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When Experts Construct a Blue Wall: Defending Police Against Code of Silence Claims



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CONTENTS

JULY / AUGUST 2022

WHEN EXPERTS CONSTRUCT A BLUE WALL: DEFENDING POLICE AGAINST CODE OF SILENCE CLAIMS

By: Robert W. Higgason, Senior Assistant City Attorney, Houston, Texas

Allegations that police are protecting one another by refusing to provide information can significantly prejudice a jury. Within the Federal Rules of Evidence are provisions that can be wielded to neutralize and rebut claims of a Blue Wall.

PAGE 6

JUST BECAUSE YOU CAN, DOESN'T MEAN YOU SHOULD: A NEW FRAMEWORK FOR LOCAL GOVERNMENT CENSURES

By: Alexandra Marshall, Class of 2022, George Washington University School of Law

A recent Supreme Court decision upholds the right of a Texas college to reprimand a teacher for incendiary speech and behavior. But in the legislative context, not all criticism or inappropriate comments should be grounds for public censure.

PAGE 10

HOW CAN YOUR CITY OR COUNTY BEGIN FILING AFFIRMATIVE SUITS?

By: Jill Habig, Founder, Public Rights Project; Christine Kwon, 2017-18 San Francisco Affirmative Litigation Project Fellow, Yale Law School; Joanna Pearl, Legal Director, Public Rights Project; Marissa Roy, 2017-18 Deputy City Attorney & Justice Catalyst Fellow, Los Angeles City Attorney's Office; and Palak Sheth, Former Managing Director, Affirmative Litigation Task Force, San Francisco City Attorney's Office.

Steps to building an affirmative litigation capability at the local government level, and doing even more to protect the rights of constituents.

PAGE 14



Cover and Page 6, illustrations by Jose Trujillo

DEPARTMENTS

18 PRACTICE TIPS

Municipal Attorneys as the Key to Successful Project Delivery

By: Steven A. Torres, West Group Law PLLC, White Plains, New York

Legal expertise for the avoidance of project glitches.

27 CASES

Charter Schools, Dress Codes, Section 1983, and *Chevron* Deference

By: Erich Eiselt, IMLA Assistant General Counsel

Chivalry and federal government oversight.

20 PROCUREMENT

Municipal Procurement Law in Canada: Everyone Sings Off the Same Song Sheet

By: Rahul Ranade, Lidstone & Company, Vancouver, British Columbia

Uniformity in provincial procurement regulations.

24 INSIDE CANADA

Windrows and Municipal Liability

By: David Boghosian and Christina Wang, Boghosian + Allen LLP, Toronto, Ontario

An Ontario Perspective on *Nelson (City) v. Marchi*, 2021 SCC 41.

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Just Because You Can, Doesn't Mean You Should: A New Framework for Local Government Censures

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"I urge you to stop being a rancid tub of ignorant contagion," Minnesota Councilmember Ben Plunkett wrote in an email to a community member.[1] Shortly thereafter he was censured by the River Falls City Council.[2]

A censure is a formal reprimand issued by a body of government, imposed on one of its members. Censures are an adaptable and unique form of government action. They can be purely symbolic, for example, publicly condemning a member for an off-color comment without further punishment. Or they can be somewhat punitive, carrying mild punishments such as stripping a member of a caucus position or placing a member last in seniority. Censures can be meaningfully used to condemn behavior otherwise unworthy of civil or criminal enforcement, but they can also serve to further drive local communities into the contentious "us" vs. "them" political narrative.

On March 24, 2022, the United States Supreme Court returned a unanimous verdict for *Houston Community College System v. David Buren Wilson*, overturning a Fifth Circuit decision involving free speech and censure at the local level.[3] Authored by Justice Gorsuch, the opinion confirms what many thought to be already-settled law: government entities – local and federal – possess nearly unlimited power to censure members for public and private conduct. In light of the decision, this article seeks to answer the question: if a local government's censure power is nearly unlimited, what framework should it apply when deciding to take such action?

This article will proceed in three parts: Part I will discuss the tradition of censure and the recent decision in *Houston Community College*; Part II will consider some recent examples of censure and their correlation to current events; and Part III will introduce a new framework for analyzing the appropriateness of local government censures based on the Court's analysis in *Wilson*, and conclude with a call to action for governments to impose censures only when it is socially and politically responsible.

