “commercial and noncommercial elements of Jewel’s ad were not inextricably intertwined” because “[n]o law of man or nature compelled Jewel to combine the commercial and noncommercial messages” in its ad. Accordingly, the Seventh Circuit affirmed that Jewel’s ad constituted commercial speech.

IV. ANALYSIS OF THE SEVENTH CIRCUIT’S DECISION

A. The Seventh Circuit’s Decision to Apply the Commercial Speech Doctrine with a Broad Scope was Proper and is the Best Path Forward

The Seventh Circuit correctly determined that the commercial speech doctrine applies with a broad, rather than narrow, scope. The court’s flexible application of the commercial speech doctrine was proper because it allowed the court to consider Jewel’s ad in context, rather than in isolation. Upon consideration of the ad’s entire context, the court reasoned that Jewel’s ad’s primary purpose was not to pay tribute to Jordan, but it was instead to promote Jewel’s brand to its potential customers. Thus, the Seventh Circuit’s flexible application of the commercial speech doctrine provided the court the opportunity to reach the “commonsense” conclusion that Jewel’s ad constituted commercial speech.

Accordingly, the Seventh Circuit’s flexible interpretation of commercial speech was proper because (1) the case law supports the Court’s broad application of the commercial speech doctrine, and (2) the practical outcomes of the Court’s flexible application of commercial speech doctrine demonstrate that a broad interpretation of commercial speech is the best path forward in private-right commercial speech cases.

321 Id. at 521.
322 Id. at 522.
323 Id.
324 Id. at 518.
1. The Seventh Circuit’s Flexible Interpretation of “Speech that Proposes a Commercial Transaction” is Supported by Case Law

The U.S. Supreme Court consistently relies on the “commonsense differences between speech proposing a commercial transaction and other varieties” to find that a variety of expressions qualify as commercial speech. Here, the Seventh Circuit’s decision properly interpreted these “commonsense differences” to effectively apply a flexible, rather than rigid, commercial speech interpretation to this case. Although some circuits find that “speech that proposes a commercial transaction” should apply with a narrow scope that is virtually identical to the “core” commercial speech test, most courts interpret the commercial speech doctrine to apply broadly. While there is some ambiguity concerning commercial speech’s doctrinal boundaries, the Seventh Circuit’s application of a flexible definition of “speech that proposes a commercial transaction” is supported by the U.S. Supreme Court’s precedent.

First, the Seventh Circuit correctly determined the U.S. Supreme Court’s changes to its commercial speech definition implied a tacit support for a flexible, rather than rigid, application of the commercial speech doctrine. Originally, the Virginia Pharmacy Court defined commercial speech as “speech that does no more than propose a commercial transaction.” However, the Fox Court altered the

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wording of its commercial speech definition to simply “speech that proposes a commercial transaction.”\textsuperscript{329} The Seventh Circuit inferred that the U.S. Supreme Court’s subtraction of “no more than” from its commercial speech definition implied that commercial speech encompassed expression beyond merely “core” commercial speech.\textsuperscript{330} Thus, the Seventh Circuit determined that it was “a mistake to assume that the boundaries of the commercial speech category are marked exclusively by th[e] ‘core’ definition.”\textsuperscript{331} Accordingly, the Seventh Circuit’s broad, rather than narrow, commercial speech interpretation properly accounted for the U.S. Supreme Court’s changes to its commercial speech definition.\textsuperscript{332}

Moreover, the Seventh Circuit appropriately reasoned that the \textit{Bolger} Court’s holding further supported a broad, rather than narrow, application of the commercial speech doctrine. The Seventh Circuit noted that \textit{Bolger} defined “speech that did no more than propose a commercial transaction” as “core” commercial speech.\textsuperscript{333} Yet, the court noted that \textit{Bolger} also held that informational pamphlets that did not directly propose a commercial transaction qualified as commercial speech.\textsuperscript{334} Therefore, because \textit{Bolger} explicitly held that speech consisting of both commercial and noncommercial elements constituted commercial speech, the Seventh Circuit appropriately

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{329} Bd. of Tr. v. Fox, 492 U.S. 469, 473-474 (1989).
  \item \textsuperscript{330} See Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 516 n.7 (7th Cir. 2014).
  \item \textsuperscript{331} \textit{Id.} The Court further stated that the “core” definition of commercial speech “is just a starting point” because other types of communication could also constitute commercial speech. \textit{Id.}
  \item \textsuperscript{332} Additionally, the U.S. Supreme Court has never expressly rejected \textit{Central Hudson}’s formulation of commercial speech. \textit{Id.} at 516 n.6. The \textit{Cincinnati} Court found that \textit{Central Hudson}’s iteration of commercial speech encompassed expression far beyond “core” commercial speech. \textit{Cincinnati}, 507 U.S. at 423. Therefore, the U.S. Supreme Court’s refusal to nullify \textit{Central Hudson}’s expanded commercial speech test is also tacit support for a flexible, rather than rigid, commercial speech interpretation.
  \item \textsuperscript{333} See Jordan, 743 F.3d at 516-517 (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-68 (1983)).
  \item \textsuperscript{334} \textit{Id.} at 517 (citing \textit{Bolger}, 463 U.S. at 66-67).
\end{itemize}
\end{footnotesize}
relied on Bolger to apply a flexible interpretation of commercial speech that extends beyond “core” commercial speech.\footnote{\textit{Id.} at 516-517. The Seventh Circuit reasoned that \textit{Bolger} was “instructive” toward determining the proper interpretation of the “commonsense distinction[s]” between different varieties of speech. \textit{Id.} at 517.}

The Seventh Circuit correctly noted that most courts cite the U.S. Supreme Court’s precedents to apply a flexible interpretation of the commercial speech doctrine.\footnote{\textit{See} \textit{Jordan}, 743 F.3d at 516; \textit{see also} Dryer v. National Football League, 689 F. Supp. 2d 1113, 1116 (D. Minn., 2010) (citing to \textit{Cincinnati, Fox, Bolger,} and \textit{Central Hudson} to declare that it would not limit its commercial speech analysis to only “core” commercial speech because commercial speech has an “elastic definition”).} Nevertheless, the Ninth and Tenth Circuits apply a narrow definition of commercial speech. In \textit{Mattel, Inc. v. MCA Records, Inc.}, the Ninth Circuit found that speech was “entitled to full First Amendment protection” because it was not “purely commercial.”\footnote{\textit{Mattel, Inc. v. MCA Records, Inc.}, 296 F.3d 894, 906 (9th Cir. 2002).} Similarly, in \textit{Cardtoons} the Tenth Circuit determined that a company’s parody trading cards were not commercial speech simply because they did not “advertise another unrelated product.”\footnote{\textit{Cardtoons}, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959, 970 (9th Cir. 2000).}

However, in both cases the distinction between commercial and noncommercial speech was not either Court’s primary focus. Both the Ninth and Tenth Circuit’s engaged in merely a cursory review of the Supreme Court’s commercial speech precedents, and their incomplete analysis led to their incorrect conclusions of law.\footnote{\textit{See} \textit{Mattel}, 296 F.3d at 906 (Ninth Circuit only spent one page discussing commercial speech); \textit{see Cardtoons}, 95 F.3d at 970 (Tenth Circuit only devoted one paragraph to commercial speech issue).} In fact, the Second, Third, Sixth, Seventh, Eighth, and D.C. Circuits all found that the Supreme Court’s commercial speech precedents support a broad application of the commercial speech doctrine that encompasses expression beyond “core” commercial speech.\footnote{\textit{See}, e.g., \textit{Semco, Inc. v. Amcast, Inc.}, 52 F.3d 108, 112-114 (6th Cir. 1995) (Although Mr. Kopp’s article does more than merely propose a commercial
Seventh Circuit’s use of a flexible, rather than rigid, commercial speech interpretation was proper because it is supported the Supreme Court’s commercial speech precedents and the majority of other court opinions.

2. The Seventh Circuit’s Emphasis on the Context of Jewel’s Ad Underscores the Practical Necessity of a Flexible Application of the Commercial Speech Doctrine

The Seventh Circuit’s broad application of the commercial speech doctrine allowed the court to analyze both the purposes and context behind Jewel’s ad. The court’s ability to evaluate the ad’s entire context and purposes to reach its decision only further illustrates why the Seventh Circuit’s broad application of the commercial speech doctrine is the best path forward in private-law cases.

The Seventh Circuit’s broad application of the commercial speech doctrine in private-law cases because of the prevalence of modern image advertising. The Seventh Circuit noted that if it focused solely on the literal meaning of the ad’s text it would have found the ad to be noncommercial speech. The court reasoned that modern advertising could still communicate strong commercial messages even though the messages were “general and implicit, rather than specific and explicit.” Thus, the court correctly determined that it needed to consider the ad’s entire context rather than focus solely on the plain meaning of the text in the ad in order to properly evaluate whether Jewel’s ad constituted commercial speech.

Upon consideration of the ad’s context, the Seventh Circuit determined that Jewel’s ad served the dual functions of

\[341\] *Jordan*, 743 F.3d at 517.

\[342\] *Id.* at 517-518.

\[343\] *Id.*
“congratulating Jordan” and “promoting Jewel’s supermarkets.” Jewel argued that its ad was a tribute to Jordan, and the ad was similar to its practice of commending local community groups for their achievements. However, the Seventh Circuit evaluated Jewel’s ad in context by acknowledging the important differences that exist between congratulating a local community group and congratulating a world-famous athlete.

Specifically, the court noted that unlike community groups, famous athletes do not need the extra notoriety that stems from an unsolicited use of their identities. The court also noted that famous athletes’ identities have commercial value, whereas community groups do not. Further, the court recognized that Jewel’s ad’s congratulatory message incorporated Jordan into Jewel’s trademarked slogan, describing “Jordan as a fellow Chicagoan who was just around the corner for so many years.” Thus, the court determined that Jewel’s congratulatory message to Jordan could not be considered the primary purpose of Jewel’s ad because Jewel’s linkage of Jordan to its slogan only made sense if Jewel’s goal was to associate Jordan with Jewel’s brand. The court ultimately held that although Jewel’s commercial message was implicit, it was easy to infer that Jewel’s promotion of its brand was the ad’s “dominant” purpose. Thus, Jewel’s ad constituted commercial speech.

Furthermore, the Seventh Circuit’s flexible application of the commercial speech doctrine allowed the court to evaluate the context and purposes behind Jewel’s design of its ad. The court noted that

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344 Id. at 518.
345 Id. Thus Jewel argued that its ad should not be considered commercial speech.
346 Id.
347 Id.
348 Id.
349 Id.
350 Id. at 519.
351 Id. at 518.
352 Id. at 518-519.
Jewel’s logo was displayed in the largest font size on the page. The court also noted that Jewel’s ad displayed its logo in the exact center of the page, and that Jewel’s logo and slogan were styled in their “trademarked ways.” Thus, the court reasoned that Jewel’s logo and slogan’s “style, size, and color” set them apart from the ad’s celebratory text and drew the reader’s attention to Jewel as the sponsor of the tribute. The Seventh Circuit determined that in the context of all these factors that the ad’s dominant purpose was not to celebrate Jordan’s legacy, but was instead for the primary purpose of fostering “goodwill for the Jewel brand” in the hopes of “increasing patronage at Jewel-Osco stores.”

In sum, the Seventh Circuit’s broad application of the commercial speech doctrine was proper here because it allowed the court to consider Jewel’s ad in context, and thus discover the dominant purposes of Jewel’s ad. If this court were to apply the commercial speech doctrine rigidly, the court would have concluded that Jewel’s ad deserved full First Amendment protection simply because the ad did not directly propose a commercial transaction. A flexible application of the commercial speech doctrine allowed the court to avoid this problem and correctly hold that advertisements promoting brand loyalty are just as “commercial” as advertisements directly “proposing a commercial transaction” for a specific product.

As the Seventh Circuit recognized, a rigid application of the commercial speech doctrine would essentially create a constitutional “distinction between product advertising and image advertising” even though both advertising genres can display an equally clear commercial message. Accordingly, the Seventh Circuit’s ability to analyze the entire context and purposes of Jewel’s ad provides strong support for the proposition that a broad application of the commercial speech doctrine

353 Id. at 518.
354 Id.
355 Id.
356 Id. at 518-519.
357 Id. at 519.
358 Id. at 518-520.
speech doctrine provides the most practical path forward in private-law cases.

B. The Seventh Circuit Properly Applied the Bolger Framework to Confirm that Jewel’s Advertisement Constituted Commercial Speech

In its Bolger analysis, the Seventh Circuit correctly asked whether the speech: (1) was an advertisement, (2) referred to a specific product or service, and (3) had economic motive. First, the Seventh Circuit properly noted that its application of the Bolger framework “confirms” its conclusion that Jewel’s ad is commercial speech. Commercial speech is defined as speech that proposes a commercial transaction. Thus, the Bolger framework serves as a method to determine whether an expression essentially proposes a commercial transaction and therefore, constitutes commercial speech. Thus, it is doctrinally impossible to hold that an expression proposes a commercial transaction but does not constitute commercial speech under the Bolger framework. The Seventh Circuit’s recognition of this principle further demonstrates its proper understanding of the commercial speech doctrine’s application.

