The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation

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Introduction

[S]peech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” —Garrison v. Louisiana

Shortly after handing down its watershed decision in New York Times Co. v. Sullivan, the Supreme Court struck down Louisiana’s criminal libel statute as violating the First Amendment. In Garrison v. Louisiana, the Court overturned the conviction of a district attorney for criminal defamation after holding a press conference during which he attributed “a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations” of particular judges and mused about possible “racketeer influences on our eight vacation-minded judges.” Emphasizing the importance in a self-governing nation of free debate regarding public officials, the Court held that “only those false statements made with the high degree of awareness of their probable falsity demanded by New

2. Id. at 65–67.
York Times may be the subject of either civil or criminal sanctions.”3

After Garrison, the American Bar Association (ABA) expressly adopted the Sullivan standard in Model Rule of Professional Conduct (MRPC) 8.2 for regulating lawyer speech regarding the judiciary. Thus, the current regulatory regime for the vast majority of states merely prohibits lawyers from making a statement “that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.”4

Despite the ABA’s express recognition of the applicability of Garrison and Sullivan,5 the courts have not followed the ABA’s lead. Indeed, most state judiciaries have read the Sullivan standard out of the language of MRPC 8.2, interpreting it and other rules6 to punish speech that impugns the integrity of the judiciary without requiring a showing of knowledge of or reckless disregard to falsity. Illustrative is the standard set by the Supreme Court of Kentucky, which requires that attorney allegations of judicial “corruption or unethical conduct” be “supported by substantial competent evidence.”7 As noted by the Supreme Court of Missouri, “[m]any courts disregard a claim of [F]irst [A]mendment protection in disciplinary proceedings, holding that free speech does not give a lawyer the right openly to denigrate the court in the eyes of the public.”8 Not to be outdone, the Supreme Court of Florida has reaffirmed, post-Garrison, its “belief in the essentiality of the chastity of the goddess of justice,”9 which “demands condemnation and the application of appropriate penalties” for attorney speech that brings the judiciary into disrepute.10

Courts vary as to the appropriate sanctions for statements that impugn the integrity of the judiciary or bring it into disrepute. As one court noted, such conduct “invoke[s] punishment ranging from admonition to disbarment.”11 Indeed, attorneys have been admonished,12 reprimanded,13 suspended from the

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3. Id. at 74–75.
5. The drafters of the Model Rules intentionally incorporated the Sullivan standard. See id. R. 8.2 legal background at 206 (Proposed Final Draft 1981); see also infra note 123 and accompanying text.
6. Courts rely most prominently on MRPC 8.2 to punish attorney speech impugning judicial integrity, but also invoke various other sources of judicial authority including regulations requiring attorneys to treat the judiciary with respect, rules forbidding attorneys from engaging in conduct prejudicial to the administration of justice, the contempt power, local court rules, civility codes, and even an attorney’s oath administered upon admission to the bar.
8. In re Westfall, 808 S.W.2d 829, 833–34 (Mo. 1991) (citation omitted).
9. From a classical perspective, this would probably be Athena—who was a virgin goddess.
10. In re Shimek, 284 So. 2d 686, 690 (Fla. 1973) (per curiam).
11. In re Frerichs, 238 N.W.2d 764, 769–70 (Iowa 1976).
12. See id.
13. See, e.g., Notopoulos v. Statewide Grievance Comm., 890 A.2d 509, 511–12, 522 (Conn. 2006); In re Abbott, 925 A.2d 482, 484 (Del. 2007) (per curiam); Fla. Bar v. Ray, 797 So. 2d 556, 560 (Fla. 2001) (per curiam); Idaho State Bar v. Topp, 925 P.2d 1113, 1117 (Idaho 1996); In re McClellan, 754 N.E.2d 500, 502 (Ind. 2001); In re Reed, 716 N.E.2d 426, 428 (Ind. 1999) (per curiam); Comm. on Prof’l Ethics & Conduct of the Iowa State Bar Ass’n v. Horak, 292 N.W.2d 129, 130 (Iowa 1980); In re Arnold, 56 P.3d 259, 269 (Kan. 2002) (per curiam); Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165, 169
practice of law, 14 held in criminal contempt, 15 and disbarred. 16 In 2003, the Supreme Court of Ohio declared that “[u]nfounded attacks against the integrity of the judiciary require an actual suspension from the practice of law.”17 And other courts have affirmed that they are duty-bound to impose penalties for such statements. 18

In some contexts, the penalties for such speech have not fallen solely on

(Ky. 1980) (per curiam); In re Westfall, 808 S.W.2d at 839; In re Raggio, 487 P.2d 499, 501 (Nev. 1971) (per curiam); In re Holtzman, 577 N.E.2d 30, 32 (N.Y. 1991) (per curiam); In re Lacey, 283 N.W.2d 250, 253 (S.D. 1979); Anthony v. Va. State Bar, 621 S.E. 2d 121, 123, 127 (Va. 2005).

14. See, e.g., U.S. Dist. Court for the E. Dist. of Wash. v. Sandlin, 12 F.3d 861, 864, 868 (9th Cir. 1993) (six-month suspension for accusing judge of having edited transcript, when judge had in fact edited transcript, though not substantively); Stilley v. Supreme Court Comm. on Prof’l Conduct, 259 S.W.3d 395, 404–05 (Ark. 2007) (explaining that normally use of disrespectful language is not serious misconduct warranting suspension, but in this case the court’s striking of the attorney’s brief prejudiced a client, which is serious misconduct); Peters v. State Bar of Cal., 26 P.2d 19, 22 (Cal. 1993) (per curiam) (three-month suspension); Ramirez v. State Bar of Cal., 619 P.2d 399, 406 (Cal. 1980) (per curiam) (one-year suspension); In re Shimiek, 284 So. 2d 686, 690 (written apology accepted in lieu of twenty-day suspension); In re Wilkins, 777 N.E.2d 714, 719 (Ind. 2002) (per curiam) (thirty-day suspension for statement in footnote of brief), modified, 782 N.E.2d 985, 987 (Ind. 2003) (reducing sanction to reprimand); In re Atanga, 636 N.E.2d 1253, 1258 (Ind. 1994) (per curiam) (thirty-day suspension for calling judge racist after judge humiliated attorney by arresting him and having him represent his client in prison garb); In re Garringer, 626 N.E.2d 809, 813 (Ind. 1994) (sixty-day suspension); In re Becker, 620 N.E.2d 691, 694 (Ind. 1993) (per curiam) (thirty-day suspension); In re Glenn, 130 N.W.2d 672, 678 (Iowa 1964) (one-year suspension for circulating leaflet questioning suspicious series of events regarding criminal convictions); In re Pyle, 156 P.3d 1231, 1248 (Kan. 2007) (per curiam) (three-month suspension for statements made in letters to clients, friends, and family); Ky. Bar Ass’n v. Waller, 929 S.W.2d 181, 183 (Ky. 1996) (suspended for six months); In re Simon, 913 So. 2d 816, 827 (La. 2005) (per curiam); La. State Bar Ass’n v. Karst, 428 So. 2d 406, 411 (La. 1983); In re Graham, 453 N.W.2d 313, 325 (Minn. 1990) (per curiam) (sixty-day suspension); In re Glauberman, 152 A. 650, 652 (N.J. 1930) (one-year suspension); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 433 (Ohio 2003) (per curiam) (six-month suspension); Farmer v. Bd. of Prof’l Responsibility of the Supreme Court of Tenn., 660 S.W.2d 490, 492 (Tenn. 1983) (sixty-day suspension); Pilli v. Va. State Bar, 611 S.E.2d 389, 392 (Va. 2005) (90-day suspension); Bd. of Prof’l Responsibility, Wyo. State Bar v. Davidson, 205 P.3d 1008, 1010, 1018 (Wyo. 2009) (two-month suspension for statements made in court filing and for failure to timely file pleading); State Bd. of Law Exam’rs v. Spriggs, 155 P.2d 285, 292 (Wyo. 1945) (six-month suspension).

15. See, e.g., Waller, 929 S.W.2d 181 (sentenced to thirty days in jail for contempt, fined $499, and additionally disciplined and suspended for six months); see also Ex parte Friday, 32 P.2d 1117, 1118 (Cal. 1934); In re Pryor, 18 Kan. 72, 72 (1877).

16. See, e.g., In re Palmisano, 70 F.3d 483 (7th Cir. 1995); In re Evans, 801 F.2d 703, 708 (4th Cir. 1986) (disbarred from United States District Court for the District of Maryland); Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Ronwin, 557 N.W.2d 515, 523 (Iowa 1996); In re Meeker, 414 P.2d 862, 870 (N.M. 1966); see also In re Cobb, 838 N.E.2d 1197, 1202–09 (Mass. 2005) (involving many ethical violations in addition to impugning judicial integrity); In re Lacey, 283 N.W.2d at 253 (court said disbarment might be warranted but did not disbar because attorney was receiving award for fifty years of active practice at annual bar conference and was on deathbed).

17. Gardner, 793 N.E.2d at 433 (emphasis added).

18. Ramirez, 619 P.2d at 406 (“Appropriate discipline must be imposed, if for no other reason than the protection of the public and the preservation of respect for the courts and the legal profession.” (emphasis added)); In re McClellan, 754 N.E.2d 500; In re Reed, 716 N.E.2d at 428 (stating that court has “constitutional duty” to preserve adjudicatory system and punish); In re Atanga, 636 N.E.2d at 1257–58 (stating that it “must preserve integrity of the process and impose discipline” despite outrageous conduct of the judge).
attorneys. In 2007, the Utah Supreme Court in *Peters v. Pine Meadow Ranch Home Ass’n* struck the brief of the party represented by the offending attorney and summarily affirmed a lower court decision that the court acknowledged was both legally and factually erroneous.\(^\text{19}\) The lower court’s decision was erroneous in precisely the manner argued by the offending attorney, but the attorney made the fatal mistake of attributing nefarious motives to the lower court.\(^\text{20}\) In a subsequent decision in which an attorney argued that a criminal defendant had been denied due process because of a biased judge, the Utah Supreme Court cited *Peters* and “remind[ed] attorneys of the pitfalls that may accompany” such an argument.\(^\text{21}\) The court elaborated, “Any allegation that a trial judge became biased against a defendant should be supported by copious facts and record evidence” and “should be made in a reserved, respectful tone, shunning hyperbole and name-calling.”\(^\text{22}\)

The speech being sanctioned runs the gamut of criticism and derogation. In some cases, the statements have been as mild as accusing the judiciary of being result-oriented or politically motivated.\(^\text{23}\) At the other end of the spectrum are accusations of widespread judicial corruption and conspiracy.\(^\text{24}\) Rarely do attorneys resort to crude language or expletives.\(^\text{25}\) Rather, the best descriptor for the typical verbal excess by attorneys in these cases is rhetorical hyperbole.

Nor does the forum in which the speech is made appear to make much difference in terms of the standard applied or punishment imposed. Attorneys are punished for allegations in briefs and filings with courts,\(^\text{26}\) statements to the

\(^{19}\) Peters v. Pine Meadow Branch Home Ass’n, 151 P.3d 962, 963, 967–68 (Utah 2007).

\(^{20}\) See id. at 963 (explaining the factual and legal arguments that were raised on appeal and gave rise to the attorney’s accusations and stating as to each that “[t]he court of appeals did err” regarding the law and facts).


\(^{22}\) Id.

\(^{23}\) For example, in *Idaho State Bar v. Topp*, 925 P.2d 1113, 1115 (Idaho 1996), an attorney who attended a hearing (and who was not involved in the case) was reprimanded for opining to the press that the ultimate decision differed from a similar case because the judge in the first decision “wasn’t worried about the political ramifications.” His statement “necessarily implied that Judge Michaud based his decision on completely irrelevant and improper considerations” and thus “impugned his integrity.” *See id.* at 1117; *see also In re Reed*, 716 N.E.2d at 427; *In re Westfall*, 808 S.W.2d 829, 831 (Mo. 1991); *In re Raggio*, 487 P.2d 499, 500 (Nev. 1971) (per curiam).

\(^{24}\) In *Committee on Legal Ethics of the West Virginia State Bar v. Farber*, 408 S.E.2d 274, 284 (W. Va. 1991), the attorney accused a judge of being part of a secret Masonic plot to cover up the arson of a local establishment.


Attorneys have been punished for statements about the judiciary in briefs to the court even when the
press,\textsuperscript{27} letters to the judiciary,\textsuperscript{28} communications with an authority to complain about a judge,\textsuperscript{29} pamphlets or campaign literature,\textsuperscript{30} comments posted on blogs,\textsuperscript{31} and even correspondence with friends, family, and clients.\textsuperscript{32} Attorneys have been punished when the statements made could not have prejudiced or affected a pending proceeding\textsuperscript{33} and when the statements are made by attorneys

suit is filed against judges, and the question at issue is whether an exception to judicial immunity exists. See Ramirez v. State Bar of Cal., 619 P.2d 399, 406, 414 (Cal. 1980) (per curiam).

27. \textit{Topp}, 925 P.2d at 1115 (statements to press that implied judge’s decision was politically motivated); In re Reed, 716 N.E.2d at 427 (statements in interview with press); In re Atanga, 636 N.E.2d 1253, 1256 (Ind. 1994) (per curiam) (statements in interview for ACLU local newsletter); Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165, 166 (Ky. 1980) (per curiam) (statement to press criticizing judge for holding restraining order hearing ex parte); Ky. Bar Ass’n v. Nall, 599 S.W.2d 899, 899 (Ky. 1980) (per curiam) (statements in radio interview); Fieger, 719 N.W.2d 123 (statements on radio show); In re Westfall, 808 S.W.2d at 831 (statements to press criticizing appellate decision that had been released); In re Holtzman, 577 N.E.2d 30, 40–41 (N.Y. 1991) (per curiam) (letter sent to press criticizing judge’s treatment of sexual assault victim); In re Raggio, 487 P.2d at 500 (statements made in television interview criticizing decision of Nevada Supreme Court to have death penalty case reheard); In re Lacey, 283 N.W.2d 250, 251 (S.D. 1979) (statements to press criticizing state courts’ handling of the case after appellate decision received); Ramsey v. Bd. of Prof’l Responsibility of the Supreme Court of Tenn., 771 S.W.2d 116, 120–21 (Tenn. 1989) (statements to the press complaining about a judge and then the disciplinary process).

28. In re Evans, 801 F.2d 703, 703–04 (4th Cir. 1986) (letter sent to magistrate after case was on appeal and no longer before the magistrate or the district court); In re Guy, 756 A.2d 875, 877–78 (Del. 2000) (letter sent to judge); Fla. Bar v. Ray, 797 So. 2d 556, 557 (Fla. 2001) (per curiam) (three letters sent to chief immigration judge complaining about another immigration judge); In re Arnold, 56 P.3d 259, 263 (Kan. 2002) (per curiam) (disqualified attorney sent letter to judge).

29. U.S. Dist. Court for the E. Dist. of Wash. v. Sandlin, 12 F.3d 861, 863–64 (9th Cir. 1993) (statements made to FBI and appropriate authorities at U.S. Attorney’s office regarding judge’s editing of transcripts); Ray, 797 So. 2d at 560 (letter sent to chief immigration judge complaining about another immigration judge, which Ray and amici argued was “an accepted manner in which to seek redress when an attorney is having difficulties with an immigration judge”); In re Disciplinary Action Against Graham, 453 N.W.2d 313, 315, n.3 (Minn. 1990) (per curiam) (statements made in letter to U.S. Attorney, in judicial misconduct complaint, and in affidavit in support of motion to recuse, although court indicates that the charges were also released to the public).

30. See, e.g., In re Glenn, 130 N.W.2d 672, 674–75 (Iowa 1964) (leaflet circulated in community); In re Charges of Unprofessional Conduct Involving File No. 17139, 720 N.W.2d 807, 810 (Minn. 2006) (statement by judicial candidate’s campaign issued about incumbent judge).

31. See, e.g., Baldas, supra note 25 (reporting pending proceedings in various states regarding discipline for comments posted by lawyers on blogs, including a Florida attorney who is being disciplined for describing a judge on a blog as an “evil, unfair witch” with an “ugly condescending attitude”).


33. See, e.g., In re Glenn, 130 N.W.2d at 674–75 (pamphlet after cases decided with no appeal pending); In re Pyle, 156 P.3d 1231 (explanatory letter regarding earlier discipline sent to family, friends, and clients). There are several cases where statements are made to the press after an appellate decision has been handed down. See, e.g., Grievance Adm’r v. Fieger, 719 N.W.2d 123, 129 (Mich. 2006), cert. denied, 549 U.S. 1205 (2007); In re Westfall, 808 S.W.2d 829, 831 (Mo. 1991); In re Raggio, 487 P.2d 499, 500 (Nev. 1971) (per curiam); In re Lacey, 283 N.W.2d 250, 251 (S.D. 1979); see also In re Evans, 801 F.2d at 704–05, 708 (attorney disbarred from United States District Court after sending letter accusing magistrate of incompetence and pro-Jewish bias, where attorney waited to send letter until after district court had adopted magistrate’s ruling and Fourth Circuit had rejected summary reversal, although full disposition at the Fourth Circuit was still pending).
who are not engaged in a representative capacity before the criticized court. Indeed, this Article excludes cases in which the speech was made verbally in a courtroom during a court proceeding or in which the speech was made at a time or in a manner that could potentially influence a jury trial. Thus, the cases focused on involve scenarios in which the special interests of the government in preserving courtroom order or in ensuring a fair jury trial are not at issue.

The widespread decision of judiciaries to carve out an exception to Sullivan and Garrison for statements regarding themselves is nothing less than shocking. In the context of attorney discipline, courts act as judge and jury, and, where the speech regards the judiciary, the courts are also the victim. Yet courts abuse this position and impose extreme punishment on attorneys and their clients to preserve their own reputation and suppress further disparagement. Some courts even deny attorneys the defense of truth. In the twenty-first century, courts cite, as authoritative, cases decided before Sullivan and even cases predating the incorporation of the Bill of Rights. Ironically, the punishment and suppression of attorney speech is done in the name of preserving the public perception of judicial integrity—an interest that the Supreme Court has never recognized as valid despite its being proffered in other cases. Rather than address problems and improve integrity itself, courts have downplayed judicial abuses while punishing attorney speech aimed at exposing them. As shown, the cases are numerous and have enjoyed a recent resurgence.

Some courts have implicitly recognized a right of an attorney to criticize the judiciary after a case is no longer pending. See In re Cobb, 838 N.E.2d 1197, 1210 (Mass. 2005) (holding that the state has the power “to regulate the speech of an attorney representing clients in pending cases,” suggesting it does not once a case is no longer pending); In re Graham, 453 N.W.2d at 321 (stating that the First Amendment protects the ability to “criticize rulings of the court once litigation was complete or to criticize judicial conduct or even integrity” (emphasis added)).

34. Standing Comm. on Discipline for the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1437, 1440 (9th Cir. 1995) (initially suspended for one year for comment sent to Prentice Hall for publication in the Almanac of the Federal Judiciary suspension reversed by Ninth Circuit, but Ninth Circuit still rejected applicability of Sullivan standard); Idaho State Bar v. Topp, 925 P.2d 1113, 1115 (Idaho 1996); In re Pyle, 156 P.3d at 1233–34, 1248; Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165, 166 (Ky. 1980) (per curiam).

35. See infra note 236 and accompanying text.

36. See infra section II.A.2.

37. See infra section III.A.1.

38. See infra notes 167–73 and accompanying text.

39. See infra notes 238–50 and accompanying text.

40. See supra notes 11–16.

41. See, e.g., Stilley v. Supreme Court Comm. on Prof’l Conduct, 259 S.W.3d 395 (Ark. 2007); Notopoulos v. Statewide Grievance Comm., 890 A.2d 509 (Conn. 2006); In re Abbott, 925 A.2d 482 (Del. 2007) (per curiam); In re Guy, 756 A.2d 875 (Del. 2000); Fla. Bar v. Ray, 797 So. 2d 556 (Fla. 2001) (per curiam); In re Wilkins, 777 N.E.2d 714 (Ind. 2002) (per curiam), modified, 782 N.E.2d 985, 987 (Ind. 2003); In re McClellan, 754 N.E.2d 500 (Ind. 2001) (per curiam); Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71 (Iowa 2008); In re Pyle, 156 P.3d 1231 (Kan. 2007) (per curiam); In re Arnold, 56 P.3d 259 (Kan. 2002) (per curiam); In re Simon, 913 So. 2d 816 (La. 2005) (per curiam); In re Cobb, 838 N.E.2d 1197 (Mass. 2005); Grievance Adm’r v. Fieger, 719 N.W.2d 123 (Mich. 2006), cert. denied, 549 U.S. 1205 (2007); In re Charges of Unprofessional Conduct Involving File No. 17139, 720 N.W.2d 807 (Minn. 2006); In re Madison, No. SC 89654, 2009
W. Bradley Wendel has written one of the few in-depth doctrinal treatments of attorney speech in his widely cited article, *Free Speech for Lawyers*. However, Wendel does not address separately the problem of attorney speech critical of the judiciary. To the extent that he treats the problem, Wendel largely rejects the use of the *Sullivan* standard for lawyer speech, instead calling for analysis of "lawyer-speech cases under ordinary constitutional rules, such as those employed by the Supreme Court in *Snyder*, *Sawyer*, and *Gentile.*" As


42. Commentators have examined issues related to the question but failed to address—from a doctrinal position that takes into consideration the various forums where such speech is made—the constitutionality of restricting attorney speech that is critical of the judiciary. *See*, e.g., Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859 (1998) (arguing that *Sullivan*’s reckless disregard standard should apply for pretrial publicity); Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705 (2004) (discussing courtroom speech from a political theory perspective rather than a doctrinal view); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 FORDHAM L. REV. 569 (1998) (examining free speech issues regarding pretrial publicity to the press, solicitation, and advertising, but not addressing lawyer speech impugning judicial integrity).

Some law review articles have been written regarding a particular case where an attorney has been sanctioned. But these are in large part narrow discussions focusing on one decision or containing sparse analysis. *See*, e.g., Carol T. Rieger, *Lawyers’ Criticism of Judges: Is Freedom of Speech a Figure of Speech?*, 2 CONST. COMMENT. 69 (1985) (discussing the *Snyder* case, which was then on appeal); Elizabeth A. Bridge, Note, *Professional Responsibility and the First Amendment: Are Missouri Attorneys Free to Express their Views?*, 57 Mo. L. REV. 699 (1992); Angela Butcher & Scott MacBeth, Comment, *Lawyers’ Comments about Judges: A Balancing of Interests to Ensure a Sound Judiciary*, 17 GEO. J. LEGAL ETHICS 659 (2004); Richard A. McGuire, Comment, *How Far Can a Lawyer Go in Criticizing a Judge?*, 27 J. LEGAL PROF. 227 (2003); Caprice L. Roberts, Note, Standing Committee on Discipline v. Yagman: *Missing the Point of Ethical Restrictions on Attorney Criticism of the Judiciary?*, 54 WASH. & LEE L. REV. 817 (1997).

43. W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305 (2001). Wendel’s article has a number of useful analogies and explores various principles of constitutional law as they might apply to attorney speech but does not provide many concrete solutions to specific problems.