I. CENSURE, A HISTORY

A. What is Censure?

Censure is defined in Black's Law Dictionary as "an official reprimand or condemnation; an authoritative expression of disapproval or blame."[4] In a legislative context, a censure is usually the passage of a "resolution that publicly condemns a member's conduct."[5] Censures are one of many tools in the toolkit of a government body. They fall in the middle of the spectrum of severity; reprimands being a lesser and more informal form of punishment, and expulsion being a more severe form.[6] Censures are just that: speech which publicly condemns another, but it does not mean they are without teeth. James Madison once remarked that a potential censure would be "a severe punishment" for the parties reprimanded.[7]

Censures allow for government bodies to take a formal public stand against harmful actions or words in circumstances where either the law is unavailable to help or where it would be politically or socially unwise to pursue such action. An overarching theme of censures is that they are tied to preserving the "peace of the community."[8] While they may appear in some ways to stifle minority voices or actions, they are not intended to suppress constitutional rights. They are instead meant to create another opportunity

for meaningful dialogue among public officials, and between the government and the governed.[9] They seek to strike a balance between formal legal action and idly standing by while holding one's tongue.

Legislative censures have held a place our nation's governance since the earliest days of the republic.[10] One of the earliest censures is thought to be President George Washington's censure during the Whiskey Rebellion in 1794.[11] And the Founding Fathers included a discipline provision in the federal Constitution: "[e]ach House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member."[12] This provision was modeled after the English court system where "[t]he power to discipline [members] was more or less assumed as a part of [legislative] privilege."[13] Today, nearly all states and many local governments have enacted similar disciplinary provisions.[14]

While censures are common and have repeatedly been upheld to be constitutional, from their debut on American soil, some scholars have expressed opposition to their use. One argument is that censure seeks to restrain public speech and may hasten the path towards censorship.[15] In this vein, one early critic said that censure would "lock the mouths of men."[16] Other scholars opposed to censures argue that they are unnecessary expressions of mere opinions, and that distasteful or unpopular speech will simply be drowned out in the free marketplace of ideas.[17]

B. The Latest Case: Background

The Houston Community College System – operating several community college campuses in Houston, Texas – is run by a publicly-elected Board.[18] Under Texas law, the Board has the authority to govern via orders and resolutions, and adopt rules and bylaws.[19] Voters elected David Wilson, the Respondent, to the nine-member Board in 2013.[20] The position came with a six-year term and Wilson's tenure was turbulent from the start.[21] During his time on the Board, he engaged in many disruptive practices. For example, Wilson filed a number of lawsuits against the Board while in office, costing the Houston Community College System more than $270,000 in legal fees.[22] In one such lawsuit, he alleged a violation of the Board's bylaws when a trustee was permitted to vote via videoconference.[23] In addition to the litigation, Wilson publicly disparaged Board members by name in local media interviews, organized nuisance robocalls to bombard constituents of other Board members, and hired a private investigator to research another member.[24]

Over the course of Wilson's tenure, the Board publicly reprimanded him on two separate occasions.[25] The first, in 2016, was a public reprimand via resolution but with no other punishment.[26] The second, and the subject of this case, was in 2018 when the Board again adopted a public resolution with a formal censure as a result of Wilson's conduct being inconsistent with "the best interest of the college… not only inappropriate, but reprehensible."[27] The 2018 censure also carried with it a number of penalties including a stipulation that barred him from holding officer positions as well as restricting his ability to be reimbursed for travel expenses absent Board consent.[28] The Board additionally recommended that Wilson attend a governance and ethics training.[29] Following this action, Wilson amended one of his pending state court claims to include a First Amendment violation, seeking an injunction, compensatory damages for his mental anguish, and attorney's fees.[30] He also sought punitive damages.[31]

Eventually the case found its way to the Fifth Circuit, which sided with Wilson, holding that he had successfully stated a First Amendment retaliation claim and finding that the censure was intended as a punishment for "criticizing other Board members for taking positions that differ from his own" and "filing suit alleging the Board was violating its bylaws."[32] The Fifth Circuit conducted a two-step merit analysis and ultimately concluded that the verbal reprimand created an actionable First Amendment claim but that the additional punishments did not violate Wilson's First Amendment rights because he never had "an entitlement to those privileges."[33] On appeal to the Supreme Court, the only element at issue was whether the verbal reprimand alone created an actionable First Amendment claim: "did the Board's censure offend Mr. Wilson's First Amendment right to free speech?"[34]