With regard to Bolger’s first factor, the Seventh Circuit properly concluded that Jewel’s ad qualified “as an advertisement in form.” The court noted that Jewel’s ad clearly promoted Jewel’s brand to the readers, and Jewel’s ad could easily be distinguished from the magazine’s “editorial content” because the ad was not an “article,” “column,” or “news photograph.” Further, the court acknowledged that Jewel’s own copywriter admitted that the ad was “too selly [sic].” Given the context behind Jewel’s ad, the court correctly

359 Id. at 519.
360 Id.
362 Jordan, 743 F.3d at 519.
363 Id.
364 Id.
determined these facts alone were enough to classify Jewel’s ad as an advertisement.

However, several other facts relevant to Bolger’s first factor solidify the Seventh Circuit’s determination that Jewel’s ad qualified as an advertisement. For instance the court could have reasoned, like the Third Circuit reasoned in Facenda, that the ad’s all-positive tone weighed in favor of finding Jewel’s ad constituted an advertisement.\(^\text{365}\) Similarly, the court could have determined, like the Second Circuit determined in Bad Frog, that Jewel’s use of its trademarked logo communicated enough commercial information to find that Jewel’s ad constituted an advertisement.\(^\text{366}\) Accordingly, it is clear that the Seventh Circuit properly found that Jewel’s ad qualified as an advertisement under the Bolger framework.

Moving to Bolger’s second factor, the Seventh Circuit conceded that Jewel’s ad did not offer a specific product.\(^\text{367}\) However, the court noted that the failure to reference a product “is far from dispositive” in image advertising cases because as the court previously noted, brand advertising can be just as commercial in nature as product advertising.\(^\text{368}\) Because of this reality, the court properly attributed less weight to Bolger’s second factor in this case.\(^\text{369}\)

Lastly, given that the Seventh Circuit had already determined that the ad’s primary purpose was to promote Jewel’s brand and increase sales, the court held that there was “no question” that Jewel had an economic motive for its celebratory tribute to Jordan.\(^\text{370}\) The court also found important that Jewel’s marketing representatives stated that it would “be good for [Jewel]” to place its logo in Sports Illustrated


\(^{367}\) Jordan, 743 F.3d at 519-520.

\(^{368}\) Id. at 519.

\(^{369}\) See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 n.14 (1983) (“[W]e express no opinion as to whether reference to any particular product is a necessary element of commercial speech.”).

\(^{370}\) Jordan, 743 F.3d at 520.
simply because more people would be exposed to the logo. As a result, the court held that these facts demonstrate that “Jewel had something to gain” by running its ad at the exact moment of Jordan’s hall of fame induction.

Moreover, because the Seventh Circuit determined that the ad’s dominant purpose was to enhance the Jewel brand, the court properly afforded greater weight to Bolger’s third factor. In some cases, the Supreme Court states that merely because a speaker could potentially profit from his speech does not by itself make the speech commercial. However, in those cases the Supreme Court makes that point under the premise that the opportunity to profit from the speech is a secondary motivation of the speech. Thus, the Seventh Circuit appropriately afforded greater weight to Jewel’s economic motivation for its ad in this case because Jewel’s economic motivation was the primary reason for congratulating Jordan in its ad.

In sum, the Seventh Circuit’s in context consideration of Jewel’s ad allowed the court to attribute the proper weight to each individual Bolger factor. The court properly attributed greater weight to Jewel’s economic motivation, because it was the dominant purpose for Jewel’s ad. Likewise, the court properly afforded less weight to Bolger’s second factor in order to avoid creating a constitutional distinction between different forms of commercial advertising. Thus, the court correctly held that the ad’s lack of reference to a particular product did not outweigh Jewel’s ad’s substantial satisfaction of Bolger’s first and third factors.

371 Id.
372 Id.
374 Id.
C. The Seventh Circuit Properly Applied the Inextricably Intertwined Exception

Before concluding its analysis, the Seventh Circuit examined the district court’s finding that the ad’s commercial and noncommercial elements were “inextricably intertwined.”375 In the district court opinion, Judge Fienerman conducted a superficial analysis of the exception lasting all of one paragraph.376 Further, the District Court’s opinion was brief to the point that it failed to cite Fox—the Supreme Court’s seminal case on the inextricably intertwined doctrine.377

In contrast, the Seventh Circuit addressed the application of inextricably intertwined exception by first reviewing how it was applied in Fox.378 Upon this thorough review, the court determined that the inextricably intertwined exception “applies only when it is legally or practically impossible for the speaker” to separate the speech’s commercial elements from its noncommercial elements.379 Contrary to the District Court’s loose application of the “inextricably intertwined” exception, the Seventh Circuit reasoned that the exception only applies in highly specific circumstances. The Seventh Circuit’s strict interpretation of the inextricably intertwined exception, rather than the District Court’s loose interpretation, is a more accurate representation of the Fox rule because the Fox Court specifically held that the exception only applies when the speaker is “required” to combine the noncommercial elements with the commercial elements in a single expression.380

Here, the Seventh Circuit correctly determined that the ad’s two messages, promoting its brand and paying tribute to Jordan, were not “inextricably intertwined” because “no law of man or nature

375 Jordan, 743 F.3d at 520-521.
376 Jordan, 851 F. Supp. 2d at 1108.
377 Id.
378 Jordan, 743 F.3d at 521.
379 Id. at 521.
compelled Jewel” to combine these messages into one expression.\textsuperscript{381} In other words, Jewel was capable of saluting Jordan’s accomplishments without simultaneously promoting its own brand. No law of man or nature forced Jewel to do both at the same time. Thus, the Seventh Circuit properly applied the “inextricably intertwined” exception to affirm that Jewel’s ad constituted commercial speech.

CONCLUSION

The U.S. Supreme Court’s reluctance to provide a uniform application of the commercial speech doctrine has left courts free to apply the doctrine as flexibly or rigidly as they see fit. The district court and Seventh Circuit’s directly opposing outcomes in \textit{Jordan} illustrate this result. Other courts’ attempts to resolve this doctrinal struggle have resulted in divergent, and often irreconcilable, commercial speech interpretations.

However, in this case the Seventh Circuit engaged in a flexible commercial speech analysis and evaluated the expression’s entire context before making its decision. This allowed the Seventh Circuit to expand the scope of commercial speech beyond expression that directly proposes a commercial transaction. This flexible application of the commercial speech doctrine is the most practical commercial speech interpretation because it provides a path for courts to hold that clearly commercial expressions qualify as commercial speech even though they do not directly reference a specific product. Thus, if and when the U.S. Supreme Court decides to formulate a uniform commercial speech analysis, the U.S. Supreme Court should follow the path laid out by the Seventh Circuit because it provides the most pragmatic and effective interpretation of the commercial speech doctrine.

\textsuperscript{381} \textit{Jordan}, 743 F.3d at 522.
THE PANHANDLERS’ DIALOGUE: ARE RESTRICTIONS ON PANHANDLING CONTENT-NEUTRAL UNDER THE FIRST AMENDMENT?

JING ZHANG*


INTRODUCTION

“Can you spare some change?” To a listener, these words of solicitation can be an annoyance, but to the speaker, these words are a plea for help and a means of survival. In September of 2014, the Seventh Circuit upheld a Springfield ordinance that prohibited oral solicitations for money in Springfield’s downtown historic area.1 This Seventh Circuit decision is the latest in a string of decisions from the federal circuits on whether regulations on panhandling, like the one in Springfield, are constitutional under the First Amendment.2

The First Amendment of the U.S. Constitution provides that Congress “shall make no law . . . abridging the freedom of speech.”3 Scholars, judges, and practitioners have found that free speech is


1 Norton v. City of Springfield, 768 F.3d 713 (7th Cir. 2014).
2 See Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014); Clatterbuck v. City of Charlottesville, 708 F.3d 549 (4th Cir. 2013); Speet v. Schuette, 726 F.3d 867 (6th Cir. 2013).
3 U.S. CONST. amend. I.
essential to the preservation of democracy, the marketplace of ideas, a person’s sense of “personhood and autonomy,” and promoting tolerance in society. Although there are some types of speech that fall outside the protections of the First Amendment, charitable solicitations are a type of speech protected under the First Amendment.

When government makes a restriction on speech that is protected by the First Amendment, the restriction is either content-based or content-neutral. If a government regulation restricts speech because of “its message, its ideas, its subject matter, or its content,” the government’s regulation is a content-based restriction. Content-based speech restrictions are analyzed under strict scrutiny review, which means that for the restriction to be valid, the government must show that the restriction serves a compelling governmental interest that is narrowly tailored to achieve that interest. On the other hand, a speech restriction is content-neutral when the government regulates the manner in which speech may be communicated, regardless of the message conveyed. Content-neutral speech restrictions are analyzed under intermediate scrutiny review, which means that for the restriction to be valid, the government must prove that the restriction serves a significant governmental interest and leaves open alternative channels of communicating the restricted speech.

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4 Erwin Chemerinsky, CONSTITUTIONAL LAW 1208-12 (3d ed. 2009) (explaining several reasons why free speech is important, including Alexander Mikeljohn’s idea that free speech preserves democracy; Justice Oliver Wendell Holmes’ idea that free speech contributes to the marketplace of ideas; Justice Thurgood Marshall’s idea that free speech is central to one’s “personhood and autonomy”; and Professor Lee Bollinger’s idea that free speech promotes tolerance).

5 See Chaplinski v. New Hampshire, 315 U.S. 568, 571-72 (1942) (holding that the First Amendment does not protect speech involving obscenity, fraudulent misrepresentation, defamation, or fighting words).


7 Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95 (1972).


9 Chemerinsky, supra note 2, at 1537.

Other factors play into the analysis of a speech restriction. One significant factor is whether the restriction takes place in a public forum. A public forum is a place, such as a sidewalk or public park, that government is “obligated to make available for speech.” When a content-based speech restriction takes place in a public forum, the restriction is analyzed under strict scrutiny just like it would be in a non-public forum. However, when a content-neutral speech restriction takes place in a public forum, the speech restriction is analyzed more rigorously than if it took place in a non-public forum. Regulations that restrict speech in a public forum may only restrict speech according to the time, place, and manner in which the speech is delivered. The regulation also must be narrowly tailored to restrict no more speech than necessary. Because content-neutral restrictions of speech in public forums require a more rigorous standard of review, the determination of whether a restriction on speech takes place in a public forum and whether the restriction is content-based or content-neutral has significant effect on the restriction’s constitutionality.

In Norton, the Seventh Circuit held that Springfield’s ordinance prohibiting panhandling in its historic downtown area was a content-neutral speech restriction. As a content-neutral restriction, the Seventh Circuit found that the ordinance was constitutional. However, this Seventh Circuit decision is out of step with the federal circuit courts that have reviewed similar panhandling regulations.

Part I of this article explores the Supreme Court’s framework for analyzing cases involving solicitations. Then, Part II explores how the federal circuits have applied the Supreme Court’s analyses in solicitation cases to panhandling restrictions. Part III discusses the Seventh Circuit’s decision in Norton. Finally, Part IV argues that the Seventh Circuit misapplied the law and departed from the Supreme

11 Chemerinsky, supra note 2, at 1537.
12 Id.
13 Id.
14 Id.
15 Id.
16 Norton v. City of Springfield, 768 F.3d 714 (7th Cir. 2014).
17 Id. at 717.
Court’s framework and sister circuits in holding that the ordinance was content-neutral and valid under the First Amendment.

I. SUPREME COURT CASES ON SOLICITATION RESTRICTIONS

The Supreme Court has not yet addressed the constitutionality of panhandling restrictions, but the Court has ruled on several cases dealing with solicitations in general. In these cases, the Court’s determination of two factors played a significant role in the outcomes of the cases: (1) whether the forum was considered a public forum and (2) whether the restriction was a content-based or content-neutral speech restriction.

In 1980, the Supreme Court held in Village of Schaumburg v. Citizens for a Better Environment, that charitable solicitation is a form of speech protected by the First Amendment. In that case, the Supreme Court reviewed a municipal ordinance that required charitable organizations that solicited funds by door-to-door solicitations or by use of public streets to apply for a permit. A fine of up to $500 per offense was the punishment for charitable organizations that solicited contributions without obtaining a permit. In granting these permits for charitable solicitations, the organizations must prove that at least 75 percent of the proceeds of their solicitations were used directly for the charitable purpose of the organization. The ordinance explicitly stated that funds used for salaries or commissions for solicitors or used for administrative expenses of the organization could not be included as funds used for charitable purposes of the organization.

Citizens for a Better Environment (CBE), an Illinois not-for-profit corporation, applied for a permit to solicit contributions. The village of Schaumberg denied CBE a permit because CBE could not

19 Id. at 622-23.
20 Id. at 623.
21 Id. at 624.
22 Id.
23 Id. at 624-25.
demonstrate that 75 percent of their solicitations would be used for charitable purposes as defined by the ordinance. CBE sued for injunctive and declaratory relief claiming that the ordinance violated the First and Fourteenth Amendments.

The Court, citing a string of cases, found that the First Amendment protects charitable solicitations because they “involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment.” Finding that charitable solicitations are protected speech, the Court went on to consider whether the ordinance’s requirement that 75 percent of the solicitations must be used for charitable purposes was a valid restriction on CBE’s protected speech. The Court held that the 75 percent requirement did not serve a sufficiently important governmental interest. Although the Village had an interest in protecting the public from fraud, crime, and undue annoyance, the Court found that the 75 percent requirement unnecessarily interfered with First Amendment freedoms of charitable organizations that used solicited funds to primarily engage in research, advocacy, or public education. The Court also noted that broad rules in the area of free expression are suspect.