Terri Day recently published an article arguing that “[l]awyers should not be restricted from making critical statements about the judiciary when the statements are made out-of-court and in non-pending cases.” Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PROF. 161, 163 (2008) (emphasis added). Notably, my thesis is not limited to speech disassociated from ongoing judicial proceedings; rather, I argue that whenever the reason for punishing attorney speech is to protect judicial reputation, the *Sullivan* standard applies and attorney speech can be punished only if it is knowingly false or made with reckless disregard as to its truth. Further, while Day provides a short analysis of *Sullivan* and a few other First Amendment cases involving content-based restrictions, see id. at 180-87, she ultimately leaves the question of the appropriate analysis open. *Id.* at 187 (“Whether the Supreme Court would apply a defamation analysis or a strict scrutiny analysis to this type of case is unclear. Perhaps an analogy to public employee speech cases provides a third avenue of analysis.”). The problems with a public employee analogy are discussed *infra* note 357.

44. Wendel, *supra* note 43, at 427–31. Wendel seems to accept the argument that “the interests served by defamation law are different from those advanced by the law of professional discipline,” *id.* at 427–28, a premise explored and disputed *infra* section III.C. He also posits that using defamation case law in the attorney discipline context can “create[] undue complications.” *Id.* at 431.

shown below, these very cases have caused confusion and are used to support the misunderstanding that judiciaries can freely punish attorney speech—a proposition that Wendel does not ultimately support.46

This Article argues that the standard set forth in *Sullivan* and *Garrison* is the constitutional standard that must be employed to punish attorneys for speech impugning judicial integrity. Part I will show that attorney speech critical of the judiciary is core political speech entitled to the fullest protection offered by the Constitution and clearly falls within *Sullivan* and *Garrison*.

State and federal courts, nevertheless, have discarded the requirements of *Sullivan* in this context, usually citing the imperative interest in preserving the public perception of judicial integrity. Part II will explore why this interest cannot justify suppression of attorney speech and in fact is antithetical to democracy itself. Indeed, the interest in preserving judicial integrity, although asserted as the primary justification for suppressing speech, instead underscores why the speech rights of attorneys to criticize the judiciary must be preserved.

Courts have offered various rationales for disciplining attorneys who impugn judicial integrity, which are explored in Part III, primarily relying on the following arguments: (1) the Supreme Court has exempted attorney speech critical of the judiciary from the strictures of *Sullivan*; (2) the restrictions on attorney speech are a constitutional condition imposed on attorneys in return for granting attorneys the privilege of practicing law; and (3) the interests served by the tort of defamation are different from the interests served by imposition of attorney discipline. None of these rationales, however, withstand scrutiny, and ultimately they can neither remove attorney speech impugning judicial reputation from the requirements of *Sullivan* nor justify a prophylactic viewpoint-based prohibition on political speech.

Part IV briefly discusses the need for much greater regulatory and analytic precision in prohibiting attorney speech regarding the judiciary. Courts should not be punishing attorney speech solely to preserve judicial reputation—an interest that of itself cannot justify suppression of core political speech outside the requirements of *Sullivan* and *Garrison*. Significant state interests do exist that justify restrictions on attorney speech—even when that speech regards the judiciary. Narrow restrictions tailored to these state interests may be imposed constitutionally. Nonetheless, speech regarding the qualifications and integrity of members of the judiciary is essential for democracy to function properly and cannot be suppressed merely to protect judicial reputation.

**I. IMPUGNING JUDICIAL INTEGRITY IS CORE POLITICAL SPEECH**

**A. HISTORICAL AND THEORETICAL FOUNDATIONS OF THE FIRST AMENDMENT**

Speech critical of the judiciary falls within the central purposes and core

46. See, e.g., id. at 440 (stating that “even the most vitriolic criticism of judges” should be protected).
protection of the First Amendment. As Cass Sunstein has stated, “There can be
to insulate itself from criticism.”47 Historical rationales for the Speech Clause
include the American theory of democratic self-government, the rejection of
seditious libel, and the American view of sovereignty in the people rather than
in government officials. These purposes directly correlate to major academic
theories of Speech Clause protection48 and were the very theories relied upon
by the Sullivan and Garrison Courts in holding that speech critical of govern-
ment officials could not be punished absent knowledge of or reckless disregard
as to a statement’s falsity.49 An examination of these theories demonstrates that
allowing speech critical of the judiciary is an essential component of the
American system of government.

1. Self-Government

A major theory of the Speech Clause, initially propounded by Alexander
Meiklejohn, posits that the purpose of free speech is to provide the means
whereby the citizens of the United States can govern themselves. Thus, “[t]he
First Amendment does not protect a ‘freedom to speak.’ It protects the freedom
of those activities of thought and communication by which we ‘govern.’”50
Meiklejohn relies on the social contract created by the Constitution under which
“We, the People of the United States” established a government where all
citizens have the privilege and responsibility of participating in government and
all agree to abide by the laws created.51 Meiklejohn contends that speech

speech to reinforce representation and preserve democratic process); Alexander Meiklejohn, Free
Speech and Its Relation to Self-Government (1948) (basing theory for need for free speech on idea of
self-government); Vincent Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Foun-
d. J. 521 (1977) (arguing that checking value embodies the rejection of seditious libel and was the
primary purpose for the Speech Clause); Sunstein, supra note 47, at 257 (arguing that “the American
tradition of free expression” and its “extraordinary protection” for “political speech can well be
understood as an elaboration of the distinctive American understanding of sovereignty”).

There are free speech theories that are more restrictive than that of Sunstein or Meiklejohn, such as
the theory of Robert Bork. But even Bork recognizes that the Speech Clause must at least protect
political speech. See Robert Bork, Neutral Principles and Some First Amendment Problems, 47 Ind.
L.J. 1, 26–28 (1971). Similarly, theories that expand the purpose for free speech protection beyond
the realm of politics still protect political speech. Thus, theories based on personal autonomy, individual-
ism, or the marketplace of ideas would call for protection of speech critical of the judiciary.
49. See infra notes 97–99 and accompanying text.
50. Alexander Meiklejohn, The First Amendment Is Absolute, 1961 Sup. Ct. Rev. 245, 255; see also
id. at 252 (“The freedom that the First Amendment protects is not, then, an absence of regulation. It is
the presence of self-government.”).
51. MEIKLEJOHN, supra note 48, at 14–16.
relevant to self-government is absolutely protected by the First Amendment.\textsuperscript{52} Meiklejohn’s theory encompasses all speech relevant to the responsibilities that a self-governing people must undertake—such as obtaining information related to understanding political and social issues, passing judgment upon the activities of governmental officials, and discussing methods for solving concerns raised.\textsuperscript{54}

Speech regarding members of the judiciary or their decisions is patently relevant to self-governance. Thirty-nine states elect their judiciary either initially or through retention elections. A surprising twenty-two of those states popularly elect all members of their judiciary, another eleven states popularly elect trial court judges but appoint appellate court judges who are then subject to a retention election, and six states appoint the judiciary with a popular retention election.\textsuperscript{55} In order to vote with informed judgment, citizens should be free to make and obtain opinions and information regarding such candidates. Even as to appointed judges, the citizenry perform self-governance in selecting representatives responsible for appointing judges and can call upon those representatives to use their power to address concerns.

Meiklejohn’s theory has been extremely influential on the Supreme Court and

\begin{footnotes}
\footnote{52. See id. at 46 (explaining that “[s]o long as [a citizen’s] active words are those of participation in public discussion and public decision of matters of public policy, the freedom of those words may not be abridged”); see also Meiklejohn, supra note 50, at 257. Notably, Meiklejohn does not believe that all speech is absolutely protected by the Speech Clause, but only speech related to self-government. Meiklejohn expressly rejects that the First Amendment is “an unlimited license to talk” and contends that “there are many forms of communication which, since they are not being used as activities of governing, are wholly outside the scope of the First Amendment.” Id. at 258.}

\footnote{53. Meiklejohn’s theory would provide protection for all speech that helps “voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare” that assists self-government. See Meiklejohn, supra note 50, at 255. Thus, protection for such things as “[e]ducation, in all its phases,” as well as philosophic, scientific, literary, and artistic speech should be included within the protection of the Speech Clause. Id. at 256–57. Of course, at the core of self-government protection is “[p]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues.” Id. at 257.}

\footnote{54. Id. at 255.}

\footnote{55. Thus, in only eleven states and the District of Columbia is the general citizenry not responsible for voting on the selection or retention of judges. See American Judicature Society: Methods of Judicial Selection, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state (last visited Feb. 7, 2009). The twenty-two states that popularly elect their judiciary are: Alabama, Arkansas, Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Washington, West Virginia, and Wisconsin. See id. Of the eleven that popularly elect trial court judges while appointing appellate court judges who are then subject to a retention election, seven states elect all trial court judges (California, Florida, Indiana, New York, Oklahoma, South Dakota, and Tennessee), and four states popularly elect some of their trial court judges, with appointment and retention elections for other trial court judges (Arizona, Kansas, Maryland, and Missouri). See id. The six states that appoint all of their judges but subject them to a popular retention election are Alaska, Colorado, Iowa, Nebraska, Utah, and Wyoming. See id.; see also Republican Party of Minn. v. White, 536 U.S. 765, 790 (2002) (O’Connor, J., concurring).}
the academy.\footnote{56} Prior to \textit{Sullivan}, Meiklejohn contended that the First Amendment required constitutional protection for libel regarding governmental officials.\footnote{57} Indeed, commentators recognize that \textit{Sullivan} and \textit{Garrison} adopted—at least in part—Meiklejohn’s democratic theory of free speech.\footnote{58} However, the Supreme Court did not adopt Meiklejohn’s thesis to its full extent, as Meiklejohn, along with other commentators, argued that the First Amendment required absolute protection for statements regarding governmental officials\footnote{59}—a protection greater than that afforded by \textit{Sullivan}.\footnote{60}

Martin Redish and Abby Mollen recently wrote that at this point “[t]he assertion that democracy and free expression are inextricably intertwined in a symbiotic relationship should hardly be considered controversial.”\footnote{61} Redish and Mollen offer a democratic theory of the First Amendment that is broader than Meiklejohn’s theory\footnote{62} and that certainly would protect speech currently pun-

\footnotesize

\begin{itemize}
  \item \footnote{56}{See, e.g., Blasi, supra note 48, at 554 (stating that “[t]he most influential scholarly analysis of the First Amendment to be published since World War II is Professor Alexander Meiklejohn’s \textit{Free Speech and Its Relation to Self-Government}”).
  \item \footnote{57}{Meiklejohn, supra note 50, at 259.
  \item \footnote{58}{Shortly after Meiklejohn’s death, Justice Brennan, the author of both \textit{Sullivan} and \textit{Garrison}, noted that the language of those opinions “echoes” Meiklejohn’s formulation that the freedom the First Amendment protects is the presence of self-government. See William J. Brennan, Jr., \textit{The Supreme Court and the Meiklejohn Interpretation of the First Amendment}, 79 HARV. L. REV. 1, 18 (1965). Harry Kalven opined that “in its rhetoric and sweep, \textit{Sullivan} almost literally incorporated Alexander Meiklejohn’s thesis . . . .” See Harry Kalven, \textit{The New York Times Case: A Note on \textit{The Central Meaning of the First Amendment}}, 1964 SUP. CT. REV. 191, 209. Kalven reports that Meiklejohn said the \textit{Sullivan} opinion was “an occasion for dancing in the streets.” See id. at 221 n.125. See also Sunstein, supra note 47, at 269 (explaining that “observers often understand \textit{Sullivan} to reflect Alexander Meiklejohn’s conception of freedom of expression”). Nevertheless, Blasi argues that subsequent history demonstrates that the Court did not accept the entirety of Meiklejohn’s theory and that the checking value represents a truer understanding of the Speech Clause and provides a better rationale for protecting speech. See Blasi, supra note 48, at 575–76; infra section I.A.2 (explaining the checking value).
  \item \footnote{59}{See, e.g., MEIKLEJOHN, supra note 48, at 37, 46; Meiklejohn, supra note 50, at 257; see also Blasi, supra note 48, at 587 (concluding that “an absolute privilege for communications about official behavior” would be the more appropriate approach, particularly in light of the “self-censorship danger”); Paul A. LeBel, \textit{Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework}, 66 NEB. L. REV. 249, 290 (1987) (arguing that “absolute immunity” from liability is needed “for speech about government”).
  \item \footnote{60}{The concurring Justices in \textit{Sullivan} took Meiklejohn’s position that the First Amendment required absolute protection for speech regarding public officials. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 293 (Black, J., concurring) (arguing that the First Amendment “completely prohibit[s] a State from exercising such a power” and the “defendants had an absolute, unconditional constitutional right to publish . . . their criticisms”); id. at 298 (Goldberg, J., concurring) (stating that “the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct”).
  \item \footnote{61}{Martin H. Redish & Abby Marie Mollen, \textit{Understanding Post’s and Meiklejohn’s Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression}, 103 NW. U. L. REV. (forthcoming 2009) (manuscript at 1, on file with the Social Science Research Network).
  \item \footnote{62}{See id. at 4–26. Redish and Mollen ultimately contend:
  [ ]Individual autonomy is both practically necessary for collective autonomy to exist and theoretically necessary for the value of collective autonomy to make sense in the first place. As a result, we argue that the purpose of democracy is to guarantee each individual the equal
ished for impugning judicial integrity. Notably, Redish and Mollen contend that any democratic theory of the First Amendment “must prohibit the government from managing public opinion, whether by overt coercion or by the indirect manipulation that comes with forcing a people to be ignorant.”

Significantly, punishment of attorney speech that impugns judicial integrity manages public opinion through both means: it overtly coerces attorneys to utter only favorable opinions; and, by silencing the segment of society that has the training, education, and exposure to best offer criticism, it indirectly keeps the public ignorant of derogatory opinions of the judiciary.

2. The Checking Value

Vincent Blasi has argued that “the checking value” provides a more appropriate and compelling rationale for Sullivan than does Meiklejohn’s self-government theory. The checking value is “the value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials.” According to Blasi, the historical context of the Speech Clause demonstrates that the checking value “was uppermost in the minds of the persons who drafted and ratified the First Amendment.” Blasi further contends that the checking value remains a persuasive theoretical basis for interpreting what speech cannot be suppressed.

Blasi’s premises regarding the need for the checking value in our democratic society are compelling in the context of attorney speech critical of the judiciary. First, Blasi points out that “the abuse of official power is an especially serious evil” that relies for its correction on “the power of public opinion” to either retire officials or make other needed changes—complete with the ultimate threat of opportunity to affect the outcomes of collective decisionmaking according to her own values and interests as she understands them.

Id. (manuscript at 11). Robert Post also criticizes Meiklejohn for his view of democracy as not being broad enough and not taking into account individual autonomy. See Robert Post, Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse, 64 U. COLO. L. REV. 1109, 1111–19 (1993).

63. See Redish & Mollen, supra note 61 (manuscript at 3).

64. Blasi, supra note 48, at 527.

65. Id.; see also id. at 538 (“There can be no doubt, however, that one of the most important values attributed to a free press by eighteenth-century political thinkers was that of checking the inherent tendency of government officials to abuse the power entrusted to them. Insofar as the views prevalent at the time of adoption have relevance to contemporary interpretation, the checking value rests on a most impressive foundation.”).

66. Id. at 538. Blasi argues that official power is a particularly serious evil for several reasons, including that much human suffering “is caused by persons who hold public office.” Id. at 541. Thus, persons should “value free expression primarily for its modest capacity to mitigate the human suffering that other humans cause.” Id.

At a more universal level for government officials, Blasi explains that “because the investiture of public power represents a form of moral approval, public servants are probably more likely than those who wield private power to lose their humility and acquire an inflated sense of self-importance, often a critical first step on the road to misconduct,” and because they have been chosen by the people in an election or through appointment are received by the public with less skepticism than powerful private figures as “[w]e want to believe in the trustworthiness of our officials.” Id. at 540. Further, once public
of the power of the populace “to withdraw the minimal cooperation required for effective governance.”

Blasi acknowledges that the United States government already has a structural system of checks and balances whereby “[e]ach branch of government may impose specific sanctions against members of the other branches.” Nevertheless, Blasi observes that this system breaks “down in certain political contexts” and is reliant on public opinion to effectively operate. He explains that “the system of checks and balances usually functions only when an aroused populace demands that one segment of the government perform its checking function.”

Thus free speech not only provides a means whereby the populace can check official abuse, but also acts as a catalyst for the other branches of government to perform their checking functions.

As noted, most states elect or popularly retain their judiciaries. Thus, where speech regarding the judiciary is quelled, the public is denied its ability to learn of and check judicial power through voting. Where a judiciary is not elected or popularly retained, the checking value maintains its importance and perhaps is strengthened. The very lack of public power to directly check judicial power intensifies the need for free speech regarding wrongdoing or incompetence so the public can call upon other governmental powers to perform their checking functions.

Blasi explains that the checking value is additionally based on the “premise that the general populace must be the ultimate judge of the behavior of public officials” and must determine whether misconduct has occurred. It is for “the general populace” to “define norms for public officials.” The populace cannot determine whether misconduct has occurred or define norms if it is kept in ignorance about what is taking place. Further, in light of the size and complexity of modern government, a need exists for “critics capable of acquiring enough information to pass judgment on the actions of government.”

In the context of the judiciary, it is attorneys who have such knowledge. As Blasi notes, the “historical abhorrence of seditious libel” and the consequent creation of a political system with a free speech guarantee “stem[med] largely from the fact that [seditious libel] was used by tyrants to silence potentially influential
critics.” Notably, courts punishing attorneys for their speech have expressly acknowledged that a reason for such punishment is the influence that attorney views may have on public opinion regarding the judiciary. Indeed, there are some cases where attorneys are punished more harshly because of their excellent reputation and record—on the notion that views coming from reputable attorneys are more likely to be influential and thus are more dangerous.

Of course, the Speech Clause only came to implicate state action by virtue of its incorporation under the Fourteenth Amendment. At the time of the adoption of the Fourteenth Amendment, there was significant distrust of state governments (including state judiciaries) to protect and enforce individual rights. For example, in enacting legislation aimed at enforcing the Fourteenth Amendment, Congress found that “state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.” Thus, the historical context of the Fourteenth Amendment indicates the need to curb and check not solely state legislative and executive power, but also judicial power. Judiciaries were not considered, nor are they in reality, above abuse of power and, thus, should not be entitled to command respect through coercive law.

Finally, Blasi argues that the checking value provides a rationale for the...
Court’s concern in *New York Times Co. v. Sullivan*78 and subsequent cases79 with the severity of the punishment imposed for speech and not solely with the fact of punishment itself.80 Blasi contends the press (and citizens) “will be unable to provide a powerful check against the misuse of government power” if their examination of the government is “distorted by financial disincentives.”81 Speakers will engage in greater self-censorship to the extent they fear not merely liability, but “financially debilitating awards.”82

Certainly an exacerbated chilling effect from the possibility of excessive punishment is relevant in the context of attorney speech about the judiciary. A sizeable number of attorneys have not merely been disciplined, but have been suspended from the practice of law for having made statements impugning judicial integrity.83 The Supreme Court of Ohio has stated that actual suspension from the practice of law is a *mandatory* punishment for impugning judicial integrity.84 Although an attorney threatened with admonition or reprimand might risk punishment to make a statement about the judiciary that she felt was important (even if the statement turned out to prove incorrect), the attorney threatened with suspension from practice and loss of her livelihood will likely walk as far from the line of impugning judicial integrity as possible. Thus speech impugning the judiciary is not merely chilled, it is frozen by the severity of the sanction that courts have imposed—even for relatively minor statements.85

3. The Rejection of Seditious Libel

Related to the checking value, Harry Kalven contends, and interprets the *Sullivan* case as establishing, that “[t]he touchstone of the First Amendment has

78. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). In *Sullivan*, the trial court awarded a verdict of $500,000 against the *New York Times* for its technically inaccurate portrayal of civil rights abuses that occurred in the South in a paid advertisement. Further, three additional lawsuits by other southern officials were pending against the *New York Times* for the same ad—they sought an additional $2 million in damages. See id. at 278 n.18. Harry Kalven argues that the extent of liability was an additional rationale for the *Sullivan* decision. See Kalven, *supra* note 58, at 200.

79. Blasi primarily cites the Court’s decisions in *Rosenbloom v. Metromedia*, 403 U.S. 29, 61 (1971), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 387 (1974), as cases in which the Court emphasized “the danger of excessive damage awards.” Blasi, *supra* note 48, at 576. But Blasi also contends that in *Sullivan* itself “the size of the award . . . undoubtedly had much to do with the Court’s initial perception that defamatory speech should no longer be considered outside the ambit of First Amendment protection.” *Id.* at 579.


81. *Id.* at 577.

82. *Id.* at 588.

83. See *supra* note 14 (citing cases where attorneys were suspended from the practice of law).


85. See, e.g., U.S. Dist. Court for the E. Dist. of Wash. v. Sandlin, 12 F.3d 861, 867–68 (9th Cir. 1993). In *Sandlin*, the Ninth Circuit upheld a six-month suspension from the practice of law for accusations made by Sandlin in confidence to authorities that a judge was editing the transcripts of court proceedings. Sandlin was found to have impugned judicial integrity even though on investigation from those authorities, the judge did edit his transcript because the judge only made clerical rather than substantive changes. *Id.*
become the abolition of seditious libel and what that implies about the function of free speech on public issues in American democracy.”

According to Kalven, it is not sufficient to merely have “leeway for criticism of the government”; rather, “defamation of the government is an impossible notion for a democracy” because “[p]olitical freedom ends when government can use its power and its courts to silence its critics.”

Kalven argues that speech critical of the government constitutes “a core of protection of speech without which democracy cannot function.”

4. The American Conception of Sovereignty

Commentators, including Meiklejohn and Sunstein, have noted the importance of the American view of sovereignty in the protection of speech. Sunstein posited that “the American tradition of free expression” and its “extraordinary protection” for “political speech can well be understood as an elaboration of the distinctive American understanding of sovereignty.”

Meiklejohn eloquently explained that “[a]ll constitutional authority to govern the people of the United States belongs to the people themselves, acting as members of a corporate body politic.”

Through the Constitution, the people have delegated “specific and limited powers” to “subordinate agencies, such as the legislature, the executive, [and] the judiciary.”

Yet, “[t]he people do not delegate all their sovereign powers.”

Consequently:

Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unbridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power.

The idea that the people maintain sovereignty and power over governmental action has significant implications for the restriction of speech regarding the judiciary. If the criticized arm of government has ultimate power to punish speech regarding itself, the people have lost their sovereign power over that

86. Kalven, supra note 58, at 209.
87. Id. at 205.
88. Id. at 208. Kalven further explains:

This is not the whole meaning of the Amendment. There are other freedoms protected by it. But at the center there is no doubt what speech is being protected and no doubt why it is being protected. The theory of the freedom of speech clause was put right side up for the first time.