C. The Latest Case: Supreme Court Analysis

In his brief, Wilson argued that the censure qualified as a "retaliatory action" after he engaged in speech constitutionally protected by the First Amendment.[35] Justice Gorsuch begins the analysis with a primer on the history of censure in the United States.[36] Throughout history Congress has censured members for a variety of public and private conduct, and local governments have followed suit, at times even surpassing in frequency their federal counterpart.[37] Justice Gorsuch concludes that this long history alone leaves a "considerable impression" on this case, if not putting the case to rest all together.[38]

The bulk of the legal analysis considers what exactly constitutes "retaliatory action." In order to qualify, the government must have taken a

Continued on page 12



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material "adverse action" following an individual's speech – such as an arrest, prosecution, dismissal, or deprivation of another right – that the government otherwise would not have taken "absent the retaliatory motive."[39] There is no decisive test to determine materiality in this context, so the Court utilized two tests proposed in lower courts. The first test asks: "whether the government's challenged conduct would 'chill a person of ordinary firmness' in the plaintiff's position from engaging in 'future First Amendment activity.'"[40] The second test asks whether the action "adversely affected" the speaker's protected speech, "taking into account things like the relationship between speaker and retaliator and the nature of the government action in question."[41]

Applying Wilson's circumstances to both tests, the Court highlights a few facts. First, elected officials such as Wilson are expected to bear a significant amount of comment and criticism in relationship to their office.[42] As candidates for public office, they necessarily insert their reputation, character, and actions into the sphere of public discourse.[43] Second, because the First Amendment allows public officials like Wilson to criticize the government, it similarly protects other representatives of that local government so that they may defend themselves or bring new information to light.[44] Finally, Wilson never evidenced a chilling of his First Amendment activity due to the Board's conduct;[45] he certainly did not "cower silently" after the Board took action.[46]

The Court unanimously sided with the Houston Community College System on these facts, but it left open the door to potential future litigation for a variety of other reprimands: censures which carry punishments, censures aimed at ordinary citizens, cross-governmental reprimands, and verbal reprimands issued by the government aimed at students or employees.[47]

II. CENSURE CASE STUDIES: A SPECTRUM

Civil unrest, democratic crises, and the Covid pandemic created many an opportunity for public officials to "open mouth and insert foot"– and in some cases, both feet. Censures provided a way for local governments to denounce conduct otherwise unworthy of formal legal action. These measures fell on a spectrum. On one end, they were effectively used to denounce wildly offensive or dangerous speech/conduct, but on the other end, they were disproportionate politically motivated reactions to otherwise mild offenses. To illustrate this spectrum, consider the following three case studies:

One extreme example is that of Senator Amanda Chase. After the January 6th Riot, Senator Chase, a Virginia Senate Member who was present at former President Trump's January 6th rally, was censured by bipartisan vote in the Virginia Senate, in part, for comments made during a floor speech.[48] During a address defending Ashli Babbitt, she stated "[t]hese were not rioters and looters, these were patriots who love their country and do not want to see our great republic turned into a socialist country."[49] The resolution, signed January 27, 2021, censured Chase "for failure to uphold her oath of office, misuse of office, and conduct unbecoming of a Senator."[50]

The Resolution was framed as being primarily a result of the Senator's January 6th comments, but this was not the only incident listed in the censure resolution. The other alleged conduct included, in part: using offensive gestures and language towards a Capital Police Officer after she was denied access to a restricted parking area, posting on social media that sexual assault survivors are to blame for their assaults because they were "naive and unprepared" and did not fend off their attackers with a gun, accusing Virginia State Senator Jennifer McClellan for not being "for all Virginians" because she was a member of the Virginia Legislative Black Caucus, and proclaiming during the pandemic that she doesn't "do" COVID, among other statements and actions.[51]

Another example, somewhere in the middle on the spectrum, is the case of Mark Paddack, a council member in Ocean City, Maryland.[52] Paddack's alleged offense stems from a late-night racially charged Facebook comment made in his personal, private account on another individual's Facebook Story video.[53] The comment read: "tell the dude to turn his hat back where the white designed the hat to be worn. Where I come from that is punk. Immature POS."[54] After the post went viral and caught the attention of the Mayor and Council, the councilman claimed his Facebook account had been hacked and the local sheriff's office began an investigation.[55] In the weeks following, absent a completed investigation, the Council President successfully moved to censure Paddock for the conduct which was "not becoming of a councilmember."[56]