The village of Schaumburg decision is important in two respects. First, the Court found that the First Amendment protects charitable solicitations. Second, although the court did not specify whether the ordinance in the village of Schaumburg was a content-based or content-neutral speech restriction, the Court established that speech restrictions cannot be overly broad and must be substantially related to the governmental interest.

24 Id. at 625.
25 Id.
26 Id. at 632.
27 Id. at 636.
28 Id.
29 Id. at 636-37.
30 Id. at 637.
31 Id. at 632.
32 Id. at 636-37.
One year after striking down the ordinance in *Village of Schaumburg*, the Court in *Heffron v. International Society for Krishna Consciousness, Inc.*, upheld a Minnesota State Fair regulation requiring that “all persons, groups, or firms which desire to sell, exhibit, or distribute materials during the annual State Fair must do so only from fixed locations on the fairgrounds.” In that case, the International Society for Krishna Consciousness, Inc. (ISKCON) sought for injunctive relief to prohibit the regulation’s enforcement against ISKCON members. ISKCON claimed that the regulation violated its members’ First Amendment rights because it suppressed their ability to practice Sankirtan, a religious ritual wherein members distribute or sell religious literature, and to solicit donations for the religion in public places.

In analyzing ISKCON’s claim, the Court first noted that the First Amendment “does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.” The Court further stated that speech restrictions are upheld when the restriction (1) is justified without reference to the content of the speech, (2) serves a significant governmental interest, and (3) leaves open alternative channels for communicating the regulated speech. The Court first held that the regulation requiring that all distribution and sales of materials take place from fixed locations on the fairgrounds was not based on the content of the speech, and thus, it was a content-neutral restriction. The regulation was not open to the kind of arbitrary application consistent with content-based restrictions that have “the potential for becoming a means of suppressing a particular point of view.” Instead, the State Fair’s method of allocating booths and other fixed locations on the fairground was a straightforward first-come, first-served system, and the regulation

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34 *Id.* at 644-45.
35 *Id.* at 647.
36 *Id.* at 648.
37 *Id.*
38 *Id.*
applied evenhandedly to all who wished to distribute or sell materials.\textsuperscript{39}

Second, the Court found that the regulation served a significant governmental interest. The State had an interest in maintaining the “orderly movement of the crowd given the large number of exhibitors and persons attending the Fair.”\textsuperscript{40} Given the high attendance of fairgoers, State’s interest in crowd control by confining distribution, selling, and solicitation activities to fixed locations served a substantial state interest.\textsuperscript{41}

Third, the Court found that ISKCON members had alternative channels for their religious expressions. The ISKON members could distribute or sell materials in the area outside of the fairgrounds, or orally propagate their views inside the fair and point fairgoers to the fixed locations where they could distribute or sell materials.\textsuperscript{42} The Court noted that the State Fair was a limited-public forum with the purpose of allowing the greatest number of exhibitors to present their products or views and that the regulation requiring that exhibitors do so from fixed locations did not limit their ability to share their views.\textsuperscript{43}

Justice Brennan wrote a dissenting opinion in \textit{Heffron}, asserting that the State Fair regulation prohibiting the distribution of materials was not narrowly tailored to the government’s interest.\textsuperscript{44} Justice Brennan joined the majority in finding that the State Fair’s prohibition on sales and solicitations was constitutional, but he found that the State Fair’s ban on distributing literature was not narrowly tailored to serve the government’s interest in crowd control.\textsuperscript{45} Justice Brennan found that because the governmental regulation infringed on ISKCON members’ First Amendment rights, the regulation must be narrowly tailored to further a legitimate interest.\textsuperscript{46} If the State’s major

\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.} at 649-50.
\textsuperscript{41} \textit{Id.} at 654-55.
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.} at 655.
\textsuperscript{44} \textit{Id.} at 657 (Brennan, J., dissenting).
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} at 658.
concern was to avoid congestion and control crowds, then the regulation could have been more narrowly tailored to prohibit the distribution of literature by ISKCON at fairground points, such as entrances and exits, where congestion would occur. Justice Brennan concluded that because distributing literature was essential for ISKCON members’ religious expression, the State could have drafted a narrower rule that protected its interest in crowd control while respecting ISKCON member’s First Amendment rights.

Several years after Heffron in 1990, the Court encountered another regulation prohibiting solicitations. In United States v. Kokinda, the Court upheld a United States Postal Service regulation that prohibited “soliciting alms and contributions” and “commercial soliciting and vending” on postal premises. In that case, members of the National Democratic Policy Committee (NDPC) set up a table on the sidewalk near the only entrance to the Bowie, Maryland Post Office to solicit contributions and sell books and subscriptions related to their organization. During the several hours that the NDPC were outside the post office, postal employees received between 40 and 50 complaints regarding their presence. When the postmaster asked the NDPC members to leave, the members refused and were subsequently arrested. A United States Magistrate Judge convicted the NDPC members of violating the postal service regulation prohibiting solicitations on postal premises. The convicted NDPC members appealed, asserting that the postal service’s regulation violated their First Amendment rights.

The Court held that solicitation is a form of speech that is protected by the First Amendment, but that the postal service regulation was a valid content-neutral speech restriction under the

47 Id. at 662.
48 Id. at 663.
50 Id. at 723.
51 Id.
52 Id. at 723-24.
53 Id. at 724
54 Id.
First Amendment. Justice O’Connor, writing for the plurality, found that the sidewalk outside of the post office was not a traditional public forum and thus, applied a test of reasonableness. The postal regulation did not suppress speech based on content because all groups were excluded from engaging in solicitation. Furthermore, the restriction was reasonable to prevent disruptions in post office business and impediments to the normal flow of traffic into and out of the post office.

Justice Kennedy, in a concurring opinion, agreed with the plurality’s holding except as to the post office’s status as a traditional public forum. Justice Kennedy found that the sidewalk was not a traditional forum to accommodate speech and thus any restrictions on speech must be valid time, place, and manner restrictions. In this case, Justice Kennedy concluded that the post office’s regulation was a valid time, place, and manner restriction.

Justice Brennan, joined by the three remaining justices, wrote a dissenting opinion in which he found that the sidewalk outside of the post office was a public forum and that the postal service regulation was not a valid content-neutral time, place, and manner restriction. Citing a string of cases, Justice Brennan found that the sidewalk was a public forum or at the very least, a limited-purpose public forum. Justice Brennan noted that content-based speech restrictions in a public or limited-purpose public forum must be narrowly drawn to serve a compelling governmental interest. Contrary to Justice Kennedy’s concurring opinion, the dissent found that the postal service regulation was not content-neutral because the restriction was tied explicitly to the content of the speech. Because a person on

55 Id. at 722.
56 Id. at 730.
57 Id. at 736.
58 Id. at 733-34.
59 Id. at 737-38 (Kennedy, J., concurring).
60 Id. at 738.
61 Id.
62 Id. at 740 (Brennan, J., dissenting).
63 Id. at 743-52.
64 Id. at 752.
65 Id. at 753.
postal premises may say, “Please support my political advocacy
group” but may not say, “Please contribute $10,” the restriction was
content-based.66 Because the regulation is based on the concern that
asking for money embarrasses or annoys the post-office-goer, the
regulation is based on the content of the speech.67 Furthermore, Justice
Brennan noted that the regulation prohibits all solicitation anywhere
on postal service property, which “sweeps an entire category of
expressive activity off of a public forum solely in the interest of
administrative convenience.”68 Therefore, Justice Brennan found that
the absolute prohibition on solicitation did not permit solicitation at
any time or any place in the forum and thus was not a valid restriction
that was narrowly tailored.69

Two years after the decision in Kokinda, the Court upheld
another regulation prohibiting solicitations because it found that the
regulation was a reasonable restriction.70 In International Society for
Krishna Consciousness v. Lee, the Court upheld a Port Authority
regulation that prohibited the sale or distribution of merchandise,
flyers, or other written material, and the solicitation and receipt of
funds in a “repetitive manner.”71 The Court first found that the Port
Authority did not constitute a traditional public forum because airports
and terminals like the Port Authority have never been traditionally
used to promote freedom of expression, and the Port Authority’s
purpose was not to promote expression but to facilitate travel.72 Thus,
because the Port Authority was not a traditional public forum, the Port
Authority could regulate solicitation as long as the regulation was
reasonable.73 The Court held that it is reasonable to regulate
solicitations in order to avoid disruptive effects, inconveniences, and
risks of duress for passengers traveling in the terminals.74 The Court

66 Id.
67 Id. at 754.
68 Id. at 753.
69 Id. at 755.
71 Id. at 675-77.
72 Id. at 682-83.
73 Id. at 683.
74 Id. at 684-85.
noted in particular that “face-to-face solicitation presents risks of duress that are an appropriate target of regulation.”  

Justice Kennedy, in his concurring opinion, disagreed with the majority’s finding in Lee that the airport terminal was not a public forum. Justice Kennedy found that the airport was a public forum, but that the airport’s blanket prohibition on in-person solicitations of money for immediate payment was narrow and a valid regulation on time, place, and manner of protected speech. Justice Kennedy argued that this ban on solicitations was directed at abusive practices and not any message or idea in particular, making this ban a content-neutral speech restriction. He also noted that conduct such as an immediate exchange for money implicates issues related to fraud and duress on those passing by in a way that allows the Port Authority to regulate it. Finally, Justice Kennedy stated that this ban left open alternative channels of communication because solicitors could explain their cause and request later payments through prepaid envelopes.

In Kokinda and Lee, the Court’s holding depended on whether the forum was considered a public forum. The plurality in Kokinda found that the sidewalk outside the post office was not a public forum and applied the more lenient reasonableness test. Similarly, in Lee, the Court found that the Port Authority was not a traditional public forum and applied the same reasonableness test to the regulation. The Court upheld both regulations as valid speech restrictions under the reasonableness test. The concurring and dissenting opinions in Kokinda, and Justice Kennedy’s concurring opinion in Lee, however, found that the forums in question were public forums or

75 Id. at 684.
76 Id. at 694 (Kennedy, J., concurring).
77 Id. at 705.
78 Id.
79 Id. at 705-06.
80 Id. at 707.
82 Lee, 505 U.S. at 683.
83 Id. at 755; Kokinda, 497 U.S. at 722.
84 Kokinda, 497 U.S. at 737-38, 740.
85 Lee, 505 U.S. at 684.
limited-public forums. In both cases, Justice Kennedy found that the regulation was content-neutral and a valid time, place, and manner restriction.\textsuperscript{86} However, Justice Brennan in the dissenting opinion of \textit{Kokinda} disagreed and found the regulation to be content-based and thus must be narrowly tailored to serve a significant governmental interest, which the regulation was not.\textsuperscript{87} The outcome of the concurring and dissenting opinions in \textit{Kokinda} and \textit{Lee} depended on whether the restriction was classified as content-based or content-neutral.

\textbf{II. Federal Circuit Split Regarding Restrictions on Panhandling}

Relying on these Supreme Court opinions, many federal circuits in recent years have reviewed restrictions on panhandling. In their analyses of regulations on panhandling, the federal circuits have disagreed on whether such restrictions on panhandling are content-based or content-neutral speech restrictions.

For example, in \textit{Iskcon of Potomac, Inc. v. Kennedy}, the Court of Appeals for the District of Columbia Circuit upheld a National Park Service regulation on solicitation, distribution, and sales of goods on the National Mall as a content-neutral restriction.\textsuperscript{88} In \textit{Iskcon of Potomac}, the Park Service regulation at issue prohibited, in relevant part, “soliciting or demanding gifts, money, goods or services.”\textsuperscript{89} The regulation defined solicitation to include only an in-person request for immediate payment.\textsuperscript{90} The court found that this solicitation prohibition was a content-neutral restriction because it did not regulate a type of expression or a specific message but instead regulated the manner in which the message could be conveyed.\textsuperscript{91} The court, citing Justice Kennedy’s concurring opinion in \textit{Lee}, found that regulating in-person

\textsuperscript{86} Id. at 738; \textit{Kokinda}, 497 U.S. at 705.
\textsuperscript{87} \textit{Kokinda}, 497 U.S. at 753.
\textsuperscript{88} 61 F.3d 949, 959 (D.C. Cir. 1995).
\textsuperscript{89} Id. at 954.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 955.
solicitations regulated the manner in which a message was conveyed, not the specific message itself.\textsuperscript{92} The D.C. Circuit next addressed whether the regulation was narrowly tailored. The court found that the regulation was not narrowly tailored because it substantially burdened more speech than necessary to achieve its interest in preserving the quality of experience for the visitors in the National Mall.\textsuperscript{93}

In contrast, the Ninth Circuit in \textit{ACLU v. City of Las Vegas} struck down an ordinance banning solicitation in Las Vegas’s downtown area.\textsuperscript{94} Unlike the D.C. Circuit, the Ninth Circuit held that the ban on solicitation was a content-based ordinance.\textsuperscript{95} Although there was no content-based purpose behind the ordinance, the Ninth Circuit found that the ordinance on its face discriminated based on content.\textsuperscript{96} The ordinance defined solicitation as “to ask, beg, solicitor plead, whether orally or in a written or printed manner for the purpose of obtaining money, charity, business or patronage, or gifts or items of value for oneself or another person or organization.”\textsuperscript{97} Because the ordinance had the primary effect of suppressing or exalting speech of certain content, the court held that the ordinance was content-based.\textsuperscript{98}