Id.
89. Sunstein, supra note 47, at 257.
90. Meiklejohn, supra note 50, at 253.
91. Id. at 254.
92. Id.
93. Id. at 257 (emphasis added).
branch of government.\textsuperscript{94} Further, as Sunstein points out, “[r]estrictions on political speech have the distinctive feature of impairing the ordinary channels for political change” and thus “are especially dangerous.”\textsuperscript{95} For “if the government forecloses political argument, the democratic corrective is unavailable,”\textsuperscript{96} and the people cease to have their sovereign control over their agents: the government.

B. THE SUPREME COURT, CORE SPEECH, AND OFFICIAL REPUTATION

The academic theories outlined above comprise the central rationales offered by the Supreme Court in \textit{Sullivan} and \textit{Garrison} for categorically protecting speech regarding government officials unless it is knowingly false or made with reckless disregard as to falsity. Namely, the Court relied on the concept of democratic self-government requiring “uninhibited, robust, and wide-open” debate on public issues,\textsuperscript{97} the rejection of seditious libel and the need to check abuse of power,\textsuperscript{98} and the American model of sovereignty in the people.\textsuperscript{99}

The \textit{Sullivan} Court,\textsuperscript{100} in light of the history and purposes of the First and Fourteenth Amendments outlined above, “eschewed silence coerced by law— the argument of force in its worst form”\textsuperscript{101} and denied governmental power to impose “any kind of authoritative selection” in public debate regarding government officials.\textsuperscript{102} The Court instead concluded that “the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and

\textsuperscript{94} Sunstein also points out that government is most likely to be biased in regulating speech when the speech is directed at government itself. See Sunstein, \textit{supra} note 47, at 305–06.

\textsuperscript{95} Id. at 306.

\textsuperscript{96} Id.

\textsuperscript{97} See Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) (explaining that “speech concerning public affairs is more than self-expression; it is the essence of self-government” (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

\textsuperscript{98} See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273–76 (1964) (reviewing the history of the Sedition Act of 1798 and ultimately concluding that it was unconstitutional as violative of the First Amendment).

\textsuperscript{99} See id. at 274–75. The Court, citing James Madison, reiterated that it is the people who possess the ultimate sovereignty and not the government. Id. at 274. Moreover, the American form of government “dispersed power in reflection of the people’s distrust of concentrated power, and of power itself at all levels.” Id.

\textsuperscript{100} \textit{Sullivan} involved a libel judgment of $500,000 against the \textit{New York Times} for publishing a paid advertisement soliciting donations to help with the civil rights movement in the South. The ad recited various events that occurred in the South, including in Montgomery, Alabama, but was inaccurate in its descriptions. Sullivan was the Montgomery Commissioner and supervised the police. He claimed the ad, which did not name him at all, would be read as imputing abuses to him because at a few points it referred to abuses committed by the police. Because of the inaccuracies in the ad, Sullivan prevailed on his libel claim, even though most of the inaccuracies were seemingly trivial. For example, they arrested Martin Luther King, Jr. only four times rather than seven; students were expelled for demanding service at a lunch counter and not for leading a demonstration at the capitol; and the police did not literally “ring” the campus but were deployed near the campus en masse on three occasions. \textit{See id.} at 256–59.

\textsuperscript{101} Id. at 270 (quoting Whitney v. California, 274 U.S. 357, 376 (1926) (Brandeis, J., concurring)).

\textsuperscript{102} See id. (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).
that the fitting remedy for evil counsels is good ones.”

The Court recognized that “erroneous statement is inevitable in free debate” and so “must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’” Thus, while truth could never form the basis of liability or punishment, even false statements deserved some constitutional protection. Consequently, a government official could not recover for libel unless he showed that the statements were false and that the speaker knew they were false or made the statements with reckless disregard as to their falsity—even for “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” The Garrison Court extended this ruling to criminal defamation and expressly stated that “only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions.”

It would thus seem obvious that punishment of attorney speech impugning judicial integrity would fall squarely within the Sullivan and Garrison rules. Indeed, both cases expressly contemplate their applicability to statements regarding the judiciary. In Sullivan, the Court noted that the judiciary cannot protect its reputation through contempt citations—even if the statements contain “half-truths” and “misinformation.” The Court surmised, “If judges are to be treated as ‘men of fortitude, able to thrive in a hardy climate,’ surely the same must be true of other government officials.” Further, Garrison directly involved speech by an attorney accusing judges of incompetence, laziness, and possible racketeer influences. Nevertheless, the Garrison Court adopted the Sullivan standard. There is no basis in the language or rationale from Sullivan or Garrison that would exempt from their strictures attorney speech critical of the judiciary.

Moreover, by definition, speech that is punished because it impugns the integrity of a particular judge (or the judiciary as a whole) is what the Supreme Court has classified as core First Amendment speech—thus requiring strict scrutiny even outside the context of Sullivan. As the Court has recognized, “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment

103. Id.
104. Id. at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).
105. Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (“Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.”).
106. Sullivan, 376 U.S. at 270.
108. Sullivan, 376 U.S. at 272–73 (quoting Pennekamp v. Florida, 328 U.S. 331 (1946)).
109. Id. at 273 (citation omitted).
111. Id. at 74–75, 77.
was to protect the free discussion of governmental affairs.'”

The Supreme Court has repeatedly recognized core constitutional protection for speech about the judiciary. In *Landmark Communications, Inc. v. Virginia*, the Supreme Court found unconstitutional a statute that criminalized reports (truthful or not) regarding the proceedings of the Virginia Judicial Inquiry and Review Commission. Virginia argued that the statute served interests of protecting the personal reputation of judges where complaints were unwarranted and protected “confidence in the judiciary as an institution.” The Court held that the speech was core political speech, and although judges traditionally “will not respond to public commentary, the law gives ‘[j]udges as persons, or courts as institutions . . . no greater immunity from criticism . . . than other persons or institutions.”’ The Court explained that “[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern” and the speech at issue “served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect.”

Similarly, in *Republican Party of Minnesota v. White*, the Court applied strict scrutiny in striking down as unconstitutional Minnesota’s “announce clause,” which prohibited judges and attorneys running for judicial office from announcing “views on disputed legal or political issues.” The Court categorized the speech as being “at the core of our First Amendment freedoms—speech about the qualifications of candidates for public office.” In like manner, speech about judicial qualifications and integrity would necessarily be such political speech “at the core of our First Amendment freedoms.” As Justice

114. *Id.* at 830, 841–42.
115. *Id.* at 835. The state offered another justification, namely that judges will voluntarily retire in the face of complaints warranting suspension or removal if it will spare them publicity of the charges. Indeed, the Court noted that in California “not less than two or three judges a year have either retired or resigned voluntarily, rather than confront the particular charges that are made,” which closes such cases “without any public furor, or without any harm done to the judiciary.” *Id.* at 836 & n.7. This idea is fascinating as it relates to the other justification offered in *Landmark Communications*, that of preserving the public’s “confidence in the judiciary as an institution.” *Id.* at 835. Public confidence in the judiciary is maintained by keeping the public ignorant of charges levied against the judiciary, and apparently valid charges were being brought somewhat frequently if at least two to three judges in the state of California alone were voluntarily resigning each year rather than face charges—again underscoring that the judiciary is not somehow immune from, as Blasi states, “the inherent tendency of government officials to abuse the power entrusted to them.” Blasi, supra note 48, at 538.

Another interest asserted by the state in *Landmark Communications* was protecting the citizens who filed complaints from “possible retaliation or recrimination.” *Landmark Commc’ns, Inc.*, 435 U.S. at 835. This interest is not relevant to the issue of attorney discipline for statements regarding the judiciary; when an attorney is disciplined, her identity obviously was not confidential.

116. *Id.* at 839 (quoting *Bridges v. California*, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting)) (emphasis added).
117. *Id.* (emphasis added).
119. *Id.* at 788.
120. *Id.* at 774 (footnote omitted).
O’Connor noted, “39 states currently employ some form of judicial elections,”\(^{121}\) and of course, “[i]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages.”\(^{122}\)

C. TREATMENT OF ATTORNEY SPEECH IMPUGNING JUDICIAL INTEGRITY

1. Rejecting the *Sullivan* Standard

One of the most jarring aspects of the cases on attorney speech impugning judicial integrity is the near universal rejection by state courts of the *Sullivan* standard. This divergence is particularly surprising because generally the authority applied is MRPC 8.2, which expressly adopts the *Sullivan* standard. Moreover, the drafters of the Model Rules intentionally incorporated the *Sullivan* standard. In the proposed final draft of the current language for 8.2, the drafters cited both *Sullivan* and *Garrison* and explained that “[t]he Supreme Court has held that false statements about public officials may be punished only if the speaker acts with knowledge that the statement is ‘false or with reckless disregard of whether it is false or not’” and that “Rule 8.2 is consistent with that limitation.”\(^{123}\)

Nevertheless, most courts have rejected the *Sullivan* standard in favor of an objective reasonableness standard. Some courts have even determined that MRPC 8.2 is a constitutional restriction on speech because its express language adopts the standard set forth in *Sullivan* and *Garrison* and then proceeded to interpret the rule as creating an objective “reasonableness” standard—the very standard that *Garrison* rejected as unconstitutional.\(^{124}\) Indeed, the 2007 edition of the Annotated Model Rules of Professional Conduct, in contrast to earlier editions,\(^{125}\) appears to embrace, and thus proliferate, this approach.\(^{126}\)

\(^{121}\) *Id.* at 790 (O’Connor, J., concurring); *see also* American Judicature Society, supra note 55.

\(^{122}\) N.Y. Times Co. v. Sullivan, 376 U.S. 254, 281 (1964) (quoting Coleman v. MacLennan, 78 Kan. 711, 724 (1908)).

\(^{123}\) *See* MODEL RULES OF PROF’L CONDUCT R. 8.2 legal background at 206 (Proposed Final Draft 1981). The drafters also state that “[t]he critical factors in constitutional analysis are the statement’s falsity and the individual’s knowledge concerning its falsity at the time of the utterance,” again citing *Garrison*, *Id.*

\(^{124}\) *See, e.g.*, Fla. Bar v. Ray, 797 So. 2d 556, 558–59 (Fla. 2001) (per curiam); *In re Simon*, 913 So. 2d 816, 824 (La. 2005) (per curiam); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 431 (Ohio 2003) (per curiam). The Supreme Court of Louisiana explained that “[b]ecause this rule [8.2] proscribes only statements which the lawyer knows to be false or which the lawyer makes with reckless disregard for the truth, it compels with the First Amendment’s guarantee of free speech” and cites *Garrison* as support for that conclusion. *See In re Simon*, 913 So. 2d at 824. However, the court then adopts “an objective standard,” punishing the speech at issue unless “a reasonable attorney would believe in the truth of the allegations.” *Id.* As explained *infra* notes 128–31 and accompanying text, *Garrison* expressly rejected an objective standard based on the reasonable person. It seems incredible that courts rely on *Garrison* to establish the constitutionality of Rule 8.2 as written and then interpret Rule 8.2 as creating the very standard that *Garrison* rejected as unconstitutional.

\(^{125}\) The Annotated Model Rules of Professional Conduct for 1984 and 2003 state that Rule 8.2 incorporates the *Sullivan* and *Garrison* standard. *See ANN. MODEL RULES OF PROF’L CONDUCT R. 8.2*
The *Sullivan* standard for determining whether a statement is made with reckless disregard as to truth or falsity has been extensively litigated and is determined by examining the speaker’s *subjective* intent, which requires “that the defendant *in fact entertained serious doubts* as to the truth of his publication.”

Indeed, an objective standard—what a reasonable person would believe was true or false—has been repeatedly rejected, beginning in *Garrison*.

As noted above, *Garrison* involved accusations of incompetence, laziness, and possible racketeer influence as to certain judges. Louisiana convicted Garrison of criminal libel because his statement was “not made in the *reasonable belief* of its truth,” on the theory that it was “inconceivable” that he “had a reasonable belief . . . that not one but all eight of these Judges . . . were guilty of what he charged them with.”

The Supreme Court’s response is direct:

This is not a holding applying the *New York Times* test. The reasonable-belief standard applied by the trial judge is not the same as the reckless-disregard-of-truth standard. According to the trial court’s opinion, a reasonable belief is one which “an ordinarily prudent man might be able to assign a just and fair reason for”; the suggestion is that under this test the immunity from criminal responsibility . . . disappears on proof that the exercise of ordinary care would have revealed that the statement was false. The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth.

In *St. Amant v. Thompson*, the Court reaffirmed that *Garrison* made it “clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.”

Despite *Garrison*’s unambiguous rejection of a reasonableness standard in the precise context of attorney speech impugning judicial integrity, state courts have almost
universally disciplined attorneys under a reasonableness standard.131

The objective standard adopted by the states comes in two basic variants. Some courts focus on “whether the attorney had an objectively reasonable factual basis for making the statements.”132 Other courts examine “what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.”133 Some courts combine these tests,134 or do not expressly adopt either, while rejecting the subjective Sullivan test.135

The two approaches are not necessarily the same, although both are termed the “objective standard” by courts. For example, an attorney could arguably have a reasonable basis in fact for saying something, and yet a reasonable attorney in light of all of his functions and duties would still refrain from saying it. Indeed, in Idaho State Bar v. Topp,136 a part-time county attorney attended a politically sensitive hearing (but was not involved in the case) about a proposed county expenditure of $4.1 million. After the hearing, he was asked by the press to comment on the court’s decision as compared to a similar issue that had been decided a different way by another judge. Topp responded that he thought the other judge “wasn’t worried about the political ramifications.”137 Topp was publicly reprimanded for violating MRPC 8.2 because the “statement necessarily implied that Judge Michaud based his decision on completely irrelevant and improper considerations” and thus “impugned his integrity.”138 At his disciplinary hearing, Topp brought forth three pieces of evidence that supported his

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131. The exceptions are cases where the court did not reach the question of whether a subjective or objective standard applied. See In re Green, 11 P.3d 1078, 1086 n.7 (Colo. 2000) (per curiam); State ex rel. Okla. Bar Ass’n v. Porter, 766 P.2d 958, 969 (Okla. 1988).

132. Fla. Bar Ass’n v. Ray, 797 So. 2d 556, 559 (Fla. 2001) (per curiam); see also In re Cobb, 838 N.E.2d 1197, 1214 (Mass. 2005).

133. In re Graham, 453 N.W.2d 313, 322 (Minn. 1990); see Idaho State Bar v. Topp, 925 P.2d 1113, 1116 (Idaho 1996); In re Simon, 913 So. 2d 816, 824 (La. 2005) (per curiam); In re Westfall, 808 S.W.2d 829, 837 (Mo. 1991); In re Holtzman, 577 N.E.2d 30, 34 (N.Y. 1991) (per curiam); see also Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165, 166, 168 (Ky. 1980) (per curiam) (discussing what Heleringer, as a practicing attorney, “knew or should have known”).

134. See, e.g, Standing Comm. on Discipline for the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1437 (9th Cir. 1995) (speaking of both what a “reasonable attorney” would do and whether there was “a reasonable factual basis”); Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71, 84 (Iowa 2008) (examining whether “reasonable attorney” would make statement and determining that attorney “did not have an objectively reasonable basis for his statement”); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 431 (Ohio 2003) (per curiam) (looking at “what the reasonable attorney, considered in light of all his professional functions, would do in the same or in similar circumstances’ . . . [and] focus[ing] on whether the attorney had a reasonable factual basis” (citation omitted)); Bd. of Prof’l Responsibility, Wyo. State Bar v. Davidson, 205 P.3d 1008, 1014 (2009) (stating that “the attorney must have had an objectively reasonable basis for making the statements” and that “the standard is whether a reasonable attorney would have made the statements, under the circumstances” (internal quotation marks and citations omitted)).

135. See, e.g, In re Terry, 394 N.E.2d 94, 95 (Ind. 1979) (per curiam) (rejecting standard from libel case as applicable in the context of attorney discipline); Grievance Adm’r v. Fieger, 719 N.W. 2d 123, 141 (Mich. 2006), cert. denied, 549 U.S. 1205 (2007).

136. Topp, 925 P.2d 1113.

137. Id. at 1115.

138. Id. at 1117.
statement, but the court rejected them, summarily concluding that “a reasonable attorney, in considering these facts, would not have made the statement in question.”

Notably, the Topp decision is typical in that the court and disciplinary authority garnered no evidence, standards, or testimony as to what a reasonable attorney would do or say in such a circumstance (indeed, I have yet to read such a case). The assumption in these cases appears to be either (1) that judges themselves, often former attorneys, are competent to decide summarily what a reasonable attorney would or would not say; or (2) that a reasonable attorney would never impugn the dignity of a court without significant evidence of misconduct. The second idea is supported by a 2003 Ohio Supreme Court decision where the court held that objective reckless disregard (an oxymoron) could be found because Ethical Consideration 8-6, under the Code of Professional Conduct, “admonishes attorneys to ‘be certain’ that their criticism [of judges] has merit.” Thus, failure to investigate and “be certain” demonstrates failure to live up to the attorney standard. The same logic could extend to incorporate an attorney oath to maintain the respect due the judiciary or a civility code: reasonable attorneys are respectful to courts unless they have (substantial) evidence of serious misconduct. So if an attorney makes derogatory statements without substantial evidence then she has failed to act as a reasonable attorney.

The “reasonable basis in fact” standard also is not applied in a manner consistent with typical evaluations of that standard. In most contexts, such as Federal Rule of Civil Procedure (FRCP) 11 or MRPC 3.1, a reasonable basis in fact sets a very low threshold of proof. Indeed, federal appellate courts interpreting FRCP 11 allow a reasonable basis in fact to be shown even though evidence is weak, and, of course, allow reliance on circumstantial evidence. Indeed, sanctions are not warranted “unless a particular allegation is

139. Specifically, Topp pointed to the following facts: (1) there had been “a political frenzy” in the county on the issue, of which the judge certainly was aware; (2) the judge rendered an oral decision “immediately after the close of argument” and released a written decision “within minutes” of the end of the hearing, which Topp thought supported “an inference that the case was decided prior to argument and that Judge Michaud was concerned with disseminating that decision to the public quickly”; and (3) “another district judge in a similar case had reached a different decision.” Id. at 1114, 1117.

140. Id. at 1117.

141. Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 432 (Ohio 2003) (per curiam) (quoting MODEL CODE OF PROF’L RESPONSIBILITY EC 8-6 (1980)). At the time, Ohio used the Model Code of Professional Conduct, which is split into Canons, Ethical Considerations, and Disciplinary Rules. The Ethical Considerations “are aspirational in character and represent the objectives toward which every member of the profession should strive,” while the “Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character and subject lawyers to “disciplinary action.” See MODEL CODE OF PROF’L RESPONSIBILITY, Preliminary Statement (1980).

142. Gardner, 793 N.E.2d at 432 (internal quotations omitted).


utterly lacking in support” or is made in “deliberate indifference to obvious facts.” Further, “Rule 11 neither penalizes overstatement nor authorizes an overly literal reading of each factual statement.” In contrast, courts applying the reasonable basis standard to statements regarding the judiciary have required that the statements be supported by “copious facts” and eschew circumstantial evidence or anything less than direct proof of the assertions. Further, courts have taken an extremely literal (and sometimes exaggerated) reading of statements regarding the judiciary.

148. Baker, 158 F.3d at 524 (internal quotations omitted).
150. State v. Santana-Ruiz, 167 P.3d 1038, 1044 (Utah 2007); see also Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165 (Ky. 1980) (per curiam).
151. See, e.g., In re Wilkins, 777 N.E.2d 714, 716–17 (Ind. 2002) (per curiam), modified, 782 N.E.2d 985, 987 (Ind. 2003). Wilkins signed a petition to transfer filed with the Indiana Supreme Court that stated in a footnote that the lower court’s decision was “so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee . . . and then said whatever was necessary to reach that conclusion . . . .” See id. at 715–16 n.2. At the disciplinary hearing, Wilkins brought in support of his statement evidence regarding the facts and law that the Court of Appeals had ignored or mistrusted. See id. at 716. The Court concluded, nevertheless, that Wilkins “offered no evidence to support his contentions that, for example, the Court of Appeals was determined to find for appellee, no matter what.” See id. at 717. The Court apparently wanted Wilkins to bring direct evidence of the motive of the court, rather than relying on circumstantial evidence. Similar scenarios occurred in In re Glenn, 130 N.W.2d 672 (Iowa 1964), and Peters v. Pine Meadow Ranch Home Ass’n, 151 P.3d 962 (Utah 2007).
152. See, e.g., U.S. Dist. Court for the E. Dist. of Wash. v. Sandlin, 12 F.3d 861 (9th Cir. 1993). In Sandlin, the attorney had a reasonable, factual basis for his statements under an MRPC 3.1 or FRCP 11 standard when he accused the judge of substantively editing a transcript. Sandlin misremembered a statement from the judge about a witness that was not in the transcript. Sandlin’s “memory of the TRO hearing agreed with that of his wife, his client, and his former law clerk, all of whom were present at the hearing.” Id. at 867. Sandlin “took, and passed, two polygraph tests” regarding his memory of the hearing. Id. Further, the judge edited the transcript, which the court reporter told Sandlin, and Sandlin consulted experts who said that they could not determine whether the audio tape had been edited. See id. at 864. Certainly this is sufficient evidence to have satisfied MRPC 3.1 or FRCP 11. See supra notes 145–49 and accompanying text. Yet the court held that Sandlin did not have a “reasonable basis in fact” for his statement and thus suspension from the practice of law was warranted. See Sandlin, 12 F.3d at 867.
153. In re Westfall, 808 S.W.2d 829 (Mo. 1991), provides a striking example of construction of statements about the judiciary. Prosecutor Westfall made statements to the press about an appellate decision prohibiting him from pursuing a prosecution on the grounds of double jeopardy. Westfall stated in part that the decision did not follow the Supreme Court “for reasons that I find somewhat illogical, and I think even a little bit less than honest” and that the opinion “distorted the statute and . . . convoluted logic to arrive at a decision that [the judge] personally likes.” Id. at 831.
In disciplining Westfall and finding that he lacked evidence for the statement, the court rephrased his statement each time, claiming, for example, that Westfall “accused Judge Karohl of deliberate dishonesty” and of “purposefully ignoring the law to achieve his personal ends”—not as “an implication of carelessness or negligence but of a deliberate, dishonest, conscious design on the part of the judge to serve his own interests.” Id. at 838. The dissent (in addition to pointing out that the majority’s construction was not even grammatically plausible as the phrase “a little bit less than honest” grammatically refers to “the reasons, not the judge”) points out that the majority used “at least six unsupported paraphrases of the respondent’s actual words” to support its decision, each of which, “are the words of the writer [the court], not the words of” Westfall. See id. at 841 (Blackmar, J., dissenting).
2. Placing the Burden of Proof on Attorneys and Presuming Falsity

Another major point of departure from *Sullivan* and *Garrison* is the failure of courts to verify that the statements for which attorneys are punished are in fact false.154 This occurs in large part because many courts place the burden of proof on the disciplined attorney to bring forth evidence supporting his statement. Thus, in a number of cases, the court holds that the speech is punishable because the attorney failed to bring forth sufficient evidence to support his statement, and no further examination is made as to whether the statement is true or not.155

Additionally, some courts appear to presume falsity. Applying an objective standard, they examine whether the attorney had a reasonable basis in fact for making the statement or whether a reasonable attorney would make the statement. If the answer to either of those inquiries is no, the court assumes that the assertion was therefore false.156 In a few extreme examples, courts have denied the attorney the opportunity to prove that the statement was true.157

Westfall claimed that what he meant was that “the court of appeals opinion was ‘intellectually dishonest.’” *Id.* at 833.