Finally, an example on the other extreme, is the case of Tom Duerr, a councilman in Allegheny County, Pennsylvania.[57] After a somewhat contentious council meeting in March 2022, Duerr allegedly "accosted" another councilman immediately following the meeting "in a hostile tone of voice."[58] The censure motion reported that Duerr said, "I always knew you were a [expletive] coward" in regard to the votes the other councilman had cast during the meeting.[59] The brief exchange has been characterized as a "personal attack" and the censure motion demanded that Duerr issue a public apology and "refrain from any such public behavior at all times in the future."[60] Ultimately, the Allegheny County Council dropped the motion, but not before the threat of censure prompted Duerr to release a statement publicly appologizing to the councilmember for the "sharpness" of the words he used.[61]

III. A NEW FRAMEWORK

A. Public Policy Perspective

Nothing in politics exists in a vacuum, and it is important to analyze censures in context of the current political environment. According to the Pew Research Center, "America is exceptional in the nature of its political divide."[62] Nine-out-of-ten registered voters associated with each party answered that they worried victory by the other party "would lead to lasting harm to the U.S."[63] And eight-out-of-ten registered voters answered that their differences with the opposing party were about "core American values."[64] There is stark disagreement on major issues: racial justice, science, law enforcement, international policy, and more.[65] As issues become more deeply entrenched in political camps it becomes more difficult for Americans to find common ground or a "collective national identity."

Like many tactical political moves, censures can be used to either heal or drive apart a community. They can be meaningfully used to condemn problematic behavior otherwise unworthy of civil or criminal enforcement, or they can be used as a weapon to further drive local politics into the contentious "us" vs. "them" mindset. Judge Edith Jones, who dissented in the Fifth Circuit *Wilson* decision, wrote about this phenomenon: "Given the increasing discord in society and governmental bodies, the attempts of each side in these disputes to get a leg up on the other, and the ready availability of weapons of mass communication with which each side can tar the other, the panel's decision is the harbinger of future lawsuits… It weaponizes any gadfly in a legislative body."[66] For this reason, the author advocates for a more nuanced approach to censures.

B. Towards a New Paradigm

The question remains: if local governments are permitted nearly unlimited power to censure their members, yet the current political climate demands they exercise restraint in imposing censures, what framework would best serve the ultimate goal of preserving the "peace of the community" while still holding public officials responsible for abhorrent conduct?[67]

The author argues that governments should adopt an analysis similar to that utilized by the Supreme Court in *Wilson*, except in a reversed order and with a modified party perspective. Recall in *Wilson* that in order to determine if a government action (in this case, a censure) offends the First Amendment, the Court considered two tests. First, whether the "challenged conduct would 'chill a person of ordinary firmness' in the plaintiff's position from engaging in 'future First Amendment activity.'"[68] And second, whether the action "adversely affected" the speaker's protected speech, "taking into account things like the relationship between speaker and retaliator and the nature of the government action in question."[69]

In the new proposed framework, the local government would apply these same standards when assessing whether or not censure is an appropriate response to a member's speech or conduct. This new framework would proceed in two steps, where the answers to each step are intended to be evaluated collectively using a totality of the circumstances approach:

> Step 1A: what was the nature of the relationship between the member at issue and the party or parties who were intended to hear the message?
> Step 1B: what was the nature of the speech or conduct?
> Step 2: how likely is it that the member's speech or conduct would chill a person of ordinary firmness in the recipient's position from engaging in future First Amendment activity?

Step 1A seeks to determine the nature of the relationship and the power dynamic between the parties. The least worrisome conduct would be between two publicly-elected members of the same governmental entity, and especially in a case where the speech or conduct is directed from a junior member to a more senior member of the governmental body. In these situations the member at issue is either equally matched with the recipient of the conduct or is in a slightly disadvantaged position. Governments should be highly skeptical of censuring a member for speech or conduct between members. This is because public officials, as Justice Gorsuch noted, are expected to bear a significant amount of comment and criticism in relationship to their office, especially from their peers.[70] Additionally, censures for speech or conduct between members may provide the greatest kindling for local animosity and political jockeying. Alternatively, censure would be more appropriate if the speech/conduct is aimed at members of the public who possess less social or political capital and therefore are unable to meaningfully respond or defend themselves.