The court stated that when an ordinance is content-based, it is presumptively invalid and will only be constitutional if the government can demonstrate that it is the least restrictive means of furthering a compelling government interest.\textsuperscript{99} The Ninth Circuit, like the D.C. Circuit, recognized that Justice Kennedy’s concurrence in \textit{Lee} addressed this issue. The Ninth Circuit held that because the ordinance did not ban the act of solicitation but instead banned messages that contain soliciting content, the ordinance was content-based.\textsuperscript{100} Thus, as a content-based restriction, the ordinance was subject to strict

\begin{itemize}
  \item \textsuperscript{92} Id.
  \item \textsuperscript{93} Id. at 956.
  \item \textsuperscript{94} 466 F.3d 784, 797 (9th Cir. 2006).
  \item \textsuperscript{95} Id. at 793.
  \item \textsuperscript{96} Id.
  \item \textsuperscript{97} Id. at 788.
  \item \textsuperscript{98} Id. at 793.
  \item \textsuperscript{99} Id. at 792.
  \item \textsuperscript{100} Id. at 796.
\end{itemize}
The Ninth Circuit struck down the ordinance because the City conceded that “even the peaceful, unobstructive distribution of handbills requesting future support” would be prohibited, and thus the ordinance could not survive strict scrutiny.102

Similarly, the Fourth Circuit in *Clatterbuck v. City of Charlottesville* struck down a municipal ordinance that made it unlawful for any person to solicit money or sell goods within fifty feet of a main downtown intersection.103 The ordinance defined solicitation as “to request an immediate donation of money or other thing of value from another person, regardless of the solicitor’s purpose or intended use of the money or other thing of value.”104 The Fourth Circuit applied the analysis from its own prior case, *Brown v. Town of Cary*,105 which held that a restriction is content-based if it distinguishes content “with a censorial intent to value some forms of speech over others” and restricts speech because the government disagrees with the message or ideas.106 Because the ordinance prevented a solicitor’s speech when it involved immediate donations of things of value but allowed other types of solicitations, such as requests for future donations or things that have no value, the ordinance was based on the content of the solicitor’s speech.107 After determining that the ordinance involved a content-based speech restriction, the Fourth Circuit remanded the case back to the district court to determine the governmental interests in enforcing the ordinance.108

Within six months of *Clatterbuck*, the Sixth Circuit also struck down a Michigan statute that made it unlawful for a person to be found begging in a public place.109 The Sixth Circuit found that the Michigan anti-begging statute violated the First Amendment because it

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101 Id. at 797.
102 Id.
103 708 F.3d 549, 552 (4th Cir. 2013).
104 Id.
105 706 F.3d 294 (4th Cir. 2013).
106 *Clatterbuck*, 708 F.3d at 556.
107 Id.
108 Id. at 560.
was overbroad. The statute did not clarify what constituted begging. Therefore, the Sixth Circuit, worried about the chilling effect if left on the books, struck down the anti-begging statute.

More recently, however, in *Thayer v. City of Worcester*, the First Circuit reviewed and upheld a Worcester city ordinance, the Aggressive Panhandling Ordinance. The Aggressive Panhandling Ordinance made it unlawful for any person to beg, panhandle or solicit any other person in an aggressive manner. The First Circuit first inquired as to whether the government adopted these ordinances restricting speech because the government disagreed with the message that the speech conveyed. The First Circuit determined that the ordinance was not content-based because the ordinances do not identify speech except by reference to the behavior, time, or location of its delivery. The First Circuit relied on the Supreme Court’s decision in *Lee* to find that certain in-person requests for immediate money could create a risk of fraud and duress. Finding that the ordinance was content-neutral, the First Circuit applied the intermediate level of scrutiny. Under intermediate scrutiny, the speech restrictions must be narrowly tailored to serve a significant governmental purpose while leaving open adequate alternative channels of communication. The First Circuit found that the appellants failed to provide evidence showing that the ordinances were overbroad. As such, the ordinances were upheld as valid restrictions on speech.

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110 Id. at 880.
111 Id. at 878.
112 755 F.3d at 64.
113 Id.
114 Id. at 67.
115 Id.
116 Id. at 69.
117 Id. at 71.
118 Id.
119 Id. at 71-73.
III. NORTON V. CITY OF SPRINGFIELD

In September of 2014, the Seventh Circuit upheld a City of Springfield ordinance prohibiting panhandling. The ordinance provided that it is “unlawful to engage in an act of panhandling in the downtown historic district.” The ordinance defined panhandling as an oral request for immediate donation of money. The court noted that because panhandling was defined as an oral request, signs requesting money and oral requests to send money later were allowable under the ordinance. The downtown historic district is a small portion of the city area but comprises the city’s principal shopping, entertainment, and governmental areas.

Plaintiffs, Don Norton and Karen Otterson, received citations for violating this ordinance. Plaintiffs feared that further citations would result if they continued to panhandle and filed suit in the district court for a preliminary injunction to stop the enforcement of the ordinance. Plaintiffs alleged that Springfield’s panhandling prohibition violated the First Amendment. In the district court, the parties agreed that panhandling is a form of speech that receives First Amendment protections. The parties also agreed that if this ordinance drew lines based on the content of the speech, the ordinance would be unconstitutional. The district court denied plaintiff’s preliminary injunction, finding that the ordinance was content-neutral.

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120 Norton v. City of Springfield, 768 F.3d 714 (7th Cir. 2014).
121 Springfield Municipal Code § 131.06(e).
122 Norton, 768 F.3d at 714.
123 Id.
124 Id.
125 Id.
126 Id.
127 Id.
128 Id.
129 Id.
130 Id.
In reviewing the district court’s decision, the Seventh Circuit first looked to its previous cases on this matter. Although the court encountered a prior case with similar facts in *Gresham v. Peterson*, the question of whether anti-panhandling ordinances were content-based or content-neutral was not presented in that case. Also, the Seventh Circuit noted the existing circuit split that exists with regards to this question.

To determine whether the ordinance in *Norton* constituted a content-based speech restriction, the Seventh Circuit held that regulations are content-based when the regulation restricts speech because of the message or idea that it conveys or when the government disapproves of the message. The court stated that restrictions on panhandling do not fall into either one of those categories because the City is not restricting an idea or message or disapproving of said idea or message. Because the ordinance is indifferent to the purposes, if any, behind the solicitor’s appeal for money, the ordinance is not content-based. Instead, panhandlers are able to use signs, which are less threatening than oral requests, and still convey their message and have access to the marketplace of ideas.

Citing to Justice Kennedy’s decision in *Lee*, the Seventh Circuit held that the regulation was narrowly tailored so that it dealt only with “potentially threatening” confrontations. The Seventh Circuit upheld the ordinance, finding that it was content-neutral and a permissible time, place, and manner restriction by the City.

Judge Manion wrote a dissenting opinion in which he held that the ordinance was a content-based regulation that was subject to strict
scrutiny. Judge Manion distinguished this case from the Supreme Court cases of Lee, Kokinda, and Heffron by noting that each of the latter cases dealt with governmental restrictions on all forms of solicitation. The ordinance at issue, however, only restricted immediate oral requests for money. Furthermore, as for the circuit split, Judge Manion believed that the Seventh Circuit took “the path less-traveled” when it joined the D.C. Circuit and the First Circuit in finding that the restrictions were content-neutral.

In his dissenting opinion, Judge Manion distinguished Norton from the cases holding that panhandling statutes were constitutional. Judge Manion found that the ordinance in Thayer from the First Circuit differed because it targeted aggressive or repeated solicitations for money. The ordinance only made it unlawful for a person to repeatedly solicit money. Because the Springfield ordinance made all oral requests for money unlawful, the ordinance in Thayer was more permissive than the Springfield ordinance and thus should not have been followed by the Seventh Circuit. In addition, Judge Manion dismissed the D.C. Circuit’s decision in Kennedy because he believed that the D.C. Circuit misapplied the law.

Moreover, Judge Manion suggested a new approach to determining whether a restriction is content-based. He suggested that the court “temporarily step into the shoes of the City’s enforcement authorities.” Under this ordinance, an enforcement authority must “listen to what the speaker is saying in order to determine whether the speaker violated the ordinance.” The authorities must discern three things from the speech: first, whether the speech is a request for money (potentially a violation) or a request for the listener’s time,

139 Id. at 718 (Manion, J. dissenting).
140 Id.
141 Id.
142 Id.
143 Id. at 720.
144 Id.
145 Id.
146 Id. at 721.
147 Id.
148 Id.
signature, or labor (not a violation); second, whether the speech is a request for an immediate transfer of money (potentially a violation) or merely a request for the transfer of money at a future date (not a violation); third, whether the speech is a request for a charitable donation (potentially a violation) or a request for commercial transaction (not a violation). Judge Manion found that because the authorities cannot determine if there is a violation of the ordinance without listening to and understanding what the speaker is saying, the ordinance is content-based. In his analysis, Judge Manion stated that the ordinance could not be content-neutral, as the majority held, because the ordinance did not impose a restriction based on the volume, location, or conduct accompanying the speech.

In his dissent, Judge Manion stated that the Springfield ordinance prohibiting panhandling was a content-based speech restriction that was subject to strict scrutiny review. Thus, because the City did not prove that the ordinance meets strict scrutiny review, Judge Manion dissented from the majority and held that the ordinance was unconstitutional under the First Amendment.

IV. ARGUMENT

In Norton, the Seventh Circuit incorrectly characterized the City of Springfield’s ordinance prohibiting panhandling in the downtown historic district as a content-neutral speech restriction. The Seventh Circuit misinterpreted the Supreme Court’s precedent and departed from the decisions of its sister circuits. The Supreme Court cases on solicitation have limited application because (1) the

\[149\text{ Id.}\]
\[150\text{ Id.}\]
\[151\text{ Id. at 722.}\]
\[152\text{ Id. at 723.}\]
\[153\text{ Id.}\]
\[154\text{ The issue is whether the ordinance in Norton is a content-neutral or content-based restriction on protected speech. The parties agreed that panhandling is a form of charitable solicitation that is protected by the First Amendment. Id. at 714 (majority opinion).}\]
downtown area in *Norton* is a traditional public forum, and (2) the ordinance in *Norton* regulates specific content rather than conduct.

First, the downtown historic area in *Norton* is a traditional public forum.\(^{155}\) The Court in *Heffron*, *Kokinda*, and *Lee*, applied a more lenient test because the state fairgrounds, the post-office sidewalk, and the Port Authority terminals, respectively, were not traditional public forums.\(^{156}\) But, because the downtown historic area is a public forum, any speech restrictions must pass a more rigorous standard—they must be a valid time, place, manner restriction that is narrowly tailored.\(^{157}\)

Second, the regulations in *Heffron*, *Kokinda*, and *Lee* were broadly applicable to anyone looking to solicit in the area. In *Heffron*, the state fair regulation prohibited anyone from distributing or selling flyers, literature, or other written works in the fairgrounds unless it was from a fixed location.\(^{158}\) Likewise, in *Kokinda*, the post office regulation prohibited anyone from soliciting contributions on post-office grounds.\(^{159}\) Similarly, in *Lee*, the Port Authority regulation prohibited the soliciting and receipt of funds in a repetitive manner.\(^{160}\) All three of these regulations applied to anyone looking to solicit and receive funds, regardless of the cause or reason for the solicitation. However, in *Norton*, the City ordinance specifically targeted oral requests for immediate donation of money.\(^{161}\) The ordinance singled out a specific type of message, for a specific cause, and linked to a particular group—the needy and the homeless. The Supreme Court has stated that speech restrictions are content based when the speech restriction has “the potential for becoming a means of suppressing a

\(^{155}\) Id. at 715.


\(^{157}\) See *Kokinda*, 497 U.S. at 740.

\(^{158}\) *Heffron*, 452 U.S. at 643.

\(^{159}\) *Kokinda*, 497 U.S. at 724.

\(^{160}\) *Lee*, 505 U.S. at 675-77.

\(^{161}\) *Norton* v. City of Springfield, 768 F.3d 714 (7th Cir. 2014).
particular point of view.” Unlike the regulations in Heffron, Kokinda, and Lee, the ordinance in Norton does not prohibit all solicitations in order to advance a governmental interest but instead targets one specific type of speech based on its content of requesting immediate donations of money.

As for the existing circuit split on panhandling regulations, as Judge Manion noted in his dissent, the Seventh Circuit did depart from its sister circuits in upholding the Springfield ordinance. Only one of the five circuit courts has upheld a regulation on panhandling—the First Circuit in Thayer. As Judge Manion noted, the ordinance in Thayer is different from the ordinance in Norton because the ordinance in Thayer specifically applied to repeated solicitations. The ordinance in Norton is more similar to those in ACLU and Clatterbuck. Both of those cases determined that restrictions on panhandling are content-based and invalid under the First Amendment. As the Fourth Circuit noted in Clatterbuck, regulations are content-based when they distinguish content “with a censorial intent to value some forms of speech over others.”