*See also In re Frerichs,* 238 N.W.2d 764, 767 (Iowa 1976) (construing attorney’s statement in petition for rehearing that court was “willfully avoiding the substantial constitutional issues” raised in this and two other cases to “alleg[e] commission of public offenses,” including a misdemeanor and a felony, and thus accusing the court of “sinister, deceitful and unlawful motives and purposes”).

154. *See, e.g.*, Anthony v. Va. State Bar, 621 S.E.2d 121, 125 (Va. 2005) (rejecting attorney’s argument that the state “had the burden of proving that his various statements concerning judges were in fact false”). Notably, a few courts do require that the disciplinary authority prove that the statement was false. *See* Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. *v.* Yagman, 55 F.3d 1430 (9th Cir. 1995); State *ex rel.* Okla. Bar Ass’n *v.* Porter, 766 P.2d 958 (Okla. 1988).

155. *See, e.g.*, *In re Wilkins,* 777 N.E.2d at 717 (noting that attorney “offered no evidence to support his contentions” regarding the motive of the court, even though Wilkins did bring circumstantial evidence); *In re Glenn,* 130 N.W.2d at 676 (stating that attorney “offered no evidence” supporting statements, although Glenn brought significant circumstantial evidence).

156. *See, e.g.*, *In re Wilkins,* 777 N.E.2d at 717 (failing to examine whether false, but relying on fact that attorney allegedly failed to bring forth sufficient evidence in support); *In re Westfall,* 808 S.W.2d at 838 (same); *In re Raggio,* 487 P.2d 499, 500–01 (Nev. 1971) (per curiam) (failing to examine whether or not statements false); Office of Disciplinary Counsel *v.* Gardner, 793 N.E.2d 425, 431 (Ohio 2003) (per curiam) (noting that attorney argued disciplinary authority must prove statement was false and made with reckless disregard, but holding that objective standard applies instead and finding that statement is punishable because reasonable attorney would not have made it); *Peters,* 151 P.3d at 963 (failing to examine whether false, but relying on fact that attorney, allegedly, failed to bring forth sufficient evidence in support); *Anthony,* 621 S. E. 2d at 125–26 (explaining that state need not prove falsity of statements, but must prove that “the statement was made with reckless disregard of its truth or falsity,” and finding this standard satisfied where attorney relied on anonymous telephone calls and anonymous letter).

At oral argument in the *Peters* case, an unidentified justice stated in question to the offending attorney: “Would you care to address the question about [sanctions] or is your answer simply that you were right. That’s what I hear you saying is . . . that your material is not inappropriate simply because it’s correct.” *Audio: Oral Argument Before the Utah Supreme Court (June 7, 2006), available at www.utcourts.gov/courts/supstreams/index.cgi?mon=2006 (emphasis added).*

157. *See, e.g.*, *In re Atanga,* 636 N.E.2d 1253, 1257 (Ind. 1994) (per curiam) (excluding from evidence as “irrelevant” attorney’s proffered witnesses to testify regarding judge’s racism); Ky. Bar
The Garrison Court maintained, “Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.” As the Court in Sullivan explained, the burden of proving truth should not be placed on the speaker because “would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.” Finally, the Sullivan Court held that such constitutional requirements could not be avoided by the creation of presumptions.

II. PRESERVING JUDICIAL INTEGRITY CANNOT JUSTIFY SUPPRESSION OF ATTORNEY SPEECH

The primary reason that courts impose serious sanctions for attorney speech impugning judicial integrity and reject the Sullivan standard is the belief that such measures are justified by “the state’s compelling interest in preserving public confidence in the judiciary.” The Supreme Court of Delaware ex-
pounded: “Adherence to the rule of law keeps America free. Public respect for the rule of law requires the public’s trust and confidence that our legal system is administered fairly . . . .” An attorney’s statement to the press regarding a court’s decision to hold a politically sensitive hearing ex parte was characterized as “chip[ping] away at public confidence in the integrity of the judicial system” and bringing “the judicial system into discredit in the public mind.” For “[e]very lawyer, worthy of respect, realizes that public confidence in our courts is the cornerstone of our governmental structure.” Finally, in oft-quoted language, the Supreme Court of Indiana stated that the Sullivan standard is inappropriate because attorneys who disparage the judiciary commit a “wrong . . . against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations.”

A close examination of the interest in preserving the public perception of judicial integrity and the assumptions underlying it paradoxically underscores the important reasons why attorney speech critical of the judiciary must be

courts and in their judges”); In re Holtzman, 577 N.E.2d 30, 34 (N.Y. 1991) (per curiam) (stating that “[i]n order to adequately protect the public interest and maintain the integrity of the judicial system, there must be an objective standard”); Gardner, 793 N.E.2d at 432 (citing the state’s compelling interest “to preserve public confidence in the fairness and impartiality of our system of justice” as supporting rejection of Sullivan standard for attorney discipline).

Notably, the alleged interest in preserving public confidence could not have been served by the discipline imposed in Ray because the communication was made in a private letter to the chief immigration judge pursuant to local practice for complaining about an immigration judge. See Ray, 797 So. 2d at 560. The public would never have known of the statements but for the filing of a disciplinary action against the attorney. This same disconnect between the interest asserted and the context of the speech occurs in several cases. See, e.g., Sandlin, 12 F.3d 861 (statements were made confidentially to authorities in FBI and U.S. Attorney’s office, who in turn were required to keep the information confidential, and insulted judge was the one who complained to the bar); In re Evans, 801 F.2d 703 (letter was sent solely to the insulted magistrate, who filed a grievance); cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 114 (2000) (explaining that “[b]ecause the purpose” of the rule “is to protect the public reputation of the judicial and public legal office, there is less reason for concern with statements made by a lawyer in private conversation” and, consequently, “[s]uch conversation is not included within the rule” (emphasis added)).

162. In re Abbott, 925 A.2d 482, 488 (Del. 2007) (per curiam); see also, In re Shimek, 284 So. 2d 686, 688 (Fla. 1973) (per curiam) (stating, post-Sullivan, that “[n]othing is more sacred to man and, particularly, to a member of the judiciary, than his integrity” and that “[o]nce the integrity of a judge is in doubt, the efficacy of his decisions are [sic] likely to be questioned”); In re Atanga, 636 N.E.2d at 1258 (positing that “the judicial institution is greatly impaired if attorneys choose to assault the integrity of the process and the individuals who are called upon to make decisions”).

163. Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980) (per curiam). Notably, the attorney’s comment that the ex parte hearing was “highly unethical and grossly unfair” was, at most, an overstatement. Id. at 166. Further, the attorney was not engaged in the underlying case, but worked for Right to Life and was politically interested in the outcome. Id.

164. Id. at 169.

165. In re Terry, 394 N.E.2d 94, 95 (Ind. 1979) (per curiam); In re Cobb, 838 N.E.2d at 1213 (same, quoting In re Terry); In re Graham, 453 N.W.2d at 322 (same, quoting In re Terry); In re Holtzman, 577 N.E.2d at 34 (same, quoting In re Terry); Bd. of Prof’l Responsibility, Wyo. State Bar v. Davidson, 205 P.3d 1008, 1015–16 (Wyo. 2009) (same, quoting In re Terry).
protected, rather than demonstrating that such speech should be suppressed. Indeed, the Supreme Court has already addressed the validity of this interest in other related contexts. In *Bridges v. California*, the Court analyzed the validity of a California court’s contempt citation against a newspaper and a non-attorney individual for publications made regarding a pending case. One of the justifications proffered by California was the possibility that the publications might create disrespect for the judiciary. The Court gave that interest precisely zero weight. The Court eloquently explained:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Similarly, in *Landmark Communications, Inc. v. Virginia*, the State offered as justifications for its statute the interest in preserving unwarranted injury to reputation of individual judges as well as preserving the integrity of the entire judiciary in the eye of the public. Citing *Sullivan* and *Garrison*, the Supreme Court explained that Virginia had “an interest in protecting the good repute of its judges, like that of all other public officials,” but that such an interest was “an insufficient reason for repressing speech that would otherwise be free.” The Court then went further and explained that “the institutional reputation of the courts, is entitled to no greater weight in the constitutional scales” than the reputation of government officials. The Court concluded, “[S]peech cannot be punished when the purpose is simply to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed.”

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166. Wendel similarly posits: “[I]t is hardly clear that preserving respect for the bar and the judiciary counts as a state interest sufficiently important to justify restrictions on speech.” See Wendel, supra note 43, at 426.
168. *Id.* at 270–71.
169. *Id.*
171. *Id.* at 841–42 (emphasis added) (internal quotation marks omitted).
172. *Id.* at 842 (emphasis added).
173. *Id.* at 842 (emphasis added) (internal quotation marks omitted). This statement also contradicts the worshipful rhetoric of the Florida and Michigan Supreme Courts. See *In re Shimek*, 284 So. 2d 686, 690 (Fla. 1973) (per curiam) (reaffirming “the essentiality of the chastity of the goddess of justice”); *Grievance Adm’t r v. Fieger*, 719 N.W.2d 123, 144 (Mich. 2006) (stating that attorneys cannot denigrate courts, which “gave [the attorney] the high privilege, not as a matter of right, to be a priest at the altar of justice” (internal quotations omitted)), *cert. denied*, 549 U.S. 1205 (2007).
The Supreme Court’s flat denial of any validity in repressing speech solely to preserve the integrity of the judiciary in both *Landmark Communications, Inc.* and *Bridges* directly contradicts the core rationale for punishing attorney speech critical of the judiciary. Courts that impose discipline on attorneys often discount *Bridges* on the basis that it concerns speech by lay persons and the press. But *Bridges* is precisely on point as to the appropriate constitutional weight to be given the state’s interest in punishing and chilling speech as a method for maintaining public confidence in the judiciary.

Further, the rejection of *Bridges* and the other contempt cases as being irrelevant to the question of disciplining attorney speech partakes of historic irony. The constitutional standard eventually adopted in *Bridges* and the other contempt cases is adopted from earlier case law as to the appropriate scope of the federal contempt statute. Notably, that contempt statute was adopted in response to, and in order to curtail future instances of, punishment of an attorney for criticizing the decision of a court. In 1831, James H. Peck, a United States District Court Judge for the District of Missouri, used the contempt power to imprison attorney Luke E. Lawless for one day and to suspend Lawless from the practice of law for eighteen months. The reason for the contempt citation and suspension was a newspaper article that Lawless wrote in which he criticized Peck’s decision in a case Lawless had argued before Peck. Judge Peck was impeached as a result of punishing Lawless, which the Articles of Impeachment declared was an “abuse of judicial authority” and a “subversion of the liberties of the people of the United States.” In the Senate proceedings, James Buchanan, who later became President and who “had charge of the prosecution of Judge Peck,” argued that Peck had in essence punished Lawless for libel of the judiciary without a jury, explaining:

To allow the judiciary to dispense with this tribunal [a jury], whenever any publication has been made affecting the dignity or the official conduct of a judge, is to create a privileged order of men in the state whose will is law, and who are not only judges in their own cause [i.e., when the judges are the victims] of the guilt of the accused, but also of the extent of his punishment.

175. See *Nye v. United States*, 313 U.S. 33, 44–45 (1941) (interpreting federal contempt statute); see also *Craig v. Harney*, 331 U.S. 367, 373 (1947) (looking to *Nye* in determining if use of contempt power was unconstitutional); *id.* at 387–89 (Frankfurter, J., dissenting) (noting that *Nye* interpreted the federal contempt statute); *Bridges v. California*, 314 U.S. 252, 267 (1941) (looking to *Nye* in determining if use of contempt power was unconstitutional).
176. See *ARTHUR J. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK* 52 (Boston, Hilliard, Gray & Co. 1833) (referring to the articles of impeachment). Judge Peck published his opinion in a newspaper, and Lawless published a response noting eighteen legal errors in the opinion. When Lawless published his article, the underlying case was on appeal to the United States Supreme Court. See *id.* at 1, 50–51.
177. See *id.* at 52 (referring to the articles of impeachment).
178. *Id.*
Such a power, so far as it goes, partakes of the very essence and rankness of despotism.\textsuperscript{180}

Although Judge Peck was not convicted, the impeachment trial led to the enactment of the current federal contempt statute.\textsuperscript{181} As Buchanan stated, “whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim.”\textsuperscript{182} Thus, the constitutional standard adopted in \textit{Bridges} and related cases had its germinal seed in the idea that the judiciary cannot use its power to punish members of the bar (without a jury) to quell attorney speech critical of the bench. Unfortunately, courts have used the disciplinary process to achieve this same end.

But beyond historical justifications and Supreme Court precedent, there are several reasons, vital to democracy itself, why the specific interest of preserving public confidence in the integrity of the judiciary (which, as discussed below, is another way to say preserving judicial reputation) cannot of itself justify the suppression of speech. First, the interest is grounded in the constitutionally forbidden notion that dangerous ideas (for example, that members of the judiciary may abuse their power or be biased, incompetent, or corrupt) must be suppressed to preserve society. Second, the interest is premised on keeping the public in ignorance as to the actual performance of government officials, an idea completely contrary to the essential workings of our American government. Finally, the promotion of this interest enhances self-entrenchment by members of the judiciary (both those that are elected and those who can only be removed for serious cause) and correspondingly lessens the electoral and sovereign power of the people.

A. SUPPRESSING THE DANGEROUS IDEA

The theory of the cases that punish attorney speech impugning judicial integrity is that \textit{Sullivan} and \textit{Garrison} should not apply because of the state interest in preserving the public perception of and confidence in an impartial judiciary.\textsuperscript{183} The reason why public perception and confidence must be maintained—apparently more so than for legislative and executive branches who remain subject to the \textit{Sullivan} standard—is that if the judiciary, or individual members of it, are perceived by the public to be biased or to abuse power then there will be a corresponding loss in respect for the rule of law and for judicial decisions.\textsuperscript{184} Judicial decisions will lose their power, and people will stop

\textsuperscript{180} STANSBURY, supra note 176, at 426 (emphasis added).
\textsuperscript{181} See Nye, 313 U.S. at 45 (explaining that the Act of March 8, 1834 arose in response to the “impeachment proceedings against James H. Peck, a federal district judge, who had imprisoned and disbarred one Lawless for publishing a criticism of one of his opinions in a case which was on appeal”).
\textsuperscript{182} Id. at 46.
\textsuperscript{183} See supra notes 161–65 and accompanying text.
\textsuperscript{184} See supra note 162 and accompanying text.
The idea, therefore, that the judiciary (whether as individual members or on the whole) may lack qualifications of integrity, impartiality, or competence is a “dangerous” idea. That is, it is an idea that should be subjected to greater regulation, suppression, and chilling because of the effect that the idea itself may have on the public. Further, the idea appears to be much more dangerous when espoused by attorneys, who are perceived as knowing what the judiciary is and should be doing. Alternatively, and more cynically, if attorneys are quelled from making the assertion, it will be made less frequently and by someone who can be discounted as less informed.

The Supreme Court has explained that speech cannot be suppressed constitutionally on the basis that it constitutes allegedly “dangerous ideas.” But states have failed to recognize that they are suppressing an idea for its dangerous impact when they use the phrase “preserving the public perception of judicial integrity” as justifying the punishment of speech. As John Hart Ely explained, “Restrictions on free expression are rarely defended on the ground that the state simply didn’t like what the defendant was saying; reference will generally be made to some danger beyond the message, such as a danger of riot, unlawful action or violent overthrow of the government.” Ely contends that asserted state interests “will always be unrelated to [suppression of] expression” and so one must examine the “causal connection” between the ultimate harm and the suppression or punishment of speech. He explains:

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185. See, e.g., In re Shimek, 284 So. 2d 686, 688 (Fla. 1973) (per curiam) (stating, post-Sullivan, that “[o]nce the integrity of a judge is in doubt, the efficacy of his decisions are [sic] likely to be questioned”) (quoting the order issued by the lower court). No rationale is offered in the case law explaining why this is truer for the judiciary than the other branches of government. If the people begin to believe that their police are corrupt, they will likely lose their confidence in, and perhaps feel less of a need to obey, the police. Further, if the people believe the legislature has been bought off in making laws, the people may feel less of a need to follow and obey those laws. While political impartiality may be an attribute unique to the judiciary (or may not, see Republican Party of Minn. v. White, 536 U.S. 765, 770–88 (2002) (holding that the Minnesota Supreme Court’s canon of judicial conduct, which prohibits judicial candidates from expressing views on disputed legal and political issues, violates the First Amendment)), integrity and competence in performing one’s office is universally needed in government.


187. See supra note 161.

188. See John Hart Ely, Comment, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1496 (1975). In Democracy and Distrust, Ely contends:

Allowing people to assault our eardrums with outrageous and overdrawn denunciations of institutions we treasure will inconvenience, annoy, and infuriate us on occasion, even set us to wondering about the stability of our society: that’s exactly what such messages are meant to do, and exactly the price we shouldn’t think twice about paying. By silencing such people we may be protecting something, but we certainly won’t be protecting “the American way.”

189. Ely, supra note 188, at 1497.
If, for example, the state asserts an interest in discouraging riots, the Court will ask why that interest is implicated in the case at bar. If the answer is (as in such cases it will likely have to be) that the danger was created by what the defendant was saying, the state’s interest is not unrelated to the suppression of free expression . . . .

In like manner, the reason that the state interest in preserving public confidence in judicial integrity is implicated in attorney discipline cases is that what the attorney has said will allegedly tarnish the public’s belief in the integrity of the court system and lead people to lose respect for the judiciary. The causal connection is based entirely on the communicative impact of the attorney’s message on the public.

This causal connection is enhanced by the fact that the restriction is merely on attorneys. One of the major justifications proffered by courts in avoiding the Sullivan standard is a belief that greater restrictions on attorney speech are needed because attorneys “possess, and are perceived by the public as possessing, special knowledge of the workings of the judicial branch” and thus “‘[c]ritical remarks from the Bar . . . have more impact on the judgment of the citizen than similar remarks by a layman.’” Again, the concern is one of communicative impact, or as Geoffrey Stone phrases the problem, the regulation is based on “a fear of how people will react to what the speaker is saying.”

The viewpoint-discriminatory nature of the regulation further underscores that it is the idea itself which is being repressed. The punishment of attorneys for speaking about courts in a manner that lessens the respect owed the judiciary or for impugning judicial integrity is aimed not merely at the content of the expression (statements about the judiciary), but at the particular viewpoint expressed (criticism or derogation of members of the judiciary). No restriction is placed on the opposing viewpoint. Attorneys are free to pronounce embellished praises of courts and judges, and to do so in every forum—in court filings, in public remarks, in letters, in pamphlets, or on blogs. Thus, if an attorney after receiving a decision in favor of her client states that the judge

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190. Id.
191. See supra notes 161–65 and accompanying text.
192. Fla. Bar v. Ray, 797 So. 2d 556, 560 (Fla. 2001) (per curiam) (quoting State ex rel. Okla. Bar Ass’n v. Porter, 766 P.2d 958, 969 (Okla. 1999)); see also, e.g., In re Pyle, 156 P.3d 1231, 1248 (Kan. 2007) (per curiam) (“‘Precisely because lawyers are perceived to have special competence in assessing judges, the public tends to believe what lawyers say about judges, even when lawyers speak inappropriately or make claims about which they are uncertain.’” (quoting ANN. MODEL RULES OF PROF’L CONDUCT R. 8.2 at 585 (5th ed. 2003))).
fairly decided the case and disregarded any political influences, no punishment can be brought. If, however, her opponent states to the press that the judge acted unfairly and was politically motivated, punishment could well be expected.

Viewpoint-based restrictions have been consistently declared unconstitutional. Among the many problems with viewpoint-based restrictions is that they distort public debate by allowing the public to hear only one side of an issue. The public should “be extremely skeptical about the claims of the judiciary to be competent to act as some sort of Consumer Product Safety Commission for [the] marketplace” of ideas—especially when the viewpoint being suppressed regards defects in the judiciary. Distortion of public debate is particularly problematic whenever it regards the qualifications and integrity of government officials—an area that requires “uninhibited, robust, and wide open” debate. Consequently, as explored below, the distortion is not merely the distortion of debate, but the distortion of democracy.

B. COERCED PUBLIC IGNORANCE AND DEMOCRACY

Perhaps the greatest problem with suppressing attorney speech critical or disparaging of the judiciary is that the public loses its right to receive that information. The premise underlying the cases involving attorney speech is that public confidence in the judiciary must be preserved, and the manner of preservation is suppressing speech significantly beyond the standard allowed by Sullivan for speech regarding government officials. In essence, public confidence is preserved through public ignorance. Government-coerced public ignorance regarding the qualifications of public officials is antithetical to democracy. It deprives the citizen of the ability to self-govern. It deprives the American people, who possess the ultimate sovereignty over government, of the ability to exercise their power to respond to or correct government abuses. It eliminates the checking power of the people, and denies them the right to define misconduct. To the extent that they are left in the dark, the people cannot exercise their democratic power and right to govern themselves.

The Supreme Court has recognized in the context of commercial speech that the right to free speech creates a reciprocal right to receive information,

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195. LeBel, supra note 59, at 293. LeBel made this statement assuming that Sullivan would provide the applicable standard, which he believes “offers insufficient protection for the critic of government.” Id.
197. Ely, supra note 48, at 125 (“[P]opular choice will mean relatively little if we don’t know what our representatives are up to.”).
including information from attorneys. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, for example, the plaintiffs were the listeners and not the speakers. The Court held that even though the state could regulate the dissemination of the prescription drug information at issue, the First Amendment protection is “enjoyed by the appellees as recipients of the information, and not solely, if at all,” by the speakers. Thus, even if courts could constitutionally restrict attorney speech on the theory that attorneys agree to such regulation as a condition of their admittance to the bar, that would not eliminate the right of the public to receive this information.

Further, as noted above, it is the class of people who have the knowledge and exposure to comment on judicial operations whose speech is restricted. While this fact has been offered as a justification for such restrictions, the difficulty with this justification is why it fails to cut the other way and provide for greater, rather than less, protection. Because lawyers have the education and training to recognize, understand, and articulate problems with the judiciary, and are regularly exposed to and experiencing those problems as they bring their clients’ cases before judges, they have more expertise and are better able to comment on the judiciary and judicial qualifications. This is precisely the kind of information that the public has a right and need to receive in order to make informed decisions about the judiciary, to fulfill their self-governing role, and check judicial abuses. As Justice Goldberg quoted in *Sullivan*, “‘The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees.’” But by silencing all lawyers, the courts have denied the public the opportunity to gain an informed opinion regarding deficiencies in the judiciary from those who know best because of education, training, and exposure to actual judges—leaving relatively few other effective critics. The Supreme Court of Oklahoma is the only court to examine these ideas and to recognize the free speech interests of the recipients in obtaining informed and

199. Bates v. State Bar of Ariz., 433 U.S. 350, 365–66, 372–76, 384 (1977) (stating that the decision to allow attorney advertising “might be said to flow *a fortiori* from” the *Virginia State Board of Pharmacy* case, noting the potential value of advertising material to the public, and holding that “the *flow* [that is, to the public] of such information may not be restrained” (emphasis added)).