Step 1B seeks to account for the differences between public versus private speech/conduct. Did the speech/conduct at issue take place in area where the member reasonably expected privacy (for example, in a private comment on a Facebook Story), or was the member acting in public? And if the conduct was public, was the conduct public in a limited way (for example, berating a Capital Police Officer in a Congressional parking lot) or in a very public way (for example, making a formal statement on national television or posting content through an official campaign Facebook page)? The less public the speech, the less appropriate a censure might be to address the situation. This step is the least meaningful in the framework, but it does provide an opportunity to evaluate the facts of the situation more wholistically.

Continued on page 30

While public officials are "on notice" that their every move is subject to scrutiny, they should nevertheless be afforded some level grace, especially in areas where privacy may have been reasonably expected.

Finally, Step 2 seeks to evaluate just how detrimental the conduct is to the peace and well-being of the community. This is the most important step in the framework. The healthiest democratic communities foster robust discourse and encourage citizens to exercise their rights to free speech, press, assembly, and so on. When citizens are afraid to engage in First Amendment activity, something is deeply amiss. The most destructive speech/conduct – and therefore most worthy of censure – is conduct which stifles First Amendment activity by making a person or group of persons feel unsafe, unwanted, or otherwise unwelcome to express their viewpoint or more broadly participate in the community. This would require something more than just unkind words. Overt racism, sexism, xenophobia, and true threats would certainly fall into this category, but other less obvious forms of offensive speech should also be considered.

C. Applying the New Framework

The new framework is best understood in the context of real-world scenarios. Recall the three examples mentioned above. In each of these cases, the member was either ultimately censured or was at serious risk of censure. Under the proposed new framework, only one of these scenarios would be found appropriate for censure.

First, the case of Pittsburgh councilmember Tom Duerr. The Allegheny County Council considered censuring Duerr after he "accosted" a fellow councilmember "in a hostile tone of voice" saying "I always knew you were a [expletive] coward."[71] Applying the facts to this new framework, the City Council should never have considered censuring Duerr. Under Step 1A: the speech was directed at the councilmember's peer, another elected official, suggesting censure may not be appropriate. Under Step 1B: the speech was made after the conclusion of a council meeting, as members were leaving. While not an entirely private space, it is clear that the speech was not intended for general public consumption, and therefore censure may not be appropriate. Finally, under Step 2: there is no indication that the speech was made or was intended to make the recipient feel unsafe or unwelcome, and there is no evidence that the speech in anyway curbed the other member's inclination for First Amendment activity. While inflammatory, the speech was relatively tame. Average Americans hear analogous commentary on a regular basis. In summary, because the speech at issue was: directed at a political peer, carried out in a semi-public forum, and did not reasonably chill the receiving councilmember's First Amendment activity, censure was inappropriate in this situation. In fact, the mere threat of censuring Duerr under these facts is likely to have done more harm than good to this local community.

Second, the case of Mark Paddack, who was censured for the racially charged private Facebook message. Utilizing the new framework, this is the only situation where the local government should conclude that censure is appropriate. Under Step 1A: the speech at issue was directed at a member of the public, suggesting that censure may be appropriate. Under Step 1B: the speech was made in a private forum, indicating that censure may not be appropriate. While online conduct does live forever, public officials, especially at the local level, should be given some level of leeway for their private behavior. Considering just steps 1A and 1B alone might suggest that censure is inappropriate in Paddack's circumstances. However, Step 2 materially shifts the analysis. His comment, while private, is the type of insidious racism which makes underrepresented minorities feel unsafe and unwanted in a community. His comment is likely to make voters of color think twice before contacting him to discuss a community issue or bringing a community issue to the attention of the Board on which he sits. This is exactly the type of behavior which chills First Amendment activity and is therefore worthy of censure.