Many of the federal circuits in deciding this issue have cited to Justice Kennedy’s concurrence in Lee. However, Justice Kennedy’s concurring decision also has limited application to this case. Justice Kennedy argued that prohibitions directed at abusive practices were content-neutral because such prohibitions regulated conduct and not content. The regulation in Lee regulated abusive practices because it prohibited “repetitive” solicitations for funds inside the terminals. In Norton, however, the ordinance prohibited any oral requests for money, which is not directed at conduct like the prohibition in Lee,

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162 Heffron, 452 U.S. at 648.
163 755 F.3d 60, 64 (1st Cir. 2014).
164 768 F.3d at 720 (Manion, J., dissenting).
165 See ACLU v. City of Las Vegas, 466 F.3d 784, 793 (9th Cir. 2006); Clatterbuck v. City of Charlottesville, 708 F.3d 549, 556 (4th Cir. 2013).
166 Clatterbuck, 708 F.3d at 556.
168 Id.
169 Norton, 768 F.3d at 714.
but rather at the type of oral message. Furthermore, Justice Kennedy’s concurrence provided that there were alternative channels for those looking to solicit funds such as explaining their message and requesting money later.\footnote{Id. at 707 (Kennedy, J., concurring).} However, Justice Kennedy’s concurring opinion does not take into account that some solicitations for money cannot be received later, such as when the person is homeless or simply cannot wait for funds. His suggestion of prepaid envelopes might be an alternative channel for organizations and business looking to solicit funds but not for an individual looking for spare change to survive.

Instead, the Seventh Circuit should have considered Justice Brennan’s dissent in \textit{Kokinda}. Justice Brennan explained that the postal service regulation was content-based because under the restriction, a person on postal premises could say, “Please support my political advocacy group” but could not say, “Please contribute $10.”\footnote{Id.} He further explained that the regulation singled out this type of speech because it had the tendency to embarrass or annoy the post-office-goer, which made it a content-based restriction.\footnote{Id. at 754.} Along similar lines as Justice Brennan’s dissent, Judge Manion’s dissent stated that singling out a specific type of speech is content-based. Because the violation occurs as a result of the content of the words spoken—that the words are oral requests for the immediate donation of money—the ordinance in \textit{Norton} is a content-based speech restriction.\footnote{Norton, 768 F.3d at 721 (Manion, J., dissenting).}

The ordinance in \textit{Norton} is a content-based speech restriction that should have been subject to strict scrutiny review. The Seventh Circuit erred in deciding that the ordinance regulated conduct instead of content. The ordinance singles out one type of solicitation and unequivocally silences this type of solicitation simply because of its content. Instead of banning all solicitation in the downtown area, the City of Springfield has only targeted those solicitations that are most likely linked to the homeless and the needy. In its decision, the Seventh Circuit silenced the voices of a group in one stroke of
categorization simply because the public disagrees or finds it difficult to listen to the message of that group.

CONCLUSION

The Seventh Circuit’s decision to uphold a Springfield ordinance that prohibits panhandling in the downtown area has deprived a particular group of its ability to contribute their ideas and messages. Although the Supreme Court has yet to review any regulations on panhandling, the Supreme Court has upheld several regulations on solicitations. The Seventh Circuit misapplied the Supreme Court’s framework for determining when a restriction is content-based and content-neutral. In finding that the Springfield ordinance is content-neutral, the Seventh Circuit departed from its sister circuits. Because the ordinance is based on the content and the ideas of the speech, the ordinance is content-based and should not have been upheld without a compelling governmental interest that is narrowly tailored. To otherwise silence an entire category of speech, as the Seventh Circuit did, is to violate the First Amendment and deprive an already underrepresented group—the homeless and the needy—of their constitutional rights.
VOTER ID IN WISCONSIN: A BETTER APPROACH TO ANDERSON BURDICK BALANCING

MATTHEW R. PIKOR*


INTRODUCTION

Ruthelle Frank was born in her home in Brokaw, Wisconsin, in 1927.1 Her mother made a record of her birth in the family Bible, but the state did not issue her a birth certificate.2 A lifelong resident of Wisconsin, she currently serves her community as an elected member of the Brokaw Village Board.3 She has exercised her right to vote in every election since 1948.4

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2 Id.
4 Id.
Unfortunately, Ruthelle will be unable to cast a ballot in the next election because of Wisconsin's new voter identification ("ID") law. The law requires that Wisconsin residents present one of several qualifying forms of photo ID before voting.\(^5\) Ruthelle has a certification of baptism, a Medicare statement, and a checkbook; but she has been unable to obtain one of the acceptable forms of ID.\(^6\) In order to acquire a qualifying form of ID under the Wisconsin law, Ruthelle needs a birth certificate.\(^7\) However, the state refuses to issue her one because her name on file with the state Register of Deeds contains a spelling error; and she cannot petition the court to amend the document without paying as much as $200 in fees.\(^8\) If she successfully fixes the error, she must then pay $20 for a copy of the birth certificate.\(^9\) Next, she would need to take it, along with 2 other forms of proof, to a local government office to obtain the ID required by the state.\(^10\) For Ruthelle, a woman in her late 80s on a fixed income, these hurdles are not trivial.

Although Ruthelle Frank’s situation may appear unique, an estimated 300,000 of Wisconsin’s residents must now take some affirmative action to satisfy these new requirements to vote.\(^11\) In December of 2011, the American Civil Liberties Union (ACLU) filed suit on behalf of Ms. Frank and all other similarly situated voters, seeking to prevent implementation of Wisconsin’s voter ID law, also known as Act 23.\(^12\) The ACLU claimed Act 23 imposed an undue

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\(^5\) See id.
\(^7\) Id.
\(^8\) Id.
\(^9\) Id.
\(^10\) Sherman, supra note 1.
\(^12\) ACLU Files Lawsuit Challenging Wisconsin’s Unconstitutional Voter ID Law, supra note 3.
burden on voters in violation of constitutional protections under the Fourteenth Amendment.\textsuperscript{13}

Supporters of Wisconsin’s “strict”\textsuperscript{14} voter ID law claimed that it was necessary to detect and prevent voter fraud, maintain confidence in election integrity, and improve election administration.\textsuperscript{15} But critics of the law argued that voter fraud is virtually non-existent in Wisconsin and voter confidence is unrelated to the strictness of a state’s voting laws.\textsuperscript{16} They also argued that the law suppresses voter turnout in large numbers. Because for many, the perceived difference of one vote is outweighed by the time, effort, and cost required to satisfy the new requirement. They also contend the law makes voting impossible for many and that low-income and minority subgroups are disproportionately affected by the regulations.\textsuperscript{17} These subgroups of voters are generally more likely to vote democratic. Thus support and opposition for Act 23 among legislators was sharply divided along partisan lines.\textsuperscript{18}

Mrs. Frank’s claim in \textit{Frank v. Walker} came fresh on the heels of the Supreme Court’s decision in \textit{Crawford v. Marion County Election Board}, where the high court considered strict voter ID requirements for the first time.\textsuperscript{19} In \textit{Crawford}, the Court considered a

\textsuperscript{13}Id.

\textsuperscript{14}“Strict” voter ID laws require further action from voters without acceptable ID before their ballots will count. For example, Act 23 provides that voters without ID may vote on a provisional ballot but must provide a qualified photo ID to the election inspectors before polls close or to the municipal clerk by 4:00pm on the following Friday. Wendy Underhill, \textit{Voter Identification Requirements, Voter Id Laws}, NATIONAL CONFERENCE OF STATE LEGISLATURES (Mar. 24, 2015), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx.

\textsuperscript{15}\textit{Frank}, 17 F. Supp. 3d at 847.

\textsuperscript{16}Id. at 847-48, 851.

\textsuperscript{17}Id. at 862, 870.


A “facial challenge” to a law is a challenge that claims the law, as written, is unconstitutional under all circumstances. In contrast, an “as-applied challenge” claims that a law is only unconstitutional in its particular application to the plaintiff. A successful facial challenge will result in complete invalidation of the law, where a successful as-applied challenge will result merely in modification of the law or the circumstances in which it may be applied. Richard H. Fallon Jr., Fact and Fiction about Facial Challenges, 99 Cal. L. Rev. 915, 922-25 (2011). available at: http://scholarship.law.berkeley.edu/californialawreview/vol99/iss4/1.

Crawford, 553 U.S. at 188.
Id. at 190-91.
Id. at 202.
A “facially neutral” law refers to a one that does not explicitly discriminate against a particular group.
See Crawford, 553 U.S. at 204.
I. CONSTITUTIONAL ANALYSIS OF ELECTION REGULATIONS

The U.S. Constitution contains no explicit guarantee of voting rights. For much of the country’s early history, federal courts declined to extend any protections to citizens excluded from elections.\(^{26}\) Instead, the federal judiciary insisted that any voting rights for citizens originated with the states.\(^{27}\) During this period, states restricted voting privileges based on gender, religion, race, national origin, property ownership, length of residency, economic status, and literacy.\(^{28}\)

Congress has since enacted four amendments to the Constitution to protect certain groups from discrimination at the polls. The Fifteenth, Nineteenth, and Twenty-Sixth Amendments collectively provided that voting rights could not be denied or abridged based on race, color, previous condition of servitude, sex, or age (for those having reached majority).\(^{29}\) The Twenty-Fourth Amendment prohibited the imposition of a poll tax,\(^{30}\) but only in federal elections.\(^{31}\) These amendments addressed certain forms of election-related discrimination; however, the Constitution still failed to affirm voting as a right.

The Supreme Court began to recognize voting as a fundamental constitutional right during the civil rights era. With a liberal majority lead by Chief Justice Earl Warren, the Court deduced that the right to vote is fundamental because it is “preservative of other

\(^{26}\) See, e.g., Minor v. Happersett, 88 U.S. 162, 178 (1874) (“Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void.”).

\(^{27}\) See, e.g., id.


\(^{29}\) U.S. CONST. amend. XV; U.S. CONST. amend. XIX; U.S. CONST. amend. XXVI.

\(^{30}\) A “poll tax” is any fee or tax required as a precondition to vote.

\(^{31}\) U.S. CONST. amend. XXIV.
basic civil and political rights.\textsuperscript{32} The Warren Court firmly established this premise over a string of cases challenging malapportioned districts in the early 1960s.\textsuperscript{33} And in 1966, the Court extended this reasoning to abolish the poll tax in all elections.\textsuperscript{34} In these cases, the Warren Court demonstrated that voting rights could be violated through dilution of the weight of a citizen’s vote and by unjustifiably burdening certain groups such as the poor.\textsuperscript{35} However, many commentators argued the Court failed to establish a clear and consistent method for evaluating ballot access restrictions in the voting rights cases that followed.\textsuperscript{36} Nearly two decades later in 1983, the Court first began to outline the framework for the constitutional analysis used today in \textit{Anderson v. Celebrezze}.\textsuperscript{37}

\textbf{A. The Anderson/Burdick test}

In \textit{Anderson}, the Court analyzed the constitutionality of Ohio’s early filing requirements for ballot access in presidential elections, which the state imposed only on independent candidates.\textsuperscript{38} There, the Court framed a balancing test.\textsuperscript{39} Justice Stevens acknowledged that states must substantially regulate their electoral processes.\textsuperscript{40} And in practice, any provision of a state’s complex regulatory scheme will affect voters’ potential political expression to some degree.\textsuperscript{41} But,
where a regulation’s restrictions are reasonable and nondiscriminatory, a state’s need to properly facilitate its election procedures will generally suffice as justification. Therefore, challengers of state election laws face a presumption in favor of the state.\textsuperscript{42}

In his opinion, Justice Stevens stated that to determine whether a particular restriction is justified, courts must weigh the character and magnitude of the asserted impairment to a plaintiff’s constitutional rights against the interests the state seeks to advance.\textsuperscript{43} At the same time, a court should consider the extent to which those burdens are necessary to achieve those state interests.\textsuperscript{44} Because of the numerosity and wide variation in type, effect, and importance of state election regulations, the Court declined to offer any bright line rules.\textsuperscript{45} Instead, it directed lower courts to weigh those factors and reach their own conclusions.\textsuperscript{46}

The Court found that because the early filing requirement unequally burdened a certain group with specific and identifiable political preferences, it was “especially difficult for the state to justify.”\textsuperscript{47} It also determined that Ohio had less of a legitimate interest in a national election than it would in local contests.\textsuperscript{48} Therefore, the constitutional interests at stake outweighed any justification put forth by Ohio.\textsuperscript{49}

Nearly ten years later, the Court created a bifurcated inquiry in \textit{Burdick v. Takushi}.\textsuperscript{50} Justice White noted that under the standard outlined in \textit{Anderson}, the proper level of scrutiny depends on the “extent to which a challenged regulation burdens First and Fourteenth

\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id. at 789.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 789-90.
\textsuperscript{47} Id. at 792-93.
\textsuperscript{48} Id. at 795.
\textsuperscript{49} Id. at 806.
Amendment rights.” Accordingly, where those rights are severely restricted, strict scrutiny applies. Where restrictions impose less than severe restrictions, courts should apply the Anderson balance. This two-part test is now commonly referred to as the “Anderson/Burdick test.”

In Burdick, the Court considered a challenge to Hawaii’s prohibition on write-in voting. The voter bringing the action claimed that the state’s refusal to count votes for a candidate not officially on the ballot violated his constitutional rights of expression and association. First, the Court determined that the burden imposed by this restriction was limited because Hawaii’s system provided ample opportunity for candidates to participate in the state’s open primary. Because there were no identifiable barriers for candidates seeking to appear on the ballot, “any burden on voters’ freedom of choice and association is borne only by those who fail to identify their candidate of choice until days before the primary.” The Court previously determined any interest a candidate and his supporters had in making a late rather than early decision was of minimal significance.