201. Id. at 756 (emphasis added).

202. See, e.g., In re Pyle, 156 P.3d 1231, 1248 (Kan. 2007) (per curiam) (stating that “‘[p]recisely because lawyers are perceived to have special competence in assessing judges, the public tends to believe what lawyers say about judges’” (quoting ANN. MODEL RULES OF PROF’L CONDUCT R. 8.2 at 585 (5th ed. 2003))).

203. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 304 n.5 (1964) (Goldberg, J., concurring) (quoting Barr v. Matteo, 360 U.S. 564, 577 (1959) (Black, J., concurring); *see also* id. at 281 (“‘[I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages.’” (quoting Coleman v. MacLennan, 98 P. 281, 286 (Kan. 1909))).

204. As the Sullivan Court observed, “Criticism of . . . official conduct does not lose its constitutional protection merely because it is effective criticism.” *Id.* at 273.
educated criticisms about the judiciary from attorneys.205

The general rule seems to be one of keeping the public in ignorance for the
good of society. But such paternalistic arguments do not even withstand the
lesser scrutiny applied to commercial speech—let alone the heightened scrutiny
applied in the area of core political speech about the qualifications and integrity
of governmental officials. As the Supreme Court has commented in the area of
restrictions on advertising, “on close inspection it is seen that the State’s
protectiveness of its citizens rests in large measure on the advantages of their
being kept in ignorance.”206 The Court in Bates v. State Bar applied this same
reasoning to restrictions on lawyer advertising, which were based on preserving
respect for the legal profession, explaining that “we view as dubious any
justification that is based on the benefits of public ignorance” as “the preferred
remedy is more disclosure, rather than less.”207 As the Virginia State Board of
Pharmacy Court had explained, state interests that at heart are aimed at “keep-
ing the public in ignorance” not only fail to support the suppression of speech,
but demonstrate the need for protection of the speech sought to be restricted.208
“It is precisely this kind of choice, between the dangers of suppressing informa-
tion, and the dangers of its misuse if it is freely available, that the First
Amendment makes for us.”209

Many courts have argued that the restriction on attorney speech is appropriate
because the attorney can always file a complaint with the relevant judicial
disciplinary authority if there is a real problem.210 But this alternate forum is

Supreme Court explained:

We agree that the attorney’s personal First Amendment rights might properly be subordinated
to the attorney’s duties as officers of the courts. Such a consideration does nothing to weigh in
the balance against the right of the public generally to be informed of the affairs of their
government. In keeping with the high trust placed in this Court by the people, we cannot
shield the judiciary from the critique of that portion of the public most perfectly situated to
advance knowledgeable criticism, while at the same time subjecting the balance of govern-
ment officials to the stringent requirements of New York Times Co. v. Sullivan and its progeny.

Id. (citation omitted).

209. Id.
210. See In re Evans, 801 F.2d 703, 707 (4th Cir. 1986) (explaining that “‘whenever there is proper
ground for serious complaint against a judge it is the right and duty of a lawyer to submit his grievances
to the proper authorities’” (quoting People ex rel. the Chi. Bar Ass’n v. Metzen, 125 N.E. 734, 735
(1919))); Ramirez v. State Bar of Cal., 619 P.2d 399, 405 n.13 (Cal. 1980); In re Wilkins, 777 N.E.2d
714, 717 (Ind. 2002) (per curiam) (“Without evidence, such statements should not be made anywhere.
With evidence, they should be made to the Judicial Qualifications Commission.”), modified, 782 N.E.
985 (Ind. 2003); Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980) (per curiam) (stating that
if an attorney “had reason to believe in good faith” that improper conduct had occurred “then the proper
forum in which to have made his claim was the Judicial Retirement and Removal Commission as
provided in our Constitution”); In re Westfall, 808 S.W.2d 829, 839 (Mo. 1991); In re Lacey, 283
N.W.2d 250, 252 (S.D. 1979); Peters v. Pine Meadow Ranch Home Ass’n, 151 P.3d 962, 964 (Utah
wholly inadequate for a number of reasons. Perhaps the most important reason is that, in every state, complaints filed with the judicial disciplinary authority are confidential—at least until a formal charge is filed, and sometimes until discipline is ordered by the state supreme court. Thus, the use of this forum continues to keep the public in ignorance as to assessments of and information regarding the judiciary. Further, this forum does not avoid the problem of authoritative selection and distortion of public debate. Not all complaints are made public, but only those that the disciplinary authority determines warrant official investigation or punishment. Consequently, the people do not have the opportunity to perform their checking function and determine what constitutes misconduct until a government authority passes on the validity and seriousness of the alleged misconduct. Thus, the people are denied their ultimate sovereignty because the “censorial power [resides] in the Government over the people,” rather than where it belongs: “in the people over the Government.”

Certainly complaints against judges, even if they do not warrant discipline in the eyes of the state, would be relevant for citizens in evaluating the effectiveness and competence of the judiciary. If the citizenry is denied access to such information, it cannot invoke democratic corrections for the judiciary. Moreover, attorneys may have opinions regarding members of the bench that would not be of sufficient magnitude that the attorney would file a complaint against the judge, but again would be relevant to the public’s exercise of their democratic responsibilities.

It is probably a truism that attorneys will be much more hesitant to file complaints with a judicial disciplinary authority than they would be to express opinions as to judges, their competence, and their motivations in ordinary public fora. An attorney may say, and have reason to believe, that she thinks a decision of a court is politically motivated but may be unlikely to file a complaint with a judicial disciplinary authority on that basis, particularly in those states where such complaints must be verified, notarized, or otherwise sworn to under penalty of perjury as to their truth. This method of allowing

211. As a doctrinal point, an ample alternate forum only cures a content-neutral restriction on speech, making such restriction a valid time, place, and manner regulation. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); United States v. Grace, 461 U.S. 171, 177 (1983). As noted, the punishment of attorney speech critical of the judiciary is not only content-based, but is moreover viewpoint-based. Thus, under normal First Amendment doctrine, it cannot be saved by the provision of an ample alternate forum. See supra note 194 and accompanying text.


213. See supra notes 71–72 and accompanying text.


speech solely through the filing of official complaints cannot be squared with
the prohibition on “rule[s] compelling the critic of official conduct to guarantee
the truth of all his factual assertions”\footnote{Sullivan, 376 U.S. at 279.} or with the “uninhibited, robust, and
wide-open” debate regarding government officials envisioned by the Sullivan
Court as necessary to our American form of government.\footnote{Id. at 270.} Indeed, it grinds
against the underlying premise of Sullivan “[t]hat erroneous statement is inevi-
table in free debate, and that it must be protected if the freedoms of expression
are to have the ‘breathing space’ that they ‘need to survive.’”\footnote{Id. at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).}

Further, in both Sullivan and Garrison, the Court expressly recognized both
the importance and probability that people would attribute motives to actions of
government officials.\footnote{See infra notes 221–23 and accompanying text.} Yet, in a number of cases, attorneys have been punished
precisely because they went beyond stating facts or making arguments and
attributed possible motives to the actions of the court.\footnote{Id. at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).} However, the Sullivan
Court contemplated that the speech it was protecting would be inclusive of
“[e]rrors of fact, particularly in regard to a man’s mental states and processes,
[which errors] are inevitable.”\footnote{Sullivan, 376 U.S. at 272 (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942)).}

In Garrison, the Court explained:

The public-official rule protects the paramount public interest in a free flow of
information to the people concerning public officials, their servants. To this
end, anything which might touch on an official’s fitness for office is relevant.
Few personal attributes are more germane to fitness for office than dishonesty,
malfeasance, or improper motivation . . . . \footnote{Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (emphasis added).}

Combined, Sullivan and Garrison contemplate that speech regarding the motiva-
tion of government officials is one of the most important subjects to be discussed in free debate and disseminated to the public, but is also a topic regarding which “[e]rrors of fact . . . are inevitable.” This is one of the reasons why the subjective Sullivan test for punishing speech about government officials is so important. Generally, people do not really know what motivates others, but improper motivation is an important factor in measuring the fitness of government officials. Thus, either the discussion of motivation must be removed from the table of free debate by punishing it whenever it is inaccurately ascribed, or it should not be punished unless a person knows it to be false or subjectively entertains doubts as to its truth or falsity.

C. JUDICIAL SELF-ENTRENCHMENT

As noted above, the severity of sanctions imposed on attorneys and the objective standard offered, requiring the attorney to prove the truth of the assertion, has a chilling if not freezing effect on attorney speech critical of the judiciary. Further, as noted, attorneys are in the best position to know of judicial incompetence and abuse and have the training and education to aptly recognize and criticize such behavior. Attorney discipline thus silences the most effective critics of the judiciary. In Democracy and Distrust, John Hart Ely argues that a representative government malfunctions not when substantive ends are achieved with which one may disagree, but “when the process [of representative government] is undeserving of trust.” One way that such a malfunction occurs is when “the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out.” In other words, democratic malfunction occurs when those in government positions use their power to entrench themselves.

An example provided by Ely is the problem of allowing the legislature to manipulate voting rights. As Ely notes, voting is “essential to the democratic process” and its “dimensions cannot safely be left to our elected representatives,

223. Sullivan, 376 U.S. at 272 (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942)).
224. An additional wrinkle with punishing attributions of motivation is illustrated by Idaho State Bar v. Topp, 925 P.2d 1113 (Idaho 1996). In Topp, the parties stipulated to certain facts, including that the judge would testify, if called, and say that his decision was not politically motivated. Id. at 1116. The court took this stipulation as establishing that the decision in fact was not politically motivated, and not as an admission that the judge would deny political motivation (as would any judge). Id. Topp presented several facts from which political motivation could certainly be inferred, but the court took the stipulated testimony of the judge as the definitive answer as to the judge’s ultimate motivation and Topp was consequently disciplined for his incorrect attribution. Id. at 1116–17.
Even if the judge honestly testified that he was not politically motivated, that does not answer the question as to what motivated the judge. The problem with punishing speech regarding potential motivations for actions is that even the person acting often cannot pinpoint or cannot recognize what actually motivated him. Try as one might to be completely objective, it is probably safe to say that everyone is biased in some way or another. And sometimes a person is most biased when she cannot even recognize the bias.
225. Ely, supra note 48, at 103.
226. Id.
who have an obvious vested interest in the status quo.” In like manner, the judiciary has authority to punish attorneys, their most likely and effective critics. Public debate as to the qualifications, integrity, and impartiality of the judiciary is essential to the democratic process. This is particularly obvious where the judiciary is elected or retained by election, but it is also true where the judiciary is appointed because institutional checks will generally only be invoked as a result of public insistence. As with Ely’s example, the punishment of speech critical of the judiciary “cannot safely be left to [the judiciary], who have an obvious vested interest in the status quo” and in preserving their own reputations. To the extent that public debate is distorted to be rid of attorney criticism and disparagement of particular judges, the populace will not be aware of the problem and will not vote out those judges who are elected, or, alternatively, will not call upon the people’s elected legislative and executive officials to investigate and remove offending judges who are appointed.

Indeed, because it is the judiciary who punishes the attorney, the situation is more suspect than the scenario presented in Sullivan or Garrison. In Sullivan, the punishment for offensive speech had to come from a jury, and in Garrison, the punishment for criminal defamation of the judiciary came from both a prosecutor (the executive branch) and a jury. But in the scenario of attorney discipline, the punishment is made by the branch being criticized, which has an obvious interest in keeping the ins in and in avoiding negative public exposure.

In re Raggio provides an example. William J. Raggio was an attorney of excellent reputation who “was prominently mentioned as a candidate for either governor or United States senator” for Nevada. Raggio made a statement in an interview with the press about a decision of the Nevada Supreme Court to rehear a death penalty case he had prosecuted and called that decision “most shocking and outrageous” and “judicial legislation at its very worst.” In disciplining Raggio, the Nevada Supreme Court revealed its concern with his comments. Noting Raggio’s prominence, the Court related:

Maximum dissemination was given his views. His initial comments were frequently repeated in the press and on television during the weeks and months to follow. The public was quick to respond. This court became the center of controversy. Essential public confidence in our system of administering justice may have been eroded.

Certainly the (popularly elected) Nevada Supreme Court did not appreciate

227. Id. at 117.
228. See Blasi, supra note 48, at 539.
229. Ely, supra note 48, at 117.
231. Id. at 500.
232. Id.
233. Id. (emphasis added).
being “the center of controversy”—which is precisely why it should not be the entity punishing such speech, or at the very least should not be allowed to carve out an exception to the Sullivan rule for itself.

But even the protection promised in Sullivan may not be enough. Justice Goldberg argued that the Sullivan standard was insufficient to protect critics of the government because of the possibility of “friendly juries” who would protect the government and find that the requisite mental state had been met.234 Thus, Goldberg argued that “the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses.”235 The possibility of a government-friendly jury is hard to quantify. But in cases involving attorney discipline for statements regarding the judiciary, Goldberg’s hypothetical problem of a judiciary-friendly “jury” is a reality. As Justice Boehm of the Indiana Supreme Court stated in a dissenting opinion, “This Court acts as judge, jury, and appellate reviewer in a disciplinary proceeding,” and “[w]here the offense consists of criticism of the judiciary, we become the victim as well.”236

The problems of self-entrenchment do not involve solely the malfunction of the democratic process and the ins staying in. Rather, self-entrenchment and the protection of one’s own dignity leads to additional abuses of power made in pursuit of that end. Again, as Justice Goldberg argued in his Sullivan concur-rence, “The American Colonists were not willing, nor should we be, to take the risk that ‘[m]en who injure and oppress the people in their administration [and] provoke them to cry out and complain’ will also be empowered to ‘make that very complaint the foundation for new oppressions and prosecutions.’”237

Unfortunately, Goldberg’s scenario has occurred on a few occasions in the context of punishing speech critical of the judiciary. In In re Atanga, Judge Donald C. Johnson rescheduled a hearing in a criminal case for a day that the judge knew defense attorney Jacob A. Atanga (who was African-American) could not attend because Atanga had to appear in court in another county at that same time.238 The judge then held Atanga in contempt for missing the hearing, had Atanga arrested at his office and jailed, had Atanga brought before the court, and forced him to represent his client while Atanga was dressed in prison clothes.239 Atanga was interviewed by an editor of an ACLU newsletter about the episode. Atanga told the editor regarding Judge Johnson, “I think he is

235. Id. at 298.
237. Sullivan, 376 U.S. at 301 (Goldberg, J., concurring) (quoting The Trial of John Peter Zenger, 17 Howell’s St. Tr. 675, 721–22 (1735)).
239. Id. at 1255–56.
ignorant, insecure, and a racist.” Atanga was suspended from the practice of law for thirty days for this statement, which allegedly violated MRPC 8.2. But Indiana never proved Atanga’s statement to the press was false (that Johnson was not ignorant, insecure, and a racist) and indeed excluded as irrelevant Atanga’s proffered testimony from witnesses in support of his statement. In suspending Atanga, the Supreme Court of Indiana explained that “the judicial institution is greatly impaired if attorneys choose to assault the integrity of the process and the individuals who are called upon to make decisions” and thus, “[t]his court must preserve the integrity of the process and impose discipline.” The Indiana Supreme Court apparently believed that punishing speech about Judge Johnson and an opinion regarding him for what was clearly outrageous judicial conduct is the best way to “preserve the integrity of the process.” Over a year later, the Indiana Supreme Court publicly reprimanded Judge Johnson for the episode in a matter-of-fact decision that simply stated agreed-upon facts and concluded that those facts constituted violations of various codes of judicial conduct. Entirely missing from the opinion is any of the rhetoric of the kind used about Atanga’s conduct, for example that Atanga “greatly impaired” the “judicial institution” by “assault- [ing] the integrity of the process and the individuals who are called upon to make decisions.” Further, Atanga received a significantly harsher punishment for his speech regarding Judge Johnson’s abuse of power than Judge Johnson received for the underlying abuse. Indeed, the Indiana Supreme Court, in its opinion disciplining Atanga, downplayed the extreme nature of Judge Johnson’s conduct by characterizing it as “not represent[ing] contemporary jurisprudence in this state” and as being a “questionable practice.” While using understatement regarding Judge Johnson’s behavior, the court cracked down on Atanga and suspended him from the practice of law. The scenario is precisely along the lines predicted by Justice Goldberg in Sullivan. Atanga was “injure[d] and oppress[ed]” by Judge Johnson, and then when Atanga spoke “out and com-

240. Id. at 1256.
241. Id. at 1257.
242. See id.
243. Id. at 1258 (emphasis added). Notably, the hearing officer had recommended to the Indiana Supreme Court that Atanga receive no discipline because he “ha[d] already been adequately punished.” See id. But the supreme court determined that it “must preserve the integrity of the process and impose discipline,” and suspended him from the practice of law. Id.
244. See In re Johnson, 658 N.E.2d 589 (Ind. 1995).
245. See id. The Court dryly states the facts and then concludes:

We find that the Respondent violated Canon 1 of the 1975 Code of Judicial Conduct which required judges to uphold the integrity and independence of the judiciary and to maintain high standards of conduct; that he violated Canon 3A(3) of the 1975 Code of Judicial Conduct, which required judges to be patient, dignified, and courteous to lawyers and others . . . .

Id.
246. In re Atanga, 636 N.E.2d at 1258.
247. Id. at 1257.
plain[ed],” “that very complaint [became] the foundation for new oppressions
and prosecutions.”

Other cases follow similar lines where a judge does something that cannot be
condoned, an attorney complains about it, and the attorney is severely sanc-
tioned for his speech. Meanwhile, the disciplining authority downplays the
conduct of the criticized judge.248 Thus the manner by which some courts have
“preserved the integrity” of the judiciary is to understate judicial abuses and
errors to make them more palatable while at the same time punishing attorney
speech that amplifies it. This in itself is an abuse of judicial power. The
Constitution does not condone such a method—“silence coerced by law” and
“authoritative selection”—as a proper means of improving the public perception
of judicial integrity.249 Acknowledging wrongs and addressing them would, by
definition, improve integrity. For, “the path of safety lies in the opportunity to
discuss freely supposed grievances and proposed remedies.”250 Perhaps public
perception of judicial integrity (as opposed to integrity itself) is more readily
obtained by punishing critical speech, but the First Amendment forbids govern-
mental resort to that option.251

248. In re Glenn, 130 N.W.2d 672 (Iowa 1964), deals with an attorney who was punished for
circulating a leaflet that questioned what was behind a rather strange set of circumstances regarding the
arrest and forfeiture of bail bonds of seventy-nine people for patronizing a bootlegging establishment in
violation of a city ordinance while letting the establishment out on a plea with almost no penalties and
without forfeiting its bond. The Supreme Court of Iowa disciplined Glenn, while admitting that the plea
agreement “does little credit to those who participated in it,” including the criticized judge. See id. at
674. Rather than be concerned that something fishy was going on in the arrest and forfeiture of the
bonds of seventy-nine citizens, the court suspended Glenn for one year for questioning and trying to
expose it. See id. at 674–75.

In United States District Court for the Eastern District of Washington v. Sandlin, 12 F.3d 861 (9th
Cir. 1993), the attorney ordered a transcript and found out from the court reporter that the judge
regularly told the court reporter to edit the transcript in what the judge called “do-overs.” Sandlin
misremembered something that he thought the judge had said and asked for a transcript and a copy of
the tape. Sandlin reported the editing to authorities in the FBI and the United States Attorney General’s
office. After investigation by the FBI and others, it was determined that, while the judge did indeed edit
the transcript, it was only for stylist changes, and the judge did not edit the audio tape. The judge filed a
grievance against Sandlin for impugning his integrity. Sandlin was suspended for six months from
practice in the Eastern District of Washington for his “false” reports of substantive editing. The Ninth
Circuit upheld the suspension but commented that it did “not condone editing in any form of official
transcripts.” Id. at 866.

In Kentucky Bar Ass’n v. Heleringer, 602 S.W.2d 165 (Ky. 1980), the judge in a politically sensitive
hearing on an injunction for an abortion statute heard the matter ex parte. The attorney for the
government had told the judge that he would be late because of another hearing that was lasting longer
than expected in the same courthouse and asked the judge to wait. The judge indicated he would wait,
but then did not and granted the restraining order without hearing from the government at all. An
attorney for Right to Life who attended the hearing (but was not actually engaged in the case) told the
media that the judge’s decision to proceed ex parte was “highly unethical and grossly unfair.” Id. at
166. The attorney was disciplined with a public reprimand for his comment. Id. at 169.

250. Id.
dangers of suppressing information and the dangers arising from its free flow [is] seen as precisely the
III. PURPORTED RATIONALES FOR PUNISHING SPEECH DO NOT WITHSTAND SCRUTINY

As demonstrated, prohibiting attorney speech critical of the judiciary is antithetical to the democratic process, and because it is a viewpoint-based prohibition on speech concerning the qualifications of government officials, it is patently unconstitutional under *Sullivan* or any regular Speech Clause analysis. Nevertheless, state and federal courts have punished attorney speech critical of the judiciary based on the following arguments (none of which withstand scrutiny): (1) the Supreme Court has exempted attorney speech critical of the judiciary from the strictures of *Sullivan*; (2) restrictions on attorney speech are a constitutional condition imposed on attorneys in return for granting attorneys the privilege of practicing law; (3) the interests served by the tort of defamation are different from the interests served by imposition of attorney discipline.

A. THE ALLEGED EXCEPTIONS FOUND IN BRADLEY, SAWYER, AND SNYDER

The Supreme Court has decided a few cases in which the issue of discipline for impugning judicial integrity was directly raised, but in each the Supreme Court declined to address the constitutional question. Unfortunately, the Supreme Court’s avoidance of the constitutional issue has made possible state court interpretation of the cases as creating an exception to the general constitutional rules (such as *Sullivan*) and thus as granting the states wide latitude to punish attorney speech that impugns judicial integrity.

1. The Shifting Legal Landscape

One of the fundamental problems with state court analysis of attorney speech is the consistent failure of courts to reanalyze precedent in light of major shifts in the legal landscape, most notably incorporation of the First Amendment, but equally important, the handing down of major decisions such as *Sullivan*, *Garrison*, and other cases that established that rules of professional conduct could violate the First Amendment.