Third, the case of Senator Chase. Senator Chase was censured for a history of concerning speech and conduct. But, if the analysis is narrowed to *only* her comments following the January 6th riot, this framework would conclude that censure is inappropriate.[72] Step 1A is inconclusive: the speech was directed at both her peers and members of the public. Under Step 1B: the speech was made in an extremely public place through an official channel, which cuts in favor of issuing a censure. However, under Step 2, the speech was not particularly harmful to any one group. It generally disparaged the nation and fed into a narrative which is widely believed to be untrue (e.g. the election was stolen, citizens should take up arms to "defend" democracy), but the comments did not chill any First Amendment activity. In fact, it likely spurred more First Amendment activity as people felt compelled to engage in counter-speech. Censure should not be used as a means to beat a political foe into submission or to further alienate

an unpopular political viewpoint, especially in circumstances such as these where the community is already deeply divided, and channels of meaningful communication are breaking down. It is the author's argument that censure would not be in the interest of preserving the "peace of the community." Importantly, the decision not to censure Senator Chase does not mean that other members cannot condemn her behavior publicly – they should take every opportunity to combat her speech with thoughtful counter-speech. It is simply that ostracizing the senator via formal censure in this scenario feeds into the "us vs. them" narrative which is already tearing our communities apart. [73]

CONCLUSION

Censures are a powerful double-edged sword for local governments; with great power, comes great responsibility. Censures can be effectively used to protect and enhance the peace of a community in circumstances where formal legal action is inappropriate. But they can also serve as a means to further drive apart communities which are already struggling to find common ground. Local governments should adopt this new framework, based on the legal analysis proposed in the most recent Supreme Court decision on local government censure power, in order to methodically consider the appropriateness of taking such an action.

If there is one group which is able to meaningfully begin the process of healing America's deeply divided social and political landscape, it is local governments. Responsible exercise of censure power, applying it when clearly appropriate but refraining when such an extreme measure is unwarranted, is one small, concrete way they can contribute to that goal.

Notes

1. Michael Brun, *River Falls City Council censures member for 'derogatory and unprofessional' comments in face mask debates,* Rivertowns.Net (Aug 11, 2020, 9:00 PM), https://perma.cc/HV5V-FY5Z.
2. *See id*.
3. Houston Cmty. Coll. Sys. v. Wilson, No. 20-804, 2022 WL 867307 (2022).
4. *Censure*, Black's Law Dictionary (11th ed. 2019).
5. *Case Comment, Constitutional Law – First Amendment – Fifth Circuit Creates Circuit Split by Finding a Legislature's Censure Can Violate the First Amendment – Wilson v. Houston Community College System, 955 F.3d 490 (5th Cir. 2020).* 134 Harv. L. Rev. 2638, 2638 (2021).
6. *See* Jack Maskell, Cong Research Serv., Rl31382, Expulsion, Censure, Reprimand, And Fine: Legislative Discipline In The House Of Representatives (2016).
7. Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. Rev. 1525, 1566 (2004).
8. *See id*. at 1572.
9. *See generally id.*
10. *See id*. at 1528.
11. *See id*.
12. U.S. Const. art. I, § 5, cl. 2.
13. *See Case Comment, supra* note 5 (quoting Mary Patterson Clarke, Parliamentary Privilege In The American Colonies 184 (1943)).
14. *See id*.
15. *See* Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. Rev. 1525, 1565 (2004).
16. *See id*.
17. *See id*.
18. *See Wilson, supra* note 3 at *2.
19. *See Case Comment, supra* note 5.
20. *See Wilson at* *2.
21. *See id*.
22. *See id*.
23. *See id*.
24. *See id*.
25. *See id*. at *2—3.
26. *See id*. at *2.
27. *Id*. at *3.
28. *See id*.
29. *See id.*
30. *See id.*
31. *See id.*
32. *See id.*
33. *See id. at *3.*
34. *Id.* at *2.
35. *See id*. at *3.
36. *See id*. at *4.
37. *See id.*
38. *See id. at *5.*
39. *See id.*
40. *Id*. (quoting Nieves v. Bartlett, 139 S.Ct. 1715, 1721 (2019)).
41. *Id*.
42. *See id.*
43. *See id. at *5.*
44. *See id.*
45. *See id*. at *6.
46. *See id.*
47. *See id*. at *7.
48. *See* Sarah Rankin Denise Lavoie, *Virginia Sen. Amanda Chase Sues Over Being Censured*, Associated Press (Feb. 1, 2021), https://apnews.com/article/censures-lawsuits-virginia-75977d7351bf4719e822b782d54ca17e.
49. *See id*. Capital Police fatally shot Ashli Babbitt during the January 6th Riot. More reading on Babbitt can be found here: Michael Biesecker, *Ashli Babbitt a Martyr? Her Past Tells a More Complex Story*, Associated Press (Jan. 3, 2022), https://apnews.com/article/ashli-babbitt-capitol-siege-a15c7e52a04d932972b7a284c7a8f7df.
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51. *See id.*
52. Greg Wehner, *Ocean City Councilman's Comments Censured with 4-2 Vote*, Ocean City Today, Oct. 22, 2021.
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54. *Id.*
55. *See id.*
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Continued on page 38