Next, the Court considered the interests advanced by the state of Hawaii. The majority cited several benefits the restriction provided, including avoiding the possibility of unrestrained factionalism, averting divisive sore-loser candidacies, voter focus upon contested races in the general election, and guarding against party raiding. The opinion implied that these interests are far more

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51 Id.
52 Id.
53 Id.
54 Id. at 430.
55 Id. at 430-31.
56 Id. at 435-36, 437.
57 Id. at 436-37.
58 Id. at 437.
59 Id. at 439.
60 Id. Party raiding refers to a political tactic where a political party’s members will vote in another party’s primary to nominate a weaker candidate.
than adequate to defeat the challenge.\(^61\) Where an election scheme imposes only a minimal burden on the right to vote and provides constitutionally sufficient ballot access, any legitimate state interest will generally prevail.\(^62\)

### B. What is a “Severe Restriction”?

As described above, a court analyzing the constitutionality of an election regulation begins with an inquiry into whether the law imposes a severe restriction on the right to vote.\(^63\) In *Dunn v. Blumstein*, the U.S. Supreme Court reaffirmed that a state election law that categorically prevents certain citizens from voting must be narrowly tailored to meet a compelling government interest.\(^64\) Indeed, complete denial of franchise is the most severe possible restriction of that right. But short of outright denial, what constitutes a severe restriction?

The Court first used the language of “severe restrictions” in *Norman v. Reed*.\(^65\) There, the Court considered Illinois’ requirements for new political parties seeking access to local and statewide office.\(^66\) Illinois required that new political parties gather 25,000 qualified voter signatures in each district their candidates sought office.\(^67\) A party seeking municipal office for one candidate in the city of Chicago and another candidate for a surrounding suburb had to acquire 25,000

\(^{61}\) See id. at 439-40.

\(^{62}\) See id. at 439-42.

\(^{63}\) See, e.g., id.

\(^{64}\) See Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (quoting Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969)) (“We concluded that if a challenged statute grants the right to vote to some citizens and denies the franchise to others, ‘the Court must determine whether the exclusions are necessary to promote a compelling state interest.’”).


\(^{66}\) Id. at 282.

\(^{67}\) Id.
If that party also wished to run a candidate for county-wide office, the signature requirement was essentially 50,000 (where it would otherwise be only 25,000). This is because failure to acquire enough signatures in any district disqualified the party’s entire slate. Although Illinois’ ballot-access scheme was onerous, it was not insurmountable. Nevertheless, the Court concluded these requirements severely restricted the right of “like-minded voters to gather in pursuit of common political ends.” Accordingly, it determined that Illinois did not choose the most narrowly tailored means of advancing their interest in demonstrating a distribution of support for new parties.

In subsequent decisions, the Court has repeated its position that strict scrutiny is appropriate for election regulations imposing a severe burden on constitutional rights. In *California Democratic Party v. Jones*, the Court found a California law placed a severe burden on the right of political association. Proposition 198 changed the state’s partisan primary election system. Before the law took effect, only members of a particular party could vote for its candidates in the primary. Proposition 198 converted the state’s primary to a “blanket” system where each voter would be free to select any candidate, regardless of that candidate’s party affiliation. The law granted voters who refused to expressly affiliate with these parties, or those that openly affiliated with rivals, legal authority to affect the

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68 Id.
69 Id. at 292-92.
70 Id. at 288, 293-94.
71 Id. at 293-94.
72 To pass strict scrutiny, a law must be narrowly tailored to meet a compelling government interest.
75 Id. at 582.
76 Id. at 570.
77 Id.
78 Id.
parties’ candidate selection.\textsuperscript{79} The Court concluded the law impaired actual party members’ ability to choose their own candidates.\textsuperscript{80} Also, the Court compelled the parties to change their message due to the adulteration of their candidate selection process.\textsuperscript{81} The Court found that although these restrictions did not completely deny franchise, they severely burdened that right, and therefore strict scrutiny was appropriate.\textsuperscript{82}

These cases illustrate how the Court is willing to apply strict scrutiny even where a regulation’s effects threaten less than outright denial of voting rights. However, the Court’s opinions do not offer any indication for how lower courts should apply this standard.\textsuperscript{83} In cases discussing this type of analysis, the Court reaches its conclusions subjectively and declines to further specify when a burden becomes severe. Predictably, lower courts routinely disagree whether a law’s effects meet this threshold.

C. Crawford v. Marion County Election Board extends the election regulation test to voter ID laws

While certain states have requested optional, non-photo identification from voters since the 1950s, only in recent years have states begun passing laws requiring photo ID at the polls. Indiana and Georgia were the first states to pass a “strict” photo ID requirement in 2005.\textsuperscript{84} First implemented in 2008, these strict voter ID laws required that in-person voters verify their identity with an acceptable

\textsuperscript{79} Id. at 577.
\textsuperscript{80} Id. at 578.
\textsuperscript{81} Id. at 581.
\textsuperscript{82} Id. at 582.
government issued photo ID before their ballot will count. In *Crawford*, the Supreme Court considered a facial challenge to Indiana’s law under the equal protection clause of the Fourteenth Amendment, marking the first time the U.S. Supreme Court examined the constitutionality of a state photo ID requirement for voting.

Indiana’s SEA 483 required that in-person voters show either a state or federal government issued photo ID. Voters who mail in absentee ballots are not affected by the requirement. Those voting in person without ID may fill out a provisional ballot which will count only if the voter then makes a separate trip to the county election office within 10 days following the election. There, the voter must either show an acceptable ID or sign an affidavit claiming indigence or a religious objection before their ballot will count. The law provided an exception for individuals residing in a state-licensed care facility such as a nursing home.

Importantly, the plurality affirmed that voter ID requirements are properly analyzed under the framework developed in the election cases outlined above. Voter ID requirements which place a severe limitation on voters’ rights must be narrowly tailored to meet a compelling state interest. Where that burden is less than severe, courts should balance it against the benefits the law provides for the state. Accordingly, “[h]owever slight that burden may appear . . . , it

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85 *Id.*
87 *Id.* at 185.
88 *Id.* at 185-86.
89 *Id.* at 186.
90 *Id.*
91 *Id.*
92 *Id.* at 190-91.
93 *See id.*
94 *Id.*
must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'”

The plurality began its analysis by addressing the interests advanced by the state. Each interest advanced by the state, in some part, relates to the state’s primary concern: voter fraud. To begin, the plurality discussed election modernization and referenced two recently enacted federal statutes that raise certain concerns.

The National Voter Registration Act of 1993 included a provision restricting states’ ability to purge names from their voter rolls. The lower court found credible evidence indicating that Indiana’s 2004 registration lists were inflated by as much as 41.4 percent because they contained the names of persons either deceased or no longer living in the state. Although the plurality acknowledged that this is partly a product of Indiana’s own maladministration, it credited the issue as a “neutral and nondiscriminatory reason supporting the state’s decision to require photo identification.”

The Help America Vote Act required that states keep a digital list of statewide voters and verify new voter registration information against that list. Although this information can be verified by documents such as a bank statement, paycheck or utility bill, Indiana’s photo ID requirement effectively establishes a voter’s qualification.

Next, the plurality discussed Indiana’s interest in deterring and detecting voter fraud. It is well settled that states have a genuine

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95 Id. at 191 (quoting Norman v. Reed, 502 U.S. 279, 288-89 (1992)).
96 Id.
97 See id.
98 Id. at 192.
99 Id.
100 Id.
101 Id. at 191-92, 196-97.
102 Id. at 192.
103 Id. at 193.
104 Id. at 194.
interest in ensuring the legitimacy of their elections.\textsuperscript{105} The plurality claimed that “carefully identifying all voters participating in the election process” also serves a valid interest in orderly administration and accurate recordkeeping.\textsuperscript{106} However, the plurality was careful to recognize that the record contained no evidence of in-person voter fraud ever occurring within the state.\textsuperscript{107}

Finally, the plurality mentioned Indiana’s contention that the law safeguards voter confidence.\textsuperscript{108} While this concern really addresses the public perception of voter fraud, the plurality suggested that “public confidence in the integrity of the electoral process has independent significance because it encourages citizen participation in the democratic process.”\textsuperscript{109} It further noted that the electoral system cannot inspire this confidence without some protections against fraud or abuse, such as voter ID laws.\textsuperscript{110}

The plurality then considered the injury to voters’ rights. It began with a cursory acknowledgement that the ID requirement presents certain novel issues.\textsuperscript{111} For example, states commonly charge a fee for issuing an ID.\textsuperscript{112} However, Indiana waives this fee. Other examples include the possibility of physical ID cards getting lost or stolen or a voter’s ID photo no longer accurately depicting the individual due to age, hairstyle, facial hair, etc.\textsuperscript{113} But the plurality summarily dismissed these issues because voters have the option of casting a provisional ballot.\textsuperscript{114} These provisional ballots will ultimately count so long as voters return to the circuit clerk within ten days and either show a proper ID or sign an affidavit claiming

\textsuperscript{105} Id. at 196.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 194-95.
\textsuperscript{108} Id. at 197.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 198.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
indigence or a religious objection.\footnote{Id. at 186.} The plurality also found any inconveniences cost associated with acquiring the ID insignificant.\footnote{Id. at 198.}

For the plurality, the more troubling issue was eligible voters for whom it is difficult or downright impossible to obtain acceptable identification.\footnote{Id. at 199.} For many, these problems originate with locating or acquiring documents the state requires before issuing ID, such as a birth certificate.\footnote{Id. at 199 (majority opinion).} The record indicated that some may face financial issues with the document fees or travel costs.\footnote{Id. at 211 (Souter, J., dissenting).} Many elderly voters, especially the indigent, could not locate any record of their birth from which to obtain a birth certificate.\footnote{Id. at 213-14 (Souter, J., dissenting).} For some, this was because they were born long ago, out of state, and/or outside of a hospital.\footnote{Id. at 200 (majority opinion).}

However, the plurality minimized this concern by again citing the provisional ballot option and affidavit exception.\footnote{Id. at 201.}

Another obstacle voters faced was finding adequate transportation. Voters without cars must sometimes travel significant distances to acquire the underlying documents and the photo ID.\footnote{Id. at 213-14 (Souter, J., dissenting).} Some voters found this far more difficult than traveling to the local polling place, especially because Indiana lacks any form of public transportation in much of the state.\footnote{Id. at 201.}

On the other hand, the record did not contain a credible estimation of the number of voters without ID.\footnote{Id. at 200 (majority opinion).} It also did not conclusively demonstrate the burden those voters would endure.\footnote{Id. at 201.} Those deposed in the record and the named plaintiffs failed to show

\begin{itemize}
  \item \footnote{Id. at 186.}
  \item \footnote{Id. at 198.}
  \item \footnote{Id. at 199.}
  \item \footnote{Id. at 199 (majority opinion).}
  \item \footnote{Id. at 211 (Souter, J., dissenting).}
  \item \footnote{Id. at 213-14 (Souter, J., dissenting).}
  \item \footnote{Id. at 200 (majority opinion).}
  \item \footnote{Id. at 201.}
\end{itemize}
that the law prevented them from voting.\textsuperscript{127} They were either ultimately successful, eligible to submit an absentee ballot without ID, or presented inadequate testimony otherwise.\textsuperscript{128} The record did contain an affidavit from a homeless woman denied ID because she had no home address, despite having all necessary documentation; however, the plurality could not determine how common this problem was from a single occurrence.\textsuperscript{129}

Ultimately, the plurality found the evidence in the record inadequate and therefore, they found it impossible to “quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.”\textsuperscript{130} Because of this, the plurality declined to weigh the interests of a small subset of voters against the broad interests advanced by the state.\textsuperscript{131} Moreover, Justice Stevens remarked on the high burden of persuasion necessary for the plurality to sustain a facial attack on the entire statute.\textsuperscript{132} But, the plurality opinion left open the possibility that a plaintiff who presents a more developed record, challenges a more burdensome law, or brings an as-applied constitutional challenge might carry this burden. In \textit{Frank v. Walker}, the Seventh Circuit considered such a constitutional challenge.