One of the cases regularly cited into the twenty-first century as authorizing punishment of attorney speech critical of the judiciary is *Bradley v. Fisher*.252 In *Bradley*, the Court declared that, when admitted, attorneys take upon themselves the obligation “to maintain at all times the respect due to courts of justice and judicial officers,” which “includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial choice ‘that the First Amendment makes for us.’” (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976)).

acts.”253 While arguments can be made that the statement is dicta,254 the biggest problem with citing Bradley as answering a First Amendment challenge is that it was decided in 1871 when the Fourteenth Amendment was less than a decade old.255 While the Fourteenth Amendment technically existed at this time, the doctrine of incorporation of the Bill of Rights as prohibitions on state authority had not been announced and would not be recognized for more than thirty years.256 The First Amendment itself would not be incorporated as a limitation on state government until 1925—over 50 years later.257 The Bradley case, thus, could have nothing authoritative to say regarding the First Amendment’s limitation on state power to regulate attorney speech.258

The legal landscape problem pervades this area because the first regulations on attorney conduct were drafted by the ABA in 1908—again, well before incorporation of the First Amendment. While the ABA subsequently changed its rules to conform with Sullivan, states have continued to cite their older case law based on earlier regulations. Under the 1908 Canons of Professional Ethics, an attorney had a duty of respect and courtesy to the judiciary and was advised to “submit his grievances to the proper authorities” for a “serious complaint” about a judge.259 If the attorney did so, “but not otherwise, such charges [against the judiciary] should be encouraged and the person making them should be protected.”260 Ethical Consideration 8-6 found in the Model Code of Professional Conduct admonished the attorney to “be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms” of the judiciary.261 These regulations became entrenched in the case law prior to the adoption of the Model Rules of Professional Conduct. And while MRPC 8.2 is the governing rule, the language of Ethical Consideration 8-6, which has been rejected by the
ABA,\textsuperscript{262} surfaces as authoritative in cases decided in the twenty-first century.\textsuperscript{263}

2. Stretching Authority

Another stumbling block in this area is reliance on \textit{In re Sawyer} and \textit{In re Snyder} as creating an exception to regular constitutional rules and as allowing punishment of attorney speech contrary to \textit{Sullivan}, when, in fact, neither the \textit{Sawyer} nor \textit{Snyder} Court addressed—and thus could not have created an exception to—the constitutional question.

In \textit{Sawyer},\textsuperscript{264} which is paradoxically set in the context of a trial of four alleged communists under the notorious Smith Act, defense attorney Harriet Bouslog Sawyer held a public meeting during the pendency of the trial. Sawyer gave a speech where she told “about some rather shocking and horrible things that go on at the trial.”\textsuperscript{265} Noting the gross inequities generally concomitant with Smith Act prosecutions, Sawyer declared, “there’s no such thing as a fair trial in a [S]mith [A]ct case” because “all rules of evidence have to be scrapped or the government can’t make a case.”\textsuperscript{266} Sawyer provided examples from the trial, explaining that hearsay rules were not applied and that “a federal judge sitting on a federal bench permits [a key witness at the trial] . . . to tell what was said when [one of the criminal] defendant[s] was five years old. There’s no fair trial in the case. They just make up the rules as they go along.”\textsuperscript{267} Sawyer was

\textsuperscript{262} See \textit{Ann. Model Rules of Prof’l Conduct} R. 8.2 at 345–46 (1984). After discussing \textit{Sullivan} and \textit{Garrison} and explaining that Rule 8.2 incorporates the standard from those cases, the ABA explains:

\begin{quote}
Rule 8.2 does not continue the standard of Model Code EC 8-6 which stated that a lawyer who criticizes judicial officials “should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms.” The EC 8-6 standard has been invoked by courts to penalize criticism considered to be undignified in manner, intemperate in tone or expressed in inappropriate language.
\end{quote}

\textit{Id.} at 345 (emphasis added).

\textsuperscript{263} See \textit{In re Arnold}, 56 P.3d 259, 264 (Kan. 2002) (per curiam) (quoting language from former EC 8-6, even though 8.2 is the governing rule); \textit{In re Simon}, 913 So. 2d 816, 824 (La. 2005) (per curiam) (same).

\textsuperscript{264} \textit{In re Sawyer}, 360 U.S. 622 (1959).

\textsuperscript{265} \textit{Id.} at 641.

\textsuperscript{266} \textit{Id.} at 644.

\textsuperscript{267} \textit{Id.} at 645. Sawyer provided another example from the trial itself, concerning the testimony of a witness named Johnson, who said:

\begin{quote}
[H]e came back from [S]an [F]rancisco with communist books and literature in a duffel bag. He said when he got to Honolulu he told Jack Hall [one of the defendants] the names of some of the books. Then the government for two days read from books supposed to have been in the duffel bag . . . [o]n cross-examination Johnson said he did not tell the names of the books, but just showed [J]ack [H]all the duffel bag. So [J]ack [H]all violated the [S]mith [A]ct because he saw a duffel bag with some books on overthrowing the government in it. It’s silly. Why does the government use your money and mine to put people in jail for thoughts . . . . [U]nless we stop the Smith trial in its tracks here there will be a new crime. [P]eople will be charged with knowing what is included in books—[i]deas . . . [T]here’ll come a time when the only thing to do is to keep your children from learning how to read.
\end{quote}
suspended from the practice of law for one year for her remarks. The basis for the suspension was that Sawyer “impugned the integrity of the judge presiding” in the Smith Act case and thus “create[d] disrespect for the courts of justice and judicial officers generally.”

Sawyer’s suspension was reversed by the Supreme Court in a plurality opinion. Justice Brennan announced the judgment of the Court, but his opinion only garnered four votes. Justice Stewart concurred solely in the result reached by Justice Brennan, writing his own separate opinion, and Justice Frankfurter wrote a dissenting opinion for four justices.

Justice Brennan’s opinion was narrowly decided on the facts and expressly avoided any treatment of the constitutional question of whether Sawyer’s speech was protected by the First Amendment. Because the Hawaii Bar failed to discipline Sawyer on the basis of obstructing justice or violating any sort of trial publicity rule (such as Canon 20 of the Canons of Professional Ethics, applicable in Hawaii at the time), Brennan ignored these aspects of Sawyer’s speech. Rather than examine the Constitution at all, Justice Brennan examined whether the statements that the Hawaii Bar found worthy of discipline in fact impugned the integrity of the trial court. Brennan sorted Sawyer’s speech into categories of speech that factually could not form the basis for Sawyer’s discipline because they did not impugn the personal integrity of the trial court judge. Namely, Brennan stated that attorneys could, without impugning judicial integrity, “criticize the state of the law,” “criticize the law-enforcement agencies of the Government, and the prosecution,” and criticize a judge as being “wrong on his law.”

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268. The Bar Association for the then-territory of Hawaii amended its rules specifically for the purpose of making it possible to bring a charge against Sawyer. Judge Wiig, who presided at the Smith Act trial, “requested the local Bar Association to investigate” Sawyer’s conduct. But under the Hawaii rules, professional misconduct charges could only be made by an aggrieved client or by the Attorney General. The Bar Association referred it to the Attorney General, who decided not to file a complaint. So the Sawyer matter was “referred to the Committee on Legal Ethics to study amendments to the Rules.” The applicable rule was amended, and the President of the Bar Association then filed a complaint against Sawyer on behalf of the Association. See id. at 624 n.2.

269. Id. at 626.

270. Justice Black also wrote a separate opinion, id. at 646 (Black, J., concurring), but additionally joined Justice Brennan’s opinion, id. at 623–46 (majority opinion). Similarly, Justice Clark authored a separate opinion, id. at 669–71 (Clark, J., dissenting), but additionally joined Justice Frankfurter’s opinion, id. at 647–69 (Frankfurter, J., dissenting).

271. Id. at 627 (majority opinion) (expressly stating that the opinion did “not reach or intimate any conclusion on the constitutional issues presented”).

272. Id.

273. Id. at 626–27.

274. Id. at 631. The Court went on to explain that “[s]uch criticism simply cannot be equated with an attack on the motivation or the integrity or the competence of the judges.” Id. at 632.

275. Id.

276. Id. at 635 (explaining that this did not impugn judicial integrity because “appellate courts and law reviews say that of judges daily, and it imputes no disgrace”).
Brennan’s opinion has been hopelessly misconstrued by subsequent state and federal courts. Courts have cited Brennan’s categorization of speech that cannot impugn judicial integrity, and they have determined by negative implication that anything not listed by Brennan is both (1) subject to punishment and (2) constitutionally so.277 Because Brennan did not reach the constitutional question, Sawyer cannot provide the authority that states construe it to create—namely, that certain attorney statements are “the subject of professional discipline”278 or “properly censurable”279 under the Constitution. The only negative implication of Brennan’s opinion is that certain statements not listed might impugn judicial integrity. But that does not mean that punishment for impugning judicial integrity would be constitutional—a proposition that must be examined in light of the Court’s subsequent holdings in Sullivan and Garrison.

Finally, Brennan rejected the idea that Sawyer’s critical remarks were improper because she was counsel of record in an ongoing trial.280 Brennan’s focus again was with what Sawyer had been charged—namely, “impugn[ing] the integrity of Judge Wiig.”281 As to these charges, Brennan said, in words that are frequently quoted, “A lawyer does not acquire any license to [impugn the integrity of the court] by not being presently engaged in a case. They are equally serious whether he currently is engaged in litigation before the judge or not.”282 This statement is quoted in modern cases to punish attorneys for speech about the judiciary even when the attorney is not engaged in a pending case. Kentucky Bar Ass’n v. Heleringer provides an example.283 The Supreme Court of Kentucky quoted the above language from Brennan’s Sawyer opinion as support for disciplining an attorney for Right to Life for making a statement to the press about a judge even though the attorney was not engaged as counsel in the underlying lawsuit.284 What courts fail to consider is Brennan’s remaining explanation:

We can conceive no ground whereby the pendency of litigation might be thought to make an attorney’s out-of-court remarks more censurable, other than that they might tend to obstruct the administration of justice . . . . But this distinction is foreign to this case, because the charges and findings in no

277. For example, the Supreme Court of Oklahoma has read Brennan’s opinion as establishing that “criticism by an attorney amounting to an attack on the motivation, integrity or competence of a judge whose responsibility it is to administer the law may be under certain circumstances properly censurable.” State ex rel. Okla. Bar Ass’n v. Porter, 766 P.2d 958, 965 (Okla. 1988) (emphasis added); see also Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165, 167 (Ky. 1980) (per curiam); Neb. State Bar Ass’n v. Michaelis, 316 N.W.2d 46, 52–53 (Neb. 1982); In re Meeker, 414 P.2d 862, 869 (N.M. 1966).
278. Michaelis, 316 N.W.2d at 53.
279. Porter, 766 P.2d at 965.
280. Sawyer, 360 U.S. at 636.
281. Id.
282. Id.
283. Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165 (Ky. 1980) (per curiam).
284. Id. at 167.
way turn on an allegation of obstruction of justice or of an attempt to obstruct justice, in a pending case. *To the charges made and found*, it is irrelevant whether the Smith Act case was still pending. *Judge Wiig remained equally protected from statements impugning him*, and petitioner remained equally free to make critical statements that did not cross that line.285

Notably, Brennan’s overall point was that absent obstruction to the administration of justice, *even attorneys engaged in pending cases* (like Sawyer) should be allowed to speak without being disciplined. Ironically, the statement is construed to prohibit speech not only from attorneys engaged as counsel in cases, but also from attorneys not engaged in a pending case. Further, Brennan acknowledged that statements might be more worthy of censure depending on the context and timing in which they are made but argued that if the problem with a statement is obstructing justice, then an attorney should be charged with obstructing justice. Notably, *Sawyer* was decided five years before *Sullivan* and *Garrison*, which is reinforced by Brennan’s statement that Judge Wiig would “remain[] equally protected from statements impugning him.”286 The Court had yet to declare that the Constitution prohibited punishment for speech regarding government officials unless the *Sullivan* standard is met. But the Court refused to reach this constitutional issue in *Sawyer*. Brennan’s opinion should be read as saying that if impugning judicial integrity is, of itself, a constitutionally valid basis for punishing and restricting speech (an issue the Court does not reach), then it is sanctionable regardless of when made. On the other hand, if the speech is sanctionable for some other reason—obstructing justice, interfering with the trial or jury venire, etc.—the state needs to punish the lawyer’s speech on that basis.

The thrust of Brennan’s opinion, and certainly its effect on Sawyer, was to allow speech by an attorney (even one engaged in a trial before the criticized judge) and to define permissible speech broadly. Ironically, it has been interpreted to constitutionally enshrine punishment of speech critical of the judiciary even for attorneys not engaged in a pending case.287 Justice Frankfurter’s dissent reached the constitutional issue, but he took care to limit his argument to the specific facts at issue.288 Frankfurter contended that

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286. *Id.*
287. Stewart’s concurrence, discussed below, is frequently interpreted to mean that attorneys have no constitutional right to free speech. Yet Stewart’s concurrence cannot be authority as to the protections of the Constitution. See infra section III.B. Black wrote a concurrence and joined Brennan’s decision. Black’s cryptic concurrence is almost never cited. The gist of it seems to be that Hawaii could not have a law (constitutionally) that prohibited an attorney from impugning the integrity of a court. See *Sawyer*, 360 U.S. at 646 (Black, J., concurring).
288. *Id.* at 653 (Frankfurter, J., dissenting). Frankfurter emphasized Sawyer’s role in the then-pending trial and other “severely aggravating circumstances”—including that motions were still pending regarding the very evidence Sawyer castigated, the speech was advertised to the public, accounts of the speech were included in newspapers, the jury was still open and receptive to media
Sawyer’s speech was “a plainly conveyed attack on the conduct of a particular trial, presided over by a particular judge” and thus fell within the charge against her. While Frankfurter argued that the Constitution did not protect Sawyer’s conduct, he emphasized that “[w]hat we are concerned with is the specific conduct, as revealed by this record, of a particular lawyer, and not whether like findings applied to an abstract situation relating to an abstract lawyer would support a suspension.”

Finally, even if Sawyer had held that statements about a judge could be punished, that holding would need to be reevaluated in light of Sullivan and Garrison. It is quite likely that Justice Brennan, who authored the Sullivan and Garrison opinions, thought that the constitutional question left open in Sawyer was answered in Garrison when the Court held in the very context of lawyer speech regarding the judiciary that “only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions.”

accounts of the speech, and the day after the speech the judge “felt called upon to defend his conduct of the trial in open court.” Id. at 664.

289. Id.
290. Justice Frankfurter concluded his opinion by stating:

Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so. But when a lawyer goes before a public gathering and fiercely charges that the trial in which he is a participant is unfair, that the judge lacks integrity, the circumstances under which he speaks not only sharpen what he says but he imparts to his attack inflaming and warping significance. He says that the very court-room into which he walks to plead his case is a travesty, that the procedures and reviews established to protect his client from such conduct are a sham. ‘We are a society governed by law, whose integrity it is the lawyer’s special role to guard and champion.’ Id. at 669 (quoting In re Howell, 89 A.2d 652, 653 (N.J. 1952)) (emphasis added). Despite the initial opener that sounded quite liberal as to the ability and even duty of lawyers to “fearless[ly]” engage in criticism of the judiciary, Frankfurter ends by saying that a lawyer such as Sawyer has a duty to guard and champion the law. Id. But again, context matters. And the Sawyer context is also that of an attorney defending clients convicted for knowing and learning about communism. Sawyer could have prejudiced the jury or the trial by her conduct, and to that extent her conduct likely should not be condoned. But see Chemerinsky, supra note 42, at 887 (arguing that even regarding pretrial statements to the press, only knowingly false or reckless statements should be prohibited). Nevertheless, the substance of Sawyer’s speech needed to be published at some point—if not during trial, then afterwards. The Smith Act prosecutions at issue were “a travesty” and “a sham.” Sawyer, 360 U.S. at 669 (Frankfurter, J., dissenting). And there is no good reason to prohibit lawyers from so saying or to require lawyers “to guard and champion” the law, id. (quoting In re Howell, 89 A.2d 652, 653 (N.J. 1952)), when the law at issue is contrary to basic rights guaranteed by our Constitution.

291. Id. at 667–68. In widely quoted language, the Seventh Circuit has said of Sawyer: “[A]ll of the Justices assumed or stated that a lawyer’s false accusations of criminal conduct directed against named judges may be the basis of discipline.” In re Palmisano, 70 F.3d 483, 487 (7th Cir. 1995). It is hard to construe any basis in Sawyer for this statement. Brennan, for four of the Justices, did not reach the Constitution and thus did not reach what “may [or may not] be the basis of discipline.” Id. Further, Frankfurter’s dissent did not talk in terms of whether the accusations about the judiciary were true or false or were of criminal conduct or lesser gravity, but whether the statements were made by an attorney in the midst of a pending trial. See Sawyer, 360 U.S. at 668 (Frankfurter, J. dissenting).

The Court’s next discussion of attorney speech critical of the judiciary occurred a quarter century later in *In re Snyder*. Snyder made repeated unsuccessful attempts to be paid for having performed indigent defense work in the Eighth Circuit. Frustrated, Snyder wrote a letter to the district court in which he said he was “appalled by the amount of money which the federal court pays for indigent defense work” and complained that he had “to go through extreme gymnastics even to receive th[ose] puny amounts.” He closed his letter saying he was “extremely disgusted by the treatment” he had received from “the Eighth Circuit in this case” and asked to have his name removed from the list of attorneys willing to do indigent criminal defense work. Snyder was suspended from the practice of law in the Eighth Circuit for six months for refusing to apologize for writing the letter. The Supreme Court reversed but did not reach the constitutional issue of whether Snyder could be punished for criticising the Eighth Circuit’s administration of the Criminal Justice Act. Rather, because Snyder was disciplined by the en banc Eighth Circuit under Federal Rule of Appellate Procedure (FRAP) 46, the Supreme Court held as a matter of federal law interpreting the reach of FRAP 46 that Snyder’s “criticism of the [Criminal Justice] Act or criticism of inequities in assignments under the Act” did not warrant “discipline or suspension.” Nevertheless, rather than point out how excessive it was for the Eighth Circuit to suspend an attorney for writing a private letter to a court to complain about real administrative problems—and which letter actually led to “a study of the administration of the [CJA]” in the Eighth Circuit and to improvements in the way the Act was administered—the Supreme Court instead chastised Snyder for the “tone” of his letter (the harshest portions of which are quoted above) and recognized, in dicta, a “duty of courtesy” owed by “[a]ll persons involved in the judicial process . . . to all other participants.” The Court further stated, “The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone.” The Court failed to explain why the “inherently contentious setting of the adversary process” required that attorneys cast criticisms of the
judicial system (rather than just criticisms of persons who are contending adversaries such as opposing counsel, opposing parties, or witnesses) in a professional and civil tone or how the contentious nature of adversary proceedings was even relevant in a situation where no case was pending and the criticism was made outside of that setting in a private letter to a court. While the Court’s actual holding as to what cannot warrant suspension from federal courts under FRAP 46 was not binding on States, its decision to chastise Snyder for his tone and to admonish attorneys to “cast criticisms of the system in a professional and civil tone” signaled to state courts approval of attorney discipline for speech critical of or disrespectful to their judiciaries.

Even though the Snyder Court did not reach the First Amendment, Snyder is additionally problematic because the underlying criticisms of the Eighth Circuit apparently were true and justified, as demonstrated by the fact that the letter formed the basis for subsequent changes made in the Eighth Circuit’s administration of the CJA. The Snyder Court’s failure to cite or mention Garrison or Sullivan as squarely prohibiting Snyder’s suspension implied their inapplicability. The Court also failed to acknowledge that Snyder’s statements constituted core political speech requiring the highest level of protection. These omissions further implied to state courts that attorney speech is somehow exempted from the restrictions placed on punishing core political speech criticizing government. However, it is important to recognize that the Snyder Court did not purport to reach, rely on, or look to any constitutional case law or principles and thus cannot be authority for what is and is not constitutionally permitted.

Sawyer and Snyder are the only two United States Supreme Court opinions addressing attorney discipline for speech critical of the judiciary or impugning judicial integrity. Yet neither reached the Speech Clause issues raised in both. Unfortunately, state courts look to both decisions as intimating an answer to the constitutional question and assume that the pair constitutionally authorizes disciplining attorneys for speech that impugns judicial integrity or is overly discourteous.

3. Recognizing Inapplicability of Cases Implicating Other Interests

State and federal courts have also erred by relying on cases that involve significant state interests or lower level speech interests as compared to the interests at issue in disciplining attorney speech that impugns judicial integrity.304

For example, the plurality opinion in Gentile v. State Bar of Nevada is generally cited for the following statement, which was joined by a majority of the Court:

304. See, e.g., In re Palmisano, 70 F.3d 483, 487 (7th Cir. 1995) (arguing in support of punishing speech impugning judicial integrity that “given cases such as Gentile and Went For It the Constitution does not give attorneys the same freedom as participants in political debate”).
It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to “free speech” an attorney has is extremely circumscribed . . . . Even outside the courtroom, a majority of the Court in two separate opinions in the case of In re Sawyer observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be.  

This statement is generally construed by states as authorizing nearly any punishment of attorney speech (both inside and outside of judicial proceedings) without analysis of the interests involved. But that is not what the Gentile Court held, and it ignores entirely the extremely important interests at stake in Gentile. As emphasized by the Gentile Court majority, the case involved the sensitive context of pretrial publicity by an attorney to the press outlining the theory of a pending criminal case and publicly impeaching the government’s witnesses. The Court explained that it “express[ed] no opinion on the constitutionality of a rule regulating the statements of a lawyer who is not participating in the pending case about which the statements are made.” The Court held, “When a state regulation implicates First Amendment rights, the Court must balance those interests against the State’s legitimate interest in regulating the activity in question.” The Gentile Court did not summarily determine that the balancing test had been satisfied, but instead examined the validity of the state’s asserted interests and the relevance of those interests to the restrictions at issue. Finally, the Gentile Court for a majority concluded:

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306. Id. at 1064. Gentile involved pretrial statements to the press by criminal defense attorney Dominic Gentile setting forth the theory of the defense that the crime was committed by a police officer who would be a primary witness at trial. Id. at 1044–45. Gentile was disciplined with a private reprimand for violating Nevada’s rule forbidding pretrial publicity that has “a substantial likelihood of materially prejudicing an adjudicative proceeding.” Id. at 1033. The Court held that the standard employed by Nevada—which is arguably less stringent than the “clear and present danger” standard applied for punishing statements about a case made by the press—was constitutionally permissible for attorneys, but as interpreted by the Nevada Supreme Court the rule was “void for vagueness.” See id. at 1048 (Kennedy, J., majority opinion in part); id. at 1070–71, 1078 (Rehnquist, J., majority opinion in part); id. at 1081–82 (O’Connor, J., concurring). Justices Kennedy and Rehnquist each authored parts of the Court’s opinion, with Justice O’Connor joining as the fifth vote. Justice Kennedy’s majority opinion held, in part, that the rule as applied was void for vagueness, and Justice Rehnquist’s majority opinion held, in part, that attorneys could be held to a lower standard than that required by the Constitution for pretrial publicity by the press. See id. at 1082 (O’Connor, J., concurring).
307. Id. at 1073 n.5 (Rehnquist, J., majority opinion in part).
308. Id. at 1075.
309. The State asserted that pretrial publicity limitations are “aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found.” Id. at 1075. In holding that these state interests outweighed the free speech interests at stake, the Court explained that “[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by ‘impartial’ jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.” Id.
The restraint on speech is narrowly tailored to achieve those objectives. The regulation of attorneys’ speech is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys’ comments until after the trial.310

Thus, despite its statements indicating lesser protection owed to attorney speech, the Gentile Court did not grant states free reign. Rather, the Court upheld the restriction in Gentile because: 1) it was narrowly tailored to the “substantial state interest” of preserving due process rights to a fair trial; 2) it only applied to statements that would have a “materially prejudicial effect” on judicial proceedings; 3) it was viewpoint neutral; and 4) it only had the effect of postponing speech until after the trial was completed.