Government Censure *cont'd from page 31*

Confrontation Over Vote, Pittsburgh Post-Gazette (Apr. 10, 2022, 7:15 PM), https://www.post-gazette.com/local/region/2022/04/08/allegheny-county-council-censure-member-confrontation-over-vote-denied-appointments/stories/202204080122. This story was first published on Apr. 8, 2022, 2:17 PM.
58. *Id.*
59. *See id.*
60. Julia Zenkevich, Allegheny County Council won't censure Councilor Tom Duerr, WESA (Apr. 13, 2022, 5:29 AM), https://www.wesa.fm/politics-government/2022-04-13/allegheny-county-council-wont-censure-member.
61. Michael Dimock & Richard Wike, America is Exceptional in The Nature of its Political Divide, Pew Research Center (Nov. 13, 2020), https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/.
62. *See id.*
63. *See id.*
64. *See id.*
65. *See id.*
66. Adam Liptak, *Are Censures of Politicians a Form of Free Speech or a Threat to It?* The New York Times, Aug. 31, 2021, at A11.
67. Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic,* 82 N.C. L. Rev. 1525, 1572 (2004).
68. *See Wilson, supra* note *3 at *5.*
69. *See id.*
70. *See id.*
71. Lauer, *supra* note 57.
72. Senator Chase's earlier conduct could likely be appropriately censured under this proposed framework.
74. This analysis is contingent only on the facts presented in this paper. There may be additional facts that this author is unaware of which could materially alter Step 2 of this analysis (for example, if she made comments explicitly praising white supremacist groups). It is this author's argument that simply making a general comment on one very complex public event is not sufficient to warrant a censure, especially during a time when the community is already in crisis.

Cases *cont'd from page 37*

overseen by a state board. Among other requirements imposed by the state, charter schools must design their educational programming to satisfy student performance standards adopted by the state board of education--a requirement not applicable to non-public schools. And in defining the nature of charter schools, North Carolina law expressly provides: "A charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located. All charter schools shall be accountable to the State Board for ensuring compliance with applicable laws and the provisions of their charters."

The majority concluded that a charter school cannot use that status to avoid regulations applicable to state actors:

> The statutory framework of the North Carolina charter school system compels the conclusion that the state has delegated to charter school operators like CDS part of the state's constitutional duty to provide free, universal elementary and secondary education. . . . Were we to adopt CDS' position, North Carolina could outsource its educational obligation to charter school operators, and later ignore blatant, unconstitutional discrimination committed by those schools. We need look no further than the shameful history of state-sponsored racial discrimination in this country to reject an application of the Equal Protection Clause that would allow North Carolina to abdicate its duty to treat public schoolchildren equally.

Thus, for purposes of Section 1983, CDS was acting under color of state law and was susceptible to an Equal Protection claim.

The court reached a different conclusion as to RBA, a for-profit management company, finding that North Carolina has not chosen to delegate its constitutional duty to provide free, universal elementary and secondary education to for-profit management companies like RBA. "To the contrary, RBA has no direct relationship with the state and is not a party to the charter agreement between CDS and North Carolina." The Circuit concluded that RBA's actions implementing the skirt requirement were not "fairly attributable" to the state.

Appeal - Equal Protection:

The plaintiffs had asserted that the skirt requirement failed heightened scrutiny, because CDS did not identify an important governmental interest that justifies the sex-based classification; instead, CDS had relied on gender stereotypes to support the skirts requirement, a plainly illegitimate justification under well-settled Supreme Court precedent. In response, CDS argued that "comprehensive sex-specific dress codes" do not violate the Equal Protection Clause when male and female students are subject to comparable burdens under the policy: the skirt requirement did not violate the Constitution because boys also were limited in dressing and grooming options, including prohibitions against long hair and wearing jewelry, which were applicable only to male students. And because its female students had achieved academic and extracurricular success, these students had not been "hobbled" by the skirt requirement.