II. FRANK V. WALKER

In 2011, the Wisconsin Legislature passed its version of a strict photo ID voter eligibility law.\textsuperscript{133} 2011 Wisconsin Act 23, signed into law by Governor Scott Walker, is somewhat similar to the Indiana law

\begin{footnotesize}
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\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Id.} at 201-02.
\item \textsuperscript{130} \textit{Id.} at 200.
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} \textit{Frank v. Walker}, 17 F. Supp. 3d 837, 841 (E.D. Wis. 2014), \textit{rev’d}, 768 F.3d 744 (7th Cir. 2014), \textit{cert. denied}, 135 S. Ct. 1551 (2015).
\end{itemize}
\end{footnotesize}
upheld in *Crawford*. For example, individuals must show one of nine qualifying photo IDs before a poll worker will give them a ballot to vote.\(^{134}\) Voters without ID may submit a provisional ballot which is counted after a subsequent trip to the municipal clerk’s office.\(^{135}\) Also, the law provides an exception for those confined to their home or a care facility due to age, sickness, injury, or disability.\(^{136}\)

However, Act 23 is more restrictive than Indiana’s SEA 483 in several important ways. First, the Wisconsin law does not allow those voting through provisional ballots the option to sign an affidavit claiming indigence or a religious objection.\(^{137}\) When subsequently appearing at the municipal clerk’s office, voters must show one of the same qualified forms of ID expected by poll workers.\(^{138}\) The *Crawford* Court relied on Indiana’s affidavit exception as a substantial mitigating factor in its analysis.\(^{139}\) Second, Act 23 requires ID from absentee voters.\(^{140}\) Only those in the military, living overseas, or who have previously satisfied the ID requirement and maintain the same home address are exempted from the ID requirement for absentee ballots.\(^{141}\) Indiana’s law does not impose this requirement on absentee voters, and the *Crawford* Court specifically cited this fact to minimize the burden on elderly residents unable to locate the necessary documents.\(^{142}\)

\(^{134}\) *Id.* at 843.  
\(^{135}\) *Id.* at 844.  
\(^{136}\) *Id.*  
\(^{137}\) *See id.*  
\(^{138}\) *Id.*  
\(^{140}\) *Frank*, 17 F. Supp. 3d at 844.  
\(^{141}\) *Id.*  
\(^{142}\) *Crawford*, 553 U.S. at 201.
A. The Eastern District of Wisconsin finds Act 23 unconstitutional; the state appeals

In the United States District Court for the Eastern District of Wisconsin, plaintiffs brought an as-applied constitutional challenge to Act 23 under the Fourteenth Amendment. Before his analysis of Act 23, District Judge Lynn Adelman addressed the precedential effect of the Crawford decision. He first concluded that because six of the Justices agreed that the Anderson/Burdick balancing test applied to Indiana’s strict photo ID voter eligibility law, Act 23 should be evaluated likewise. Judge Adelman then discussed the effect of the split among Justices regarding whether such laws could be invalidated on the basis of their effect on a subgroup of voters. He determined that Crawford is not binding precedent on the issue. However, after consideration of the Anderson and Burdick cases themselves, he concluded that they “require invalidation of a law when the state interests are insufficient to justify the burdens the law imposes on subgroups of voters.”

Judge Adelman began his analysis by addressing the state’s four justifications for the law: 1) detecting and preventing in-person voter-impersonation fraud; 2) promoting public confidence in the

143 Frank, 17 F. Supp. 3d at 842. Plaintiffs also brought a statutory challenge under section 2 of the Voting Rights Act; however, any statutory analysis is beyond the scope of this comment.

144 Id. at 845.

145 Crawford, 553 U.S. at 200-03, 206. While the three Justice concurrence opines that voter ID laws should be evaluated on the “basis of their ‘reasonably foreseeable effect on voters generally,’” the three Justice Plurality opinion implies that such laws could be invalidated solely by their effect on a subgroup of voters. Id.

146 Frank, 17 F. Supp. 3d at 846 (The plurality opinion was narrowest because it did not reach additional constitutional question of whether “a law could be invalidated based on the burdens imposed on a subgroup of voters.”) (citing Marks v. United States, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds.”)).

147 Frank, 17 F. Supp. 3d at 846-47.
integrity of the electoral process; 3) detecting and deterring other types of voter fraud; and 4) promoting orderly election administration and accurate recordkeeping.  

First, Judge Adelman accorded the state’s interest in voter-fraud prevention very little weight despite acknowledging that voter fraud prevention is a legitimate state interest. The evidence at trial demonstrated that in-person voter impersonation fraud is virtually non-existent in Wisconsin. Dispatching any contention that a lack of voter-fraud evidence was attributable to underenforcement of existing laws, Judge Adelman cited three fruitless sweeps in the state’s recent history: the 2002 Department of Justice Ballot Access and Voting Integrity Initiative, the 2004 Joint Task Force, and the 2008 Election Fraud Task Force. He also dismissed the claim that the lack of evidence was due to the difficulty of detecting such fraud. Although the fraud itself may be difficult to detect, he suggested there would surely be more circumstantial evidence of it. For example, voters would find that a ballot had already been cast in their name. Lastly, the evidence indicated that any development of future fraud issues was exceedingly unlikely; therefore, “Act 23 cannot be deemed a reasonable response to a potential problem.”

Second, Judge Adelman concluded that “Act 23 does not further the state interest of promoting public confidence in the integrity of the electoral process.” The state presented no empirical evidence supporting this claim; however, the plaintiffs presented evidence in rebuttal. At trial, a professor of political science testified

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148 Id. at 847.
149 Id.
150 Id.
151 Id. at 848-49.
152 Id. at 849-50.
153 Id.
154 Id. at 849.
155 Id. at 850.
156 Id. at 852.
157 Id. at 851.
that photo ID requirements have no actual effect on “a person’s level of trust or confidence in the electoral process.”\textsuperscript{158} Another professor, specializing in the study of the incidence of voter fraud in contemporary American elections, testified that photo ID laws actually undermine voter confidence.\textsuperscript{159} This is because the laws create a “false perception that voter-impersonation fraud is widespread.”\textsuperscript{160} Furthermore, Judge Adelman argued that the laws work against public confidence because much of the electorate believes that the ID requirement disenfranchises and marginalizes many voters.\textsuperscript{161} Third, the Judge addressed the state’s claim that the ID requirement will help detect and deter other forms of fraud, such as voting by felons or non-citizens and double voting.\textsuperscript{162} Again, the state presented no evidence in support of this claim.\textsuperscript{163} In fact, the state neglected to adequately explain how the law might prevent these types of fraud.\textsuperscript{164}

Fourth, Judge Adelman found that any state interest Act 23 serves in promoting orderly election administration and accurate recordkeeping is inseparable from the state’s interest in preventing voter fraud.\textsuperscript{165} Because the defendants have failed to show how these interests are distinct, the Judge found that “Act 23 serves the state’s interest in orderly election administration and accurate recordkeeping only to the extent that it serves the state’s interest in detecting and preventing voter fraud.”\textsuperscript{166}

Judge Adelman then examined the burdens Act 23 imposes on voters.\textsuperscript{167} To begin, he acknowledged that the laws adverse effects

\textsuperscript{158} Id.
\textsuperscript{159} Id. at 848, 851.
\textsuperscript{160} Id.
\textsuperscript{161} Id. at 852.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id. at 853.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
were felt primarily by those who did not currently possess qualifying ID.\textsuperscript{168} Credible evidence at trial indicated that approximately 300,000 registered voters fit this description.\textsuperscript{169} Those individuals, who would not otherwise require it, must take the necessary steps to obtain an ID exclusively for the purpose of voting.\textsuperscript{170} Evidence also indicated that a substantial portion of those voters without ID are low income individuals.\textsuperscript{171} And because the Wisconsin law lacked any exceptions similar to the indigence affidavit allowed by the Indiana law, all of those voters must physically obtain proper ID to vote.\textsuperscript{172}

To obtain proper ID, voters must first identify the requirements for the ID and any required underlying documents such as a social security card or birth certificate.\textsuperscript{173} The voter must then account for the time and effort required to get the ID. Voters must travel to the DMV at least once, and if necessary, to the other various government offices for the other required documents.\textsuperscript{174}

There are financial costs to consider as well. Low-income individuals without a driver’s license often must pay to use public transportation, which is not available everywhere in the state.\textsuperscript{175} Also, although the state offers a free ID card, the underlying documents often cost money.\textsuperscript{176} And due to the narrow business hours for state agencies, these voters almost certainly require time off from work.\textsuperscript{177}

Sometimes problems arise in the form of clerical errors where the name on the birth certificate is not correct.\textsuperscript{178} To remedy these

\textsuperscript{168} Id.
\textsuperscript{169} Id. at 854.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} See id. at 863.
\textsuperscript{173} Id. at 857.
\textsuperscript{174} Id.
\textsuperscript{175} Id. at 857-58.
\textsuperscript{176} Id. at 858.
\textsuperscript{177} Id. at 857.
\textsuperscript{178} Id. at 859.
problems, the amendment process requires that the voter must make additional trips to various agencies. 179

Judge Adelman then proceeded to weigh the burden on voters against state interests. 180 Because of these obstacles and the supporting evidence at trial, he concluded that a “substantial number of the 300,000 plus voters who lack a qualifying ID will be deterred from voting.” 181 In fact, the record contains testimony from eight Wisconsin residents who wished to vote in the upcoming election but could not secure an acceptable ID. 182 Therefore, “it is absolutely clear that Act 23 will prevent more legitimate votes from being cast than fraudulent votes.” 183 Accordingly, the state’s asserted interest in detecting and preventing in-person voter fraud did not justify those burdens. 184 As for the other three justifications advanced by the state, as discussed above, there was either no supporting evidence or counter-balancing considerations. 185 Thus, “the burdens imposed by Act 23 on those who lack an ID are not justified.” 186 Judge Adelman therefore held the law violated Fourth Amendment protections and enjoined its enforcement. 187 The state immediately appealed and motioned for stay. On September 12, 2014, the Seventh Circuit Court of Appeals stayed the district court’s injunction pending the outcome on appeal. 188

B. The Seventh Circuit Reverses

Judge Easterbrook authored the unanimous opinion for the three-judge panel of the Seventh Circuit Court of Appeals, which

179 Id. at 859-60.
180 Id. at 862.
181 Id.
182 Id. at 854-55.
183 Id. at 862.
184 Id. at 862.
185 Id. at 852-53.
186 Id. at 862-63.
187 Id.
188 Frank v. Walker, 769 F.3d 494 (7th. Cir. 2014).
reviewed the case de novo, and reversed the lower court’s ruling. The panel held that Judge Adelman’s findings “did not justify an outcome different from Crawford.” Although it agreed that Wisconsin’s Act 23 differed from Indiana’s SEA 483, the panel found any differences legally insignificant.

First, the court dismissed any claim that Act 23 placed a higher burden on voters than the Indiana law, and insisted voters face no more difficulty in obtaining a qualifying ID in Wisconsin than they did in Indiana. It argued that Wisconsin residents who fail to acquire the requisite ID are not disenfranchised. Rather, they are merely marginalized. The court did not find this troubling because “any procedural step filters out some potential voters.” It stated that because the DMW issues photo ID to anyone with a birth certificate, all that can be inferred from a person without ID is that “he was unwilling to invest the necessary time.” The court concluded that foregoing a photo ID is a matter of choice for most eligible voters. In support, it cited a district court finding that more than half of the eligible voters without ID possess a birth certificate. Because the process of obtaining an ID is no more difficult in Wisconsin than Indiana, the lower court’s ruling can only stand if the Act does not serve any important purpose.

190 Id.
191 Id. at 746.
192 Id. at 749.
193 Id. at 748.
194 See id. at 748-49.
195 Id. at 749.
196 Id. at 748.
197 Id. at 749.
198 Id.
199 Id.
The Seventh Circuit determined that the important purpose Act 23 served is also indistinguishable from the Indiana law. The court dismissed the importance of the lower court’s determination that voter fraud is non-existent because this was also the determination in *Crawford*. The court required no evidence from the state for the remaining three justifications: fraud deterrence, accurate recordkeeping, and strengthening voter confidence. The Supreme Court believed these were sound justifications for Indiana’s law; therefore, they were equally sound justifications for Act 23.

The panel specifically referred to the *Crawford* Court’s determination that an ID requirement promotes public confidence in the electoral system. It labeled this finding a “legislative fact” and stated that the district court must accept such findings from the higher court. It reasoned that ID laws “either promote confidence, or they don’t; there is no way they could promote public confidence in Indiana (as *Crawford* concluded) and not in Wisconsin.” Because the Supreme Court already concluded that they promote confidence, a district court judge cannot conclude otherwise, even when presented with new and compelling evidence. And because these laws promote confidence, there is sufficient state interest. Therefore, unless plaintiffs can show they suffer significantly higher burdens obtaining proper ID than voters in Indiana, the laws are valid in every

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200 See id. at 749-50.
201 Id.
202 See id. at 750.
203 See id.
204 Id.
205 A legislative fact refers to a broad, general fact that is not unique and relates indirectly to the parties to litigation. Judge Easterbrook defines a legislative fact as “a proposition about the state of the world, as opposed to a proposition about these litigants or about a single state.” Id.
206 Id.
207 Id.
208 See id.
209 Id. at 751.
state. On March 23, 2015, the Supreme Court announced its decision to decline review of the case.

III. ANALYSIS

In the Frank opinion, Judge Easterbrook highlighted a very important distinction: the difference between disenfranchisement and marginalization. Indeed, the proper analysis of a particular law depends on it. Dunn and its progeny are still precedential, so where a plaintiff can show that voters have been categorically prevented from accessing the polls, strict scrutiny should be applied. Heightened scrutiny is also appropriate where a law makes it significantly more difficult to vote, thereby suppressing voters. But the level of suppression courts should tolerate remains unclear.

A. A strategic balance

As discussed above, the U.S. Supreme Court has been ambiguous about precisely when an election law imposes a severe burden on voters. In Crawford, the Court found the record insufficient to support a claim that Indiana’s voter ID law crossed that line. However, the record was more developed in Frank. There, credible evidence suggested that compared to Indiana, six times as many registered voters in Wisconsin would be affected. Also,

210 Id. at 750.
211 Id. at 748.
216 District Judge Barker “estimated that as of 2005, when the statute was enacted, around 43,000 Indiana residents lacked a state-issued driver’s license or identification card.” Crawford, 553 U.S. at 188-89. District Judge Adelman found
considerations such as financial costs, inconvenience, travel issues, and time off work were more substantiated through statistical and testimonial evidence.\textsuperscript{217} Despite this, the district court in \textit{Frank} seemed to concede, without deliberation, that Wisconsin’s law does not impose severe restrictions.\textsuperscript{218} It proceeded directly to balancing the law’s burden on voters against the state’s asserted justifications.\textsuperscript{219} The conservative panel in the court of appeals certainly did not raise the issue in the district court’s stead.