Such analysis is completely foreign in the context of attorney speech critical of the judiciary. Even in the rare situations where courts recognize some need to “balance” the free speech interests of the attorney with the interests of the state, the actual “balancing” is empty. For example, in In re Wilkins the Indiana Supreme Court claimed to be applying a balancing test where it examined “the factual setting . . . in light of the affected State interest and measured against the limitation placed on the freedom of expression.”311 Yet the Court suspended Wilkins from the practice of law for making the following statement in a footnote of an appellate brief: “[T]he Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee . . . and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).”312

Upon balancing the state interest “in preserving the public’s confidence in the judicial system and the overall administration of justice” with Wilkin’s free speech interests, the court concluded, “Without evidence, such statements should not be made anywhere. With evidence, they should be made to the Judicial Qualifications Commission.”313 Such “balancing” completely denies both the attorney’s right to speak and the public’s right to receive speech.314 Indiana’s balancing act is a far cry from Gentile, where it was noted that speech was not suppressed but merely postponed until after trial, and where the court required that the speech materially prejudice a proceeding.315 Nor did the Indiana Supreme Court have any support or evidence for the validity of its state interest—the court assumed that preserving public confidence in the judiciary

310. Id. at 1076.
312. Id. at 715–16 n.2. Wilkins’s suspension was later reduced to a public reprimand. See In re Wilkins, 782 N.E.2d 985 (Ind. 2003).
313. In re Wilkins, 777 N.E.2d at 717 (emphasis added).
314. See supra section II.B.
315. See Gentile, 501 U.S. at 1076.
was a state interest worthy to suppress speech, which, as shown above, it is not. The situation is not like *Gentile* where the state’s interest was preserving the integrity of jury trials, an interest of compelling constitutional magnitude. Indeed, state courts consistently equate the state interests in *Gentile* with the dubious interest in protecting public perception of judicial integrity.

The cases that follow *Gentile* and “balance” the interests at stake when the state interest is preserving the integrity of the court inevitably balance in favor of the state and against speech, regardless of the forum where the speech is made (in briefs, to the public, in a private letter), regardless of whether the attorney is actively engaged in a case or not, regardless of the possible impact of the speech on the asserted interest of preserving public perception of judicial integrity, and without any discussion of the strength or validity of the state interest of preserving the public perception of judicial integrity.

Courts that undertake “balancing” in this situation additionally fail to recognize that the Supreme Court already balanced the relative interests between preserving governmental reputation and free speech, and that balancing resulted in the *Sullivan* and *Garrison* decisions. As explained by Melville Nimmer, the *Sullivan* rule was one of constitutional balancing at a definitional level. The Court did not adopt an ad hoc balancing rule whereby in each case the value of the speech would be “balanced” with the value of preserving the face of government. Rather, in *Sullivan* and *Garrison*, the Court balanced the interests for all subsequent cases involving the punishment of speech for harming the reputation of government officials and determined that “only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal

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316. See Wilkins, 777 N.E.2d at 717–18.
317. See In re Palmisano, 70 F.3d 483, 487 (7th Cir. 1995); In re Shearin, 765 A.2d 930, 938 (Del. 2000); Idaho State Bar v. Topp, 925 P.2d 1113, 1116 (Idaho 1996); In re Cobb, 838 N.E.2d 1197, 1211 (Mass. 2005). But see Standing Comm. on Discipline for the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1443 (9th Cir. 1995) (explaining the differences between the interests in *Gentile* and interest in preserving judicial integrity).
318. For example, in *Kentucky Bar Ass’n v. Heleringer*, 602 S.W.2d 165 (Ky. 1980), the Kentucky Supreme Court explained that it would balance the state’s interests with the right of the free speech and concluded its balancing by surmising that “free speech does not give an attorney the right to openly denigrate courts in the eyes of the public”—even when done by an attorney not engaged in the underlying case. Id. at 168.
sanctions.320

Finally, courts have relied on cases such as Florida Bar v. Went For It, Inc., in which the Court upheld a restriction on targeted lawyer advertising, as allowing curtailment of attorney speech.321 Such reliance fails to recognize the relative weight of the competing interests in that context. Notably, Went For It and similar cases involve commercial speech, which, while protected, does not have nearly the same constitutional value as political speech regarding the qualifications of government officials. The Went For It Court even explained, “We have always been careful to distinguish commercial speech from speech at the First Amendment’s core.”322 Thus, the relative weight of the constitutional protection for the speech at issue was significantly less in Went For It than it is in cases involving political speech regarding judicial integrity.323 Further, on the state interest side of the scale, Went For It involved interests not at play with speech regarding the judiciary. Specifically, Went For It involved interests in protecting “the personal privacy and tranquility of [Florida’s] citizens.”324 Thus, Went For It does not demonstrate that courts can freely regulate attorney speech. Rather, it only demonstrates that the regulations at issue were constitutionally permissible (that is, regulations in the context of lesser protected commercial speech with heightened state interests in protecting the public from harassment and duress).325

B. A CONSTITUTIONAL CONDITION OF THE PRIVILEGE OF PRACTICING LAW

The vast majority of the decisions regarding punishing attorney speech critical of the judiciary do not rely on any Gentile-style balancing. Rather, they hold, usually relying on Stewart’s concurrence in Sawyer or statements by Justice Rehnquist in Gentile, that attorneys have given up their free speech rights in exchange for the privilege of being an attorney. As stated in its classic

322. Id. at 623.
323. The Court in Went For It specifically noted the problem inherent in failing to recognize the relative weight of speech. It observed that “[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech.” See id. at 623 (citation omitted). When courts, such as the Seventh Circuit in In re Palmisano, 70 F.3d 483, 487 (7th Cir. 1995), rely on Went For It as allowing prohibitions on public speech critical of the judiciary, they create this kind of leveling—they dilute protection for political speech by relying on authority to suppress forms of commercial speech.
324. Went For It, 515 U.S. at 630 (citation omitted).
325. The four-Justice dissent in Went For It argued that under the Court’s prior cases on attorney speech, the regulation at issue—even in the context of commercial speech with the interests alleged by the state—was unconstitutional. See id. at 637–40 (Kennedy, J., dissenting). Both the majority and the dissent applied the regular constitutional test for restrictions on the commercial speech of regulated industries set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980). See, e.g., Went For It, 515 U.S. at 623–24; id. at 636 (Kennedy, J., dissenting). Neither applied a “special” test because attorney regulation was involved.
Cardozian formulation: “Membership in the bar is a privilege burdened with conditions.”326 The idea is that no one has a “right” to be an attorney—an idea that is called into question by Supreme Court case law327—and in return for granting a person the “privilege” of being an attorney, the state can impose otherwise unconstitutional conditions on lawyers.328 Further, commentators, including Wendel, have argued that constitutional conditions and a privilege/rights distinction are useful in the attorney speech context.329 This doctrine is often stated in the reverse as “unconstitutional conditions,” and is used to protect rights by prohibiting government from coercing people to give up constitutional rights through creating a condition on the receipt of a benefit.330

The doctrine is also used, as it is in the area of attorney free speech, to justify the constitutionality of conditions that are placed on benefits. State courts cite constitutional conditions ideas to justify restrictions on and punishment of attorney speech. The Missouri Supreme Court summarized the view thus, “[A]n attorney’s voluntary entrance to the bar acts as a voluntary waiver of the right to criticize the judiciary.”331 The Supreme Court of Kansas explained in 2007 that “[u]pon admission to the bar of this state, attorneys assume certain duties,” including “the duty to maintain the respect due to the courts” and an attorney is bound thereby “whether he is acting as an attorney or not.”332 In sum, the idea

326. In re Rouss, 221 N.Y. 81, 84 (1917). The Michigan Supreme Court recently phrased the idea in perhaps its most absurd formulation when it explained that an attorney could not make denigrating comments about courts, which “gave [the attorney] the high privilege, not as a matter of right, to be a priest at the altar of justice.” See Grievance Adm’r v. Fieger, 719 N.W. 2d 123, 144 (Mich. 2006) (emphasis added), cert. denied, 549 U.S. 1205 (2007).

327. See, e.g., Schware v. Bd. of Bar Exam’ rs, 353 U.S. 232, 239 n.5 (1957) (noting that “a person cannot be prevented from practicing [law] except for valid reasons” as “[c]ertainly the practice of law is not a matter of the State’s grace” (emphasis added)); see also Baird v. State Bar, 401 U.S. 1, 8 (1971) (stating that “[t]he practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character” (emphasis added)).

328. The idea of the importance of separating rights from privileges was expounded by Wesley Hohfeld in his influential article, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L. J. 16, 35 (1913).


330. Kathleen Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1413, 1415 (1989) (explaining that the unconstitutional conditions doctrine “holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether”).

331. In re Westfall, 808 S.W.2d 829, 834 (Mo. 1991); see also In re Shearin, 765 A.2d 930, 938 (Del. 2000) (holding that “there are ethical obligations imposed upon a Delaware lawyer, which qualify the lawyer’s constitutional right to freedom of speech,” and thus, “members of the Delaware Bar are subject to disciplinary sanctions for speech consisting of intemperate and reckless personal attacks on the integrity of judicial officers,” and defining “reckless” as an objective standard requiring attorneys to have a reasonable factual basis “before the First Amendment protections for such speech can apply”); In re Frerichs, 238 N.W.2d 764, 767 (Iowa 1976); Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980) (per curiam); In re Raggio, 487 P.2d 499, 499, 501 (Nev. 1971) (per curiam); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 429 (Ohio 2003) (per curiam) (“Thus attorneys may not invoke the federal constitutional right of free speech to immunize themselves from evenhanded discipline for proven unethical conduct.”).

332. In re Pyle, 156 P.3d 1231, 1243 (Kan. 2007) (per curiam) (emphasis added) (quoting In re Johnson, 729 P.2d 1175 (Kan. 1986)).
propounded is that attorneys implicitly agree when admitted to the bar to forfeit their rights to free speech, and thus the state can constitutionally punish such speech without violating the First Amendment.  

To the extent that the state courts rely on the idea of “constitutional conditions” as supporting nearly all restrictions on attorney speech, they find support in language from Supreme Court opinions—although not from a majority of the Court. The primary source for the theory is the concurrence of Justice Stewart from Sawyer. Justice Stewart wrote:

If . . . there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards. Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.

The problem with this formulation is apparent from the opening line—it is practically limitless. Justice Stewart claims that if there has been “even-handed discipline for proven unethical conduct”—which apparently means a proven violation of any rule of professional conduct enacted by a state—then a lawyer cannot “invoke the constitutional right of free speech” as a defense. Stewart assumes that all “inherited standards of propriety and honor” or “ethical precepts” are necessary to the practice of law and must be conformed to, even though they “may require abstention” from free speech rights. If a state has created a restriction on the practice of law (whether as a matter of “ethical precepts” or from “inherited standards”), that restriction is, therefore, permissible, and the regulated attorney cannot “invoke the constitutional right of free speech” but “must conform” and “[o]be[y].”

333. See also Iowa Sup. Ct. Bd. of Prof’l Ethics & Conduct v. Ronwin, 557 N.W.2d 515, 519 (Iowa 1996) (stating that “a lawyer’s right of free speech does not include the right to violate the statutes and canons proscribing unethical conduct”); In re Erdmann, 301 N.E.2d 426, 428 (N.Y. 1973) (Burke, J., dissenting) (explaining that statements by attorney for article in Life magazine “violate restrictions placed on attorneys which they impliedly assume when they accept admission to the Bar”).

334. See, e.g., In re Pyle, 156 P.3d at 1247 (quoting as authoritative Stewart’s concurrence in In re Sawyer); Ronwin, 557 N.W.2d at 518 (same); In re Fericich, 238 N.W.2d at 769 (same); Heleringer, 602 S.W.2d at 167–68 (same); Grievance Adm’r v. Fieger, 719 N.W.2d 123, 247, 259 (Mich. 2006) (same), cert. denied, 549 U.S. 1205 (2007); In re Westfall, 808 S.W.2d at 835 (same); Gardner, 793 N.E.2d at 429 (same).


336. See also Gardner, 793 N.E.2d at 429 (concluding from Stewart’s concurrence that “attorneys may not invoke the federal constitutional right of free speech to immunize themselves from even-handed discipline for proven unethical conduct”).

337. In re Sawyer, 360 U.S. at 647.

338. Id.
Stewart’s statement was perhaps justifiable at the time he wrote it because the Supreme Court had never stricken as violative of the First Amendment any state rule regarding attorney conduct. Even prior to Sawyer, however, the Court recognized some limitations within the Due Process Clause on the state’s regulation of attorneys by holding that states could not deny an applicant admission to the bar on the basis of former membership in the communist party. In so holding, the Court noted that “a person cannot be prevented from practicing [law] except for valid reasons” as “[c]ertainly the practice of law is not a matter of the State’s grace.”

Of course, it did not take long for Justice Stewart’s formulation to be proven utterly untrue even as to rules applicable to all attorneys rather than denials of individual applications to the bar. In ensuing years, the Supreme Court struck down several state rules regulating attorney conduct as violative of the First Amendment. In 1963, the court struck down restrictions that prohibited political associations like the NAACP from soliciting clients. Throughout the 1970s and 1980s the Court repeatedly struck down as violative of the Speech Clause state bans and restrictions on attorney advertising. Most recently, in Republican Party of Minnesota v. White, the Court struck down Minnesota’s announce clause, a rule of professional conduct that prohibited attorney candidates for judicial positions from expressing their views on certain political issues, as violating the Speech Clause. In each of these cases, the Court did not determine that the restrictions were constitutional because they satisfied the Stewart criteria of either being historically accepted as necessary and honorable (like solicitation bans) or containing some “ethical precept.” Indeed, in both White and In re Primus, the Court subjected the state’s restrictions to strict scrutiny because White involved “speech that is at the core of our First Amendment freedoms—speech about the qualifications of candidates for public

339. The Sullivan Court noted that Madison believed that states (the primary licensing authority for attorneys) had the power to restrict speech. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 274–75 (1964). Thus, traditional licensing of attorneys by the states could constitutionally restrict speech. It has since been recognized that the Fourteenth Amendment eliminated that state power. But it was not until Gitlow v. New York, 268 U.S. 652 (1925), that the Speech Clause was incorporated by the Fourteenth Amendment to restrict state power. Id. at 666. Further, even at the time of Sullivan, as evidenced by that opinion itself, there was considerable question as to whether—despite incorporation—the states retained greater power to restrict speech than did the federal government. See Sullivan, 376 U.S. at 276–77. Thus, Stewart’s belief that states’ regulations of attorney conduct were not subject to attack as abridging free speech had some contemporary and historical support.


341. Schware, 353 U.S. at 239 n.5.


office,”345 and because *Primus* involved “limitations on core First Amendment rights,”346 given that the ACLU was engaged in a “form of political expression” in its solicitation of clients.347

Unfortunately, in the context of speech critical of the judiciary, the Stewart idea of constitutional conditions is still widely cited and quoted as the law—despite the subsequent precedent of the Court demonstrating otherwise. Indeed, state courts wishing to uphold restrictions on attorney speech often just cite the Stewart statement as the conclusive analysis for any free speech challenge raised by disciplined attorneys.348

Regrettably, Stewart’s concurrence has been given renewed life through Chief Justice Rehnquist’s opinion in *Gentile*. Rehnquist quoted Stewart’s formulation in reviewing the *Sawyer* case, explaining that Stewart “provided the fifth vote for reversal of the sanction” and consequently characterizing Stewart’s statement as representing a “majority” view.349 Rehnquist is not the first to make the assertion that Stewart’s opinion was for a majority—either because Stewart provides the fifth vote for reversal, or because, ostensibly, Stewart’s statement is in line with the four dissenters, thus creating a majority.350 But neither the *Sawyer* dissent nor the plurality adopted Stewart’s broad view of constitutional conditions or permissible punishment of attorney speech, and so it cannot provide a “fifth vote” for either side. Indeed, the majority did not reach the constitutional question,351 and the dissent limited its discussion to the precise facts.352 In the end, Stewart’s concurrence is for exactly one member of the court and is dicta at that because Stewart joined Brennan’s holding that Sawyer did not impugn the integrity of the court (which makes the constitutional question disappear).353

Lamentably, in addition to citing Stewart’s formulation, Rehnquist, speaking for only four justices, concluded his *Gentile* opinion as follows:

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345. *Id.* at 774 (internal quotations omitted); *see also id.* at 781 (“‘[D]ebate on the qualifications of candidates’ is ‘at the core of our electoral process and of the First Amendment freedom,’” (quoting Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 222–23 (1989))).
347. *Id.* at 432.
348. *See supra* notes 331–34 and accompanying text.
350. *See, e.g., In re Frerichs*, 238 N.W.2d 764, 769 (Iowa 1976) (stating that Stewart “clearly was speaking for at least five members of the Court”); Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165, 167–68 (Ky. 1980) (per curiam) (stating that Stewart “was speaking for five members of the court” in his concurrence).
351. *See supra* note 271.
352. *In re Sawyer*, 360 U.S. 622, 667–68 (1959) (Frankfurter, J., dissenting); *see also id.* at 666 (stating that the “problem raised by this case” was whether “the particular conduct in which this petitioner engaged constitutionally protected from the disciplinary proceedings of courts of law” (emphasis added)); *id.* at 667 (stating that a criminal defense attorney does not have “a constitutionally guarded freedom to conduct himself as this petitioner has been found to do” (emphasis added)).
353. *See id.* at 646–47 (Stewart, J., concurring).
When petitioner was admitted to practice law before the Nevada courts, the oath which he took recited that “I will support, abide by and follow the Rules of Professional Conduct as are now or may hereafter be adopted by the Supreme Court.” The First Amendment does not excuse him from that obligation, nor should it forbid the discipline imposed upon him by the Supreme Court of Nevada.354

This constitutional conditions formulation is even more unworkable than Stewart’s concurrence for several reasons. First, it is patently untrue. As noted above, the Supreme Court has in fact excused attorneys from obligations imposed by rules of professional conduct (and attendant discipline) based on First Amendment guarantees.355 Thus, the Supreme Court’s own case law—including the opinion joined by Rehnquist in Republican Party v. White356—refutes the proposition that attorneys agree to any and all restrictions on their conduct no matter how unconstitutional because the attorneys were admitted under oath or were provided the privilege of being an attorney. Second, Rehnquist’s formulation is even more limitless than Stewart’s. Stewart’s statement was at least grounded in necessity and based on historic practice or ethical precepts for a given rule. But Rehnquist’s version means that if a state requires attorneys to promise upon admission to uphold any regulation the state has made or will yet make (as Nevada and certainly other states in fact do), then the attorney cannot be relieved from this obligation and has no constitutional argument against any existing or future regulation enacted by the state. If this system works, then rules of professional conduct can never be stricken as unconstitutional.

Of course, as with any regulated industry,357 states can and do place restric-

355. See supra notes 340–44.
356. Rehnquist joined the majority in Republican Party of Minnesota v. White, 536 U.S. 765, 766 (2002), and allowed the attorney to be relieved of his obligation to abide by the announce clause, a rule of professional conduct, on the basis that the regulation was unconstitutional. Id. at 788.
357. Some have argued that attorney speech issues are analogous to restrictions on the speech of public employees rather than restrictions on regulated industries. See, e.g., Comm. on Legal Ethics of the W. Va. State Bar v. Douglas, 370 S.E.2d 325, 331–32 (W. Va. 1988) (analogizing attorney speech to public employee speech cases); Day, supra note 43, at 187–90; Roberts, supra note 42, at 846–54 (analogizing attorney speech to speech of federal employees as restricted by the Hatch Act); Wendel, supra note 43, at 375–76 (arguing to a limited extent that “there are some appealing analogies between the public employee cases and lawyer-speech issues”). But even for public employees, the Supreme Court has stated, “[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.” Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, 391 U.S. 563, 568 (1968) (citation omitted).

Nevertheless, the public employee analogy to attorney speech is unpersuasive. Notably, public employees, unlike attorneys, are paid by the government and often are hired to deliver a specific government message. See, e.g., Garcetti v. Ceballos, 547 U.S. 410, 423 (2006) (“Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission.”). In contrast, in Legal Services Corp. v.
tions and conditions (including educational, character and fitness conditions, and other requirements) on attorneys, and attorneys agree to abide by those conditions in exchange for their license to practice law. But those restrictions must be constitutional. For example, as actually held in Gentile, the restriction on pretrial publicity was constitutional because: (1) it was narrowly tailored to a “substantial state interest” (preserving due process rights to a fair trial); (2) it only applied to statements that would have a “materially prejudicing effect” on judicial proceedings; (3) it was viewpoint neutral; and (4) it only had the effect of postponing speech until after the trial was completed.\footnote{Gentile, 501 U.S. 1076.} Similarly, in the context of restrictions on attorney commercial speech, the Court has required states to satisfy the constitutional test articulated in \textit{Central Hudson Gas & Electric Corp. v. Public Service Commission of New York},\footnote{Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 566 (1980).} as the state would be required to do in restricting the commercial speech of any other regulated industry.\footnote{See \textit{Fla. Bar v. Went For It, Inc.}, 515 U.S. 618, 623–24 (1995) (analyzing constitutionality of restriction on lawyer advertisements under \textit{Central Hudson}); \textit{Shapero v. Ky. Bar Ass’n}, 486 U.S. 466, 472 (1988) (same); \textit{Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio}, 471 U.S. 626, 637–44 (1985) (same); \textit{In re R.M.J.}, 455 U.S. 191, 203–06 (1982) (same); \textit{Bates v. State Bar of Ariz.}, 433 U.S. 350, 365 (1977) (relying on \textit{Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council}, 425 U.S. 748 (1976), the precursor to \textit{Central Hudson}).}
Similarly, in the context of speech critical of the judiciary, the fact that a citizen obtains a license from the state to practice law does not change the fact that the Supreme Court held in *Garrison*—in the context of punishment of attorney speech impugning judicial integrity—that “only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions.” Nor does it change the fact that the states’ alleged justification for these restrictions on attorney speech critical of the judiciary is an interest the Supreme Court has repeatedly discounted entirely, or the fact that the restrictions are viewpoint based. Yet, relying on the erroneous Stewart and Rehnquist formulations of constitutional conditions, courts do not even address or acknowledge these significant constitutional stumbling blocks but assume that any condition that is placed on attorneys is automatically constitutional. Thus, the problem with the idea of constitutional conditions in the context of speech critical of the judiciary is not that states cannot constitutionally place conditions on those who practice law, but that the formulations of constitutional conditions articulated by Rehnquist and Stewart are contrary to the actual state of the law and are useless in that they fail to provide any method for delineating when a regulation on attorney speech is or is not constitutional. The formulations serve only as an excuse, allowing states to forgo any analysis of the constitutionality of their attorney conduct rules, and indeed, allowing states to ignore the reality that such a regulation can be unconstitutional.

C. DIFFERENT INTERESTS UNDERLYING DEFAMATION AND PROFESSIONAL MISCONDUCT

Finally, states offer several arguments in an attempt to distinguish *Sullivan* and *Garrison* legally and factually from attorney discipline for statements impugning judicial integrity. First, courts contend that the purposes underlying defamation law are different from the purposes behind professional conduct rules. True enough, but upon closer scrutiny, irrelevant. The First Amend-

362. See infra notes 167–73 and accompanying text (examining Supreme Court cases discussing the validity of the state interest in preserving the perception of judicial integrity).
363. See infra notes 192–96 and accompanying text (noting the constitutional prohibition on viewpoint based restrictions on speech).
364. See infra notes 340–44 and accompanying text.
365. Fla. Bar v. Ray, 797 So. 2d 556, 558–59 (Fla. 2001) (per curiam). In *Ray*, the Court rejected the *Sullivan* subjective, actual malice standard despite the language of Rule 8.2 because “of the significant differences between the interests served by defamation law and those served by ethical rules governing attorney conduct” and explaining that the “purpose of a defamation action is to remedy what is ultimately a private wrong by compensating an individual whose reputation has been damaged by another’s defamatory statements. However, ethical rules that prohibit attorneys from making statements impugning the integrity of judges are not to protect judges from unpleasant or unsavory criticism. Rather, such rules are designed to preserve public confidence in the fairness and impartiality of our system of justice.” *Id.*

See also Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1437 (9th Cir. 1995) (“[T]here are significant differences between the interests served by
ment gloss on defamation found in *Sullivan* and its progeny was never intended to promote the underlying purposes of the tort of defamation. Indeed, the First Amendment gloss directly detracts from the purposes of defamation law and allows harm to reputation for government officials in all but fairly extreme circumstances. Rather, the reason the First Amendment comes into play in the defamation context is because, at its core, the First Amendment protects certain speech from being repressed or chilled—particularly speech regarding government officials (such as judges). Thus the reason for the First Amendment gloss is the same in both the defamation and attorney discipline scenario. In both, the judiciary punishes a person for speech regarding a public figure. Indeed, in the MRPC 8.2 context—as the rule applies only to speech regarding the “qualifications or integrity” of a judge366—the speech, by definition, is core First Amendment speech. Thus the same concerns regarding the need for breathing room that prompted the *Sullivan* Court also exist for speech critical of the judiciary.367

Further, while defamation and attorney discipline in the abstract aim at different ends, in this particular context, both harms are entirely reputational—defamation protects the reputation of the individual and discipline for criticism of the judiciary protects judicial reputation.368 As noted, courts claim that the interest served by punishing speech critical of the judiciary is the need “to


Wendel similarly cites this distinction as a persuasive reason to reject *Sullivan* in the attorney discipline context. See Wendel, supra note 43, at 427–28.


367. Ironically, courts enforcing MRPC 8.2 have seen it precisely the other way around—namely, that because the speech regards the “qualifications or integrity” of a judge, the *Sullivan* and *Garrison* rules do not apply.

For example, in *Ray*, the court said that because “the statements at issue concerned ‘the qualifications or integrity of a judge,’” there was “no error in the burden then shifting to Ray to provide [or prove] a factual basis in support of the statements.” *Ray*, 797 So. 2d at 558 n.3. In other words, if the subject matter of the speech is the qualifications or integrity of a judge, the attorney speaker must prove or substantiate his statements to avoid liability. Similarly, in *In re Shearin*, the court held that “there must be some factual basis for the lawyer’s accusations of judicial dishonesty before the First Amendment protections for such speech can apply”—thus an attorney must first prove a factual basis before the First Amendment becomes applicable. *In re Shearin*, 765 A.2d 930, 938 (Del. 2000) (emphasis added) (relying on *In re Palmsano*, 70 F.3d 483, 487 (7th Cir. 1995)).

Prior to the Model Rule approach, but after *Sullivan* and *Garrison* were decided, the Florida Supreme Court responded to an assertion of First Amendment protection thus: “On the contrary it appears to us that if the Bench . . . were being assaulted from all angles, with or without justification, it would be the duty of the lawyer above all others to exercise every measure of care and caution to avoid creating any justification for the suspicions.” *In re Shimek*, 284 So. 2d 686, 689 (Fla. 1973) (per curiam) (quoting *State ex rel. Fla. Bar v. Calhoon*, 102 So. 2d 604, 608 (Fla. 1958)).

368. Nevertheless, judges are concerned with their private reputations as well. In *In re Shimek*, the court said when disciplining an attorney for speech made in a brief, “Nothing is more sacred to man and, particularly, to a member of the judiciary, than his integrity. Once the integrity of a judge is in doubt the efficacy of his decisions are[sic] likely to be questioned.” *In re Shimek*, 284 So. 2d at 688.
preserve public confidence in the fairness and impartiality of our system of justice.” As the Fourth Circuit stated, “the public interest and the administration of the law demand that the courts should have the confidence and respect of the people,” and “[u]njust criticism, insulting language and offensive conduct toward the judges” from attorneys “tend[s] to bring the courts and the law into disrepute and to destroy public confidence in their integrity.” Of course, keeping someone from being brought “into disrepute” in order to preserve the public’s respect for or confidence in that person is what it means to protect that person’s reputation.

Second, courts make the argument that defamation provides a personal remedy for “a private wrong,” while ethical rules “are designed to preserve public confidence in the fairness and impartiality of our system of justice.” But this argument cannot form a principled distinction between the Sullivan and Garrison context and the context of attorney criticism of the judiciary—indeed no such distinction can be seriously made. In both situations, the relevant context is criticism of government officials. Neither Sullivan nor Garrison dealt with private defamation lawsuits by private citizens whose actions did not reflect on government. Rather, Sullivan involved speech that exaggerated wrongs of governmental officials in Alabama, and Garrison involved severe accusations regarding members of the Louisiana judiciary by an attorney. Consequently, the harm sought to be remedied through the defamation actions at issue in Sullivan and Garrison was far more than simply a private wrong; rather, the actions were specifically aimed at preserving the face of government officials in performing their official duties and, therefore, the reputation of that arm of the government. Indeed, if preservation of public confidence in our government were a valid reason for suppressing speech contrary to the requirements of Sullivan, the Sullivan rule itself could not exist. The whole idea of the Sullivan rule is that speech regarding public or government officials cannot be suppressed in the name of preserving the reputation of either the specific public official or of the government more broadly. Sullivan and Garrison expressly contemplated that protected speech would “include vehement, caustic, and sometimes unpleas-

369. Yagman, 55 F.3d at 1437; see also supra notes 161–65 and accompanying text.
370. In re Evans, 801 F.2d 703, 707 (4th Cir. 1986) (emphasis added).
371. Ray, 797 So. 2d at 558–59; see also Yagman, 55 F.3d at 1437 (explaining that “[d]efamation actions seek to remedy an essentially private wrong by compensating individuals for harm caused to their reputation and standing in the community,” while “[e]thical rules that prohibit false statements impugning the integrity of judges, by contrast, are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice”); In re Terry, 394 N.E.2d 94, 95 (Ind. 1979) (per curiam) (stating that “[d]efamation is a wrong directed against an individual and the remedy is a personal redress of this wrong,” while “[p]rofessional misconduct, although it may directly affect an individual, is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations”); In re Cobb, 838 N.E.2d 1197, 1213 (Mass. 2005) (same, quoting Terry); In re Graham, 453 N.W.2d 313, 322 (Minn. 1990) (same, quoting Terry); In re Holtzman, 577 N.E.2d 30, 34 (N.Y. 1991) (per curiam) (same, quoting Terry); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 432 (Ohio 2003) (per curiam) (same, quoting Terry).
antly sharp attacks on government and public officials” as well as “erroneous statement,” but that such was necessary to establish “uninhibited, robust, and wide-open” debate on public issues and to provide “the breathing space” that free debate needs to survive. Further, the Sullivan Court recognized that a speaker “[t]o persuade others to his own point of view . . . at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state” and that there would be “excesses and abuses.” But the Court found such probabilities an insufficient basis to chill speech about government officials.

The Sullivan Court directly addressed the concern of government reputation, stating that “[i]njury to official reputation error affords no more warrant for repressing speech that would otherwise be free than does factual error.” Indeed, the Court goes on to explain that the judiciary cannot protect its public reputation, and so neither can other branches:

Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision . . . . This is true even though the utterance contains ‘half truths’ and ‘misinformation.’ . . . If judges are to be treated as ‘men of fortitude, able to thrive in a hardy climate,’ surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

The Court contemplates that statements regarding public officials will in fact hurt their official reputation and thus the reputation of their branch of government—but does not give this distinction any weight. Instead, the Court invites other branches of government to follow the judiciary’s example and undergo such criticism. Ironically, state and federal courts have since interpreted Sullivan and Garrison as inapplicable to attorney statements about the judiciary.

Allowing an exception to the Sullivan rule on the basis of protecting the official reputation of a government officer would require a rule exactly opposite of that found in Sullivan—instead of more breathing room where statements regard government officials, there would need to be less breathing room and greater restrictions. Such restrictions would eat at the core of the First

373. Sullivan, 376 U.S. at 271.
374. Id. at 272.
375. Id. at 272–73 (emphasis added) (citations omitted).
376. Courts consistently pay lip service to the idea that they are not engaging in any sort of authoritative selection and that attorneys are free to criticize courts, but this liberality is belied by the fact that the courts then refuse to apply the Sullivan standard, often requiring the attorney to establish the truth or basis for his statements and presuming the falsity of statements impugning their integrity.
Amendment and would hearken back to the Sedition Act castigated by the *Sullivan* and *Garrison* Courts.\(^{377}\) Further, as shown above, it would be antithetical to democracy itself and the American view of sovereignty in the people.

A related distinction made by courts to justify rejection of the *Sullivan* rule is that defamation protects a private interest in reputation while ethical restrictions protect the public interest in the reputation (or integrity) of the judicial system as a whole. But this distinction is also unconvincing. In these cases, the comments made and for which attorneys are sanctioned invariably regard the actions of a specific judge or panel and not the judicial system as a whole. Certainly a comment about one senator cannot be read as being subject to suppression because it brings all of Congress into disrepute and thus can shake the foundation of the entire legislative branch. Similarly, negative statements regarding a particular CEO of one company do not amount to destroying the entire free market system or undermining capitalism. Even if comments regarding an individual judge (or senator or CEO) could be seen as affecting the public’s perception of the overall integrity of the system, how does that make it speech worthy of suppression under *Sullivan* and *Garrison*? Like the argument regarding private versus official reputation, if speech is punishable as long as one can characterize comments made about one government official as affecting the reputation of that entire branch of government, then the *Sullivan* rule can never be applied to statements made about government officials. No good reason is offered as to why imputation of the flaws of one bad apple to the entire branch would be more problematic for the judiciary than for other branches of government.

Courts have similarly rejected the applicability of *Sullivan* and *Garrison* on the slight distinction that *Sullivan* dealt with civil penalties and *Garrison* dealt with criminal penalties, but neither dealt with quasi-criminal penalties such as

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\(^{377}\) As noted in *Sullivan*, the Sedition Act of 1798 punished “any false scandalous and malicious writing or writings against the government of the United States,” Congress, or the President that would bring them “into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States.” *Sullivan*, 376 U.S. at 273–74 (quoting Sedition Act of 1798).
attorney discipline. Both Sullivan and Garrison address this argument. In Sullivan it was argued that a civil lawsuit for libel was private and not equivalent to criminal prosecution from the state and thus the Constitution did not prohibit civil lawsuits by public officials. The Court in Sullivan responded:

[T]he Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute . . . . The test is not the form in which state power has been applied, but whatever the form, whether such power has in fact been exercised. 379

Certainly disciplining attorneys is the exercise of state power and comes within prohibitions on such power to restrict free speech. Further, in Garrison, the Court explained that “even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood.” 380 Again, the use of state power to discipline attorneys constitutes “attaching adverse consequences” to speech critical of public officials.

Finally, an argument proffered in some cases is that attorney speech critical of the judiciary must be restricted beyond Sullivan because judges do not generally make public responses to accusations against them. For example, the Seventh Circuit has stated, “[J]udges do not take to the talk shows to defend themselves, and few litigants can separate accurate from spurious claims of judicial misconduct”—therefore, the Sullivan standard is inappropriate for attorney statements regarding the judiciary. 381 The most obvious problem with this as a distinction of Sullivan, as noted above, is that the Sullivan Court expressly contemplated and the Garrison Court actually held that the Sullivan standard applied to statements regarding the judiciary. 382 At first blush, it may seem unfair to hold the judiciary to the Sullivan standard if they truly lack the same degree of media access held by other public officials. 383 Yet, as the Supreme Court explained in Gertz v. Robert Welch, Inc., there is a “compelling normative consideration underlying the distinction between public and private defamation

378. See, e.g., In re Westfall, 808 S.W.2d 829, 833 (Mo. 1991) (noting that neither civil nor criminal penalties can be imposed on attorneys for derogatory statements about the judiciary under Sullivan and Garrison but holding that attorney discipline does not fall within that rule).

379. Sullivan, 376 U.S. at 265 (emphasis added); see also id. at 277 (explaining that “[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel”).


381. In re Palmisano, 70 F.3d 483, 487 (7th Cir. 1995).

382. See supra notes 100–11 and accompanying text.

383. Although as a matter of history and propriety the judiciary does not generally make use of the media, judges are not like private defamation plaintiffs who cannot get airtime. If members of a state or federal judiciary wanted to make public statements responding to criticism, they would likely have access to the press in like manner to other public officials.
plaintiffs” that is “[m]ore important” than any difference in media access to rebut false statements.\textsuperscript{384} Namely:

An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society’s interest in the officers of government is not strictly limited to the formal discharge of official duties . . . [as] the public’s interest extends to anything which might touch on an official’s fitness for office . . . [including] dishonesty, malfeasance, or improper motivation . . . .\textsuperscript{385}

Like private individuals who “thrust themselves to the forefront of . . . public controversies” and thereby “invite attention and comment” despite lacking media access, “public officials and public figures [including judges] have voluntarily exposed themselves to increased risk of injury from defamatory falsehood” and, therefore, are subject to the \textit{Sullivan} standard.\textsuperscript{386} This rationale seems particularly appropriate in the thirty-three states where some or all of the state judiciary runs for office in popular elections\textsuperscript{387} but would equally hold for judges who accept appointments to office. Judges in both systems voluntarily thrust themselves into the world of public controversy and debate by “assuming an influential role in ordering society.”\textsuperscript{388}

Additionally, the fact that the judiciary as a matter of propriety generally does not publicly respond to criticism (although courts and judges have in fact publicly responded to accusations made against them\textsuperscript{389} and have the opportunity in published opinions to explain the reasons for their decisions) does not reduce, in a democracy, the importance of the uninhibited, robust public debate regarding all public officials that the \textit{Sullivan} and \textit{Garrison} Courts found

\textsuperscript{385} See \textit{id}. at 344–45 (emphasis added) (citations omitted).
\textsuperscript{386} \textit{Id}. at 345 (emphasis added).
\textsuperscript{387} See \textit{supra} note 55 and accompanying text.
\textsuperscript{388} See \textit{Gertz}, 418 U.S. at 345.
\textsuperscript{389} An interesting example is found in the Louisiana Supreme Court’s response to a law review article published in the \textit{Tulane Law Review} in 2008 that argued, based on an empirical study later found to be flawed, that judges in Louisiana ruled in favor of contributors to their campaigns. See Vernon Palmer & John Levendis, \textit{The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Election}, 82 \textit{Tul. L. Rev.} 1291 (2008). The Court used its website to post its own response to the article as well as other criticisms of the article. See Louisiana Supreme Court, \url{http://www.lasc.org/} (last visited Feb. 9, 2009) (containing links to a response to the article dated June 12, 2008 by Chief Justice Pascal F. Calogero, Jr. of the Louisiana Supreme Court, two critiques of the \textit{Tulane Law Review} article, a letter of apology from the Tulane Law School Dean, and an announcement from the court regarding the Dean’s apology). The authors of the article admitted some miscalculations and flaws in the alleged empirical study but, in an interview with the press, stated that “with all the mistakes now corrected . . . the study’s conclusions, broadly speaking, are the same.” See Dan Slater, \textit{Dean Apologizes to Louisiana Supremes for Errors in Law Review Article}, The Wall Street Journal Law Blog, \url{http://blogs.wsj.com/law/2008/09/18/dean-apologizes-to-louisiana-supremes-for-errors-in-law-review-article} (Sept. 18, 2008, 9:20 EST).
necessary for proper self-government. As Justice Goldberg explained in his Sullivan concurrence, “In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized.”390 Indeed, well after Sullivan and Garrison were decided the Supreme Court explained in a related context:

Although it is assumed that judges will ignore the public clamor or media reports and editorials in reaching their decisions and by tradition will not respond to public commentary, the law gives “[j]udges as persons, or courts as institutions . . . no greater immunity from criticism than other person or institutions.’ . . . The operations of the courts and the judicial conduct of judges are matters of utmost public concern.391

IV. PERMISSIBLE NARROWLY TAILORED REGULATION OF ATTORNEY SPEECH

States assuredly have the power to regulate attorney speech, however, they do not have carte blanche to do so. Courts are required to follow Sullivan and Garrison in punishing attorney speech on the basis that the speech impugned judicial integrity, was discourteous to the judiciary, or reduced the respect owed the judiciary. Avoidance of the Sullivan standard on the basis of the allegedly “compelling” or “significant” governmental interest in preserving the public’s perception of judicial integrity should have the same weight that it has been given in other contexts—none.392 That non-weight is appropriate. As was the case in Landmark Communications, Inc., courts offer “little more than assertion and conjecture to support” this interest—often hypothesizing a parade of horribles where judicial authority becomes meaningless if speech is allowed.393 Further, allowing punishment beyond the realm of Sullivan under the guise of this interest would undo Sullivan entirely. For surely the protection of the integrity of any branch of government in the eye of that branch would be so important as to justify an exception to the Sullivan rule. Moreover, the Sullivan rule as applied to statements regarding the judiciary is essential to democratic governance by the people of the United States. It is they who hold the ultimate sovereignty, even over the judiciary. In many states the judges are elected and the public must be informed to exercise their electoral powers. Where the judiciary is appointed, the judiciary must remain in the scrutiny of the public so that abuses and incompetence can be checked and, where necessary, steps can be taken to remove judges.

393. See Landmark Commc’ns, Inc., 435 U.S. at 841; supra notes 167–73 and accompanying text.
Requiring the judiciary to adhere to *Sullivan* when the basis for punishment is impugning judicial integrity does not deny courts the ability to regulate attorney speech on the basis of other important state interests. Notably, the state can curb attorney speech that has the potential to interfere with a criminal defendant’s right to an impartial jury trial. *Sawyer* itself is an example.\(^{394}\) If Hawaii had punished Sawyer’s speech on the basis of attempting to improperly influence the jury or interfere with the administration of justice, it could have done so. Similarly, where attorneys make statements in court filings, the state has a legitimate and significant interest in assuring that pleadings, motions, and briefs contain relevant allegations that have a reasonable basis in fact. The state can require attorneys to adhere to such standards that are inextricably tied to the just and fair resolution of disputes—as long as the state does not employ a harsher standard for statements regarding the judiciary (and thus punish the statements for impugning judicial integrity as opposed to being irrelevant or not having a sufficient basis in fact). Other significant state interests justify a vast number of regulations of attorney speech, including confidentiality rules, candor rules, rules regarding ex parte communications with judges in pending cases, rules regarding the collection of fees, many advertising rules, pretrial publicity rules, unauthorized practice of law rules, and the like.\(^{395}\)

What is needed is far greater precision in regulating and punishing lawyer speech aimed at the judiciary. When speech is punished and that speech regards the judiciary, close examination needs to be made as to whether the punishment is merely a protection of judicial reputation (in which case, *Sullivan* controls) or whether the punishment is based on another valid state interest unrelated to suppressing speech that impugns judicial integrity.

**Conclusion**

Speech concerning government (including judicial) officials, their competence, their integrity, the wisdom or folly of their decisions, their biases and political aims, and their overall fitness for office is, as the *Garrison* Court claimed, “more than self-expression; it is the essence of self-government.”\(^{396}\) When courts punish speech to protect their own reputation and that of the judges of lower courts, it does not just damn truth—as problematic as that may be. It also damns self-governance, robust public debate, the unique sovereignty of the American people, and the ability of the people to check and define the abuse of judicial power and to call upon democratic correctives to fix such

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395. *Gentile v. State Bar of Nevada* provides a guideline for other restrictions on attorney speech not based on preserving judicial reputation. The Court in *Gentile* noted that the restriction on pretrial publicity was “narrowly tailored” to significant government interests, “applied[d] only to speech that is substantially likely to have a materially prejudicial effect” on a judicial proceeding, was “neutral as to points of view,” and “merely postpone[d] the attorneys’ comments until after the trial.” *Gentile v. State Bar*, 501 U.S. 1030, 1076 (1991).
abuses. In short, it dams democracy. It chills speech from the very class of persons with the knowledge and exposure to have informed opinions about the judiciary—denying the public that information. Further, it clogs the wheels of political change, allowing for self-entrenchment—keeping the ins in and the outs out.\textsuperscript{397} And all of it is done in the name of preserving our government by preserving the public perception of its integrity.

Paul LeBel, in discussing \textit{Sullivan}, posited:

Perhaps the fragility of a government is too easily forgotten in this country since we have managed to escape the turbulence and unrest that causes governments to fall with predictable regularity in much of the rest of the world . . . . [I]t is at least possible that one of the techniques that is successfully used to diffuse the revolutionary spirit in this country is . . . the effect of the imposition of limits on what the government can do to its critics. Viewed from this perspective, \textit{Sullivan} emerges as a decision that was at least as much protective of the fundamental stability of the existing government structures as it was of the free speech interests of the defamation defendants in that case.\textsuperscript{398}

Even the best governments have officials who are incompetent or corrupt. Some officials may not start out corrupt but may become corrupt as they exercise power.\textsuperscript{399} One method of preserving public confidence in government is to shield this fact from the citizenry. But our American form of government combined with the First Amendment’s guarantee of free speech compels an alternate solution: “‘[S]unlight is the most powerful of all disinfectants.’”\textsuperscript{400}

\textsuperscript{397} See Ely, \textit{supra} note 48, at 103.

\textsuperscript{398} LeBel, \textit{supra} note 59, at 291–92; see also N.Y. Times Co. v. Sullivan, 376 U.S. 254, 301 (1964) (Goldberg, J., concurring) (quoting Chief Justice Hughes in \textit{DeJorge v. Oregon}, 299 U.S. 353, 365 (1937), on the “imperative” need to preserve free speech “in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. \textit{Therein lies the security of the Republic}, the very foundation of constitutional government.” (emphasis added)).

\textsuperscript{399} Blasi, \textit{supra} note 48, at 538 (noting that political thinkers at the time of the Founding believed it necessary to “check[] the inherent tendency of government officials to abuse the power entrusted to them” (emphasis added)).

\textsuperscript{400} \textit{Sullivan}, 376 U.S. at 305 (Goldberg, J., concurring) (quoting Justice Brandeis) (citation omitted).