Perhaps Judge Adelman made a strategic choice in his district court opinion. The U.S. Supreme Court rarely characterizes a law’s effects as severe. Decided in 2000, \textit{California Democratic Party} was the most recent case where the Court applied strict scrutiny because an election regulation severely burdened voters.\textsuperscript{220} This could reasonably imply that this standard is quite high. Additionally, the Court has not suggested any bright line rules or factors for consideration. Instead, it has simply invited the lower courts to make a “hard judgment.”\textsuperscript{221}

But in making such a subjective judgment, a lower court leaves itself especially vulnerable to an adverse ruling on appeal. Despite careful use of empirical evidence to show a substantial burden on voters, any characterization of that burden as severe is entirely judicial discretion. Conversely, a lower court would likely be less susceptible to reversal where it carefully evaluated the evidence demonstrating both a law’s burden on voters and the supporting justifications advanced by the state. Although there would still be some subjectivity to the balance of interests, a higher court would certainly have to work harder to undo such analysis by a lower court.

Ultimately, the Seventh Circuit panel did overturn Judge Adelson’s ruling, but not without exposing its subjectivity. The court

\textsuperscript{217} See \textit{Frank}, 17 F. Supp. 3d at 854.
\textsuperscript{218} \textit{Id.} at 846-47.
\textsuperscript{219} \textit{Id.} at 847.
\textsuperscript{221} \textit{Crawford}, 553 U.S. at 190.
embraced certain pieces of evidence, ignored others, and supported several of its conclusions with false statements and erroneous assumptions. More importantly, even if the Seventh Circuit arrived at the proper legal result, it is unlikely it secured an efficient outcome.

Credible evidence indicated that 300,000 people would have to take affirmative action to maintain their right to vote. Many of them must spend substantial time, money, and effort to do so. Furthermore, the district court found the evidence conclusive that the law would prevent more legitimate votes from being cast than fraudulent votes. The counterbalancing benefits for the law were comparatively weak. The problem lawmakers designed the law to fix does not exist in Wisconsin. The Seventh Circuit panel grounded its justification primarily on the Supreme Court’s speculative assumption that voter ID laws improved voter confidence, despite credible recent evidence to the contrary. Judges can only reasonably uphold

222 See generally Frank 773 F.3d at 783 (Posner, J., dissenting from denial of rehearing en banc) (describing the Seventh Circuit Panel’s erroneous justifications for its ruling. For example, the panel opinion states that Act 23 would prevent voting by underage children and non-citizens; however non-citizens can easily obtain a Wisconsin state-issued ID and acceptable student IDs need not include a date of birth. Other examples include the panel opinion’s erroneous assumption that photo ID cannot be a burdensome requirement because one needs it to fly, pick up prescriptions at pharmacies, open a bank account. However, in Wisconsin, one does not need an ID for all prescriptions; bank customers do not need photo ID to open an account; Federal law does not require photo ID to purchase firearms at gun shows, flea markets or online; and the Supreme Court requires no ID of visitors.).
223 Frank, 17 F. Supp. 3d at 854.
224 Id. at 855-57.
225 Id. at 862.
226 Id. at 847-48.
227 Frank, 768 F. 3d at 750-51 (arguing that because the Supreme Court previously concluded voter ID laws promote confidence, a district judge cannot subsequently dispute this finding, even when presented with recent evidence which contradicts that conclusion).
a law with such doubtful net advantages so long as the legal test maintains its deference to the state.

B. Addressing the proper concern

The Anderson/Burdick balance grants this deference to state regulations that impose less than a severe burden on voters. The Supreme Court describes such non-severe regulations as evenhanded, reasonable, and nondiscriminatory, essentially referring to facially neutral laws. However, there is compelling evidence that laws like Act 23, though facially neutral, disproportionately affect African Americans, Latinos, women, and the indigent. Although several of these subgroups are constitutionally protected classes for purposes of equal protection, a discriminatory impact upon them is not sufficient to violate those protections. A plaintiff must demonstrate discriminatory intent, which can be difficult to confirm. Perhaps this contributed to the Supreme Court’s decision to adopt a balancing test for election regulations. Regardless, few would seriously argue that voter ID laws are primarily motivated by racial prejudice, outright sexism, or animosity toward the poor. However, there is reason to suspect that voter ID laws, like most of history’s controversial election regulations, originate with political self-interest.

As mentioned above, the United States has an extensive history of voter suppression with facially neutral laws. For example,

(2008) (concluding no relationship between voter ID laws and a person’s level of trust or confidence in the electoral system).


231 See generally Frank, 17 F. Supp. 3d at 870-79 (discussing the evidence presented at trial that Act 23 disproportionately affects Black, Latino and indigent voters); Michael J. Pitts, Empirically Measuring the Impact of Photo ID Over Time and its Impact on Women, 48 Ind. L. Rev. 605 (2015).


233 See, e.g., id.
Massachusetts and Connecticut adopted literacy tests in the 1850s.\footnote{KEYSSAR, supra note 27 at 142.} These requirements suppressed and disenfranchised the poor and uneducated, and thus disproportionately affected African-American and Native American subgroups.\footnote{Id. at 112, 255.} Congress waited until 1975 before passing a permanent nationwide ban on literacy tests.\footnote{Id. at 274.} More recent examples of facially neutral laws that disproportionately impact minority groups include felon disenfranchisement, the elimination of early voting opportunities, and voter ID laws.

The most troubling contemporary concerns regarding election regulations are political. The obvious fear is that lawmakers might manipulate election laws to entrench themselves in office. Less conspicuous, but equally troubling, is the possibility that confirmation bias\footnote{See generally Raymond S. Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises, 2(2) Rev. of Gen. Psy. 175 (1998). (“Confirmation bias, as the term is typically used in the psychological literature, connotes the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.”)} blinds lawmakers, leading to the irrational justification of a laws virtue.\footnote{Id. at 191-92 (discussing cognitive bias as applied to policy rationalization).} And to be clear, these concerns lie on both sides of the aisle. For example, literacy tests and other suppressive election regulations made Republicans unelectable in the southern state general elections for a substantial period.\footnote{See KEYSSAR, supra note 27 at 107-08.} Early voting restrictions often disproportionately affect black voters, which adversely affects democratic turnout.\footnote{Obama for Am. v. Husted, 697 F.3d 423, 440 (6th Cir. 2012).} Both Republican and Democratic controlled
Legislatures have gerrymandered district boundaries to all but guarantee their party victory in certain district-wide elections. Nevertheless, voter ID laws benefit republicans politically. And critics of these laws argue they are designed to do just that. For example, in his dissent from the Seventh Circuit’s opinion in 
Crawford, Judge Evans characterized Indiana’s voter ID law as “a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”

When passing Act 23, Wisconsin legislators predictably split along party lines. Republican legislators voted unanimously for the law, democrats united against it. The liberal district court judge ruled against it; the conservative three-judge panel in the Seventh Circuit ruled in favor of the law. Conservative and liberal media outlets predictably tow their respective party’s line. Of course, the fact that support for this particular policy almost universally depends on party alignment does not necessarily mean that support is guided by politics rather than a genuine interest in election integrity. However, it does raise justifiable suspicion. But because proponents of such laws

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241 Gerrymandering refers to the manipulation of district boundaries to secure an electoral advantage for a certain political party.
244 Wisconsin Assembly, supra note 18.
have been able to advance some justification for them, even if hypothetical or speculative, the laws stand. Again, this is possible because the Anderson/Burdick balance grants deference to states’ interests. To remedy this, courts should carve an exception where misconduct appears likely.

C. A better approach to Anderson/Burdick balancing

An effective constitutional analysis of election laws needs to acknowledge the possibility of improper partisanship by lawmakers. Accordingly, where a plaintiff can demonstrate a strong likelihood that the primary motive for a law’s passage is political, courts should not accord the state deference.\textsuperscript{248} Courts should consider factors such as whether a law: (1) confers a political advantage to the enacting lawmakers or their party; (2) politically disadvantages their opponents or an opposing party; (3) dilutes or otherwise weakens the political participation of identifiable groups of voters; and (4) creates sharp division along party lines. Where this improper partisanship appears likely, a court’s presumption should shift in favor of the plaintiff; and the burden of showing that the law’s benefits outweigh its burden on voters should fall upon the state.

This burden-shifting approach would be effective for several reasons. First, it would help ensure the utility of election regulations and discourage lawmakers from passing unnecessary, bureaucratic laws. Although regulations which offset the benefits they provide by imposing equally burdensome restrictions are generally undesirable, courts appropriately give state lawmakers wide latitude to regulate their own elections.\textsuperscript{249} However, ethically questionable election regulations that fail to provide clear, demonstrable, and convincing benefits should not stand. The elimination of such zero-sum

\textsuperscript{248} Of course, plaintiffs must first show that the law interferes with their ability to vote.

\textsuperscript{249} \textit{E.g.}, Storer v. Brown, 415 U.S. 724, 730 (1974) (describing how it is important for courts to allow states to substantially regulate their elections).
regulations would help ensure lawmakers keep focus on public policy rather than political maneuvering.

Second, this approach would increase voter confidence. As the Supreme Court noted in *Crawford*, “public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.” 250 As discussed above, the United States has a troubling history involving election law; yet, the current election law analysis ignores politically self-serving tactics. This initial inquiry into improper politics would bolster a public perception of trust in our electoral system by acknowledging the concern and demanding adequate justification when it arises.

Third, the partisanship inquiry would force judges to confront their own political bias. 251 Part of the current concern is partisan judicial activism. If the constitutional analysis of election regulations included an explicit inquiry into improper partisanship, judges would be less likely to put a finger on the scale in their party’s favor, consciously or subconsciously. This approach would create more pressure on judges to sufficiently justify any ruling that furthered their own person political interests to both the public and their peers in the judiciary.

Professor Dan Tokaji suggested inappropriate partisan manipulation of state voting processes should trigger heightened scrutiny. 252 Going even further, Professor Edward B. Foley recommended courts replace the Anderson/Burdick balance entirely with an inquiry into whether an election regulation was indeed “a ploy to achieve a partisan advantage.” 253 However, both of these approaches fail to allow sufficient room for laws that may appear improper but were passed in good faith and provide adequate utility.

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253 Foley, *supra* note 241 at 1860-64.
Also, they run contradictory to the Supreme Court’s history of allowing states wide latitude in governing their election procedures. In *Crawford*, the Supreme Court stated that “if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.”

Although entrenchment tactics should be treated harshly in the context of election law, concrete evidence of actual intent will seldom be available. Rather, courts should consider whether wrongful political tactics are *likely*. Then, by reversing the presumption to favor plaintiffs and placing the onus on the state to demonstrate a law’s usefulness, courts can adequately address this concern while not overly intruding into state sovereignty.

If the Seventh Circuit employed this balance-shifting approach in *Frank*, the outcome would certainly be reversed. To begin, all the factors supporting a claim of improper partisanship are present; support and opposition for Act 23 split along partisan lines and credible evidence indicated the law disproportionately weakened participation by certain subgroups that tend to support democratic candidates. Thus, the law disadvantaged the Democratic Party, and accordingly, conferred a political benefit on its primary rival, the Republican Party. Therefore, the Court should disallow the presumption favoring the state replace it with the burden of proof. Next, as discussed in detail above, defendants in *Frank* were unable to establish Act 23’s benefits to the extent necessary to outweigh its burden on voters. Under these facts, the plaintiff’s challenge is successful.

However, if defendants were able to show that voter fraud was present in Wisconsin and that Act 23 competently addressed this problem, their burden would be carried. In this scenario, a decision favoring defendants is a desirable outcome. Here, the state is

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254 *Crawford*, 553 U.S. at 204.
hypothetically able to demonstrate that our democratic system of governance was actively perverted through fraud and the law solved or substantially mitigated that problem. Those benefits are substantial enough to defeat plaintiffs challenge in this case, even though partisanship may have influenced the decisions of individual lawmakers.

For this hypothetical, if the panel inquired only whether improper partisanship was present, like Professor Foley suggested, plaintiffs challenge would succeed. This outcome is problematic because the fraud would continue. Furthermore, where the only solutions available are more easily tolerated by affluent members of the electorate, a fix would remain elusive as long as the legislature is controlled by republicans. If the court applied heightened scrutiny here, as Professor Tokaji suggested, the outcome is less certain. Plaintiffs might be able to present a narrower alternative, or the court may insist that the state further tailor the current law. Regardless, this presents a similar problem. While republicans control Wisconsin’s legislature, courts would be forced to closely scrutinize all laws more easily tolerated by conservative-leaning groups. Where these laws are otherwise beneficial, courts should not require they meet such lofty standards.

CONCLUSION

The current federal constitutional analysis of individual election regulations allows both lawmakers and judges much discretion in their respective drafting and evaluation of these laws. This is a necessary element for a jurisprudential standard charged with overseeing a body of law whose regulations inherently interfere with fundamental constitutional rights to some degree. However, while the Anderson/Burdick test has provided a more clear and consistent mechanism for courts to use when analyzing ballot access restrictions, a fundamental piece is still missing. An approach that more competently addresses the political nature of election law would both decrease improper partisan activity and increase public confidence and trust in the system. In Frank, the Seventh Circuit demonstrated the
malleability of the Anderson/Burdick balance. Neither the District Court nor the Appellate Court clearly erred in their applications of the test. But, because the most historically troubling motive in election law appeared a likely factor there, both judicial and legislative discretion should be narrowed.